Summary: This essay begins with claims that private property should promote human flourishing and constitutional ideals and that the transformation of property law now needed calls for a paradigm-shift in thinking about the institution, beginning with a major revision of the “rights paradigm.” Private ownership in obvious ways benefits an owner. But as explained, the links between private rights and human flourishing are complex, implicating not just owners but neighbors, surrounding communities, the landless, future generations, and other life forms. The recognition of private rights can both expand and curtail human flourishing. As for human flourishing, it is equally complex in that it is affected by many factors going beyond physical needs and consideration. The reform of property rights cannot fairly look only how property rights benefit an owner, nor can property rights be justified on that basis. Property rights are created by law and involve the use of state power to protect rights by curtailing the liberties of nonowners and others. The only sound moral justification of this use of coercive power—this use of state power to help owners control and dominate others—rests in the ways a well-designed property regime can foster the welfare of nearly everyone, owners and nonowners alike. Law thus should not vest an owner with a power that does not, on balance, promote overall human flourishing. Inherited ways of thinking about private property cloud these realities and distort inquiries into property’s origins and moral and practical consequences. Much of this thought is best wiped away with discussion begun from a new place, from an express recognition of private property as an evolving, socially created, morally complex institution that can both promote and undercut human flourishing, an institution that must be carefully calibrated to maintain its moral legitimacy and maximize its social benefits.

Property belongs to a family of words that, if we can free them from the denigrations that shallow politics and social fashion have imposed on them, are the words, the ideas, that govern our connections with the world and with one another: property, proper, appropriate, propriety.  

1 Introduction: Imagination and the Weight of the Past

South Africa’s journey of social transformation has included an effort to reassess private property as a defining national institution, particularly private rights in land and natural resources. In calm times, a society typically takes its property regime for granted, giving little thought to its origins or to possible alternatives. For South Africa, times are agitated and need-filled. It thus seems appropriate if not essential for its lawmakers to look
hard at its particular property system, reaching beyond the legal details to probe its basic elements and the values and modes of thought that sustain them.

This essay on private property begins from three, related places. In a thoughtful introduction to a recent book on property, scholars Hanri Mostert and Thomas Bennett contend that “the only legitimate reason for the existence of property rights is their contribution to human well-being,” which is to say, they explain (borrowing from an American legal scholar), their contribution to “human flourishing.” Individuals flourish when they enjoy opportunities “to become fully developed persons in a particular social context.” Private ownership, they state, needs to foster this goal, far better than it has and does. Mostert’s and Bennett’s policy stance connects with the lofty aims of the 1996 South African Constitution, which supply a second point of beginning. The Constitution calls for a new social order in which all South Africans are adequately fed and housed and enjoy freedom, dignity, and equal treatment. This new order should include, the Constitution instructs, widespread, equitable access to land and natural resources along with land restitution and improved security of land tenure.

Providing a third departure point are various writings in which Professor André van der Walt questions the prevailing intellectual understanding of property at law. Ideologically dominant today, Van der Walt laments, is a “rights paradigm” of ownership that frames and constrains public thought about private rights. It is a paradigm that serves “to resist or minimise change, including change brought about by morally, politically and legally legitimate and authorised reform or transformation activities.” The time has come, he contends, to entertain “fundamental challenges to the very foundations of the existing property regime.” The rights paradigm itself needs revision if not replacement. So long as the paradigm remains dominant and “frustrates reformist or transformative policies, it is difficult to imagine theoretical space where further and stronger justice-inspired reforms of the property regime can be developed.” As for legal change, it must reach beyond “interventions in the current distribution of property rights and privileges” to include “reform of the system of property rules and practices as such.”

Legal change of any type is challenging to bring about. Change in property law is especially daunting given the institution’s centrality and the many ways private land is culturally linked to economic liberty, personal rights, and individual achievement. These three points of beginning pose a number of vital, insistent questions, perhaps most cleanly presented in Mostert’s and Bennett’s chosen language. In what ways does private ownership relate to human flourishing, understood in light of the Constitution? What is the nature of the linkage, how complex is it, and how might South Africa best restructure property to help promote it? Finally, if as Van der Walt contends an intellectual paradigm shift is needed, then what old modes of property thought should be pruned and what new ideas fertilized?

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5 Constitution of the Republic of South Africa, 1996, ss 1, 9, 10, 11, 26, 27.
8 S 25.
9 AJ van der Walt Property in the Margins (2009) viii.
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This essay engages these questions, clarifying the issues, identifying relevant factors, and offering partial answers. As explained, these questions necessarily implicate normative considerations, calling for policy judgments that are rightfully subject to public debate. Property scholars can particularly help the process by explaining how ownership systems and their associated rhetoric inevitably embody key policy choices, and by showing how today’s new social visions—based on dignity, equality, fairness, and ecological health—might rightly give rise to new property talk and new property rules.

The essay’s first substantive part identifies the various, conflicting ways that private property is linked to human flourishing. The aim is to get beyond simplistic assumptions and understandings to recapture the institution in its full, interpersonal complexity.

The second part explores the implications of this complexity for property as an institution and for how we might best think and talk about it. In effect, this section supplies materials for a progressive approach to property, one in which property is understood chiefly as a powerful, flexible tool for a society to use to achieve its goals; to promote “progress,” as a society might define it.

The final substantive part turns to Van der Walt’s call for an intellectual paradigm shift and his particular challenge to the rights paradigm. In fact, a good deal of current thought on property needs calling into question, more than just the rights paradigm and the related, “property as dominion” image inherited from Roman-Dutch thought. Indeed, most Western ways of discussing property share the same conservative faults as the rights paradigm. They too serve to entrench current entitlements, to divert attention from property’s dark sides, to forestall serious moral engagement, and to cast doubt on democratic reforms. Put otherwise, prevailing thought supports and protects current property forms and distributions, intellectually, morally, and legally. The reform of private property, accordingly, faces not just the normal political and cultural hurdles. It also faces substantial intellectual ones.

2 Property’s Links to Human Flourishing

At first glance, property seems to promote human flourishing in direct, evident ways. People need food to live and thus places to obtain the food. They need shelter from the elements and physical places where they can live, thrive, and enjoy privacy. Particular natural resources have special values for people, so access to them also plays a role. When the homeless and hungry are ubiquitous, it is natural and easy to think of property in terms of meeting their basic needs: This is what property is mostly about, it would seem, and how it relates to human well-being. So obvious is this starting point, and so right, that one is tempted to start and stop with it. Why engage complexities when basic needs abound?

Among the intellectual constraints of modern thought on property is precisely the tendency to consider ownership in terms of how it benefits a property owner; indeed, to assume that property exists chiefly if not entirely for this purpose. With property, a person can flourish in ways not possible without it. In fact, property is a distinctly complex arrangement, not just in its details but in terms of its basic functioning, and grave dangers lie in focusing solely or even chiefly on the individual owner as such. Some of these complexities are evident in recurring legal disputes; we know these complexities, and sometimes connect them to the (mal)functioning of property as an institution. But if real transformation is going to unfold in South Africa, critical observers need to give a long, clear-sighted look at property and all of its effects—the bad as well as the good, the long-term and hidden as well as the short-term and obvious. Yes, property can help owners meet basic needs. But it does much more than that, for owners, neighbors, communities, the
landless, and future generations. It affects human flourishing for ill as well as good, both directly and through its effects on perceptions, values, and ways of behaving.

2.1 The owner, neighbors, and nature

A place to start is to distinguish between a private property regime (using land as the clearest example) and a less-ordered land-use arrangement in which might makes right. In a lawless world, a person with power can stake out territory and keep others away, enjoying exclusive use. This arrangement resembles a property system but we would not typically call it private property, and for good reason. Private property does not emerge simply when a person seizes land and says ‘this is mine.’ It arises only when other people accede to the claim and largely respect it. Private property, that is, is not merely a way of carving up territory. It is a social arrangement and ordering that somehow arises among members of a collective order—some tribe, extended family or community of people who live and work together. It is a way of sharing a landscape that is agreed upon, and more or less respected, by members of a group. The social order might rest on duress or autocratic power or could function more democratically. The norms governing ownership could be sustained by stern enforcement mechanisms or people might comply voluntarily. But some sort of social order is essential.

The real world is one of scarcity, and even when land and resources are reasonably abundant they can vary in quality and location, making some lands more desirable than others. In all settings, therefore, and particularly as scarcity increases, the control of land or resources by one person necessarily reduces options for others. Put otherwise, the recognition of property rights, while promoting an owner’s flourishing, can decrease the flourishing of other people. This reality is especially evident in landscapes where all land is owned and many are landless. In a world without property all people could use nature as they liked, in equal competition with others. With the advent of a property regime this initial liberty disappears, partially or fully. An even greater limit on liberty can come if a person fails to respect the property rights of others and is arrested or imprisoned.12

Merely to add this single element to the narrative changes the tone of discussions. To know whether private property promotes human flourishing we need to consider the effects on people other than the owner. Perhaps they enjoy benefits that exceed their losses. But we need to identify and quantify those benefits before reaching a conclusion.

In the ordinary world of scarcity, holders of ownership rights over land and resources are commonly empowered to charge other people for the right to use their property (as licensees, tenants) and able also to hire people to work on or with their property. People given access to the owner’s property may use it for their own direct benefit, enjoying the property for its use value (as, eg, the renter of a home). Instead, they may use the owner’s property for economic production (as a tenant or employee), in which case the thing owned and used is a capital asset, or capitalist property. In either case, the owner is highly likely to benefit by demanding in exchange some portion of the earnings or benefits gained from the land use. This arrangement, of course, is both familiar and widely accepted, so much so that it is easy to miss the element in it of what Marx and others termed exploitation.13 The owner of

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13 My comments pertain most directly to land and other parts of nature, without improvements. Exploitation, in Marxist terms, occurs when the value created by a person’s labour is taken away by a property owner in whole or in part. In the case of improved property, the calculations are more difficult but do not materially change the
private property extracts income from the people given permission to use the property. The property-use arrangement, of course, will also typically benefit the user—hence the user’s willingness to pay for the use right, in cash or labor. But this benefit to the user does not eliminate the underlying loss or cost that comes from having to pay for the right to use.

In cases of extreme resource scarcity, individuals who control a scarce resource may be able to exploit other people quite substantially, extracting most of the resulting earnings or benefits. Again, such arrangements are common and on balance might make sense. But an overall calculation needs to include this element of income transfer: Property law empowers an owner to extract income from others, thereby affecting the flourishing of both the property owner (for good) and the person doing the paying (for ill). A similar income transfer occurs when property is sold. The purchaser in effect forgoes past and/or future income in order to make the purchase, with the seller’s flourishing correspondingly benefited by the income shift. The sale situation is more factually complicated because the seller likely was a purchaser and the purchaser in turn might soon sell to someone else. But these complications merely divide up the pluses and minuses of individual flourishing among multiple people.

Going further, assume an owner develops a land parcel and uses it in a way that creates spillover economic gains for the community. This use of property can promote human flourishing not just for the owner but for other people as well, perhaps many others (including tenants and employees). Again, the point is obvious—private property can encourage initiative and promote growth with widespread benefits—and is central to public development strategies. So prominent is this link between private property and economic growth that it is sometimes offered (simplistically and unhelpfully) as a stand-alone justification: private property is legitimate because it can promote economic growth that is difficult if not impossible to achieve without private property.

Land ownership can help an individual gain a sense of settled engagement with a particular place; another contribution to flourishing. When ownership is widespread—when nearly all community members have secure access to property—then the community as such and its governance processes are likely enjoy greater stability. Similarly, widespread ownership can help found and stabilize a social order, fostering interpersonal ties that greatly enhance welfare. It can help support family stability and, with economic growth, foster the arts, celebrations, and acts of generosity. Widespread ownership disperses power in society and can encourage people to take responsibility for their conduct.14

Intensive uses of land and resources, on the other hand, can generate harms that cross property boundaries and interfere with the flourishing of neighbors or community members. Intensive activities can also degrade the land itself in ecological terms, sapping fertility or future use value in ways that diminish the flourishing of future users (whose plight is rightly considered in overall calculations). Intensive land and resource uses, of course, can greatly disrupt nature in ways that affect other life forms. We may not choose to give nonhuman animals a direct place in calculations of flourishing. But their status is nonetheless critical given the many ways human flourishing is linked to the presence and well-being of animals, plants, and ecological forces. Land degradation is more likely to take place when a legal regime authorizes it. At the same time, however, secure legal rights in nature can give an owner greater ability to act as steward of the land, using nature in sensible ways and avoiding the kinds of degradation that can afflict an open-access commons. Thus, in terms of environmental change and pursuit of environmental goals (eg ecological sustainability), situation. Then exploitation comes to the extent that labour/earnings are captured by an owner in excess of the labour used to create the improvement.

14The effects of property on an owner’s sense of self are considered in many works, including J Waldron The Right to Private Property (1988) chaps 8-10; S Munzer A Theory of Property (1990) chap 6.

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private property plays multiple roles. It can encourage and help justify degradation; it can facilitate and protect good land uses.\textsuperscript{15}

2.2 Competition, the market, and exchange value

Secure private property rights help stimulate the emergence of markets. Markets facilitate economic growth and thus the enhanced promotion of flourishing that can accompany such growth. Property’s roles here can vary significantly based on what can be owned, how intensively it can be used, and its transferability. As markets emerge, they can give owners greater incentives to use lands intensively, thus fostering greater degradation, yet they can also encourage owners to manage lands more sensitively to maintain long-term productivity.

Markets also have the effect of shaping the ways people assign value in the world, to physical things (including parts of nature) and also to humans and their labor. Market transactions help establish exchange value and implicitly invite people to use such values as they assess the world. An item without exchange value can seem less worthy; a person whose labor commands a low market price can similarly decline in status. Elements of nature and society that are not bought and sold can be overlooked entirely and their disappearance unnoted. Older modes of evaluating people—based on character, talent, and moral acts—can lose ground to evaluations based on income, wealth, and associated power. Private property does not, alone, bring about these shifts in understanding, but it is central to the overall process and specific rules of owning can aggravate or mitigate the ills.\textsuperscript{16}

As they thus provide new methods of valuation and new opportunities for economic gain, transferrable rights and markets can foster competition, breeding selfishness and greed. In a competitive market system, individual ownership can encourage preoccupation with personal welfare understood in isolation from the welfare of other people, sapping social cohesiveness and concern for the less fortunate. Gift-giving and sharing can diminish in a society as competitive bargaining and market transactions become the norm. The giving and sharing that does still occur, particularly outside families, can take on more negative connotations, demeaning to recipients and making acts of sharing more problematic. At the same time, however, considerable wealth can empower individuals to give generously at economic levels never before possible, perhaps in ways that considerably enhance overall welfare.

In some settings, a property-rights regime can evolve in ways that vest vast resources in the hands of the comparatively few. This undesirable arrangement gives to the wealthy great power to exploit and control others. (This could come about by using market processes, control over government or the military, control over long-distance trade and finance, or in other ways, but private property is central to it.) Given the principles of marginal benefits, great disparities in income and wealth always reduce overall human welfare, sometimes dramatically.\textsuperscript{17} Moreover (and as recent research explains), economic inequality also is strongly linked to a wide variety of individual and social ills, which bring their own, often tragic reductions in welfare.\textsuperscript{18} Yet further declines can come when wealthy elites dominate

\textsuperscript{15}I discuss this complexity in “Property Rights” in \textit{Berkshire Encyclopedia of Sustainability} vol 10 (2012) forthcoming.

\textsuperscript{16}For instance, a land-use system in which owners must take steps to protect endangered species on their lands draws attention to the rare species and the values attached to them.

\textsuperscript{17}That is, a given amount of income contributes more to overall human flourishing when it goes to a poor person with basic unmet needs than when it goes to a wealthy person whose reasonable material needs are all satisfied.

government and manipulate it to their perceived advantage. Social conflict can then worsen. Public policies can favor the few at the expense of the many.

Social strife, particularly when it entails crimes against property, can in turn lead to expenditures to protect property, in the form of security services, physical barriers, and alarms. These expenditures are wasteful (and thus diminish flourishing) when they are negative by-products of an unequal property regime. Such security measures can, in turn, worsen social divisions and sap senses of community, mutual-dependence, and shared fate (eg in the form of gated communities). The dangers here are always present but can worsen when inequalities of wealth appear unrelated to individual merit and when resources are disproportionately divided according to race, ethnicity or gender.

As it gains momentum, social strife in a society can lead to more overt challenges to a property regime, and thus to further, wasteful expenditures to defend against the challenges. When challenges include calls to seize property and redistribute it, even when not implemented, the property system as such can be shaken. Owners and potential investors can pull back from socially beneficial decisions. Several of private property’s key contributions to welfare require reasonable stability in property rights and confidence in the system’s peaceful continuance. For instance, the good care of land in ecological terms can depend on owners who are willing and able to implement long-term plans. Declines in stability and popular confidence can thus diminish a system’s overall welfare gains.

2 3 Intellectual integrity

As noted, a contented society may give little thought to its property arrangements and feel little need to justify or reassess them. Still, beneficiaries of property regimes, particularly unequal ones, are prone to justify their regimes intellectually. That is, they are prone to promote ways of public thinking that accept a reigning property regime and its particular features as normatively good if not inevitable. Similarly, they may foster ways of thinking about property that make discussion of systemic change inappropriate or that question the motives and merits of citizen-critics.

In rhetoric deployed to defend a property regime, change may be labeled inappropriate because the regime allegedly is sufficiently fragile and inflexible that material alteration would risk unacceptable harm. Change could also be portrayed as contrary to national traditions or otherwise inconsistent with liberty, just deserts, and other basic values. Simplistically and counter-factually, defenders could contend that a property regime can really take only one form—it exists as an ideal, which a society merely takes off the shelf ready-made. More vigorously, regime defenders can contend that present-day citizens have no legal power to change the property system: Perhaps the system (so the argument might go) simply respects inherent individual rights or is dictated by a natural law that transcends or predates the current political order; perhaps the system was put in place by an earlier generation, with their descendants powerless to reconsider it. In a broader defense, apologists could cast doubt on government generally and argue that individual preferences (on this issue and others) are best assembled and implemented through market means, not corrupted politics. Not the least, regime defenders can portray people calling for change as simply losers in the competitive market: They are individuals out to get something not earned by their labors; out to use political processes to upset the more fair outcomes of the market. In all such instances, the rhetoric serves to divert attention, confuse understanding, and sap democracy.

19Many of the important US writings of this type are listed in Freyfogle “Property and Liberty” 76 n 3.
Especially in societies with high economic inequality, beneficiaries of a particular property regime (and their intellectual and moral allies) can unduly shape discussions in commercial media and political forums. They can assert similar influence over intellectual discussions, in and out of the academy, through control over funding and political forces. In some settings, further, they can indirectly shape the content of religious doctrines as they relate to support for, or criticisms of, existing property arrangements. The defense of a property regime, in other words, can take the form of quieting social institutions from which criticism ought to arise.

This inordinate influence over discussion—and indeed, over public understandings and thought—can forestall beneficial changes in property regimes, thus reducing overall human flourishing. It can also influence the integrity and functioning of academic institutions, public media, and even religious organizations, distorting them in ways that generate losses extending well beyond property rights. As it becomes less disinterested, intellectual inquiry and public argument can become more instrumentally guided; it can become more of a tool to justify existing patterns of wealth and power.

3 The Implications for Property as an Institution

These various comments on the links between property and human flourishing provide a background for observations about private property as a social institution. Taken together, the observations in turn supply components for a progressive theory of property.20

3 1 Institutional basics and moral complexity

As the preceding part makes clear, the links between private property and human flourishing are numerous and complex. The recognition of particular rights in a given setting can increase flourishing, decrease it or do both at once. The balance of costs and benefits depends on how property is defined and distributed, on the valuation methods used, on a regime’s sensitivity to ecological realities, and more.

Given these benefits and burdens, private property is manifestly a morally complex institution, although this long-standing (and, at one time, well known) reality is now rarely mentioned. No property system is morally neutral, nor could it be, in that private property inevitably empowers some people to dominate or otherwise assert power over other people. It is vital, again, to recall that property exists within a community and realistically requires enforcement to protect private entitlements. In the modern age, enforcement typically comes from the state; state power—police, courts, even prisons—are used to pressure individuals to respect the rights of owners. The power held by property owners, in other words, is derivative of state power. In effect, property law puts state power at the beck and call of owners, allowing them to summon the state to limit the liberties of other citizens. In this sense, property is a public institution that cries out for moral justification. How can we justify this use of state power to constrain the activities—to punish, even imprison—nonowners? Needless to say, it is no justification to respond that we are punishing people because they have violated property rights because it is the property rights themselves that need justifying.

The need for a moral grounding is particularly acute when wealth inequality is high and elites hold scarce resources. Market forces can further exacerbate moral problems when oligopoly exists, when high barriers limit entry into socially important markets, and when dominant market players extract higher profits. In some way, we must explain morally why property owners possess such power over other people and why we use state power to

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20Important US writings on property of a more progressive nature, through 2008, are listed in Freyfogle “Property and Liberty” 76 n 5.
enforce the arrangements. Property cannot be justified simply by reference to the benefits it brings to owners; that should be abundantly clear. To the contrary, a sound justification needs to account for all effects of a property regime, for good and ill, for owners and everyone else.

To attain legitimacy a property regime must yield benefits that are not just widespread in society but ones that are, on balance, beneficial for nearly everyone. Given the need to attend to all effects, an adequate justification necessarily must take a consequentialist form. Particular forms of private property, to be sure, are linked to the flourishing of the individual owner and we can place these benefits at the top of the list of all benefits and costs. But we cannot fairly grant these good consequences special privilege; we cannot enshrine and protect them without regard for the resulting costs or harms imposed on other people—people who possess equal civil rights and whose flourishing is equally important. In short, a consequentialist inquiry needs to look at a system’s effects on all people—including, one hopes, future generations—and to pay special, independent attention to the distribution of these effects.

As noted, private property is inherently a social institution, most visibly in the case of land and other parts of nature. Even a quick glance around the world and into history makes plain that private property is also a highly flexible institution. Property rights can and do take a wide variety of shapes and sizes, in terms of what can be owned and what it means to own. Rights can be more or less exclusive and definite; can last for varied periods of time; can be more or less transferable or divisible; can be subject to various use-limits designed to promote social aims; and can be interwoven with the rights of others in ways that attend to nature, social contexts, and much more. Given these real-world variations, it makes no sense to ask abstractly “what does it mean to own land?” It similarly makes no sense to start with property as an idea and to proceed through deductive reason to produce a regime of ownership.

Recurring claims that we might reasonably start discussion with a particular understanding of property always seem to choose an understanding from the distant past, typically one crafted long age to justify the property entitlements of the era’s wealthy people. John Locke’s writings, for instance, were intended to defend the property entitlements of wealthy Englishmen from royal interference. Locke responded to Sir Richard Filmer, who explained property’s origins (starting with the Bible) so as to justify the strong property claims of the Stuart monarchy. Natural law writers from the seventeenth century seemed motivated by a desire to get rid of the vestiges of feudalism so as to benefit existing landowners. John Stuart Mill (like Robert Nozick after him) wrote about property but did so with reasoning that linked property’s legitimacy to a calculation of the common good, with individual property rights shaped accordingly. Of course, more critical writings about property have also arisen—from Proudhon, Rousseau, Frederick Engels, Henry George, and

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21With this conclusion, I disagree that a personality theory of property can, standing alone, lead to a legitimate property regime. One problem: what personality claims do we respect? The builder of a massive office tower whose ego is wrapped up in it? See Freyfogle The Land We Share 102-34.

22In making this calculation it seems fair to consider how property affects a person over a lifetime and not expect the system to benefit nearly everyone at all times of life. On the other hand, benefits need to be actual, not imagined or merely dreamed.


24Mill challenged the power of society to limit individual liberty but recognized that liberty ended the moment one’s actions affected others. JS Mill On Liberty (1956 ed, originally 1859) 68, 91-92, 95-100. As importantly, Mill believed that society recognized and protected individual rights only to the extent consistent with communal welfare. JS Mill Utilitarianism (2005 ed, originally1861) 55-57. A critical look at Nozick’s thought appears in Freyfogle On Private Property 99-114.
others—but it hardly needs saying that mainstream property writers rarely start with their ideas.

A seemingly more legitimate point of departure, of course, is to start with the legal past and with ideas of property embedded in the history of a given legal system. But the past is where one turns to learn about the experiences and choices of the people then in charge, wealthy people for the most part. Moreover, to go back even a century is to return to eras when women and minorities could not vote at all, when most men lacked sufficient property to vote, and when voting was often done in public ways that pressured commoners to defer to their betters. Systems strongly favored economic elites and their modes of domination. Their values infused legal culture. To listen to the past is wise; to defer to it is folly and disrespectful of the sovereignty of citizens now living.

3.2 Shifting ideas on flourishing

Any reformulation of private property to promote human flourishing needs to have, in hand, understandings of what flourishing means and when and how it happens. The subject, of course, is complex, reaching far beyond the law. Aside from obvious matters relating to food, housing, clothing, education, health care, and the like, flourishing is linked to stable communities and sound interpersonal relations and to opportunities for expression and recreation. Happiness studies make clear that wealth beyond reasonable levels brings only modest gains to individual well-being. Studies of economic inequality, as noted, show how the distribution of wealth and income can greatly skew overall welfare. A longstanding claim is that people gain full satisfaction only through public engagement and service to others. In many instances, of course, people will want to flourish in their own chosen ways, and should have opportunities to do so. The recognition of carefully shaped individual rights are one means to promote individual flourishing, at least when their exercise does not bring offsetting costs.

Economic calculations can help measure overall welfare, but they must be used with great caution because of their methodological biases. For one, most such calculations measure market transactions and thus pass no judgment on whether a particular transaction aids or diminishes welfare. Thus, money spent on hiring security guards to protect the wealthy is just as socially beneficial as money spent on early child education; rises in diseases are good when they stimulate rises in amounts spent on health care; the economy goes up when toxic waste is spilled and cleaned up. Economists are hardly unaware of this problem, and sometimes adjust their calculations accordingly. But the more economic models are altered to deal with defects, the more they cease being anything special in the way of an assessment methodology; the more they become, instead, simply all-things-considered assessments of all relevant factors in which economists have no especial methodologies or expertise. In addition, the preferences people express as individual consumers in the market often differ considerably from the ones they express as citizens in the voting booth.

The point to make is that human flourishing is a complex phenomenon deeply laced with normative choices, some for citizens to make collectively, others perhaps best left to individuals and families to make. Sound thinking on the topic would take into account the foundational dependence of humans on nature and the wisdom of living in ways that sustain ecological health. Sound thinking would also recognize the many ways that communities as such are more than the sum of their individual parts; like natural systems, human communities have emergent properties that add to human flourishing, in ways that private

25This generalization fails to note that lawmakers sometimes deviated from their wishes so as to avoid popular uprisings, an elementary although hardly adequate form of democratic power sharing.

property systems might foster. Further (and as critics of strong liberal autonomy have long urged), individual welfare is linked to social roles and satisfying relationships. People, that is, do not typically flourish in isolation. They also do not flourish in landscapes that are biologically impoverished or ecologically dysfunctional.

Given this complexity, it is no easy task to come up with a formula or set of measures for human flourishing. But the task must be undertaken, just as, in lawmaking generally, legislators need to craft a vision of the common good. Once formulated, this understanding of human flourishing then needs connecting to the equally complex ways that a property-rights regime both adds to and detracts from that flourishing. If a new property regime were being constructed from scratch, all of these factors would clearly be relevant. Yet they are just as relevant, all of them, when lawmakers tinker with an existing property regime. It is too easy for lawmakers to consider one social problem, and to alter a property regime to help address it, without giving due thought to the other implications.

A word about who owns: Property system, fundamentally, explains what things can be owned (tangible and intangible) and what it means to own the things. When property is first made available for individual acquisition, the law also plays a role in defining allocation methods. But in the case of most property (land, especially), original allocation has taken place and assets are largely in private hands. After original allocation, the law plays only a minor role in affecting the identities of owners; that matter is left to private transfers and market forces. This reality is important, because dissatisfaction with a property regime (as in South Africa today) often centers on the race of owners. Racial inequalities are serious problems, calling for concerted, long-term public solutions. Racial disparities, however, have little to do with the core of property law as such; with the legal definition of what can be owned and what it means to own. On their face, racial disparities give no particular cause to change property law in any fundamental way, and there is danger in altering it for that purpose. The causes of racial disparities lie elsewhere, as should the solutions.

That said, property law is rightly changed, and indeed on moral grounds should be changed, when it cannot be morally justified through its contribution to the common good. And the justification here needs to be undertaken finely, looking at the various elements and powers of property rights one by one. It is not enough to say that a world with private property is better than one with no property. Each aspect of ownership needs to make sense communally. Any rule of property that empowers an owner to act in a way that, overall, harms the public at large is a rule that cannot rightly stand.

3 3 On the edge: Stability and change

The bottom line, in a sense, is that private property is a highly valuable social arrangement, able to help individuals, communities, and entire states in many ways, but it is also a tool that is easily abused. Wisely constructed and when kept up to date, a property regime can promote the welfare of nearly everyone, owners and nonowners alike, stimulating beneficial economic enterprise, creating spheres for privacy and creativity, and encouraging people to sink roots in a place and engage in communal activities. It can give people secure places to live, stabilizing families and facilitating social interactions. On the other side, control over nature brings control over people, and a poorly designed or out-of-date system of

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27 The points in this paragraph figure importantly in the work of various progressive property scholars, including, in the United States, MJ Radin, G Alexander, and JW Singer, and Canadian J Nedelsky.

28 The progressive literature critiquing private property in ecological terms is substantial. Eg Freyfogle The Land We Share (citing sources). Two works that deserve broad audiences are CA Arnold “The Reconstitution of Property: Property as a Web of Interests” (2002) Harvard Environmental LR 281; ML Duncan “Reconceiving the Bundle of Sticks: Land as a Community-Based Resource” (2002) Environmental Law 773.
property can facilitate unfair exploitation and domination. It can (and does) lead to vast inequalities in wealth and income. It can encourage ecological degradation while providing a shield to ward off criticism. And it can distort methods of valuation, encourage wasteful expenditures, and otherwise promote unhealthy competition and social strife.

It is likely that no private property system is optimal in the sense of fully enhancing net benefits. Carefully crafted reforms, then, would likely bring gains everywhere, and some property regimes fairly cry out for change. On the other side, change itself can do more harm than good. As noted, key benefits of property arise only when a system is reasonably stable and people can reliably make long-term plans. Economic investment is threatened when investors fear unduly disruptive legal change. Homes and farms can fall into disrepair or decline in fertility when legal uncertainty (in tandem with other uncertainties) make capital improvements problematic. The tension is thus clear, between stability and change. Both are needed, and in just the right amounts.

The legal community has always been conservatively minded, particularly when it comes to private property. Not surprisingly, most talk seems to focus on the needs for stability and much less on the problematic sides of property. Exploitation is rarely labeled as such. Many of the ills of competition are attributed to the market rather than to private property, as if the former did not depend directly on the latter. When market valuations are thoroughly embraced, it is easy to assume that vast discrepancies in income and wealth are due to individual merit and initiative. The system itself, that is, is accepted as morally and politically neutral and is absolved of any significant role in skewing income flows. Somehow, the landowner fortunate enough to control vast oil deposits can sit back and rake in massive royalties, doing nothing and yet feel that the royalties are just deserts. Somehow, the owner of scarce residences in a city can charge ever-higher rents because the market will bear it, even though the owner did nothing to deserve the rising income. It hardly needs saying that there is little legal memory of older property discourses in which the “right to property” included a positive claim to easy access to land for subsistence, based on the even older idea that humans own the world in common.29 Similarly, there is little interest in challenging existing property rights in nature because titles are allegedly rooted in theft or exploitation, except when descendants of aboriginal or native owners are present to press the issue.30

Given this conservative bent, it makes sense to look closely at the principal claims supporting the call for stability in property laws. Two arguments predominate, one that focuses on economic development and the need to foster it, the other on the claimed role of private ownership in providing a check on misguided governmental conduct.31

Behind the economic development argument is the simple fact that a person will not sow a crop if she cannot reliably reap the harvest. A landowner will not erect a building if he cannot use it for at least most of its useful life. When security is lacking, people are prone to skim the land of its riches and depart.

This argument for stability, as thus phrased, is a consequentialist one: Protection is good because it encourages behavior that society values. Underlying the argument is a moral claim based on labor and on an individual’s alleged ownership of her body and her labor. If a person owns her labor then she has a moral entitlement to value created by that labor, without

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29On the influence of this thinking in eighteenth century US see WB Scott In Pursuit of Happiness: American Conceptions of Property from the Seventeenth to the Twentieth Century (1977) 36-58.
30Eg JW Singer “Original Acquisition of Property: From Conquest and Possession to Democracy and Equal Opportunity” (2011) 86 Indiana LJ 763.
31The comments here about stability in law might be distinguished from arguments in particular settings that it would be unduly costly to disrupt existing land uses (eg residential neighbourhoods) and the benefits they generate.
regard for any social utility. This longstanding labor argument, as long noted, is weakened by the scarcity of resources: It does not explain why the laborer should own the part of nature improved by the labor along with the value added, nor explain why one person should get to labor while others lack the same opportunity to do so. Still, the moral argument remains, however qualified, to bolster the stronger argument based on social utility.

This economic-growth line of reasoning plainly has merit, but it is by no means an across-the-board justification for resisting all legal change. If we want a farmer to plant crops, the right to harvest must be protected, but it is less clear that the farmer also needs a protected right later to construct a factory or shopping mall. Generally, an owner needs substantial protection of existing improvements on the land and for existing uses of the land. Even that protection can be tied to the useful life of improvements, and need not extend further out in time. To use an older and still valuable distinction, landowners need protection for the use value of their current activities but need not enjoy nearly as much protection for exchange values of property, particularly when exchange value is elevated due to prospects for shifting the property to another use.

Land values are inherently speculative when based on prospects for initiating different land uses. Once an owner actually begins a land use, protection is needed; without it, the use may not be started and society could lose. But does society gain in some way by going further and protecting speculative land values? Would it benefit, and if so how, by promising that it will not materially restrict future land-use options? There are reasons why society might want to make such a promise, mostly to avoid unduly rapid private development (driven by a fear that development rules might suddenly change). But this benefit needs to be put in context and compared with other costs and benefits. Generally speaking, there is little wrong with a legal system in which land purchasers take their chances; in which the right to develop or change land uses is determined entirely by the laws in effect at the time of action, not at the time of purchase.

This element of legal stability arises starkly in the case of valuable subsurface minerals. A mining company that drills or digs a mine, and otherwise improves a mining site, needs legal protection for these improvements and for the use value of the on-going enterprise. Without such protection, the mining would not likely occur. But what of the landowner who has done nothing to begin mining and simply holds title to mineral-bearing land? Perhaps we want to offer legal protection for future extraction in order to avert overproduction in the present (particularly in oil and gas fields). But without having some specific public benefit to point to, it is simply not clear why and how society benefits by offering legal such protection. The labor theory/just deserts argument does not apply. In terms of social utility, society does not benefit by having a particular person purchase and hold the land. At this point no person has done anything that benefits society and that society would care to encourage. The effect of legal protection is simply to augment land prices, a consequence that could easily prove harmful to a community rather than beneficial.

The central conclusion here is that landowners need substantial but by no means unlimited stability in property law in order to encourage them to improve their lands in socially productive ways. Existing uses need far more protection than do plans to engage in different, future uses. Land values as such, apart from improvements, typically require little protection except the protection that comes from fair treatment under laws of wide application.

32The argument is the heart of Locke’s justification of private property. Schlatter Private Property 151-61.
33Freyfogle The Land We Share 110-15.
34I consider the importance of a right to develop in Freyfogle On Private Property 84-104.
35When land values remain low it becomes easier for new farmers to acquire land and for conservation groups, housing authorities, and cities to do so also.
The second claim behind calls for legal stability—the claim that property rights usefully check bad government—is one that similarly needs careful inquiry. Exactly how would inflexible property rights improve government, and what forms of bad decision-making might it forestall? Poor government decision-making is a major danger. It is unfair to dump on a property regime the burden of averting it, unfair in that it efforts to cabin government could easily distort a property regime in ways that diminish its benefits. If a particular government is so flawed that it ignores laws, then property laws will not help; they too can be ignored. If the concern is over snooping government agents, the better remedy might be strong constitutional protection against illegitimate searches and seizures. If the problem is that particular owners are singled out for extra burdens, not borne by other, similarly situated owners, then the need is for a constitutional right of equal protection and perhaps constitution protection for interferences with property rights that are not based on new, widely applicable laws.

This leaves the central, critical question. Is it socially beneficial to define property rights, and then to protect them through constitutional means, in such a way that they limit the power of legislatures to redefine ownership rights over time? Cynics of government can produce arguments they deem persuasive: if government routinely makes matters worse, then why not contain its powers? But if the claim is true—or to the extent it is true—the better response is to push for improvements to government decision-making, not to strip government of tools that, properly used, could yield considerable public benefit.

A different argument for curtailing lawmaking powers could be based on an alleged core element (or elements) of ownership that property laws ought to respect, without regard for competing considerations. If such elements of ownership could be identified—elements so plainly in the public interest that lawmakers should leave them untouched—then society might benefit by enshrining their protection in the constitution. Yet, a look around the world and back in time yields very little in the way of core elements that all peoples at all times have deemed worthy of protection. Conservative US scholars often point to an owner’s right to exclude as a core entitlement, but that claim clashes with the reality that many if not most property systems do not offer such protection (nor did the United States for much of its history). The most widely recognized property right is likely the right to privacy and noninterference in one’s home, but even that right has been subject to tribal or communal decisions to relocate to new landscapes. The reality is that property really is a highly flexible institution that can take countless forms. Every power vested in an owner ought to require on-going justification in terms of its contribution to overall welfare.

Aside from the difficulty of deciding what elements of ownership to put off limits from government tampering, there is the question of who selects them. Some lawmakers, somewhere, would need to decide what property rights deserve special protection and which do not. Presumably this would be done by a constitutional court, interpreting constitutional language. But on what basis would this be done? What line of reasoning would be used? Given the moral complexity of ownership (and for reasons already covered), it makes little sense for a court to look only at the way property benefits an owner apart from others. It also

36The issue here has to do with limits on law-making powers to revise property rules, not on the ways (mentioned earlier) that widespread ownership can diffuse power and thus help keep government in check.  
37On US history, see B Sawyer "The Right to Exclude from Unimproved Land" (2011) 83 Temple LR 665. Scotland’s recent confirmation of broad public access to the countryside is considered in J Lovett “Progressive Property in Action: The Land Reform (Scotland) Act 2003” (2010) 89 Nebraska LR 739. The right to exclude (by no means essential) is usefully distinguished from the far more important right to halt interferences with on-going activities.  
38I put to one side the desirability of giving residence owners powers to resist expropriation in particular settings. Such a power, like all landowner powers, is properly based on a full assessment of overall costs and benefits.
makes little sense for a court to undertake a manifestly incomplete inquiry into the consequences of recognizing certain property rights and graft its conclusion onto a constitutional clause. Property is a majoritarian social institution. It is an institution best constructed by taking into account all relevant considerations in a process in which everyone can participate.

A better approach for courts to take—and for those worried about governmental misfeasance—is to develop a process-centered form of judicial review, one that focuses on the methods of government decision-making and that insists that changes in property law emerge only out of well-constructed, well-operated lawmaking procedures. A process approach would distinguish between government actions that are legitimate reforms of property law and other, less-legitimate acts by government that single out particular owners for burdens or shift private assets into public hands. A well-designed lawmaking system would be deliberate and transparent. It would inquire into all factors relevant to the legal change being proposed. In the instance of a new law intended to curtail an allegedly harmful action, it would ask: What evidence is there of the harm, and has the legislature made a settled determination of harmfulness (and then applied that determination in other settings)? In all instances it would inquire: Have lawmakers recognized the complexity of property as an institution and have they, in particular, paid attention to the ways that a proposed change might prove harmful to some of the institution’s existing benefits? If good process is not followed, then a legal change could be set aside and sent back for further work.

Far more can be said on this issue, but the point is clear enough: The better approach to inhibit government from unwisely altering existing property rights is to push for better decision-making processes.

4 Pruning and New Growth

In his many writings questioning property’s intellectual framing, Professor André van der Walt has raised pointed questions about familiar ways of thinking and talking. He has been particularly forceful in questioning what he terms the “rights paradigm,” an understanding of property that assigns to an owner nearly unlimited powers and implicitly questions restrictions on that power. Under the rights paradigm it is not an owner’s power that requires moral or prudential justification. It is the limits that a government might put on that power.

Van der Walt is certainly right in his criticisms to the extent that he presses them. The rights paradigm and its variants—the dominion model of property; the absolute-ownership model—are strongly slanted to favor existing interests. The paradigm does not shut off all criticism or call for change. But it begins from one end of the debate, not from a central position. It presumes that strong landowner powers are good, without regard for overall consequences. It starts the story with only one character—the landowner—and expects critics to add other characters to the narrative. Its framing diminishes the chance that all relevant considerations will come to light.

If this is true, if the rights paradigm and its variants provide a distorted frame for discussions, then what alternative frame might take its place? How might we talk about property as an evolving institution, one that yields benefits but also poses dangers, an institution that aids owners greatly but does so, or ought to do so, only when society benefits also?

Before drawing together the above comments to sketch an answer, it is helpful to extend Van der Walt’s critique to take note of various other frames, also used to talk about

39I elaborate on this reasoning in ET Freyfogle “Regulatory Takings, Methodically” (2001) 31 Environmental L Reporter 10313.
property, that share many of the faults of the rights paradigm. The rights paradigm is far from the only intellectual container or lens that distorts and constricts discussions.

One frame, less common than generations ago, is the narrative of the social contract, which in one influential form contends that private property arose in pre-social times and that individual owners then formed governments to protect their property. Such state-of-nature, social-contract thinking came to the fore in the seventeenth century and continued through the eighteenth. When originally presented the story was not intended as an historical claim; not intended as a description of anything that really happened. Instead it was offered for its presumed insights. (Rousseau in the eighteenth century was perhaps the first to take it seriously as history.) History aside—and the narrative in fact has no historical grounding—the story makes little logical sense when property is understood as more than simply might-makes-right. Property arises by social consensus or through social governance; a society in some form must come first. Property requires shared understandings or norms, which is to say some form of law. Early societies routinely provided property rights to all group members, with many rights held in common. Societies were not set up so that some individuals could own everything while others had nothing. Plainly, the social-contract story was constructed specifically to justify existing rights in the face of attack, from above or below. In it, property implicitly benefits owners at the expense of others. It is a hegemonic narrative that supports elites, too biased and dismissive of popular power to help today.

A related line of talk uses the terms “natural rights” and “natural law” and contends that property owners somehow gained more or less expansive powers out of a presumed natural order. This literature is useful insofar as it carries forward lessons from Roman continental legal pasts. But there is no reason why forms of ownership developed centuries ago, for far different circumstances and usually to benefit then-existing elites, should carry special weight today. The reference to “nature” is, of course, fanciful; the proffered elements of ownership bear no resemblance to the kinds of physical arrangements that Isaac Newton and Johannes Kepler explained in their science writings. Presumably the term natural law is employed to give particular ideas a timeless air that transcends politics and current preferences. It is rhetoric used to curtail debate and forestall needs to justify particular rights morally and prudentially. Like the state-of-nature, social-contract reasoning, this natural law/rights rhetoric should be pushed aside. Ideas contained in it can certainly play roles. But they need to stand on their own, without gaining influence from any actual or fictitious pedigree.

More used in recent generations has been the claimed split between proprietary and sovereign powers in a jurisdiction; the split between power based on property ownership and power derived from governmental authority. This distinction does have validity and is sometimes useful. The dichotomy is dangerous, however, when brought into property-reform discussions unless used with care. Property is shaped by law and rights exist in the real world only when recognized and protected by law. Descriptively, Jeremy Bentham had it right: “Property and law are born together, and die together. Before laws were made there was no property; take away laws and property ceases.” To reiterate, property involves state power made available to private owners. Owners do not want government to stay away; they want

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40The line of reasoning is typically attributed to late sixteenth-century French philosopher Jean Bodin, who used it to support the Crown’s powers over property. It was soon attacked in England by royalist apologist Richard Filmer, who claimed that property was based on a gift from God. Schlatter Private Property 118-30, 152-53.

41Such reasoning was routinely used by medieval and early modern writers when expedient and discarded when not. Schlatter Private Property 47-161.

42The variety of property arrangements that arise under informal law is surveyed in A Bell & G Parchomovsky “Property Lost in Translation” (2012) Univ Chicago LR (forthcoming).

government on their side. Ironically, perhaps the greatest value of the proprietary-sovereign distinction in property discourse is to help explain why, when it comes to investing power in property owners, these two forms of power overlap. 44

The dangers of the proprietary-sovereign distinction are significant. It confuses thinking on where property comes from and how it operates. It also clouds thinking on the morality of the arrangement; the morality of using public power to benefit some people at the expense of other people. In the modern age, actions by private parties are more likely to escape criticism than actions of government. Accordingly, the proprietary-sovereign distinction pushes actions by owners into a category where scrutiny is less.

Similar to this dichotomy is the public-private distinction, which more broadly describes different spheres of life. Property, it is asserted, exists in a private realm, presumably available to serve private interests (those of the owner), while government inhabits a public realm and promotes public interests. Through this lens, property seems to exist simply to benefit the owner, while public laws and regulations sustain the public interest. By implication it is legitimate for owners to act only in their interest, with government entrusted to look after broader concerns. 45

The confusions and dangers of this reasoning are perhaps apparent enough from what has been said. In fact, private property in land legitimately exists chiefly to serve the public interest, not private interests initially. The public-private distinction errs in implying that private property somehow exists apart from law and government. And it unhelpfully suggests that clashes over property rights are best assessed by some “balancing” of private and public interests, a balancing that breeds confusion and lessens chances that an inquiry will fully engage all moral and prudential factors. 46

Comments about the last two frames—the proprietary-sovereign and public-private dichotomies—also explain why it is confusing and unhelpful to presume that property laws come in two distinct forms: those that define property rights, and those that regulate uses of these rights. This distinction is rarely presented overtly. Instead, it lies beneath the surface as people talk about government “regulation” and whether it does or does not cut too deeply into individual rights. The image only makes sense if property rights are somehow defined by a body of law existing apart from, and is unaffected by, the regulation. In Anglo-American law, this underlying body of law is typically the common law, most often the common law as modified up through late nineteenth century when it most favored owners and intensive land uses. But laws are laws, and it is the province of the legislature to replace old ones with new ones. Old laws do not somehow linger on, as if they had not been amended. A property owner’s rights can only be determined by taking into account all laws that apply to the property and uses of it, without regard for the name given to the law. To be sure, some laws are of highly localized application, and there are critical reasons to distinguish among laws based on the unit of government enacting them and their scope of application. But laws do not come in two distinct types and the functions of articulating (and redefining) rights and regulating uses of them are far from distinct.

44A classic, skilful use is M Cohen “Property and Sovereignty” (1927) Cornell L Quarterly 8.
45The practice of property law, and much of its content, is rightly put in the private law category; I do not mean to suggest otherwise. What is public is the drafting and revision of laws that vest owners with power backed by the state.
46By way of example, we might consider the landowner who wants to erect a building on a wetland, a structure that lawmakers deem harmful to the public interest. What would it mean to balance the competing interests? Allow construction of a smaller building? A better approach is to get clear first on whether the building is in the public interest. If not, the question then becomes: Notwithstanding that the building as such conflicts with the public interest, are there nonetheless reasons related to property as a functioning institution that would make it wise to allow building to proceed?
This define-regulate dichotomy is yet another one that serves to confuse thinking. It particularly miscasts the links between property and law. By implying that lawmakers today can regulate but not fundamentally redefine, it clouds the sovereign powers of people today and makes real change harder. It is yet another intellectual frame that benefits existing owners.

Enough has been said to make clear why it is unhelpful to explain property simply in terms of its benefits to the owner—yet another common frame for discussions today. Such an inquiry is grossly incomplete. This reality would perhaps be better understood except for the emergence of economics-influenced writing on property, which typically equates benefits to owners with the common good. Economically oriented writing on property is vast and complex. Much of it, though, comfortably assumes that property law should help owners engage in desired transactions and otherwise maximize the values of their lands. Much writing talks about market imperfections, and at least some commentators call for law changes that diminish these imperfections. But the central point remains: property law should help increase property prices and support a well-functioning market, an approach that allegedly would benefit the public more than other property systems.

Much can be said about this literature. For this purpose, it is important to note that it typically accepts the legitimacy of familiar property arrangements and rarely interjects moral and social factors. For instance, little is said about property as a tool of domination, about the injustice of unequal property distributions, or about the ways markets contribute to increased inequality and multiple social ills. Public decision-making processes are largely pushed aside except insofar as they implement lessons of economists on how best to enhance markets and property values. Studies of human happiness, concerns for aesthetics, and environmental morality are all pushed aside as mere factors for individual consumers to consider in formulating their preferences. The world is typically (though not always) presented in atomistic terms, comprised of autonomous individuals, with only occasional recognition of families and the emergent properties of neighborhoods and communities. Perhaps most troubling, it is discourse undertaken by experts in language that is off-putting to others, language that encourages people to view what are, in fact, vital topics for public discussion as technical matters for experts.

These then are the central ways Western writers talk about property and frame their discussions. Other rhetoric exists, to be sure, but even leftist, social-justice writing often accedes to these rhetorical frames and seeks space within them to interject competing values. Most striking from this list is that each of these frames is slanted to favor existing owners. None of them brings out moral considerations clearly; none explains that property is a product of law and necessarily changes in content as law changes; none makes clear that property can be understood overall as a tool that society uses to foster its welfare and with individual rights derivative of that group welfare. This latter line of thinking is hardly new; Benjamin Franklin embraced it, so did John Stuart Mill and Oliver Wendell Holmes to name a few. But it seems almost heretical to assert the claim in today’s neoliberal times.

A new view of property, perhaps gaining some traction, is one that begins by conceding ground to the above, pro-owner rhetorical frames but then interjects further elements into the discussion. The claim is that private ownership entails responsibilities in addition to rights, a point often made in early legal opinions. Strong individual rights remain, but they are qualified or mitigated by attendant duties to neighbors and communities as such and to opposing parties in property transactions (leases and mortgage loans in particular). The origin and legal status of these responsibilities is put up for discussion.

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47I do not consider the bundle-of-sticks metaphor as a property frame because it is used in multiple, conflicting ways and thus lacks coherence. It is critically considered in the Arnold and Duncan articles in n 28.
One function of this social-relations reasoning is to bolster the legitimacy of regulatory limits on using property: If property inherently includes inchoate responsibilities and if a legislature imposes an express responsibility or limit, then the validity of the legislature’s action is clearer, given the existence of the inchoate responsibilities. In this role, the language of responsibility does not itself directly limit landowner rights. Instead it encourages and facilitates legislative creation of new limits. Language of responsibility also has value in common law litigation and when interpreting statutes and regulations by colouring the discursive context. It invites courts to see value in social relations, family ties, and neighborhood bonds. It invites them also to consider the plight of people on the margins before enforcing property rights mechanically.

The alternative to this virtue- or responsibility-based line of property reasoning is one that largely wipes the intellectual slate clean and starts afresh. It begins with the idea that private ownership (particularly of land and resources) is a tool that society uses to promote its interests. Property rights are based on law and are defined and redefined over time by lawmakers. In this approach, the limits on rights arise at the beginning because the rights themselves extend only to the particular extent set by law. Ownership entails no inherent rights, nor does it derive from an intellectual model that presumes a particular package of entitlements. No later balancing is needed except when a law expressly calls for it. In this approach, property rights are best crafted based on all-things-considered assessments, giving, to be sure, due weight to the many social benefits that come by creating and protecting secure individual entitlements. Elements of ownership can be expressed as standards rather than clear rules to give courts greater discretion to consider all relevant factors before allowing owners to enforce their rights.

The benefit of this latter approach, over the virtue- or responsibility-based approach, is that it gets rid of the slanted frames for property that so cloud and encumber current discussions. It gets away from the idea that property exists chiefly to benefit the owner; gets away from the idea that property rights are based on either some extra-legal source (nature, pre-social times, a metaphysical ideal) or upon legal elements put in place generations ago. In brief, it takes the offense. Better than others, this realist, positivist intellectual paradigm invites a full consideration of the many ways private property contributes to human flourishing, for good and for ill. It invites exploration of all opportunities to revise property law to foster today’s lofty goals. Meanwhile, it alerts lawmakers to the need for thorough inquiries and cautious action.

Van der Walt is right in wanting to curtail if not eliminate the rights paradigm as a rhetorical frame. Other inherited modes of thought need similar pruning; indeed, inherited ways of talking about property should largely be swept aside in their entirety. What should grow in their place is an understanding of property as a dynamic, flexible, evolving social institution; one that can bring both gains and costs; one that can promote both flourishing and exploitation. Property’s social and moral complexities have always existed, even when covered up. Surely an open embrace of them can yield better outcomes for all.