

## A Research Agenda for the History of Property Law in Europe, Inspired by and Dedicated to Marc Poirier

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### I. INTRODUCTION

I first met Marc Poirier at one of the yearly “Progressive Property” Conferences convened by Greg Alexander and Joe Singer at Harvard Law School in 2011. As a first-time attendee and a junior, Europe-trained, property scholar I was excited, but, I have to confess, slightly intimidated at the idea of joining this gathering of American property scholars whose work I had read and admired for years. I was immediately drawn to Marc’s big, warm, and contagious smile and I spent most of the lunch break talking to him. I was thrilled to find out that we shared an interest in comparative property law. At the time, Marc was working on his article,<sup>1</sup> which dealt with a program of regularizing title to dwellings in Rio de Janeiro’s *favelas*. Our conversation immediately delved into questions about the comparative history of property that had occupied me for years: the concept of a “right to the city” in the work of French philosopher Henri Lefebvre and the development of the idea of a “social function” of property which, it turned out, Marc and I agreed, was the product of a dialogue

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<sup>1</sup> Marc R. Poirier, *Brazilian Regularization of Title in Light of Moradia, Compared to the United States Understandings of Homeownership and Homelessness*, 44 U. MIAMI INTER-AMERICAN L. REV. 259 (2013).

between European and Latin American jurists in the early twentieth century. That first conversation over lunch was the first of many other exchanges in the years to come. Marc became a warm friend and a generous and supportive mentor. My property scholarship, and my teaching, owes a lot to Marc. As a tribute to Marc I would like to lay out the main lines of a research agenda in the history of property law in Europe which I hope to develop over the coming years. It is a research agenda that Marc helped me develop, think through, and clarify.

A. *What Type of History?*

Property law and property theory are the technical, often sophisticated and abstract, products of a specific subgroup of legal scholars: property law scholars. Hence, one way of writing the history of property law would be to write a history of property law as a discipline, with its accumulated body of technical knowledge, its methodological and political agendas, and its professional identity concerns. Disciplinary histories are a *genre* with a long life: from Giorgio Vasari's *Lives of the Painters* (1550), to the abundance of eighteenth-century histories of astronomy and histories of the arts and sciences, to the more recent histories of disciplinary "revolutions" and "paradigms" inspired by Thomas Kuhn's work and the flurry of self-reflective disciplinary histories prompted by Michel Foucault's deconstruction of disciplinary discourses.<sup>2</sup> There are many reasons why historians write histories of disciplines. Much of the early disciplinary histories were written to celebrate the achievements of specific disciplines, revel in the disciplines' emancipation from more invasive and hubristic forms of thought and knowledge such as theology, philosophy, or "social science," and to offer the hagiography of their founders and heroes.<sup>3</sup> Another reason to write disciplinary histories is to chart the fundamental methodological and epistemological shifts in the field and to review its advances and failures with the ultimate goal of proposing or refuting a new agenda for the discipline.<sup>4</sup> Yet another reason for writing disciplinary history is to pursue a critique of modern disciplines that shows their imbrication with power. This critical disciplinary history involves two

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<sup>2</sup> Suzanne Marchand, *Has the History of the Disciplines Had Its Day?*, in *RETHINKING MODERN EUROPEAN INTELLECTUAL HISTORY* 131–52 (Darrin M. McMahon & Samuel Moyn eds., 2014) (reviewing the long life of disciplinary history, its main achievements and questioning its continuing relevance).

<sup>3</sup> *Id.* at 132.

<sup>4</sup> *Id.*

fundamental moves.<sup>5</sup> The first move is an “archaeology” of a specific discipline, for example, a study of the essential rules and principles that operate beneath the consciousness of individual practitioners of the discipline and that determine the boundaries of the discipline in a given period. After uncovering the essential structure, the second move is a “genealogy” of the discipline, in other words, showing that the rules, principles, and the knowledge of the discipline were the result of contingent turns in history, rather than the outcome of rationally inevitable trends.

Legal history is often written as disciplinary history. My field, private law, has its own tradition of disciplinary histories. Historians of European private law have produced disciplinary histories that fit into each of the three types I have outlined. The history of property I have in mind is of a different type. It is in some loose sense disciplinary because it is the history of the concepts and doctrines crafted by elite professional lawyers and scholars. It will occasionally, and inevitably, do some of what disciplinary histories do. The disciplinary history will not be free from a marginal dose of celebration: it will chart fundamental methodological and conceptual shifts, endorse certain trends, and reveal the tacit assumptions of property law and theory, their contingent natures and imbrications with power. However, my driving commitment is towards understanding the development of property law and theory in the context of the larger, long-term social, economic, and political transformations of modern Europe and beyond. In the sections that follow, I will outline the main lines of this research agenda: (a) understanding the relation between property and long-term economic change by focusing on the relation between property law and what historians call “social property” relations; (b) understanding property concepts and ideas in the context of the larger ideological and philosophical ideas that shaped the immediate world of jurists and property lawyers; (c) looking beyond the single, contingent episodes of the history of property law and identifying long-term patterns and regularities in the way jurists conceptualized property; and (d) understanding European property culture in its many entanglements with the non-European world. I will conclude with some thoughts about the role of presentism in the history of property.

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<sup>5</sup> On Foucault’s critical historical project, see Gary Gutting, *Foucault and the History of Madness*, in *THE CAMBRIDGE COMPANION TO FOUCAULT* 49–73 (Gary Gutting ed., 2003); Joseph Rouse, *Power/Knowledge*, in *THE CAMBRIDGE COMPANION TO FOUCAULT* 95–122 (Gary Gutting ed., 2003).

### 1. Property and Long-term Economic Growth: The Key Role of Social-Property Relations

Property law is the body of law that allocates competing entitlements over valuable resources between social and economic actors.<sup>6</sup> Hence, the question of the relationship between property law and the economy is a central one both in terms of historical description and of normative prescriptions. A history of property law in Europe must account for the affiliation between property and social and economic factors. What is the link between the development of modern property law in Europe and the rise of liberal capitalist democracies? Did changes in property law merely reflect this transformation in the social and economic structure of modern Europe<sup>7</sup> or is property law a causal factor? In the latter case, does property law play a merely facilitative role, aiding certain transformations that would have otherwise been slower or more difficult, or does property law play an actual constitutive role, creating the very conditions for economic and social change, shaping social relations, roles, and identities?<sup>8</sup> Economic and comparative historians have debated at length the casual factors that explain the rise of capitalism in Europe, and in many accounts that have been offered, property has played a variety of roles.<sup>9</sup>

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<sup>6</sup> Anna di Robilant & Talha Syed, *Hohfeld in Europe and Beyond: The Fundamental Building Blocks of Social Relations Regarding Resources*, in *THE LEGACY OF WESLEY HOHFELD: EDITED MAJOR WORKS, SELECT PERSONAL PAPERS, AND ORIGINAL COMMENTARIES* (Shyam Balganeshe et al. eds., forthcoming 2018).

<sup>7</sup> See OREN BRACHA, *OWNING IDEAS: INTELLECTUAL ORIGINS OF AMERICAN INTELLECTUAL PROPERTY, 1790-1909*, 7–9 (2016) (discussing how the history of American intellectual property is the history of larger ideas about owning intangibles, ideas that are shaped by economic, social and technological concerns but also have relatively autonomy).

<sup>8</sup> On the constitutive role of property law, see Simon Deakin et al., *Legal Institutionalism: Capitalism and the Constitutive Role of Law* (Centre for Bus. Res., Working Paper No. 468, 2015), [http://www.cbr.cam.ac.uk/fileadmin/user\\_upload/centre-for-business-research/downloads/working-papers/wp468.pdf](http://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp468.pdf) (“Consequently, law is not simply an expression of power relations, but is also a constitutive part of the institutionalized power structure, and a major means through which power is exercised”). See also Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 *CORNELL L. REV.* 743, 744 (2009) (“Property confers power. It allocates scarce resources that are necessary for human life, development, and dignity. Because of the equal value of each human being, property laws should promote the ability of each person to obtain the material resources necessary for full social and political participation. Property enables and shapes community life. Property law can render relationships within communities either exploitative and humiliating or liberating and ennobling. Property law should establish the framework for a kin.”).

<sup>9</sup> For an introduction to the debate, see *THE BRENNER DEBATE: AGRARIAN CLASS STRUCTURE AND ECONOMIC DEVELOPMENT IN PRE-INDUSTRIAL EUROPE* (T.H. Aston & C.H.E. Philpin eds., 1985).

A long prevailing historiographical orthodoxy explained the rise of capitalism with the growth of the market. In this view, the definition and enforcement of property rights are among the key institutional conditions for markets to work.<sup>10</sup> Proponents of this view argue that, while technological innovation is often cited as the prime reason for economic development and the industrial revolution as the pivotal moment in European economic history, innovation is a symptom of growth, not its cause.<sup>11</sup> Growth will simply not occur unless the existing economic organization is efficient. The development of an efficient economic organization accounts for the “rise of the Western World.”<sup>12</sup> As a leading proponent of this view asserted, “efficient organization entails the establishment of institutional arrangements and property rights that create an incentive to channel individual economic effort into activities that bring the private rate of return close to the social rate of return.”<sup>13</sup> When private costs exceed private benefits because property rights are not properly defined and enforced, individuals will not be willing to undertake economic activities that are socially beneficial. North and Thomas, in their economic history of the West, argue that the example of ocean shipping and international trade provides a great illustration of the core argument of the “rise of the market” thesis.<sup>14</sup> A major obstacle to ocean shipping was the inability of navigators to accurately determine their true position, which required measuring latitude and longitude. In particular, the determination of longitude required a timepiece that would remain accurate for the duration of long oceanic voyages. European sovereigns, from Philip II of Spain to the British monarchy, offered rich money prizes for the invention of such a timepiece. The prizes, North and Thomas conclude, were artificial devices to stimulate effort, while a more general incentive could have been provided by assigning exclusive intellectual property rights over inventions.<sup>15</sup> Another obstacle to the development of trade and international markets was the threat of piracy, which raised the costs of commerce and reduced its extent. For some time, the solution was to pay bribes, to protect shipping by convoy, or to develop naval squadrons. Ultimately, North and Thomas argued that “piracy disappeared because of the

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<sup>10</sup> See, e.g., DOUGLASS C. NORTH & ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* 1–2 (1973).

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 3.

<sup>15</sup> *Id.*

international enforcement of property rights by navies.”<sup>16</sup>

A competing approach, one that also takes the role of property seriously, focuses on social-property relations.<sup>17</sup> While the approach discussed above points at an unspecified set of property rules that provided incentives to expand trade, this competing approach pinpoints and zooms in on the specific property relations and rules that allowed capitalism to develop. Social-property relations are the relations within which people engage in productive activity.<sup>18</sup> These relations are relations between persons embodying different interrelated roles and are structured by rules, including property rules.<sup>19</sup> The two primary aspects of social-property relations, as described by Robert Brenner, who first developed this approach, are: (a) the relations of the direct producers to one another, to their tools, and to the land in the immediate process of production; and (b) the property relations, always guaranteed by force, by which an unpaid-for part of the product is extracted from the direct producers by a class of non-producers.<sup>20</sup> Brenner argues that social-property relations, once established, tend to set strict limits and impose certain overall patterns upon the course of economic evolution because they restrict economic actors to certain options.<sup>21</sup> Under different social-property relations, similar commercial trends or demographic factors yield widely different economic results.<sup>22</sup>

In Ellen Meiksins Wood’s view, capitalism was not born in European cities through the expansion of trade and markets, but rather in the English countryside, and relatively late, in the sixteenth century.<sup>23</sup> A vast system of trade certainly existed in Europe and extended across the globe but it was not capitalist.<sup>24</sup> The dominant principle in the system of trade was buying at a low cost in one market

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<sup>16</sup> NORTH & THOMAS, *supra* note 10, at 3.

<sup>17</sup> Memorandum from Talha Syed, Assistant Professor of Law, Univ. of Cal. Berkeley Sch. of Law, to Anna di Robilant, Professor of Law, Bos. Univ. Sch. of Law (Summer 2016) (on file with author).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Robert Brenner, *Agrarian Class Structure and Economic Development in Pre-Industrial Europe*, 70 PAST & PRESENT 30 (1976); Robert Brenner, *The Agrarian Roots of European Capitalism*, 97 PAST & PRESENT 16, 31 (1982) [hereinafter Brenner, *The Agrarian Roots of European Capitalism*].

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Ellen Meiksins Wood, *The Agrarian Origins of Capitalism*, in HUNGRY FOR PROFIT: THE AGRIBUSINESS THREAT TO FARMERS, FOOD, AND THE ENVIRONMENT 23 (Fred Magdoff et al. eds., 2000).

<sup>24</sup> *Id.* at 17–18.

and selling for a profit in another.<sup>25</sup> This non-capitalist trade system existed side-by-side with non-capitalist modes of exploitation.<sup>26</sup> Feudal social-property relations, which in various forms prevailed throughout the European continent until the late eighteenth century, limited methods for developing production and led to stagnation.<sup>27</sup> Producers, such as peasants, had access to the means of production, the land, and produced for subsistence without having to offer their labor-power as a market commodity.<sup>28</sup> Non-producers, such as landlords and office-holders, extracted surplus from peasants with the help of various extra-economic powers and privileges in the form of tax and feudal rent.<sup>29</sup> Production for subsistence and surplus-extraction through extra-economic powers precluded any widespread trend towards specialization of productive units, regular technological innovation, and systematic reinvestment of surpluses.<sup>30</sup> Capitalism is qualitatively different from this non-capitalist system of trade and mode of production in that it requires a distinct type of social-property relations between producers and appropriators, whether in industry or agriculture.<sup>31</sup> Capitalism developed only when and where feudal social-property relations were replaced by this new type of social-property relations.<sup>32</sup> In England, land was concentrated in the hands of big landowners.<sup>33</sup> Producers did not have direct access to the land and had to lease it from the landowners or sell their labor as wage laborers.<sup>34</sup> In turn, landowners—due to the political centralization of the English state—did not possess, to the same degree of their continental European counterparts, the extra-economic powers on which the latter relied to extract surplus from their tenants.<sup>35</sup> Hence, to enhance their ability to extract surplus, English landlords had to enhance the productivity of their tenants.<sup>36</sup> For tenants, low productivity meant the inability to pay the rent and hence, outright loss of their land.<sup>37</sup> The effect of this system of social-property relations was to compel

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<sup>25</sup> *Id.* at 26.

<sup>26</sup> *Id.* at 15–16.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Wood, *supra* note 23, at 15–16.

<sup>30</sup> See Brenner, *The Agrarian Roots of European Capitalism*, *supra* note 20, at 17.

<sup>31</sup> Wood, *supra* note 23, at 19–21.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Wood, *supra* note 23, at 19–21.

producers and landowners to produce.<sup>38</sup>

This focus on social-property relations has great explanatory potential. For instance, it allows a fuller and more nuanced understanding of the relationship between the introduction of modern “bourgeois” property in France in the late eighteenth century and the development of capitalism. Was the modern property law ushered in by the French Revolution and the Code Napoleon “bourgeois,” and if so, in what sense? One, long dominant account holds that the French Revolution was a bourgeois revolution, which ushered in modern absolute property, paving the way for capitalism.<sup>39</sup> The French Revolution remade the system of property that had existed in France before 1789.<sup>40</sup> On the famous night of August 4, 1789, the revolutionaries abolished feudalism, thereby ending the Old Regime.<sup>41</sup> In a single decree, the National Assembly dismantled the hierarchical and divided tenurial system of landholding by abolishing feudal dues and associated lordly prerogatives.<sup>42</sup> These changes in the property system were the critical precondition for the development of a capitalist economy in France. However, this notion of the French Revolution as a “bourgeois revolution” ushering in modern property and in turn, capitalism, is today challenged by a prolific “revisionist” scholarship.<sup>43</sup> The revisionists argue that in late eighteenth-century France, there was no self-conscious capitalist bourgeoisie with a fully articulate program to shake off feudalism and pave the way for capitalism.<sup>44</sup> As to its effects, no modernized, capitalistic economic system followed in the wake of the revolution.<sup>45</sup> French economic life declined during the post-revolutionary period and did not regain vigor until the 1820s.<sup>46</sup> The social-property approach allows us to square these apparently conflicting accounts. The type of feudal social-property relations that prevailed in France prior to the Revolution hindered the development of a capitalist mode of production and precluded the rise of a capitalist bourgeoisie. Therefore, the revisionists correctly argue that the leaders of the revolution were not

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<sup>38</sup> *Id.*

<sup>39</sup> See RAFF BLAUFARB, *THE GREAT DEMARCATION: THE FRENCH REVOLUTION AND THE INVENTION OF MODERN PROPERTY* 49 (2016).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 48–49.

<sup>43</sup> COLIN MOOERS, *THE MAKING OF BOURGEOIS EUROPE* 1–5 (1991).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> ALFRED COBBAN, *THE SOCIAL INTERPRETATION OF THE FRENCH REVOLUTION* (1999).



capitalists, but were drawn from the middle strata of lawyers, office holders, and professionals who most acutely felt the impact of restrictions on their social mobility and who demanded “careers open to talent.”<sup>47</sup> However, the fact that the revolution did not *begin* as a bourgeois revolution, in other words, a revolution initiated by a self-conscious capitalist bourgeoisie, does not preclude the possibility that it *became* bourgeois. Through the successive phases of radicalization of the revolution, “the bourgeoisie was forced by the dual threat of revolt from below and counter-revolution to forge a national program which entailed, as an unintended consequence, the institution of measures which were vital to the long term development of capitalism in France.”<sup>48</sup> This is to say that despite its conscious aims, the French bourgeoisie was turned by the pressure of the events into a self-conscious class with an agenda for the transformation of France in the image of other bourgeois states. Colin Mooers writes, “the dynamics of the revolutionary struggle made the bourgeoisie just as much as the bourgeoisie made the revolution.”<sup>49</sup>

## 2. Property Law in the Context of Larger Ideas

The approach sketched above illuminates the relationship between property law, social-property relations, and economic change; however, a full account of the rise of modern property in Europe must also situate property concepts and doctrines in their ideological context. The discrete realm of thinking about property law and theory cannot be cordoned off from the larger intellectual landscape, and the ideas and beliefs that permeated both the larger public discourse of the time as well as specific neighboring fields, such as philosophy, political theory, or political economy. It is only by placing property law in this broader discursive context that we can fully appreciate the meaning, particularities, and potentialities of property ideas and concepts as well as the resonances and ramifications of ideas across disciplines and discourses. This type of contextualist analysis, championed by Quentin Skinner in his 1969 essay on “Meaning and Understanding in the History of Ideas,”<sup>50</sup> has characterized much of the intellectual history of the last forty years. But, more recently, some intellectual historians have revisited their full and unqualified allegiance to contextualism. The revised or “weaker” contextualism

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<sup>47</sup> MOOERS, *supra* note 43, at 1–5, 17–33 (1991).

<sup>48</sup> *Id.* at 67.

<sup>49</sup> *Id.* at 34.

<sup>50</sup> Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3 (1969).

that has emerged as a result may deliver important benefits, particularly in the history of property law.

Peter Gordon explains the need for this revised contextualism by highlighting the tension between two ideals in the writing of intellectual history: the ideal of *containment* and the ideal of *movement*.<sup>51</sup> The former invites us to situate ideas in context, in the larger horizon of meaning within whose bounds an idea can be understood. The latter alerts us to the contingency of any particular horizon meaning and urges us to attend to the patterns of endless transformation and reformation by which an idea travels through time.<sup>52</sup> While both these ideals are critical to historical writing, they pull in different directions and, if embraced in their full, unqualified form, present different risks. Full commitment to containment may lead us to see context as a self-stabilizing unity, thereby breaking up the historical continuum into a set of discrete totalities, each of which exists in isolation.<sup>53</sup> By contrast, unqualified commitment to the ideal of movement supports the illusion that ideas, like passengers on a high-speed train, travel through history hardly paying any attention to the surroundings.<sup>54</sup> The “weaker” version of contextualism that Gordon embraces promises to ease this tension between containment and movement.<sup>55</sup> Specifically, it makes two contributions. First, it challenges the normative attitude that often accompanies “strong” contextualism, such that the *original* context in which an idea was articulated is the one and only context: the “native” and “proper” context.<sup>56</sup> By contrast, weak contextualism allows for the possibility that an idea may travel outward beyond its original context of articulation into other contexts in which it takes up altered or new meanings.<sup>57</sup> These subsequent contexts are not “improper” or “derivative” or “exotic” but rather highlight the many potentialities of an idea. Second, weaker contextualism does not see context as temporally bounded.<sup>58</sup> Strong contextualism often assumes that, because authors’ intentions were to be in actual conversation with other authors of their time, their words should be considered within a limited context and span of time, a sufficiently short period that

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<sup>51</sup> Peter Gordon, *Contextualism and Criticism in the History of Ideas*, in *RETHINKING MODERN EUROPEAN INTELLECTUAL HISTORY* 34 (Darrin M. McMahon & Samuel Moyn eds., 2014).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 35.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 34.

<sup>56</sup> *Id.* at 37–38.

<sup>57</sup> Gordon, *supra* note 51, at 37–38.

<sup>58</sup> *Id.* at 41.

coincides with an intellectual, political, or generational era (such as “the Ancien Regime” or “the Scientific Revolution” or the “Modern Revolutions”).<sup>59</sup> On the contrary, weak contextualism refines and questions the idea of authorial intentions. It refines the idea by noting that it is often the author’s intention to speak beyond her or his time and to communicate with a broader audience.<sup>60</sup> Weak contextualism also questions the idea of authorial intent by showing that it rests on the mythical notion of a subject who enjoys sovereign control over her or his self-expressive utterances. This notion has been discredited by both psychoanalysis and post-structuralism, both of which have urged us to acknowledge that meaning will always exceed the bounds of the author’s intentions.<sup>61</sup>

This weaker, revised contextualism, has the potential to illuminate the many facets of the idea of modern, absolute property that became dominant in continental Europe in the late eighteenth and early nineteenth century. The development of the modern concept of absolute property is a complex political and ideological project, one in which innovation and continuity, or, in the language of the new contextualism, *containment* in temporally bounded, “original” context of innovation and larger patterns of continuity and *movement* across time, are equally significant. The idea of unitary and absolute property, which is at the heart of modern European property, was hardly a new idea and its nineteenth century manifestation, and is certainly not the last one. It is an idea that moved across ages acquiring, at each manifestation, new aspects and possibilities. The notion that property is one and consists of a monolithic right, comprising core entitlements such as the right to exclude and to control the use of the resource, was a Roman idea, although a largely symbolic notion rather than an actual reality.<sup>62</sup> Roman *dominium* symbolized the highest and most perfect form of property reserved to Roman citizens and immune from interferences by neighbors and by the state. The Roman origin made the idea of unitary and absolute property particularly appealing to the jurists and statesmen of the late eighteenth and early nineteenth century, but the effective redeployment of the idea for the project of legal and political modernity required the development of a new constitutional vision

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Eva Jakab, *Property Rights in Ancient Rome*, in *OWNERSHIP AND EXPLOITATION OF LAND AND NATURAL RESOURCES IN THE ROMAN WORLD* 108–10 (Erdkamp et al. eds., 2015).

and a novel political economy. The abolition of the feudal property system in France, on the night of August 4, 1789, was the product of a radically new constitutional vision, based on the principle of the separation between private property and public power and on the ideas of free and equal citizenship and a single unitary national sovereignty.<sup>63</sup> The invention of modern absolute property also called for a new political economy, a new vision of the relation between property, the market, and the state. The invention of modern absolute property took place in the new cultural space of political economy, in which economic activity, commerce, and agriculture were recast as patriotic endeavors and foundations of the civic order. The structure and scope of property were seen as fundamentally related to the promotion of what John Shlovin calls the “political economy of virtue.”<sup>64</sup> While this late eighteenth century ideological context is highly specific, it would be limiting to see it as temporally bounded, limited to the generation of the revolutionaries and their immediate predecessors. In their intentions and ambitions, the craftsmen of the modern concept of absolute property and the ideologues who explained its constitutional meaning and political-economic benefits were speaking beyond their own time, to the broader audience of the citizens of modern Europe.

### 3. Property Law in Movement: Long Term Patterns

The theme of *movement* in the history of property law points to another commitment of the research agenda laid out in this article: the commitment to studying property law in the long term. The history of property law in Europe is as much about patterns, structures, and regularities as it is about the particular and the specific. If we look beyond the many specific and contingent episodes in the history of property law in Europe, we will see the larger pattern emerge neatly. European continental property law developed out of the constant tension and attempts at creative mediation between two competing conceptual models of property: (1) property as a unitary, monolithic right that confers absolute power over a resource; and (2) property as a set of distinct entitlements that can be parceled out and shaped by private parties and by the state.

The absolute model dates back to Roman *dominium*, although Roman property was much more complex and diverse than *dominium* would suggest. Absolute *dominium* was only one of the many

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<sup>63</sup> BLAUFARB, *supra* note 39, at 48–80.

<sup>64</sup> See generally JOHN SHLOVIN, *THE POLITICAL ECONOMY OF VIRTUE: LUXURY, PATRIOTISM AND THE ORIGINS OF THE FRENCH REVOLUTION* (2006).

conceptual building blocks of Roman property, many of which speak to a relative and pluralistic notion of property, but it is the concept that exerted the most lasting impact on generations of modern lawyers. A quick glance at Roman law textbooks reveals the ubiquitous presence of the idea that Roman property is absolute and unitary. “The Roman law of classical times,” a leading textbook reads, “is dominated by what is commonly called the absolute conception of ownership,” defined as “the unrestricted right of control over a physical thing.”<sup>65</sup> This unrestricted right to control includes the right to use (*ius utendi*), the right to draw fruit (*ius fruendi*), and the right to abuse (*ius abutendi*).<sup>66</sup> The owner has very limited ability to parcel out to other individuals these three entitlements in the way an owner can, for example, in the Anglo-American common law, divide ownership of land between a life tenant and a reversioner. This limited ability makes property a “unitary” or “concentrated” right.<sup>67</sup>

The second conceptual model of property, the disaggregated model, was also built largely from Roman law materials, but it was fully perfected in medieval times. Symmetrically opposed to Roman absolute and unitary *dominium*, “medieval” or “feudal” property is described as “relative,” “divided,” “pluralistic,” “communitarian.”<sup>68</sup> Medieval property, the story goes, was ushered in by the

<sup>65</sup> H. F. JOLOWICZ & BARRY NICHOLAS, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 140 (3d ed. 2008).

<sup>66</sup> BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 154 (2d ed. 1976).

<sup>67</sup> W. W. BUCKLAND & ARNOLD D. MCNAIR, *ROMAN LAW AND COMMON LAW* 81–82 (2d ed. 1952) (“The classical jurists had an extremely concentrated notion of ownership, that is to say, although they recognized that various people could own the same thing in common at the same time, they did not attempt any division of ownership as such. This excluded for instance anything in the nature of feudal tenure, under which the ownership of land could be split up between landlord and tenant: even in respect of leases, the landlord was full owner, and the tenant had only the benefit of an obligation. Similarly it excluded anything in the nature of a doctrine of estates, whereby the ownership of land could be divided in respect of time . . . . Finally, there could be no distinction between the legal and equitable estate. In other words one could not dissociate the owner’s powers of management from his right of enjoyment, and vest the former in a trustee, and the latter in a beneficiary.”).

<sup>68</sup> Andre van der Walt & D.G. Kleyn, *Duplex Dominium: The History and Significance of the Concept of Divided Ownership*, in *ESSAYS ON THE HISTORY OF LAW* 213–60 (D.P. Visser ed., 1989); Magnus Ryan, *Succession to Fiefs: A Ius Commune Feudorum?*, in *THE CREATION OF THE IUS COMMUNE: FROM CASUS TO REGULA* 145–47 (John W. Cairns & Paul J. du Plessis eds., 2010); Ennio Cortese, *Controversie Medievali sul Dominio Utile: Bartolo e il Quidam Doctor de Aurelianis*, in *AMICITIAE PIGNUS*, *STUDI IN RICORDO DI ADRIANO CAVANNA* 613–35 (Gian Paolo Massetto eds., 2003); Robert Feenstra, *Les Origines du “Dominium Utile” Chez les Gloassateurs* (avec un Appendice concernant l’opinion des ultramontanes), in *FATA IURIS ROMANI ETUDES D’HISTOIRE DU DROIT* 21–259 (1974); PAOLO GROSSI, *LE SITUAZIONI REALI NELL’ESPERIENZA GIURIDICA MEDIEVALE. CORSO DI STORIA DEL DIRITTO* 144–208 (1968).

transformation in the political structure known, not without controversies, as “feudalism.” The vacuum left by the crumbling of the overarching Roman imperial state was filled by local and regional administration in the form of contractual arrangements between kings, lords, and vassals, whereby kings or lords granted land (fiefs) to their warriors (vassals) in return for loyalty, military service, jurisdictional service, and financial aids, subject to inheritance limitations. In other words, the feudal political and administrative structure rested on a system of “limited” or “conditional” property. In flat contradiction with Roman *dominium*, which was unitary, medieval property is a *duplex dominium*. Property is split. Both the lord and the vassal are owners of the fief. The lord has *dominium directum*, or superior ownership, and the vassal has *dominium utile*, or actual use.

These two opposite modes of conceptualizing property provided the foundations for modern European property debates. Modern European jurists appropriated these two models for their own methodological and political property agendas, refining and expanding them, and, at times, creatively combining elements of both. The pattern that emerges is not a simple one, not one in which the unitary and absolute model and the disaggregated and relative model endlessly supersede one another, in the same way, as in American property law, formalism and realism are often said to perpetually alternate.<sup>69</sup> The pattern is more complex. These two models of property coexisted in an uneasy tension throughout the nineteenth and twentieth century until the present. The liberal jurists who in the era of the great codes shaped modern European property law relied on the unitary model in their effort to break down the hierarchies and the constraints of the feudal pre-modern Ancien Regime and to facilitate the rise of modern liberal capitalism. In turn, their social critics relied on the disaggregated model to impose duties on owners and limit owners’ entitlements in the public interest. Between the 1920s and 1950s, faced with the threat of totalitarianism, liberal and social jurists sought to achieve a mediation between the two models, one that would retain a strong commitment to protecting owner’s autonomy and freedom of action interest while also allowing for a modicum of regulation in the public interest. Starting in the 1990s, with debates over the Europeanization of private law, the tension

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<sup>69</sup> For an account of American jurisprudence that emphasizes discontinuity, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860* (1977); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960* (1992). For an account that highlights continuity and complex patterns, see generally NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* (1995).

between unitary property and disaggregated property was critical again, with market advocates appropriating the former, and social democrats the latter.

#### 4. Property Law Beyond Europe: The Role of Cultural Intermediaries

A history of property law in Europe cannot evade the question of the meaning and scope of Europe. For decades, “European legal history” was understood as a relatively well-defined enterprise, one that entailed chronicling, charting, and explaining the production and development of a unique legal culture within the boundaries of a geographically- and historically-bound area called Europe. Many of the highly acclaimed and now “classic” histories of law in Europe, from Franz Wieacker to Harold Berman, Helmut Coing, and Manlio Bellomo, were written in this mode.<sup>70</sup> Today, a rich post-colonial studies literature and the recent rise of “global history” has radically challenged the old mode of writing European legal history, confronting legal historians with new questions.<sup>71</sup> In the words of Thomas Duve, a vocal advocate of a new “(European) Legal History in a Global Perspective,” muses: How do we define Europe? Why do we make a categorical distinction between “Europe” and “Non-Europe”? Does “Non-European” legal history play a role in our texts and analysis? How can we integrate a global perspective in a “European Legal History”?<sup>72</sup>

As these questions suggest, the challenge for historians is to clarify and ponder the available choices “at a threshold moment in the possible formation of an intellectual history extending across geographical parameters far larger than usual.”<sup>73</sup> The answer to this challenge and to these questions depends on how the term “global” is

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<sup>70</sup> See, e.g., FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE* (Tony Weir trans., 1996); MANLIO BELLOMO, *THE COMMON LEGAL PAST OF EUROPE 1000–1800* (Lydia G. Cochrane trans., 1995); HELMUT COING, *DIE URSPRÜNGLICHE EINHEIT DER EUROPÄISCHEN RECHTSWISSENSCHAFT* (1968); HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983).

<sup>71</sup> On the new global legal history, see generally *ENTANGLEMENTS IN LEGAL HISTORY: CONCEPTUAL APPROACHES* (Thomas Duve ed., 2014); Samuel Moyn & Andrew Sartori, *Approaches to Global Intellectual History*, in *GLOBAL INTELLECTUAL HISTORY* (Samuel Moyn & Andrew Sartori eds., 2013) [hereinafter Moyn & Sartori]; *THE AGE OF REVOLUTIONS IN GLOBAL CONTEXT, C. 1760–1840*, (David Armitage & Sanjay Subrahmanyam eds., 2010).

<sup>72</sup> Thomas Duve, *European Legal History—Global Perspectives 2* (Max Planck Inst. for Eur. Legal Hist., Working Paper No. 2013-06, 2013).

<sup>73</sup> Moyn & Sartori, *supra* note 71, at 4.

conceptualized.<sup>74</sup> In the global history literature, there are at least three analytically separate but often overlapping conceptualizations of the global. The turn to global history could be seen as a meta-analytical category of the historian, thus a commitment to creating a “more inclusive intellectual history that respects the diversity of intellectual traditions” and expands the inquiry beyond the narrow limits of the old, heavily Euro-centric history.<sup>75</sup> The global could also be taken as a substantive scale of historical process, either in the sense of a Hegelian idealist universal history, or in the sense of investigating the work of the cultural mediators who establish connections at the boundaries of cultures that are conventionally approached as separate units of study: the East and the West or the North and the South.<sup>76</sup> Finally, the global history may be a subjective category used by the very “historical agents who are [] the objects of the historian’s inquiry.”<sup>77</sup>

The research agenda outlined in this article is global in all three senses: as a methodological commitment, a scale of inquiry, and, at times, the subjective attitude of the characters themselves. The commitment to a more inclusive appreciation of the history of property law is long due. Legal historians have, for too long, either ignored or underestimated the contributions of Non-European property scholars to the development of modern property. Exchanges between Europe and the Non-European world have long been seen through the lenses of the “legal transplants” or “legal diffusion” paradigms which tend to brush aside the possibility of creativity and influence on the part of non-European property lawyers.<sup>78</sup> To write a more inclusive history of property law, historians need to appropriate some of the methodological tools developed by “global history.”

The use of differential scales of inquiry is one of the “tricks of the trade” of global historians that can enrich our understanding of the history of modern property. To have a full picture of modern property, we need to zoom out, beyond the geographic and historical/cultural boundaries of Western Europe and to conceive of Europe as having flexible, porous borders and a long history of “global entanglements.”<sup>79</sup> Property concepts and doctrines were exported to the non-European

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<sup>74</sup> *Id.* at 5.

<sup>75</sup> *Id.* at 7.

<sup>76</sup> *Id.* at 5–7.

<sup>77</sup> *Id.* at 5.

<sup>78</sup> For a critique of the “legal transplants” concept, see generally DIEGO LOPEZ MEDINA, *TEORIA IMPURA DEL DERECHO* (2009); Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 *HARV. INT’L L.J.* 1 (2004).

<sup>79</sup> Duve, *supra* note 72, at 49.



world often through processes that involved violence and forced imposition, but also through the work of “cultural mediators.” The focus on “mediators” is another tool developed by global history that can advance our appreciation of the complexity of modern property.<sup>80</sup> Cultural, linguistic, social, and civilizational boundaries, global historians suggest, are always occupied by mediators and go-betweens who establish connections and traces that defy any preordained closure. These encounters with cultural mediators took place in different venues and were facilitated by a variety of institutions and dynamics. In the case of property law, these cultural mediators were Latin American, Asian, or Arab jurists who encountered modern European property law in the imperial territories of European monarchies, in the epicenters of the capitalist economy, in the universities and academic institutions of the metropole, and through the political and diplomatic institutions of modernizing liberal nations and of the international order.<sup>81</sup> If we expand the focus to the work of these mediators, the development of modern property appears much more complex than a simple story of one-way diffusion. Rather, modern property appears to have been developed through reciprocal, albeit asymmetrical, processes of circulation and negotiation. Jurists who functioned as cultural mediators were active, although unequal, participants in the debate on the scope and the shape of the modern concept of property. European property law was creatively reshaped in the non-European world and often brought back to bear onto European debates through the work of these mediators who were participating in European debates and publishing in Europe. For example, the development of the concept of property’s “social function” well illustrates the global scope of European debates about the scope and shape of modern property. Since the 1920s, several countries in Latin America have promulgated constitutions that adopt a definition of property that incorporates a “social function” qualification, the idea that property’s “social function” limits the scope of the owner’s entitlements.<sup>82</sup> The notion of “social function” was first articulated by French jurist Leon Duguit in the early twentieth century, but the concept adopted in the Latin American constitutions is more

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<sup>80</sup> Vanessa Smith, *Joseph Banks’s Intermediaries: Rethinking Global Cultural Exchange*, in *GLOBAL INTELLECTUAL HISTORY* 82–84 (Samuel Moyn & Andrew Sartori eds., 2013); Moyn & Sartori, *supra* note 71, at 9.

<sup>81</sup> Duve, *supra* note 72, at 15–18.

<sup>82</sup> M.C. Mirow, *The Social-Obligation Norm of Property: Duguit, Hayem, and Others*, 22 *FLA. J. INT’L L.* 191 (2010); M.C. Mirow, *Origins of the Social Function of Property in Chile*, 80 *FORDHAM L. REV.* 1183, 1183 (2011) [hereinafter Mirow, *Origins of the Social Function of Property in Chile*].

than a simple “transplant.” In Latin America, the notion of social function had both more complex origins and a broader scope. It developed from the creative combination of Duguit’s writings and local innovations in law and legal thought, most notably the Mexican Constitution of 1917, in a legal and political culture predisposed from both pre-Colombian and colonial times “to view property as a means to an end or a policy tool rather than an inviolable right of the individual against the state.”<sup>83</sup> Further, from the moment of its adoption in Latin America, the notion of social function was expanded well beyond Duguit’s original purpose.<sup>84</sup>

Zooming out onto the work of cultural mediators is not enough to gain a fuller understanding of modern property.<sup>85</sup> We also need to focus on regional differences within Europe. Traditionally, “European legal history” has fixated almost exclusively on a core of countries whose legal culture was considered most creative and influential, particularly those of Germany, France, and Italy.<sup>86</sup> But a history of “peripheral” European legal cultures yields a rich variety of property concepts and forms that have remained largely outside the purview of property theorists in continental Europe as well as in the Anglo-American world. Scandinavian property law, with its relational approach and its focus on context, is one example.<sup>87</sup> More broadly, there is a history of property law in the European periphery that is now being written and that will significantly enrich our historical-descriptive accounts as well as normative debates.

#### CONCLUSIONS: THE HISTORY OF PROPERTY AND PRESENTISM

The type of historical property work advocated for in this article has a presentist thrust. As one of the “new” intellectual historians recently observed, “a certain historical presentism need not be a dirty word” and the “new” history of ideas is “well placed to do self-consciously what the best historical writing often does anyway: use the past to illuminate the present.”<sup>88</sup> Some of the greatest challenges of our time—from the rise of income and wealth inequality to the

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<sup>83</sup> Thomas T. Ankersen & Thomas Ruppert, *Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America*, 19 TUL. ENVTL. L.J. 69, 72 (2006).

<sup>84</sup> Mirow, *Origins of the Social Function of Property in Chile*, *supra* note 82, at 1185.

<sup>85</sup> Duve, *supra* note 72, at 5.

<sup>86</sup> *Id.*

<sup>87</sup> Filippo Valguarnera, *Scandinavia e Italia : Le ragioni di un dialogo difficile*, in *IL DIRITTO ITALIANO IN EUROPA 1861–2014* (Mauro Bussani ed., 2014).

<sup>88</sup> Darrin M. McMahon, *The Return of the History of Ideas?*, in *RETHINKING MODERN EUROPEAN INTELLECTUAL HISTORY 25* (Darrin M. McMahon & Samuel Moyn eds., 2014).

sustainable use and management of natural resources—implicate property doctrines and forms and call for creative property reform. A long-term contextualist and global history of property can help us think about these challenges. It can demonstrate the possibilities of human agency and it can remind us that effective answers need not be invented from scratch but may simply benefit from new uses of property concepts and forms we already have. Generations of property lawyers before us have faced similar challenges. Starting in the mid-nineteenth century, French jurists confronted the “social question,” which concerns the new hierarchies and vulnerabilities created by modern liberal capitalism.<sup>89</sup> Throughout the Middle Ages and the early modern era, peasant communities in the Alpine region struggled to develop systems for the productive, and yet sustainable, use of village lands. Knowledge and awareness of these past challenges and of the solutions that were devised can remind us of the extent to which we have agency.<sup>90</sup> But the history of property can also teach us another lesson. The conceptual vocabulary of property—the ideas, concepts, doctrines, and forms developed over the centuries—is broad and rich. A great deal can be done with it. Brand-new property forms are rare, but existing property concepts are capacious, flexible, and malleable. The history of property law presents us with the endless revival, expansion, and refinement of existing forms for different purposes and agendas. The public trust doctrine, the commons, and the social function norm are concepts that have been part of the vocabulary of property since Roman times and have been endlessly reused, twisted, and expanded in different ways and with different outcomes. Effective solutions to the questions of housing inequality, inequality in access to natural or cultural resources, and conflicts over the use of urban space require political will and a degree of radical innovation; but also, more modestly, the creative use of the rich historical conceptual vocabulary of property.

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<sup>89</sup> See Donald R. Kelley & Bonnie G. Smith, *What Was Property? Legal Dimensions of the Social Questions in France (1789-1848)*, 128 PROC. OF THE AM. PHIL. SOC'Y 200, 221–225 (1984).

<sup>90</sup> JO GULDI & DAVID ARMITAGE, *THE HISTORY MANIFESTO* 30–31 (2014).