

This book proposal may help the reader get a better sense of the larger project.

**The Making of Romanist-Bourgeois Property:
The Law of Property between Roman Antiquity and Bourgeois
Modernity.**

Book Proposal

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OVERVIEW

The idea of property structures virtually every aspect of our lives. It informs our views about the market and our understanding of the role of the state; it also shapes how we conceive the physical space we inhabit and how we relate to each other. In contemporary liberal democracies, lawyers and non-experts alike understand property as a set of robust legal entitlements that give the owner broad control over a resource, while also recognizing that these entitlements are limited to protect the interests of others and the public good. This contemporary idea of property is indebted to legal concepts developed, over the course of the nineteenth century, by a global network of jurists, located in continental Europe as well as in its informal imperial periphery, who shared a training in Roman law and the ambition to “modernize” their countries’ property law. Beginning in late eighteenth century France, where the revolution made change appear possible and, to many, desirable, these jurists outlined a new concept of property for what they experienced as the “modern” social and political order. I call this new concept of property “Romanist-bourgeois” because, in their quest for modern property, the jurists turned to Roman antiquity, selectively appropriating doctrines developed by the Roman jurists and creatively reshaping them to meet the needs of nineteenth century economies and bourgeois societies.¹ By the 1850s, the effort to modernize property spread to the informal periphery of Europe and the discourse of property modernization continued, albeit in different terms, well into the twentieth century.

¹ I owe the concept of “Romanist-Bourgeois” law to the path-breaking work of Aldo Schiavone: *The Invention of Law in the West* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2011); *The End of the Past: Ancient Rome and The Modern West*, vol. 13 of *Revealing Antiquity* (Cambridge, Mass.: Harvard University Press, 2000); *La storia spezzata. Roma antica e Occidente moderno* (Rome: Laterza, 1996); *Alle origini del diritto romano borghese. Hegel contro Savigny* (Rome: Laterza, 1984).

For over two centuries, Romanist-bourgeois property has occupied a central place in the social and political imaginary of the West. Yet the work of its creators is largely underappreciated. Historians of property have delved deep into the more rousing writings of publicists and the normatively ambitious theories of philosophers and economists, leaving the technicalities of property law to the competence of doctrinal lawyers. But the jurists were not mere technicians. An ambitious professional group, the jurists aspired to be the conceptual architects of modern property and the movers and shakers in the real-world life of property. Further, they presented themselves as both *scientists* and *philosophers* of property. *The Making of Romanist-Bourgeois Property* provides the first, broad-scale, comprehensive account of the jurists' complex cultural and political project of selective and creative revival of Roman property. The book retrieves the history of modern property from the narrow purview of doctrinal studies and restores it to its central place in the intellectual history of modernity.

The jurists who are the main characters of this book were scholars of Roman law and of private law, two powerful groups in universities across nineteenth century Europe. They presented themselves as the ideal candidates to lead the ambitious project of modernizing the law of property. Shaping modern property was not only a matter of fine legal craftsmanship; it also required a grasp of the institutional reality and sensitivity to political and economic needs. Further, modern property had to appeal to the larger intellectual and ideological movements of the time. Roman law and private law professors could plausibly claim to have familiarity with all these dimensions. They cast themselves as “scientists” with a solid command of the law and intellectuals steeped in the larger conversations of their time. Their prestigious academic jobs and, often, judicial appointments, brought them close to the levers of institutional and political power and, yet, did not place them obviously on the forefront of partisan politics.

The jurists experienced a sense of unprecedented and seemingly incessant change that demanded an overhaul of the legal system. This period saw the beginning of the gradual and uneven transition towards a capitalist mode of production, the slow ascendance of a new class (the bourgeoisie), as well as the proliferation of ambitious disciplinary reform agendas, from political economy to the new science of public administration advocated by the German “Camerallists.” Because of property's centrality to questions of constitutional political economy,

the reform of property law appeared particularly urgent. In this initial, early nineteenth century phase, modernizing property was by no means a coherent project shared by a supranational, cosmopolitan class of elite legal academics. Rather, reforming property law was a vague and ill-defined ambition, felt with varying intensity and different sensibilities. The first generation of property modernizers rode the wave of vocal, if often half-hearted and disingenuous, anti-feudal rhetoric that spread throughout the European continent in the wake of French revolution. Accordingly, the reformers sought to repudiate the feudal property regime, which consisted of limited ownership entitlements split between a “superior” and an “inferior” owner, and to replace it with the concept that property is the owner’s exclusive and “absolute” right. Even though property could never be “absolute” in the sense of free of limits, “absolute” became the jurists’ *mantra*. Absolute property, the jurists argued, would anchor the new liberal order of equal citizens and free owners and support the prescriptions for economic growth offered by the different schools of economic thought and the many societies for “agricultural improvement.”

By the late nineteenth century, the jurists’ ideas about modernizing property changed dramatically. European nations were confronting the negative spill-over effects of industrialization and enormous social and economic inequalities, while, at the periphery of Europe, the newly independent nations of Latin America were facing struggles over land that pitted the landed elites against the emergent class of politically active subalterns. Ideas about “absolute” property lingered and never completely disappeared, but a new generation of jurists argued that, in modern society, property has a “social function.” Accordingly, modernizing property entailed a set of further reforms limiting ownership entitlements to protect the interests of neighbors and the public and to expand access to critical resources such as agricultural land, water, or housing.

Whether they thought of modern property as “absolute” or as “social,” the jurists turned to Roman law for inspiration. It was not a surprising choice. Neo-Romanism had always been an irresistible temptation for lawyers in continental Europe and there had been two previous waves of neo-Roman renaissance, a medieval and an early modern one. Yet, this third wave was unprecedented in scope and ambition. *The Making of Romanist-Bourgeois Property* explores the complexities and contradictions of this nineteenth century Romanist renaissance.

The jurists approached Roman law with a combination of sincere scholarly devotion and instrumental spirit. In Roman antiquity, they found a rich inventory of property concepts and doctrines, a method for legal analysis that satisfied their quest for scientific rigor, and the professional role model of a juristic class with both intellectual prestige and temporal power.

The liberal proponents of absolute property selected from the Roman inventory those property doctrines that conferred upon owners the broadest control over the resources they owned. Most notably, they retrieved the notion of *dominium ex Iure Quiritium*, the supreme form of ownership available to Roman citizens, and proposed it as the blueprint for modern property. Later in the century, as a new generation of jurists started thinking of property modernization as the full realization of property's "social function," they also turned to Roman law. The "social" jurists retrieved the Roman doctrines that spoke to the pluralistic and limited nature of property that the liberal proponents of "absolute" property had overlooked. Inspired by these overlooked Roman "social" doctrines, the critics proposed an alternative concept of property as a variable, limited set of entitlements regulating relations among individuals with regards to specific types of resources. This notion that the scope and shape of the owner's entitlements varies depending on the resources owned, on their specific characteristics as well as on the distinct values and interests they implicate, is the most significant, and underappreciated, legacy of the social jurists.

The making of modern property was local in its practical dimension, but universal in its aspirations. Obviously, modern property had to fit the needs and the institutional set up of different nations, and, yet, many among the jurists who set out to modernize property believed they were embarking on a shared, and to some degree global, project. No book has charted the global ambitions and scope of these originators of the discourse of modern property. *The Making of Romanist-Bourgeois Property* argues that the invention and later critique of Romanist-bourgeois property are neither products of Europe conceived as a homogenous legal space, with its own values and traditions, nor the product of any territorially defined legal space. Romanist-bourgeois property was shaped, and later taken apart and reshaped, by a loose network of jurists, located both at the core and at the informal periphery of Europe, who shared a civil law training based on Roman law and common methodological beliefs. For the jurists

who were part of this network, Europe was a cultural reference point, a reference used strategically by some and critically by others. Leadership in property innovation changed over time. The general outlines of modern “absolute” *dominium* were shaped in France and Germany, the two most influential legal cultures of continental Europe. However, the social critique of “absolute” property was developed simultaneously and independently in different locales and debates. The “social function” doctrine was carried to its full potential by only a handful of Latin American jurists, inspired by the idea of a post-colonial alternative republican modernity. For all the zeal of their onslaught on modern “absolute” *dominium*, the social critics’ effort was piecemeal and incomplete. The social jurists were able to mitigate the most obvious injustices and inefficiencies of “absolute” property, but never succeeded in fully undermining its appeal. Ultimately, these “social correctives” made Romanist-bourgeois property more viable, thereby reinforcing it, rather than eroding it. More generally, the book demonstrates that modern property was the work of numerous intellectuals of different perspectives, rooted in different societies, who, over the course of a century, gradually entrenched two opposite ideas of property, endlessly struggling to reconcile them.

Scholars of property law have long been baffled by the powerful impact and impressive duration of the Romanist-bourgeois concept of property. The tension between the idea that property should grant the greatest possible latitude and security to individual action and the notion that property entails a “social obligation” is still central to contemporary debates about housing, eminent domain, and natural resources. *The Making of Romanist-Bourgeois Property* argues that, while the material interests of the rising capitalist elites played an obvious role in entrenching a robust Roman-inspired idea of property, its avowed scientific and diverse ideological foundations were also key to its success. There is little doubt that Romanist-bourgeois property doctrines structured property relations that, in the long term, proved critical to the development of capitalism. And yet the relationship between modern Romanist property, the conscious aims of the capitalist bourgeoisie, and the effective establishment of capitalism is neither direct and immediate nor understandable in a purely voluntarist fashion. Rather it is slow and indirect.

Science and ideology played a greater role than is often acknowledged. The jurists’ claim—to have developed a science of property that relied on

methodologies imported from physiology, organic biology, or Leibnizian geometry, untainted by power and politics and conducive to an organized body of specialized knowledge—spoke powerfully to the pervasive infatuation with science of large segments of the nineteenth century intellectual elites. But science alone would not have done the trick. Alongside the ambition to develop a science of property, the jurists also aspired to be prominent participants in the larger public conversations about the role of property in modern society. In the prefaces to their treatises and monographs, they were eager to rise above the technical, disciplinary discourse of property and to engage philosophers and political theorists on their own terrain. Addressing present and future moderns, the jurists justified Romanist-bourgeois property with a variety of arguments, old and new, that were not necessarily consistent nor coherent. They marshaled long held natural law ideas about liberty and labor but also new, and less obvious, arguments about democracy, civic virtue, and equality. These latter arguments were often half-hearted and imperfect and yet they proved persuasive to the segment of the public opinion still committed to revolutionary ideas.

DISCIPLINARY CONTEXT AND CONTRIBUTIONS OF THE BOOK

The Making of Romanist-Bourgeois Property fills a surprising gap in the literature: the lack of a broad-scale account of how jurists in so-called “civil law” (i.e. Roman law-based) legal systems conceptualized modern property and shaped its fundamental legal doctrines. “Civilian” property theory has exerted a lasting and profound influence well beyond Roman law-based legal systems, shaping the property consciousness of the West. However, the millenary and complicated history of civilian property is not well known outside Europe and Latin America and has been explored only piecemeal. Legal historians have related isolated episodes in the history of civilian property or have studied distinct national property systems, but have not offered a big-picture account of the development of modern civilian property. To be sure, there are a variety of now classic, broad-scale intellectual histories of private law in Europe.² But

² Franz Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung*, 2nd ed. (Göttingen: Vandenhoeck & Ruprecht, 1967); Id., *A History of Private Law in Europe*, trans. Tony Weir, forward by Reinhard Zimmermann (Oxford, U.K. and

these “classic” histories do not focus specifically on property; rather, they look at private law as a unitary and coherent field that regulates “private” interactions between individuals. Yet, property law is a peculiar subfield of private law and served as a unique arena for the jurists’ professional aspirations.³ What makes property law unique is its distinctively “public” and constitutional dimension, as well as its inherently distributive nature. The law of property structured the constitutional political economy of modern nations, by allocating exclusive rights to access, and to profit from, critical resources, such as land, water, or housing, and by imposing on all others duties of non-interference. By allocating entitlements and dis-entitlements with regards to resources, property law also shaped social relations and, in turn, the social and political imaginary of modern nations. Because of its public and distributive character, property was a site where the jurists’ ambitions to temporal power, their claims about an impartial, scientific ethos, as well as their methodological diatribes and ideological conflicts surfaced most visibly and with unique force. The book features a close reading of excerpts from primary sources, such as property treatises and monographs that, for the most part, have never appeared in the English language.

The Making of Romanist-Bourgeois Property makes a second contribution to the literature. It sees the modernization of civilian property as a project that was, to some degree, consciously shared and global. While a growing literature

New York: Clarendon Press of Oxford University Press, 1995); Helmut Coing, *Europäisches Privatrecht, Bd. 1: Älteres Gemeines Recht (1500 bis 1800)* (Munich: C. H. Beck, 1985); Id., *Europäisches Privatrecht*, vol. II: 19. Jahrhundert (Munich: C. H. Beck, 1989); Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983); Peter Stein, *Roman Law in European History* (Cambridge, U.K. and New York: Cambridge University Press, 1999); Manlio Bellomo, *L’Europa del diritto commune* (Rome: Cigno Galilei Edizioni di Arte e Scienza, 1989); Paolo Grossi, *L’Europa del diritto* (Rome: Laterza, 2009); Antonio Padoa Schioppa, *Storia del diritto in Europa. Dal Medioevo all’età contemporanea* (Bologna: Il Mulino, 2007).

³ James Gordley, *The Jurists: A Critical History* (Oxford, U.K.: Oxford University Press, 2013); Bruce W. Frier, *The Rise of the Roman Jurists: Studies in Cicero’s Pro Caecina* (Princeton, N.J.: Princeton Legacy Library at Princeton University Press, 2014); Antonio Manuel Hespanha, *Como os Juristas Viam o Mundo, 1550-1750: Direitos, Estados, Pessoas, Coisas, Contratos, Ações e Crimes* (Lisbon: António Manuel Hespanha, 2015); James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago: University of Chicago Press, 2008); Philippe Jestaz and Christophe Jamin, *La Doctrine* (Paris: Dalloz, 2004); R. C. Van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (Cambridge: Cambridge University Press, 1987); Rafael Domingo and Javier Martínez-Torrón, *Great Christian Jurists in Spanish History* (Cambridge, U.K.: Cambridge University Press, 2018).

approaches the history of legal modernity as a global phenomenon⁴, the global dimension of the making of modern, Romanist property has surprisingly attracted little attention. Yet it is remarkable and multifaceted. Civilian jurists around the globe shared the sense of belonging to a millenary legal culture, rooted in Roman law and committed to a robust idea of property. Also, starting in the second half of the nineteenth century, civilian jurists established professional networks that were truly global in reach, not only connecting jurists in different countries on the European continent but also opening important channels of communication with jurists in Latin America, East Asia, and the Arab world. Finally, the most intellectually sophisticated and publicly active jurists also shared, with different intensity and sensibility, ideas about legal modernization, its meaning and implications. Obviously, modernizing the law of property was, first and foremost, a national enterprise, profoundly determined and conditioned by local political, economic, social, and institutional factors. Yet, the supra-national and global dimension of the discourse of property modernization was never lost on its most aware participants.

For the most part, legal scholars have studied the global circulation of legal ideas through the lens of the metaphor of “legal transplants,” first developed in

⁴ Thomas Duve, “Global Legal History – A Methodological Approach,” in *Oxford Handbooks Online – Law* (Oxford, U.K.: Oxford Handbooks Online at Oxford University Press, Jan. 2017), doi: 10.1093/oxfordhb/9780199935352.013.25; Thomas Duve, ed., *Entanglements in Legal History: Conceptual Approaches*, vol. 1 of *Global Perspectives on Legal History* (Frankfurt am Main: Max Planck Institute for European Legal History, 2014); María Rosario Polotto, Thorsten Kaiser, and Thomas Duve, eds., *Derecho privado y modernización: América Latina y Europa en la primera mitad del siglo XX*, vol. 2 of *Global Perspectives on Legal History* (Frankfurt am Main: Max Planck Institute for European Legal History, 2015); Duncan Kennedy, “Three Globalizations of Law and Legal Thought: 1850-2000,” in *The New Law and Economic Development: A Critical Appraisal*, eds. David M. Trubek and Alvaro Santos (Cambridge, U.K.: Cambridge University Press, 2006); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge, U.K.: Cambridge University Press, 2001); Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge, U.K.: Cambridge University Press, 2004); Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842-1933* (Cambridge, U.K.: Cambridge University Press, 2014); Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800-1850* (Cambridge, Mass.: Harvard University Press, 2016); Lauren A. Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge, U.K.: Cambridge University Press, 2010); Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2010); Jean-Louis Halpérin, *Five Legal Revolutions Since the 17th Century: An Analysis of a Global Legal History*, vol. 1 of *Studies in the History of Law and Justice* (Cham, Switzerland: Springer, 2014).

the 1970s by Alan Watson.⁵ While the notion of legal transplants nicely captures the fact that jurists consciously import legal doctrines from other countries, it fails to acknowledge the transformations that legal doctrines or ideas undergo when they are transplanted. Alternative, more recent conceptualizations, such as “legal translations”⁶ or “creative mis-readings”⁷, better capture the complexity and the creativity that characterize the circulation of legal ideas. However, these new concepts also have limits. Specifically, they do not account for the fact that exchanges and appropriations of specialized legal knowledge take place in the context of relations characterized by varying degrees of power asymmetry. Further, they fail to encapsulate the institutional complexity of knowledge transmission: the specific sites and vehicles through which legal knowledge circulates.

The Making of Romanist-Bourgeois Property relies on tools developed by global intellectual historians, such as the idea of “cultural intermediaries” and of “zones of contact” to account for these important dimensions.⁸ Property ideas circulated through colonial violence and post-colonial informal imposition, but also through the work of cultural intermediaries. Cultural, linguistic, civilizational, and social boundaries, global historians suggest, are always occupied by intermediaries and go-betweens, who establish connections and traces that defy any preordained closure. These encounters take place in different venues and are facilitated by a variety of institutions. In the case of property law, students from every corner of the civil law world attended doctoral programs in the most prestigious universities of the European continent, forming lifelong relationships of mentorship and collaboration. Some prominent academics also had busy schedules of academic travel that brought them from Bordeaux to Coimbra to Buenos Aires to Cairo, for lectures and conferences that

⁵ Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Charlottesville: University Press of Virginia, 1974).

⁶ Máximo Langer, “From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure,” *Harvard International Law Journal* 45, no. 1 (2004), 1-64.

⁷ Diego Eduardo López Medina, *Teoría Impura del Derecho: La Transformación de la Cultura Jurídica Latinoamericana* (Bogotá: Legis, 2004).

⁸ Samuel Moyn and Andrew Satori, eds., *Global Intellectual History* (New York: Columbia University Press, 2013); Darrin M. McMahon and Samuel Moyn, eds., *Rethinking Modern European Intellectual History* (Oxford, U.K.: Oxford University Press, 2014); Lynn Hunt, *Writing History in the Global Era* (New York: Norton, 2014); Mary Louise Pratt, *Imperial Eyes: Travel Writing and Transculturation* (London: Routledge, 1992).

often generated epistolary correspondences. Further, a canon of textbooks, monographs, and specialized legal journals had wide readership across the civil law world. These professional networks were numerous and competing, often converging around common methodological approaches or ideological beliefs.

The academic world is—and always has been—a highly hierarchical one and, hence, power differences based on scholarly reputation, institutional position or affiliation, and legal culture of origin were never far from the fore. Jurists who were part of these networks produced, shared, and exchanged not only technical property concepts and ideas, but also larger ideas about the meaning of modern property. If we expand the focus of the inquiry to the work of these intermediaries, the development of modern property appears much more complex than a simple story of one-way diffusion from the metropolitan centers of Europe to its peripheries. Rather, modern property appears to have been developed through reciprocal, albeit asymmetrical, processes of negotiation. For many, in Europe and beyond, modern property was peculiarly European. Others strategically invoked a shared, universal modernity to build political and professional alliances. Still others, largely peripheral jurists, located primarily across Latin America and the Caribbean, reclaimed modernity as a truly universal concept that, because of contingent political and institutional circumstances, would be fully and most perfectly realized only outside of Europe. These jurists were active, though unequal, participants in the debate on the scope and meaning of modern property.

ANNOTATED TABLE OF CONTENTS

Introduction. As the idea of legal modernity started coalescing in the early nineteenth century, academic jurists set out to modernize the law of property. They presented themselves as the professional group with both the expertise and the ethos to play a prominent role in the modernization of property. The introduction discusses some of the critical features of this juristic project: the jurists' diverse and changing ideas about the meaning and scope of property modernization, the reasons why the jurists turned to Roman law for inspiration, and the increasingly "global" scope of the jurists' project. The introduction also outlines the main features of the two conceptual models of property that the

jurists developed in their effort to modernize the law of property: “Romanist-bourgeois property” and “social property.”

Chapter One. What Roman Antiquity Had to Offer. This chapter introduces the reader to the features of Roman property law that attracted nineteenth century jurists: the jurists’ “scientific” methodology, the professional role model of a powerful and prestigious juristic class, and a rich set of property concepts and doctrines. My argument is that Roman property law was much broader and richer than the simplistic notion of “absolute” *dominium* mythologized by the liberal architects of Romanist-bourgeois property. Alongside the narrow and highly symbolical idea of *dominium* as a right unique in kind, Roman property law also included features that speak to property’s variable and pluralistic character, features that inspired the late nineteenth and early twentieth century “social” property theorists. In particular, two such features proved critical for the development of modern property law: the Roman classification of “things” (*res*), i.e. the different resources that can be the object of property rights, and the existence of more limited and variable ownership forms for resources of critical economic and political importance, such as provincial land and public land.

Chapter Two. The Foundations of Romanist-Bourgeois Property: Robert Joseph Pothier and the Transition from Medieval “Divided Dominium” to Modern Absolute Dominium. The jurists who set out to develop a modern, Romanist, law of property, faced a fundamental challenge. They had to explain the transition from the medieval idea that ownership is split (between a “superior” owner, with a mix of proprietary and sovereign entitlements, and an “inferior” owner, with limited use rights accompanied by affirmative duties) to their new concept of “absolute” property. In France, the jurists’ task was made easier by an earlier generation of precursors, who had effectively laid the conceptual and ideological foundations for modern property. This chapter looks into the work of these precursors, in three stages. First, a small cohort of sophisticated sixteenth and seventeenth century constitutional theorists clarified the distinction between property and sovereignty. Second, anticipating by several decades the Napoleonic Civil Code, Joseph-Robert Pothier conceptualized property as the owner’s full and broad right over a thing. Finally, the schools of political economy and agrarian improvement that proliferated in mid and late eighteenth century France illustrated the benefits of robust property rights.

Chapter Three. Crafting Romanist-Bourgeois Property: Roman Antiquity, a Rising Bourgeoisie, and the Appeal of Science. This chapter delves deep into the development of Romanist-bourgeois “absolute” property, illustrating its critical conceptual features and exploring the different concerns that moved the jurists. The focus is on France and Germany, which were considered the two leading centers of juristic innovation in the nineteenth century. Between the early 1800s and the 1870s, the “mandarins” of the French law faculties, eager to reaffirm their professional power, recently threatened by the revolutionary upheavals, and to serve the interests of the rising “grand bourgeoisie,” transformed the concept of property outlined in the *Code Napoleon* into a simplistic and ruthless proprietary framework for governing resources. They explained their property regime in the grandiloquent language of bourgeois individualism and they grounded it in the positive, descriptive sciences, i.e. history, the natural sciences, and political economy. In Germany, jurists dedicated all their conceptual creativity to crafting a modern concept of property. They developed a property law system organized with an almost geometric method and informed by a Kantian “will theory.”

Chapter Four. The Contradictions of Romanist-Bourgeois Property. Far from being a coherent and workable system of property concepts and doctrines, Romanist-bourgeois property was riven with inconsistencies. Property was the only right of its kind, qualitatively different from all other lesser rights over a thing, but, in practice, the most robust of these supposedly subsidiary rights, such as the long-term emphyteutical lease or the usufruct, closely resembled property. Property and possession, respectively the *right* to control a thing and the *fact* of controlling the thing, were perfectly aligned and yet, in real life, they were often mismatched, with owners pitted against possessors. The owner’s power over the thing was “absolute” within the limits of the “laws and regulations,” but these legislative and regulatory limits kept expanding and so did the concept of “public utility.” In some regions, modern Romanist *dominium*, individual and absolute, had to uneasily coexist with competing forms of “Germanic” communal property. This chapter explores how the jurists struggled to solve these conceptual, and practical, flaws, often engaging in fascinating displays of conceptual “acrobatics.”

Chapter Five. Romanist-Bourgeois Property in the Periphery: Nation-Building, Modernization, and Individualism. Largely through the vehicle of the French Declaration of the Rights of the Man and the Citizen (1789) and the *Code*

Napoleon, Romanist-bourgeois *dominium* found its way to the formerly colonial peripheries of Europe. An absolute, exclusive, and perpetual right of *dominium* was the centerpiece of the new codes enacted in the independent republics of Latin America between the 1810s and the 1860s. “Absolute” ownership also figured in the Mejlle, the Civil Code of the Ottoman Empire (1869-1877), and in the nineteenth century civil codes of Egypt. Yet, outside of Europe, absolute property took up new shape and meanings. This chapter focuses on the conceptual and ideological challenges that the jurists who advocated “absolute property” in Latin America and in the Arab world had to confront. For one thing, Romanist-bourgeois property competed and interacted with pre-existing notions of property, from colonial Spanish law in Chile to Islamic property forms in Egypt. Further, absolute property served, in ways that are complicated and contradictory, a variety of local agendas. The idea of a nation of free owners was critical to the liberal-republican nation-building project of the newly independent Latin American republics. However, the question of who would be the owners of “*la nacion propietaria*,” and consequently whether the republican proprietary project was going to be racially and socially inclusive or simply benefit the landowning oligarchy, remained deeply contested. No less complex was the relation between the new absolute *dominium* and the local relations of production, which were qualitatively different from those in Europe. Absolute property stood in an ambiguous relation to a mode of production that was neither strictly capitalist, as it still relied on labor drafts and various forms of serfdom, nor truly feudal, as the unequal but mutual structure of feudal obligations fails to capture the intensity of colonial and post-colonial mercantile exploitation.

Chapter Six. The Assault on Romanist-Bourgeois Property: Interdependence, Inequality, and the Social Function of Property. As the nineteenth century drew to a close, a new generation of methodologically innovative scholars, committed to a “realistic” and sociological approach to property law, mounted a powerful attack on Romanist-bourgeois property. They denounced absolute *dominium* as inadequate to govern the complexity of property problems in rapidly industrializing societies: the need to increase resource productivity, the negative externalities of industrial uses of property, and the “social question.” This chapter explores how the social critics reconceived the law of property, inspired by a strikingly different account of Roman property as pluralistic and variable. Retrieving Roman doctrines overlooked by the liberal proponents of absolute *dominium*, such as “abuse of rights,” the *lex agraria*, and the classification of the

different types of *res*, the social jurists argued that property has a “social function” and redefined property as a variable set of resource-specific entitlements, effectively transforming “property” into a multiplicity of “properties.” A malleable concept, the social function was embraced by diverse social and political actors with conflicting agendas: from liberals seeking to respond to the social problems that had ushered in Fascism, to the proponents of a left-republican “solidarism” seeking to make the distribution of property more equitable, to the advocates of authoritarian and statist social and economic policies aimed at enhancing the nation’s “productivity.”

Chapter Seven. Non-European Modernity and the Dramatic Expansion of the “Social Function” of Property. By the first decade of the twentieth century, a global academic network of methodologically innovative scholars interested in modernizing and “socializing” the law of property was well established and it was within this network that the concept of property’s “social function” was dramatically expanded. From Mexico to Chile to Nasserite Egypt, these broader articulations of the theory regarded the “social function” as an internal, structural feature of property that justified more expansive redistributive projects, such as land reform, rental laws, and urban planning, as well as ambitious projects of workplace democracy and a socialized market. Throughout Latin America, this expansive idea of property’s social function was embraced by popular, subaltern movements that infused the national republican project with a democratic challenge and the assertion of social and economic rights. The expansion of the social function went hand in hand with the belief that the center of modernity had shifted to the New World, to a new civilization based not on European norms but on republicanism and democracy. While this broader notion of the social function largely failed to deliver the outcomes it promised, it remained available in the vocabulary of property and has since inspired reform movements around the globe.

Conclusion. Clearly Romanist-bourgeois property and social property are not of purely historiographical interest, as versions of these two models, a robust “ownership” framework and a “social” notion of property as relational and variable, still dominate contemporary property debates. Today, property law faces tremendous new challenges that involve both inequality and sustainability. Certainly, some of the property forms and doctrines developed by the Romanist-bourgeois jurists and their social critics can be usefully repurposed to meet these

challenges. However, the approach to property that has dominated for the last two centuries—robust liberal ownership corrected by doctrines that incorporate social and democratic concerns—has largely exhausted its potential to generate the type of outcomes that the current inequality and sustainability crisis calls for. New property creativity is what is most needed. The story of this book is a story of innovation and endless creative mediations and it is meant as both an inspiration and a cautionary tale for today’s property law reformers.

MARKET

The Making of Romanist-Bourgeois Property will appeal to multiple scholarly audiences, reaching across sub-disciplinary and even disciplinary boundaries. The book will, in the first instance, interest legal historians and historians of modern Europe. Likewise, scholars of property law and property theory will want to understand the origins of the robust notion of ownership that continues to exert a powerful influence in contemporary debates about law reform and institutional innovation. Comparative law scholars and legal theorists interested in the “globalization” of law will find in this book a comprehensive account of the circulation of legal ideas in a field, the law of property, that the extant literature on the subject has largely overlooked. Within historical circles, and particularly the history of science and of knowledge production, the study of cultural exchange is an important conversation to which the book contributes explicitly. *The Making of Romanist-Bourgeois Property* is also the first book to introduce the broader, generalist audience, whether with training or simply an interest in property law, to Roman property law and its nineteenth century revival. Roman property is either the object of casual and simplistic remarks that emphasize its highly individualistic nature (remarks that are ubiquitous in the modern philosophical, economic, and legal literature on property), or the focus of a highly technical and specialized literature that is hard to access for a reader with no Roman law background. This book eschews jargon and does not assume background knowledge of Roman law or the civil law systems.

TIMELINE TO COMPLETION

I have completed a draft of the Introduction and Part I (Chapters One to Four) and I have drafted significant portions of Part II (Chapters Five to Seven).

I plan on revising Part I between September 2018 and June 2019. Over the course of academic year 2019-2020, taking advantage of a significantly reduced teaching load, I plan on completing and revising Part II. The final product should be ready by the end of 2020. An excerpt of my research on the movement that, starting in the early twentieth century, sought to make property law more social, variable, and pluralistic has already appeared in print. *Property: A Bundle of Sticks or a Tree?*, which appeared in the *Vanderbilt Law Review* in 2013, is the only material that will appear in the book that was published in advance.

September-October 2018: Revision of chapter three.

November 2018-January 2019: Redrafting of chapter four.

May-September 2019: Drafting of chapter five.

October-December 2019: Revision of chapter six.

January-April 2020: Drafting of chapter seven.

May-November 2020: Overall revision of the manuscript.

December 2020: Submission of the manuscript.

AUTHOR'S QUALIFICATIONS

I am a Professor of Law at Boston University School of Law, where I teach and write in the areas of property law, property theory, legal history, and comparative law. I have published extensively in both peer reviewed journals and student-edited law reviews. My publications include: *A Genealogy of Soft Law* (*American Journal of Comparative Law*, 2006); *Abuse of Rights: The Continental Drug and the Common Law* (*Hasting Law Journal*, 2010); *The Virtues of Common Ownership* (*Boston University Law Review*, 2011); *Common Ownership and Equality of Autonomy* (*McGill Law Journal*, 2012); *Property: A Bundle of Sticks or a Tree?* (*Vanderbilt Law Review*, 2013); *Property and Democratic Deliberation. The Numerus Clausus Principle and Democratic Experimentalism in Property Law* (*American Journal of Comparative Law*, 2014); *Big Questions Comparative Law* (*Boston University Law Review*, 2016); *Populist Property Law* (*Connecticut Law*

Review, 2017); *Hohfeld in Europe and Beyond: The Fundamental Building Blocks of Social Relations Regarding Resources*, (with Talha Syed in *The Legacy of Wesley Hohfeld: Edited Major Works, Select Personal Papers, and Original Commentaries*, Shyamkrishna Balganesh, Ted Sichelman & Henry E. Smith, eds., Cambridge University Press, 2018); and *The Long Road Towards Modern Property* Book Review (forthcoming in the University of Toronto Law Journal, 2019).

In 2015 I was appointed chair of the Property section of the “Common Core of European Private Law,” a project that has brought together more than 200 legal scholars and practitioners to analyze and map the connections and underlying similarities in Contract, Property, and Torts laws across Europe. I received training in both Europe and the United States. I received my JD (Laurea in Giurisprudenza) from the University of Torino, Italy, a Doctorate in Comparative Private Law from the University of Trento, Italy, and an LLM and SJD from Harvard Law School. My training has prepared me for this project, which I began researching in 2013. I come to this work with years of graduate study in Civil Law and Roman law as well as extensive study of both European intellectual legal history and comparative legal methodology. My deep familiarity with both systems of Western property law-- the Anglo-American common law and the Roman law-based civil law-- gives me a unique insight into the trans-Atlantic dialogue between these systems. Between 2013 and 2018, I spent eight months doing research on the primary sources for this project in Europe and Latin America, in four languages (Italian, French, Spanish, and German).

Chapter Six

The Tensions of Absolute Property.

The nineteenth century jurists who shaped modern Romanist *dominium* sought to develop a logically coherent and practically workable set of property doctrines designed to maximize the owner's freedom of action. From the rich inventory of Roman law property doctrines, our jurists chose only those doctrines that magnified the owner's powers. The product of this selective process was a body of property law that, at first glance, might have appeared coherently organized around one pillar: the owner's will. A symbiotic relation between an individual and a physical thing, property seemed to give the owner virtually unlimited control over the thing, including the right to destroy the thing, to the exclusion of all others who owed the owner full deference. Further, the simple fact that an individual exerted their will over a thing by exclusively possessing it appeared to deserve such deference as to be protected against disturbances by others, regardless of whether the possessor was the rightful owner. Also, the jurists explained that, even when the owner had granted others a limited and temporary right to use the thing, such as a servitude or a right of usufruct, the "fullness" of owner's right was in no way diminished since property is "elastic" and thereby capable of contracting and re-expanding without losing its amplitude. Finally, limits on owners' entitlements were presented as a minimally invasive set of juristic doctrines and statutory provisions meant to secure the harmonious coexistence of neighboring owners and to protect important public interests. Achieving this appearance of coherent will-based body of property law was no easy task. It took impressive displays of conceptual *bravura*, conspicuous omissions and cursory and evasive commentary.

Yet, despite the efforts, the tensions of modern Romanist *dominium* could hardly be disguised. Far from being a coherent and workable system of concepts and doctrines, Romanist-bourgeois property was riven with inconsistencies. In court decisions and legislative debates, but also in the lengthy footnotes of the jurists' treatises, these inconsistencies were becoming more obvious as the decades went by. For one thing, as industrialization and the development of large commercial agriculture picked up, property law faced new practical problems that could only be answered by significantly straining the simplistic framework of absolute *dominium*. Despite all their talk about modernization and

improvement, the jurists who re-invented Roman *dominium* were hardly preoccupied with the needs of the capitalist economy. They obviously sought to accommodate and protect the interests of the political and economic elites. But, until the mid-nineteenth century, these elites (the emerging French professional bourgeoisie, the conservative German landowning class or the colonial landowning classes of the peripheries), had not yet developed a capitalist mindset focused on maximizing profit through purely economic means and, hence, their interests seemed well served by the jurists' simplistic framework of absolute *dominium*. In other words, the jurists of the first half of the nineteenth century were able to preserve the appearance of coherence because they could still gloss over the real-life problems that were starting to emerge. However, as social and economic change accelerated, and, with it, class antagonism, capital and labor's demands on the property system multiplied and became more vocal. The most advanced sectors of the infant entrepreneurial bourgeoisie understood that development required a more flexible set of property doctrines that would empower owners to parcel out entitlements, expanding investment and access opportunities for non-owners as well. And a growing chorus of "social" and "socialist" writers and pamphleteers of all stripes vocally denounced the role that "absolute" property played in the "social question". As legislatures and courts started responding to these demands, the jurists' evasive conceptual bravura became less convincing.

The points of strain of Romanist-bourgeois property were several. The jurists cast property as the only right of its kind, qualitatively different from all other lesser rights over a thing. Yet, the most robust of these supposedly subsidiary rights, such as the *emphyteusis* (long-term lease) or the right of *superficies* (the right to erect buildings or structures on land owned by another) were becoming increasingly more important as they allowed owners to maximize the value of their land and non-owners to effectively acquire critical productive resources. On the ground, these subsidiary lesser rights closely resembled property. Further, while property and possession, respectively the *right* to control a thing and the *fact* of controlling a thing, seemed perfectly aligned in the jurists' writings, in real life, they were often mismatched, with absentee or inert owners, pitted against possessors who put the land to productive use or took from the land natural resources, such as water, timber or pasture. Also, in the high-flown introductions and theory chapters of property treatises, the owner's power over the thing was described as "absolute" within the limits of the "laws and regulations," but these legislative and regulatory limits kept expanding and so

did the concept of “public utility.” Finally, from Germany to the Italian Alps to Mexico and Chile, modern Romanist *dominium*, individual and absolute, uneasily coexisted with competing forms of “Germanic” or “indigenous” collective ownership informed by diametrically opposed principles of community and solidarity.

In the pages that follow, we will take a close look at the jurists’ attempts to deal with these tensions. While partial and unsatisfactory, these attempts deserve a close look. When faced with hard questions, the architects of modern Romanist *dominium* were forced to clarify their methodology and to make plain their ideological commitments, revealing important differences, but also surprising moments of openness and doubt, within the apparently harmonious chorus singing the praises of absolute *dominium*. The jurists’ dense and convoluted writings on topics such as emphyteusis, possession, or expropriation for public use warrant careful examination also because they opened rifts in the apparently solid edifice of modern *dominium* that their social critics were quick to exploit.

Emphyteusis: A Form of Quasi-Property?

By the mid-nineteenth century, *emphyteusis*, a form of long-term lease that originated in late Roman law and became widespread in medieval times, had turned into a highly controversial issue that made sparks fly in juristic circles. As French jurist Jean Charles Florent Demolombe put it:

The right of emphyteusis! There has never been a real right as important and renowned as the right of emphyteusis. Of all the real rights, it is the one that has generated the greater difficulties and controversies and is discussed everywhere in legislation and in the writings of the jurists.¹

The reason for such drama was that, since its very beginning and throughout its long life, the right of *emphyteusis* appeared a maddeningly confusing, hybrid form: part lease, part ownership, part limited real right over a thing owned by another. *Emphyteusis* had its origins in the Roman *ager privatus vectigalisque*, which was one of the many, smaller “ownership” forms that, as we have seen, Roman law made available for distinct types of resources. Following the

¹ Demolombe, Cours de Code Napoleon, livre II, titre I chap II, p 402

Gracchan agrarian law, the public lands held by private possessors in excess of the prescribed limit were confiscated and redistributed in small parcels to private “tenants” who were granted broad entitlements in return for the payment to the Roman state of a yearly fee known as *vectigal*. The “tenants” entitlements were robust and included the right to use the parcel, the right to transfer it to one’s heirs and to grant others limited rights to use, for example by transferring a right of usufruct. Besides these robust entitlements, another feature made this landholding form unique. In case of disturbances and interferences, the tenants of parcels of *ager vectigalis*, who, initially, could only avail themselves of the *actio conducti* resulting from the standard contract of lease, were soon given by the magistrate known as *praetor* an action *in rem (utilis in rem actio)*. The fundamental ambiguity of this form of landholding was reflected in its name, *ager privatus vectigalisque*. While the term *privatus* accounted for the fact that the holder had rights similar to those of a private owner, the reference to the payment of *vectigal* indicated that, formally, title remained with the state. By the time of the emperor Zeno, this form had become known with the Greek name *emphyteusis*. This new name derived from the Greek verb “to plant and referred to a new feature that, in time, had become essential to the emphyteutical relation, further complicating its already confusing nature. In addition to the duty to pay the annual “rent”, the holder of the *emphyteusis* now also had an affirmative duty to improve the land.

A ubiquitous form of structuring agrarian relations in France and in Italy between the fourteenth and the late eighteenth centuries, *emphyteusis* took up local and regional features and became further muddled by its resemblance to a host of other landholding forms introduced by feudal law. Despite these local customary variations, by the eighteenth century, *emphyteusis* became a standardized form with a number of essential features: a perpetual or long-term transfer of land from a private or public landlord, who retained title, to an “emphytecarius” who acquired a set of inheritable and transferable rights and duties. Along with the duty to pay the annual rent, the emphytecarius had the right to use, subject to no restrictions, the duty to make improvements, the right of first refusal if the landlord decided to transfer title, and the right to redeem the parcel by paying the capitalized rent.

As the enthusiasm for the project of a modern law of property centered around the idea of absolute *dominium* spread through law faculties and legislatures, *emphyteusis*, with its unique combination of robust rights but also important duties, presented jurists with two intractable questions, one

conceptual and one about values and policy. The former question interrogated the nature of *emphyteusis* and its place in modern property law? Is *emphyteusis* a simple contract of lease? Or an instance of divided *dominium*, with the title owner holding direct *dominium* and the emphytecarius holding *dominium* utile? Or is *emphyteusis* the most robust of the real rights over things owned by another? Could *emphyteusis* be a form of *quasi-dominium* or temporary *dominium*? Finally, what if *emphyteusis* was a unique hybrid creature deserving its own, separate place in the “system”? Equally contentious was the question regarding the desirability of *emphyteusis* in modern society. Is *emphyteusis* a remnant of feudalism, an inherently hierarchical landholding form fundamentally at odds with the values of a modern society of free and equal owners? Or a property form designed to expand access to land and to promote the productive use of land, entirely in accord with modern egalitarian values and the new emphasis on productivity?

Jurists and legislatures throughout continental Europe and its peripheries offered widely differing answers to these questions but diffidence and hostility towards *emphyteusis* prevailed. At a time when the anti-feudal rhetoric was vocal and pervasive, the diffidence toward a property form that smacked of feudalism proved hard to overcome. Equally tenacious was the hostility to recognizing a new form of quasi-property that could cloud the centrality of *dominium*. The section about *emphyteusis* in Demolombe’s *Cours de Code Civil* is a remarkable instance of this widespread juristic hostility. *Emphyteusis* was a hot topic in France. The evasive and confusing treatment of *emphyteusis* in the revolutionary legislation and the Napoleonic Code had generated a heated debate among French jurists over the status of *emphyteusis* in the modern French property system. A *loi* of December 18th-19th 1790 had explicitly abolished perpetual *emphyteusis* but seemed to allow temporary emphyetutical leases that did not exceed ninety-nine years. The Code Napoleon restated the prohibition of perpetual *emphyteusis* but was silent about temporary *emphyteusis*, failing to list it among the real rights on things owned by another enumerated in article 543. The *Cour de Cassation*, on the other hand, had repeatedly stated that, under the new *Code*, the grant of an *emphyteusis* operated a transfer of ownership of a parcel of land for a specific term, effectively treating *emphyteusis* as a form of temporary ownership.² Demolombe vocally sided with the many prominent colleagues who read the Code’s silence as implicitly abrogating temporary

² D 1832, I, 296; Dev., 1840, I 433; Dev 1843, I 830; Cass., 6 mars 1850; Dev 1850 I 210.

emphyteusis and decried the *Cour's* idea of temporary ownership. Demolombe's tone is sarcastic:

What! It is the Code Napoleon that changed and modified the nature of *emphyteusis*? But it does not say a single word! *Emphyteusis* is a temporary transfer of property and the holder of an *emphyteusis* is a temporary owner? But, in truth, can there be a temporary owner? Can the right of property, which consists in disposing of the thing in the most absolute manner (art. 544), be limited to a certain time?³

No less disparaging is Demolombe's rebuttal of the similar idea that *emphyteusis* is a form of quasi-*dominium* surprisingly endorsed by his colleague Troplong, who once again, proved to be one of the most open-minded and historically aware of the Exegetists.

But what is this quasi-*dominium*? It is not enough to answer that so called it Cujas. We are now in the presence of a Code, under which this designation of quasi-*dominium* must refer to a right, one of the real rights recognized by this Code. Now, what is the right that quasi-*dominium* refers to? We do not say it. It is very difficult indeed to answer!⁴

The truth, Demolombe concludes, is that *emphyteusis* is part lease, part usufruct and part ownership without really being any of them. Rather, Demolombe suggests, *emphyteusis* is a *sui generis* form, an agreement between the parties that has the effect of "dismembering" property. It is no surprise that this effective dismemberment of ownership was favorably viewed by the *Ancien Regime* jurists, given its affinity with the values and needs of a hierarchical political and social order. However, Demolombe resolutely asserts, this dismemberment of ownership has no place in modern society. Rehearsing the standard arguments of what he calls "wise" liberalism, as opposed to "revolutionary" liberalism, Demolombe explains why the Napoleonic legislature's decision to abrogate *emphyteusis* was the right decision:

And all this explains why our new laws, our liberal and democratic laws (wisely democratic and liberal, not revolutionary) that regulate

³ Demolombe, *supra*, p 404.

⁴ Demolombe, *supra*, p 405.

the relationship between those who own land and those who do not reject *emphyteusis*, admitting only the lease. It is because the new legislature not only aimed at freeing persons and things, securing their respective independence (Marcade, t. II art 526). The legislature also sought to simplify the legal regime of landownership, suppressing all the divisions and subdivisions that complicated it and prevented its free alienability.⁵

Demolombe goes beyond simply airing the platitudes of “wise” liberalism about freedom and alienability; he also directly engages the most powerful argument of the supporters of *emphyteusis*, who viewed *emphyteusis* as a means for expanding access to land for peasants who did not own land. Turning on its head his opponents reasoning, Demolombe denounces *emphyteusis* as an instrument of inequality, one that fails to adequately serve the needs of small peasants with limited financial resources. To prove his point, Demolombe contrasts the position of the tenant in a standard lease with that of the *emphytecarius*. At first glance, *emphyteusis* may appear more advantageous than a simple lease because it does not expire upon the death of the *emphytecarius* and it can be mortgaged. However, at closer inspection, the legal regime of *emphyteusis* is in fact harsher on direct producers with limited means. While the tenant is not responsible for the payment of taxes, is only held to simple rental repairs and may be entitled to rent reduction if the crop is lost, the holder of an *emphyteusis* pays all taxes, is in charge of all repairs, including major repairs, and bears the full risk of crop loss.⁶

While outspoken and widespread, Demolombe’s rejection of *emphyteusis* was by no means the only, or even the dominant, characterization of *emphyteusis*. Among the German Romanists, for example, many showed greater openness. Preoccupied first and foremost with logical systematization, the Pandectist scholars were less interested in taking sides in the debates about the desirability of *emphyteusis* in modern society and its distributive effects. Rather, they viewed *emphyteusis* as a conceptual problem, a concept in search of a place in the modern property “system” and they strove to find a satisfactory answer. While some were not afraid to describe *emphyteusis* as an instance of *dominium divisum* and few were not shy to consider *emphyteusis* as a type of ownership, most viewed *emphyteusis* as one of the real rights over a thing owned by another.

⁵ Demolombe, *supra*, p 408.

⁶ Demolombe, *supra*, p 408.

Arndts' treatment of *emphyteusis* in his *Treatise on the Law of Pandects*, well exemplifies this growing consensus. For Arndts, it is relatively straightforward that *emphyteusis* is simply one of the limited real rights of enjoyment. As Arndts explains:

Emphyteusis [and the right of superficies] are real rights of enjoyment over immovables that, because they are so broad as to allow the right holder to enjoy and dispose of the thing in a virtually unlimited way, and because they are alienable and inheritable, so resemble property as to be sometimes considered forms of limited property. But, to be true to their conceptual nature, they are nothing other than real rights over a thing owned by another. Since they are real rights of enjoyment, *emphyteusis* [and the right of superficies] can also be the object of quasi-possession which is acquired by taking hold of the thing with the intent to exercise a right of *emphyteusis* [or superficies] over it.⁷

However, this apparently straightforward classification was hardly satisfactory. *Emphyteusis* was obviously a more robust real right of enjoyment than an usufruct or a servitude but nailing what exactly made *emphyteusis* different from the other limited real rights was not easy. The most globally acclaimed of the German jurists, Savigny, believed he had found the right answer: what makes *emphyteusis* special, as compared, for example, to the usufruct, is not so much the scope of the entitlements granted to the *emphytecarius*, but rather the immediate relation between the *emphytecarius* and the thing, the *corporis possessio*, the full physical control of the land which is bound up with *emphyteusis*.

The debate on *emphyteusis* was not all abstractions or “wise” liberal platitudes. At the semi-periphery of Europe, in the Kingdom of the Two Sicilies, the largest state of pre-unitary Italy, *emphyteusis* was a central political question that prompted creative juristic analyses and galvanized activists. In the new market in land opened up by the abolition of feudalism in 1812, *emphyteusis* was the centerpiece of a bargain between different segments of the elite: the former feudal lords, who belonged to the high echelons of the aristocracy, the smaller aristocracy and an emerging entrepreneurial middle class. By entering contracts of *emphyteusis*, the former feudal lords were able to retain ultimate title to the family lands to which their nobility titles were attached, while smaller

⁷ Arndts, *Trattato delle Pandette*, vol I, parte 2, capo quarto, par 195, p 362

landowners were able to expand their farms, turning previously uncultivated or under-utilized into a productive resource. Hence, contrary to the Napoleonic legislature, the drafters of the *Leggi Civili per lo Regno delle Due Sicilie*⁸ (Civil Laws for the Kingdom of the Two Sicilies) explicitly regulated emphyteutical relations and local jurists produced a flurry of treatises that portrayed *emphyteusis* in terms that differed starkly from the skepticism and hostility we saw in Demolombe.

In the pages of the jurists of the Italian South, *emphyteusis* is, for all matters, a “type” of ownership because it grants the emphytecarius long-term use and transfer rights, effectively similar to those of an owner, as well as a privileged path to full ownership through the payment of the capitalized rent. Retaining this ancient ownership form is, the Southern jurists argue, a matter of good economics and common sense and is synonymous with access to land and agricultural improvement. The difference with the French and German treatises could not be greater. Feudalism does not project its ghostly shadow over *emphyteusis*, references to divided *dominium* have no pejorative overtone, and the arcane conceptual diatribes of the mandarins of French and German legal academia receive scant attention. Instead, patriotic aspirations and regional anxieties loom large in this regional literature on *emphyteusis*. For the Sicilian jurists, *emphyteusis* was the occasion to assert their intellectual autonomy from the small cohort of French and German writers that dominated property debates and to emphasize the unique challenges faced by the Italian South. The reader may be surprised to learn that one of the first treatises on *emphyteusis* to appear, Pasquale Liberatore (1763-1842)’s *Trattato dell’Enfiteusi*, was published as an appendix to Liberatore’s Italian translation of the Claude Etienne Delvincourt’s *Cours de Code Civil*.⁹ Delvincourt belonged to the camp of those who argued that the Code Napoleon had effectively abolished the *emphyteusis* and Liberatore’ decision to supplement his translation of Delvincourt’s *Cours* with a vocal defense of *emphyteusis* reads like a defiant vindication of national and intellectual autonomy. A similar assertion of autonomy appears in the 1864 treatise of another Southern Italian jurist, Gaetano Arcieri (1794-1867), who was actively involved in the *Carboneria* movement that fought to liberate Italy from foreign oppressors. After briefly

⁸ quote

⁹ Pasquale Liberatore, *Trattato dell’Enfiteusi*, in *Corso di diritto civile del Sig Delvincourt novellamente tradotto dall’ultima edizione francese ed accompagnato dalla nuova giurisprudenza civile del regno delle Due Sicilie*, vol X, 1824.

explaining the arguments that induced the Napoleonic legislature and many French jurists to expunge *emphyteusis* from the legal system, i.e. that *emphyteusis* effectively splits *dominium* in two, negatively affecting land values, Arcieri concludes that “in France these arguments have triumphed, however this is not a reason to abide by the example of the French”. The question of whether to retain *emphyteusis* in a modern legal system is an eminently local and practical one. As Arcieri explains:

“to solve the question of emphyteusis we need to move from the level of ideology to that of practical common sense. To decide this question [what to do with emphyteusis], we need to consider our customs and traditions, the needs of our agrarian economy and of our industrial development [...] And even the most obstinate advocates of economic principles, have to agree that emphyteusis perfectly suits the need for the division of lands and their improvement. Hence even if we consider the question from this perspective only, it would be good advice to preserve the contract of emphyteusis in our law books”.¹⁰

Along with agricultural improvement, access to land was the other theme that pervaded the pages of the Sicilian jurists. Arcieri, who had participated in the revolutionary insurrections of 1848, dwells at length on the perils of an unequal distribution of a critical productive resource such as land.

The motor of prosperity is the equal distribution of wealth. When property is concentrated in the hands of few, two negative consequences follow that gravely damage the economy of a nation. The first, is that agricultural land becomes is left vacant and desolate; the second is that it leads to misery because the worth and welfare on the individual is based on labor.¹¹

That *emphyteusis* has the potential to effectively remedy inequities in the distribution of land, to promote productivity and to restore the dignity of agricultural laborers, Arcieri notes, explains why few modern nations have entirely discarded this ancient ownership form and instead are still weighing its benefits. For Arcieri, the case for *emphyteusis* was even stronger in Sicily where land was, until very recently, concentrated in the hands of a small number of large owners and agricultural development has faltered.

¹⁰ Gaetano Arcieri, *Trattato dell'enfiteusi*, libro III, tit IX, cap II, par 32 p 17

¹¹ Arcieri, *supra*, par 33 p 17.

In the treatises of the Sicilian jurists, not only was *emphyteusis* the occasion for frank discussions of the highly unequal distribution of land, discussions that were rare in the property law literature produced by the mandarins of French and German legal thought; *emphyteusis* also provided the impetus for a pragmatic focus on actual specific economic resources that foreshadowed the call for a new resource-based property analytic that will transform property debates towards the end of the century. For example, in his treatise on *emphyteusis* published in 1852 in Catania, jurist Francesco Duscio discussed *emphyteusis* as property form with the potential to boost the improvement and productivity of resources that were critical to the economy of the region.¹² By the mid-nineteenth century, Sicily was emerging as one of the most important sulphur-producing areas of Europe as the demand of sulphuric acid in the French and British chemical industry kept growing and Duscio's hope was that *emphyteutical* leases for sulphur mines would encourage investment and in this booming industry. *Emphyteusis*, in Duscio's view, could also bring new capital to the Sicilian *tonnare*, the tuna-fishing plants that had also historically been concentrated in the hands of few large entrepreneurs. And *emphyteusis*, Duscio suggested, may also encourage investment in water mills and steam-powered mills, supporting the larger effort to spur industrialization in Sicily.

Demolombe was right: among the real rights, *emphyteusis* was the one that posed the greatest difficulties for the proponents of a coherent will-based modern property system; but it is also the one that generated the richest and most forward-looking juristic exchange, pushing the boundaries of nineteenth century property theory.

The Quandaries of Possession

The doctrine of "possession" was another point of strain in the apparently solid edifice of modern Romanist property. The treatise "*On Possession*" published by the great German jurists Friedrich Carl von Savigny (1779-1861), went through seven editions and was widely acclaimed as pathbreaking. Savigny's intention was to bring some clarity to the knotty questions

¹² Francesco Duscio, *Trattato*, vol I p 156.

surrounding the Roman concept of possession and yet Savigny's analysis, far from placating the controversy, further inflamed it. While the 1840s were the high peak of the debate on possession, with a wave of important and widely noted treatises on possession throughout Europe, the debate was still raging in the 1870s when Italian Romanist Ilario Alibrandi compared possession to a distant land still awaiting to be discovered:

The process of revealing the truth is similar to the discovery of distant lands. The first explorers capitulate and dying half way through while the last voyagers happily reach their destination.¹³

The obstacles on the road to possession were both conceptual and practical. To begin with, jurists could not agree on the very nature of possession. Is possession a right or a mere fact? The mere detention of a thing, which the Romans called "*naturalis possessio*" is a non-juridical physical relation. However, under certain conditions, possession acquires a legal character, becoming "*possessio civilis*". Hence, Savigny explains, it is self-evident that possession is *both* a right and a fact and the complex and lengthy analyses of his fellow jurists seemed to him "useless and uninformative"¹⁴.

It is clear that possession in itself, according to the original notion of it, is a simple fact; it is just as certain that legal consequences are bound up with it. Therefore, it is at the same time both a right and a fact, namely, fact according to its nature, and equivalent to a right in respect of the consequences by which it is followed, and this double relation is a very important one to keep in mind throughout.¹⁵

The legal rights which bare possession confers, Savigny further explained, are two: *usucapio*, or the right of the possessor who has possessed a thing for certain period of time to become its owner; and the right to possessory interdicts, that is the possessor's ability to obtain the remedies known as "possessory interdicts" whenever a certain disturbance occurred.¹⁶ Another great master of German legal thought, Bernard Windscheid, also viewed the questions of possession as relatively straightforward. Possession, Windscheid argued, is a

¹³ Ilario Alibrandi, *Teoria del Possesso secondo il diritto romano* 1871 p 37.

¹⁴ Savigny, *On Possession*, p 20.

¹⁵ Savigny, *On Possession*, book I , p 17, p 23

¹⁶ Savigny, *supra*, p 5.

simple *fact* that, when accompanied by the will to have the thing for oneself, has a number of *legal consequences*: others have to respect this state of fact until a court declares it unlawful; under certain circumstances, possession, if in good faith and based on a proper ground for acquiring property (*iusta causa*), leads, with the passage of time, to full ownership through *usucaptio* (prescription), thereby changing a fact into a right; finally, in other circumstances, possession leads directly to ownership, as when someone acquires possession of a thing that has no owner or when the owner delivers possession with the intention of passing ownership.¹⁷

However, what appeared plain to Savigny and Windscheid, seemed shrouded in fog to the many others who, for decades continued to apply themselves to the question of the nature of possession, reaching widely divergent conclusions. Particularly sharp were the disagreements among those who concurred that possession was a “right”, but parted ways when asked what kind of right. For some, possession was a *jus in re*, the fifth to be added to the traditional four identified by the medieval jurist Baldus (ownership, servitude, pledge-right and the right of inheritance).¹⁸ Others argued that was a possession in the law of things under a special title subordinate to the *jus in re* and *ad rem*, a view, Savigny scornfully added, “which could only have been adopted because no better solution presented itself”.¹⁹ Still others viewed possession as provisional ownership and the interdicts as provisional vindications introduced for the sake of convenience in the early stages of lawsuits in which ownership is disputed.²⁰ Finally, for some, possession was incipient ownership protected in Roman law with a special action, the *actio Publiciana*, because it has the necessary requisites to potentially lead to full ownership through *usucaptio*.²¹

These disputes over the nature of possession, fact or right, may seem the pedantic elucubrations of Roman law scholars obsessed with minute conceptual distinctions. But the debate on possession was not all abstractions. A fascinating controversy, rich of philosophical and political implications, probed the reasons why possession is accorded protection regardless of whether it is accompanied by the right of ownership. Why should modern law follow Roman law and protect

¹⁷ Windscheid, Pandette, p 509

¹⁸ Hahn, diss inaug de iure in re, 1664 4to cited in Savigny, supra p 24

¹⁹ Savigny, supra p 25

²⁰ Savigny, supra p 26

²¹ Gans, System des Romischen Civilrechts, 1827, 201-216.

a possessor who did not have a right? Rudolph von Jhering bluntly posed the question at the outset of his monograph on possession:

Why do we protect possession? Non one asks this question for property, so why raise it with regards to possession? Because the protection of possession stands out for all its contradictions. Protecting possession means protecting robbers and thieves. How can the law, which condemns robbery and theft, recognize and protect the possession of the fruits of such acts? Isn't this equivalent to condoning and approving with one hand what is rejected and prosecuted with the other hand?²²

Yet, if possession is an institution that has existed for centuries, Jhering continued, there must be a good reason. However, participants in the debate had widely different ideas about what this good reason could be. The first to offer an answer was Savigny who argued that possession is protected to preserve the public order.²³ Dispossession or disturbances by means of force or violence are, in themselves, unlawful, a personal injury that the possessor shall not have to suffer, regardless of whether they have a right worthy of protection. Savigny was concerned mostly with the private law dimension of this disturbance of the public order, that is with the harm suffered by the individual possessor. By contrast, others, shifted the focus away from the private dimension towards the larger, systemic or “public” aspect of forceful interferences with possession. Adolf Rudorff (1803-1873), for example, insisted that the reason modern property law should protect possession is that any disturbance suffered by the individual possessor is also, fundamentally, an injury to the community and to the legal system itself.²⁴

As Savigny's treatise went through successive editions, German jurists started challenging Savigny's attempt to ground the protection accorded to possession in the need to preserve the public order. Ultimately, this controversy about the rationale for protecting possession independently of ownership implicated larger questions about the very values that should inform private law. At a time in which jurists were intent on perfecting their reorganization of the private law system as a mighty architecture of the individual will, some sought to find an alternative justification for the protection of possession, one more

²² Jhering, *Sul fondamento della protezione del possesso*, p 4.

²³ Savigny, *supra* p 32.

²⁴ Rudorff *Zeitschrift für geschichtl Rechtswissenschaft* B 7 1830 p107.

directly related to the dominant will-based theory of private law. The rationale for protecting possession independently of the right of ownership, these jurists argued, lies in the deference owed to any manifestation of the individual will, even before the lawfulness of its volition is established. Proponents of this will-based theory of possession challenged one another to formulate the theory in the most persuasive terms. Eduard Gans (1798-1839), an independent-minded jurist influenced by Hegelian thought, who had long been in disagreement with Savigny, offered one variant of the argument. Gans explained that:

The detention of a thing, considered as an act of the will of the subject can be in harmony with the universal will, that is with the law, and in this case it is property, or it may be based only on the individual will, and this is possession. The reason why we recognize and protect the will even in this instance lies in that the will, is in itself, a substantial element that deserves protection. The will of the individual when applied to a thing is a right and it is to be treated as such.²⁵

Georg Puchta offered a different variant of the will-based theory of possession, equating possession to a personality right. The will of an individual who has legal capacity, Puchta argued, deserves recognition and protection even before it is demonstrated that its volition is lawful because:

Find quote: it is the will of someone who has legal capacity and, hence as matter of possibility. Possession in other words protects the possibility of rights, the legal capacity. The right of possession is nothing other than a special type of right the personality applied to the subjugation of things.²⁶

Another champion of the will-theory of possession, Georg Bruns (1816-1880) explicitly discussed the methodological concerns behind the effort to ground the protection of possession in the respect owed to the will. In his *Das Recht des Besitzes im Mittelalter und in der Gegenwart*, published in 1848, Bruns noted that theories that justify the protection of possession by citing “external” policy factors, such as the protection of the public order, miss the point. The task of a positive legal science is to identify an “internal” justification for possession:

²⁵ Gans, *supra*, p 211-212; Id, Sul fondamento del possesso 1839

²⁶ Puchta, A quale classe di diritti appartiene il possesso? Rheinischen Museum B3 289-308 1829.

It may be convenient to adduce empirical and practical reasons for the protection of possession, but there is little to gain from such efforts in a matter in which legal science resolutely demands an internal juridical necessity, deduced from the nature of possession.²⁷

Unconvinced by theories that emphasized the public order and approaches that foregrounded the will, Rudolph von Jhering, sought to move the debate beyond the impasse it had reached in a monograph titled *Über den Grund des Besitzesschutzes*, published in 1869. Jhering starts by conceding the argument that the will is the force that animates private law, but is then quick to add that the will finds its measure and limitation in the law and is given legal power only if it stays within the limits of the law. Jhering can hardly conceal his dismay at the will-based theories of possession, particularly at the idea that the right of possession is a right of the personality.

One has to keep separate the personality from its unlawful acts. The former, despite having acted unlawfully, remains what it is and does not lose any of its legal protection. But it does not follow that the personality, like a saint capable of miracles, can elevate, cure and purify, by simply touching it, everything that is malignant, ill or unclean and can cover with the ample mantle of its legal protection all the unlawful acts in which the will may manifest itself.²⁸

After a lengthy and detailed critique of his opponents' theories, Jhering proposed yet another answer to the puzzle of possession: *ownership* is the key to understand possession. Protecting possession, Jhering argued, is only a means that makes it easier to secure effective protection to ownership. In Roman law, possession was a needed supplement to ownership, introduced to spare the true owner the burden of proving title in case of disturbances. In the Roman legal system, proof of ownership was often difficult, requiring proof of an uninterrupted chain of transfers of title going back to the first owner. Hence, to grant more effective protection to the owner who suffered disturbances, Roman law made available possessory interdicts that did not require proof of title.

²⁷ Bruns, par 58.

²⁸ Jhering, supra p 27.

Indulging in a military metaphor, Jhering describes possession as an outpost positioned to guard against intrusions and surprise attacks on property:

According to this notion of possession, one may characterize possession as a “military outpost of property”, a fortification of property that exists not for its own sake but because of property. Through possession, the owner fends off the first attacks on his property rights. On the battlefield of possession, what takes place is not a full, decisive battle over title, but rather a skirmish in which, if you allow me, heavy artillery is not necessary and light artillery suffices. You do not use cannons to drive back thieves and burglars.²⁹

But if effectively protecting ownership is the key, how to explain the protection given to the possessor who is not the true owner? Jhering candidly admits that the protection given to possessors who were not the true owners was an unavoidable consequence, the price paid for protecting owners.

The protection of possession was introduced because of property. However, this protection cannot be granted to the owner without also giving it to the non-owner. In fact, if you limit the proof of ownership to the mere exterior condition that corresponds to ownership, this assistance to the owner ends up benefitting anyone who can show this factual condition of possession presupposing ownership. Hence, possession acquires an independence vis a vis property that allows it to turn against property, rather than exclusively assist it.³⁰

The lofty theoretical disquisitions that fill the pages of the German jurists obliterated the practical questions posed by possession. However, these factual questions were front and center in France. With both feet on the ground, French jurists dismissed Savigny’s sophisticated abstractions as useless and turned instead to the real life of possession in France. This shift in focus came with declarations of methodological independence and assertions about the unique history of possession in France. In the preface of his *Traite’ de droit de possession*, published in 1842, William Belime (1811-1844), professor at the university of Dijon, does not go easy on Savigny:

²⁹ Jhering supra p 43.

³⁰ Jhering supra p 43.

The most well-known jurist of contemporary Germany, M. de Savigny, recently appointed minister of justice in Prussia, did not disdain to write a treatise on possession, which is his most popular title in the universities on the other side of the Rhine. One has to acknowledge that so divorced are the principles of Roman law from ours, particularly when it comes to possession, that this work, so remarkable in many ways, for the sagacity of its exegesis and for its skilled analysis of the sources, this work in which Savigny, one could say, became Roman to interpret the Roman laws, this work that could have been written by a jurist of the second century, by Caius or Ulpian, is of little or no avail in practice. Hence, despite my admiration for the learned professor of Berlin, I will rarely have the occasion to cite his work.³¹

Belime doubles down on the practical irrelevance of the Germans' theoretical investigations in the first chapter of his treatise when he attributes the endless controversy over whether possession is a fact or a right to the *philosophisme* of the *savants* on the other side of the Rhine and to their lack of interest for real-life problems. Belime is not alone; virtually all the many works on possession published in France around the middle of the nineteenth century dwell upon the unique practical, legislative and historical dimensions of possession in France. Not only were French jurists less inclined to lofty philosophizing, the legal sources that govern the law of possession were also different, with customary law playing a major role. Intriguingly, in a France in which the anti-feudal rhetoric had proven so powerful in the revolutionary and Napoleonic decades, jurists were not shy to assert that the French modern law of possession had its origin in "our feudal customary law". To truly understand the history of the law of possession in France, Belime warns, one has to look away from Roman law and turn instead to the great experts of the *coutume*, from Beaumanoir to Boutillier, and to the royal ordinance on procedure of 1667.³² Similarly, to fully grasp the complexities of the modern law of possession one has to shove aside purely academic literature and examine instead the work of the *juges de paix*, who have competence over possessory actions. Created by a law of 1790 and reorganized by a law of 1838, the justice of the peace was an eminently practical role, in Belime's words, "a paternal court in which the subtleties of positive law count less than common sense and the rectitude of intentions".³³

³¹ Belime preface VIII

³² Belime p x

³³ Belime p xi

To be helpful to the *juges de paix*, who often did not have legal training, the very vocabulary of possession needed to be simplified. In the lengthy chapter on possession that opens his treatise on prescription, Troplong laid out the basic types of possession in France. The Roman law language of the German theorists who distinguished between “natural” and “civil” possession is obscure, Troplong notes, and French courts prefer a more mundane classification of the different types of possession rooted in French law and, hence, intelligible to practitioners:

I no longer hear [courts] speak of natural and civil possession because the obscurity of this distinction does not even begin to do justice to it. Rather, what I hear every day is precarious possession, possession grounded in a property title or *animus domini*, possession sufficient to give rise to acquisitive prescription, to designate the possession described by article 2229 of the civil code, which leads to prescription, and “*possession annale*” (year-long possession) or *saisine* to designate the possession which is the foundation of our possessory actions and that gives rise to a presumption of ownership. With this simple and unpretentious vocabulary we always understand each other. With the words *naturalis possessio* and *civilis possessio*, we would always have to explain and argue.³⁴

This “simple and unpretentious” fourfold classification recurs in virtually all the French treatises on possession. While the first three types of possession are intuitive for a Roman law-trained lawyer, the fourth, the *saisine*, is distinctively French and treatise writers took great pains to explain its uniqueness. The Romanists’ disquisitions about the possessory interdicts are of limited help, Troplong explains, because our possessory actions have a distinct genealogy; they are based in the *saisine*, which originated in the Salic law and in customary law.

Here we find a great innovation. For Roman law, it was sufficient to have possession at the time of the lawsuit to be able to use the interdicts. In France, simple possession is not sufficient. One needs to have possessed for a year and day. This point is important and rich of consequences.³⁵

³⁴ Troplong, p 136, par 238.

³⁵ Troplong, p 178 par 295.

Fairness, Troplong seems to suggest, is among these consequences: only protracted possession, not recent, momentary possession, ought to receive protection. Another authority in matters of possession, Henrion de Pansey, described simplicity as the virtue of the *saisine*. Instead of a confusing variety of interdicts with different requirements, French law makes available to the possessor who has possessed for one year and one day a straightforward, but limited, action, the *complainante*. All the plaintiff in a *complainante* needs to prove is the *saisine*, which is possession for one year, with *animo domini*; and all the plaintiff can obtain is to be maintained in his possession.³⁶

While the *saisine* had the virtue of being simple, possessory matters were never simple. The practical conflicts that arise between competing possessors take up a large portion of the French literature on possession. In real life, treatise writers agree, it is entirely possible to see three individuals each claiming one of these types of possession. As Toullier explains,

Mere detention (*possession*) possession grounded in ownership title (*droit de possession*), *saisine* (*droit de posseder*) are three entirely distinct things and may belong to three different individuals. For example, if a negligent owner allows another to dispossess him, he still retains the right of ownership to which the right to possess is attached. At the same time, the usurper, after a year of possession, has the right to maintain possession of the land for the time being, to prevent anyone from disturbing him and to engage, like the owner, in the acts permitted by the right of ownership. Finally, a second usurper who has dispossessed the first with violence or otherwise, has the mere detention.³⁷

Conflicts between different possessors arose in a variety of circumstances and treatise writers agreed that possession was largely a practical, empirical question in which the *juge de paix* is called to weigh facts and intentions with little guidance from the black letter law of possession or the academic literature. To illustrate how meaning of possession, the scope of the acts that show possession and the question of intent and *animus domini* are ultimately empirical questions, Troplong recounts an 1830 case that had attracted significant attention. Nicolas Foray, the owner of a mill and a canal had effectively abandoned the property, failing to operate the mill for sixty years. Taking advantage of the state of

³⁶ Henrion de Pansey, *Ouvres Judiciaires*, p 138.

³⁷ Toullier, *Le Droit Civil Francais* 1845, p 20 par 79.

disrepair of the dams that formerly carried the water into the canal, occupants has cultivated the banks of the canal and part of the canal itself, which had become a little stream for the irrigations of the crops. When Foray sued, the occupants claimed ownership through acquisitive prescription. The occupants' possession was indisputable and one would have imagined they would have prevailed. But the court of Lyon held, and the *Cour de Cassation* confirmed, that, because over the sixty-year period the canal had never become completely dry, the heirs of Foray had maintained possession.³⁸ While the court did not provide an explanation for this bizarre outcome, Troplong notes, the ultimate question is how to solve the conflict between passive possession and active, productive possession:

It is likely that what remained of the canal appeared to the court a continuation of intentional possession sufficient to make the right of the owner prevail. But the court did not consider that the occupants of the banks, through their cultivation and labor, had also possessed what remained of the canal, and hence it was no longer possible to privilege an intentional but inactive possession over the possession of third parties who used the land, applied their labor to it, and harvested its fruits in broad daylight, finally claiming ownership.³⁹

The case of Nicolas Foray was by no means exceptional: conflicts between active possessors and passive owners were a significant part of the daily work of courts and the justices of the peace. The nature and scope of the activity possessors and owners engaged in, as well their relative economic power varied significantly; “active” possessors were often occupants who used the lands for grazing, timbering and harvesting and title owners could be idle landowners or large productive enterprises. The law in the books and the scholarly treatises were largely irrelevant to these daily conflicts and the outcomes of the cases were hardly predictable.

As this brief journey through the academic treatises on possession shows, in the 1840s, possession seemed a maddeningly complicated matter. Despite their different methodological approaches, neither the German theoreticians nor

³⁸ Troplong p 138, par 245.

³⁹ Troplong p 138, par 245.

the French pragmatists could fully clarify the many conceptual and practical questions raised by possession.

Is Man the King of All Things? The Limits and Duties of Ownership.

The right of *emphyteusis* and the concept of possession presented the architects of Romanist-bourgeois property with thorny conceptual problems that our jurists, despite their sophisticated analytical skills, could never fully straighten out. Perhaps less intellectually stimulating, and yet equally consequential, was another challenge facing our property writers. In the second half of the nineteenth century, to support social, economic and technological change and address the negative externalities it created, legislatures started tightening the limits and duties for owner of specific types of property such as mines, water course, wetlands, or urban rental real estate. The tension between the jurists' ubiquitous grandiloquent statements about modern *dominium* being absolute and exclusive and these statutes and regulations, which kept growing in number and significance, could hardly be concealed. The problem was not one of conceptual organization, as in the case of possession. Roman law came in handy in this case. Because these legislative and regulatory limits were, largely, resource-specific, they could be easily fit in the section about the "law of things", the Roman jurists' classification of the different things that can be the object of property based on their characteristics and the interests they implicated. The problem was that the treatises' introductory section on ownership and the section on the law of things described property in starkly different terms and this gap between absolute *dominium* and the many, fine-grained limitations to owners' entitlements would only grow in the decades to follow.

The jurists relied on a number of strategies to minimize this tension but they could not fully dispel it. One strategy was to minimize the import of the limits on ownership. This is the path followed by Jean Baptiste Victor Proudhon, in his *Traite du domaine de propriete*. The high-sounding prelude sets the tone for the rest of the discussion: things exist to serve the needs of man and man is the king of nature.

By *biens* we generally mean all the things that contribute to the welfare of man: *naturaliter bona ex eo dicuntur, quod beant, hoc est*

beatos faciunt; beare est prodesse. From this it follows that, properly speaking, the denomination *biens* may not be used to describe things that are more harmful than useful; *proprie bona dicit non possunt quae plus incommodi quam commode habent.* Man is the king of nature, all other beings are meant to serve his needs, as declared by the Creator.⁴⁰

Having declared man the king of nature, Proudhon then proceeds to illustrate the fundamental distinctions of the Roman law of things, the main types of *biens*: things that belong to the public domain, movables and immovables, corporeal and incorporeal things, fungible and non-fungible things, things that are used by the public, things that are owned by the state, things that are owned by townships, corporations and public institutions and things that can be owned by private individuals. Not only does Proudhon list all the canonical distinctions, he also goes as far as paying lip service to methodology of the Roman jurists, their intriguing combination of formalism and pragmatism. These distinctions between different types of *biens*, Proudhon acknowledges, are not a purely abstract legal taxonomy, rather they account for the actual physical characteristics of things as well as their social and economic significance.⁴¹ Echoing the Roman jurists, Proudhon explains that:

The laws vary according to the diversity of the objects they govern, since the principle is that the rules that govern things depend either on the nature of each thing, or on the special role that things play in the market or finally on the different relation things have with the persons who own them: hence, the need to account for the peculiar nature of each type of thing.⁴²

But the reader who expects Proudhon to then delve into a detailed description of the many ways in which the growing body of legislation shaped and limited the owner's entitlements to reflect these differences, will be disappointed. All that follows is a succinct acknowledgement, phrased after the famous article 544 of the *Code*, that ownership is, by necessity, limited:

No matter how perfect private property, the power it puts in the hands of the owner is always subject to the omnipotence of the law

⁴⁰ Proudhon, vol I, p I p 69.

⁴¹ Proudhon vol I p 70 par 4.

⁴² Proudhon vol I p 100.

so that the owner can dispose of his thing so long as he does not use it in a manner prohibited by the statutes and regulation.⁴³

Proudhon's list of specific limits is relatively skimpy and the duties imposed on owners are largely meant to secure public safety, the basic needs related to the transport infrastructure or the peaceful coexistence of neighboring owners. For instance, owners of buildings that pose safety risks have a duty to demolish them; owners of wooded land may not clear their land without the authorization of the competent authority; owners of forests situated in proximity of the Rhine river may be requested to sell to the government fascines to strengthen the embankments in case of flood; and owners of wetlands may be forced to drain and fill their marshes.⁴⁴ Downplaying the legislative limits to property is also the strategy followed in most of the many German treatises on the "Law of Pandects" published in the central decades of the nineteenth century. In the pages of the Pandectist writers, the Roman "law of things" became an abstract conceptual taxonomy, accurately reproduced but emptied of all its pragmatic, real-life flavor and the list of specific limits is largely antiquarian. Arndts' treatise, for example, explained the limits to ownership in general terms, distinguishing between restrictions of the owner's right to use and limits to the owner's right to transfer. Arndts explains that the former, are imposed either for reasons of public safety or in the interest of neighboring owners and confines the list of specific limits to a lengthy footnote.⁴⁵ The nine limits listed largely reproduce Roman law restrictions and are relatively trivial, ranging from the duty to grant rights of ways in specific instances, to the cutting of branches, to the encroachment of structures, to the respective rights and duties with regards to nuisances such as smoke.⁴⁶

Another strategy to manage the tension between the ideal of "absolute" property and the reality of a growing number of legislative limitations to owners' entitlements was to draw a neat distinction between the *private* and the *public* realms and confine the most significant regulatory regimes governing specific resources in the latter. In his *Cours de Code Civil*, Demolombe elaborates at length on the private-public distinction. These two realms rest on antithetical normative foundations: while considerations of public utility and the common

⁴³ Proudhon vol I p 74.

⁴⁴ Proudhon vol I p 74 par 1-20.

⁴⁵ Arndts, Pandette, vol I p 228.

⁴⁶ Arndts, Pandette, vol I p 228 footnote 1.

good govern public and administrative law, the purpose of private law is to allow ample freedom to owners, with minimal restrictions.

Thereby, the idea that informs article 537 is clear. It seeks to determine the scope and the confines of civil legislation and divide the matter into public and private law. It is for private, or civil, law to govern the things that belong to private individuals, (*que singulorum sunt*, Inst, lib II, titre I, princ).[...]hence, the goal of art 537 is less to establish what are the rights of private individuals over the things that belong to them than to establish, by a sort of antithesis, the principle that the things that do not belong to individuals and are managed and transferred according to their own rules, are the object of special legislation outside the code. [...] We will follow the legislator and we will avoid any incursion in the realm of administrative and public law.⁴⁷

However, it is not long before Demolombe drops any pretension that his choice to stay away from public law is simply dictated by a supposedly neat subject matter division and candidly shares his fears about the dangers of blurring the public-private distinction.

The terrain of private law is, thank God, more firm and stable than that of public law and administrative law. Obviously political revolutions can cause significant changes in certain areas [of private law], as for example in the area of fideicommissary substitution. However [private law] is far more secure from the catastrophes that, alas, we have too often seen swallow the principles of public and administrative law almost whole.⁴⁸

Demolombe's message is clear: it is in the more solid terrain of private law that property needs to be firmly planted, insulated as much as possible from the convulsions that periodically shake public law.

Not all jurists eluded the fundamental tension between absolute *dominium* and the expanding limitations on ownership entitlements. In the fifth edition of his treatise on French civil law, which as the subtitle recites, sought to "reconnect theory and practice", Toullier made this tension plain in the opening paragraphs of the chapter titled "*Des modifications de la propriete*". Toullier's

⁴⁷ Demolombe p 331.

⁴⁸ Demolombe p 332.

starting point is not surprising and echoes the familiar language we have seen in other treatises. When property is full and perfect, Toullier explains, the owner's right to dispose of the thing is entirely free and may not be prohibited or restrained; however, the law can put remarkable limits on this freedom, limits that effectively modify property itself.⁴⁹ The surprise comes when Toullier, instead of reproducing a short antiquarian list of Roman law limitations to ownership, delves in a detailed discussion of the laws that were starting to transform if not the concept of property, at least the life of property on the ground. The list is interminable and includes, for example, the *loi* of September 16th 1807 that imposed a duty to drain marshes and wetlands in conformity with government plans on owners of such lands; the *loi* of April 21st 1810, which established a comprehensive legal regime for mineral resources, imposing limits on the rights of surface owners and regulating the requirements and procedures for mineral permits and leases; finally, a lengthy series of *lois*, *ordonnances* and *decrets* that reshaped the rights of owners of wooded land, limiting their ability to cut down trees and clear their lands to secure availability of wood to the French Navy.

While, as Toullier admits, these statutes and regulations effectively modified owner's rights in significant ways, the real question that loomed large in discussions of "absolute" *dominium* was the nature and scope of the state's power to take property for a public purpose. In France, between 1804 and 1841, *expropriation pour cause d'utilite publique* was an important item on the legislature's agenda and the object of intense controversy among legal scholars. The taking of private property subject to the payment of compensation was obviously not new, as a long series of royal *edits*, *arrets* of the *Conseil d'Etat* and *lettres patentes* had authorized the expropriation of private lands for the construction of the nation's transportation infrastructure, from the royal canal in Languedoc in 1666, to the canal d'Orleans in 1679, to the system of *grandes routes* starting in the early eighteenth century. However, as the nineteenth century ushered in economic change and spectacular urban planning efforts, in Paris and elsewhere, the legal questions surrounding expropriation acquired an altogether different magnitude. Jurists debated the meaning of public purpose, the role played respectively by administrative action and the judiciary, and the procedural guarantees for owners. Expropriation was wutlined in article 545 of the *Code Napoleon*, which stated that "no one can be compelled to give up his

⁴⁹ Toullier p 54.

property except for the public good and with payment of a fair and previous compensation”, and further regulated by three successive laws in the short span of three decades. Each of these three laws, the *loi* of March 8th 1810, the *loi* of July 7th 1833 and the *loi* of May 3rd 1841, redesigned the process of expropriation but failed to appease the scholarly controversies about the procedural and substantive conditions for expropriation. More fundamentally, these laws only magnified the core tension between the almost sacrosanct respect owed to “absolute” private property and the modern state’s unquestionable right to take property for a public purpose.

The liberal jurists’ strategy to minimize this tension was to emphasize the exceptional nature of expropriation. Expropriation was exceptional in many ways. To begin with, it was an un-Roman idea, a tool unknown to Roman law made necessary by the economic and technological transformations of modern society and made acceptable by the political sensibility of modern liberalism. As successive legislatures were intent at honing the procedures for expropriation, the Romanists engaged in a fierce debate on whether Roman law knew a doctrine of expropriation. The puzzle was a fascinating one. On the one hand, the idea of government takings seemed at odds with the Roman political and legal culture, which the nineteenth century Romanists presented as fundamentally committed to the idea of private property. On the other hand, it appeared unlikely that the Roman state could have realized its impressive program of public works, from the advanced aqueducts, to the sewage system, to the road infrastructure, without a doctrine of expropriation for a public purpose. While some Romanists retrieved traces of a doctrine of expropriation ultimately not dissimilar from the modern one, most questioned the existence of expropriation in Roman law. As Rene Bauny de Recy (1844-1894), *chef de bureau a la Direction Generale de l’Enregistrement et des Domaines* and author of well-received treatise on expropriation explained:

Based on the vague data we have we can only formulate conjectures with regards to the question of expropriation for the public good in Rome, but based on what we can see, it seems difficult to argue that this exceptional doctrine existed.⁵⁰

⁵⁰ Bauny de Recy, *Theorie de l’expropriation*, 1872, p 8.

To explain how Roman society could possibly function and how the Roman state could have erected its massive infrastructure in the absence of a doctrine of expropriation, Bauny de Recy conjured up cultural and institutional arguments, drawing attention to a number of peculiarities of Roman society. Religion, patriotism and a large public domain, Bauny de Recy argued, made expropriation unnecessary in Rome. The first and foremost safeguard for property, came not from law but from religion. Individuals' property was often placed under the protection of tutelary deities and religious devotion not only secured respect for private property but it also occasionally allowed the pontifices, the highest Roman priesthood, to easily obtain owner's consent to the transfer of property to the state in the interest of the public.⁵¹ Further, the strong patriotic sense of the early Roman citizenry and, later, the hunger for power and status that led wealthy private citizens to finance public works and art from their own pockets also explain why expropriation was not necessary.⁵² Finally, large swaths of land were actually public land (*ager publicus*) assigned to private possessors with no guarantee of security of tenure and could taken back at any point if the public interest demanded it.⁵³

Besides highlighting its absence in Roman law, the jurists also presented expropriation as exceptional in another sense. Expropriation, treatise writers invariably argued, is a painful but necessary "sacrifice" that modern society requires of owners in extraordinary circumstances. In his *Traite de l'expropriation pour cause d'utilite publique*, Charles Delalleau (1791-1850), who served as *avocat* in the royal court of Paris, described expropriation as a sacrifice justified by an intractable normative trade-off between two equally vital principles and one that needs to be imposed with an eye to distributive equity. The sensation caused by the marvelous public works that have transformed the appearance of French cities in recent decades, Delalleau writes, should not make us forget the gravity of the government's action and the fact that, every time the government takes private property, two equally important principles come into conflict:

One is the respect for property, a right that governments neither create nor concede but that is inherent in human nature and in the exercise of the individual's freedom, a right that is the

⁵¹ Bauny de Recy, *supra*, p 11.

⁵² Bauny de Recy, *supra*, p 15.

⁵³ Bauny de Recy, *supra*, p 16-18.

foundation on which all social institutions are built. The other is the right of the nation to prosper and to provide for its internal and external security, its welfare and advancement through any means that intelligence, industry and the progress of the arts and sciences make available. [...] Because the transfer of property is a sacrifice for the benefit of the state and imposed in the name of the state, the burdens of state action need to be distributed equally and proportionally. All equality and proportion is destroyed if a single individual can be forced to make a sacrifice to which others do not contribute.⁵⁴

The idea that government takings are exceptional also pervades Proudhon's discussion of expropriation in his property treatise. Proudhon's choice to address *expropriation pour cause d'utilité publique* in one of the most important chapters of his treatise, titled "*The Substance of Property*", is a telling sign that, in juristic circles, expropriation was seen as the critical point of strain in the theory of modern "absolute" property.⁵⁵ Expropriation, Proudhon explains, is necessary and extraordinary sacrifice that requires exceptional substantive and procedural guarantees: the nature and significance of the public purpose needs to be assessed thoroughly; the burden of expropriation is to be distributed with an eye to equity; finally, the procedure for expropriation is unique, part administrative and part judicial.

In the case of expropriation for the public good, one has to start with investigating whether the public purpose is sufficient to induce the government to commit to the expenditures necessary for the realization of the project as well as to justify taking property from an individual who has no specific and explicit obligation in this regard, and can be asked to make this sacrifice only for the general maxim that the public good should prevail over private interests, maxim in the application of which it is easy to make a thousand mistakes. [...] From what we said it is clear that expropriation is a peculiar procedure, entirely different and not governed by the principles that govern ordinary litigation.⁵⁶

At the level of legal doctrine, this emphasis on the exceptional nature of expropriation translated in a very narrow formal definition of expropriation.

⁵⁴ Delalleau, *supra*, vol I p 3.

⁵⁵ Proudhon, *supra*, vol II p 13.

⁵⁶ Proudhon, *supra*, vol II p 14-15.

Dallelau explained that the legislature's recent attempts to redesign the procedures for expropriation suggest that *expropriation pour cause d'utilite publique*, properly defined, has four characteristic features. To begin expropriation refers only to cases in which there is an actual *transfer* of title from a private individual to the state; second, the special legislation on expropriation only applies to *immovable* property; further, expropriation needs to be justified by a *public purpose* narrowly conceived and property may never be taken to benefit another private individual; finally, expropriation requires the *prompt* payment of *full compensation*.⁵⁷

However, on the ground, things looked quite different. This narrow doctrine of expropriation failed to account for the many other instances in which the state demanded "sacrifices" from private owners. As the treatise writers themselves acknowledged, a growing number of laws and regulations limited and curtailed owners' entitlements so severely as to effectively amount to instances of expropriation in disguise. While these "regulatory takings" often required compensation, they were not subject to the procedural and substantive requirements for expropriation properly defined. In his treatise, Dellaleau compiled a long list of regulatory limits that may have been regarded as having an impact on owners similar to that of expropriation.⁵⁸ The list included, most notably, the physical invasion of privately owned land for an indefinite period of time; the temporary occupation or impairment of the use and value of property; the imposition on private owners of an easement or servitude for the benefit of the public or the expansion of an existing easement or servitude; the taking of a servitude enjoyed by a private owner on public property; the taking of a lessee's interest in a lease as well as instances in which an owner was to lease their property to government. While this list may not come as a surprise for today's reader, it was definitely at odds with the idea of absolute *dominium* and with the asserted Napoleonic emphasis on giving full and meaningful protection to private property.

Common Ownership: A Hieroglyphic that Cannot be Deciphered

In his devastating critique of Bernard Windscheid's influential theory of common ownership, Italian Romanist Sergio Perozzi dubbed Windscheid's

⁵⁷ Delalleau, *supra*, vol I p 78-103.

⁵⁸ Delalleau, *supra*, vol I p 81 ff.

attempt to make sense of common ownership a “hieroglyphic that cannot be deciphered”.⁵⁹ Few topics triggered emotions and reciprocal verbal attacks as intense as these generated by common ownership. In the scholarly debate over common ownership, Perozzi lamented, a debate “ideas usually considered axiomatically absurd are taken as valid and writers habitually clear and precise seem content with the strangest, most imprecise and empty ideas one could imagine”.⁶⁰ The crux of the matter was how to reconcile two apparently contradictory ideas of Roman law. The first was the principle, attributed to the Roman jurist Celsius the Young, that two owners cannot own the same thing at the same time (*duo non possunt habere dominium eiusdem rei in solidum*).⁶¹ The second was the concept of *communio* or *condominium*, a form of common ownership, established by contract or by law, in which two or more persons owned an undivided fractional interest in the same thing. How to conceptualize the relationship between the various co-owners in a *communio* without coming into conflict with Celsius’ maxim? More generally, if property is the individual’s exclusive and absolute control of a material thing, how could multiple owners have a right of the same nature and scope over the same thing at the same time? And the difficulties did not end here. For jurists who aspired to build a coherent property system the fact that the rules about *communio* were scattered throughout the Roman law sources and that *communio* seemed to have no obvious logical place in the system was a source of angst. Should *communio* be discussed along with ownership? Or does it pertain to the “law of things”, more precisely to the question of whether things are divisible? Finally, could *communio* be an altogether different concept that deserves its own separate place in the system? As a German jurist (and Dante reader) noted, if anyone managed to get out of this labyrinth of questions and opinions, they could happily declare to have found their way out of Dante’s “*selva oscura*”.⁶²

German and Italian jurists were the fiercest contenders in the debate over common ownership and intra-European intellectual rivalry played a non-trivial role in the dispute. Theories of common ownership were one of the few instances in which the Italians, who were newcomers in the high echelons of European legal thought, explicitly questioned the excesses of German legal formalism. In the very first page of his essay, Perozzi explains that he felt the urge to bring

⁵⁹ Perozzi, *Saggio critico sulla comproprietà* Il Filangieri, 1890, p 81.

⁶⁰ Perozzi, *supra*, p 364.

⁶¹ D 13.6.5.15

⁶² Steinlechner *Das Wesen der iuris communio* I p 148.

clarity and real-world sensibility to a topic that “had too easily offered the German jurists the occasion to display their taste for abstraction which is their main weakness”.⁶³ With lively prose and sharp wit, Perozzi walks the reader through the twists and turns of this seemingly unending juristic controversy and finds none of the many theories of *communio* offered by his fellow jurists fully convincing. All these theories, Perozzi argued, are based on the same mistaken assumption that there is only one idea of property (individual property), and that there must be a way to square the puzzle and to demonstrate that multiple co-owners can have a right on the same thing that is identical to the right of a sole owner. Take, for example, the oldest theory of common ownership, embraced by the German Pandectist Georg Puchta among many others, who sought to solve the dilemma by arguing that each co-owner had an identical right over an *ideal portion* of the thing. Puchta explained in very plain terms that:

Given the nature of ownership, there cannot be multiple owners of the same thing. If a thing does in fact have multiple owners (aside from the case in which each owns a distinct material corporeal, material portion of the thing, *pro diviso*) this is fathomable only so long as each owns only an ideal portion of thing, but because this portion exists only in the mind (*iuris intellectu*) it is impossible to mark its boundaries externally, on the thing. This state of affairs is called condominium. None of the co-owners can control the thing in its entirety or even a physical portion of it, but each can withdraw and for partition, thereby transforming their right of ownership *pro indiviso* in ownership *pro diviso*.⁶⁴

Champions of this theory believed they had solved the puzzle by dividing up the thing in ideal portions which are then “incorporated” in the common thing so that the latter consists of the sum of these ideal parts and belongs jointly to the co-owners. For Perozzi, the fault of this theory is obvious: property is a right over a physical thing but, according to this theory, each co-owner has a right over a creation of the mind, a pure abstraction and “the physical thing” is left with no owner. To say that these imaginary portions are “incorporated” in the physical thing is not an answer; how these imagined parts can be “incorporated” in the thing without losing their nature of mere ideas is a mystery.⁶⁵

⁶³ Perozzi, *supra*, p 1.

⁶⁴ Puchta, *Corso delle Istituzioni*, *supra*, vol II p 111.

⁶⁵ Perozzi, *supra*, p 66.

Equally faulty was the theory according to which it is the right of ownership itself that is divided, not the thing. Far from being clarificatory, Perozzi noted, this theory only seemed to muddle things up. To begin with, its advocates agreed that the thing is and remains one and it is the right that is divided, but had widely different ideas on how exactly the right of ownership would be divided. For some, the right is one but mentally divided in *ideal* parts which together form the whole, full right.⁶⁶ Others suggested that these portions of the right of ownership are *real* rather than ideal: the unitary right of ownership is actually and effectively divided up in multiple rights of identical nature.⁶⁷ Still others would divide the *effects* of the right, not the right itself.⁶⁸ A right is divisible, these writers reasoned, when its effects can be divided in fractional shares without altering the essence of the right. While not all the effects of property can be arithmetically divided, what matters for the question of common ownership is that the two effects that allow the owner to appropriate the value of the right, i.e. receiving the revenue produced by the thing and cashing the price resulting from the sale, be divisible. While clever, none of these solutions seemed convincing to Perozzi. The idea of a unitary right divided into ideal parts as simply absurd because it leads to the inevitable conclusion that each co-owner has a right over the thing that *is* and *is not* property at the same time. If the thing is one, then, given the Roman maxim that two owners cannot own the same thing at the same time, it follows that each co-owner's right *is not* property but must rather be another type of real right, short of property. At the same time, each co-owner's right *is* property because it is an ideal part of the common property right.⁶⁹ Similarly implausible, Perozzi suggested, is the theory whereby the property right is actually divided in "real" parts, in multiple identical property rights over the undivided thing. To avoid openly contradicting the maxim that two owners cannot own the same thing at the same time, its advocates are left with no choice but to argue that, while the thing is one and undivided, because the right is divided it *appears* that the thing itself is divided. It is readily apparent, Perozzi notes with a hint of mockery, that the notion that the co-owners' distinct property rights have as an object not the actual physical thing but "fractions of the thing that seem to exist but in fact do not exist" is ridiculous and raises the

⁶⁶ Bocking Inst, vol II p 9.

⁶⁷ Wachter, arch f civil Pr vol 27 p 155; Handbuch des wurt Priv R II, par 43, 75.

⁶⁸ Scheurl, Tailbarkeit als Eigenschaft von Rechten p 3 ff.

⁶⁹ Perozzi, *supr*, 69-70.

exact same difficulties encountered by the theory about the division of the thing in “ideal” parts.⁷⁰

While Perozzi was not kind to the supporters of these theories, he reserved the most vehement scorn to Windscheid’s theory of *communio*, which was rapidly becoming the leading theory in Europe and was widely applauded as innovative. Rather than dividing up the thing or the right, Windscheid conceptualized common ownership as one unitary property right belonging to a collectivity of owners. Windscheid’s starting point was the will-based definition of property dominant in Pandectist circles: that a thing belongs to someone as a matter of law means that the will of the owner fully and exclusively controls the thing. However, Windscheid noted, that the full exercise of owner’s will is property’s core idea does not preclude the possibility of common ownership. As he explained:

From the concept of property it follows that there cannot be multiple property rights over the same thing. On the other hand, it is possible that the one, unitary, property right over the thing belongs to multiple subjects. We call this *communio*. In this case, the relationship between the multiple owners is such that none of them can take any action with regards to the thing without the will of the others. The size of each owner’s share does not matter and the majority does not decide. But this principle is not applied with abstract rigor and each co-owner has to allow the others to use the thing so long as this use does not damage the thing or diminish its use. If one’s use precludes the others from using the thing, then the co-owners will parcel the use according to their respective shares. Similarly, the revenue or any other utility produced by the thing is to be divided among co-owners according to their shares and the same is true for the expenses. Each co-owner can represent the group vis a vis third parties but they will only receive what is due to them based on their share. In a similar way, the obligations contracted with regards to the thing bind each co-owner only to the extent of their respective shares.⁷¹

In this paragraph, Windscheid admits what seemed anathema to many others, that property may pertain to a group of owners collectively, “so that it can only be set in motion by the collective will of the owners”. While the will is exercised collectively by the group, each co-owner receives a portion of the value of the

⁷⁰ Perozzi, *supra*, p 73.

⁷¹ Windscheid, *supra*, p 603-605.

thing (the use, the revenue, and the price obtained if the thing is sold) proportional to their share. In other words, what is divided in parts is neither the thing nor the right, but rather the *value* generated by the thing. Having outlined his theory, Windscheid shares with the reader a confession likely to leave many fellow-Romanists bewildered.

In German law, Roman *communio* is often contrasted with so-called collective ownership (*Gesamteigentum*); while there is disagreement as to the details of this form, it generally describes a situation in which multiple owners collectively own the thing without an ideal, mental partition in arithmetic fractions. Many have expressed concerns about introducing a concept of common ownership different than the Roman one. The essential point in this controversy is to acknowledge that a plurality of property rights over the same thing is a possibility ruled out by the very nature of property and that the same logic precludes the possibility of conceiving of property as the sum of the single entitlements of the various co-owners. Beyond this, one has to confess that common property may be modified in ways not contemplated by Roman law and, in particular, that nothing precludes the possibility that the portion of value due to each may be determined otherwise than by fractional shares. [...] ⁷²

What Windscheid openly admits in this paragraph is that Roman *communio* may not be the only form of common ownership. The Germanic *Gesamteigentum* Windscheid alludes to was a conceptual framework for collective ownership supposedly rooted in an ancient German communitarian agrarian tradition and focused on the group rather than on the individual co-owners. Whether the *Gesamteigentum* was actually a property form unique to the living law of Germany and the pre-unification German states was hotly contested and, yet, allusions to a radically “other” Germanic property tradition were ubiquitous in the Romanists’ writings on common ownership. Germanic collective ownership may have been less an actual living institution than an ideological provocation on the part of the scholars known as the “Germanists”, who rejected the Roman law scholars’ idea of a modern German law based on Roman law and called instead for an authentically Germanic private law inspired by social and communitarian values. Most famously outlined by the great Germanist Georg Beseler, *Gesamteigentum* was heralded as the antithesis of the Roman

⁷² Windscheid, *supra*, p 606-607.

communio, a diametrically opposed, non-individualistic way of thinking about ownership, of conceiving the relation between the individual, the group and the thing.⁷³ Windscheid's overture to this fundamentally other property tradition is surprising for a member of the Pandectist School, and a tribute to his methodological openness. Interestingly, Windscheid did not persuade Perozzi, who was himself known among the Italian Romanists for his intellectual and methodological autonomy. Windscheid's idea of a unitary property right held collectively by multiple subjects, Perozzi argued, is an undecipherable hieroglyphic, an impossible attempt to reconcile two opposite assumptions: the idea that each member is an actual full owner and the notion that there can be only one property right over a thing.⁷⁴

The reader who, after this series of firm and colorful rebuttals, cannot wait to hear Perozzi's own theory of common ownership will be disappointed. A sensible legal analyst with a distaste for extravagant conceptual schemas, Perozzi was less interested in proposing yet another theory of common ownership than in convincing the reader that, so long as we hold on to the traditional definition of property as one individual's right to exclusively control a physical thing, the puzzle of common ownership is simply impossible to solve. In other words, to allow for a form of property with multiple owners, we need a new definition of property. Perozzi concludes his essay with an admonition:

To develop a theory of common ownership one needs to start with a revision of the concept of property. For too long legal science has been caught in a vicious circle; if we do not break this vicious circle, we will continue to do and undo, to play with ideas of property, things, subjects, parts, division, value and effects without ever finding an intelligible solution. This at least is my conviction, and I hope that, one day, it will become everyone's conviction.⁷⁵

Perozzi's invitation to set aside their property monism, that is their belief that there exists only one concept of property, to discard their formalistic and hyper-individualistic assumptions about Roman property and to turn with fresh eyes to the pluralism of Roman property forms was largely ignored and the question

⁷³ Beseler, *Volksrecht und Juristenrecht*, 1843, p 193-194; Id., *System des gemeinen deutschen Privatrechts*, 1885 par 82; Gierke, *Deutsches Privatrechts* vol II.

⁷⁴ Perozzi, *supra* p 81.

⁷⁵ Perozzi, *supra* p 368.

of how to conceptualize *communio* remained a highly contested one well for many more decades.

Conclusion

This brief glance at the intricate, abstract and seemingly endless controversies over the place of *emphyteusis* in the modern property system, the reasons for protecting possession regardless of ownership, the ever-expanding limits on ownership entitlements and the nature of common ownership reveals the ineludible difficulties and the complexity of modern Romanist property, unspoken and carefully disguised in the magniloquent programmatic statements of the jurists. Each of these questions presented a true conceptual puzzle, showing the fuzziness of apparently neat conceptual boundaries such as that between *dominium* and *emphyteusis* and the elusiveness of any one-way to logically organize the concepts that made up the property “system”, as in the case of possession or common ownership.

Most importantly, each of these forms presented jurists and courts with a tension between the individualistic idea of a modern property system designed to maximize the will of *the* owner and the need to attend to the relations among multiple stakeholders with regards to scarce and valuable resources with an eye to larger goals such as promoting greater distributive equity, enhanced productivity, or civic virtue. *Emphyteusis* effectively “emptied” the title-owner’s right but had the potential to expand access to the material and moral benefits of “ownership” and to stimulate agrarian development. Protecting possession regardless of ownership made it easier for owners to fend off disturbances by granting them temporary protection without the difficulties of proving an uninterrupted chain of title; and yet it also encouraged a variety of occupants and improvers, from cattle owners seeking grazing land to timber harvesters, to use land they did not own. Common ownership limited individual co-owners’ ability to freely control and fully benefit of the resource for the duration of the arrangement, until partition, but it also enabled the cooperative management of resources within egalitarian and communitarian family or group institutions.

The scholarly debates explored in this chapter also attest the resilience and “stickiness” of the Roman conceptual vocabulary of property. No matter how selectively the nineteenth century jurists mined the texts of the Roman jurists in their attempt to shape a modern, Romanist and individualistic property system,

the property forms they chose to overlook because at odds with the guiding normative principle of maximizing the owner's will, such as *emphyteusis* or common ownership, had become entrenched in real life-property law and kept surfacing in scholarly debates. Despite the liberal jurists' attempt to cast them as remnants of the feudal past or as marginal doctrines operating at the edges of the property system, *emphyteusis*, the right of *superficies*, common ownership were never fully displaced and remained available as conceptual constructs as well as actual forms of organizing social relations with regards to resources.

Finally, the juristic controversies over *emphyteusis*, expropriation, common ownership and possession reveal the intellectual diversity and the ideological differences within what is often portrayed in the generalist law literature as the monolithic camp of the supporters of absolute property. When faced with the difficulties posed by these conceptually fuzzy and normatively dissonant property forms, Troplong, Perozzi, Windscheid, all of whom had their feet firmly planted in the ground of modern Romanist legal science, showed an unexpected intellectual and ideological openness that may be read as a sign of growing doubt and seem to presage the seismic methodological changes that were about to shake legal science.