

Texas Law Review

See Also

Volume 95

Response

The Story of Land

Christina Mulligan*

When we talk about property, why is land the default case? The law recognizes a variety of exclusive rights in land, chattels, natural resources, and intellectual and virtual goods. Increasingly, digital and otherwise intangible objects are developing economic value and import that rival physical goods. But despite this economic and legal reality, many property textbooks and academic articles continue to treat the notion of “property” as virtually synonymous with land and chattels.

Julie Cohen’s recent article *Property as Institutions for Resources* takes to task the “despotic dominion” that the land-centric model of property holds over property thinking and scholarship.¹ She draws attention to the reality that there is not one type of resource, but many, and recognizes that because the characteristics of resources differ in important ways, varied legal institutions will be desirable to regulate and organize them.² While there are “family resemblances” among resources—qualities they have in common—Cohen argues there is no canonical case of property.³ Land is no more paradigmatic than patents, and real property law ought to be no more central to our thinking than other resource-regulating law. As Cohen articulates in

* Associate Professor of Law, Brooklyn Law School.

1. Julie E. Cohen, *Property as Institutions for Resources: Lessons from and for IP*, 94 TEXAS L. REV. 1, 1 (2015).

2. *Id.* at 4 (“One also must admit to coequal status as first-order forms of property law the various legal institutions that have evolved to manage those resources.”).

3. *Id.* at 20 (“[M]y aim . . . is not theoretical purity, but rather usefulness. Simply put, a theory of property as family resemblances provides a more useful foundation for understanding the types of rules and institutions through which existing systems of property perform their resource-coordination functions.”); *id.* at 32 (“Property rights are bundles of attributes constructed and assembled for particular purposes, and as such they exhibit systematic patterns. It seems most sensible to understand ‘property’ as an umbrella term covering a set of institutional choices that are related by an emphasis on exclusivity and exchange.”).

her conclusion:

Land is sufficiently different from intellectual goods that legal rules governing property in land should not be assumed to provide definitive guidance about the design of IP institutions. To the extent that real property offers such guidance, moreover, it is important to recognize that natural resources law, corporate law, and the laws governing negotiable instruments also have important contributions to make to an account of IP's functions and purposes.⁴

Cohen is spot on. And yet, as I read *Property as Institutions for Resources*, I couldn't shake the sense that real property law still has a central and critical role to play in the development of resource-governance law and institutions. This comment investigates that instinct, exploring and rejecting a handful of reasons one might be tempted to embrace the idea of land as the canonical resource, and ultimately argues that land is best understood as a cultural touchstone for designing other resource-governance methods.

I. Naïve Induction

A believer in land's canonical role might initially be drawn to a somewhat naïve, inductive-style reasoning about property law. From this perspective, one might treat land as the "base case" of property,⁵ and reason inductively from the case of land to decide what other kinds of resources should be "property."⁶ Thus the question of "whether intellectual property is property," for example, could be informed by deciding how similar inventions and expressive works are to land. And from there, if one decided that the objects of patent and copyright "were property," one might then also conclude that the best way to design law about patents and copyrights would be for their law to mimic the law of land.

Cohen's article plainly exposes the underlying limitations of this kind of reasoning. She further observes, "[I]f one moves away from the relatively narrow debate about whether IP is property and what guidance real property doctrine can supply, one rapidly discovers a literature about the design of IP entitlements . . . that is far more adventurous, methodologically speaking, than property scholarship proper."⁷ The law of land does not necessarily instantiate the platonic ideal of resource governance, particularly when the

4. *Id.* at 56.

5. *See id.* at 5 ("Whatever their theoretical allegiances, property theorists typically share the assumption that property in land is the paradigm case of property, and therefore tend to think that real property doctrines supply the proper template for reasoning about property in other kinds of resources.").

6. *See id.* at 3 ("In particular, the despotic dominion of the property-in-land paradigm has shaped the debate about whether intellectual property . . . is, or should be, property."); *see also id.* at 9–10.

7. *Id.* at 10.

goals underlying the management of different resources vary.⁸ Real property law does not even necessarily instantiate the ideal governance of real property; indeed, few who have studied future estates would agree that real property law has been perfected.⁹

II. Reasoning by Analogy

A more nuanced approach to determining the role real property law should play in resource management could embrace the notion that the law of land does have something to teach us, not because land is special or more important, but because sometimes land *does* share particular characteristics with other resources that affect what governance model works well for those resources. My own scholarship, for instance, has argued for more standardization in how intellectual property rights can be divided, based on qualities intellectual property and physical property share.¹⁰ This “argument by analogy” approach posits that some resources should be governed like land, not because land is an ideal or is “more property-like,” but because the resource and land share a similar characteristic, and because a certain policy has seemed well-suited to addressing that characteristic in a real property context.¹¹

Nonetheless, analogical reasoning doesn’t fully explain both the law and legal education’s near-obsession with the law of land. Analogical reasoning may suggest that copyright law should be more like land law, but it equally could teach us lessons about how copyright should be more like water¹² or securities. Yet, these arguments appear less often in legal literature. Land is the default point of comparison.

III. The Shoulders of Giants

So why is land the example scholars and lawyers consistently return to? Another possibility is that land and chattel property are intuitive entry points to thinking about exclusive rights and resource control. Land and chattels are concrete. Most humans have a sense from their experience in the world of how ownership of physical objects might work. And although one may gain facility in thinking about more abstract types of ownership with time

8. *See id.* at 32–33.

9. *See generally* Quintin Johnstone, *Major Issues in Real Property Law*, 55 MO. L. REV. 1 (1990).

10. *See, e.g.*, Christina Mulligan, *A Numerus Clausus Principle for Intellectual Property*, 80 TENN. L. REV. 235, 237 (2013); Christina Mulligan, *Personal Property Servitudes on the Internet of Things*, 50 GA. L. REV. 1121 (2016).

11. *See* Cohen, *supra* note 1, at 13 (discussing natural resources as property).

12. *Cf.* Cohen, *supra* note 1, at 47 (“Here the system of IP rights is more like a water rights management scheme, which must mediate between competing and incommensurable uses. Yet the natural resources analogy does not fully describe the ecologies of intellectual production and consumption, either.”).

and effort, it is perhaps easiest to do this by tying those thoughts to something concrete and intuitive. This may be the superficial reason that land law is prime: land is easier to begin studying than abstract objects. It is checkers and not chess.

But the notion that physical property is an intuitive starting place is not enough, without more, to explain the dominance of land in resource-governance thinking. As children, we begin playing tic-tac-toe and hop scotch, but quickly move on to more challenging games. In a similar manner, why shouldn't we leave the study of land behind as new, provocative questions emerge?

Isaac Newton famously wrote: "If I have seen further [than others,] it is by standing on [the] sho[u]lders of [g]iants."¹³ The common law tradition allows legal practitioners and scholars to stand on the shoulders of jurists, legislators, and litigants who came before them. And when it comes to resource governance, those thinkers historically grappled with the problems surrounding land. For hundreds of years, disputes around land have occurred and were resolved. We learned to differentiate good policy from bad by considering and deciding what made sense iteratively, in cases with similar, but nonidentical, fact patterns. Real property law doesn't always get it right, but it's also not usually entirely wrong. Like a wise, older relative, real property law has the benefit of experience.

And just like a wise, older relative, real property law offers a certain kind of advice. Relatives might not completely appreciate the context of a new problem, such as how to navigate social media interactions. But nonetheless, they have had dozens of experiences relevant to resolving other social conflicts. And from those experiences, they can often offer solutions and anticipate consequences that a newcomer would miss. They can do this because they have been thinking about and resolving problems for a long time. Referencing real property law is like asking an experienced person for advice: by doing so, we see further than we would otherwise, because we stand on the shoulders of those who have considered similar problems before.

But even the "shoulders of giants" perspective may not be quite enough to justify the "despotic dominion" of land in legal thinking. As Cohen explains, some of the most "adventurous" scholarship has moved far away from the real property paradigm.¹⁴ Moreover, some scholars and lawyers abhor the substance of real property law. Many believe the wisdom of the common law is overblown. And even when common law reasoning is convincing, it is sometimes only recent theoretical work that effectively takes a cut at explaining why.¹⁵ The concise character of old cases often says little about the

13. 1 CORRESPONDENCE OF ISAAC NEWTON: 1661-1675, at 416 (1959).

14. Cohen, *supra* note 1, at 10.

15. See, e.g., Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 777 (2001); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization*

thought processes involved.¹⁶ In short, while real property law is sometimes wise, it can also be incredibly unhelpful. Why “stand on the shoulders” of such a rickety foundation?

IV. The Remix

A final perspective on the potential role of real property law is as the fodder for remixing legal rules—a necessary starting point from which to develop law further. Quoting Candice Breitz, Larry Lessig explains in his book *Remix* that culture is not and cannot be created in a vacuum.¹⁷ In *Free Culture*, he similarly argues: “Creators here and everywhere are always and at all times building upon the creativity that went before and that surrounds them now.”¹⁸ *The Odyssey* informs stories about journeys. *Cinderella* informs rags-to-riches narratives. And just as culture can’t occur in a vacuum, neither can law. Real property law informs resource management. Even when we reject the relevance of real property law to a new situation, our choices are often made in the context of rejecting the land-related norm, rather than justifying our positions without an anchor.

Real property law is the archetypal fairy tale, the recurring theme of property jurisprudence. When different types of resources are in play, we often deviate from the rules governing real property, and we should. But those deviations don’t occur in isolation. Even when the law of intellectual property, of water and oil, of air, deviates from the law of land, it does so because of real property law, not despite it. As discussed above, scholars often look at why real property law developed a certain rule or practice and ask whether the resource in question shares the relevant qualities with land. If it does, that often indicates that we should consider extending the rule for land to the law of the new resource. We can look at cases and analysis and determine whether the rule effectively addresses the problem or goal in question. We can gauge whether it is a good rule by looking at the effect the rule has had on land. In the alternative case, having dissimilar qualities to land might indicate a need to deviate from established practice. In either situation, there is a pull to make these judgments in light of the context—the real property jurisprudence that developed in the past.

Put in other words, real property law plays the role in law that Shakespeare, Grimms, and Homer play in culture. It is a common cultural touchpoint. Real property law has themes that, because of its longevity and omnipresence, have been explored and revised and re-keyed many times. And like

in the Law of Property: The Numerus Clausus Principle, 110 YALE L.J. 1, 8–9 (2000).

16. See, e.g., *Armory v. Delamirie*, 93 Eng. Rep. 664, 1 Strange 505 (1722).

17. LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 8 (2008).

18. LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 29 (2004).

the stories of Romeo and Juliet, Cinderella, and Odysseus, the themes of real property law help us understand later problems and conflicts. The teenagers in *West Side Story* lived in a world with different conflicts, culture, values, and technology than the protagonists of *Romeo and Juliet*. But we understand *West Side Story* better because we already grasp the futility of the conflict in *Romeo and Juliet*. Real property law has the same potential to inform the law of new resources.

V. Questioning and Embracing the Narrative

Just as it is worth asking why certain authors and stories are read in English and history classes, it is equally appropriate to ask whether real property law *should* be the center of our story of resources. But there are several reasons to think land should have a major role to play in the future, because of its prominent role in our past. As Jack Balkin observes:

We understand ourselves in terms of stories about who we are and how we came to be. These stories help us understand the situation we are currently facing and the way we should respond to it. . . . The stories we tell about ourselves are full of normative lessons: They explain who we are, where we came from, what we have done . . . what we said we must never let happen again, and what we said we must make happen again . . .¹⁹

Real property law is the story of how we managed resources in the past. Whether we embrace or reject that law in the future, real property law will be part of those decisions. The literal centuries of solving land-related problems have begotten a set of tools and frameworks, albeit incomplete, from which to consider the problems associated with creating law for other types of resources. Unanticipated and unlikely fact patterns have had time to occur, to force judges and scholars to think hard about what property law is and should be doing. Due to its age and scope, real property law is a giant for us to stand on, a rich corpus of both wise decisions and horrible mistakes that we can grapple with and respond to. Ideally, it will help us decide who we are and where we want to go.

19. JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 26 (2011).