Book Review: Property and Sovereignty: Legal and Cultural Perspectives, by James Charles Smith (ed)

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Book Review

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THE PRECISE NATURE OF THE RELATIONSHIP between property and sovereignty is an ancient and perplexing question. Modern debates on the issue often start with Morris R. Cohen’s famous piece, “Property and Sovereignty,” in which he argues that private property rights are in essence a form of delegated sovereignty or public power. Property and Sovereignty: Legal and Cultural Perspectives contributes to this discussion though a series of essays that explore many facets of the intersection between these two concepts. Through a whirlwind tour of military conflict zones, outer space, HBO dramas, nineteenth-century American pastoral artwork, virtual reality gaming, ancient Roman political dynasties, and other topics, the chapters in the book weave together dramatically different examples of the connections between private wealth and public power. By juxtaposing seemingly disparate scenarios, the book highlights the common aspects among these various subject areas. It provides both useful examples and food for thought for anyone interested in property and sovereignty, not only from a legal or cultural perspective, but also from the perspectives of political theory, sociology, history, and anthropology.
Editor James Charles Smith\(^3\) begins his introduction by describing two contemporary meanings for the word “sovereignty.” The first, “political sovereignty,” distinguishes sovereignty sharply from property. Here, “sovereignty” refers to the power of a state to make laws, adjudicate disputes, and govern generally. Exercising its sovereign power, a state can create, modify, regulate, or destroy property rights. In this way, “political sovereignty” sets the parameters within which property operates. The second conception, “owner sovereignty,” understands property rights themselves as a form of sovereignty, by virtue of the fact that the owner of property in a resource effectively has “power, limited but real” over others who want or need access to that resource.\(^4\) From this perspective, property rights define a bounded but powerful sphere in which the owner has power akin to the power of a state over its subjects and territories.

The tension between these two ideas runs through the contributions in the book. While on one level, the terms “political sovereignty” and “owner sovereignty” are simply different meanings that coexist without direct contradiction, the two conceptions ultimately point to separate visions of sovereignty and property that are, in fact, inescapably in conflict. On the one hand, property and sovereignty can be understood as fundamentally different ideas. Any similarities between the two under this conception are understood in the nature of an analogy only, rather than representing any deep commonality. The commonalities may be provocative or illuminating, but property and sovereignty each rests on different theoretical foundations. On the other hand, property and sovereignty can be understood as being fundamentally the same, differing only in degree rather than in kind. Here, sovereignty is property writ large, and property is sovereignty writ small. Scholars adhering to this view would describe a continuum between the two as they shade into each other, and would expect to find legal institutions and concepts in the middle of the spectrum that cannot be categorized clearly as one or the other.\(^5\)

The three chapters that follow the introduction explore the effects of territorial instability on property and sovereignty. In chapter one, “Relaxing Legal Norms to Restore Rights to Homes and Land in the Aftermath of War,” Megan J. Ballard argues that the regular, peacetime rules regarding registration of land ownership and evidence of title should be loosened when a population returns to

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\(^{4}\) Cohen, \textit{supra} note 2 at 12.

\(^{5}\) \textit{Cf.} Joseph William Singer, “Sovereignty and Property” (1991) 86:1 Nw UL Rev 1. Singer describes how Indigenous tribes and their connection to land is interpreted by legal actors sometimes as property, and sometimes as sovereignty, depending on which point of view is least advantageous to the tribe in that context. \textit{Ibid} at 55.
land that has been recently restored to its members after armed conflict. Ballard looks at the history of restitution procedures in Bosnia, Kosovo, Georgia, and Colombia, and recommends use of a community-evidence model to help with property title restoration. In chapter two, “Property Endowments and Social Ordering: The Long Road to Land Law in East Timor,” Daniel Fitzpatrick examines the complications that arise in attempting restitution in a society that has undergone successive waves of conquest, colonization, and conflict. Recounting the history of land reform in East Timor since independence in 2002, he argues that indigenous East Timorese, Portuguese, and Indonesians vying for control have skewed the land title system, creating large amounts of state-owned property controlled by political elites and a complex, uncertain system of private property ownership that inhibits economic growth for ordinary citizens. These two chapters, seen together, reveal the dependency of stable property rights on “political sovereignty” and how its breakdown can impact the distribution and nature of property in a society.

Chapter three, “Is there a Right to Territory in International Law?,” continues the theme of fragile statehood while turning in a new direction. In this piece, Alexandra R. Harrington analyzes the loss of territory because of environmental changes such as rising sea levels. She traces the development of the law regarding sovereign territory from its roots in the Roman concepts of “imperium” and “dominium”—rough analogues of the modern notions of “sovereignty” and “property”—through the colonial period and into the modern era. Drawing from this history, Harrington concludes that nation states have a right to continue to exist even if they lose most or all of their territory, although they may acquire new territory only with the consent of the donor state.

Having canvassed issues of property and sovereignty with respect to territorial vulnerability, the book then moves to two “new frontiers” of property law: outer space and virtual worlds. In chapter four, “Outer Space and the Non-Appropriation Principle,” Steven Freeland outlines and defends the international community’s traditional view that neither space itself nor any bodies in space can be “appropriated,” either as sovereign territory or as property. (As an aside, it is interesting to note here that although placed in different parts of the book, chapters three and four together explore what happens at legal extremes: the former addressing sovereignty without territory, the latter, territory without sovereignty.)

Chapter five, “Property and Sovereignty in Virtual Worlds,” examines contemporary online, multiplayer games such as World of Warcraft and Second Life that create new worlds, objects, and spaces. Wian Erlank argues that the developer of the game acts as a sovereign of the virtual world, while the players
develop interests in game objects and resources that are akin to property interests. The sources of “law” in this virtual world include the terms of access and service set by the developer, the software code that defines the game environment, and customary practices that arise among players. In this virtual context, sovereignty and property arise together to enable a new world to function. At the same time, the new world itself is considered the property of the “developer-sovereign,” who has an interest in limiting the formation of property rights held by the “player-citizens” as much as possible.

Part three of the book presents two chapters dealing with law and the arts. In chapter six, “Property and Sovereignty in HBO’s Deadwood,” Michael B. Ken, Jr. and Lance McMillan discuss how the television series explores the development of property and sovereignty in a gold-rush era settlement near the Black Hills in South Dakota. The fictionalized account provides an entertaining backdrop for the long-standing “gunfight” between “natural rights” accounts and “positivist” accounts of property rights and their relationship to sovereign government. In chapter seven, “American Scenery and American Sovereignty: A Quantitative Analysis of Landscape and Property before the Civil War,” Anna Elizabeth Lineberger and Alfred L. Brophy investigate two collections of landscape prints from the mid-1800s to show how they reflect the dominant mindset of the times: land is to be developed, and development is necessarily progress.

Part four then turns to aspects of the regulation of property, revealing how “political sovereignty” has a direct impact on the shape of property rights. In chapter eight, “The Rise and Fall of the ‘Underclass’: Ideology and Governmental Exclusion of the Poor through Zoning,” David Ray Papke traces the history of the concept of the “underclass” in American society, which rose to prominence in the 1970s and 1980s but gradually faded to obscurity during the 1990s and early 2000s. He notes that in its heyday, the idea of an “underclass” prompted judicial oversight of zoning regulations to ensure an adequate supply of low-income housing. In chapter nine, “Governmental Marks: What Souvenirs Say About Speech and Sovereignty,” Malla Pollack argues that no one, including governmental entities, should be entitled to trademark protection for marks that indicate origin from or affiliation with a governmental body. In her view, the political nature of sovereign entities should preclude the assertion of a property right in public designations and descriptors as against private citizens. Consumer

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protection can be adequately provided for by remedies for fraud or by requirements to use disclaimers.

To this point, most of the pieces in the book have, explicitly or implicitly, understood property and sovereignty as essentially different, though perhaps related in some interesting ways. The final chapters suggest more fluidity between the two concepts. The first contributor, Larissa Katz, examines the doctrine of adverse possession. In chapter ten, “Adverse Possession and Sovereignty,” she argues that the doctrine is best understood as a recognition of de facto over de jure title in a manner similar to the international recognition of a new de facto government after a political coup d’état. Katz claims that a primary concern of property law is to ensure that all resources have a clear owner who is responsible for setting the agenda for their use. The doctrine of adverse possession thus evolved to recognize that in cases of long-standing, notorious, and adverse use, recognizing the person in de facto control as the new owner promotes stability and certainty. In chapter eleven, “The Semi-Sovereign Corporation,” Daniel J.H. Greenwood explores the notion that corporations are best seen, not as property owned by their shareholders, but as quasi-sovereign political bodies mediating the interests of their various stakeholders. Outlining the early history of the large colonial companies and the later development of modern corporate law in the nineteenth and early twentieth centuries, Greenwood argues that the law should return to the original understanding of corporations as delegates of sovereign power and analyze them through a political, rather than an economic, lens.

Finally, in chapter twelve, “Status, Contract, Identity, and Sovereignty: What the Romans Have to Tell Us About Family Property,” David S. Rosettenstein outlines the role of family property under the ancient Roman plutocratic system. His exposition shows how the Roman property concept of “dos,” somewhat analogous to the medieval European notion of “dowry,” evolved over centuries as part of a complex dance of sovereignty and power among the great Roman houses. As a lesson for modern American family law, he suggests that the regulation of financial arrangements on marriage and divorce should take into account the interests of the extended families of both spouses and encourage a dynastic accumulation of wealth and power.

Taken as a whole, Property and Sovereignty serves two important purposes: it gets the reader thinking critically about the relationship between these two fundamental but abstract concepts, and it explores legal structures that exemplify these concepts in different ways. In relation to Cohen’s controversial claim that property is a form of sovereignty, the work does not provide any specific

theoretical treatment, but instead lays out a range of phenomena that such a treatment would need to address, if offered. As well, the phenomena explored are by no means exhaustive. Notably, there is very little discussion of Aboriginal title and self-governance, and none whatsoever regarding either systems for redistribution of wealth or the impact of bankruptcy law, receiverships, and corporate restructuring on property and sovereignty. However, given the tremendous range of issues that could have been covered, this oversight is not surprising, and the work does not claim to be comprehensive in this regard.

By focusing more on exposition than explanation, the book raises many questions. For starters, several chapters point to situations where sovereignty and property have arisen together, or could arise together, in a new form: in outer space, in online environments, and in a gold-rush era community. What is happening in these scenarios? Do property and sovereignty arise in some sense independently, and then need to relate to one another? Or do they necessarily arise together, creating a coherent and unified system? Similarly, the book examines several situations where there is a breakdown in the sovereignty/property order, and asks about the political and legal responses to such situations: post-conflict repatriated zones, de-colonized countries, complete loss of territory, and de facto displacement of a nominal owner by a squatter. In these circumstances, are we dealing with questions of allocation of property rights, exercises of sovereignty, or both? Are these public or private questions, or both, or neither? Finally, the book explores a few areas where property and sovereignty appear to be effectively inseparable: in land-use planning and zoning, in the constitutional makeup and function of the corporate form, and in the intricacies of property and political power dynamics in any society where dynastic wealth can accumulate. How do the distribution of property and the definition of property rights interfere with or confine the exercise of sovereignty in a society? Which structures do we consider “sovereign” and which do we consider “property”? And why?

The contributors to the book sometimes provide partial answers. Indeed, readers looking to advance their knowledge and understanding of the particular area addressed by an individual chapter will find useful descriptive and normative analysis on the topic. However, the most significant way in which the book adds to the discussion on sovereignty and property is by prompting these questions in the first place. Anyone working on further understanding this complex relationship will need to grapple with these questions, and will need to consider how the issues raised by these questions play out in a wide variety of contexts. Although the book may have missed an opportunity to engage in a detailed and integrated critique, it does provide both a springboard for further investigations of the
multifaceted aspects of the connection between property and sovereignty and a foil against which to test theoretical explorations of that connection.