(DE-)LIBERATING PROPERTY: A POLITICAL GRAMMAR OF PROPERTY LAW

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3, 2, 1 - mine. Most people 'in the street' today still have a quite naturalized understanding of exclusive property. A thing belongs to one or to another. *Tertium non datur*. Already our children illustrate that binary perception yelling on the playground: 'Stop! Don't touch it. This is mine!' The philosophical archetype of such an exclusive conception of private property is laid down in Locke's natural law theory.[1] Whenever the concept of 'property' is used in this paper without any further clarification, it mostly means 'private property'. And yet, the core aim of this paper is to deconstruct this private 'nature' of the concept as purely conventional and dependent on diverse normative (political) background ideas and to prepare the ground for a more pluralistic understanding of property.

[1] Locke 1690

A (natural) human right's view of property might allow for a conceptual 'structural' pluralism of diverse legal forms and types of property,[2] but accepts only a monistic justificatory basis and social function of property as enhancing private autonomy and subjective freedom. Most economic theories, yet understanding property rights as pure socio-legal conventions, also attribute one monistic function to them, i.e. internalization of social costs allowing for efficient (economic) allocation of resources.[3] Thus, the core of the definition shifts with its normative background assumptions. 'How one defines the core of property depends on what values one thinks property serves'.[4]

This paper attempts to sketch a more freestanding genuinely pluralistic property theory relying on a 'deliberative' discourse theory.[5] Starting from value pluralism, it is impossible to define one 'universal' core of property either on a conceptual or normative (justificatory) level. The strategy of a 'deliberative legal theory' is more pragmatic.[6] Considering law as a constitutive structure of social cooperation, it analyzes social practices of law and theory discourses (scholarship, legislation and judicial cases). It deconstructs or 'liquefies' monistic normative principles or policies and tries to reconstruct them as an integrative yet plural 'political grammar' for legal argumentation on property. This reconstructive method adds a structuralist level to the deliberative grounding. The paper is perhaps best understood as a (de-)constructivist mapping of 'good reasons' in mainly legal property argumentation with the aim to pluralize and democratize the property discourse.

1 Political Properties: What? Who? How? Why?

Despite or even due to the pluralistic lenses of a discourse theory, it is possible to outline certain initial predefinitions. The structure of any deliberative account on

[2] Cf. Dagan & Dorfmann 2015; Dagan 2011
[3] Alchian 1965; Demsetz 1967; Alchian & Demsetz 1973
[4] Alexander 2015, 27
[5] Cf. 'deliberative democracy' theories: Habermas 1994; Benhabib 1994
[6] Lomfeld 2013; Lomfeld 2010

institutions is fundamentally relational (social), constructivist (conventional) and political.

Property as Social Relation. Property is not a relation between a person and a 'thing'.[7] Robinson may feel a special personal connection to some objects he likes, but there is no rational sense in saying he 'owns' them. Without another communicating subject there is just no non-metaphysical fundament for a property relation. Property always and only is a relation between potentially communicating persons. Of course property is a social relation attributing material or immaterial 'objects' or specific rights thereof to its owner. And yet, it is nothing other than an institutionalized social relation.

Open Intersubjectivity. The specific characteristic of the social relation of property is its generality. A contract for example, creates or forms a relationship between a clearly determined number of subjects. A contractual right addresses the other contractual party, or parties. Property potentially affects everybody. This 'open intersubjectivity' is the only practical reason for labeling property as an objective 'thing-relation'. Yet, it remains a social relation with the particularity of an open range of persons involved. A property right has an undetermined amount of addressees. In demarcation to a 'relative' contractual right, it may be referred to as an 'absolute' right towards everybody. As the factual determinant of the respective addressees is always the attributed object, one might want to define this sort of relation as 'three-dimensional' (person-thing-person),[8] but there is no obvious analytical gain from that labelling.

Objects of Property. Attributed objects to property relations could theoretically encompass all those subjective rights with the ability to enfold an 'open intersubjectivity', i.e. those that could potentially effect an indeterminable number of people. This definition allows for a wide range of legal and factual positions to be considered as 'property'. Possible objects of property encompass land, natural resources and all tangible objects, but also firms, patents, copyrights, social insurance

[7] Cf. already Kant 1797; and Georgiades 1977 ('Eigentumsverhältnis'); Singer 2000; Underkuffler 2003
[8] Sherwin 1997

claims, access rights to public infrastructure.[9] Even digital code and data are possible objects. The question 'what' should count as property is more a political than an analytical question, deciding also on the possible commodification of social spheres.

Property as Social Structure. Property is neither a natural nor a purely technical legal institution. The forms of property in any given society imply a specific decision about social ordering. The structure of property mostly determines the type of political economy. A strong system of private property coincides with a decision for some form of market economy. Encompassing state property demands central economic planning. Other forms of collective property (commons, cooperatives) still need common economic management. Any idea of property always entails a political structure or a social property 'system'[10] of resource management. The 'who owns what' reflects the political structure of a society.[11]

F1. Typology of Ownership

Typology of Ownership. The political structure of resource governance (the 'who-question') could be reframed as a question of 'types of ownership': private property, public (state) property and common property (collective commons).[12] Private property does of course not imply that it is completely independent of public influence. The state not only administers public property like public schools and infrastructure, but also enforces, determines and limits private property rights. The popular notion of the 'commons' embraces different phenomena. A natural resource like air is 'common'

[9] Cf. Reich 1990; German constitutional court BVerfGE 83, 201 (208); E 89, 1 (6)
[10] Alexander 1997; Singer 2009; Wielsch 2015
[11] Cf. Rose 1996
[12] Heller 2008; Page 2017

property in the sense that it belongs to everybody. Yet, as privatization and commodification of water demonstrate, commons are no natural given, but again a normative convention. Commons could also refer to common economic property like cooperatives or even joint-stock companies. The normative characteristic of common property may be seen in an object specific form of collective self-governance.

The Law of Things. The central social mechanism for constituting and organizing the social relations concerning objects is the law. Legal conventions establish the structures to regard phenomenological 'objects' (form Latin 'obiectus': existing, be present, be available) as things which are used by and exchanged within persons. The 'Law of Things', which is the German heading for a property rights regime, prescribes the rights between persons in relation to (physical) objects. The legal 'how' coins the field of possible social relations concerning the attribution, use and exchange of things. The 'how-question' influences (if not predetermines) the 'what-' (legal objects?) and the 'who-question' (legal types?).

Property is Political. Not only because of implied choices for a social structure, property is an eminent political institution. In regulating the access to resources, property is a form of sovereignty.[13] Any structure of property has fundamental effects on the social order and for any individual living within this society. Given all that, any member of the society may ask why this order is justified (the 'why-question'). At the latest when the state guarantees the enforcement of exclusive subjective property rights, the decision for private property turns into a general issue of political legitimacy. Property discourse is genuinely political. All property questions (what? who? how?) converge in this ultimate 'why?'.

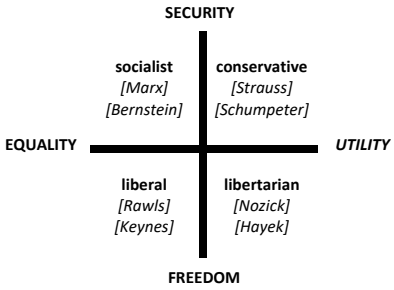
Democratic Theory of Property Law. The political character of property discourse is reflected in basic justificatory principles or reasons for property within property law. Here, a pluralism of principles is not a technical issue, but goes back to a fundamental (ethical) value pluralism. A democratic theory of property law takes this pluralism seriously. A democratic conception of property law could only be constructed with

[13] Weber 1922; Cohen 1927; Merrill 2015

plural values.[14] The legal task than is to balance between private and public interests.[15] This paper constructs a pluralist matrix of diverse property values as discursive grammar of legal balancing.

2 Discursive (Political) Grammar

Behind any technical or doctrinal legal argument lurks an implicit political battle on underlying principles and policies. To structure this balancing the paper suggest a basic 'political grammar' of fundamental values or reasons for political-legal discourse. This discursive grammar of basic normative poles ('values') and structures of argumentation serves as a structure for mapping and comparing legal arguments on property.



F2. Discursive Grammar of Political Values

Spectrum of Political Theories (Ideologies). This structural value matrix or 'discursive grammar' was originally developed for classifying contract theories[16] but reflects recent classifications in political theory (ideologies) and economic sociology (political economies). Developed as a critique of 'bourgeois' philosophy the concept of 'ideology' was later used more neutrally to describe basic social value environments.[17]

[14] Alexander 2009; Penalver 2009; Singer 2009; Purdy 2009
[15] Cf. sec. 6: Lukas v South Carolina 1992; German Constitutional Court 1981 (Nassauskiesung), E 58, 300
[16] Lomfeld 2015
[17] This is the development form Marx & Engels 1845 to Mannheim 1929; for recent cf. f.ex.

Contemporary political theory classifies at least three big ideologies: 'liberalism', 'socialism' and 'conservatism'.[18] The same core typology underlies social welfare theory and newer varieties of capitalism research which both differentiate a liberal, conservative and social democratic model.[19]

Political Value Research. The here proposed discursive grammar quadrant echoes earlier psychological classification of social attitudes.[20] Based on broad quantitative value surveys and qualitative discourse analysis subsequent typologies of social values mostly classify along the two axis of freedom and equality.[21] All popular political spectrum charts (cf. politicalcompass.org) are build upon this value typology which gives rise to the further differentiation between a 'liberal' and a 'libertarian' position.[22] Also the history of economic thought and the existing variety of economic theories today could be classified according to a similar matrix of underlying value commitments.[23]

3 Justificatory Reasons for Property

Competing Monistic Justifications. Regarding property as a basic social and political structure its form, scope and limits are under constant need of justification. Different 'political' theories start their reasoning from different ethical values. Most normative theories of property are monistic starting their justification from one fundamental ethical value. A prominent historical example is again Locke's labor theory which justifies property rights by the single value of individual effort.[24] But throughout centuries very diverging values and interests were qualified as ultimate nucleus of property. Today even more, property theory splits up into diverse property theories.[25]

[18] Cf. f.ex. Freeden 1996; Heywood 2017
[19] Esping-Andersen 1990; Schröder 2013
[20] Eysenck 1957
[21] Rokeach 1973
[22] Cf. Mitchell 2007
[23] Clark 2016
[24] Locke 1690
[25] Cf. Alexander & Penalver 2012

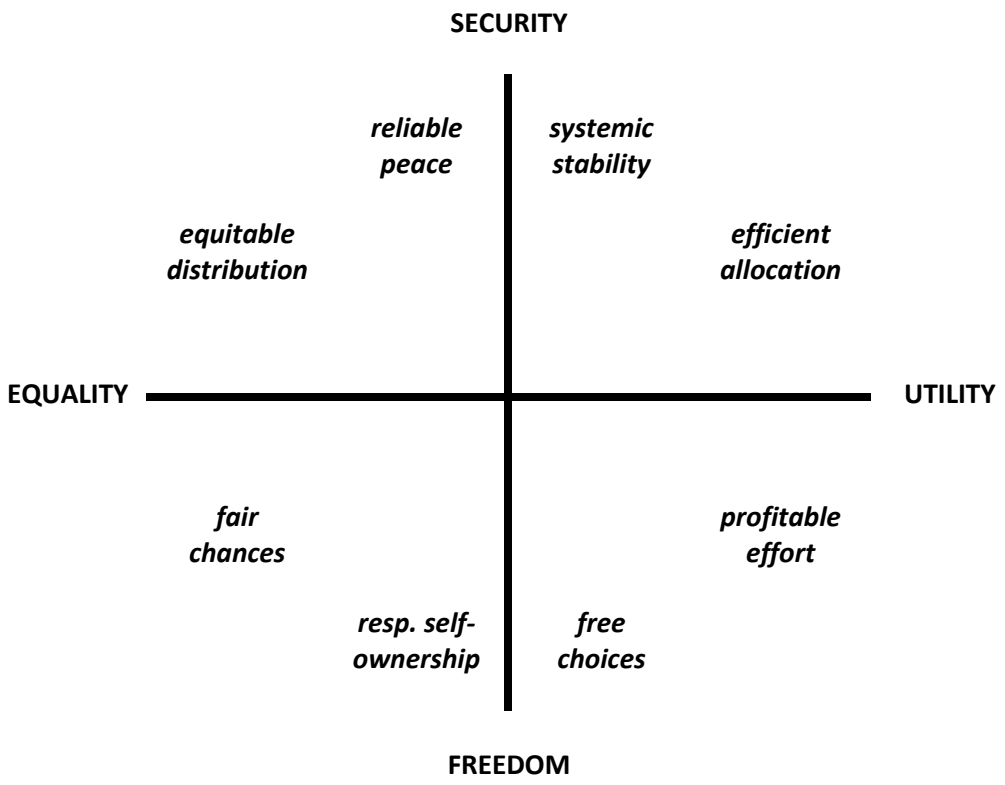
Most evident poles of the spectrum are liberal ethics of individual freedom competing with more communitarian and systemic ideas of social stability. Concurrently, economic theories of individual and collective (utilitarian) wealth maximization strive with egalitarian accounts of individual fairness and social justice. As monistic theories each claim an exclusive reconstruction under their normative stance, competing justifications open a political battle of property theories.

Pluralistic Justification. (Post)modern value pluralism dismisses any alleged normative or empirical predominance of any monistic justification of property. There is no single justification, but only plural potentially conflicting justificatory reasons of property. No specific value but only the argumentation process of giving and taking (deliberating) reasons itself could justify legal norms and decisions.[26] Even if one rests skeptical about the ultimate possibility of deliberative consensus,[27] legal discourse translates or at least gives a voice to plural communicative rationalities and social perspectives.[28] Yet, within a historical development of property justifications, plurality does not mean arbitrariness. Diverse property theories coin 'discursive formations'[29] outlining the respective political fields of competing reasons of property. A deliberative account of property law tries to integrate plural 'good' reasons for the why of property relations extracted from diverse property theories as systematical arguments into one 'political grammar' of legal deliberation.

Property as Social Security. The institution of property stabilizes interpersonal relations and the social system in general. The assignment of clear and enforceable property rights minimizes interpersonal and systemic conflicts. The absence of conflicts means social security. This security or stability function of property is the essential justification of most occupation theories of property. Even if mixed with some strategic motives, the straightforward assignment of property rights to the first occupying a resource guarantees some form of *reliable peace.*[30] Assuming a war of everybody against everybody, the state enhances personal and collective security by

[26] Habermas 1981; Habermas 1992; cf. also Brandom 1994
[27] Like Lyotard 1983 and other poststructuralist thinkers
[28] Teubner 1996
[29] Foucault 1969
[30] For the most prominent occupation theory based on the idea of guaranteeing peace cf. Grotius 1625

enforcing a system of private property.[31] From a more functional perspective property stabilizes a process of systemic evolution.[32] Only the distinction of property from possession allowed the economy to separate from politics as a genuine social system. The legal institution of property, thus, generates a *systemic stability* that enables collective social innovation.



F3. Political Grammar of Property Theory

Property as Individual Freedom. From an individual perspective property enables freedom. An owner is free to realize options of his property or not. Most liberal reconstructions start with Locke's highly influential labor theory of property, where ownership is justified with invested personal labor.[33] Libertarians praise the idea of private appropriation by labor as independence from political influence of the state.[34]

31 Hobbes 1651
32 Luhmann 2004, 257
33 Locke 1690
34 Nozick 1974; Epstein 1985

This reading of property as pure privacy is not a necessary corollary of a justification of property with individual freedom. In fact, Locke's justification of property might also be read under another normative perspective (cf. next paragraph). An indispensable element of any purely subjective account of property is the freedom to say 'it is mine', i.e. a *free choice* of an autonomous persons.[35] Owners realize the options of resources by engaging their free will. A more demanding, contextualized concept of individual autonomy is the idea of *self-ownership*. Here, property constitutes the subjective sphere of freedom in the outer world.[36]

Property as Wealth Maximization (Utility). Although Locke's labor theory of property is mostly used as liberal blueprint, its essential argument is not freedom but the material effort made by individual work and merit in processing resources. Following this materialistic trace property enables economic markets. Any competitive market is based on the possibility of individual profit. Property incentivizes subjective economic performance by framing a *profitable effort*. The utilitarian nucleus of welfare economics is that individual profit maximizes collective wealth. Resources will be traded as long as they reach their highest economic potential. In that respect, property and contract allow for an *efficient allocation of resources*.[37] An institutional economic justification of property often starts with the common pool dilemma of free usage of resources.[38] Property rights internalize social costs and advance an efficient use of resources. As long as transaction costs remain low, the initial distribution of property is not relevant from that perspective.[39]

Property as Equality? Quite to the contrary, egalitarian theories focus on just distribution. Private property counts as a primordial reason for social inequality.[40] As a consequence, radical egalitarian accounts in the Marxian tradition condemn all private property, whereas others demand social equality as necessary condition of any form of property.[41] A positive egalitarian justification of private property rights thus

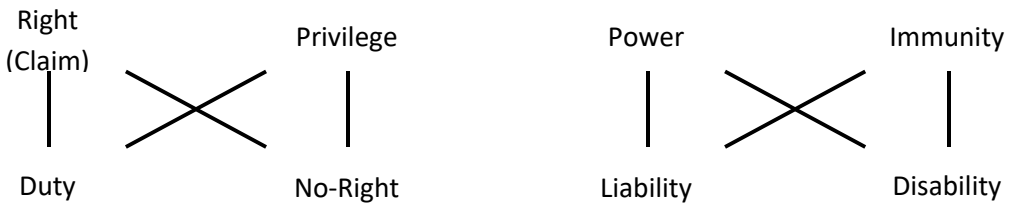
35 Kant 1797
36 Hegel 1821
37 Alchian 1965; Posner 1973
38 Hardin 1968; Demsetz 1967
39 Coase 1960
40 Rousseau 1755
41 Proudhon 1840; the radical Marxist tradition starts from Marx & Engels 1847

fundamentally depends on an *equitable distribution* of social wealth,[42] which could also be achieved with an accompanying redistributive tax system.[43] Less material accounts of liberal egalitarians stress the equal distribution of opportunities. The structure of property rights, then, has to provide a *fair chance* for everybody regardless of his background and capabilities and to benefit the least advantaged members of a society.[44]

4 A Bundle of Property Rights

Property as Legal Construction. Rights are the product of legal rules.[45] Property rights are created by respective state regulations. Thus, property primarily is a 'bundle of rights'.[46] This conventional position was and still is the starting point of passionate intellectual battles in US American property theory. With another terminology, it is also a focus of controversy in German constitutional property theory. According to Art. 14 of the German constitution, 'Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws'. Despite its formal insistence on a genuine (pre) constitutional concept, the German constitutional court defines the content of property as 'sum of all statutory rules governing the position of ownership'.[47] The doctrine speaks of a 'rule-made fundamental right' in the hands of the lawmaker[48] and an 'artifact of the existing legal order'[49]. The complete public regulation of the content of property necessary implies a bundle of rights.[50] As the constructivist discourse theory account of property shares the conventional view, it will adopt some of its analytical structure.

42 Cf. Cohen 1995; Harris 1996
43 Murphy & Nagel 2002
44 Rawls 1971; 2001; Sen 2009
45 Commons 1924; Schlager & Ostrom 1992
46 Hohfeld 1913; 1917; Hale 1922; Demsetz 1967 cf. for Germany Oertmann 1892; Kelsen 1934; 1960
47 German Constitutional Court 15.07.1981 (Nassauskiesung), E 58, 300 (para. ?)
48 Maunz/Dürig/Papier 2015, 38
49 Mangold/Klein/Depenheuer, 29, Brocker 1992, 400; Böhmer in Bauer 1988, 78
50 Auer 2014



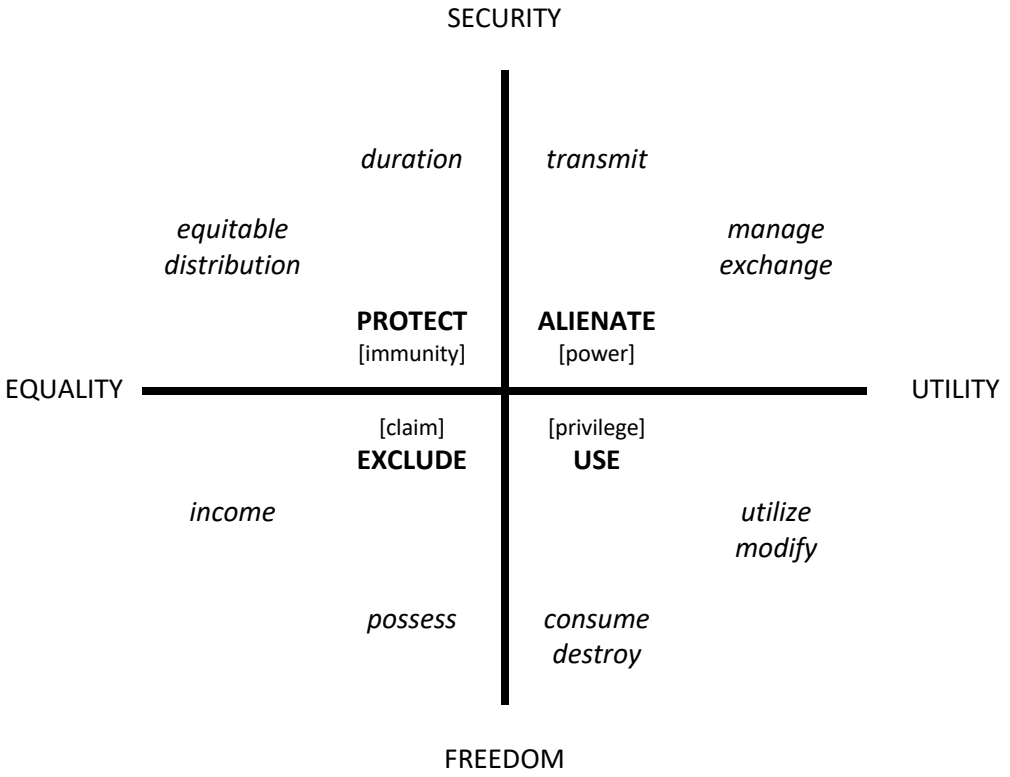
F4. Hohfeld's Analytical Structure

Phenomenology of Rights & Duties. The nucleus of bundle theory in American tradition was Hohfeld's analytical treatment of rights and duties.[51] The following deliberative reconstruction of property will integrate Hohfeld's core demarcations: 'A right is one's affirmative *claim* against another, and a *privilege* is one's freedom from the right or claim of another. Similarly, a *power* is one's affirmative "control" over a given legal relation as against another; whereas an *immunity* is one's freedom from the legal power or "control" of another as regards some legal relation'.[52] Concerning the correlatives and opposites he describes a *'duty'* as 'legal obligation […] which one ought or ought not to do' to another and *'no-right'* just as non-existence of privileges. A *'liability'* is concerned to be a general not yet determined obligation that could substantiate into a duty. Finally, a *'disability'* is just the absence of the 'legal ability' (power) 'to effect […] legal relations'.

Bundled Rights. The differentiation into distinct property rights was said to 'disintegrate property'.[53] Yet this consequence is not evident.[54] It is also possible to understand rights as bundled or lumped together within one institution or different institutional substructure.[55] Even if Honoré intended to describe the components of full 'ownership',[56] his list offers other interpretative options. His prominent

[51] For his structural presentation cf. Hohfeld 1913, 30; 1917, 710
[52] Hohfeld 1913, 55 (italic emphasis added)
[53] Grey 1980; Xifaras 2015
[54] Critical as well: Mossoff 2003; Di Robilant 2013
[55] Singer 2009; Fennell 2012; cf. also Merrill & Smith 2001; Penner 1996
[56] Honoré 1961; Becker 1980; for Germany cf. already Windscheid/Kipp 1906

description of these 11 'standard incidents'[57] together with Becker's reformulation of the list as 13 core 'elements of ownership'[58] will serve as starting point for a discursive grammar of property rights.[59]



F5. Bundle of Property Rights

Privilege (Liberty) to Use. The central *privilege* of ownership is to 'use' one's own property as it means the freedom from claims of others. The parallel classification as 'liberty' already indicates the individualist (liberal or libertarian) background. Obvious components of this liberty are to consume or destroy, i.e. to 'annihilate the thing'. The

[57] Honoré 1961: (1) Right to Possess, (2) Right to Use, (3) Right to Manage, (4) Right to Income, (5) Right to Capital, (6) Right to Security, (7) Incident of Transmissibility, (8) Incident of Absence of Term, (9) Prohibition of Harmful Use, (10) Liability to Execution, (11) Residuary Category.
[58] Becker 1980, 190: (1) Claim to possess, (2) Liberty to use, (3) Power to manage, (4) Claim to income, (5) Liberty to consume or destroy, (6) Liberty to modify, (7) Power to alienate, (8) Power to transmit, (9) Claim to security, (10) Absence of term, (11) Prohibition of harmful use, (12) Liability to execution, (13) Residuary rules
[59] The quotes in the following paragraphs are from Becker 1980, 190

privilege to 'utilize' an object meaning the 'personal enjoyment of the benefits' also points to a liberal economic perspective. The privilege to use or utilize an object or legal position optimizes the individual utility of the owner. Its right to 'modify', i.e. to 'effect changes less extensive than annihilation', underlines the close link to Locke's account of property as labor performance.

Power to Alienate. The core *power* of ownership is to alienate property. This power to 'carry out transfers by exchange or gift, and to abandon ownership' together with the power to 'manage', i.e. to decide on usage (how and by whom) encapsulates the economic (utilitarian) heart of property. Only the exchange of property leads to an effective allocation of resources. The power to transmit, i.e. 'to devise or bequeath' allows for a systemic stability of the property system. The same is true for its 'residuary' power, 'that is, the rules governing the reversion to another, if any, of ownership rights which have expired or been abandoned'.

Claim to Exclude. The *claim* to exclude others from possession, i.e. the 'exclusive control of the thing' is best understood within the normative background of self-ownership. If, as Hegel puts it, property is the externalization of freedom, then the right to exclude others seems a natural part of it. Leaving for a moment the question of a fair overall distribution of property aside, it could also be viewed as a fair opportunity if everybody could exclusively receive the income from his or her property, i.e. the 'benefits derived from foregoing personal use of a thing, and allowing others to use it'.

Immunity from Intervention (Protect). The 'claim to security' translates into an '*immunity* from expropriation' and protection against other interventions in one's property. Taken together with the incidence of 'absence of term', i.e. 'indeterminate length of one's ownership rights', both relate to a normative idea of stability. The collective body (i.e. the state) should protect the abstract and concrete institution and content of property.[60]

[60] Cf. the German constitutional guarantee of the institution of property ('Insitutsgarantie') and the given state of property ('Bestandsgarantie'): BVerfG 18.12.1968 (Deichordnung), E 24, 367.

5 A Bundle of Property Duties

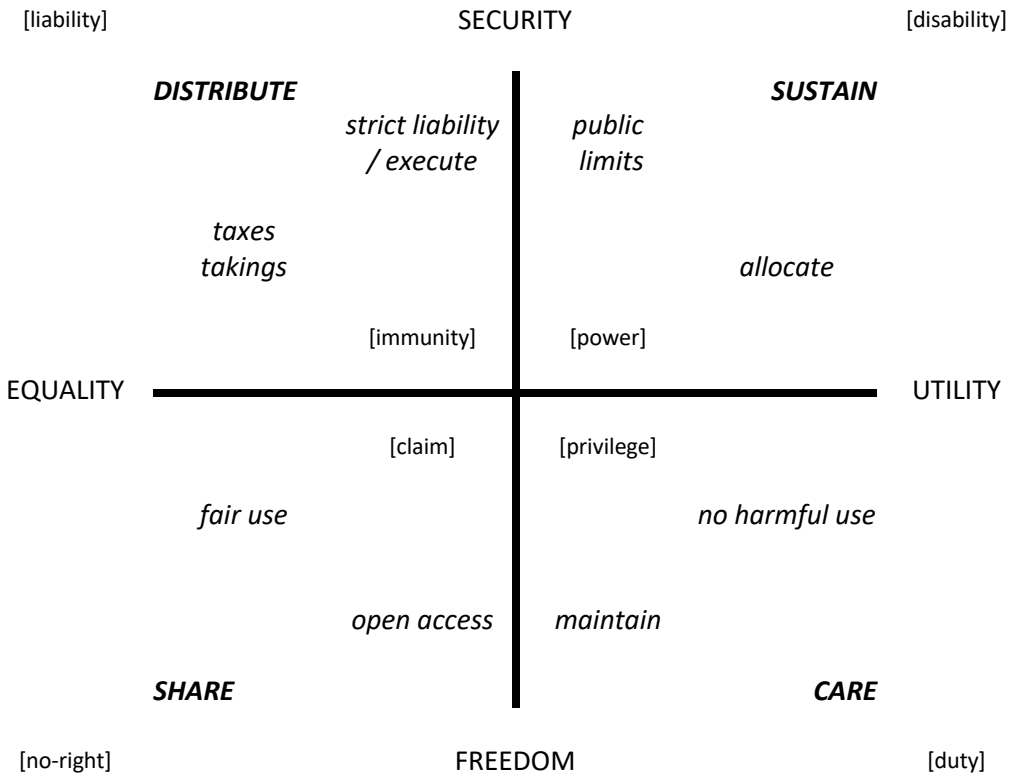
Duties and obligations. Two 'incidents' were left out from the Honoré/Becker 'elements of ownership' described in the previous section: 'prohibition of harmful use' and 'liability to execution'. In general, duties, liabilities, no-rights and disabilities are not really reflected within the classical concept of property rights. The bundled rights approach implies an unbalanced idea of property as a social structure. Instead, democratic theory of property discusses obligations, responsibilities and commitments as well as rights.[61] In the same respect, Art. 14(2) of the German Constitution reads: 'Property entails obligations. Its use shall also serve the public good.' The German constitutional court stresses especially an 'essential social function' of land,[62] which means that public restrictions do not count as expropriation, but constitute a restricted content of property.[63] Property as social structure includes a bundle of duties.

Duty of Care. The prohibition of harmful use, 'that is, one's duty to forbear from using the thing in ways harmful to oneself or others' was already part of the liberal enlistment of incidents of ownership.[64] This *duty* could be seen as a social opposition to the liberty of unlimited use. In the same sense there could be a social duty to maintain the property in good condition, for example in the case of tenancy. A duty to care could thus be seen as a general structural element of a social conception of property.

No-Right to Control Access (= Share). The social opposition to the claim for exclusion is a *'no-right'* of the owner to block or even control access. Especially coming to intellectual property, 'access' to common resources is the central social issue.[65] In a positive reformulation, the social 'rules of access' enfold a legitimate claim for public

[61] Alexander 1997; Arnold 2002. Cf. Hale 1922; Jhering 1893; Gierke 1889; Demogue 1911; Duguit 1920
[62] BVerfGE 52, 1 (32) – ‚Kleingartenrecht'
[63] BVerfG 15.07.1981 - 1 BvL 77/78 (Nassauskiesung), NJW 1982, 745 (749); Yet, a further general 'social obligation' of property is mostly denied. Cf. Münch/Kunig/Bryde 66; Dreier/Wieland 90; Merten/Papier/Randelzhofer § 37, 33
[64] Becker 1980, 191
[65] Cf. f.ex. Benkler 2013

sharing, not only but especially in the case of knowledge.[66] If self-ownership needs to materialize in some external freedom, open access and the freedom to roam are a social opposition (in defense of other self-owners) to exclusionary possession (by one owner only). Fair use may equalize opportunities. The absence of the right (no-right) to control access translates into a social obligation to share the own property.



F6. Bundle of Property Duties

Disability to Allocate & Sustain. The main normative idea behind the power to alienate is the allocative function of private property. An opposition to this legal ability to alienate and mange derives from *disabilities* to efficiently allocate and sustain resources. Two prominent dilemmas of a social disability of efficient and stable

[66] Wielsch 2008; 2015

resource allocation are the 'tragedy of commons' [67] and the 'tragedy of the anticommons'[68], i.e. the overuse and underuse of common resources. The first tragedy serves as a general economic justification of private property, which is said to internalize social costs. [69] Yet, the time delay of environmental costs practically suspends the allocative function of private property as ongoing pollution and exploitation of natural resources underscore. Even worse, the anticommons dilemma results from private ownership. Both social problems call for some adaption of a social property structure to allow efficient and sustainable allocations. The same is true for an efficient competition. Without antitrust rules, monopolies would counterfeit the market mechanism and limit the allocative function of property.

Liability to Distribute. The originally enlisted incidence of a 'liability to execution', i.e. the 'liability to having the thing taken away as payment for a debt' is already in opposition to the immunity from intervention. This *liability* could be understood as an obligation in favor of normative stability of legal enforcement. A general liability to distribute is a completely different obligation. A material 'social-obligation norm'[70] in property law is based on an egalitarian philosophy.[71] Distribution and sharing both reflect an egalitarian ideal. With sharing, however, the property remains with its owner; he or she only has to share its possession. Distribution is more far-reaching in demanding to give away part of the revenues (taxes) or even part of the property itself (takings). Sharing income possibilities might overlap with distribution. Another form of indirect distribution would be an extended strict liability for damages caused by property.

6 Property As Deliberation

Property Theory as Social Practice. Is there a 'core' of property? From the constructivist perspective of deliberative theory, the answer is: no, at least not a

[67] Hardin 1968
[68] Heller 1998; 2008; 2013
[69] Demsetz 1967; but cf. Rose 1996
[70] Alexander 2009
[71] Cohen 1995; Harris 1996

universal one. The legal institution of property is a social structure that changes. More generally speaking, there are always different readings and interpretations with respect to this institution. There is not one single idea of property, but a pluralistic range of ideas. Property rights and obligations are formed as a social practice.[72] And yet, the ongoing practical discourse is not totally arbitrary and alternating. Ideas carve their historical structures into the discourse and coin relative conceptual cores, like Hohfeld's classification of property rights and Honoré's elements of ownership. Legal practice shapes a discursive core of elements and good reasons attributed to property.

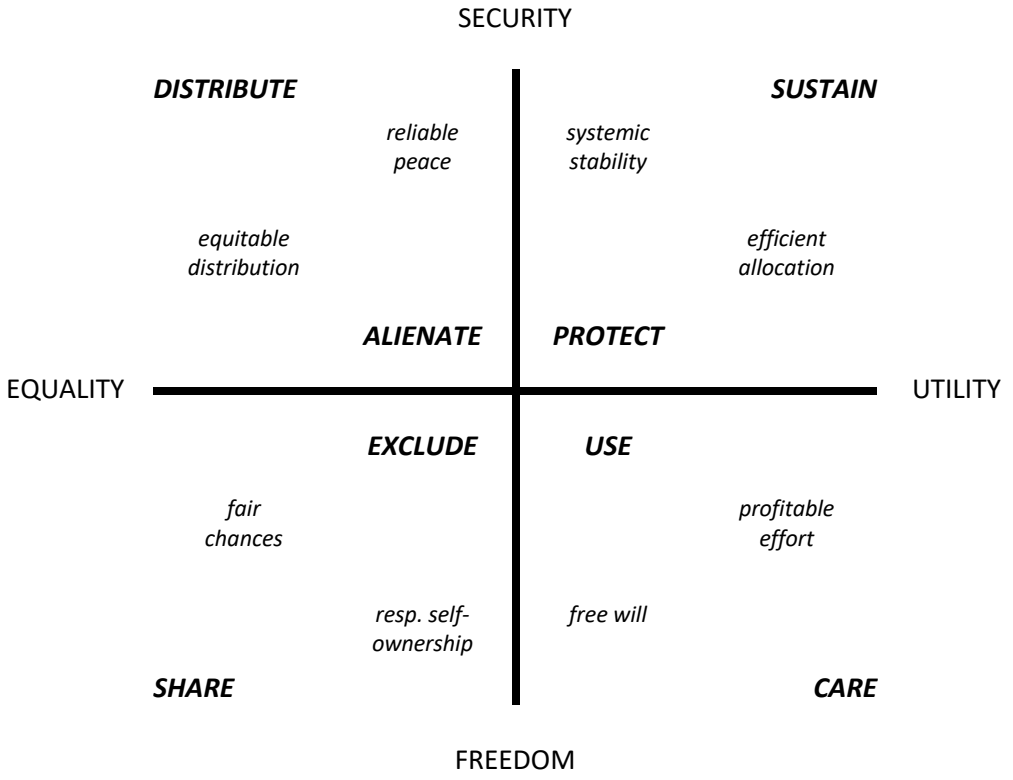
Battle of Rights & Duties. Obviously the conceptual 'bundle of rights' and the 'bundle of duties' conflicts on the shape and boundaries of property (the 'how-question'). Which rights? Which duties? Which balance? There is not one consistent practice of property theory either. And yet, Hohfeld's scheme allows for an illustration of a certain social logic between the rights and duties discussed. Of course this analytical structure does not imply any strict logical relations, but rather tries to demonstrate a certain semantic lineage along which the property discourse evolves or might evolve.

F7. Analytical Legal Structure of Property Entitlements and Obligations

Property (Law) as Deliberation. This paper attempted so far to map or reconstruct some of the normative language of property theory, revealing plural ideological roots of competing arguments. Expanding Hohfeld's scheme with a social dimension allows for a plural 'legal semantics' of basic property rights and duties, which might be used to explain different property institutions and to construct a normative framework for

[72] Purdy 2009

graded forms of property.[73] Within a deliberative 'political grammar' the conceptual use of any element within the bundle of rights or duties could be attributed to underlying justificatory reasons.



F8. Political Grammar of Property Law

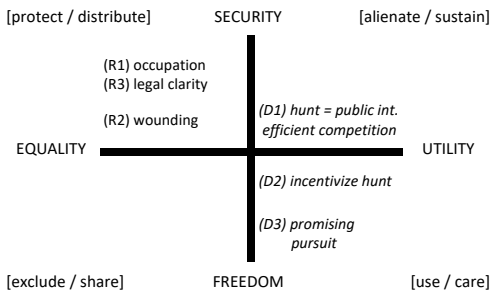
The structure thus allows for a transparent reconstruction of the infinite political battle on entitlements and boundaries of resource access and distribution within the deliberative practice of property law. The following last section of the paper tries to apply the grammar to the reconstruction of the arguments within some prominent US property cases.

[73] For a graded scale of common property forms with different bundles (‚owner', ‚proprietor', ‚claimant', ‚user') cf. Schlager & Ostrom 1992; 1996; Ostrom 1999

7 Applying the Grammar: Some Tentative US Case Studies[74]

a. Opposing Justifications of Property Acquisition (the Why-Question)

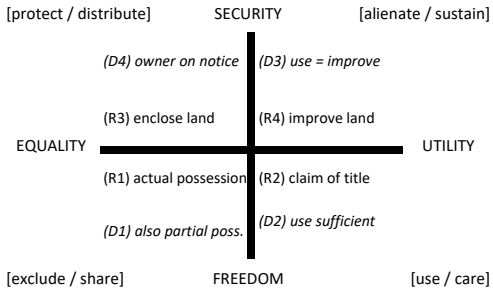
Pierson v Post (1805).[75] In this famous classic case Pierson killed a fox and took possession of it even though he did know that Post was hunting it already with his dogs. Pierson prevailed. The decision (Tompkins) is based on the rationale of a (R1) factual occupation by capturing the fox, which might be already fulfilled if (R2) the hunter mortally wounds it; and that mere pursuit is not sufficient (R3) for the sake of legal clarity and prevention of litigation. The dissent (Livingston) argued that foxes are a public nuisance and that it would be (D1) in the public interest to set up (D2) subjective incentives for hunting them. As Post's pursuit was (D3) promising it was sufficient to acquire title. The political controversy reveals between a more social security and egalitarian oriented occupation theory (R) and a libertarian-utilitarian labor theory of property (D).



F9. Political Grammar of Property Acquisition
[R = Rationale of Decision; D = Dissent]

b. Acquisition, Copyright and Opposing Justifications of Property (the What-Question)

Van Valkenburgh v Lutz (1952).[76] In this adverse possession case the Lutzes occupied a piece of a land later acquired by the Van Valkenburghs. The Lutzes used part of the land as garden to cultivate vegetables and mainly to store rubbish on it. When the Van Valkenburghs built a

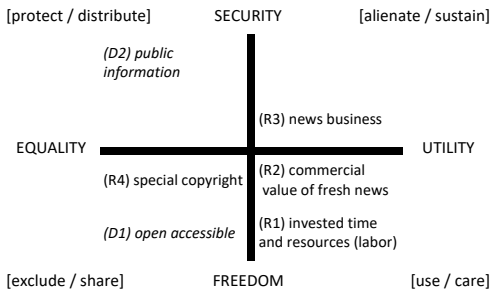


F10. Political Grammar of Adverse Possession
[R = Rationale of Decision; D = Dissent]

74 The discussion of US cases follows the casebooks of Dukeminier et al 2014 and Merrill & Smith 2007.
75 US Supreme Court, Pierson v Post, 3 Cai. R. 175, 2 Am.Dec. 264 (1805)
76 New York Court of Appeals, Van Valkenburgh v Lutz, 304 N.Y 95, 106 N.E.2d 28 (1952)

fence the Lutzes claimed a right of way across the land and prevailed before the court. Yet, in the actual case their claim for a factual ownership position from adverse possession was denied by the court. The decision (Dye) was framing the prerequisites of adverse possession as (R1) actual possession; and (R2) claim of title; and (R3) enclose land or (R4) improve land. All these elements were denied as the Lutzes used only part of the land, admitted that they were not owning it, did not enclose it and mainly stored rubbish on it. The dissenting opinion was arguing that (D1) land need not be completely occupied; (D2) intend to acquire and use the land as own is sufficient; (D3) the land was substantially improved by using it and most importantly (D4) that the behavior of the Lutzes was clearly enough to put the true owner on notice. The main line of political conflict here is between a rights-oriented (R) and a more duty-oriented (D) view of the property bundle. Duties may justify a new interpretation of what are sound legal positions (adverse possession).

International News v AP (1918).[77] In this classic intellectual property case Associated Press gathered news and made it available to all its member newspapers. International News copied news from one of the papers and published it. The decision approved copyright for the gathered news because (R1) Associated Press invested time and resources into the creation of that news collection. This resembles the general precondition of any copyright that the protected has to be a original creation (Feist v Rural Telephone 1991). Associated Press could, thus, prevent others from copying the news until (R2) the commercial value of the news have passed away. No news service could (R3) manage to stay in business without such a (R4) special copyright in fresh news. The original defendant International News had argued that once published, the news are (D1) open accessible as (D2) public information and there is no copyright



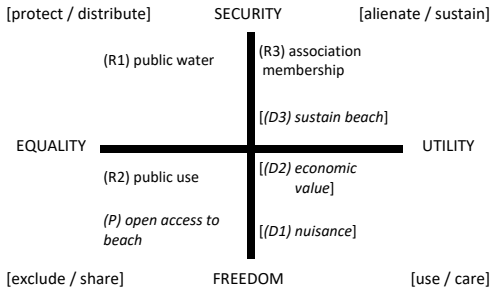
F10a. Political Grammar of Copyright Acquisition
[R = Rationale of Decision; D = Defendant]

[77] US Supreme Court, International News Service v Associated Press, 248 U.S. 215, 39 S.Ct. 68 (1918)

preventing anyone from using them. The case reveals the classic political controversy around intellectual property between the egalitarian demand for open access and public ownership of information and the economic counter argument that only intellectual private property with subjective copyrights would incentivize individuals to produce socially wanted creative content. The political 'why' predetermines the legal 'what' of (intellectual) property.

c. Servitudes and the Commons (the Who-Question)

[US] Matthews v Bay Head (1984).[78] The Bay Head Improvement Association controls and supervises all of the dry beach property including the streets to the beach in the Borough of Bay Head at the Atlantic Ocean during the summer. Use of the beach was restricted to its members which consist of and are limited to the property owners in the borough. The public advocate (P) who stepped in after the original plaintiff, claimed open access to the beach for the public. The court approved a right to access under the public trust doctrine. The rationale of the decision (Schreiber) was to grant (R1) access to public water; including some further (R2) public use of the dry sand area for public's reasonable enjoyment. Yet, the court did not follow the public advocate's claim for (P) an unrestricted general right of the public to open access to the beach. Instead, the court only hold that (R3) the membership of the association must be open to the public at large. [...] The discussion here touches upon the vibrant scholar debate on open commons[79] versus regulated commons[80]. [...] The defendant argued with a (D1) public nuisance of private property, (D2) the reduced economic



F10b. Political Grammar of Public Trust Servitude (Matthews)
[R = Rationale of Decision; P = Plaintiff; D = Defendant]

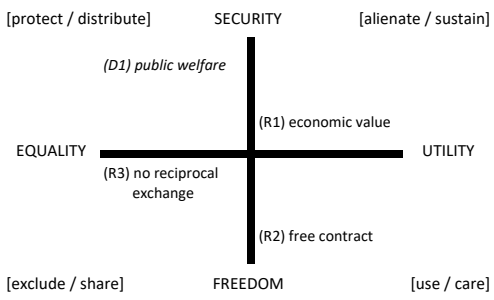
[78] New York Court of Appeals ?, Matthews v Bay Head Improvement Association, 471 A.2d 355 (N.J.), *cert. denied*, 469 U.S. 821 (1984)
[79] Benkler 2006; 2013
[80] Ostrom 1990; 2000; Schlager & Ostrom 1992

value in general and (D3) the rising costs for sustaining the property, e.g. keeping it clean or caring for anti-corrosion measures. [...]

d. Regulatory Taking, Fair Use and Social Obligations on Property (the How-Question)

[US] Euclid v Ambler (1926).[81] This unanimous decision affirmed a municipal zoning plan that restricted the size and use of buildings in various districts in the suburbs of Cleveland including the ban of commercial or industrial use which was intended by the Ambler Realty company. The rationale read zoning as a valid exercise of police power for the sake of public health, safety, morals and general welfare, therefore not violating property rights. [...]

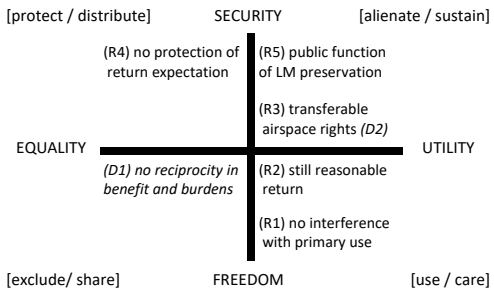
[US] Pennsylvania Coal v Mahon (1922).[82] In that landmark case of regulatory taking, the coal mining company sold in 1878 surface rights of land to Mahon but retained the right to mine underneath. A regulatory act in 1921 prohibited any mining that would endanger any structure used for human habitation. Mahon who lived on the land claimed for a prohibitive injunction. The decision (Holmes) considers the regulation as a uncompensated taking and denies an injunction out of the following reasons: (R1) it would diminish the economic value of the property (i.e. the mining rights); (R2) undermine the valid contract with Mahon who waived therein arbitrarily any rights for damages, which (R3) shows that there would be no reciprocity of advantage as Mahon paid only for a risky piece of land. The dissent (Brandeis) argues that property rights are never absolute especially when their use (D1) threatens public welfare, i.e. public health, safety or morals. [...]



F11. Political Grammar of Regulatory Taking (Pennsylvania Coal)
[R = Rationale of Decision; D = Dissent]

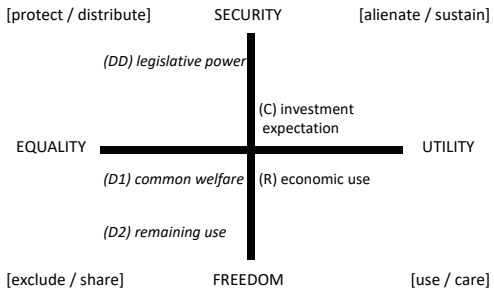
[81] US Supreme Court, Village of Euclid v Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114 (1926)
[82] US Supreme Court, Pennsylvania Coal Co. v Mahon, 260 U.S. 393, 43 S.Ct. 158 (1922)

[US] Penn Central v NY (1978).[83] In that next regulatory taking case the transportation company planned to construct an office building over Grand Central Terminal that falls under Landmarks Preservation Law of New York City. The landmark commission refused both submitted plans as 'an aesthetic joke' in the given architectural environment. The decision denied a taking (Brennan) because (R1) the regulation does not interfere with the primary use of the property; (R2) the owner still obtains a 'reasonable return' on its investment; (R3) he could have transferred the airspace rights to nearby properties; (R4) there is no general protection of the expectation to enhance future returns that could balance the (R5) public function of the preservation of landmarks. The dissent (Rehnquist) criticizes that unlike typical zoning restrictions (D1) there is no reciprocity in benefits and burdens within the landmark law, although (D2) the transferable development rights might be sufficient compensation for a taking. [...]



F12. Political Grammar of Regulatory Taking (Penn Central)
[R = Rationale of Decision; D = Dissent]

[US] Lucas v South Carolina (1992).[84] In that last US regulatory taking case, Lucas claimed that a coastal zone management act of South Carolina barred him from building on his barrier island property. The decision (Scalia) approved a taking without just compensation because the regulation (R) deprives the owner of all economically valuable use of its property; the prevention of public harm often results in public benefit, which has to be compensated. A concurrence (Kennedy) argues (C) that the reasonable investment-backed expectations of the owner had been violated. To the contrary, the dissent (Blackmun) denies a taking



F13. Political Grammar of Regulatory Taking (Lucas)
[R = Rationale; C = Concurrence; D = Dissent; DD = 2nd Dissent]

83 US Supreme Court, Penn Central Transport. Co. v New York City, 438 U.S. 104, 98 S.Ct. 2646 (1978)
84 US Supreme Court, Lucas v South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886 (1992)

because the coastal regulation was (D1) protecting the common welfare and (D2) the owner still retains his regular using rights of the land like swimming and camping. Another dissent (Stevens) underlined that an arbitrarily broad taking rule would (DD) deprive legislature from the power to revise and develop law. The arguments reveal a full spectrum of economic libertarian (R), economic conservative (C), liberal (D) and socialist (DD) normative background positions.

8 Conclusion

Within a 'democratic model of property law'[85] there is no single value which determines the interpretation of property rights or obligations. Foundational values become relative reasons which compete on guiding the legal interpretation of property law. A 'deliberative rationality'[86] allows to understand law as procedural framework for the exchange of competing reasons. A deliberative account of property law reconstructs judicial decisions as balancing procedures between conflicting legal principles or reasons of property law. Legislative and jurisprudential rules structure the legal argumentation as an ongoing democratic process of property law deliberation. Understanding property as a legal construction, property itself thus becomes a deliberative form as 'discursive property'.

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[85] For another model with the same goal cf. Singer 2009
[86] Benhabib 1996

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