Correlated ownership: Polanyi, Commons, and the property continuum

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Abstract

According to the economic analysis of law, an efficient property regime is premised on the universality, the exclusivity, and the transferability of property rights. Ideally then, every (legal) person can enjoy the status of an owner and any (economic) resource can become private property; ownership titles could be bought and sold across national jurisdictions and would ultimately be respected everywhere in the world. Throughout history, property regimes indeed seem to have moved towards this ideal. However, this conception of private property is far less natural than it seems, and not without problems. Instead, the institution of property rights is inherently connected with the development of capitalist society, and it reflects the latter’s underlying tensions. The starting point for a sociological account of property rights is to conceive them as a social relation, or a relation of power, which includes (other) owners and non-owners as well as the state as a ‘third party’. In this chapter, the authors build on the work of Karl Polanyi and John R. Commons to suggest that the property regime of the market society relies both on the reification of property (identifying it with the thing owned) and the commodification of the right of ownership (turning it into a marketable commodity). Looking back, the authors retrace how the concept of property changed with the
advent of modern capitalism, and how it evolved in the transition from agricultural to industrial capitalism. Looking into the future, they also address the challenges of today’s informational capitalism, which is characterized by the commodification of knowledge. Based on James’s work, the authors introduce the ‘correlative rights doctrine’ as an alternative to the remnant ‘property rights absolutism’ in the field of intellectual property law, but also beyond. With cross-border conflicts in who owns what having proliferated in the global age, investigations into the relational quality of property rights also matter for international lawyers, who are confronted with new subjects and objects of property, from international investment law to intellectual property law.

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PREFACE: WHY BOTHER WITH PROPERTY RELATIONS?

Why should international lawyers be interested in the sociology of property rights? It is usually taken for granted that property rights arise from municipal law and that international public law plays only a marginal role in regulating them (while international private law mediates between different property regimes). The idea that there is an ‘international law of property’ may thus first seem to be a contradiction in terms. However, this is only the case in a classical understanding of international law, which is based on the doctrinal distinction between public and private law, national and international law. The conceptual starting point can be found in the Westphalian notion of sovereignty, or ‘the axiom that a state has sovereignty over its territory’. What follows from this is that ‘each state has the right to adopt laws governing how private actors utilize that territory’, that is, what forms of property they can acquire, with land being the prototypical object of property. Control of territory and control of property thus have the same ideological roots. In nineteenth-century legal positivism, public international law eventually came to be defined in ‘loose analogy to the private law of contract’, which means that the relations between sovereign states were conceived in similar terms as the relations between private actors – or property owners, for that matter. In contrast, the natural-law idea of property rights has always had universalist underpinnings. According to this line of thinking, property rights exist independent from states but rely on states for enforcement. In this sense, ‘the state was created to protect pre-existing property rights’.

The controversy between naturalism and positivism on the origins of property rights and their relevance for international law has given way to what one could term a more functionalist vision of international relations, which pays heed to the effects of capitalist expansion and economic globalization. If there is a universal idea of property rights today, this also reflects the coming-into-being of a global society of property owners, whose activities in trade and investment are shaped by international economic law. The formal understanding of (public)

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2 Ibid, at 5.
3 Ibid.
5 Sprankling, International Law of Property (n 1 above), at 6.
international law as ‘the law governing relations among states’ is increasingly being superseded by a functional understanding of international (economic) law as ‘the law, of whatever origin, which governs international economic transactions’. Today, international law is no longer addressed to states only, and private actors are increasingly regarded as legal subjects who can assert their rights without mediation by states. Concomitantly, we can speak of ‘the doctrinal disestablishment of sovereignty and blurring of the boundaries between public and private or international and municipal law’.

The last forty years witnessed the rise of the international law of property, which ‘(1) creates property rights; (2) protects property rights stemming from municipal laws; (3) coordinates property rights arising under municipal law; (4) restricts property rights authorized under municipal law; and (5) prohibits the creation of property rights under municipal law’. International property law extends from the property-related aspects of human rights law to international investment law, from the law of the global commons to international intellectual property law. It encompasses property rights to immovable as well as movable, tangible as well as intangible ‘things’. Conceptually speaking, international property law has the same pedigree as its national-law constituents or derivatives. Not surprisingly then, its notion of property ‘is most commonly equated with the complete ownership of a particular thing – a comprehensive set of rights over the thing, including the rights to use, destroy, and transfer it and to exclude others from it’.

Going beyond the confines of international property law, our aim in this chapter is to unpack the conventional notion of property rights, which starts from absolute rights of the owner, just as state sovereignty was once considered absolute. Our argument is that if we speak of a universal right of property today, it can no longer rest on such absolutist foundations. Just as the post-Westphalian world is, or should be, characterized by limited sovereignty and a balance of rights and responsibilities between states, we have to conceive of property rights as limited, or correlated, between owners. Arguably, this reinterpretation of property rights

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7 Kennedy, ‘International Law in the Nineteenth Century’ (n 4 above), at 388.
8 Sprankling, International Law of Property (n 1 above), at 14.
9 Ibid, at 41.
10 Ibid, at 28.
11 Ibid, at 27.
matters for national as much as for transnational or international legal relations involving claims, or disputes, of ownership.

INTRODUCTION: ADVANCING POLANYI AND COMMONS

Karl Polanyi’s *The Great Transformation*\(^{12}\) begins with a section on ‘the international system’, which lists the key institutions of the political-economic order of the nineteenth century: the ‘international gold standard’, the ‘balance-of-power system’, the ‘self-regulating market’, and the ‘liberal state’.\(^{13}\) Studying the foundations of the modern market society, Polanyi naturally engaged with international law. One may even identify in his work the ingredients of a ‘sociology of international economic law’,\(^{14}\) which centres around the ‘fictitious commodities’ of ‘land’, ‘labour’, and ‘money’.\(^{15}\) Given the intertwining of public and private law, national and international law in regulating, or deregulating, the market, it seems adequate to extend the focus to ‘transnational economic law’, which defines the law of the market society not by its legal form but its economic function.\(^{16}\) Either way, many scholars interested in the legal framework of the reinvigorated market society of today draw inspiration from Polanyi’s work.\(^{17}\)

Polanyi started his career as a doctor of law, but gained his reputation as an economic historian, economic sociologist, or economic anthropologist. Within the interdisciplinary field of socio-economics and the sociological sub-discipline of economic sociology, *The Great Transformation* is rightfully regarded as a classic, which introduces and substantiates

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\(^{13}\) Ibid, ch. 1.


\(^{15}\) Polanyi, *Great Transformation* (n 12 above), ch. 6.


\(^{17}\) See, for example, Christian Joerges and Josef Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Hart Publishing 2011); Amanda Perry-Kessaris (ed.), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Routledge 2012); Bettina Lange and Dania Thomas (eds), *From Economy to Society? Perspectives on Transnational Risk Regulation* (Emerald 2013).
the ‘embeddedness paradigm’. The idea that market exchange is (positively speaking) or should be (normatively speaking) ‘embedded’ in social relations can be seen as the lowest common denominator of economic sociology, whereas the neoclassical mainstream of the economic discipline is characterized by a ‘disembedded’ view of the market. And yet, the role of the law in ‘embedding’ or ‘disembedding’ market exchange did not receive much attention in contemporary economic sociology until, more recently, a call was made to develop an ‘economic sociology of law’. This resonates with efforts in the field of ‘law and society’ research, which coalesces around a socially embedded conception of law, to further ‘a sociological approach to the interplay of law and the economy’. The enterprise to advance the ‘economic sociology of law’ can build on the work of the classic sociologists, who were still concerned with the interaction of law, economy, and society in the formation and transformation of modern capitalism. This integrative perspective, which was shared by historical-holistic scholarship in economics as well as jurisprudence, disappeared from view in the increasing interdisciplinary division of labour in the social sciences, and in the intra-disciplinary specialization of the sociological discipline. At the same time, the initiative to bring the law back into sociological and socio-economic thinking can also be understood as a response to the recent boom of ‘law and economics’ as well as ‘new institutional economics’ within the economics discipline. In these distinctive

but intersecting areas of scholarship, the role of law is no longer taken for granted, as has long been the case in the neoclassical mainstream. Instead, what is studied are which differential effects public and private (legal) ordering or formal and informal (legal) institutions may have on economic performance.

Taking a ‘Polanyi-inspired’ approach to property relations in the market society, this chapter continues earlier work outlining a ‘Polanyian’ economic sociology of law. Even though property was not an explicit focus of Polanyi’s institutional analysis, his interest in the commodification of land, labour, and money implies a deep concern with the capitalist overhaul of property relations. In modern capitalism, market exchange, which is premised on the individual assignment and alienability of property rights, has become a major principle of social organization. Moreover, one of the three fictitious commodities that Polanyi highlighted – ‘land’, which is the result of the commodification of nature – is commonly seen as the prototype of property. Historically, the expansion of agricultural and industrial capitalism entailed the ‘commercialization of the soil’ not only in the Western European countries, which were the pacemakers of capitalist development, but also in their colonies elsewhere in the world, whose natural resources were appropriated as well. According to Polanyi, the ‘mobilization’ of land and its produce was required to fit them ‘into the scheme of a self-regulating world market’, which underlies our ideas of free trade and the international division of labour.

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28 Polanyi, *Great Transformation* (n 12 above), at 179.
29 Ibid.
However, Polanyi’s work is not the only source of inspiration for this chapter. As pertinent to an understanding of the configuration of property relations in the market society is the work of John Roger Commons, which forms part of the ‘first wave of law and economics’. This antedates the neoclassical and neo-institutional ‘law and economics’ movement, which dominates the contemporary ‘economics of property rights’. The first wave of law and economics involved various strands of scholarship within the economic discipline, which are considered ‘heterodox’ from the perspective of modern standard economics, including the (German) Historical School and what is now referred to as Old (American) Institutionalism. The proponents of this older ‘law and economics’ movement shared with the classic sociologists an interest in historical-comparative scholarship, which took shape in the question ‘how property and other rights were determined, historically and functionally, across different societies’. Commons’s *The Legal Foundations of Capitalism* is a case in point. Focusing on ‘federal court decisions before and during the industrial period’, it documents a change in the ‘legal understanding of property and property rights’ in US-American jurisprudence in the second half of the nineteenth century.

The third major element of this chapter comes from the doctoral thesis Rick James wrote when searching for a solution to the modern problems in intellectual property law. As part of that exercise, he created a property continuum which describes the evolution of property rights in all properties. The intent was to show that the absolute property rights found in intellectual property law were merely one form of property rights which had existed over the expanse of human history. He uses this continuum as support for his argument that, because the modern concept of universal property rights still rests on an antiquated understanding of absolute rights, this hampers an equitable distribution of benefits in highly differentiated, or integrated, relations of production. James’s property continuum is used here to advance the respective views of Polanyi and Commons regarding the contingency of property rights.

30 Mackaay ‘History of Law and Economics’ (n 22 above), at 69.
31 Ibid.
By linking the works of Polanyi and Commons and taking their arguments one step further, this chapter demonstrates that the ‘old’ economic sociology and the ‘old’ institutional economics indeed had much in common, since scholars in both fields were interested in the institutional, or constitutional, premises of the modern market society. In contrast, in much of the ‘new’ economic sociology and the ‘new’ institutional economics, these premises are taken as given, and institutional analysis is confined to within variety in a capitalist setting. In this sense, the difference between ‘old’ and ‘new’ approaches is bigger than the difference between ‘economic’ and ‘sociological’ approaches that share the same, or a very similar, research paradigm. Be this as it may, this chapter takes a relational approach to property, with property rights not being confined to the ‘relation between an individual and a good’ but extending to ‘social relations between individuals’, owners as well as non-owners.35 Moreover, given the legal nature and enforceability of property rights, they also include relations ‘between individuals and the state’.36 This perspective is applied to the expansion of private property rights into spheres of nature and knowledge which have so far escaped commodification, or what can be referred to as the ‘new enclosures’.

Following this introduction, the argument proceeds in six steps. In the first step, we explore the classical beginnings of a sociological approach to property, which does not conceive of property as a thing or a right but as a social relation. The second section turns to Polanyi’s account of the first enclosure movement and the commodification of nature, or the proliferation of private property in land. The third section deals with Commons’s account of the evolution of the concept of property in the industrial age: from focusing on the use-value of physical objects to emphasizing the exchange-value of marketable assets. In the fourth step, which largely draws on James’s work, today’s regime of universal property rights is presented as an evolutionary stage in the history of property regimes, which has not come to an end yet. In the fifth step, the different historical accounts by Polanyi, Commons, and James are connected, suggesting that the property regime of market society consists both of the reification of property, identifying it with a thing, and the commodification of the right of ownership. The sixth section asks what type of property relations the knowledge-based economy of today takes to the fore, and what conceptual adaptations this may entail, again

36 Ibid.
drawing on James’s dissertation. The final section concludes with the suggestion that a suitable response to property rights absolutism is not to abolish private property altogether, but to further develop the relational quality of property rights.

CLASSICS: CONCEIVING PROPERTY AS SOCIAL RELATION

Is property a right or a thing? Lawyers may easily concur in that it is a right, or a bundle of rights. For economists it has not always been that clear. It was long held that the land owned or the commodities exchanged on the market were property. And even in today’s economics of property rights, a sharp distinction between property as the legal right of ownership and possession as the actual control over things seems to be missing. And sociologists? They may beg to differ from both lawyers and economists and emphasize that property is a relation and, eventually, a relation of power. However, in the works of the classic sociologists, who were naturally influenced by the economic and legal discourses of their time, property relations were not yet explored in full. Traces of a one-sided understanding of property as a relation between thing and person, to the exclusion of all others, can still be found both in Durkheim’s and Weber’s work.

Writing in the late nineteenth century, Durkheim identifies law as an indicator of social solidarity, with ‘restitutory’ and ‘repressive’ law suggesting different forms of social integration. Whereas repressive law, which is characterized by punitive sanctions, was more typical for traditional societies, and can still be found in criminal law, the prevalent type of law in modern societies is restitutory in orientation. This is clearly the case for the law ordering the market economy, whose rationale is to restore rightful relations, such as by claiming damages for breaches of contract. Property law certainly forms part of modern ‘economic law’, but Durkheim distinguishes it from other areas of private law, such as ‘contractual law’ and ‘commercial law’, not to mention public law, including ‘procedural law, administrative and constitutional law’. What makes property law special, in Durkheim’s perspective, is that it is about the ‘negative relationship … which joins a thing to

37 Hodgson, ‘Economics of Property Rights’ (n 35 above).
38 Emile Durkheim, The Division of Labour in Society (Macmillan 1984 [1893]).
39 Ibid, at 77.
a person
d whereas (all) other fields of law would concern relations between persons.

Accordingly, ‘[t]he relationships that are regulated by these [other] laws … express a positive contribution, a co-operation deriving essentially from the division of labour’.\footnote{Ibid, at 72.} In other words, they further the integration of modern societies, which are highly differentiated in nature, by balancing the rights and duties of the different parties to a relationship.

Writing in the early twentieth century, Weber distinguishes between ‘open’ and ‘closed’ relationships and introduces property relations as a special case of the latter, which would exclude ‘outsiders’.\footnote{Max Weber, 
\textit{Economy and Society: An Outline of Interpretive Sociology} (University of California Press 1978 [1922]), at 43.} Put differently, closed relationships are characterized by ‘monopolized advantages’, which may be allocated or distributed in different ways in a group of ‘insiders’.\footnote{Ibid, at 44.} However, in the case of ‘[a]ppropriated advantages’, everybody else is excluded but the owner, who enjoys ‘[property] “rights”’.\footnote{Ibid.} This is what private property is about. Accordingly, ‘the individual may enjoy his rights on a purely personal basis’ as well as bequeath them to his heirs.\footnote{Ibid.} Moreover, depending on the property regime in place, ‘it may be that the [rights-]holder is more or less fully empowered to alienate his rights by voluntary agreement’,\footnote{Ibid.} such as by selling them to somebody else. Including this aspect of alienability, Weber speaks of ‘“free” property’,\footnote{Ibid.} which obviously plays a central role in the market economy. In the context of production, appropriated advantages include ‘the opportunities of disposing of, and obtaining a return from, human labor services …, the material means of production; and the opportunities for profit from managerial functions’.\footnote{Ibid, at 126; references omitted.} This suggests that not only the ‘physical’ production factors of land and capital can be considered objects of property but also the ‘opportunities for profit’ derived from management and labour.\footnote{Cf. John Roger Commons, 
\textit{Institutional Economics: Its Place in Political Economy} (University of Wisconsin Press 1959 [1934]), at 251.}
Historically, the debate about property rights can be structured around two poles: the natural rights school and the conventional school. The natural rights school argues that private property is natural, fair, and efficient. Accordingly, private property corresponds to the ‘original state of humans’ or is at least considered to be ‘more consistent with human nature’ than common property.\(^50\) For the conventional school, private property is not natural but conventional, and it is held that common property was the historical ‘norm’.\(^51\) The idea that private property is not given but may become ‘naturalized’ in social discourse and practices obviously forms part of conventionalist thinking, which today can also be labelled ‘constructivist’. This perspective can be condensed as follows: ‘The meaning of property is not constant. The actual institution, and the way people see it, and hence the meaning they give to the word, all change over time.’\(^52\) Moreover, the ‘basic question’ of who owns what, which purportedly ‘existed throughout human history’,\(^53\) is premised on an answer to the even more fundamental questions of who can own and what can be owned in the first place; that is, the definition of legitimate ‘subjects’ and ‘objects’ of property.\(^54\) Finally, even the distinction between subjects and objects of property is nothing fixed. In reality, certain objects of property (slaves, spouses, animals, companies) could also become legal subjects and, thus, right-holders and potential owners by themselves.

Within Marxist scholarship, it has long been emphasized that ‘[c]apitalist society is above all a society of commodity owners’, of which the concepts of private property, contract of will, and legal personhood are regarded as constitutive.\(^55\) According to this line of thinking, the concept of ownership is inherently connected with the institution of the market: ‘only the development of the market initially makes possible and necessary the transformation of man,

\(^{51}\) Ibid, at 11.
who appropriates objects by means of labour (or theft), into a legal owner’. The relation between thing and person is not interpreted in ‘naturalist’ ways, say, of man controlling a piece of land and his belongings, but in ‘constructivist’ terms. In fact, thing and person are regarded as mutually constituted entities that owe their ‘existence’ to the concepts of private property and legal personhood, which both arise from the capitalist principle of market exchange. The emphasis of this approach is not so much on the relation between thing and person than on how the ‘relation of objects, commodities’, exchanged on the market, is reflected in ‘will relationships of individuals independent and equal to one another – legal subjects’. Against this backdrop, the task for a sociology of property rights is to understand property not in ‘absolutist’ terms but to emphasize its ‘relational’ qualities in a network of social, or capitalist, relations. Characteristically, these relations involve the exchange of commodities and, concomitantly, the transfer of ownership, but also the coordination of different property claims.

POLANYI’S COMMONS: THE COMMODIFICATION OF NATURE

Polanyi’s *The Great Transformation* includes an assessment of the English ‘enclosure movement’, which turned common land into private property. Whereas the overall process ‘started in the fifteenth century and went on … until the nineteenth century’, Polanyi first deals with the enclosures between the late fifteenth and seventeenth century only, which preceded, and literally prepared the ground for, the Industrial Revolution. In the chapter entitled ‘Habitation versus Improvement’, which alludes to the political rhetoric of the time, he characterizes the enclosures as furthering ‘economic progress … at the price of social dislocation’. Moreover, he replicates the assessment that this ultimately was ‘a revolution of the rich against the poor’. In line with critical scholarship before and after him, Polanyi

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56 Ibid, at 84.
57 Ibid, at 79.
59 Polanyi, *Great Transformation* (n 12 above), ch. 3.
60 Ibid, at 34.
61 Ibid, at 35.
points out that the appropriation of the commons was premised on the negation of customary rights. This is evident in the following passage:

The lords and nobles were upsetting the social order, breaking down ancient law and custom, sometimes by means of violence, often by pressure and intimidation. They were literally robbing the poor of their share in the common, tearing down the houses which, by the hitherto unbreakable force of custom, the poor had long regarded as theirs and their heirs.63

Regarding the trade-off between ‘habitation’ and ‘improvement’, Polanyi’s argument is not that economic progress, which was meant to be facilitated by the enclosures, could never compensate for the social dislocation which they eventually entailed, but that ‘[t]he time-rate of change compared with the time-rate of adjustment will decide what is to be regarded as the net effect of the change’.64 Along these lines, he suggests that the enclosure movement in pre-industrial England turned out to be ‘less devastating’65 than it possibly could have been, given that ‘the Tudors and the early Stuarts used the power of the Crown to slow down the process of economic improvement until it became socially bearable’.66 Put differently, even if legislation did not really manage to keep the enclosures in check, at least it did not accelerate them. This was already Marx’s point, who noted that, at first, ‘the process [of turning arable into pasture land] was carried on by means of individual acts of violence against which legislation … fought in vain’ whereas ‘[t]he advance made by the 18th century shows itself in this, that the law itself becomes now the instrument of the theft of the people’s land’.67

Polanyi returns to this matter in a later chapter, which is entitled ‘Market and Nature’68 and which elaborates on ‘land’ as a fictitious commodity, next to ‘labour’69 and ‘money’.70

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63 Polanyi, *Great Transformation* (n 12 above), at 35.
64 Ibid, at 38.
65 Ibid.
66 Ibid, at 34.
68 Polanyi, *Great Transformation* (n 12 above), ch. 15.
70 Ibid, ch. 16.
concept of fictitious commodities is formulated against the backdrop of a ‘substantivist’ approach which emphasizes the close interrelation of man and nature in traditional societies. However, the idea of an intact social metabolism does not have to reflect a historical, or premodern, condition only, and it can also be found in contemporary, or postmodern, concepts of sustainable development. Moreover, it also informs the original understanding of the embeddedness paradigm, even though the latter can be given a more ‘constructivist’ reading as well.\footnote{Frerichs, ‘Re-embedding Neo-liberal Constitutionalism’ (n 26 above).} For Polanyi, the defining feature of fictitious commodities is that they are traded on the market but have not been produced for the market in the first place. Instead, ‘[l]abor is only another name for a human activity which goes with life itself’, ‘land is only another name for nature, which is not produced by man’, and ‘actual money … is merely a token of purchasing power which … comes into being through the mechanism of banking or state finance’\footnote{Polanyi, Great Transformation (n 12 above), at 72.}.\footnote{Frerichs, ‘From Credit to Crisis’ (n 26 above).} Whereas the true substance of money is harder to define,\footnote{Frerichs, ‘From Credit to Crisis’ (n 26 above).} labour and land are, in the uncommodified state, ‘no other than the human beings themselves of which every society consists and the natural surroundings in which it exists’, and ‘[t]o include them in the market mechanism means to subordinate the substance of society itself to the laws of the market’.\footnote{Polanyi, Great Transformation (n 12 above), at 71.}

In the case of land, the commodification process can now be identified with the enclosure movement as a whole, including its continuation, with the sanction of the British Parliament, in the eighteenth century, which was a premise for accomplishing the ‘industrial-agricultural division of labor’ of today, ‘first on a national, then on a world scale’.\footnote{Ibid, at 181.} Polanyi describes the overall process as consisting of three stages: abolishment of feudal structures preventing the commercialization of land; increase in the productivity of the land to feed a rapidly increasing urban population; and ‘the extension of such a system of surplus production to overseas and colonial territories’.\footnote{Ibid, at 179.} As to the latter step, he adds that ‘[t]o effect this change
was the true meaning of free trade’,77 which hints at the role of international economic law, or of the law of a market society going global.

From a neo-Polanyian point of view, the enclosure movement is far from over. Instead of understanding enclosure ‘as a periodizing concept set prior to the ascent of capitalist property relations’ only, it can also be considered ‘as an ongoing process that in different capacities and forms preceded, initiated and continues to accompany ongoing capital accumulation’.78 Along these lines, social scientists have come to apply ‘the lens of enclosure’79 to phenomena that go far beyond the commercialization of the soil as such. While some scholars have preserved a substantivist approach and now speak, in more general terms, of the commodification of natural resources, which ‘extend beyond land to water bodies, subsurface minerals, wildlife habitats, genetic substances, carbon sequestration zones, and seascapes’,80 others have turned to the commodification of intellectual resources, or knowledge,81 or what Boyle refers to as ‘the enclosure of the intangible commons of the mind’.82 Arguably, then, there is a new dimension to the enclosure process, or a shift of emphasis from real property to intellectual property. This change in the subject of enclosure is obviously premised on a change in the concept of property itself: from more concrete to more abstract notions of what can be ‘enclosed’, or from a more substantivist to a more constructivist understanding. This is where Commons comes in.

COMMONS’S PROPERTY: THE TURN TO THE EXCHANGE-VALUE

77 Ibid, at 181.
80 Ibid.
82 Boyle, ‘Second Enclosure Movement’ (n 58 above), at 37.
As a representative of the earlier ‘law and economics’ movement, ‘Commons probably did more than anyone else to establish the importance of legal matters for economics’,\(^8\) with two of his books ‘now serv[ing] as a benchmark for institutional law and economics’:\(^8\) *The Legal Foundations of Capitalism*,\(^8\) which was already mentioned above, and *Institutional Economics*,\(^8\) an outline of what is now dubbed ‘old institutionalism’. For Commons, legal institutions were crucial for an understanding of capitalist development. In his writings, he was able to draw on insights gained by ‘his … involvement with the courts, his service on government commissions and his drafting of legislation’ in the US-American legal system.\(^8\)

In *The Legal Foundations of Capitalism*, Commons retraces the evolution of the concept of (private) property in the case law of American federal courts in the late nineteenth and early twentieth century. His study exposes the historical contingency of property law as ‘man-made law’ as opposed to the timeless quality of ‘natural law’.\(^8\)

Characteristic of the first wave of law and economics, Commons was as much interested in ‘how economy influences law’ as in ‘how law influences the economy’,\(^8\) that is, how the development of economic structures and the development of legal concepts go hand in hand.

What the US case law in the period under scrutiny reveals is that the concept of property changed from a preoccupation with the ‘use-value’ of things to emphasizing its ‘exchange-value’.\(^8\) Whereas in an earlier stage of capitalist development, the concept of property was confined to absolute control over things, in the later stage it came to include more abstract privileges, or opportunities for profit. Accordingly, the Supreme Court had first held that the Fourteenth Amendment of the US Constitution protected only the exclusive use of physical property by its owner.\(^8\) This ‘primitive definition of property as the mere holding of physical objects for one’s own use and enjoyment’\(^9\) was still the majority position in court cases


\(^8\) Medema et al., ‘Institutional Law and Economics’ (n 24 above), at 427.

\(^8\) Commons, *Legal Foundations of Capitalism* (n 32 above).

\(^8\) Commons, *Institutional Economics* (n 49 above).

\(^8\) Medema et al., ‘Institutional Law and Economics’ (n 24 above), at 428–9.

\(^8\) McCally, ‘Free Labor Revised’ (n 33 above), at 16.

\(^8\) Medema et al., ‘Institutional Law and Economics’ (n 24 above), at 429.

\(^8\) Commons, *Legal Foundations of Capitalism* (n 32 above), ch. 2.

\(^9\) Ibid, at 12.

\(^9\) Ibid, at 15.
decided in the early 1870s, although some justices were already dissenting. In 1890, then, it was acknowledged by the majority of the court that property may not only rest in the monopolization of the use-value of concrete, physical things, but also in the ‘propertization’ of the exchange-value of potentially more abstract things. In 1897, the court ruled that ‘selling property is an essential part of liberty and property as guaranteed by the Fourteenth Amendment’, and thus made more explicit that the exchange-value is linked to market access.\textsuperscript{93} Indeed, a constitutive feature of modern capitalism seems to be that all things or rights owned are ultimately tradeable: they can be transferred for a market price.

To illustrate the different dimensions of property, Commons distinguishes between corporeal and incorporeal property as well as intangible property. Whereas incorporeal property consists of ‘debts, credits, bonds, mortgages, in short, of promises to pay’, intangible property may consist of the ‘exchange-value of anything whether corporeal property or incorporeal property or even intangible property’\textsuperscript{94} or, in short, of ‘opportunities for profit’.\textsuperscript{95} Commons points out that ‘anything’ can have an exchange-value, ‘whether it be one’s reputation, one’s horse, house or land, one’s ability to work, one’s goodwill, patent right, good credit, stocks, bonds or bank deposit’.\textsuperscript{96} In turn, the exchange-value of property includes ‘anything that enables one to obtain from others an income in the process of buying and selling, borrowing and lending, hiring and hiring out, renting and leasing, in any of the transactions of modern business’.\textsuperscript{97} Put differently, it consists in the ‘earning potential’ of any form of property in any form of market exchange. Hence, whereas the ‘primitive’ concept of property focused on physical things and their more or less concrete uses, the more ‘sophisticated’ concept of property at the turn of the twentieth century includes all kinds of ‘marketable assets’, even the most intangible ones.\textsuperscript{98} These alternative understandings are also contrasted as the traditional ‘common-law meaning’ and the modern ‘business-law

\textsuperscript{93} Ibid, at 17.
\textsuperscript{94} Ibid, at 19 [sic]; cf. ibid at 157-159.
\textsuperscript{95} Commons, \textit{Institutional Economics} (n 49 above), at 251.
\textsuperscript{96} Commons, \textit{Legal Foundations of Capitalism} (n 32 above), at 17.
\textsuperscript{97} Ibid.
\textsuperscript{98} Ibid, at 18.
meaning’ of property. It is the latter which better reflects the advances of industrial capitalism.

The legal cases analysed by Commons concern the question to what extent state regulation may interfere with constitutionally protected individual rights. This is also the setting of the famous *Lochner* case of 1905, in which it was held that a state law limiting the working hours of employees in the baking industry would violate the freedom of contract. For Commons, the related line of cases raises the issue of economic power, or the relative bargaining power of the parties of a contract, which is determined by the market price. He argues that state laws, such as ‘[p]ublic-utility laws, usury laws, labor laws’, some of which have been declared unconstitutional by the courts, were ‘designed … to curb the bargaining-power of property where it seems to be excessive’. For him, there is thus a legitimate public interest in controlling the economic power derived from property. With the ‘propertization’ of the exchange-value, the economic lever of property owners has arguably increased.

Commons’s interest in the unequal bargaining power on the market can only be understood if property rights are conceived in strictly relational terms. The starting point is a conception of capitalism as a form of social organization, which consists in ‘production for the use of others and acquisition for the use of self’. In other words, economic survival is premised on market exchange, or what Commons refers to as ‘transactions’. Under these conditions, property can no longer be perceived as absolute control but has to be understood as relation of power: ‘the power of property [is] the economic power to withhold from others what belongs to self but is needed by others’. It is against this backdrop that the transition from use-value to exchange-value in the understanding of property rights can also be understood as ‘a change from a concept of holding things for one’s own use to withholding things from others’ use’. Thus, a constitution that protects private property and the freedom of contract

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100 For a reference to the *Lochner* case, see ibid, at 63, fn. 19. On the ‘wage-bargain’, more generally, see ibid, ch. 8, and on the emerging ‘common law of labor’, in particular, see ibid, at 311-2.
101 Ibid, at 29.
102 Ibid, at 33.
103 Ibid, at 21.
104 Ibid., ch. 4.
105 Ibid, at 32.
106 Ibid, at 52; original emphasis.
automatically also sanctions the use, or abuse, of economic power based on these principles. Applying this conceptual framework to the *Lochner* case, the core issue was ‘the power of property over employees’,\(^\text{107}\) which mirrors Polanyi’s concern with the commodification of labour. Whereas neoclassical economics works against the background assumption of a liberal state that protects private property rights, without analysing it any further,\(^\text{108}\) old institutional economics considers the state a ‘third party’ that can never be neutral, as by defining rights it either privileges one side or the other.\(^\text{109}\) In short, the bargaining power on the market is shaped by the legal framework.

**A HISTORY OF THE PRESENT: THE PROPERTY CONTINUUM**

According to the ‘economic analysis of law’, which forms the mainstream of contemporary ‘law and economics’, an efficient property regime is characterized by the ‘universality’, the ‘exclusivity’, and the ‘transferability’ of property rights:

If every valuable (meaning scarce as well as desired) resource were owned by someone (universality), if ownership connoted the unqualified power to exclude everybody else from using the resource (exclusivity) as well as to use it oneself, and if ownership rights were freely transferable, or as lawyers say alienable (transferability), value would be maximized.\(^\text{110}\)

Strictly speaking, this is neither an empirical account of how property rights are organized, nor a normative claim as to how they should be organized, but a conditional statement that reflects the restrictive assumptions of neoclassical economic theory about rational action and efficient markets. On the other hand, property rights regimes indeed seem to have moved towards universality, exclusivity, and transferability throughout history, to the effect that in the market society of today these criteria are often taken for granted. And yet, it is important

\(^{107}\) Ibid, at 62.


\(^{109}\) Hodgson, ‘Economics of Property Rights’ (n 35 above), at 688.

to mark them as the contingent result of the evolution of the idea and institution of property, which does not have to stop here.

What is of interest in the present context is not only the universality of property rights in the sense that all limited resources are privately owned, or at least capable of being owned and, consequently, that all in need of limited resources have to be capable of becoming owners; that is, to acquire ownership rights. The universality of private ownership also suggests that this regime of property rights is ultimately global: it concerns resources everywhere in the world and considers everyone a potential owner who may exclude everybody else from using the appropriated resources. Moreover, the transfer of property rights can also take a global dimension, with ownership titles being traded and exchanged across the world. Considering that the prototype of property, in terms of the object owned, is land, this globalization can by no means be taken as a given. The regulation of land ownership is, or at least used to be, quintessentially local: ‘The traditional concept of land law was that it literally represented the “law of the land”.’¹¹¹ This distinguishes land law from other fields of law, such as merchant law or maritime law, which naturally involved cross-border transactions and were therefore more prone to the creation of universal norms.¹¹² More recently, however, with ‘exporters of capital … increasingly investing in real estate around the globe’,¹¹³ domestic land laws have likewise become more aligned with the global law of the market. In this sense, the universality of property rights ultimately implies one global regime for all, which only reflects the universalist assumptions of the ‘economics of property rights’.¹¹⁴ However, it can be argued that this universality and the neoclassical proposition of exclusivity represent a relatively modern construct.

According to James, the history of property rights should really be defined on a property continuum which consists of three successive phases: a ‘common property phase’, a

¹¹² Ibid, at 465.
¹¹³ Ibid, at 428.
¹¹⁴ Ibid, at 457.
‘concentrated property phase’, and a ‘universal property phase’. The common property phase refers to a phase in early society where the land was considered to be a common heritage of all the people which reflected their shared existence as a group. It can be assumed that this was the case for the longest time in human history in what is referred to as the Stone Age. The common property phase may be further subdivided into a ‘communal property stage’ with little social differentiation and a ‘tribal property stage’, which shows first signs of a division of labour. As written records from the primordial stage of communal property are lacking, it is impossible to say anything definite about the ‘legal’ quality of ownership in this period. However, the available archaeological evidence seems to suggest a primitive property stage which consisted of communal property developed and maintained by small communities for the benefit of the entire community. This ancient idea of communal property, according to which the land sustaining a community is owned by the very collective, obviously differs from the modern idea of individual property, according to which everybody owns and controls a distinct share to the exclusion of others, but also from the contemporary concept of global commons, according to which certain non-exclusive resources are shared by humanity as a whole. The tribal property stage, which follows the strictly communal stage, is characterized by an incipient division of labour, which includes elements of a formal hierarchical structure with specialized functions for leadership. The institutionalization of different roles, which probably involved the attribution of usage rights with respect to land, can already be seen as a first step in the transition from common to private property. However, in ancient tribal communities the communal element still remained dominant.

In the concentrated ownership phase, property rights were held and controlled by small centralized bodies within a society. In the extreme case, everything would be owned by one individual leader only: an absolute ruler with absolute property rights. The transition from the common property phase to the concentrated property phase might have been triggered by different communities competing for the same fertile land or hunting grounds, with some tribes being able to appropriate the resources of the others. It is plausible that the contest for scarce resources furthered the establishment of a warrior class, whose members were

James, Correlated Intellectual Property Rights (n 34 above), ch. 14: A Theoretical Property Continuum, at 408-512. In what follows, we give a brief summary of James’s much more detailed account of the property continuum.
rewarded for their services by retaining a share of the appropriations for themselves. Thus, one can assume that the concentrated property phase had its beginnings in a ‘warlord property stage’, in which taking property by warfare became an accepted development method for the society. The acquired property could include land as much as labour, by enslaving members of the conquered tribes. Whereas regimes of warlord property had mainly relied on brute force, the ensuing stage of ‘royal property’ invoked divine right as a new, or additional, source of legitimation, which allowed for further centralization of ownership in what would become vast empires. It is in this period that the absolutism of property rights reached its peak. As is well known, modern legal developments took off from a criticism of the concept of absolute dominion, which ultimately inspired the civil revolutions of the eighteenth century.

However, the transition from absolute rule and concentrated property to democratic rule and universal property was not abrupt but led over stages of noble property and aristocratic property, in which royal property was increasingly ‘diluted’, as it came to be shared with the highest ranks of the king’s loyal or rebelling subordinates. In the ‘noble property stage’, this dilution of ownership did not yet entail a corresponding diminution in claims of absolute authority with regard to the civil population. However, with the rise of the merchant class, the nobles could no longer assume that they could exercise absolute authority over their property regardless of the consequences to their society. Instead, they had to give way to the property rights of the merchants. This change occurred in the ‘aristocratic property stage’, which witnessed a change in the legitimation of property from divine providence to natural rights. In the end, the natural-law justification of property as the fruit of one’s labour, which might include ‘[a]s much land as a man tills, plants, improves, cultivates and can use the product of’,\textsuperscript{116} would also undermine the concentration of property in the hand of aristocrats. However, the revolutionary content of this idea took time to unfold, while aristocrats continued to enjoy various legal privileges. In mercantilist times, another form of aristocratic property eventually emerged in the form of trade monopolies. These privileged trading rights, which were granted to government-chartered trading companies, provided opportunities to only a few select merchants. In other words, the property rights regime still remained relatively exclusive.

\textsuperscript{116} John Locke, \textit{The Second Treatise of Government} (Barnes and Noble 2004 [1690]), at 19.
In contrast, the universal property phase is defined by the legal and practical possibility of all individuals in society to own property. These universal property rights were premised on both the availability and ownership possibilities of new world property which led to the modern civil revolutions, and the advances of commercial and industrial capitalism, which created new forms of property. We can speak of the birth of the market society, which both presumes and promotes a new justification of property rights: economic efficiency. While this type of thinking is reflected in today’s ‘economics of property rights’, which reduces property relations to their potential contribution to economic growth, the sociology of property rights is more interested in property relations as such, which can be considered a constitutive element of the globalized market society. With the expansion of property rights to the entire population, the potential for conflict between individual property owners increased as well. The ‘doctrine of absolute property rights’, which emerged in the concentrated ownership phase, is now applied to a much more dispersed property structure. Instead of the feudal relations between sovereign and subjects, or between one landowner and a multitude of tenants, modern capitalism brings the relations between different property owners to the fore. This is evident in exchange relations, but already the assignment of individual property rights has distinctive social implications. Whereas the ‘universality’ and ‘transferability’ of property rights are relatively new features, the ‘exclusivity’ of property rights has its origins in absolute rule. Having been passed on from warlords to monarchs, nobility, and aristocrats, in what were concentrated property regimes, the idea of exclusive property rights is now applied to all economic actors.

SYNTHESIS: THE PROPERTY REGIME OF MARKET SOCIETY

In the market society, property relations are commodified in the sense that they are mediated by the market price, which expresses, according to Commons, the relative economic power of the parties. Quite obviously, then, property can no longer be equated with the thing owned, be it corporeal, incorporeal or intangible. However, what stood at the beginning of modern capitalism was, precisely, a reified understanding of property. This is suggested in a passage by Macpherson, which helps to connect Polanyi’s account of the enclosure movement with Commons’s account of the transition from use-value to exchange-value. With regard to
England, Macpherson argues that, until the seventeenth century, ‘the great bulk of property was … property in land, and a man’s property in a piece of land was generally limited to certain uses of it and was often not freely disposable’, while ‘another substantial segment of property consisted of those rights to revenue which were provided by such things as corporate charters, monopolies granted by the state, tax-farming rights, and the incumbency of various political and ecclesiastical offices’.

Obviously, these property rights concerned material as well as immaterial ‘things’, uses of land as well as opportunities for profit which were granted by the authorities. However, because ownership titles were either lacking exclusiveness or alienability, there was, as yet, little risk of conflating rights with things.

This changed with ‘the spread of the full capitalist market economy from the seventeenth century on’, which entailed ‘the replacement of the old limited rights in land and other valuable things by virtually unlimited rights’. In other words, property rights took the form of ‘full or complete ownership’, which includes the right to use (ius utendi), the right to derive income from (ius fruendi), and the right to consume or alienate (ius abutendi) the thing owned.

Macpherson’s argument continues as follows:

<quotation>As rights in land became more absolute, and parcels of land became more freely marketable commodities, it became natural to think of the land itself as the property. And as aggregations of commercial and industrial capital, operating in increasingly free markets and themselves freely marketable, overtook in bulk the older kinds of moveable wealth based on charters and monopolies, the capital itself, whether in money or in the form of actual plant, could easily be thought of as the property.</quotation>

Hence, in a nutshell, modern capitalism changed the idea of property from ‘limited and not always saleable rights in things’ to ‘virtually unlimited and saleable rights to things’, that is,

\[\text{\textsuperscript{117}}\text{Macpherson, ‘Meaning of Property’ (n 52 above), at 7.}\]
\[\text{\textsuperscript{118}}\text{Ibid.}\]
\[\text{\textsuperscript{119}}\text{Furubotn and Richter, }\textit{Institutions and Economic Theory} \textit{(n 53 above), at 89.}\]
\[\text{\textsuperscript{120}}\text{Macpherson, ‘Meaning of Property’ (n 52 above), at 7.}\]
from relative, or divided, property rights to absolute, or exclusive, property rights, which could easily be equated with the things themselves.\textsuperscript{121}

Whereas the popular understanding of property is thus characterized by a certain confusion between rights and things, the distinction obviously matters from a legal point of view. At the same time, the link between capitalist development and the development of legal concepts, which ‘old’ institutionalists were interested in, is preserved. One could thus claim that the reification of property as a thing, in terms of the commodification of natural and human resources, is complemented by the commodification of the right of ownership, which was fictitious to begin with but which has now become exclusive and alienable enough to be traded on the market. The idea that it was not the (material or immaterial) object of property but ‘ownership that was bought and sold’ can already be found in the work of Henry Dunning MacLeod, which dates back to the second half of the nineteenth century and is discussed at length in Commons’s \textit{Institutional Economics}.\textsuperscript{122} For Commons, MacLeod was ‘the first lawyer-economist’\textsuperscript{123} and ultimately the ‘originator’ of institutional economics.\textsuperscript{124}

The property law of market society clearly forms part of the universal property phase, in which all members of society have the legal and practical possibility to own property.\textsuperscript{125} However, like the common property phase and the concentrated property phase, the universal property phase can be subdivided into different stages. It begins with the ‘free-market property stage’, which came to dominate the nineteenth century, building on the liberal theories of classical political economy. The crisis of this \textit{laissez-faire} model evoked a counter-reaction, which is reflected in a series of three regulated property stages, with incrementally decreasing levels of regulation in the twentieth century. With the pendulum swinging back from (more) regulation to (more) deregulation, one could even see a new free-market property stage emerge towards the end of the twentieth century. However, the commodification of property rights was taken furthest at the beginning of the universal

\begin{itemize}
\item \textsuperscript{121} Ibid, at 7–8; original emphasis.
\item \textsuperscript{122} Commons, \textit{Institutional Economics} (n 49 above).
\item \textsuperscript{123} Ibid, at 394.
\item \textsuperscript{124} Ibid, at 399.
\item \textsuperscript{125} James, Correlated Intellectual Property Rights (n 34 above), ch. 14: A Theoretical Property Continuum, at 408-512. In the following, we further build on James’s much more elaborate account of the property continuum (cf. n 115 above).
\end{itemize}
property phase. While property rights had become generalized, they were still considered as absolute. It was during the free-market property stage that property owners had the greatest flexibility of doing whatever they wanted with their property regardless of the consequence for other members of society. While property was, in principle, accessible to all, in practice there were huge differences in economic power. In the absence of government regulation, powerful property owners could seek to control the markets solely for their own benefit and to the detriment of society as a whole.

In the following stages, the attempt to strike a balance between economic efficiency and social equity brought about more regulated markets, and more restricted property rights. Commons’s argument that state laws interfering with absolute property rights could serve to balance the bargaining power of owners with that of tenants, employees, debtors or consumers marks a time when the courts were still wrestling with the constitutionality of such interventions; that is, the beginning of a more regulated property stage.126 Depending on the degree of government involvement, one could distinguish ‘directed’, ‘restricted’, and ‘supervised’ property stages, in which property owners, or capitalist enterprises, are either told by the state what to do (such as through wage or price controls), what not to do (such as engaging in anti-competitive behaviour), or business practices are otherwise subject to scrutiny (such as under the ‘rule of reason’).127 Within the overall development of property regimes, the stage of regulated markets marks a turning point in that property rights came to be conceived in less absolutist ways. Property was no longer defined as an item of unitary ownership with an implied understanding of absolute dominion, but as a bundle of legal relationships that could be separated into individual rights and duties. This ‘bundle of rights’ conception made it possible to restrict certain rights, or to accentuate the respective duties, while leaving other rights, or even the majority of rights, intact. Put differently, the law could now circumscribe the institution of ownership without violating its substance, which made it possible to strike a balance between the interests of property owners (maintaining their incentive to invest), the needs of the market (introducing competition policies), and society as a whole (furthering social and environmental policies). On the other hand, any particular right, or ‘stick’, in the bundle of rights that was not restricted could still be regarded as an

127 For the full argument, see James, *Correlated Intellectual Property Rights* (n 34 above), ch. 14: A Theoretical Property Continuum, at 408-512.
absolute right. Arguably, these leftovers of a property rights absolutism still make it difficult to fully internalize the external effects of property ownership.

FUTURE: FROM ABSOLUTE TO CORRELATED PROPERTY RIGHTS?

Taking the variability of capitalist social formations as given, ‘[c]hanges in the objects of property depend on [the respective grade of] commodification and de-commodification’, that is, to what extent the market mechanism is used as a means of social organization in different policy fields. While the works of Polanyi and Commons referred to the age of agricultural and industrial capitalism, the acceptable scope of commodification is also subject to debate in the knowledge-based economy of today. Focusing on recent developments in the domain of intellectual property rights, Boyle speaks of a ‘second enclosure movement’ triggered by the information revolution. With the proliferation of digital technologies, questions arise concerning the respective rights of producers and users of so-called ‘information goods’. The parallel between the old and the new enclosure movement can be seen in the limitation of user rights to what could be freely shared before: ‘once again things that were formerly thought of as either common property or uncommodifiable are being covered with new, or newly extended, property rights’. Like Commons, Boyle starts from the duality of property rights, namely that holding things or reserving technologies for one’s own use means withholding them from others’ use. Accordingly, an extension of property rights in informational goods means a restriction of user rights in the public domain. Boyle’s concern is not only the loss of individual user rights but also the foreclosure of a collective mode of production. For illustration, he contrasts the model of competitive, exclusive, proprietary production under a restrictive intellectual property regime with a model of cooperative, distributed, non-proprietary production in the public domain or, what is almost the same, under a general public licence.

128 Carruthers and Ariovich, ‘Sociology of Property Rights’ (n 54 above), at 25.
129 Boyle, ‘Second Enclosure Movement’ (n 58 above), at 37.
130 Ibid, at 59 and 68.
131 Ibid, at 48.
In neoclassical and neo-institutional (law and) economics, private property rights are considered constitutive for the functioning of the market economy, given that they would act as an incentive for economic actors ‘to maximize the value of their property and thus also further the “wealth of nations”’.\(^{133}\) The presumption is that economic actors have to be sufficiently sure that they can reap the fruit of their labour, or investment.\(^{134}\) Put differently, they have to be able to exclude others from the benefits of their work: ‘The more exclusive are property rights to the individual or group the greater the incentive to maintain the value of the asset. Furthermore, more exclusive rights increase the incentive to improve the value of the asset by investment …’\(^{135}\)

The standard case for private property rights is also applied to the area of ‘intellectual’, ‘informational’, or ‘innovational’ production. Generally speaking, intellectual, or ‘immaterial’, property rights are meant to fulfil the same function as material property rights: ‘to protect the holder of rights against unauthorized use of his assets’.\(^{136}\) However, in contrast to material goods, which typically can be used only in one or the other way, or by one or another, immaterial goods are generally ‘non-rival’ in their use, which means that different uses, and users, do not interfere with each other. Moreover, without artificial barriers, informational goods are ‘non-excludable’, which means that ‘it is impossible, or at least hard, to stop one unit of the good from satisfying an indefinite number of users at zero marginal cost’.\(^{137}\) Hence, in the case of intellectual property rights, the exclusions of others does not serve to protect the substance of the property; instead, the limitation of users’ rights seems necessary to incentivize the provision of informational goods.\(^{138}\) However, as Boyle aims to show, the case for intellectual property rights is not as clear as the economic standard argument suggests. Whereas in the case of land, or limited natural resources, a lack of private property rights may indeed create individual incentives for overuse and conjure a ‘tragedy of

\(^{133}\) Furubotn and Richter, *Institutions and Economic Theory* (n 53 above), at 85.


\(^{136}\) Furubotn and Richter, *Institutions and Economic Theory* (n 53 above), at 90.

\(^{137}\) Boyle, ‘Second Enclosure Movement’ (n 58 above), at 42.

\(^{138}\) Furubotn and Richter, *Institutions and Economic Theory* (n 53 above), at 90.
the commons’, provided that no alternative governance mechanisms are in place, the propertization of intellectual or cultural production may eventually result in a ‘tragedy of the anti-commons’, as it restricts the access to information goods from which other information goods are created. In this sense, ‘enclosure of the information commons clearly has the potential to harm innovation as well as to support it’. Accordingly, the underuse of creative resources can be considered as much of a problem as the overuse of natural resources.

While James recognizes the potential economic problems embedded in current thinking about intellectual property, he views the enclosure effects quite differently from Boyle. Whereas Boyle tends to regard the enclosure from the perspective of preventing freely shared access to innovations, James views enclosure in terms of preventing intellectual property owners from receiving an equitable share of the rewards that are created by an integrated technological product. Specifically, he is concerned that multinational high-tech manufacturers are excluding the intellectual property contributors from receiving their equitable rewards by engaging in extensive and expensive patent litigation, a process which he describes as ‘legal attrition’. Although James attributes this enclosure effect to the application of absolute property rights, he explains that it is an indirect rather than a direct effect which causes it. In simple terms, this indirect effect can be explained as follows.

Given that most advanced technological products are now dependent on multiple intellectual property contributions from a multitude of intellectual property owners, when one of the contributors abuses their absolute rights to demand licensing fees far in excess of the value of their contribution, this obviously and inequitably deprives other contributors of the possibility of receiving a fair share for their contribution. This direct effect is referred to as a ‘patent hold-up’. When the courts are obligated to apply absolute property rights, one way of

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142 Boyle, ‘Second Enclosure Movement’ (n 58 above), at 43.
143 Ibid, at 44.
144 James, Correlated Intellectual Property Rights (n 34 above). What follows is a very short summary of the core argument of James’s thesis.
avoiding the inequitable outcomes of ‘patent hold-up’ is to allow the defendants, who are usually multinational high-tech manufactures, to indulge in protracted litigation with the expectation that these protracted proceedings will encourage the plaintiff to be more reasonable. The problem is that once the courts allowed protracted litigation to combat ‘patent hold-up’, they could not prevent the same manufacturers from using the same ‘legal attrition’ to reduce the licensing fees of intellectual property contributors who were not abusing their property rights, but merely offering to licence their intellectual properties near the value that they contributed to the technological product.\(^{145}\)

To the extent that James is concerned about ensuring that all intellectual property owners receive an equitable return for their work, he is clearly addressing similar social issues to those addressed by Polanyi and Commons. However, in contrast to Polanyi, he does not argue for the removal of the ‘fictitious commodities’ of land, labour, and money, or knowledge for that matter, from the market,\(^ {146}\) or for an increase of government intervention, which may lead to an excess of ‘planning, regulation and control’.\(^ {147}\) Instead, James suggests a solution in line with the ‘common-law method’ specified by Commons:\(^ {148}\) the application of an alternative property rights doctrine, called the ‘correlative rights doctrine’. In essence, that doctrine states that: *When multiple parties have individual property claims on an inherently integrated property each is legally entitled to their proportional share of the value of that property and the law should protect that share from being appropriated by others, including other owners.*\(^ {149}\) While the doctrine itself is relatively unknown in mainstream property law, it has in fact been applied in water law and oil and gas law for over 100 years.\(^ {150}\)

James’s argument for the application of correlated rights in intellectual property relies on the same arguments which were used to establish the correlative rights doctrine in these two bodies of law. More specifically, this means that when individual property owners have


\(^{146}\) Polanyi, *Great Transformation* (n 12 above), at 251–2.

\(^{147}\) Ibid, at 257.

\(^{148}\) Commons, *Institutional Economics* (n 49 above), at 73; cf. ibid, at 221 and 706-7.


\(^{150}\) Ibid, ch. 6: History of the Correlated Rights Doctrine, at 112-70.
individual property claims on what is a common asset, the courts have duty to ensure that each individual owner is able to secure no more, or less, than their proportional share of the aggregate value available or created. James further argues that once the threat of patent hold-up is eliminated, this will also eliminate the courts’ justification for allowing ‘legal attrition’, and as such they will be required to take a more proactive response to frivolous litigation.151

As opposed to the absolute property rights doctrine, which was based on the ‘negative’ relation between a (solid) thing and a person, the correlative property rights doctrine puts the ‘positive’ relations between different persons centre-stage, each of which has rights in the same (fugitive) thing. Given this more equitable approach to property ownership there is good reason to claim that this concept of property better meets the requirements of the information age. In the last chapter of his thesis,152 James speculates on whether or not the correlative rights doctrine has to be confined to just similar contributions to an integrated asset. The question he asks is whether it can also be used to resolve disputes between dissimilar contributions to an integrated asset. For example: can it be used to resolve disputes between workers and their employers, when the dispute revolves around the workers’ contributions to the product which they produce? Regardless of whether or not the correlated rights doctrine can be used in cases involving dissimilar contributions, given the ubiquitous nature of high-tech products and the multinational nature of their manufacturers, if it is only applied in correlated intellectual property law, it would certainly have both domestic and international legal implications.

In summary, what James is arguing is that while the globalized market society may rest on private property rights, the absolute quality of these rights should be contested by both legislators and the courts whenever their application creates inequitable results. Against this backdrop, it is entirely possible that correlative property rights will become the defining feature of a future intellectual property regime which leaves universal property rights intact, but also respects their ‘embeddedness’.

CONCLUSION: TAKING PROPERTY RIGHTS TO THE FUTURE

Taking a Polanyian approach to international economic law, which cross-cuts conventional distinctions between national and international, public and private law, the aim of this chapter was to explore the configuration of property relations in the market society. In order to understand the specificities of this regime, the development of property rights was put in a long-term historical perspective, identifying phases of common property, concentrated property, and universal property. The functioning of the market society, which rests, to a large part, on commodity exchange, including the fictitious commodities of land, labour, and money, is premised on the ‘universalization’ of property rights. This universalization can be understood not only in the way that nowadays everybody can be an owner and that almost anything can be owned and eventually traded, but also in the way that the rationale, or science, behind this property regime is of a universalistic nature. In practice, the global diffusion of neoclassical or neo-institutional concepts of property goes hand in hand with the transnationalization of the economic profession.\(^\text{153}\)

However, the property law of market society is not static; instead, it has experienced considerable variation within the basic universalist framework. The universal property stage could thus be divided into a stage of free, or ‘self-regulating’, markets and a subsequent stage of more regulated markets, with the respective degrees of commodification and de-commodification changing over time. As we have seen, the universalization of ownership was linked to the rise of the merchant class, or the emergence of commercial capitalism. In a market society, which relies on commodity exchange as allocation mechanism for almost anything, trade obviously has a central function. At the same time, the (relative) economic weight of different sectors of production – agriculture, industry, and services – has significantly changed over the last two centuries. This is reflected in adaptations of the institution of property in terms of its main subjects, its main objects, and its core conditions.

Agricultural capitalism was premised on the enclosure of land, with big landholdings furthering economic progress while depriving rural people of their livelihoods. With the Industrial Revolution, the focus changed from land to capital as the key property, and from

individual to corporate owners as the key actors driving capitalist development. The propertyless had to turn to wage labour in the new factories to make a living, often under highly exploitative conditions. Today’s informational capitalism is marked by an emphasis on intellectual property, or the commodification of knowledge. With the proliferation of inherently integrated properties with multiple interdependent owners, the old property rights absolutism becomes dysfunctional, and may easily lead to the abuse of economic power, as the example of patent hold-ups demonstrates. Imbalances of economic power show in the relation between multinational corporations, which can afford to disregard certain patents and wait for courts to decide, and small-scale software engineers, whose economic survival depends on their ‘fractional’ property rights being observed and royalties being paid in time.

What the concept of correlative property rights illustrates is that there is a middle ground between leaving absolute property rights intact and abolishing private property altogether. In this sense, the alternative of capitalist and socialist models of ownership, which was at stake at the time of Polanyi’s writing, and which is still invoked in economic textbooks of today, leaves out the possibility of further developing the relational quality of property rights: within the universal property paradigm but under the premise of correlated rights.

While our focus was on the historical development of property rights, and not on the different geographical layers of property law, our study does have implications for national and international property law alike. This is already clear from the fact that the enclosure movements regarding land and knowledge were and are not confined to national territories but ultimately global in their ambit. More generally, the globalization of the market society, which implies the universalization of property rights (not only as available for all but as enforceable everywhere), rests on international economic law, which we here understand in functional terms, including aspects of public and private law, within, between, and beyond ‘sovereign’ states. It may not surprise that intellectual property, as least wedded to the soil

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154 Polanyi, *Great Transformation* (n 12 above), at 234.
155 For example, Furubotn and Richter, *Institutions and Economic Theory* (n 53 above).
or most fluid in character,\textsuperscript{157} is at the forefront of this development and today ‘the most prominent category of international property law’.\textsuperscript{158} International investment law may, at first, seem more traditional in that its notion of property – or investment – basically refers to ‘land and other immovable assets’.\textsuperscript{159} But it is revolutionary, from a Westphalian perspective, in that it is no longer about sovereigns handing down property to (dependent) subjects, but about private actors confronting sovereign states with ownership claims as (independent) subjects of the international legal order. When property thus trumps sovereignty, it is time to take a relational approach – to both.


\textsuperscript{158} Sprankling, \textit{International Law of Property} (n 1 above), at 82.

\textsuperscript{159} Ibid, at 34.