

Review Essay

Private Property Suffuses Life

Owning the Earth: The Transforming History of Land Ownership by Andro Linklater (2015) Bloomsbury, 496 pp, ISBN 9781408855430

Empire of Things: How We Became a World of Consumers, from the Fifteenth Century to the Twenty-First by Frank Trentmann (2016) Harper, 880 pp, ISBN 9780062456328

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Abstract

This review essay explores, in four Parts, the ways in which private property has become a ubiquitous means of exerting control over things and over people. First, it recounts the liberal conception of private property. Second, using Andro Linklater's *Owning the Earth: The Transforming History of Land Ownership* and Frank Trentmann's *Empire of Things: How We Became a World of Consumers, from the Fifteenth Century to the Twenty-First*, it considers how the liberal conception of private property has spread to every thing in, and every corner of, our contemporary world. Third, it reflects upon the seriousness of the consequences that follow the fact of this spread of free choice. Finally, it provides some brief concluding thoughts.

*Canst thou, O partial sleep, give thy repose
To the wet sea-boy in an hour so rude,
And in the calmest and most stillest night,
With all appliances and means to boot,
Deny it to a king? Then happy low, lie down!
Uneasy lies the head that wears a crown.¹*

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¹ William Shakespeare, *Henry IV* (Penguin, 2005) Part II, Act III, Scene I, 26–31.

I Introduction

You may not realise it, but everything you do is made possible by private property. Both as a concept and as law, private property allows you the power of choice over things and over people. And, as a consequence, it allows us to decide — both as individuals and as political collectivities — how things, tangible and intangible, are used, and so to shape the world in which we live, both physically and socially. In short, private property suffuses the whole of life. How did this come to be?

For some time now, scholars of every disciplinary and political stripe have attempted to define the normative content of and to offer justificatory theories for the concept of private property. The earliest accounts started with theology and philosophy.² Richard Schlatter extended this approach, tracing the history of private property from Greece and Rome to the natural rights and classical theory of the 18th century.³ Others followed, most notably Richard A Epstein,⁴ Jeremy Waldron,⁵ Stephen Munzer,⁶ J W Harris,⁷ and Richard Pipes.⁸ Some tackle the place of private property in law as a means of allocating immovable⁹ and moveable resources,¹⁰ moveable tangible¹¹ and intangible things,¹² and of structuring relationships between humans and other humans,¹³ humans and non-humans,¹⁴ and between humans and resources themselves.¹⁵ Still others, most notably Karl Marx,¹⁶ critique the corrosive effects of private property on human relationships.¹⁷

Each of these existing accounts share a common theme: they are theoretical and doctrinal explorations. None of them explore the actual, concrete circumstances of private property as it works in the everyday lives of people. Two recent books, however, offer refreshing new analyses of just that, and how it came to be so in our world: Andro Linklater's *Owning the Earth: The Transforming*

² L T Hobhouse et al, *Property: Its Duties and Rights Historically, Philosophically and Religiously Regarded* (Macmillan, 1915).

³ Richard Schlatter, *Private Property: The History of an Idea* (Russell and Russell, 1951).

⁴ Richard A Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press, 1985).

⁵ Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1988).

⁶ Stephen R Munzer, *A Theory of Property* (Cambridge University Press, 1990).

⁷ J W Harris, *Property and Justice* (Oxford University Press, 1996).

⁸ Richard Pipes, *Property and Freedom* (The Harvill Press, 1999).

⁹ See, eg, T P Fry, *Freehold and Leasehold Tenancies of Queensland Land* (The University of Queensland, 1946).

¹⁰ See, eg, Mark Kanazawa, *Golden Rules: The Origins of California Water Law in the Gold Rush* (University of Chicago Press, 2015).

¹¹ See, eg, E L G Tyler and N E Palmer, *Crossley Vaines on Personal Property* (Butterworths, 5th ed, 1973).

¹² See, eg, Robert P Merges, *Justifying Intellectual Property* (Harvard University Press, 2011).

¹³ See, eg, Alan Watson, *Slave Law in the Americas* (University of Georgia Press, 1989).

¹⁴ See, eg, Gary L Francione, *Animals, Property, and the Law* (Temple University Press, 1995).

¹⁵ See, eg, Bruce Pascoe, *Dark Emu: Black Seeds: Agriculture or Accident?* (Magabala Books, 2015).

¹⁶ See, eg, Karl Marx, *Capital: Volume One: A Critique of Political Economy* (Ben Fowkes trans, Penguin Books, 1992) [1867]).

¹⁷ See Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) *Yale Law Journal* 16, DOI: 10.2307/785533; Joseph William Singer, 'The Reliance Interest in Property' (1988) 40(3) *Stanford Law Review* 611, DOI: 10.2307/1228814; Pierre Dardot and Christian Laval, *Commun: Essai sur La Révolution au XXIe Siècle* (Éditions La Découverte, 2014).

History of Land Ownership,¹⁸ and Frank Trentmann's *Empire of Things: How We Became a World of Consumers, from the Fifteenth Century to the Twenty-First*.¹⁹

This essay explores how private property allows us to exert control over things and over people. Part II recounts the liberal conception of private property — a conferral of choice upon individuals suffusing the whole of our existence. Part III, using Linklater's and Trentmann's analyses, considers how that conception of private property has spread to every thing in, and every corner of, our contemporary world. Part IV reflects upon the seriousness of the consequences that follow the fact of choice. Part V offers some brief concluding thoughts.

II Suffusion

Put simply, the liberal concept of private property confers a 'bundle' of legal relations (rights: typically use, exclusivity, and disposition)²⁰ created and enforced by the State between people in relation to the control of goods and resources (things, tangible and intangible).²¹ A person who holds private property can exercise its rights to suit personal preferences and desires.²² Rights, in other words, are simply another way of saying that individuals enjoy liberal freedom of choice about the allocation, control and use of things.

With choice in one person comes a corresponding duty (lack of choice) in others.²³ Thus, a person who holds choice means all others (the community, society) are burdened with a lack of it as concerns a thing: '[private] property [i]s a claim that other people ought to accede to the will of the owner.'²⁴ Or, private property allows one to control the lives of others.²⁵

Choice carries the potential to create outcomes — consequences, or 'externalities' — for those without choice.²⁶ In theory, then, law vests the holder of choice with '[an] absolute claim to a divisible portion of social capital' and that '[i]n this zone the rightholder [can] avoid any tangle of claims to mutual responsibility.'²⁷ The individual revels in 'a zone of unchecked discretionary action that others, whether private citizens or governmental officials, may not invade.'²⁸

¹⁸ Andro Linklater, *Owning the Earth: The Transforming History of Land Ownership* (Bloomsbury, 2015).

¹⁹ Frank Trentmann, *Empire of Things: How We Became a World of Consumers, from the Fifteenth Century to the Twenty-First* (Harper, 2016).

²⁰ Margaret Jane Radin, *Reinterpreting Property* (University of Chicago Press, 1993) 121–3.

²¹ See Joseph William Singer, *Property* (Aspen Publishers, 4th ed, 2013) 2.

²² See John Stuart Mill, *On Liberty* (Penguin Books, 1985 [1859]).

²³ Hohfeld, above n 17.

²⁴ C Edwin Baker, 'Property and its Relation to Constitutionally Protected Liberty' (1986) 134(4) *University of Pennsylvania Law Review* 741, 742–3, DOI: 10.2307/3312019.

²⁵ Morris R Cohen, 'Property and Sovereignty' (1927) XIII(1) *Cornell Law Quarterly* 8, 13.

²⁶ See Joseph William Singer, 'How Property Norms Construct the Externalities of Ownership' in Gregory S Alexander and Eduardo M Peñalver (eds), *Property and Community* (Oxford University Press, 2010) 59, DOI:10.1093/acprof:oso/9780195391572.001.0001.

²⁷ Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Harvard University Press, 1986) 37–8.

²⁸ *Ibid* 38.

Morris Cohen, writing in 1927, used a public law term to clarify what the State confers when it grants private property to a person or corporation.²⁹ Adverting to the ancient Roman distinction between private law *dominium* and public law *imperium*, Cohen argued that while both are a form of sovereignty, the real distinction lies in who holds the power. In the case of private property, *dominium* is the grant of power conferred by the State upon the individual.³⁰ Cohen concludes that

the law of property helps me directly only to exclude others from using the things which it assigns to me. If then somebody else wants to use the food, the house, the land, or the plow which the law calls mine, he has to get my consent. To the extent that these things are necessary to the life of my neighbor, the law thus confers on me a power, limited but real, to make him do what I want.³¹

And one must not lose sight of the fact that *dominium* over things also constitutes *imperium* over people; greater protection for the individual has consequences for others. Focusing on labour law, Cohen stressed that ownership of machinery determined future distributions of things.³² And so, every choice a person makes determines the course of others' lives. Choices are affected by other choices, in an ever-expanding web of relationships.³³ Cohen concludes that in property, then, 'we have the essence of what historically has constituted political sovereignty.'³⁴

Still, the State can and does use its retained political sovereignty, *imperium*, to stop power being exercised pursuant to private property in ways harmful to the greater social good.³⁵ Cohen argues that the State should do quite a lot: '[t]his profound human need of controlling and moderating our consumptive demands cannot be left to those whose dominant interest is to stimulate such demands.'³⁶ For '[n]o community can view with indifference the exploitation of the needy by commercial greed.'³⁷ Thus, while the State, through law, may confer private property, every legal system acknowledges the exercise of power thereunder to be a potential problem best avoided; every State, to a greater or lesser extent, accepts, indeed requires, rights to come with obligations towards others.³⁸ Just as it creates private property through law, the State also limits (regulates) choice through law.

Regulation is law's means of mediating the relationships established by private property. Over time, regulation preserves the social function of a private property right, whatever it might be, within a context of relatedness, thus limiting potentially harmful outcomes for others.³⁹ Because choice operates within a network of social relationships that form a community, every system of private

²⁹ Cohen, above n 25.

³⁰ Ibid 11.

³¹ Ibid 12.

³² Ibid 13.

³³ Ibid 13–4.

³⁴ Ibid 13.

³⁵ Ibid 11.

³⁶ Ibid 30.

³⁷ Ibid 23.

³⁸ Singer, above n 26.

³⁹ Joseph William Singer and Jack M Beermann, 'The Social Origins of Property' (1993) 6(2) *Canadian Journal of Law and Jurisprudence* 217, 228.

property is inherently limited by duties and obligations, imposed and enforced by law, so as not only to allow the holder of private property to choose on the basis of personal preferences, but also to allow the State to prevent outcomes inimical to the legitimate interests of others.⁴⁰

Yet, recognising the place of regulation within the concept of private property is not to say that a system achieves perfect symmetry. Comparing the legal protection of choice to regulation always yields a surplus of individual choice and a deficit of regulation. Most disturbing about this asymmetry involves the legal ground rules of law, which give permissions to injure others, to cause legalised injury.⁴¹ These are both insidious and invisible:

[W]hen lawmakers [judges and legislators] do nothing, they appear to have nothing to do with the outcome. But when one thinks that many other forms of injury are prohibited, it becomes clear that inaction is a policy, and that law is responsible for the outcome, at least in the abstract sense that the law 'could have made it otherwise.'⁴²

The asymmetry of choice to regulation — as we might expect from liberal theory, which prizes above all else the freedom, liberty and autonomy of the individual — further allows us to control every thing and, ultimately, every other person on the Earth, through a growing web of relationships. Private property confers on each of us the power to divide up the world around us and, in so doing control the lives of others. It has, in short, suffused everything that we do and every relationship that we have with others. And it has spread to apply that way of dividing up the world and structuring relationships to every corner of the planet.

III Spread

For both Linklater and Trentmann, the modern world of consumers and private property is the outcome of historical forces that produced not only the suffusion,⁴³ but also, and more importantly, the spread of that concept, which in turn changed our relationship to the physical and social world. Trentmann is less explicit about the concept of private property, focusing instead on the liberal concept of choice,⁴⁴ which we know to be a synonym for private property.

Linklater, however, links the spread of private property to European colonialism, which allowed it to leave its mark in every corner of the Earth.⁴⁵ This powerful idea emerged in the 16th century conflicts between the English Crown and citizens, from which grew a new form of political power, concentrated in the House of Commons and wielded against the Crown. This in turn made it possible to conclude that the source of power over land was not the Crown and its prerogative, but lay with the person and individual effort or toil. And from there it

⁴⁰ Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale University Press, 2000) 204.

⁴¹ Duncan Kennedy, *Sexy Dressing Etc: Essays on the Power and Politics of Cultural Identity* (Harvard University Press, 1993) 90–1.

⁴² Ibid 91.

⁴³ Trentmann, above n 19, 9.

⁴⁴ Ibid 1–18.

⁴⁵ Linklater, above n 18, 5.

was but a short logical step to private property, with its attendant rights (choice) and the development of mercantile exchange of goods and the agricultural division of land.

Yet, at its core, private property is the unequal distribution of scarce resources.⁴⁶ Together Puritan theology and Lockean philosophy combined to provide a moral justificatory theory; the former suggesting that private property was innate, ‘independent of government ... [because it] originated in human existence’,⁴⁷ the latter that first possession and labour rendered the right inalienable.⁴⁸ In a word, it was natural that the world should be divided up according to and subjected to the power of private property.

The Industrial Revolution in England combined with the ‘root-stock’ of the English common law, which prized free individuals enjoyment of the rights to life, liberty and the acquisition of property. But the route to the modern world was one of detours rather than straight lines, and this one went through the American colonies, where the Revolution combined industrialisation with private property in the *United States Constitution*. For Linklater, this thread of liberty running from the earliest conflicts between Crown and citizen in England ultimately established the United States (‘US’) as ‘the greatest private property society in history.’⁴⁹

At every stage of historical development it was the idea, the concept, the theory of private property that drove economic and political developments. Those developments ‘changed [S]tates, societies and daily life’,⁵⁰ and produced the private property society in which we live today.⁵¹ How did it spread to control our relationship to land and everything else?

A Land

Why do people tend to consider land to be synonymous with private property? It was not always so. As recently as 200 years ago, much of the world’s land was held under a range of common property regimes.⁵² Linklater argues that a ‘private property revolution’ since that time has disrupted these alternative forms of ownership.⁵³ That revolution attached the idea of private property to the materiality of land, and its potential lies at the heart of every political and economic change over the course of the last 200 years.⁵⁴ The US serves as the ‘shining “city on a hill”’⁵⁵ in which private property moves from an idea to the means used to divide up and cast its power over vast quantities of land. Having suffused the mind, it enwrapped the entire Earth, subjugating the world’s land and people to its power.

⁴⁶ Ibid 9–90.

⁴⁷ Ibid 90.

⁴⁸ Ibid 183.

⁴⁹ Ibid 210.

⁵⁰ Trentmann, above n 19, 9.

⁵¹ Linklater, above n 18, 199–211.

⁵² Ibid 91–166.

⁵³ Ibid 5.

⁵⁴ Ibid 169–98.

⁵⁵ Ronald Reagan, ‘A Vision for America’ (Election Eve Address delivered 3 November 1980), The American Presidency Project <<http://www.presidency.ucsb.edu/ws/?pid=85199>>.

The global spread started with US ‘Founding Father’ and third President Thomas Jefferson, whose blueprint for the expansion of the US involved ‘the acquisition of territory, its survey and sale as private property, and the power of the Congress to supervise the entire process.’⁵⁶ Having thus laid the foundation for the physical and political structure of the US, it made possible the westward spread of the new nation.⁵⁷ And that blueprint was taken up by British politician Edward Gibbon Wakefield — for use in the colonial territorial expansion of the British Empire in Australia, Canada, New Zealand, South Africa — before finally returning to Europe. Jefferson’s blueprint ultimately ensured the use of private property as the means of dividing up the entire planet.⁵⁸ Private property had captured the imagination of the world; it could not and would not be contained.

B *Things*

Before it had even been applied to land, the liberal conception of private property had already been called into service as copyright law to protect the ideas of British innovation driving the Industrial Revolution.⁵⁹ And from those origins, private property’s power to control things spread ‘the culture of goods in the fifteenth century to the end of the Cold War in the 1980s and the resurgence of Asian consumers since’,⁶⁰ forming our modern consumer culture.

Consumer culture is unique to a society, each shaped by ‘[S]tates and markets, income and prices, urbanization and social structure’⁶¹ and ‘values that ... societies [attach] to things ... set[ting] them apart from each other and ma[king] some hungrier consumers than others.’⁶² Still, common themes are evident, the most significant of which are trade and the international marketplace, the primary historical drivers of modern consumption, choice, private property. And, just as empire served to proliferate private property in dividing up territory, it had the same effect on the proliferation of goods, driven by demand in the European metropole for goods coming from the colonial peripheries.⁶³ Between 1500 and 1800, the movement of goods was from East to West,⁶⁴ for which Europe was well-placed due to its ‘favourable climate of ideas and institutions’, especially liberty and private property, and the capital made possible by expanding colonial markets.⁶⁵ Private property made possible the accumulation of ‘more stuff’, as Trentmann puts it,⁶⁶ because it facilitated a person’s ability to hold that stuff to the exclusion of others so as to suit personal preferences.

⁵⁶ Linklater, above n 18, 211.

⁵⁷ *Ibid* 215–33.

⁵⁸ *Ibid* 235–71.

⁵⁹ *Ibid* 169–75. See *Copyright Act 1710*, 8 Anne, c 19.

⁶⁰ Trentmann, above n 19, 15–6.

⁶¹ *Ibid* 23.

⁶² *Ibid* 23.

⁶³ *Ibid* 21–43.

⁶⁴ *Ibid* 53–71.

⁶⁵ *Ibid* 76–7.

⁶⁶ *Ibid* 53.

Around the turn of the 19th century, however, the pattern begins to change, with slaves and ‘drug foods’ (chocolate, coffee and tea) moving from the colonies into the European markets, driving a global trade in commodities.⁶⁷ Urbanisation followed, making it possible to provide product differentiation and specialised services, as well as facilitating communication.⁶⁸ All of this stimulated a new way of seeing the world: through a philosophical lens that focused on self-definition through things, and a desire for constant self-improvement.⁶⁹ And that required both goods and the means to control them — global trade provided the former, private property the latter.

But with liberty embodied in private property came the notion that people were not merely consumers, but *citizens*, capable of voicing dissatisfaction:⁷⁰ ‘the American and French revolutions demonstrated the political force generated by the expanding culture of consumption.’⁷¹ That ‘was only the beginning’; soon there would be an ‘Imperium of Things’ in which the same colonising geopolitical forces that used private property to divide territory in pursuit of empire would do the same with goods and material culture. These ideas carved through, and thereby shaped, the modern city and home, promoting three ideologies as it did: consumerism, democracy and capitalism.⁷²

The final triumph? Asia. Once closed to these economic and political forces, not only Asia’s goods, but also its ideology finally gave way in one swift stage:

[T]he rise of the middle class, a culture of domestic comfort, urbanization, a boost in discretionary spending and increasing home ownership — these were processes that took four centuries in Europe and the US. In the booming societies of Japan in the 1950–80s, and in China and India since, these transformations happened more or less in parallel.⁷³

And so today we continue to face the consequences of the suffusion and the spread of the power of private property to control all that we do in every part of the world.

IV Seriousness

Few people in our world today fail to understand how the sovereignty of private property confers upon them an awesome power to structure the physical and social world in which we live. Local and global examples abound of how people understand the importance of property in their lives. In 2010, Peter Spencer spent 52 days suspended on a platform 15 metres above his New South Wales (‘NSW’) farm in protest over his inability to use his land due to native vegetation and land

⁶⁷ Ibid 78–93.

⁶⁸ Ibid 93–4.

⁶⁹ Ibid 95–110.

⁷⁰ Ibid 111.

⁷¹ Ibid.

⁷² Ibid 118–9, 119–273.

⁷³ Ibid 355–6.

clearing laws prohibiting him from making use of those lands.⁷⁴ In 2013, following an eight-year battle to prevent the Australian Government compulsorily acquiring his South Australian farm,⁷⁵ Graham French lamented that governments ‘shouldn’t be able to rip people’s lands off them for no good reason ... it’s just wrong.’⁷⁶ And in 2014, Glendon Turner, a senior environmental compliance officer for the NSW Government, was shot and killed in 2014 by Ian Turnbull, a farmer. It emerged that Mr Turnbull had been involved in a legal dispute with the NSW Office of Environment and Heritage over illegal land clearing in the Croppa Creek area.⁷⁷

From the US,⁷⁸ to Zimbabwe,⁷⁹ to China,⁸⁰ the pattern found in Australia continues. Perhaps the saddest of the recent stories comes from China, where Jia Jinglong’s house in North Gaoying village stood in the way of the high-rise towers that had long since swallowed up the village as part of the city of Shijiangzhuang. The Government’s attempted expropriation without compensation went tragically wrong when Mr Jia, under intense personal and legal pressure, murdered a local party official. Sentenced to death, the Chinese Government executed Mr Jia on 15 November 2016.⁸¹

But the power of private property is not without its complications. Before his execution, Mr Jia suggested that ‘if the people had any choice in life, I would not have taken this dead-end path.’⁸² While a tragic case, Mr Jia’s conclusion about the nature of the problem stands counter to the reality: rather than a paucity, it is a surfeit of choice that leads people like Mr Jia to defend what they see as theirs; the belief that one has choice through private property over a thing and, indeed, over others, that leads people to defend attempts to limit, restrict, remove, or deny its loss at the hands of or to others, especially the Government. Advertisements like this best sum up the belief:⁸³

⁷⁴ *Native Vegetation Act 2003* (NSW); *Native Vegetation Regulation 2005* (NSW). See also Jessie Davies, ‘Spencer Loses Land Clearing Case’, *The Land* (online), 24 July 2015 <<http://www.theland.com.au/story/3296888/spencer-loses-land-clearing-case/>>.

⁷⁵ *French v Gray, Special Minister of State* (2013) 217 FCR 404.

⁷⁶ Tory Shepherd, ‘Their Home is Their Castle — Corunna Station Will Stay in the Hands of the French Family after Federal Court Victory’, *The Advertiser* (online), 8 November 2013 <<http://www.adelaidenow.com.au/news/south-australia/their-home-is-their-castle-corunna-station-will-stay-in-the-hands-of-the-french-family-after-federal-court-victory/story-fni6uo1m-1226756092281>>.

⁷⁷ Nicole Graham, ‘Land Clearing Laws Bring out Worrying Libertarian Streak’, *The Conversation* (online), 4 August 2014 <<http://theconversation.com/land-clearing-laws-bring-out-worrying-libertarian-streak-29978>>.

⁷⁸ *Kelo v City of New London*, 545 US 469 (2005).

⁷⁹ *Mugabe and the White South African* (Directed by Lucy Bailey and Andrew Thompson, Arturi Films, 2009).

⁸⁰ ‘Obituary: Jia Jinglong Died on November 15th’, *The Economist* (26 November 2016) <<http://www.economist.com/news/obituary/21710780-chinese-protester-against-forced-expropriation-was-30-years-old-obituary-jia-jinglong-died>>.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ ‘Renters live by the rules. Owners make their own.’ (© 2012 Homestart Finance).



People the world over understand that property is power, the power to make the rules, to set the agendas, to make the decisions about how things are used.⁸⁴

But why does it matter if a person holds that belief, or even if law confirms it? The answer lies in the asymmetry between the power of choice and the limitation of law. The exercise of the sovereignty of private property produces consequences for others, sometimes positive, far more frequently negative. Consider the consequences that follow from ‘perhaps the most existential impact [of choice:] ... our materially intensive lifestyle on the planet ... fired by fossil fuels’⁸⁵ — of which anthropogenic climate change is a stark example. Among its many effects, climate change results in drought and desertification, increased extreme weather, melting polar ice and rising seas,⁸⁶ natural disasters, and wars.⁸⁷

Who suffers these consequences? The inhabitants of the Earth.⁸⁸ And there is no end in sight. The most recent United Nations (‘UN’) climate talks received a new report confirming that 2016 was the hottest year ever recorded — taking the title from 2015. While global greenhouse gas emissions may be at or near their peak, with carbon-dioxide emissions from burning fossil fuels stabilising, global temperatures in 2016 were about 1.2°C above pre-industrial ones, dangerously close to the warming limit of 1.5°C agreed during the 2015 UN Paris Climate Change Conference.⁸⁹

⁸⁴ See Larissa Katz, ‘Exclusion and Exclusivity in Property Law’ (2008) 58(3) *University of Toronto Law Journal* 275.

⁸⁵ Trentmann, above n 19, 2.

⁸⁶ Andrew J Weaver ‘The Science of Climate Change’ in Harold Coward and Andrew J Weaver (eds), *Hard Choices: Climate Change in Canada* (Wilfrid Laurier University Press, 2004) 13, 25 (Figure 2.8: Schematic Diagram of Observed Variations); Steven Lonergan, ‘The Human Challenges of Climate Change’ in Harold Coward and Andrew J Weaver (eds), *Hard Choices: Climate Change in Canada* (Wilfrid Laurier University Press, 2004) 45, 51–3.

⁸⁷ See Charles Officer and Jake Page, *When the Planet Rages: Natural Disasters, Global Warming and the Future of the Earth* (Oxford University Press, 2009).

⁸⁸ See William Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, Cambridge University Press, 2009).

⁸⁹ MSLJ and the Data Team, ‘Global Warming: The State of The Climate in 2016’, *The Economist* (17 November 2016) <<http://www.economist.com/blogs/graphicdetail/2016/11/global-warming?cid=cust/ddnew/n/n/n/20161118n/owned/n/n/nwl/n/n/n/8157389/email&etear=dailydispatch>>.

The choice made possible by private property facilitates this ‘climate change relationship’ between producers of greenhouse gases and others.⁹⁰ Climate change, an externality of private property, does not end at the borders, physical or legal, of a good or a resource, or even the nation that confers and protects private property. And climate change is but one such problem that finds its origin in the choice of private property. And for that reason, Linklater concludes that:

The iron law of private property turns out to be a paradox. Although it promotes individuality, it only works by giving equal weight to the public interest The guardian of the public interest ... ultimately ... grows from humanity’s simultaneous desire for individual fulfilment and for social justice.⁹¹

In other words, private property fails when there exist extreme asymmetry between limitation — obligations and duties — and choice. But therein lies the true paradox:

The idea of individual, exclusive ownership, not just of what can be carried or occupied, but of the immovable, near-eternal earth, has proved to be the most destructive and creative cultural force in written history. It has eliminated ancient civilizations wherever it has encountered them, and displaced entire peoples from their homelands, but it has also spread an undreamed-of degree of personal freedom and protected it with democratic institutions wherever it has taken hold.⁹²

It is paradoxical because it fulfilled a dream, while simultaneously portending a nightmare: that which seemed to produce equality, really did so only for some, while for many others it destroyed their understanding of relationship to land and to things.

We could see this simultaneous dream and nightmare two ways. On the one hand, we could view private property as the dawning of the individual, endowed with the rights to life and liberty that, together, permit the exercise of choice as concerns the distribution, control and use of land and things. On the other hand, we could see private property as increasing the division of people through government, management, social forces, economics, and politics.⁹³ The seeming freedom given to us by private property in fact gives us a power that does nothing but remove us further from one another. As the empire of things broke down divisions among us, that empire allowed for new forms of power by placing the freedom and liberty of the individual above the very connectedness it seemed to foster.⁹⁴

⁹⁰ See Paul Babie, ‘Choices that Matter: Three Propositions on the Individual, Private Property, and Anthropogenic Climate Change’ (2011) 22(3) *Colorado Journal of International Environmental Law and Policy* 323.

⁹¹ Linklater, above n 18, 397.

⁹² Ibid 5–6.

⁹³ Gerald Raunig, *Dividuum: Machinic Capitalism and Molecular Revolution* (Semiotext(e), 2016).

⁹⁴ See Trentmann, above n 19, 399.

V Concluding Thoughts

What does the future hold? Only time will tell. But this much is clear: what Cohen uncovered almost 100 years ago was the fact that private property *is* a grant of power that allows individuals to control not only things, but, ironically, in their indifference to them, people, too. That ultimately divides, as power is used to satisfy the desires and preferences of the individual over the group. We are, as Gerald Raunig suggests, no longer individuals, but ‘dividuals’.⁹⁵ Linklater and Trentmann add to Cohen’s story: power has spread, insidiously, and without us even really recognising it, to suffuse everything we do. It brings with it invidious consequences. Cohen captures best the implications of that spread, warning us that property is a form of sovereignty, a power that allows individuals and groups of them in the form of corporations, to control both things and others.⁹⁶ But Cohen also leaves us with another way of understanding sovereignty, its traditional public law meaning, in which the State retains the power that allows it protect the interests of the community and the general welfare. In other words, the power retained by the State makes it possible to redress the asymmetry of choice and regulation.

Shakespeare’s *Henry IV*, in the existential moment which forms the epigraph to this review essay, reflects upon a monarch’s life: ‘uneasy lies the head that wears a crown.’⁹⁷ Here Shakespeare cuts to the heart of absolute power — which, once acquired, weighs heavily upon its holder. Private property confers the same sort of power. And Shakespeare’s *Henry IV* is really you and me. We, too, wear a crown of power, of sovereignty, of private property, and with it come the consequences of control over everything around us and, thus, over others and ourselves. And so we have come to know the weight of that crown, and just how uneasily lies the head that wears it. Seek it carefully; for having acquired it we may just come to wonder at the wisdom of doing so.

⁹⁵ Raunig, above n 93.

⁹⁶ Cohen, above n 25.

⁹⁷ Shakespeare, above n 1.