

Private Property and Political Power in a Liberal-Democratic Society

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Summary: The legitimacy of political institutions in liberal-democratic societies depends upon a clear split between the private and the public sphere. Political institutions protect public interests and private individuals/groups can freely pursue their private interests. In early-liberal political philosophy this was expressed by the concept of property: the state's exercise of political power is legitimate to the extent that it protects private property, which is then left alone. However, three developments highlight that the contemporary economy diverges from this image of a clear private/public split: (i) the spill-overs of inequalities in private wealth to the political sphere, (ii) the political effects of the activities of corporations and (iii) the quasi-public functions fulfilled by common property initiatives. These interpenetrations of the private and public sphere risk hollowing out liberalism's claim that political institutions are well equipped to protect public interests. This project investigates whether and how liberal political philosophy should be updated to take account of these developments, focusing on the need for a new conceptualization of property and its function in the legitimation of the exercise of political power. The development of such a conception would thus be an important innovation in liberal philosophy, which will help citizens and policy-makers to come to a better understanding of the role of private property in the current economic landscape. The project thereby shows whether liberal commitments to private freedom and public democracy can be sustained and points to new institutions of property and accountability for doing so.

Introduction

Liberal-democratic societies were historically premised on the image of a clear split between **the private and the public sphere**. The political organs of the state are supposed to protect public interests, while private actors have the freedom to pursue their private interests. In the earliest philosophical theories of the modern liberal-democratic state (17th/18th century), the key concept connecting the public sphere to the private sphere was the **concept of property**. The legitimate role of political institutions was to protect a private sphere in which property-owners could interact freely. Through this protecting role, they helped to constitute a private sphere of market relations, which was supposed to be insulated from further political interventions.

Since these early liberal theories, the reality in contemporary liberal-democratic societies has increasingly diverged from the image of a clear private/public split. **Three developments** deserve special attention. First, the free exchange of private property leads to large *inequalities in wealth* between citizens. These inequalities may spill over into the public sphere. In a democratic society, citizens are supposed to be equal in their abilities to influence the course of the political process, but economic inequalities provide a threat to this supposedly equal influence. Second, the private sphere consists not only of individuals but also of corporations. While corporate property is legally private, the acts of many corporations affect vital public interests. This *political role of corporations* leads to accountability problems which remain unresolved. Third,

structures of *common property* remain important and receive renewed attention today. Examples can be found in the context of environmental protection (common-pool resources) and the “sharing economy”, which are often legally based on private ownership but are meant to further public interests like solidarity and social justice amongst their members. Each of these developments in its own way challenges the early liberal image of the public-private split and the legitimacy of the political authority of liberal-democratic states based upon this split. The **interpenetration of private and public spheres** risks hollowing out liberalism’s claim that political institutions are well equipped to protect public interests.

In light of these developments, this project will rethink liberal philosophy, by concentrating on the pivotal role of property. In the early liberal tradition inaugurated by the social contract theorists, a highly specific conception of property fulfilled the legitimating role: the right to property gave the owner near-absolute powers over their possessions, inaugurated a sacrosanct private sphere, and justified large inequalities between citizens in the distribution of property. This classical conception continues to pervade present-day liberal theorizing. The **main question** is whether this is acceptable in light of liberalism’s own commitment to the democratic legitimation of political power; or whether – in light of the developments above – we need an alternative conceptualization of property and its function in legitimizing the exercise of political power. The **aim of this project** is to investigate the possibilities for such an alternative conception. By doing so, the project researches whether and how liberalism’s stance on the property-legitimacy interface can be updated to account for the blurring of the line between the private and public sphere. Such an update is **academically relevant**, for it will tell us whether liberalism is still adequate in legitimizing the core institutions of constitutional democracies. Moreover, such an update can help society in diagnosing whether the developments sketched above provide a threat to liberal democracy, if so how to cope with them and search for possible solutions. In this lies the **societal relevance** of the project.

Theoretical framework: Liberalism, Property & Power

A property-owner has a power recognized by law to do with her possessions as she pleases. Property rights impose obligations on others, who must refrain from interfering. By claiming ownership, the property-owner can exclude others from the benefits and limit their options. This exercise of private power has to be legitimated politically. However, political power itself also has to be legitimated, and here the concept of property may play an important role in turn. In the influential 17th and 18th century **social contract doctrines** of Hobbes, Locke and Kant (Hobbes 1991; Locke 2003; Kant 1996), the protection of property was represented as a key consideration to understand why coercive state authority needs to come into being. These theories present the start of **liberal theory**. Their innovative role was to propose constitutional-democratic institutions to curtail the arbitrary use of political power by feudal land-owners and monarchs, replacing it with a more impartial exercise of political power in the service of all citizens. In these theories, a highly specific understanding of property played this legitimizing role, **the classical conception of property**. It can be characterized using the template of dimensions of property (see table) as one in which property is predominantly represented as (i) private, (ii) widely ranging in scope, (iii) alienable without restrictions and (iv) unconcerned with unequal distributions. In

this scheme, precisely because the exercise of property is conceived as private, a-political, it can function as the legitimating ground of political power.

Table: Dimensions of property	Question	Typology of answers to the question
<i>Subjects</i>	who is allowed to hold property?	Single individuals (private property), individuals together (collective property), artificial persons (corporate/state property)(Macpherson 1978)
<i>Objects</i>	what can become object of a property right?	From a restricted range of objects to the 'commodification' of all possible objects.
<i>Prerogatives</i>	what are owners allowed to do?	A range from all rights in the 'bundle of rights' (Honoré 1987; Becker 1977) to only some of these rights.
<i>Distribution</i>	who owns the existing property in a society?	A range from very equal to very unequal distributions throughout the population.

This historical background is important because early liberalism shows the potential role of using a concept of property to legitimate political power. This project itself however is not historical, but focuses on **contemporary liberalism** to see whether and how this link can be preserved in today's socio-economic context.

Contemporary 'classical liberals' (and related, 'libertarians') still defend the classical conception (Nozick 1974; Narveson 2001; Mack 2010; Tomasi 2012). However, most contemporary liberal authors accept private property as a fundamental right but supplement this acceptance of unrestricted private property rights with a set of social rights (Nickel 2007; Griffin 2008; Donnelly 2013). This **supplementation strategy** also reflects the practice of many international human rights documents and national constitutions. Social rights (to housing, health care, etc.) are meant to counterbalance the harsh effects to vulnerable individuals resulting from only recognizing unrestricted private property rights. Roughly the same attitude is taken by contemporary property theorists, who have accepted a basic right to property, but argue for egalitarian corrections (Waldron 1988; Munzer 1990). This gives contemporary liberalism a double-sided character: a classical-liberal conception of property is combined with an egalitarian endorsement of social rights.

The problem with this is that, because this supplementation strategy leaves the classical conception intact, it cannot address the question whether property-holders themselves exercise political power by exercising their property rights, and if so, whether does this undermine democratically legitimated political decisions. The supplementation strategy must remain silent on these issues since the apolitical nature of property exercises is the assumption it shares with classical liberalism. This project therefore proposes to search for a different route and to

rethink the compatibility of the right to property with the legitimacy of political authority. Herein lies its main **innovative potential**. In doing so, the projects builds on legal scholars who have since long attacked the classical conception and proposed a more differentiated framework for conceptualizing property as a 'bundle of rights' (Hohfeld 1913; Wenar 2005). Such differentiated frameworks open up the conceptual space for conceiving of property as (i) not just private, (ii) not ranging over all possible objects, (iii) not granting property-owners all rights in the bundle, and (iv) being more evenly distributed (See table above). It also builds on the work of political theorists who have used more differentiated notions of property to argue for more egalitarian distributions of property (Macpherson 1978; Christman 1994; Alexander 2009). In contrast to the latter, however the focus here will not be on distributive justice per se, but on property's role in the (de-)legitimation of political power.

The **structure of the project** is bottom-up. To study the central question we need to look at *specific* exercises of property. The first three subprojects inquire whether and if so how the exercise of *corporate, common and individual* property undermines the private/public distinction and puts pressure on the legitimacy of political institutions. These subprojects provide the input for the synthesizing subproject, which investigates how to reconceptualize the link between these exercises of property in the modern economy and the legitimize exercise of political power.

SP1: Corporate Property: the public role of the corporation (postdoc)

Given their magnitude and international scope, many corporations wield extensive powers, which cannot be classified as merely private. Since a few decades now, corporations are increasingly called upon to act in the public interest, as a matter of taking their 'corporate social responsibility' (Freeman 2004). It has been widely noted that this clashes with their ownership structure and a focus on maximizing shareholder value (Jensen 2002). It is clear that the classical-liberal picture of the purely private use of property is unable to reflect these realities. However, more debated is how constructively to understand the nature of this not-purely-private role that corporations play.

So far the dominant idea was that corporate social obligations should be understood as *moral* obligations (discussed in the area of business ethics). The execution of these obligations is a matter of voluntary action by corporations. Only recently, a literature has emerged which classifies the nature of corporate action as *political* (Dubbink 2004; McMahon 1995; 2012; Moriarty 2005; Néron and Norman 2008; Hsieh 2008; Scherer and Palazzo 2007). This interpretation will also be the basic presupposition to this subproject. However, this leaves a lot to be disputed. The main questions are: (i) is corporate action really public/political, instead of private? If so, why? (ii) does this render corporate action problematic from the standpoint of political legitimacy, and if so, are there mechanisms of democratic accountability which could nonetheless render corporate action legitimate? The ownership question runs through these questions, since corporate action is at all times embedded in its ownership structure, and the proposed mechanisms will constrain the exercise of corporate property as it is conceived in the classical liberal paradigm.

(i) The first task of the subproject accordingly is to clarify the nature of corporate action. Most of the recent accounts of the political nature of property connect its political nature to the emergence of new regulatory powers for corporations. Especially in the international context, where the public power of international organizations has not kept pace with the globalization of economic activities, many transnational corporations have acquired quasi-public powers of regulation (e.g. Scherer and Palazzo 2007). However, as David Ciepley has argued, the case for seeing corporations as quasi-political actors is much older. From their creation at the end of the Middle Ages, he argues that they are hybrids, which straddle the private/public distinction. Key to understanding their specificity is their ownership structure (limited liability, asset lock-in and entity shielding). According to Ciepley, this renders corporations into 'constitutional republics' akin to sovereign republics in their structure. Liberal theory has still not been updated to take account of this hybrid nature (Ciepley 2013). The present subproject builds on Ciepley's diagnosis. It will investigate whether or not the powers of this private republic undermine the legitimacy of political institutions, and if so, how its hybrid nature can be incorporated into liberalism.

(ii) If corporate action is at least partly political in nature, this still leaves open which mechanisms can make sure that the exercise of corporate power is legitimated. Several routes have recently been explored. One is to try to implement voting mechanisms which ensure the representation of a broader range of stakeholders (Hussain and Moriarty 2014). This route is mainly situated in democratic theory. It reconceives corporations as quasi-political actors, which are required to represent the interests of all fairly. In contrast to the usual business ethical implementation of this idea (requiring corporate boards to do the balancing of all stakeholder interests), here the stakeholders themselves acquire voting rights. A completely different route is to strengthen corporate obligations with respect to human rights (Kolstad 2009; Wettstein 2012). Human rights traditionally bind only states: they are the paradigmatic example in western history of how state power was bound, so that it would not arbitrarily impinge on citizen's vital interests. Putting the same demands on corporations treats them analogous to states in this important respect. Yet another route is to create more space for cooperative actions by a set of corporations in competition law (Claassen and Gerbrandy 2015; 2016). Here the presupposition is that the problem for corporations in fulfilling their social responsibilities lies in the unilateral nature of corporate action (often taking on a social duty such as producing more sustainably is difficult or impossible, due to competitive pressures). Here the political mechanism is to loosen the requirement of market competition that is normally imposed on corporations.

The subproject needs to study the philosophical presuppositions of each of these routes: do they require a reconfiguration of the corporation's property structure, and if so how? What do they imply in terms of the balance between corporate power and democratic accountability?

SP2: Communal Property: The New Commons (phd1)

In pre-capitalist economies common ownership of land often played a vital role in supporting peasants in their life support. The transition to private ownership has been interpreted by some as a necessary measure to avoid 'the tragedy of the commons' (Hardin 1968) and increase the efficiency of the economy (Demsetz 2002) while Marx considered this capitalism's 'original sin' (Marx 1976).

Nowadays, new practices of common property attract renewed attention. The subprojects focuses on these new practices and has as its main question – parallel to the other subprojects – whether these provide a challenge to the legitimacy of public institutions.

In the environmental context, exhaustion of natural resources and pollution raise serious questions about the state's ability to protect its population, hence, its legitimacy. Some authors have argued that natural resources may be hard to regulate through a private property regime and require a common-pool structure (Ostrom 2003; Rose 2009). Another example is the rise of cooperatives, both on the production (producer coops) and on the consumption (consumer collectives) end of the economy . Initiatives such as crowd-funding have popped up in response to traditional banks' failure to provide credit. In the sphere of ICT 'commons-based peer production' by volunteers on new computer software has arisen as an alternative to commercial production (Benkler and Nissenbaum 2006). Finally, some interpret the activities in the 'sharing economy' (where private rooms and taxi rides are offered to strangers) as a form of production based on pooling property (Zale 2016). All of these can be interpreted as creating 'a new commons' between the market and the state.

There is almost no political-philosophical literature on these new commons. The subproject will fill this gap, by studying them from the angle of the problem of property and political power. The key question is whether the commons undermine the power of public institutions or provide a welcome supplement to it. The claim of those enthusiastic about common-property based forms of production and consumption often is that these are able to assume responsibility for public interests (like solidarity and social justice), in contrast to commercial production focused on wealth maximization. In this, the commons can act as a substitute but also as a rival to old-style public services. The subproject studies whether such responsibilities are justified. One problem, familiar from the closely connected context of non-profit associations, which have a similar positioning between the state/public sphere and the individual/personal sphere, is that their 'public focus' may lead the state to regulate and use these organizations to enforce public power. When this happens, this leads to a loss of freedom on the part of these associations; they lose their private character and become 'too public' (Cordelli 2012).

Another problem, in the opposite direction, is that these organizations are successful in delivering certain public goods, but do so on an exclusionary basis. The benefits of commons-based production normally flow to those participating in them (insiders), not to others (outsiders). Hence they provide only a partial measure of solidarity, their character remains 'too private'. An example of the latter are the recent disputes about the sharing economy, which, critics claim has been captured by large commercial companies. Although there initially was a great sense of idealism about their capacity for more solidaristic production and consumption, this has now cooled down considerably (Schor 2014; Dyal-Chand 2015).

The philosophical question which arises from the debate about the sharing economy and similar debates about other common property structures is whether these new commons really do provide a third model between market and state, and if so whether this enhances or rather decreases the legitimate exercise of

public power. Much depends on the way public institutions are able to regulate these activities. Do they require distinct mechanisms of political protection from commercial take-over, and/or regulation to make them democratically accountable to the public as a whole? Often public authorities are perceived as lacking the capacity or the legitimacy to regulate them (e.g. disputes over Airbnb regulation in many cities), since it requires rather deep intrusions into private initiatives between citizens. In these cases common forms of production do provide a challenge to public power. This needs to be set against the possibility that these commons form an enhanced source of organizing solidarity and public goods themselves, hence becoming quasi-public or quasi-political actors (not unlike the political role of corporations studied in subproject 1). By addressing these questions, the subproject will shed light on the hybrid public/private character of the new commons and answer the question whether they are a threat or an opportunity for safeguarding the legitimacy of political institutions.

SP3: Individual Property: Private Wealth & Democratic Participation (PhD2)

The classical conception of property has throughout history been attacked for its distributive consequences. This problem has recently received renewed attention with Occupy protests against the concentration of wealth at “the top 1%” and Piketty’s empirical study of the trends in wealth inequalities (Piketty 2014). Even bracketing global inequalities and focusing on developed countries, wealth inequalities seem to be back at 19-century levels. These wealth inequalities are discussed in the context of political philosophy’s traditional tasks of (i) proposing conceptions of social justice, and (ii) proposing conceptions of political legitimacy. An engagement with both contexts is necessary for rethinking property relations.

(i) Since the ground-breaking publication of John Rawls’s *Theory of Justice* (1971), philosophers have written extensively on the fairness of differences in wealth (Scanlon 2003; O’Neill 2008). An important egalitarian strand in liberal philosophy has incorporated distributive concerns using a renewed form of the social contract tradition to argue that wealth increases should be to be benefit of all (Rawls 1999). However, this has not led to sustained philosophical investigation of conceptions of private property. What seems to be missing is an institutional translation of Rawls’s (and others’) abstract proposals for a fair wealth distribution. For the theme of property, this is crucial. Fortunately, over the last decade a bit more discussion has occurred, in two contexts. One is the discussion about ‘property-owning democracy’ (O’Neill and Williamson 2012). Here the maintenance of sufficient property by everyone is seen as a prerequisite of justice. A second context is the newly emerging literature on ‘justice in taxation’, which tries to develop principles of just taxation (Murphy and Nagel 2002; Halliday 2013; Verbeek 2015). Neither of these contexts focuses explicitly on the concept of property used, however. This will be the task of this subproject: to reconstruct from this literature on social justice, whether it implicitly still uses a ‘classical’ conception of property, or whether an alternative conception is emerging that diverges from that. The focus will not be on the justice of property distributions per se, however, but on the relation between justice and legitimacy. For Rawls, a just distribution requires that wealth difference should not impact upon each citizen’s ability to exercise her political rights. Political legitimacy then requires the just arrangement of a society’s wealth. Many have argued this demands too much: political legitimacy should be a lower standard than justice. The subproject

will inquire whether or not this is the case: can political institutions still function legitimately even in the presence of unjust wealth distributions?

(ii) The relations between private wealth and political power have mainly been the focus of empirical studies. Here too however, recent work is changing this. One important step is to theorize the nature of power in the economic sphere: against the image of the economy of a power-free zone, some have proposed a reconceptualization of power in the economy (Barry 2002; Dowding 2003). Building on their work, we can then ask whether the holding of private wealth has an effect on political decision-making which renders the latter illegitimate. Although the popular media often and loosely speak of the corrupting effect of wealth on politics, sustained philosophical analysis shows these claims are not so easily made. On a principled level, the legitimacy of buying votes in open markets is disputed (Freiman 2014; Taylor 2016). Accepting such markets, would mean that the separation between wealth and political power is unproblematic from the start. But even when one thinks there is a problem, we need to distinguish several channels of influence between private wealth and political power: influencing elections, influencing the political agenda, influencing public opinion and influencing background socio-economic conditions. For each of these the predicament might be different (Christiano 2012). More nuance is also needed on another score: while private individuals and firms may disproportionately influence or constrain political decisions, this is not necessarily illegitimate because a complicated balance between this problem and the benefits of free markets need to be established (Christiano 2010). The subproject will study these debates on the political (il)legitimacy of the influence of private wealth on politics. For the conceptualization of property, two themes will be key. On the one hand, the key question is whether a 'mere' redistribution of property is sufficient to insulate politics from distorting private influences, or whether a different (e.g. more collective) ownership of property, or a different set of conditions (obligations) on the use of property, is called for. On the other hand, the question is whether mechanisms of democratic accountability can be formulated to legitimize the (inevitable) linkages between wealth and decision-making that are likely to persist (e.g. the ethics of campaign financing is a neglected topic in the ethical literature to which the subproject could contribute).

SP4: Synthesis (main applicant)

The aim of the synthesizing subproject is to investigate whether an alternative conceptualization of the property-legitimacy interface is emerging from the actual developments studied in the three previous subprojects, which can be contrasted with the classical conception. The synthesis focuses on extracting from the subprojects indications on three parameters that together are necessary parts of such an alternative conceptualization.

First, while the classical conception gave rise to a solid private/public split, an alternative conception might accept hybridization of public and private spheres. The synthesis studies whether the subprojects provide indications that property rights should change to account for this hybridity: whether an alternative conception of political legitimacy requires non-private forms of property, new objects of property, restrictions on the exercise of property or redistribution of property (hence, an alternative stance on the dimensions 1a-d from the table above). Here the differentiation in concepts of property from the 20th century legal literature will be brought to bear on the political-philosophical legitimacy question.

Second, where the classical notion focuses on giving owners a right to a sphere of unrestricted freedom, the alternative is to attribute both rights and obligations to owners. If public interests in a complex modern economy are inevitably exercised by “private” actors, then *obligations* need to be attributed to owners to use their property in the public interest. The synthesis studies whether the subprojects provide indications for such obligations arising in the areas of corporate, common and individual property, and whether these must be understood as moral or as political obligations (the latter but not the former being legally sanctioned).

Third, by resting on the idea that public interests would be protected by public institutions, the classical conception could relieve private property holders of the burdens of *democratic accountability*. If we accept hybridization of public and private spheres, new mechanisms need to be devised to render the private exercise of public power politically legitimate. The synthesis studies whether the subprojects suggest mechanisms of accountability that could fulfill this role. It compares them to see whether the subprojects point in different directions depending on the issue at stake, or whether there are (also) trends emerging common to all subprojects.

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