2017

The Honoré-Waldron Thesis: A Comparison of the Blend of Ideal-Typic Categories of Property in American, Chinese, and Australian Land Law

Paul T. Babie

John V. Orth
University of North Carolina School of Law, jvorth@email.unc.edu

Charlie Xiao-chuan Weng

Publication: *Tulane Law Review*

The Honoré-Waldron Thesis: A Comparison of the Blend of Ideal-Typic Categories of Property in American, Chinese, and Australian Land Law

Paul T. Babie,* John V. Orth,**
and Charlie Xiao-chuan Weng***

* Professor of Law, Adelaide Law School, The University of Adelaide. We are grateful to Laira Krieg (LLB, 2014), Emily Carr (LLB, 2016), and Jordan Teng (LLB, 2017) for providing outstanding comments and research assistance in the preparation of this Article and to Nigel Williams for preparing the diagrams in Part VI.

** William Rand Kenan Jr. Professor of Law, UNC School of Law, University of North Carolina.

*** Associate Professor of Law, UNSW Law School, University of New South Wales; formerly Oriental Scholar Chair Professor of Law, KoGuan Law School, Shanghai Jiao Tong University.

I. INTRODUCTION: THE HONORÉ-WALDRON THESIS

In his seminal essay on the nature of ownership and its "standard incidents" or "bundle of rights,"[1] A.M. Honoré made two significant points concerning the place of property in different politico-economic systems of government. First, Honoré noted, it is patently false to

> claim that all systems attach an equal importance to ownership (in the full, liberal sense) . . . . In the Soviet Union [still extant in 1961], for instance, important assets such as land, businesses and collective farms are in general withdrawn from 'personal ownership' (*viz.* the liberal type of ownership) and subjected to 'government' or 'collective' ownership, which is a different, though related institution.[2]

And, second, that

> in nearly all systems there will be some things to which not all the standard incidents apply, some things which cannot be sold or left by will, some interests which cannot endure beyond a lifetime, some things . . . which it is forbidden to use or to use in certain ways. If the differences between these cases and the paradigm case are striking enough, we shall be tempted to say that the things in question are not or cannot be owned, but it would be a mistake to conclude that the legal systems in which these cases occur do not recognize ownership. Whether a system recognizes ownership, and to what extent it permits ownership (who may own, what may be owned), are widely differing questions.[3]

Of course, in using "full liberal ownership," or simply "personal ownership," Honoré was moving toward an analytical description of that which would only later become described and readily recognized as "private property," comprising both full ownership and some parcelling of a smaller bundle of those rights which together might constitute full ownership held by an individual private person. For

---

1. *See* LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 11-15 (2003); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 9-13 (1988); Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 694 (1938).

2. A.M Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE: A COLLABORATIVE WORK 107, 109 (A.G. Guest ed., 1961).

3. *Id.* at 109-10.

Honoré, this "personal ownership" stood in contrast to that form of ownership which attaches to the state or the public, or to the community, or to some defined group drawn from the members of a wider community or of the state.[4] Again, Honoré was describing analytically that which would only later become recognized as "state or public property" and "common property."

Yet it would be some time in coming. Honoré wrote in 1961, and even as recently as 1996, J.W. Harris, in his own seminal work *Property and Justice*, could write that property theorists "have seldom attempted any analysis of modern property institutions which exhibits that which unites, and that which divides, these differing conceptions of property—in particular, what precisely is the difference between 'ownership' when ascribed to private persons or groups or to agencies discharging public functions."[5]

Harris does, however, go some way toward providing a thoroughgoing analytical account of the three theoretical ideal types of property to which he alludes, as well as adding a fourth category. Those categories are: (1) private property, whether held by individuals, jointly by more than one individual or group, or by a corporation; (2) public/state property; (3) common property; and (4) a category created by Harris, which he called "communitarian property" to describe the increasingly important form of property for many postcolonial nations, variously known as native, aboriginal, or indigenous title.[6]

These ideal-typic categories of property add precision to what Honoré revealed only in an amorphous way, and doing so allows a better understanding of what Honoré meant in answering the dual question of who may own and what may be owned in liberal-capitalist (largely common law) and communist-socialist (largely civil law) legal systems:

> No doubt liberal societies are more inclined than socialist societies to extend the list of items that can be owned, but it does not follow that, when a socialist system permits ownership, or 'personal ownership' [in other words, private property], it is permitting something different from what is permitted in the corresponding case in a liberal society. It may well be—and all the evidence indeed supports the view—that socialist societies recognize the 'liberal' notion of 'full' ownership [in other

4. *Id.* at 110.
5. J.W. HARRIS, PROPERTY AND JUSTICE 100 (1996).
6. *Id.* at 100-18.

> words private property], but limit the range of things that can be owned.[7]

In other words, Honoré makes a point seldom grasped when we think of property today: every legal system, no matter its politico-economic-legal genesis, contains a mix of *each* of the four ideal types identified initially by him in 1961 and later sharpened by Harris. It is a matter of the mix of these types, and not the presence or absence of any of them, on which we ought to focus. Jeremy Waldron puts it this way:

> Property rules differ from society to society. Though we describe some societies (like the United States) as having systems of private property, and others (like China) as having collectivist systems, all societies have some places governed by private property rules, some places governed by state property rules, and some places governed by common property rules. Every society has private houses, military bases, and public parks. So if we want to categorize whole societies along these lines, we have to say it is a matter of balance and emphasis. For example, we say that China is a collectivist society and that the United States is not, not because there is no private property in China, but because most industrial and agricultural land there is held collectively whereas most industrial and agricultural land in America is privately owned. The distinction is one of degree. Even as between two countries [that] have basically capitalist economies, New Zealand (say) and Britain, we may say that the former is "communist" to a greater extent (that is, is more a system of common property) than the latter because more places (for example, all river banks) are held as common property in New Zealand than are held as common property in Britain.[8]

Waldron identifies something alluded to by both Honoré and Harris: the true difference between systems is not one of the presence or absence of any one or more than one ideal-typic form of property, but one of the degree to which those types of property are found in each system. In other words, no system has a complete absence of any one type of property but, rather, a blend, the only difference being one of degree.

---

7. Honoré, *supra* note 2, at 110.

8. Jeremy Waldron, *Homelessness and the Issue of Freedom*, *in* LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991 309, 312-13 (1993); *see also* Michael A. Heller, *Critical Approaches to Property Institutions: Three Faces of Private Property*, 79 OR. L. REV. 417, 421 (2000) (noting that property theorists always recognize that any actual property regime should and will contain all elements of the trilogy of private, common, and state property).

In this Article, we call the identification of this mix, balance, or blend, in varying degrees of ideal-typic property types identified in varying stages of specificity by Honoré and Waldron, the "Honoré-Waldron thesis." And in this Article, we test the accuracy of the thesis by considering, comparatively, the real property or land law of a communist/socialist and civilian legal system, that of China, and two liberal/capitalist and common law systems, those of the United States and Australia.

The Article proceeds in five parts. Part II briefly describes the principal features of each of the four ideal-typic categories of property. Parts III through V examine, respectively, the real property law of the United States, Australia, and China, demonstrating examples of each of the four ideal-typic categories, in varying mixes of ideal-types found in representatives of the two main legal traditions (common and civil). In order to test the thesis, the three jurisdictions are organized here according to the extent to which most people intuitively consider one of the ideal-types to predominate. Thus, the United States is dealt with first, as an example of a common law system in which private property is thought by most people to be the dominant ideal-typic form of property. We then deal with Australia, in recognition of the fact that a reader who is familiar with Australia (also a common law system) will typically think it is more like the United States and less like China in terms of the mix of ideal-typic categories, although not exactly like either one of those other jurisdictions. And China represents a civilian system in which most people would think that public or state property comprises the largest category.

The intuitive sense that people have of each system is the point of the Honoré-Waldron thesis—what we *think* is the case may not be and likely is not necessarily so. Thus, this Article reveals the truth of the thesis: none of the three systems we examine reveals a complete absence of any one ideal-typic form of property. Rather, as the thesis predicts, each exhibits a blend of the three ideal-typic forms. It is a difference of degree.

Part VI offers some comparative reflections on the nature of the mix of ideal types in each of the three legal systems examined and how the Honoré-Waldron thesis confirms Honoré's assessment of property made over half a century ago. Indeed, what emerges is a continuum of property systems, based upon intuitive understandings of the mix of property types. The continuum ranges from those property systems in which we have an intuitive sense that private property predominates to those in which we have an intuitive sense

that state or public property predominates. What we find is that, in actuality, at neither end of the continuum is there a complete absence of any of the ideal types of property. Or, put another way, this assessment of the Chinese, American, and Australian land law systems confirms, apart from providing a working outline of each of those systems, the truth of the Honoré-Waldron thesis. There is, indeed, a mix, balance, or blend of each of the four ideal-typic categories of property found in these jurisdictions. This conclusion is significant, for it means that the land law, and indeed any aspect of the property law, of any jurisdiction can just as easily be plotted along the continuum which we present here.

II. IDEAL-TYPIC CATEGORIES

Before we consider the three land law systems which form the basis of our test of the Honoré-Waldron thesis, it is necessary to provide a brief outline of the four ideal-typic categories identified by Harris. This allows us accurately to classify the types of property in land in each of the three systems. As we know, the ideal-typic categories identified by Harris are private property, common property, state/public property, and communitarian property. This Part considers each in turn.

A. Private Property

Let us consider what private property is by splitting the phrase into its two parts: "private" and "property." It is easier to take "property" first. The modern liberal conception of property consists of an Honoré-inspired "bundle" of legal rights or relations created for and conferred upon individuals, or groups of them, and enforced by the state between those individuals, or groups of them, in relation to the control of goods and resources.[9] Today this is known as the "Hohfeld-Honoré bundle of rights" picture of property,[10] "the bundle

9. For various accounts of the liberal conception of private property, see STEPHEN R. MUNZER, A THEORY OF PROPERTY 166-69 (1990); MARGARET JANE RADIN, REINTERPRETING PROPERTY 31-33 (1993); JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 2-6 (2000); WALDRON, *supra* note 1, at 9-13.

10. *See* LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 11-14, 21-22 (1977); MUNZER, *supra* note 9, at 17-27; Gerald F. Gaus, *Property, Rights, and Freedom*, *in* PROPERTY RIGHTS 209, 212-18 (Ellen Frankel Paul et al. eds., 1994).

of rights picture of property,"[11] or simply "the sophisticated or legal conception of [private] property."[12]

At a minimum, this bundle includes the "liberal triad" of use, exclusivity, and disposition.[13] With few exceptions, one can use or dispose of any "tangible or intangible good, resource, or item of social wealth . . . to the exclusion of all others."[14] And the holder may exercise these rights in any way they see fit, to suit personal preferences and desires or, simply, to act in a self-seeking way.[15] Or, to put this in a way that comports more closely with the language of liberal theory, rights are the shorthand way of saying that individuals enjoy choice, the ability to "set agendas"[16] about the control and use of goods and resources in accordance with and to give meaning to a chosen life project. Of course, in addition to protecting the rights themselves and their exercise against interference from others or from government, those very laws may also impose limits on self-seekingness.[17]

---

11. *See* J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 715 (1996).

12. *Id.* at 724 (quoting MUNZER, *supra* note 9, at 23).

13. RADIN, *supra* note 9, at 121-23. This builds, of course, upon the ground-breaking work of Honoré, who identified eleven "standard incidents" of ownership. On whether there are essential incidents, see Thomas W. Merrill, *Property and the Right To Exclude*, 77 NEB. L. REV. 730 (1998). On antiessentialism, see Thomas C. Grey, *The Disintegration of Property*, *in* 22 NOMOS: PROPERTY 69 (J. Roland Pennock & John W. Chapman eds., 1980) and Lior Jacob Strahilevitz, *Information Asymmetries and the Rights To Exclude*, 104 MICH. L. REV. 1835 (2006).

14. Paul Babie, *Climate Change: Government, Private Property, and Individual Action*, SUSTAINABLE DEV. L. & POL'Y, Winter 2011, at 19.

15. This begins with John Stuart Mill's "self-regarding act." JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 88-98 (The MacMillan Company 1926) (1859); *see also* HARRIS, *supra* note 5, at 29, 31, 105; MUNZER, *supra* note 9, at 3-9; JOSEPH WILLIAM SINGER, THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP 66-70 (2000) (outlining how property norms assist in determining the difference between a truly self-regarding act and one that is not); SINGER, *supra* note 9, at 30; Gregory S. Alexander, *Property as Propriety*, 77 NEB. L. REV. 667, 699 (1998). For the modern work on self-regarding acts, see Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975.

16. This phrase was coined by Larissa Katz. Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275 (2008).

17. This is because there has yet to be any example in the history of human society where "sole and despotic dominion" described the on-the-ground distribution of resources or social wealth. Blackstone himself recognized this. 2 WILLIAM BLACKSTONE, COMMENTARIES *2; *see* Frederick G. Whelan, *Property as Artifice: Hume and Blackstone*, *in* 22 NOMOS: PROPERTY, *supra* note 13, at 101, 114-25. For more contemporary critiques, see Heller, *supra* note 8, at 419 and Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 620-31 (1998). Even the Romans—to whom the notion of absolute dominium in things is often attributed—did not in practice recognize such a possibility. Joshua Getzler,

Modern scholarship reminds us that it is important to see these rights as legal *relations*. This is significant because it adds both a social dimension to property and explains that property can only exist as a product of relationship between and among individuals. Wesley Newcomb Hohfeld first brought this to our attention in the notion of "jural opposites," which, at the risk of drastic oversimplification, means that where there is a right (choice) to do something, there is a corresponding duty (a lack of choice) to refrain from interfering with the interest protected by the right.[18] Rights would clearly be meaningless if this were not so. The liberal individual therefore holds choice, the ability to set an agenda about a good or resource, while all others (individuals and the community or society)[19] are burdened with a lack of choice.

Having described "property," we must remember that we are concerned with "private" property. What, then, is meant by "private?" C.B. Macpherson captures the meaning of "private" by noting that it "had to be based on the individual: property could only be seen as a right of an individual, a right derivable from his human essence, a right to some use or benefit of something without the use or benefit of which he could not be fully human."[20] J.W. Harris adds that "private" means that situation where the rights which constitute property are held by individuals, jointly by more than one individual or group, or by a corporation.[21] And C. Edwin Baker summarizes the combination of "private" and "property" this way: "[Private] property [i]s a claim that other people ought to accede to the will of the owner, which can be a person, a group, or some other entity. A specific property right amounts to the *decisionmaking authority* of the holder of that right."[22]

Roman Ideas of Landownership, *in* LAND LAW: THEMES AND PERSPECTIVES 81, 81-106 (Susan Bright & John Dewar eds., 1998).

18. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28-31 (1913-1914); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 710-13 (1917).

19. On the meaning of community and society as concerns property theory, see PROPERTY AND COMMUNITY (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010).

20. C.B. Macpherson, *Liberal-Democracy and Property*, *in* PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 199, 201-02 (C.B. Macpherson ed., 1978).

21. HARRIS, *supra* note 5, at 101-02; Thomas Hill Green, *The Right of the State in Regard to Property*, *in* PROPERTY: MAINSTREAM AND CRITICAL POSITIONS, *supra* note 20, at 101-17.

22. C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 742-43 (1986) (emphasis added).

In this web of legal relationships, which instantiates the rights that comprise it and which defines its holder as the individual, a group of individuals, or legal individuals, especially corporations, we therefore find the liberal conception of private property.

B. Common Property

As we know from Honoré's and Harris's work, we must add to private property two other ideal-typic categories of property—common and state/public[23]—as well as the boundaries between the three.[24] While it does exist in real-world societies,[25] true common property is very rare—the atmosphere, for instance, is the primary example, which might be contrasted with the public domain of intellectual property. Rather than describing any real world place, common property typically serves as a residual theoretical category necessary to describe any property regime that is neither private nor state/public.[26] It is a hypothetical postulate for a theory that attempts to demonstrate, conceptually and logically,[27] the emergence and ongoing existence of private property in any society.[28] In other words, it is the method of resource allocation in a society where it cannot be said that private or state/public property exists, whatever content those categories may have for that society.

As a matter of content then, common property is the absence of any exclusionary rights; instead, everyone has the privilege and no one has the right to exclude others in relation to the resource or thing in question. Frank Michelman argues that in the commons, "[p]eople are legally free to do as they wish, and are able to do, with whatever objects (conceivably including persons) are in the [commons]."[29] In

---

23. The "ideal-typic" and "ideal types" phraseology was coined by Heller. *See* Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1200 (1999); Heller, *supra* note 8, at 418-22.

24. *See* Heller, *supra* note 23, at 1169.

25. Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1322-28 (1993); Heller, *supra* note 8, at 420-21.

26. HARRIS, *supra* note 5, at 110; Heller, *supra* note 8, at 419.

27. HARRIS, *supra* note 5, at 111-14.

28. *See* BLACKSTONE, *supra* note 17, at *2-8; JOHN LOCKE, TWO TREATISES OF GOVERNMENT 327-44 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690); WALDRON, *supra* note 1, at 277-78; Heller, *supra* note 8, at 420; Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 52 (1990).

29. Frank I. Michelman, *Ethics, Economics, and the Law of Property*, *in* 24 NOMOS: ETHICS, ECONOMICS, AND THE LAW 3, 5 (J. Roland Pennock & John W. Chapman eds., 1982).

other words, in the commons, the protections afforded private or state/public property have not been extended to the resource in question.[30]

C. State/Public Property

While many examples of state/public property (sometimes also called collective property[31]) can be found in existing societies,[32] it can also, like common property, represent a theoretical counterpostulate to private property. It exists where "the collective, represented usually by the state, holds all rights of exclusion and is the sole locus of decision-making regarding use of resources."[33] Thus, drawing parasitically upon private property, this ideal-type confers bundles of rights on agents of the state or other public officials in relation to certain assets or resources.

The major theoretical distinction between state/public and private property is the fact that unlike the latter, in the case of the former, no legitimate, self-seeking, preference-satisfying, or self-regarding exploitation is allowed. Rather, any use is governed by the conceptions of social function according to the public enterprise in question, typically by legislative means.[34]

D. Communitarian Property

J.W. Harris, as noted above, added a fourth ideal-typic form of property: communitarian.[35] Distinguishable from private and state/public, communitarian property, not to be confused with common property, is that form of property which belongs to an indigenous people, yet depends for its existence upon the recognition and protection of a dominant legal system. Still, while the dominant legal system recognises and protects it, communitarian property does not depend upon that external protection or upon any conception of private property or public property for its content. That content must come from the unique rules, traditions, and customs of the indigenous people in question, which always differentiate this type of property from private and public. Indeed, any external protection provided by

---

30. HARRIS, *supra* note 5, at 107-10.
31. Heller, *supra* note 8, at 420.
32. MUNZER, *supra* note 9, at 25.
33. Heller, *supra* note 8, at 421.
34. HARRIS, *supra* note 5, at 105.
35. *See supra* text accompanying note 6.

the dominant system must stop short of *internal* regulation; interference by a dominant society and its legal system irreversibly alters the distinction between communitarian property and public and private property.[36]

External protection, therefore, is not sufficient for the existence of communitarian property. There must also exist an internal content which derives from a mutual sense of community; that content is the subject of the protection offered by the dominant legal system. Where members of a community have mutual rights over land which they claim as theirs, referable exclusively to their own traditions and customs but protected by external rules conferred by a dominant legal system, communitarian property exists.[37]

With these theoretical distinctions in place, it is possible now to turn to the working land law or real property law systems in the three jurisdictions chosen to test the Honoré-Waldron thesis. As we explained in the Introduction, the three systems are organized according to the intuitive understanding of the ideal-typic categories of property normally associated with them: in the case of the United States, private property; in the case of China, state/public property; and in the case of Australia, something in between.

III. REAL PROPERTY LAW IN THE UNITED STATES

Prior to European contact, the area within the present boundaries of the United States was occupied by indigenous peoples. Beginning in the late fifteenth century, European nations, operating on their own legal and cultural premises, claimed sovereign ownership of the land, to the exclusion of the natives. While European settlers in the future United States were not exclusively English, English common law became the predominant legal system in the colonial period.[38] The real property law of most states remains a variation of English land law as it was at the time of American independence in the late 18th century,[39] although the state of Louisiana, formed out of land

36. HARRIS, *supra* note 5, at 102-04.

37. *Id.*

38. For colonial land law, see 1 DAVID A. THOMAS, HISTORY OF AMERICAN LAND LAW: ENGLISH ORIGINS AND THE COLONIAL EXPERIENCE ch. 9-11 (2013).

39. For a state-by-state survey of the reception of the English common law of property, see 2 DAVID A. THOMAS, HISTORY OF AMERICAN LAND LAW: LAND LAW IN THE AMERICAN STATES ch. 12-14 (2013).

purchased from France in 1803, retains a civil law property system,[40] and the property law of some western states includes civil law elements, particularly community property for married persons.[41] Although reference is sometimes made to an "American law of property,"[42] in fact there is no single body of real property law in the United States, but instead distinct, although related, state systems.

A. Private: The American Fee Simple

The modern history of American land law begins with the Declaration of Independence by thirteen British colonies in 1776, an independence formally recognized by the former colonial power in the Treaty of Paris in 1783.[43] In one form or another, all the newly independent states declared that sovereignty had passed from the Crown to the people. The North Carolina Constitution of 1776, for example, begins with an affirmation of the first principle of republican government: "That all political power is vested in and derived from the people only."[44] In consequence, "The property of the soil . . . being one of the essential rights of the collective body of the people . . . . all the territories, seas, waters, and harbours, with their appurtenances . . . are the right and property of the people of this State, to be held by them in sovereignty," albeit with a proviso saving Indian "hunting grounds."[45] Notwithstanding the people's newly acquired sovereignty, the state's first constitution affirmed titles granted in the colonial period, excepting only property forfeited by those who remained loyal to the Crown.[46] Land not privately owned belonged to the state, which sought to provide for an orderly sale, although

---

40. *See* LA. CIV. CODE bk. II (discussing "Things and the Different Modifications of Ownership").

41. The nine community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Two other states, Alaska and Tennessee, offer a community property option. *See* WILLIAM A. REPPY, JR. & CYNTHIA A. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES (6th ed. 2004).

42. *See* 1 AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES (A. James Casner ed., 1952).

43. This treaty was ratified by the U.S. Congress on January 14, 1784. *Continental Congress, 1774-1781*, OFF. HISTORIAN, https://history.state.gov/milestones/1776-1783/continentalcongress (last visited Jan. 28, 2017); *Continental Congress Ratifies the Treaty of Paris*, HIST., www.history.com/this-day-in-history/ContinentalCongress-ratifies-the-treaty-of-Paris (last visited Jan. 28, 2017).

44. N.C. CONST. of 1776, A Declaration of Rights, art. I.

45. *Id.* art. XXV.

46. Michael Toomey, *State of Franklin*, N.C. HIST. PROJECT, http://northcarolinahistory.org/encyclopedia/state-of-franklin/ (last visited Feb. 10, 2017).

western settlement was sometimes a scramble.[47] Today the State of North Carolina retains title to less than 7% of the land.[48]

In keeping with contemporary English practice, land law was based in theory on a form of "legal feudalism," a system of tenures without private allodial title. The basis of the property system was the estate (technically a tenancy)[49] in fee simple, a property interest of potentially indefinite duration that was alienable, devisable, and inheritable.[50] Despite the theory, Americans developed a robust culture of private ownership of land, often associating private property and free markets with liberty and democracy.[51] About two-thirds of American land is privately owned, although the percentage is higher in the eastern states.[52] The only significant remnant of feudal theory is escheat on the death of a sole owner without a valid will or qualified heir. In the event of escheat, title reverts to the sovereign or "overlord"—in the American system of federalism, the state where the land is located rather than the federal government.[53] Whether as an aspect of tenure or as an inherent element of sovereignty, the power of eminent domain allows the state or federal government to take

47. *Id.*

48. *See Public Land Ownership by State*, NAT. RESOURCES COUNCIL ME., http://www.nrcm.org/documents/publiclandownership.pdf (last visited Jan. 28, 2017).

49. *See* A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 88-89 (2d ed. 1986) ("[T]he medieval lawyers never spoke of a person *owning* an estate in lands. . . . Freeholders are all tenants.").

50. *See* John V. Orth, *After the Revolution: "Reform" of the Law of Inheritance*, 10 LAW & HIST. REV. 33, 39-43 (1992). After independence, American states acted to replace primogeniture, favoring the first-born male, with partible inheritance, treating all children equally. *Id.* at 34-36. In premodern times, a limited fee existed as well, the fee tail, inheritable only by bodily heirs. *Id.* at 36-37. American states have struggled over the years to eliminate or modify the entailed estate, generally converting it into a fee simple. *See, e.g.*, N.C. GEN. STAT. § 41-1 (2016) ("Every person seized of an estate in tail shall be deemed to be seized of the same in fee simple."). The State of Connecticut adopted a similar statute in 2015. 2015 Conn. Acts 234. Prior Connecticut law recognized a fee simple in the issue of the grantee of a fee tail, in effect preserving the entail for one generation. For a survey of the varieties of state responses to the fee tail, see RESTATEMENT OF THE LAW OF PROPERTY: INTRODUCTION AND FREEHOLD ESTATES ch. 5 (AM. LAW INST. 1936).

51. *See generally* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 154-55 (2d ed. 1998) (tracing the history of private ownership and property law in America).

52. *See Public Land Ownership by State*, *supra* note 48.

53. William R. Vance, *The Quest for Tenure in the United States*, 33 YALE L.J. 248, 248-49 (1923-1924). There is "no escheat to the original grantor, even though such grantor [was] the Federal government, but only to the State in which the land lies." *Id.* at 248.

private property for public use, subject to a constitutional guarantee of just compensation.[54]

The unencumbered fee simple held in severalty by a sole proprietor, while the paradigm form of property ownership, is rarely encountered in practice. Instead, the fee is often held in concurrent ownership, whether by spouses, siblings, or coventurers.[55] The traditional array of concurrent estates, originally recognized in most states, included the tenancy in common, the joint tenancy, and the tenancy by the entirety.[56] The tenancy in common, whereby each co-owner holds a separate although undivided share, remains generally available today.[57] The joint tenancy with its associated right of survivorship, once the favored form of co-ownership, has been significantly modified in many states.[58] The tenancy by the entirety, limited to married persons, continues to exist in about half the states.[59] In those where it survives, it provides important benefits to spouses in the form of an indestructible right of survivorship and in some states significant protection from creditors; in consequence, it was caught up in the recent marriage equality debate.[60]

In time, increasing amounts of property were held by combinations organized in the form of trusts or corporations.[61] Where property is transferred in trust, the title is divided into legal title held by the trustee and equitable title held by the beneficiaries.[62] The trustee holds all the legal incidents of ownership but must exercise them exclusively for the benefit of the equitable owners.[63] A corporation, by contrast, is itself a legal entity, a "fictitious person,"

---

54. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). State constitutions are to the same effect. *See, e.g.*, N.J. CONST. art. I, ¶ 20.

55. 4 THOMPSON ON REAL PROPERTY § 32 (David A. Thomas ed., 1994 & Supp. 2011).

56. For a summary of the law of concurrent estates, see *id.*

57. *See id.* § 32.05.

58. *See id.* § 31.05.

59. *See id.* § 33.

60. Prior to Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that there is a federal constitutional right to state recognition of same-sex marriage), state courts had begun to find the ban on same-sex marriage unconstitutional because, among other things, it denied such couples the protections afforded by tenancies by the entirety. *See* Lewis v. Harris, 908 A.2d 196 (N.J. 2006); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

61. *See* Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2309, 2315-30 (2013).

62. *See* Robert H. Sitkoff, *Trust Law as Fiduciary Governance Plus Asset Partitioning*, *in* THE WORLDS OF THE TRUST 428, 448 (Lionel Smith ed., 2013).

63. *Id.* at 429.

capable of holding full title to property, legal and equitable, although the corporation itself is owned by its shareholders; corporate officers, like trustees, are accountable to the owners.[64]

In addition to sharing title among co-owners, splitting it between trustees and beneficiaries, and vesting it in corporations, the fee can be divided temporally into present and future interests, such as life estates and remainders or reversions.[65] Life tenants enjoy all the rights of owners, limited to the term of their lives.[66] Owners of so-called future interests after life estates actually have present rights to future enjoyment, enabling them to hold life tenants accountable for waste, that is, lasting damage to the property.[67]

The fee can also be parceled into leaseholds or burdened with lesser interests, such as easements, covenants, and servitudes.[68] Leases, which are actually grants of time-limited interests in property, usually in return for periodic payments of rent, give tenants the rights of ownership for the duration of the term, but like life tenants, tenants for a term are liable to the landlord, owner of the reversion after the lease, for waste.[69] Easements are nonpossessory interests, allowing easement owners the rights of use, such as passage over the burdened estates.[70] Covenants also burden land, usually limiting its use in favor of covenantees or their successors, while servitudes similarly restrict use, often imposing affirmative duties of maintenance to a certain standard on the present owners of the servient estates.[71]

Land may be pledged (mortgaged) by its owner as security for the repayment of debt.[72] The traditional mortgage is in form a transfer of title defeasible upon repayment. Despite the transfer, the mortgagor (the borrower) remains in possession—the historical explanation of the name mortgage, or "dead pledge," as opposed to a

---

64. *Id.* at 435.

65. Roger W. Andersen, *Present and Future Interests: A Graphic Explanation*, 19 SEATTLE U. L. REV. 101, 101-14 (1995). The fee simple can also be made defeasible, either limited to terminate automatically on the occurrence or failure of a stated event (fee simple determinable and fee simple subject to executory limitation) or terminable by one with the right of reentry on the occurrence or failure of a certain condition (fee simple subject to condition subsequent and fee simple subject to executory limitation). *Id.*

66. *Id.* at 110-11.

67. *Id.* at 103-04.

68. *See* ROBERT KRATOVIL, REAL ESTATE LAW (6th ed. 1974).

69. *Id.* at 412-13, 433.

70. *Id.* at 404-05.

71. *Id.* at 407.

72. *Id.* at 232.

form of hypothecation (pawn) in which possession is held by the lender until repayment.[73] While the form of the transaction remains a transfer of title in many of the older, eastern states, the reality is now more candidly acknowledged in many western states to be a lien to secure repayment.[74]

There is also a vertical dimension to land ownership. Although it was once confidently asserted that the surface owner's title included all the space above ground without limit—*Cujus est solum, ejus est usque ad coelum*[75]—it is now recognized that the navigable airspace beyond "the immediate reaches of the enveloping atmosphere" is a public highway.[76] Within the owner's airspace, intrusion by airplanes approaching the ground—or, today, drones—qualifies as entering private property. Below ground, the surface owner's title still extends downwards to an indefinite extent and includes title to deposits of solid minerals. But ownership in both directions may be divided. The surface owner may grant avigational easements authorizing flight through the "immediate reaches" above ground; similarly, the surface owner may sever the underground mineral estate.[77]

Today, extensive regulations of land use by law, most notably zoning ordinances, further restrict a property owner's rights—for example, limiting use to residential or commercial purposes. Private arrangements, not only easements, covenants, and servitudes, but also newly recognized interests such as conservation and historic preservation easements, enforceable by organizations or individuals without regard to privity of estate, blur the distinction between public and private land use control.

Novel forms of property ownership continue to develop. Cooperative apartment buildings are owned by the residents to whom the apartments are leased.[78] Condominiums provide for individual ownership of dwelling units coupled with ownership by all residents of common areas.[79] Timesharing, usually of vacation property,

---

73. *Id.* at 255-56.
74. *Id.* at 235.
75. HERBERT BROOM, A SELECTION OF LEGAL MAXIMS, CLASSIFIED AND ILLUSTRATED 395-96 (8th ed. 1882).
76. United States v. Causby, 328 U.S. 256, 264 (1946).
77. *Id.* at 259, 265.
78. David T. Engle, Comment, *Legal Challenges to Time Sharing Ownership*, 45 MO. L. REV. 423, 424 n.3 (1980).
79. *Id.* at 425 n.11.

involves joint ownership by multiple persons who take turns occupying the premises.[80]

While most private titles to land are derived from prior owners by conveyance inter vivos or testamentary, or by inheritance, titles acquired by adverse possession—original titles—are also recognized. The requirements vary from state to state, but generally include long continued possession under a claim of right.[81] Today the most common incidence of title by adverse possession is in settling boundary lines that have departed from the legally described route and clearing titles that have become clouded by ancient, inactive claims.[82]

B. Common: Light and Air

Truly common property in land is unknown in American law. Title to land open to all would be recognized as held by "the people" in the form of government, state or federal. It is not too much to say that all land is presumed to be owned by the government unless a private claimant can prove ownership from a chain of title extending back to the state or to a recognized adverse possessor.[83] Much government land is held in a form of "public trust," discussed below. Also, as discussed later, the federal government holds legal title to significant amounts of land for the benefit of Native American tribes, who may occupy it in a form of customary common ownership.

Certain resources necessary for the beneficial enjoyment of land, such as access to light and air, are by their nature not subject to private appropriation. Although English common law allowed easements of light and air appurtenant to a fee simple,[84] American courts were reluctant to recognize them[85] because they were concerned about the antidevelopmental potential of such interests, particularly if

---

80. *Id.* at 425.

81. James Charles Smith, *Some Preliminary Thoughts on the Law of Neighbors*, 39 GA. J. INT'L & COMP. L. 757, 764 (2011).

82. *See id.* at 763-64.

83. *Cf.* N.C. GEN. STAT. § 146-79 (2016) ("In all controversies and suits for any land to which the State or any State agency or its assigns shall be a party, the title to such lands shall be taken and deemed to be in the State or the State agency or its assigns until the other party shall show that he has a good and valid title to such lands in himself.").

84. *See* 3 JAMES KENT, COMMENTARIES ON AMERICAN LAW 448 (O.W. Holmes, Jr. ed., 12th ed. 1873).

85. *See id.* at 448 n.1. The doctrine of ancient lights "has never . . . been deemed a part of our law." Parker v. Foote, 19 Wend. 309, 318 (N.Y. Sup. Ct. 1838).

acquired by "prescription," that is, by long continued use.[86] Today environmental regulations often restrict unqualified use of common elements.[87]

C. State/Public: The Public Trust

Approximately one-third of the total area of the United States is owned by the federal or state governments, although a sizeable portion of that land is located in Alaska, the largest state, where the federal government holds title to almost 90% of the land mass.[88] Land owned by the government may be held for public purposes, such as municipal buildings, parks, or military bases.[89] Additionally, the state may hold title to land used for ordinary proprietary purposes, as to run a business such as a railroad or to provide a utility such as electricity or communication services.[90] In such cases, the state's title does not differ substantially from the title to land held in private ownership. A significant but unquantifiable portion of government land, particularly land used for public transportation, is held in a form of public trust. As explained in James Kent's classic *Commentaries on American Law*, "Every thoroughfare which is used by the public, and is, in the language of the English books, 'common to all the king's subjects,' is a highway, whether it be a carriage way, a horse way, a foot way, or a navigable river."[91] Ocean beaches below the average high tide line are also generally considered public highways, and as mentioned above, navigable airspace has been added to the list.[92] Land held in public trust may be subject to restrictions on alienation by the state, which holds such land for the benefit of the public.[93] Whether the state can alienate land under navigable waters is uncertain. Most commonly it is possible, although the intention to alienate must be very clearly expressed.[94] Some public land of particular environmental or historic significance is reserved by state constitutions for preservation and

---

86. *See Parker*, 19 Wend. at 318; *see also* 1 AM. JUR. 2D *Adjoining Landowners* § 90, Westlaw (database updated Nov. 2016) (explaining easements of light, air, and view).

87. *See Landowner Liability Protections*, EPA, https://www.epa.gov/enforcement/landowner-liability-protections (last visited Jan. 28, 2017).

88. *See Public Land Ownership by State*, *supra* note 48.

89. Merrill, *supra* note 13, at 733.

90. *See, e.g.*, TEX. LOC. GOV'T CODE ANN. § 552.001 (West 2017) (providing an example of municipality-owned land for utilities).

91. KENT, *supra* note 84, at 432.

92. *See id.* at 426-27, 448-50.

93. *See id.* at 427.

94. *See* Gwathmey v. State, 464 S.E.2d 674 (N.C. 1995).

may be alienated only with the approval of exceptional majorities in the state legislature.[95]

In the process of Western expansion, the United States acquired by conquest or treaty vast amounts of land. Much of that land was disposed of to settlers at little or no cost under the various *Homestead Acts* in the second half of the nineteenth century.[96] Of what remains, some is reserved as national parks, national forests, or wildlife preserves, while some remains available for sale.[97] Grazing of privately owned herds on public land has long been permitted.[98] At first, free access was allowed to all ranchers, but this inevitably led to overuse (the tragedy of the commons), and today pasturage is leased by the federal government, subject to environmental regulations.[99] Since 1975, mining leases on public land have also been granted, subject to forfeiture if not put into production within ten years.[100] While the federal government retains less than 5% of the land east of the Mississippi River, it retains title to almost half of the land to the west.[101]

Although at common law private acquisition of public land by adverse possession was impossible (*Nullum tempus occurit regi*),[102] many states now permit the practice, usually exempting public highways and requiring longer adverse occupancy than would be necessary against a private owner.[103] The explanation of the change probably lies in the historic abundance of land and the public interest in settlement.

---

95. *See, e.g.*, N.C. CONST. art. XIV, § 5 (discussing the conservation of natural resources).

96. *See, e.g.*, Act of May 20. 1862, 12 Stat. 392.

97. *See Public Land Ownership by State*, *supra* note 48.

98. *See* Michelman, *supra* note 29, at 29.

99. 7 THOMPSON ON REAL PROPERTY § 55.06 (David A. Thomas ed., 2006).

100. *Id.* § 55.03.

101. *See Public Land Ownership by State*, *supra* note 48.

102. BROOM, *supra* note 75, at 65.

103. *See, e.g.*, N.C. GEN. STAT. § 1-35 (2016) (providing that adverse possession against the state gives title after thirty years and twenty-one years in case of possession under color of title); *id.* § 1-45 (providing that there is no title by adverse possession of public ways); *see also* Lenoir County v. Crabtree, 74 S.E. 105 (N.C. 1912) (holding that adverse possession is ineffective to confer title to a navigable stream).

D. Communitarian: Indian Land[104]

Native Americans who occupied the territory claimed by European powers were generally recognized as having some property rights in their land.[105] North Carolina's 1776 Constitution, as mentioned earlier, expressly acknowledged traditional Indian "hunting grounds" when the newly independent state claimed sovereign ownership of its territory on behalf of "the people."[106] Acquisition of title to Indian lands in North Carolina, as elsewhere, could not be acquired by individual purchasers from Indians or Indian tribes, but only "by authority of the General Assembly."[107] After the adoption of the U.S. Constitution in 1789, the federal government entered into treaties with various Indian nations and assumed legal title to lands reserved for their occupancy.[108] The process was often marked by coercion and violence and led to the steady reduction in native populations as the pressure of expanding settlements and a pervasive sense of cultural superiority resulted in a national policy of forced Indian removal to Western territories (the Trail of Tears).[109] Native rights were limited to possessory interests; these were progressively confined to smaller and smaller areas, until today barely 2% of American land is occupied by the 566 federally recognised tribes.[110]

The legal status of Indian title was defined by the U.S. Supreme Court in the leading case of *Johnson v. M'Intosh*, holding that the government of the United States "had a clear title to all the lands . . . subject only to the Indian right of occupancy, and that the exclusive

---

104. Terminology when discussing indigenous peoples is inevitably problematic. "Indian" and "tribe," despite their widespread use in this field, suffer from the stigma of colonialism. They are used herein only because they frequently appear in statutes, judicial decisions, and academic literature. For a useful discussion of the topic, see DAVID E. WILKINS, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM (2d ed. 2007).

105. *See* FELIX COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.02 (2015), Lexis (describing principles that dominated European concepts of Indian property rights: "(1) that Indian peoples had both property rights and the power of a sovereign in their land; (2) that Indian lands could only be acquired with tribal consent or after a just war against them; and (3) that acquisition of Indian lands was solely a governmental matter, not to be left to individual colonists").

106. N.C. CONST. of 1776, A Declaration of Rights, art. XXV.

107. *Id.* art. XXXXII.

108. *Rights of American Indians Are Protected*, TACHI YOKUT TRIBE, https://www.tachi-yokut-nsn.gov/wp-content/uploads/2015/08/rights_of.pdf (last visited Jan. 28, 2017).

109. *Id.*

110. *See Public Land Ownership by State*, *supra* note 48.

power to extinguish that right, was vested in that government."[111] Thus, although

> the original inhabitants . . . . were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, . . . their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied.[112]

In *Cherokee Nation v. Georgia*, the Supreme Court coined the now classic phrase to describe the tribes' legal status: "domestic dependent nations."[113]

From the beginning, there was unease about the place of Indian nations in a republic committed to Anglo-American legal principles. As a concurring justice in the *Cherokee Nation* case put it: "[T]his state, if it be a state, is still a grade below them all: for not to be able to alienate without permission of the remainder-man or lord, places them in a state of feudal dependence."[114] Chief Justice John Marshall, the author of the opinion of the Court in *Johnson*, predicted that the native peoples would eventually "be blended with the[ir] conquerors."[115] In 1887, in an attempt to speed the assimilation of Indians into the dominant American culture, Congress adopted the General Allotment Act, popularly known as the Dawes Act, which provided for the transfer of fee simple titles, albeit subject to restrictions, to individual Indians.[116] The result was the further reduction of tribal land. Over the ensuing generations, fractionation resulted in uneconomic parcels and the immiseration of many Indians.[117] Eventually the allotment project was abandoned, but forced assimilation persisted into the last half of the twentieth century. Today, an attempt to allow native self-determination prevails.[118]

---

111. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 585 (1823).

112. *Id.* at 574.

113. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). Chief Justice Marshall observed that "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence." *Id.* at 16.

114. *Id.* at 26-27 (Johnson, J., concurring).

115. *Johnson*, 21 U.S. at 589.

116. Act of Feb. 8, 1887, 24 Stat. 388 (codified in scattered sections of 25 U.S.C.).

117. *See* Hodel v. Irving, 481 U.S. 704, 712 (1987) (citing, as an example, one Indian reservation on which "[t]he average tract has 196 owners and the average owner undivided interests in 14 tracts," "many of which generate only pennies a year in rent").

118. *See* COHEN, *supra* note 105, § 1.01 (describing six periods of American Indian history: "(1) Post-Contact and Pre-Constitutional Development (1492-1789); (2) The Formative Years (1789-1871); (3) Allotment and Assimilation (1871-1928); (4) Indian

While legal title to the reservations is vested in the federal government, beneficial ownership is allocated by each tribe according to its own laws and customs, normally aimed at preserving possession by enrolled members. For example, the Eastern Band of Cherokee Indians in the mountains of western North Carolina, descendants of a group that eluded forced relocation, assigns "possessory holdings" to individual tribal members.[119] The tribe applies state property law, subject to specific exceptions. For instance, a possessory holder may alienate the holding only to another enrolled member,[120] and failure to utilize a possessory holding for five years results in "escheat" to the tribe.[121] Because tribal land is deemed essential to the preservation of tribal identity, Native American tribes, once victims of American property law, now use it defensively to protect their remaining land. The tribes purchase adjacent property when possible and transfer legal title to the federal government to hold for the benefit of the tribe (land-into-trust program).[122]

IV. REAL PROPERTY LAW IN AUSTRALIA

As a counterpoint to real property in a legal structure, the historical trajectory of which represents both continuity and radical departure from its English law origins, we turn now to Australia, which shares continuity with the American law in terms of its English origins, but not in terms of the radical break effected by the American Revolution. While one's intuitive sense of the ideal-typic categories of property in land in the Australian system may closely align with initial thoughts about the blend found in the United States, we will see

---

Reorganization (1928-1942); (5) Termination (1943-1961); and (6) Self-Determination and Self-Governance (1961-present)" (emphasis omitted)).

119. The territory occupied by the Eastern Band of Cherokee Indians, the Qualla Boundary, is not technically a federal Indian reservation but land purchased by the tribe in the 1870s and subsequently placed under federal protection. *See* Ben Oshel Bridgers, *An Historical Analysis of the Legal Status of the North Carolina Cherokees*, 58 N.C. L. REV. 1075, 1078-80 (1980).

120. CHEROKEE INDIANS EASTERN BAND, CHEROKEE CODE pt. II, ch. 44A, § 6 (2017), https://www.municode.com/library/nc/cherokee_indians_eastern_band/codes/code_of_ordinances?nodeId=PTIICOOR.

121. *Id.* ch. 47, § 6.

122. *Cherokee Nation, BIA Place Largest Area of Land into Trust*, CHEROKEE NATION (Apr. 29, 2016), http://www.cherokee.org/News/Stories/20160429-Cherokee-Nation-BIA-place-largest-area-of-land-into-trust; S.E. Ruckman, *Oklahoma Indians Guiding the Way for Land-into-Trust*, INDIAN COUNTRY MEDIA NETWORK (June 21, 2011), https://indiancountrymedianetwork.com/news/oklahoma-indians-guiding-the-way-for-land-into-trust/.

that the two systems, while similar in some respects, also differ quite markedly in others.

Intuitive perceptions aside, while the Australian balance of the conceptual types of property in land clearly tips in favor of private property in the form of the fee simple title, very significant forms of state/public and communitarian property can also be found. This Part first briefly addresses the Australian fee simple and the limited forms of common property found in Australia, before giving greater attention to public/state property in what is known as Crown land and accompanying state leasehold interests and communitarian property in the form of Native Title.

A. Private: The Australian Fee Simple

The Australian fee simple, and private property in land generally, mirrors the American system in all but one respect: the place and role of "the Crown." In this respect, as we have seen earlier, the American Revolution effected a major break with the English law that formed the foundation of and continues to inform the Australian law of private property in land. The difference today revolves around the complexities of the English doctrines of tenure and estates, which posited that the Crown (the state) was the ultimate owner of all English land through the concept of radical title (a postulate which, while carrying with it no proprietary status, makes it possible for the Crown to exercise its role of granting an interest in land to private persons or groups of them).[123] Due to these twin doctrines, it was always the case, and remains so today, that the ultimate title in English and Australian land cannot be held, in an allodial sense, by private persons, natural or legal.[124] As T.P. Fry wrote over seventy years ago,

> No proprietary right in respect of any Australian land is now, or ever was, held, by any private individual except as the result of a Crown grant, lease, or license and upon such conditions and for such periods as the Crown (either of its own motion or at the discretion of Parliament) is or was prepared to concede.[125]

No private person, then, can be said to "own" land pursuant to Anglo-Australian law. Rather, through the reception of the English

123. *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, 48 (Austl.).
124. *See id.* at 46-49.
125. T.P. Fry, *Land Tenures in Australian Law*, 3 RES JUDICATAE 158, 159 (1947).

doctrines of tenure and estates,[126] the Crown grants such estates as may be possible to such private persons, while retaining the ultimate right, in the form of reversion to the state through escheat or *bona vacantia* (land or a thing with no owner, in other words, where the holder of an estate is deceased intestate and with no next-of-kin), to itself.[127]

It is said, however, that the fee simple is the closest thing to private allodial ownership due to the possibility of escheat (or *bona vacantia*). This residual possibility means that, in effect, the land remains a form of state or public land to the extent that the ultimate heir of any person who holds a fee simple is the state. While this is largely a theoretical possibility, with legislation providing an extensive list of possible heirs before the state is reached, that possibility nonetheless exists. In short, the state therefore retains an interest in all land in Australia, including that held under fee simple, and for that reason, it can be said that all land is, in fact, state or public property.

The possibility of escheat or *bona vacantia* notwithstanding, the fee simple remains the "largest" estate in Australian tenures[128]—referring, of course, to the freedom conferred by the title[129]—and it is distinguished from other forms of tenure by its inherently unrestricted heritability and alienation.[130] "Fee" refers to an estate that is heritable,

---

126. The reception of the English law in Australia was settled by the common law and the *Australian Courts Act 1828* (ACT) s 24. *See also Mabo*, 175 CLR at 34-38 (discussing the reception of English common law in Australia); Ulla Secher, *The Reception of Land Law into the Australian Colonies Post*-Mabo*: The Continuity and Recognition Doctrines Revisited and the Emergence of the Doctrine of* Continuity Pro-Tempore, 27 U.N.S.W. L.J. 703 (2004) (noting that Australian courts have modified English property doctrines).

127. ADRIAN J. BRADBROOK ET AL., AUSTRALIAN REAL PROPERTY LAW 43-47 (5th ed. 2011). The effects of escheat and *bona vacantia* are largely the same. However, in most states the land passes to the Crown as *bona vacantia* rather than the old principle of escheat. *Administration and Probate Act 1929* (ACT) sch 6 (Austl.); *Succession Act 2006* (NSW) ch 4, pt 4.5 (Austl.); *Administration and Probate Ordinance 1969* (NT) sch 6 (Austl.); *Succession Act 1981* (Qld) sch 2 (Austl.); *Administration and Probate Act 1919* (SA) s 72G(e) (Austl.); *Intestacy Act 2010* (Tas) pt 5 (Austl.); *Administration and Probate Act 1958* (Vic) s 55 (Austl.); *cf. Escheat (Procedure) Act 1940* (WA) (Austl.) ("[W]here it appears that any property has escheated to the Crown . . . the State Solicitor may make application to a Judge of the Supreme Court for an order declaring that the property concerned has become the property of the Crown by way of escheat.").

128. PETER BUTT, LAND LAW 125 (6th ed. 2010).

129. Fee simple title can be held over small stratum and the owner of a fee simple is no less restricted in their use of the land than an owner in fee tail. John Baalman, *The Estate in Fee Simple*, AUSTRALIAN L.J., May 27, 1960, at 3-4.

130. *Id.* at 3; *see* Vance, *supra* note 53, at 266. Whilst the inheritance and alienation of fee simple titles might be regulated by statute, at common law the fee simple is inherently without restriction.

and "simple" to its potential inheritance by anyone, as opposed to a particular class of heirs[131] and its unlimited alienability, inter vivos or by bequest. Because of these rights, the fee simple is the most enduring and uninhibited of all of the estates which exist under the Australian doctrine of tenure,[132] and while technically not allodial, culturally, it enjoys the status of "ownership" of land.[133] For that reason, of the possible tenures which the Crown may grant pursuant to its radical title, the fee simple estate is the most significant, and the closest thing to private allodial ownership in Australian land.

The fee simple confers upon its holder significant rights, which together comprise the bundle of rights or liberal triad reflected in the liberal conception of private property, and which we see in action in the fee simple estate, bringing it as close to allodial private ownership as possible under Australian law. Thus, assuming it is unencumbered by other possessory or nonpossessory rights, the holder of a fee simple title enjoys the right to use and possess the land, to the exclusion of all other people. The holder may exercise those rights so as to suit personal preference.[134] Moreover, the fee simple holder may remove the land subject to it from the control of the state indefinitely and even in perpetuity.[135] The corollary of this control resides in the fact that the holder of the fee simple may validly dispose of it inter vivos, in any way desired, including to sell or otherwise dispose of the land, in whole or in part, subject to the prohibitions on waste (which prevent harm to the land for future holders of an estate in that same land).

The rights conferred by the fee simple survive the death of the owner and can be bequeathed by will or granted to next of kin.[136] In short, the fee simple can be dealt with according to the wishes or family ties of the owner to the exclusion of state interests.

The fee simple represents the proprietary interest covering the greatest expanse of Australian land, comprising 62.75% of the

---

131. Baalman, *supra* note 129, at 3. The fee tail, however, can only be inherited by heirs of a particular sex or in a particular family line. *Id.*

132. Native title is arguably as enduring, although, as a sui generis interest, it does not exist as an estate pursuant to the doctrine of tenure.

133. BUTT, *supra* note 128, at 125.

134. Paul Babie, *Sovereignty as Governance: An Organising Theme for* Australian *Property Law*, 36 U.N.S.W. L.J. 1075, 1076 (2013).

135. *See Fejo v Northern Territory* (1998) 195 CLR 96 (Austl.).

136. *Id.* at 105-06.

Australian land mass.[137] Yet, over a third of the Australian land mass is held pursuant to nonprivate forms of property, to which we now turn.

B. Common: Light and Air

Due to the impossibility, or virtual impossibility, of creating an effective right of exclusion vested in any one person (natural or legal), true common property in the sense that no person or entity holds such an exclusionary right seldom exists. And those who attempt to elide this fact by arguing that private property emerged from large-scale and effective systems of common property are likely either overstating historical reality or exaggerating small and isolated historical examples. The reality is that common property represents a largely theoretical foil in order to explain why private property exists (in other words, why an exclusionary right exists),[138] rather than occupying any historical priority to the existence of private property.[139] Still, some examples have existed historically and continue to be found in many legal systems, such as Australia's.

Australian law recognizes light and air, for instance, being infinite and uncontrollable, as common property.[140] No person can hold title over them and there exists no restriction on access to them or regulation of their use.[141] In short, they remain a part of the commons which lies at the heart of the concept of common property. And they will likely continue this way so long as there remains no need for a regulatory regime to facilitate their sharing—one's use of air or light does not, in most cases, impede another's similar such use. Still, it is possible to imagine a future in which that might not be so.

At a time when light and air are becoming increasingly important due to sustainability considerations in the generation of electricity,[142] it is also increasingly possible to impede access to those

---

137. *Land Tenure*, AUSTRALIAN BUREAU STAT. (Jan. 25, 2002, 11:30 AM), http://www.abs.gov.au/ausstats/abs@.nsf/0/C4F37E4488D32591CA256B35007ACE07?opendocument.

138. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1246-47 (1968).

139. HARRIS, *supra* note 5, at 109-18.

140. *See* AUSTRALIAN LAW REFORM COMM'N, ALRC REPORT 129, TRADITIONAL RIGHTS AND FREEDOMS—ENCROACHMENTS BY COMMONWEALTH LAWS, 468-69 (Dec. 2015).

141. *See id.*

142. BRADBROOK ET AL., *supra* note 127, at 837-40; Paul Babie, *How Property Law Shapes Our Landscapes*, MONASH U. L. REV., 2012, at 1, 17-20.

resources.[143] Urban development, while not rendering light and air finite, has certainly made it possible to restrict access to them in ways previously unknown. The placement of solar energy panels or small wind turbines on the roof of one building can be affected, for instance, by taller buildings around it. And the traditional remedies for such interference, such as the torts of trespass or nuisance, may be unable to address these new circumstances. As such, the law, both common law and legislation, in this previously unregulated area may need to be developed in order to create exclusionary rights for and corresponding enforcement rights to protect this "common property" of light and air.

Although it is not settled at common law,[144] the existing private property easement may be used to modify the existing law relating to light and air. In 1918 Chief Justice Griffith of the High Court of Australia acknowledged the possibility of easements to allow passage of the sun's rays and the free movement of air.[145] Thus, Griffith wrote, "In the light of modern knowledge . . . there is no difference in principle between a right to the free passage of moving air to my windmill and the free passage of running water to my watermill."[146] While the technology may be dated, the kernel of the idea for modification is there. Indeed, while the creation of an easement for access to light or air has not yet been tested in Australian law,[147] as reliance on sustainable resources increases, it may become a ubiquitous part of modern urban regulation.[148]

The question arises, if such developments occur, whether these resources continue to be called, in any meaningful way, "common property." Whatever the answer to that question may be, for the time being, this form of property remains a very insignificant one in Australian law. As such, as between this and private property, the balance is clearly in the latter's favor. What, though, of public/state and communitarian property?

---

143. For a modern example demonstrating how structures may create such blockages, see Hunter v. Canary Wharf Ltd. [1997] 2 WLR (HL) (appeal taken from Eng.) 684 (describing case where building blocked television signals).

144. *See* Allen v Greenwood [1980] 1 Ch. 119.

145. *Commonwealth v Registrar of Titles (Vic)* (1918) 24 CLR 348, 354 (Austl.).

146. *Id.*

147. Adrian Bradbrook has, however, advocated for solar easements. *See* A.J. Bradbrook, *The Development of an Easement of Solar Access*, 5 U.N.S.W. L.J. 229 (1982).

148. Babie, *supra* note 142, at 17-20.

C. State/Public: Crown Lands[149]

At the time of English settlement, Australia appeared to have an abundance of land, although, as we have also seen, sovereignty itself did not confer upon the Crown an absolute ownership, but rather a radical title, and, as we will see, subject to the grant of fees simple, the existence of native title continued to operate in respect of such unpatented lands. Nonetheless, the Crown's radical title allowed it to grant such lands either pursuant to a fee simple or to other titles, thus making these lands a vast body of public/state property covering much of the continent. Known today as "Crown land," this public/state property covers public lands comprising approximately 23% of the land mass of the continent, of which 12.5% is vacant land.[150]

It did not take the colonial governments of Australia long to determine a means of parcelling out Crown land to private holders through a novel form of tenures.[151] Yet, rather than a small number of tenures—which one might have thought likely given the declining importance of tenure in England—the Australian state breathed new life into the doctrine in order to make it possible to allow private use of land while at the same time strictly controlling that use, whatever it might be. In other words, the Crown's control over this vast body of public/state property has been exercised extensively, not only to create an array of tenures unknown to the English law, but also to create a new form of private property in those lands. It was an "interplay of historical, social, and political factors [that] produced [this] unique and complicated system of tenures in Australia."[152] Thus, "[w]hile the initial seed of [public/state property in these Australian lands,] planted in 1788, was the English common law, the subsequent [development of that system into the fully grown Crown land system was] uniquely

---

149. This example draws extensively on Fry, *supra* note 125, and on the longer study, THOMAS PENBERTHY FRY, FREEHOLD AND LEASEHOLD TENANCIES OF QUEENSLAND LAND (1946). For a modern Queensland study, see CHRISTOPHER BOGE, STATE LEASEHOLD IN QUEENSLAND (W.D. Duncan ed., 2000). For a New South Wales study, see ANDREW G. LANG, CROWN LAND IN NEW SOUTH WALES (1973). For a South Australian study, see Gwen A. Miller, The Legal History of the Incidents Imposed in Nonfreehold Tenure in South Australia During the Nineteenth Century (unpublished LLB (Hons.) thesis) (on file with author). For a Victorian study, see JOHN QUICK, THE HISTORY OF LAND TENURE IN THE COLONY OF VICTORIA (1883). For a general study, see Paul Theodore Babie, Crown Land in Australia (2001) (unpublished D. Phil. thesis, University of Oxford) (on file with author).

150. *Land Tenure*, *supra* note 137.

151. Babie, *supra* note 134, at 1076; Fry, *supra* note 125, at 159-61.

152. Babie, *supra* note 134, at 1098.

Australian."[153] T.P. Fry summarized it this way: rights to land are "derived either directly or indirectly from the [Australian] Crown, or not at all."[154] Thus, it has never been

> possible to gain rights to land in any other way, for example, by 'squatting' on it (the one subsequent exception, being, of course, native title rights). Thus, as we have already seen, the Crown's sovereignty . . . was settled rather early on in Australia—it was the power to control the exercises of rights granted pursuant to the system of land tenure that had developed over time from the initial settlement.[155]

Over time, then, Australian Parliaments created a series of unique tenures, available only in relation to Crown land, in order to maximize the benefit of Crown ownership; leases directly from the Crown, for instance, were and are still common in Australia and can be subject to a wide variety of conditions, such as payments, development and maintenance requirements, and restrictions on usage and alienation.[156] This process provides "evidence of a cogent and administratively enforced policy of making land serve as an instrument of national and social purposes."[157] This is nothing less than the history of the Australian Crown's exercising its radical title over land to allow the individual to hold power to make use of land, while at the same time controlling that use so as to protect the common good. T.P. Fry wrote that:

> In the feudal era in England, as also in Australia to-day, Parliament and the Crown (as advised by the magnates of the realm in past times and by Cabinet Ministers in modern times) imposed upon Crown tenants such tenurial incidents as were best calculated to advance the policies thought at any particular time to be appropriate for the purpose of ensuring the safety and prosperity of the realm.[158]

Four examples assist. First, throughout Australia's history, state-owned land played a key role in agricultural life and development; this tenure, which came to be known as the pastoral lease, was invented in 1847.[159] Granted first to illegal settlers of Crown land,[160] this leasehold

---

153. *Id.*; *see Australian Courts Act 1828* (ACT) s 24; *Mabo v. Queensland [No. 2]* (1992) 175 CLR 1 (Austl.); *A-G v Brown* (1847) 1 Legge 312 (Austl.).

154. Fry, *supra* note 125, at 158.

155. Babie, *supra* note 134, at 1098; *see Mabo*, 175 CLR 1.

156. Fry, *supra* note 125, at 165.

157. *Id.* at 167.

158. *Id.* at 170.

159. *See* Babie, *supra* note 134, at 1099.

160. *See id.* at 1098-99.

began life as a license to occupy land on the condition that it be used for pastoral purposes.[161] In 1847, the Crown altered the concept so as to grant leases directly to pastoralists, on the same condition of pastoral use.[162] This meant the Crown retained the right of resumption, which would have been lost if a fee simple title had been granted.[163] Today, equivalent leases and licenses are granted under State or Territory Crown land management acts.[164]

Second, colonial New South Wales used Crown land to control development through innovative selection tenures, created by statute in 1868, which were in effect leasehold tenures of agricultural land capable of being "converted" into freehold tenures through the performance of certain state-imposed conditions.[165] A common condition required holders to undertake permanent improvements to the land and to make annual payments.[166] In this way, the state ensured development of the colony along with a tidy profit, all while retaining control over the land in a way the fee simple did not.

Third, colonial governments introduced a lasting form of control through a novel tenure known as the perpetual lease. As is well known, at common law a lease must be for an ascertainable period; Crown perpetual leases, however, unless a lessee failed to preform one of the imposed conditions, endured in perpetuity.[167] By creating leases of this kind, the Crown could retain control over public land. States and territories today continue to grant such perpetual leases.[168]

Finally, in addition to the use of Crown land to further the state's agenda, the Australian Crown has frequently exercised its power over public/state property to further the public interest.[169] Thus, although

---

161. Fry, *supra* note 125, at161.

162. *See* Babie, *supra* note 134, at 1099.

163. *Id.*

164. *Planning and Development Act 2007* (ACT) (Austl.); *Crown Lands Act 1989* (NSW) (Austl.); *Western Lands Act 1901* (NSW) (Austl.); *Crown Lands Act 1992* (NT) (Austl.); *Land Act 1994* (Qld) (Austl.); *Crown Land Management Act 2009* (SA) (Austl.); *Pastoral Land Management and Conservation Act 1989* (SA) (Austl.); *Crown Lands Act 1976* (Tas) (Austl.); *Land Act 1958* (Vic) (Austl.); *Land Administration Act 1997* (WA) (Austl.).

165. Fry, *supra* note 125, at 161.

166. *Id.*

167. *Id.* at 167-69.

168. *See Pastoral Land Act 1992* (NT) s 48(1)(a) (Austl.); *Crown Lands Act 1992* (NT) s 26(b) (Austl.); *Western Lands Act 1901* (NSW) s 28A(3)(a) (Austl.); *Land Act 1994* (Qld) s 15 (Austl.); *Crown Land Management Act 2009* (SA) s 32 (Austl.).

169. *See Crown Lands Act 1989* (NSW) ss 87-91 (Austl.) (discussing the power to reserve land for public use).

the public has no proprietary right in lands used for public purposes (such as public highways),[170] under Crown lands legislation, the states and territories may reserve land to be used for a public purpose.[171] Effecting such a reservation of land precludes its sale, affording some protection of public amenities owned by the Crown as public/state property.[172] Similarly, such land can be held by the Crown in trust for a charitable public purpose.[173]

Thus, while a large body of Australian land is held by the Crown as state/public property, it is nonetheless enjoyed by individuals as a form of quasi-private property, or by the public pursuant to some form of trust, through the proliferation of these various legislatively created tenures. The final form of property that is well-represented in Australian real property law is communitarian, in the form of Australian native title.

D. Communitarian: Native Title

As we have seen, "upon the European settlement of Australia in 1788, the continent was regarded as terra nullius [(uninhabited land without an owner)] and as such,"[174] the Crown "settled" the land—as opposed to acquiring it by either cession or conquest—and the Crown was thought to have gained unencumbered beneficial title to the land upon settlement.[175] This was the legal position for more than 200 years, "[t]he result of [which] was that the system of land tenures in operation in Australia was inconsistent with the recognition of any Indigenous or native title rights to Australian land."[176] Although, as noted earlier, in 1992, Justice Gerald Brennan acknowledged in *Mabo v. Queensland* that:

> The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterizing the indigenous inhabitants of the Australian colonies as

170. *Stow v Mineral Holdings (Austl.) Pty. Ltd.* (1979) 180 CLR 295, 311-12 (Austl.).
171. *See Crown Lands Act 1989* (NSW) ss 87-91.
172. *Western Australia v Ward* (2002) 213 CLR 1, 132-33.
173. *See Brisbane City Council v A-G* (Qld) (1978) 19 ALR 681.
174. Babie, *supra* note 134, at 1095.
175. *Milirrpum v Nabalco Pty. Ltd.* (1971) 17 FLR 141, 242 (Austl.) (citing *Cooper v Stuart* (1889) 14 App Cas 286 (Austl.)); *A-G v Brown* (1847) 1 Legge 312 (Austl.).
176. Babie, *supra* note 134, at 1095-96.

> people too low in the scale of social organization to be acknowledged as possessing rights and interests in land.[177]

"The decision went on to recognise the existence of native title in Australia, a type of beneficial title to land which depends on the traditional occupation of, or connection with, the land by Indigenous people."[178]

In *Mabo*, the High Court acknowledged that Indigenous societies' customs in relation to land could be recognized as a preexisting legal system, and that such rights to land under this law should be recognized and enforced by the common law.[179] The Crown's radical title to land was correspondingly subject to native title.[180] The native title rights so found could continue to exist until the Crown exercised its radical title in a manner inconsistent with the native title.[181] Subsequent legislative enactment and amendment today ensure that the Crown may no longer extinguish or otherwise interfere with native title without giving appropriate consideration for taking, altering, or diminishing the property right so held.[182]

Native title constitutes the Australian form of the fourth ideal-typic category of property identified by Harris: communitarian property. And today native title comprises fully 14.25% of the Australian continent.[183] Consistent with Harris' outline of this ideal-type, both the external and internal elements of communitarian property are evident in Australian common law native title. On the one hand, the common law recognizes, protects, and defines the geographic scope of native title. Holders of native title must approach Australian courts (the legal heirs of their invaders) and are expected to prove their law and custom before they can enforce their rights. On the other hand, the unique rules, traditions and customs of each

---

177. *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, 58 (Austl.) (emphasis added). The writings on the decision and its impact are truly voluminous, but for early commentary, see MABO: A JUDICIAL REVOLUTION—THE ABORIGINAL LAND RIGHTS DECISION AND ITS IMPACT ON AUSTRALIAN LAW (M.A. Stephenson & Suri Ratnapala eds., 1993) and the companion volume, MABO: THE NATIVE TITLE LEGISLATION (M.A. Stephenson ed., 1995).

178. Babie, *supra* note 134, at 1096; *see Mabo*, 175 CLR at 58. Also, for the Commonwealth's legislative response to *Mabo*, see the *Native Title Act 1993* (Cth) (Austl.) and the subsequent landmark decision in *Wik Peoples v Queensland* (1996) 187 CLR 1 (Austl.) (holding that statutory pastoral leases did not extinguish native title rights).

179. *Native Title Act 1993* (Cth) pt II div 5 (Austl.).

180. *Mabo*, 175 CLR at 48.

181. *Id.* at 69.

182. *Native Title Act 1993* (Cth) ss 51, 53 (Austl.).

183. *Land Tenure*, *supra* note 137.

indigenous group determine the content of its native title. Unlike the tenurial system, native title does not rely on grants of tenure by a ruling power. It is not the grant of a fee simple upon the sufficient demonstration of Indigenous connection to the land. Rather, the recognition of native title exists outside the Australian system of tenure and is declared to exist, rather than granted existence, by the Crown.[184]

Native title rights are, in essence, the recognition by the Australian state of the legal systems in place prior to European settlement of the continent. The specific native title rights held by indigenous claimants are determined solely by reference to the traditional laws in relation to the land.[185] A court therefore engages in a fact-finding exercise, following the normal rules of evidence for federal courts,[186] in order to determine the existence and extent of the law and custom. If sufficient evidence of right to the land under indigenous law is found, and it passes three tests to determine if the law is "traditional,"[187] the court will grant a determination of native title. At no stage in the process do the Indigenous claimants have to refer to common law concepts of property in order to make their claim.

Having considered the two systems in which one has an intuitive sense of a predominance of private property—the American and the Australian systems—we turn now to China, a system about which one might, justifiably, begin with the thought of very near total domination by state/public property in land. Yet, as we will see, and as we saw in the case of the American and Australian systems, the Honoré-Waldron thesis holds true: China's system is characterized, just as the American and Australian systems are, by a blend. The only real difference is one of degree.

---

184. Currently the Federal Court of Australia has jurisdiction to hear native title claims and to make determinations as to the existence or nonexistence of native title. *Native Title Act 1993* (Cth) s 13(1) (Austl.). Some novel possibilities for the conversion of Indigenous land to freehold tenure, however, have recently been introduced in Queensland. *See Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Act 2014* (Qld) (Austl.); Leon Terrill, *Converting Aboriginal and Torres Strait Islander Land in Queensland into Ordinary Freehold* 37 SYDNEY L. REV. 519 (2015). This creates some interesting hybrid possibilities, which, while not the focus of this Article, demonstrate the flexibility of the boundaries between the four ideal types.

185. *See Native Title Act 1993* (Cth) s 233(1) (Austl.); *Mabo*, 175 CLR at 88.

186. *Native Title Act 1993* (Cth) s 82(1) (Austl.).

187. *Members of the Yorta Yorta Aboriginal Cmty. v Victoria* (2002) 214 CLR 422, 444-47 (Austl.).

V. REAL PROPERTY LAW IN CHINA

As an authoritarian country,[188] Chinese property law reinforces the preeminent role of the state. Emerging from this overarching fact, what one finds, rather than a comprehensive system of property law, is a piecemeal system in which the major sources of land law consist of a number of provisions scattered across various statutes and administrative orders.[189] For that reason, while recognizing the state's role in property law, both that law, and the theories which underpin it, remain relatively young compared to their western counterparts. Still, it is possible to reveal something about how the system operates.

Chinese law recognizes only two types of land ownership: state-owned and collectively-owned. In addition to these forms of land ownership, however, an individual may hold a land usage or land use right;[190] while not allodial—existing under a form of tenure—these rights are the closest that an individual can come to such ownership within the Chinese system. Given the tensions within the system, and while there has been extensive reform in recent years,[191] it is unsurprising that the state, collective, and private rights regimes often come into conflict and have sparked significant debate concerning the priority among them.[192]

This Part briefly considers both the private land use right and the largely undeveloped area of common real property. It then turns to the most significant real property rights in China: state and collectively-owned real property rights.

---

188. Professor Jacques deLisle correctly writes that "China remains an authoritarian state. Compared to liberal constitutional democracies, the Chinese regime is much less fettered by legal constraints on government power and offers its citizens far weaker legal rights against the state even in ordinary times and absent extraordinary threats." Jacques deLisle, *Security First? Patterns and Lessons from China's Use of Law To Address National Security Threats*, 4 J. NAT'L SECURITY L. & POL'Y 397, 397-98 (2010).

189. *See* Chen Huabin (陈华彬), dui wo guo wu quan li fa de ruo gan si kao (对我国物权立法的若干思考) [Thoughts on Chinese Property Law Legislation], 6 ZHEJIANG SOC. SCI. [浙江社会科学] 69 (2005).

190. Liang Huixin (梁彗星) & Chen Huabin (陈华彬), wu quan fa (物权法) [Real Right Law] (5th ed. 2010).

191. *See* Yun-chien Chang & Henry E. Smith, *The* Numerus Clausus *Principle, Property Customs, and the Emergence of New Property Forms*, 100 IOWA L. REV. 2275, 2301-03 (2015); Shitong Qiao, *The Evolution of Chinese Property Law: Stick by Stick?*, *in* PRIVATE LAW IN CHINA AND TAIWAN: LEGAL AND ECONOMIC ANALYSES 182, 182-83 (Yun-chien Chang et al. eds., 2017).

192. *See* Shang Pingji (单平基) & Peng Chengxin (彭诚信), guo jia suo you quan yan jiu de min fa zheng dian (国家所有权研究的民法争点) [Civil Law Disputes on State Ownership], 2 SJTU L. REV. [交大法学] 34 (2015).

A. Private: The Land Use Right

As we might expect intuitively, private property in land represents only a small fraction of the landholding in China. Historically, this was not always the case; not unlike the kings of England following the Norman Conquest, the feudal emperors of China held seemingly omnipotent and supreme power in relation to the ownership of land. As with those medieval kings of England, private property nonetheless emerged through a form of feudal governance regime in land ownership rights in many Chinese dynasties.[193] But the revolution and advent of the People's Republic in 1949 and the first three decades of communist rule brought with it a series of feverish, radical, and, some have argued, overreaching political campaigns,[194] the centerpiece of which was land ownership.[195] The communist system resulted in the wholesale revocation of any private property rights in Chinese land.[196] This pertained until the emergence of market reforms in the late 1970s and the last thirty years, during which these early communist changes have come to be viewed in a different light.[197] As such, and in order to reverse some of the early communist overreach, China has recently reviewed its attitude towards private real ownership rights. Consequently, this means that the Chinese system contains private property, albeit of a limited form.

Following the "open-gate policy" of 1978, ensuring the transformation of the market economy and the security of foreign investment, Chinese law has recognized substantial private ownership rights in a range of resources.[198] Still, while allowing a liberalization of private property rights in other resources, the unique political

---

193. *See, e.g.,* Chen Qiuyun (陈秋云), song dai zi you di quan fa zhi de li shi yi yi yu dang dai qi shi (宋代自由地权法制的历史意义与当代启示) [The Historical and Contemporary Implications of the Free Rights in Land in Song Dynasty] 2 STUDIES IN L. BUS. [法商研究] 154 (2011); Taisu Zhang, *Property Rights in Land, Agricultural Capitalism, and the Relative Decline of Pre-Industrial China*, 13 SAN DIEGO INT'L L.J. 129 (2011).

194. *See generally* Huixin & Huabin, supra note 190 (discussing the history of real property rights in China).

195. *See* Wang Liming (王利明) & Zhou Youjun (周友军), lun wo guo nong cun tu di quan li zhi du de wan shan (论我国农村土地权利制度的完善) [Study on the Legal Institutions in Land in Village] 1 CHINA LEG. SCI. [中国法学] 45 (2012).

196. *Id.* The removal of individual property rights may reduce incentives for individuals; this is believed to be one reason for the massive famine and economic slowdown that followed the post revolution reforms.

197. *See id.*

198. *See id.*

regime and ideological setting of China means that strong opposition remains directly to resuscitating private real ownership rights.[199] Within the comprehensive Chinese property rights regime, the only substantial right missing is the private real ownership right.[200] Even with promulgation of the most recent Chinese property law in 2007, this Gordian knot continues to puzzle the Chinese legislature, which remains unsure of the extent to which it should permit private real ownership.[201]

Whether one views this knot from the perspective of economic development or from that of private sector stabilization and security, the protection of private property rights in land represents a crucial and unavoidable issue. In order to meet, at least partially, the needs originating from these twin concerns and to protect private interests in land,[202] during the 1980s, the Chinese legislature introduced the Land Use Right (*Tudi Shiyong Quan*), a quasi-real ownership right. This was followed by the 1988 amendment of the Chinese Constitution in order to permit the transfer of such an interest in land.[203]

The land use right places exclusive ownership of land in the State and special collective organizations, while permitting the holder of the land use right the use of the land for an ex ante set period,[204] during which time the State may not withdraw the use right in absence of compelling social welfare or national security reasons.[205] The right comprises an absolute right that can exclude all others from the subject land.[206] The regime thereby established allows for mortgage,

---

199. Chen Xiaojun (陈小君), "Tudi Guanli Fa"xiu gai zhong de bu dong chan wu quan zhi du (《土地管理法》修改中的不动产物权制度) [The History, Principles and Institutions of Chinese Land Administrative Law], 5 POL. L. [政治与法律] 2 (2012).

200. *Id.*

201. Fan Xuefei (范雪飞), si ren suo you quan :suo you quan zhi du de zhi dian (私人所有权:所有权制度的支点) [Private Ownership Right and the Fulcrums of Ownership Institutions], 29 MOD. L. SCI. [现代法学] 168 (2007).

202. *Id.*

203. Casey Watters & Charlie Xiao-chuan Weng, *Does the Housing Market and Absence of Consumer Bankruptcy Protection Make Interpretation (III) of the Chinese Marriage Law Beneficial to Women, Not Men?*, 3 CHARLOTTE SCH. L. PROP. L.J. 101 (2016).

204. Zhan Zhongle (谌中乐), wo guo tu di shi yong quan shou hui lei xing hua yan jiu (我国土地使用权收回类型化研究) [Categorizing Land Use Right Withdrawal Types], 2 CHINA LEG. SCI. [中国法学] 98 (2012).

205. *Id.*

206. Zhang Shaopeng (张少鹏), "tu di shi yong quan "shi du li de bu dong chan wu quan ("土地使用权"是独立的不动产物权) [The Right to the Use of Land is an Independent Immovable Property Right], 6 CHINA LEG. SCI. [中国法学] 49 (1998).

inheritance, alienation, sale, and easements.[207] Taking the form of a contract, a right may be issued for one of five types of land tenure: (1) residential; (2) industrial; (3) educational, scientific, cultural, health service, and sport; (4) commercial, tourism, and entertainment; and (5) mixed.[208]

Pursuant to the contract which creates the land use right, the State retains control of the land subject to a land use right through the imposition of conditions, including the payment of a fee, development and maintenance requirements, and restrictions on use and alienation (within the framework of the contract, the holder may freely dispose of the land use right).[209] Whatever the conditions imposed, they are all aimed toward two objectives: (1) securing the holder's payment pursuant to the payment condition, and (2) the efficient use of the subject land (e.g., education land may not be transferred for noneducational purposes).

A maximum use period, or term, attaches to each land use right,[210] with the longest allowable use period not exceeding 70 years.[211] Prior to the promulgation of Chinese property law in 2007, the relevant State Council regulation of 1990 (which created and regulated the tenure system providing for the term of a land use right) was silent on the matter of the extension of a term.[212] The new law, however, provides for extension, although the extension conditions remain elusive, especially for the residential use right.[213] While this

---

207. Chengzhen Guoyou Tudi Shiyongquan Churang He Zhuanrang Zanxing Tiaoli (中华人民共和国城镇国有土地使用权出让和转让暂行条例) [Interim Regulations of the People's Republic of China Concerning the Assignment and Transfer of the Right to Use of the State-owned Land in the Urban Areas] (promulgated by the St. Council, May 19, 1990, effective May 19, 1990) (Westlaw China) (official translation).

208. *Id.* art. 12.

209. *Id.* arts. 1-54.

210. *See id.* art. 12. This law stipulates:

> The maximum term with respect to the assigned right to the use of the land shall be determined respectively in the light of the purposes listed below: (1) 70 years for residential purposes; (2) 50 years for industrial purposes; (3) 50 years for the purposes of education, science, culture, public health and physical education; (4) 40 years for commercial, tourist and recreational purposes; and (5) 50 years for comprehensive utilization or other purposes. *Id.*

211. *Id.*

212. *See id.*

213. A residential land use right can be extended automatically, while the extension of nonresidential land use rights are subject to administrative discretion. Most scholars believe that extension should be free of charge. *See* Huixin & Huabin, *supra* note 190, at 270-71; Zhonghua Renming Gonghe Guo Wuquan Fa (中华人民共和国物权法) [Property Law of the People's Republic of China] (promulgated by the Nat'l People's Congress, Mar.

clearly concerns the holder of the right,[214] it is not a matter to which the state devotes much attention, mainly for two reasons: first, the Chinese government controls the supply of the land use right, and second, the massive expiration of the first round of land use rights is at least three decades away.[215] From the state perspective, in order to ensure the maximization of the payment for land use rights, these are very often issued for the maximum allowable tenure period according to law.[216] Moreover, the lack of effective investment conduits and a distorted banking system have driven private capital to flood the real estate market to avoid high inflation rates, and this imbalance between demand and supply of real property eclipses the title renewal and land use value discount issues.

From the state perspective, the grant of land use rights for a fee is currently the primary source of revenue for all levels of the Chinese government.[217] According to the most recent official data, in the past three years, the state sells approximately 700,000 hectares of land to private parties per year.[218] And there is no questioning the lucrative nature of these rights. In 2014, the Chinese government derived RMB 3.34 billion ($USD 524 million) through the sale of land use rights (a quarter less than derived in 2013),[219] representing one quarter of the national budget.[220] This only fuels China's already skyrocketing real estate prices. Consider Shanghai: in 2014 the average cost per square

---

16, 2007, effective Oct. 1, 2007) art. 149 (Westlaw China) (official translation); Tudi Dengji Banfa (土地登记办法) [Measures for Land Registration] (promulgated by the Ministry of Land and Resources, Dec. 30, 2007, effective Feb. 1, 2008), art. 52 (Westlaw China) (official translation).

214. Sun Xianzhong (孙宪忠), que ding wo guo wu quan zhong lei yi ji nei rong de nan dian (确定我国物权种类以及内容的难点) [The Difficulties of Defining Types and Context of Property Right], 1 LEGAL STUDY [法学研究] 50 (2001).

215. *See id.*

216. *See id.*

217. Zhou Gang-zhi (周刚志), di fang "tu di cai zheng " zhi he xian xing kong zhi (地方"土地财政" 之合宪性控制) [The Constitutional Control of Local "Land Finance"], 1 N. L. REV. [北方法学] 132 (2014).

218. zi yuan gai kuang (资源概况) [2015 Report], zhong hua ren min gong he guo guo tu zi yuan bu (中华人民共和国国土资源部) [Ministry of Land & Resource] (2015), http://www.mlr.gov.cn/zygk/.

219. While this is the official figure, it does not include indirect profit, such as SOE's profits through retransferring a land use right previously hoarded. *See id.*

220. *See* guan yu 2014nian zhong yang he di fang yu suan zhi hang qing kuang yu 2015nian zhong yang he di fang yu suan cao an de bao gao (关于 2014 年中央和地方预算执行情况与 2015 年中央和地方预算草案的报告) [Report from the Ministry of Finance on 2014 National Budget], Xinhua She (新华社) [Xinhua News Agency] (2015), http://www.gov.cn/xinwen/2015-03/17/content_2835417.htm.

metre of residential property for developers reached RMB 20,000 ($USD 3141), most of which represented the cost of land use rights.[221]

Still, notwithstanding its difficulties, from the private sector perspective, the land use right represents the only available means for private parties to obtain land pursuant to a form of private property, either as an original right from the State or, under limited conditions, from economic collective organisations. Notwithstanding its obvious shortcomings as a form of full private real ownership, the land use right provides a sense of security for private parties during the tenure of the right,[222] which is enough to separate the land use right from common property under Chinese law.

B. Common: Unquantifiable Natural Resources

Although infinite and uncontrollable, air, light, and other unquantifiable natural resources can comprise the subject matter of property under Chinese law. The Chinese Constitution stipulates that all natural resources, including air and light, remain the property of the state. Article 9 provides: "All mineral resources, waters, forests, mountains, grasslands, unreclaimed land, beaches and other natural resources are owned by the State, that is, by the whole people, with the exception of the forests, mountains, grasslands, unreclaimed land and beaches that are owned by collectives [in accordance with the] law."[223]

In the absence of scarcity of any of these resources, the state typically refrains from enforcing its paramount right. Moreover, due to the lack of enforcement, a gap exists in the literature as to the full nature of the state's right.[224] This, of course, does not mean the absence of disputes in relation to such resources. With the ongoing rapid development of real property in China, the right equally to access common property, such as light and air, has become

---

221. *See* qu nian shang hai zhai di lou ban jun1 jia bi jin 2wan da guan chuang li shi xin gao (去年上海宅地楼板均价逼近 2 万大关 创历史新高) [The Cost of Residential Property Has Reached RMB 20,000 PSM], Wang Yi (网易) [Net Ease] (2015), http://sh.house.163.com/15/0109/16/AFHIL7AF00073SDJ.html.

222. Zhang Qianfan (张千帆), cheng shi tu di "guo jia suo you "de kun huo yu xiao jie (城市土地"国家所有"的困惑与消解) [The Puzzle and Solution of State-owned Land], 3 CHINA LEG. SCI. [中国法学] 178 (2012).

223. *See* XIANFA art. 9 (2004) (China).

224. It is very difficult to imagine that the country can charge foreigners to pay for inhaling air; it is also difficult to monitor how much air every individual consumes for a cost-benefit analysis.

increasingly important. The proximity of new buildings which block sunlight, for instance, conflicts with the right to access such light. Legislative regulation has, as yet, failed to respond to such disputes which, with increased urbanization, will become more acute.

In order to fill the void left by the positive law, as well as the academy, Chinese law has borrowed from civilian systems,[225] with Roman law significantly influencing Chinese property law.[226] Thus, in order to efficiently and fairly solve the equal access dispute, Chinese law employs the civil law principle of adjacent relation (*Xianglin Guanxi*). The duties required of adjacent relation must therefore either be stipulated by law or recognized by local custom.[227] Similarly, the Chinese law has borrowed the easement as a form of usufruct arising under contractual obligation for consideration in order to solve equal access disputes.[228] As with the land use right, however, common property applies to only a fraction of the land mass of China; by far the most significant form of property in Chinese land is state or public. We deal with this in the next section.

C. State/Public: Public Property Right

In comparison to the small amount of private property in Chinese land, state/public property constitutes one of the two most significant forms of landholding in China. Generally, state/public property or ownership applies to all Chinese land.[229] It is therefore impossible to acquire any interest in Chinese land other than through the grant of some form of tenure, such as the land use right. In the absence of these grants, therefore, all land otherwise without a legal owner is an asset of the state. Indeed, this principle applies to anything that may be the subject matter of property, real or personal; Article 113 of the Chinese property law illustrates this point. "A lost thing shall belong to the State if no one goes to claim it within six

---

225. *See* Liu Baoyu (刘保玉), zhong guo wu quan fa de cheng jiu yu bu zu (中国物权法的成就与不足) [The Achievements and Shortcomings of China Real Right Law], 5 LEGAL FORUM [法学论坛] 21 (2008).

226. *See id.*

227. *See* Zeng Dapeng (曾大鹏), lun xiang lin guan xi de ding yi yu ben zhi (论相邻关系的定义与本质) [On the Definition and Essence of Neighboring Relation], 37 NANJING U. L. REV. [南京大学法律评论] 89 (2012).

228. Geng Zuo (耿卓), wo guo di yi quan xian dai fa zhan de ti xi jie du (我国地役权现代发展的体系解读(我国地役权现代发展的体系解读) [Systematically Deciphering Chinese Easement Development], 3 CHINA LEG. SCI. [中国法学] 85 (2013).

229. *See* XIANFA art. 9-10 (2004) (China).

months from the date the notice of the finding of the thing is published."[230] Thus, from an economic perspective, state-owned land comprises a crucial and never-depleted financial resource for multiple levels of government. Indeed, its prominence as a source of revenue has grown since the central government curbed the issue of bonds by local governments as a means of raising revenue.[231]

The state's interest in land therefore takes the form of the public property right. Both extensive and superior to all other proprietary interests in Chinese land, the public property right operates as the functional equivalent of allodial ownership, save for the fact that it is the state itself that holds the interest.[232] And it may be applied even to those lands otherwise held pursuant to the land use right, thus adding to the lands available for state/public use. As part of the urbanization process, for instance, the state can, citing compelling social welfare as its justification, not only withdraw land use rights before the tenure is due, but also levy collectively owned lands, permanently converting the subject lands to state-owned land subject to a public property right.[233]

The state further controls the use of Chinese land by mandating that only state-owned land can be used for construction and development purposes,[234] while collective organizations may use their land only for agricultural and related purposes.[235] Thus, in order to allow for urban development and the use of land subject to the public property right generally, the state employs two forms of transferring a

---

230. *See* Zhonghua Renming Gonghe Guo Wuquan Fa (中华人民共和国物权法) [Property Law of the People's Republic of China] (promulgated by the Nat'l People's Congress, Mar. 16, 2007, effective Oct. 1, 2007) art. 113 (Westlaw China) (official translation).

231. *See* Ma Guangyuan ：hua jie di fang zhai wu wei ji bu neng yi lai tu di cai zheng (马光远：化解地方债务危机不能依赖土地财政) [Land Finance Is Not the Solution to Local Debt Crisis], zhong guo jing ji dao bao (中国经济导报) [CHINA ECON. HERALD] (2011), http://www.ceh.com.cn/ceh/llpd/2011/7/2/81801.shtml.

232. Chen Shujuan (程淑娟), lun wo guo guo jia suo you quan de xing zhi (论我国国家所有权的性质) [Study the Characteristics of Chinese State-owned Property Right], 1 LAW SCI. [法律科学] 73 (2009).

233. *See* Han Yonghong (韩咏红), zhong guo she ke yuan "She Hui Lan Pi Shu" : qiang zhan nong di shi cheng shi hua zui da tiao zhan (中国社科院《社会蓝皮书》：强占农地是城市化最大挑战) [The Biggest Challenge of Urbanization Is Illegal Taking Famers' Lands], Lian He Zao Bao (联合早报) [ZAOBAO] (2010), http://www.zaobao.com.sg/special/report/politic/cnpol/story20101216-138111.

234. Huixin & Huabin, *supra* note 190, at 265.

235. *Id.*

usufruct in state-owned land to private parties: land transfer and land allotment.[236] The remainder of this subpart considers each.

1. Land Transfer

A land transfer arises as a commercial-contractual relationship between the state and private parties for consideration,[237] conferred subject to a limited term,[238] ensuring the state a sustainable financial resource. At the end of the term of a transfer, the state holds the power to amend the fee payable from the term of any succeeding tenure.[239]

Because the state transfers only a usufruct in land with a limited term rather than allodial ownership, the issue of the ownership of any improvements, especially buildings, arises. In this case, a form of the law of fixtures arises in Chinese property law: during its term, the ownership of buildings attaches to the land use right held by a private party.[240] At the conclusion of the term, if the state determines the right, in theory the private owner loses any interest in the building but remains entitled to reasonable compensation based on market value.[241] The most recent regulations, however, fail to directly address this issue.[242] Moreover, the only regulation that addresses the issue, promulgated in 1990, in fact stipulates that in such a case, the state can retain the improvements to the land without providing any

---

236. *See* Zhonghua Renming Gonghe Guo Wuquan Fa (中华人民共和国物权法) [Property Law of the People's Republic of China] (promulgated by the Nat'l People's Congress, Mar. 16, 2007, effective Oct. 1, 2007) art. 137 (Westlaw China) (official translation); Tudi Guan Li Fa (土地管理法) [Land Administration Law of the People's Republic of China] (promulgated by the Standing Committee of the Nat'l People's Congress, Aug. 28, 2004, effective Aug. 28, 2004) art. 54 (Westlaw China) (official translation); Zhonghua Renmin Gonghe Guo Chengshi Fangdichan Guanli Fa (中华人民共和国城市房地产管理法) [Urban Real Estate Administration Law] (promulgated by the Standing Committee of the Nat'l People's Congress, Aug. 30, 2009) art. 8, 13, 23.

237. Huixin & Huabin, *supra* note 190, at 267.

238. *See* Chengzhen Guoyou Tudi Shiyongquan Churang He Zhuanrang Zanxing Tiaoli (中华人民共和国城镇国有土地使用权出让和转让暂行条例) [Interim Regulations of the People's Republic of China Concerning the Assignment and Transfer of the Right to Use of the State-owned Land in the Urban Areas] (promulgated by the St. Council, May 19, 1990, effective May 19, 1990) art. 12 (Westlaw China) (official translation).

239. *See* Tudi Dengji Banfa (土地登记办法) [Measures for Land Registration] (promulgated by the Ministry of Land and Resources, Dec. 30, 2007, effective Feb. 1, 2008), art. 52 (Westlaw China) (official translation).

240. Huixin & Huabin, *supra* note 190.

241. Yao Ruiguang (姚瑞光), min fa wu quan lun (民法物权论) [Civil Property Law Study] 166 (1999).

242. Huixin & Huabin, *supra* note 190.

compensation.[243] Of course, this seems absurd, even within the parameters of Chinese public ownership and this loophole will likely invite future debate about the public ownership right.

2. Land Allotment

As with the land transfer, the land allotment endures for a limited term, thus allowing the state a sustainable resource.[244] However, unlike the former, the latter is typically conferred by the state without taking consideration in exchange.[245] And, unlike the land transfer and its commercial operation, the state retains greater control over these lands through administrative regulations exercised as a matter of discretion.

The reality of administrative discretion in relation to the land allotment carries with it the potential for this form of tenure to operate as an incubator of corruption and state-owned asset embezzlement. This is only exacerbated by the fact that the law fails to elaborate the procedure for and requirements of a land allotment. The China Land Administrative Law only briefly mentions that public interest comprises the major criterion to be considered.[246]

From a land management perspective, the bifurcated land acquisition system of land transfer and land allotment is efficient; the former ensures the state's revenue and control of land use through zoning, while the latter cuts the costs of public interest projects making it is easier to launch a project benefitting the social welfare. Still, the lack of a developed legal system and efficient enforcement causes ongoing concern and requires the attention of the Chinese legislature.

D. Communitarian: Collectively Owned Land

Of course, it is very difficult to find in Chinese history anything approximating the history of indigenous peoples found in systems

---

243. *See* Chengzhen Guoyou Tudi Shiyongquan Churang He Zhuanrang Zanxing Tiaoli (中华人民共和国城镇国有土地使用权出让和转让暂行条例) [Interim Regulations of the People's Republic of China Concerning the Assignment and Transfer of the Right to Use of the State-owned Land in the Urban Areas] (promulgated by the St. Council, May 19, 1990, effective May 19, 1990) art. 40 (Westlaw China) (official translation).

244. *See id.* art. 12.

245. Huixin & Huabin, *supra* note 190, at 267.

246. *See* Tudi Guan Li Fa (土地管理法) [Land Administration Law of the People's Republic of China] (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 28, 2004, effective Aug. 28, 2004) art. 54 (Westlaw China) (official translation).

such as the United States and Australia. In a strict sense, there may be very little if any true communitarian property in Chinese land. Still, in terms of the area of land covered and the population involved, Chinese collectively owned property may represent the most significant form of land ownership in China. The area of land is almost twenty times larger than that covered by state-owned land on which construction and development is occurring.[247] As of 2014, about 618 million people live on such land.[248] Additionally, for present purposes, collectively owned land most closely approximates the definition of communitarian property used in this Article. To some extent, this imperfect fit may be more a case of the difficulty of attempting to develop ideal-typic definitions rather than demonstrating that no such type of land holding exists in Chinese law.

In order to make use of such land, the state divides agricultural economy units into collective organizations. The Chinese law provides no workable definition of these organizations;[249] about all that can be said about them is that they may not always be treated as legal persons,[250] and the relevant farmers as a whole own the subject land as opposed to the organization itself. While academic commentary makes the case for the equal protection of whatever use is made of collectively owned land,[251] the vagueness of the relevant law and the fact that this is not an allodial ownership restricts the functionality of such land in the hands of farmers, as compared to state-owned land, in three significant ways.

First, collectively owned land can only be used for agricultural and related purposes, even though the law does not explicitly forbid otherwise.[252] Thus, farmers may, for instance, build a factory to process the crops harvested, but cannot develop a commercial residential project on it.[253] Article 151 of the Property Law of the

---

247. *See* Xinhua She (新华社) [Xinhau News Agency], *supra* note 220.

248. *See* 2014nian mo cheng zhen chang zhu ren kou 7.5yi xiang cun chang zhu ren kou jian shao 1095wan (2014 年末城镇常住人口 7.5 亿 乡村常住人口减少 1095 万) [Report of the National Statistical Bureau in 2014], Cai Jing Wang (财经网) [CAIJING] (Jan. 20, 2015, 10:27:02), http://economy.caijing.com.cn/20150120/3802875.shtml.

249. *See id.*

250. Huixin & Huabin, *supra* note 190, at 129.

251. S Sun Xianzhong (孙宪忠), zai lun wo guo wu quan fa zhong de "yi ti cheng ren 、ping deng bao hu "yuan ze (再论我国物权法中的"一体承认、平等保护"原则) [Rethink the Principle of "Recognizing and Equal Protection" in Chinese Property Law], 160 STUDIES IN L. BUS. [法商研究] 67 (2014).

252. Huixin & Huabin, *supra* note 190, at 265.

253. *Id.*

People's Republic of China (*Zhonghua Renming Gonghe Guo Wugquan Fa*) provides that: "In case a piece of collectively owned land is used as land for construction, it shall be handled according to the law on land administration and other relevant laws."[254] The law surrounding this provision is unclear. On the one hand, except in very limited situations, the theoretical interpretation of the *Tu Di Guanli Fa* treats the law as not permitting use for construction and development.[255] The Chinese Constitution, on the other hand, contains no such restriction, Article 10 stipulating that:

> Land in the cities is owned by the State. Land in the rural and suburban areas is owned by collectives except for those portions which belong to the State [in accordance with the] law; house sites and privately farmed plots of cropland and hilly land are also owned by collectives.[256]

Given the lack of clarity on this issue, it comes as no surprise that disputes arise. An example of this is found in what is known as the small property right (*Xiao Chanquan*).[257] The overheated real estate market has enticed collective organizations to join the construction bandwagon.[258] As we have seen, theoretically, collective organizations may legally build apartments on the land for their members' accommodation, but cannot seek profit by developing commercial residential properties. Moreover, the state refuses to recognize and register the buildings, taking the position that the building works are illegal as touching the interests of the state.[259] Without any form of recognition, therefore, any such proprietary rights flowing from these actions are fragile at best, leading to the name "small property right." Notwithstanding the lack of security, due to the enormous demand for accommodation and the resulting profitability derived from meeting that demand, the small property right is increasingly found in many provinces in China.[260] This draws interesting parallels to other ways in

---

254. Zhonghua Renming Gonghe Guo Wuquan Fa (中华人民共和国物权法) [Property Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) art. 151 (Westlaw China) (official translation).

255. Liu Jiaan (刘家安), WU QUAN FA LUN (物权法论) [Property Law] 163-64 (2009).

256. XIANFA art. 10 (2004) (China).

257. *See* Shitong Qiao, *Small Property, Big Market: A Focal Point Explanation*, 63 AM. J. COMP. L. 197 (2015).

258. *See id.* at 205-06.

259. *See id.* at 206.

260. quan guo xiao chan quan fang "fan lan cheng zai "de bei hou (全国小产权房"泛滥成灾"的背后) [Rampant Small Property Right], Zhongguo Jingying Wang (中国经营网) [CHINA BUS. NETWORK] (Jan. 16, 2014, 12:28:42), http://www.cb.com.cn/economy/2014_0116/1033994.html.

which parties can provide some form of security in many property systems in the absence of state/legal sanction.[261]

Less drastic in terms of the interests involved, the second restriction involves the substantial weakening of farmers' financial capability. The members of a collective organization are entitled to a piece of land for curtilage; this is known as *Zhai Jidi*.[262] Neither members nor the collective organization are entitled to alienate this interest by way of mortgage or sale to anyone outside the organization.[263] While this would be a sensible limitation if its aim was to keep land within the organization, the law in fact exhaustively forbids any kind of curtilage transfer to members outside of an organization, even if such transfers may result in benefit to the organization.[264] Those transfers allowed within an organization are subject to strict limitations. For instance, if a transferee already holds an assignment of curtilage, then any attempted transfer of additional curtilage is invalid.[265] While academic authority is clearly on the side of allowing such minimal transfers, it seems the policy behind the prohibition on transfers beyond an organization stems from the concern that such a transfer could be used as security for a mortgage, which could be enforceable by allowing a nonmember to obtain an interest in collectively owned land by way of a sale effected by a lender enforcing its security over the curtilage.[266]

The final limitation involves those permissible assignments of agricultural land by means of a land management contract. While this increases the functionality of such land, as with *Zhai Jidi*, members have a very limited ability to transfer that land management right.[267]

---

261. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); SINGER, *supra* note 9; Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

262. *See* Zhonghua Renming Gonghe Guo Wuquan Fa (中华人民共和国物权法) [Property Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) art. 152-154 (Westlaw China) (official translation).

263. Huixin & Huabin, *supra* note 190, at 275.

264. *Id.*

265. *Id.*

266. *Id.*

267. *See* Zhonghua Renming Gonghe Guo Wuquan Fa (中华人民共和国物权法) [Property Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) art. 128 (Westlaw China) (official translation); Tudi Guan Li Fa (土地管理法) [Land Administration Law of the People's Republic of China] (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 28, 2004, effective Aug. 28, 2004) art. 2 (Westlaw China) (official translation).

In most cases, therefore, the transfer of such rights may only occur as between members of the same organization.

Collectively owned land is, on the one hand, capable of free utilization by those organizations that hold it, although the rights which provide for that use remain incomplete. While the revolution of 1949 took as its main focus the collective holding of land,[268] which resulted in the return of land to the "ownership" of Chinese farmers, except for working on the soil itself in furtherance of agricultural and related activities, farmers do not have any further latitude to maximize the utility of the land.[269] The restrictions placed on this form of landholding leave farmers as the poorest social group in Chinese society, notwithstanding the value of the resource on which they live.[270] This in turn has resulted in people moving in vast numbers from agricultural areas to large urban regions when natural disasters strike. Of course, rather than putting them in a better financial position, these migrants find themselves working in the lowest paid jobs.

VI. CONCLUSION: THE HONORÉ-WALDRON CONTINUUM

The Honoré-Waldron thesis posits that one's intuitive sense of a predominant ideal-typic category of property in land tends not to withstand an assessment of the reality of a working legal system. Put another way, an assessment of a legal system's real property law belies our intuitive sense of the predominant category of property in that system. Rather, what one finds is not the complete absence of any one of the four ideal-typic categories of property in a working legal system, but a blend of those four types. The only difference between systems will always be one of degree. Thus, each system considered in this article demonstrates some invocation of the concept of private property in land. In the United States and Australia (both common law systems), this takes the form of the fee simple which, as we have seen, itself is very similar in the two systems, save for the role of the people in the United States and the Crown in Australia, while in China (a civilian system) it is found in the Land Use Right. And each system has some implementation of state/public property. In the United States, this occurs in the case of the public trust, while in

268. Liming & Youjun, *supra* note 195.

269. *See* Shitong Qiao, *The Politics of Chinese Land: Partial Reform, Vested Interests, and Small Property*, 29 COLUM. J. ASIAN L. 70, 76-77 (2015).

270. *See id.* at 102-03.

Australia it is through Crown lands, both very similar means of dealing with public land but, again, with the people in the case of the former standing in contrast to the Crown in the case of the latter marking an important substantive difference. In China, of course, this form of property predominates in the Public Property Right.

All three systems place very little weight on the existence of common property, either theoretically, in the case of the United States and Australia, or practically, in the case of China (although common resources such as light and air are treated somewhat differently in China than they are in the United States and Australia); this is to be expected given the theoretically narrow category that this term encompasses.

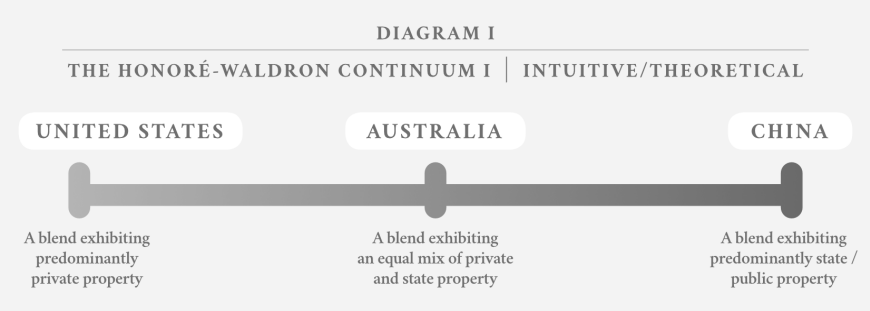
Perhaps communitarian property represents the most difficult category. Both the United States and Australia clearly accommodate this form of property in tribal lands and native title, respectively. China represents the limiting case; we have characterized collectively held land as communitarian property. This may or may not be correct, but that characterization does not affect the validity of the Honoré-Waldron thesis, which only posits a blend of the ideal-typic categories. We have found that there is such a blend in each of the systems considered.

We have tested this thesis through an assessment of the real property systems of three dominant systems, representing both the common and civilian legal traditions, each the subject of a common intuitive understanding of the type of property one might find there: the United States, a common law system, the intuitive sense of which is one of private property; Australia, also a common law system, with an intuitive sense of its being largely a system of private property; and China, a civilian system with a strong intuitive presumption of state/public property. It is true that the intuitive sense is largely borne out by our analysis, but the Honoré-Waldron thesis also tells us—indeed, this is its important insight—that while this may be true, one will always find a blend of types. The difference, as we have noted, is always a matter of degree. Such is the case in each of the jurisdictions considered here.

What we propose, given that every system of land law will normally be structured around the private-state/public polar opposites, is that the Honoré-Waldron thesis requires us to begin by placing any legal system's real property structure on a continuum based upon our intuitive/theoretical sense of the place and role of either private or state/public property in that system. We can call this the Honoré-

Waldron Continuum I (Intuitive/Theoretical), represented in Diagram 1. At one end of the continuum is the intuitive/theoretical presumption of a system dominated by private property. Clearly, the United States sits at this position on the continuum. At the other end is a strong intuitive/theoretical presumption of state/public property, which is where China sits. And between those two poles we can place Australia—for convenience we have placed it in the middle. However, those initial placements are not intended to indicate the reality of the system.

Diagram 1
Honoré-Waldron Continuum I
(Intuitive/Theoretical)



Indeed, what we have found is that, in the actual operation of the systems of real property examined, the United States sits somewhat closer to the middle of the continuum, where we might think of a roughly equal blend of private and state/public property. China, too, sits closer to the middle than we might intuitively expect. But both are still on the private and state/public ends of the continuum, respectively. Australia, based upon its actual blend, likely sits closer to the United States, and certainly on that end of the continuum, as opposed to its intuitive placement roughly in the middle. In other words, as predicted by the Honoré-Waldron thesis, our intuitive/theoretical assumptions about a system do not coincide with its operation in practice. Put another way, the actual content of ideal-typic property types in each system places all three closer to the middle of the continuum than our intuition would otherwise dictate.

For this reason, a second continuum must run parallel to the first, on the basis of the actual blend of ideal-typic categories: the more state/public property in a system for which is held an intuitive/theoretical presumption of private property moves that

system closer to the centre of the continuum in the direction of state/public property. And the more private property in a system for which is held an intuitive/theoretical presumption of state/public property moves that system closer to the centre of the continuum in the direction of private property. This requires a second form of the continuum, which we call the Honoré-Waldron Continuum II (Actual), represented in Diagram 2.

Diagram 2
The Honoré-Waldron Continuum II
(Actual)

Our intent is to show that the Honoré-Waldron thesis will be of value in characterizing the real property systems, and indeed, of any type of property system, in any given nation, under either a common or civilian legal system; this will, in turn, assist in understanding the operation of the system, as well as making clear that no one system is a monolith. Every system of property, in other words, contains a blend of the ideal-typic categories. While our analysis is limited to three jurisdictions, our hope is that future research will bear out the Honoré-Waldron thesis, both in terms of systems of property in alternative resources, such as intellectual property, and in relation to other national jurisdictions, both common law and civilian.