

Against the Backdrop of Dignity and Equality, The Non-Absoluteness of Property Rights

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AJ van der Walt, [The Modest Systemic Status of Property Rights](#), 1 J. L. Prop. & Soc'y 15 (2014).

We must stop imagining that property is the saviour of the legal system, the knight on the white steed, or the guardian of every other right. That was the lesson [Andre van der Walt](#), South African Research Chair in Property Law at Stellenbosch University, taught the assembled audience when he delivered the Keynote Address at the 2014 Annual Conference of the Association of Law, Property and Society. As Professor van der Walt writes in the landmark article based on that memorable address: "I prefer to see property as a gaggle of cleaners who move in after everyone has left, brandishing buckets and mops, cleaning up the property debris once the real work of maintaining the democratic legal system has been completed." (Pp. 105-106.) In this article, van der Walt reflects on the systemic status of property rights within a wide frame of constitutional, "non-property" rights. Moving from normative theory to doctrinal analyses of the case law of South African courts implementing the Constitution of 1996, as well as examples from the United States, Canada, the United Kingdom, and Germany, the article explores how property rights are, and should be, balanced against non-property rights, including rights to life, human dignity, and equality.

This paper comes at a fascinating moment for property theory, as the politics of property law—particularly in "advanced" democracies like the United States and the United Kingdom—are being tested against a backdrop of rising socio-economic inequality, dramatically accelerated following the global financial crisis of 2008 and the "austerity" politics that followed. As the claims that markets left to their own devices are efficient and stable—or that property is an effective guardian of other rights (Pp. 32-42)—have been challenged, the landscape of unequal opportunity has been exposed, reverberating through property scholarship to spark a renewed interest in property law's methodologies and discursive traditions across the global property community. Van der Walt explores these debates in the first section of his paper.

Van der Walt's contribution is sympathetic to the "progressive property" school, in challenging property theories that place the right to exclude at the "core" of ownership, and ownership at the front and centre of property conversations. Yet, van der Walt goes beyond calls for value pluralism and contextualised reasoning *within* the sphere of property law, to challenge the proposition that property rights and entitlements take presumptive priority at the front and centre of broader debates about the allocation of resources. A core line of argument in the article is that:

...it is important for progressive property theory to recognise the relatively modest systemic status of property rights in the broader scheme of fundamental rights protection; to acknowledge that the default position is to secure the protection and promotion of non-property rights on the basis of their relatively superior normative and systemic status and not via the protection of property; and to devise conceptual and analytical tools to facilitate a distinction between the two categories of rights. (P. 42.)

While van der Walt recognises that property rights will, and should, generally be protected once the

fundamental democratic conditions of our legal system are secured, understanding those rights in a wider constitutional framework has important implications for our theoretical, doctrinal, and methodological approaches to property.

This article focuses on a relatively narrow category of property disputes: access conflicts involving quasi-public land, or land to which a small group of non-owners have been granted restricted access for specific purposes (e.g., shopping centers and airports), and where the owner of the land wants to exclude or evict from land persons who want to use it for a non-property purpose. Within this narrow context, these other preferred uses and interests include the exercise of their right to free movement, assembly, free speech, public demonstration or picketing—although van der Walt also signals potentially broader applicability of this approach to contexts like housing rights and servitudes.

Despite a seemingly narrow focus, there is also far-reaching potential for the work. One of the great strengths of van der Walt's writing (see also, AJ van der Walt, *Property in the Margins*, Hart, 2009) is to challenge us to critically re-evaluate our ingrained habits of thinking, the methodological blind-spots that are embedded by the dominant discourse of our discipline. On the one hand, it is (or should be) uncontroversial to argue that, in cases which engage the right to life in conflict with a property right, courts do not (and should not) take the protection of the landowner's property right as the self-evident starting-point for deciding the case. Yet van der Walt's analysis of these access-conflict cases highlights the distorting effects of the Blackstonian tradition on our methodologies for resolving conflicts involving property.

Thus, while the particular cases van der Walt refers to as illustrations of this approach are well-known (he discusses, for example, the totemic "progressive property" case of *State of New Jersey v. Shack* 58 NJ 297 (1971)), his fresh contribution to these debates offers an intellectually radical space for property lawyers to reflect on the place of property rights within the wider legal landscape, and then to show how this is actualised within doctrinal reasoning.

The Systemic Marginality of Property offers a new way to think about the complexities of property contests, the crucial role of context in legal decision-making, and the real human impacts that result from our methodological commitments, particularly when we balance property rights and entitlements against fundamental non-property rights. Joseph Singer has argued that "property law is a constitutional problem because the norms and values of a free and democratic society limit the kinds of property rights that can be created." ((Joseph William Singer, *Property as the Law of Democracy*, 63 Duke L.J. 1287, 1304 (2014)) This article takes a crucial step forward for this line of analysis, by demonstrating some of the theoretical, doctrinal and methodological steps that follow from accepting that property rights are not absolute but inherently defined by the demands of living in a democratic society, characterised by dignity and equality.

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