

COMMENT

# Property rights rule: comments on Bart Wilson's 'The primacy of property; Or, the subordination of property rights'

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## Abstract

Bart Wilson argues that property is based on custom, not rights. Wilson (2022) further argues for the primacy of property over property rights. Wilson's research, including the recent book, *The Property Species: Mine, Yours, and the Human Mind* (2020), is a significant and arguably pathbreaking contribution to the vast literature on property and property rights. It also falls into the trap of economic arguments that unnecessarily devalue legal rights. I argue that we can all agree that ideas about property are always important to understanding property rights but that property rights still rule. This is in part because those who have property typically care most about property rights. I also argue that Wilson's concept of property is too focused on private ownership, rather than shared ownership or even government ownership of property. I suggest that considering the idea of sharing and other legitimate forms of property ownership alongside private ownership would generalize Wilson's constructivist theory of property and improve our ability to explain the diversity of property rights.

**Key words:** Electromagnetic spectrum; property rights; property; spontaneous order

## 1. Introduction

Wilson (2022) argues that property is based on custom, not rights, and that property rights are subordinate to property. Wilson's argument is compelling and provocative; it calls into question much of the way economists and social scientists more generally think about property rights. Wilson directs our analytical gaze to property, in particular ideas about property, instead of toward legal and enforceable rights.

Wilson's article and his recent book on the subject (Wilson, 2020) are wonderfully rich with insights and provocative arguments. The argument about the idea of property can and should inform just about any inquiry into property or property rights. That said, I argue that Wilson's argument mistakenly sees property as more significant than property rights. A more useful approach is to see both property and property rights as social constructs and that if we were forced to choose, the logical conclusion is the primacy of property rights. There are several reasons for the primacy of property rights, the most significant being that people with property want them but also because property rights most directly and significantly influence economic behavior. Moreover, nearly all the research which relates property institutions to prosperity is based on measures of property rights, not property. Further, Wilson is almost entirely focused on individual possession of property, or private property. Accordingly, Wilson's recent research devalues both property rights and the diversity of property that humans have devised, including sharing arrangements. I illustrate some of these ideas with a

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brief discussion of property and property rights to electromagnetic spectrum before concluding with a brief explanation why Wilson's perspective ought to inform just about any serious inquiry into the institutions of property and property rights.

## 2. Property and property rights are social constructs

One of the insights of Wilson's argument is that property is a social construct: property is based on ideas. The focus on property as a human construct links together insights of heterodox research traditions in economics, including Austrian economics (especially Hayek's research on sensory order), the 'old' institutionalism of Veblen, Commons, and more recently, Hodgson and Bromley (which recognizes the role of ideas, beliefs, and historical accident in the process of institutional change), as well as some of the more recent research on what could be called cognitive institutionalism (such as research on mental models).

So far, so good. But the argument does not go far enough, in my view. Property *rights* are socially constructed as well. Indeed, all institutions are social constructs, which is clear in the North's (1990) definition as 'humanly-devised constraints.' One might disagree with the view that rules are constraints – they also liberate – but it is also clear what humans do is create rules.

The reason why this is significant is because ideas, beliefs, and values influence property rights. Bromley (2006) argues that changes in warranted beliefs about rights that ultimately lead to changes in institutions. We are better able to explain why and how institutions change once we see property and property rights as social constructs. Wilson's insights about the social construction of institutions are more general than he lets on.

## 3. Property rights still rule

Hodgson (2015) wrote an important article that argued that much of the economics of property devalues legal rights. Part of the issue Hodgson is responding to can be grouped into spontaneous order theories of property, or what Barzel (2002) calls 'economic rights.' The problem with such a view is that these are not 'right' since they are not enforced and they do not last long once an economy becomes more mature (Bromley, 1998). They also pale in comparison to property rights, that is, rights to ownership that include private property, regulated commons, state ownership, and all combinations of such regimes.

This does not mean informal institutions do not matter; as Williamson (2009) put it, informal institutions rule. When it comes to property, however, property rights rule. This point is made clearly by legal institutionalists: capitalist economies are complexes of formal, enforceable rules (Deakin *et al.*, 2017). Such a vast literature finds that economic freedom is associated with prosperity. That is all a measure of legal rights.

Why, then, subordinate property rights? Property rights are what people who develop property customs want, in most cases. It would be foolish to deny the insights of the economics of anarchy, which shows that there is much order that occurs without government (see, for example, Leeson, 2014 and Powell and Stringham, 2009). It is equally questionable to ignore that what people want are property rights. This was clear to me when considering property and property rights on the US frontier in the 19th century: settlers were able to claim property through private associations, but they also established those private associations as a way to secure property rights in fee simple (Murtazashvili, 2013). The ideas about property and their ownership were significant but what really mattered to the settlers was that they got their property *rights* in fee simple. It does not mean property was insignificant; only that possessors were primarily concerned with property rights.

## 4. Property rights are political

If the above is correct, then we can conclude that Wilson – like many economists before him – have devalued property rights. There is no need to do that since the ideas are complementary. But a

consequence of devaluating property rights is that Wilson basically leaves out what might be the most significant issue in the analysis of property: that any consideration of property rights must be concerned with questions of the politics of those property rights. A property *right* is always a claim that is enforced by a third party. That is what is meant by a right. What follows ought to be an inquiry into politics. The reason is that the nature of the external enforcers always determines the content and quality of the rights. That is, property rights are always a question of politics (Cai *et al.*, 2020).

The only question whether we recognize that ‘politics’ is not limited to governments. Libecap (1989) showed how conflict within government, including rent-seeking and perverse bureaucratic incentives, can undermine emergence of property rights. Politics, however, need not be limited to enforcement by government since government-like entities often enforce property rights as third parties. This could be the Mafia, a traditional or customary organization, or essentially anything else that has power over people (Murtazashvili and Murtazashvili, 2016). Sometimes the state is not able to provide property protection effectively, in which cases, customary governance is often a more effective option. This is what we see in places like Kenya, where government is often predatory (Leeson and Harris, 2018); Afghanistan, where the government (even before the Taliban returned to power in 2021) has generally been untrustworthy or lacked capacity or both (Murtazashvili and Murtazashvili, 2021); or the US frontier, where cowboys developed their own rules to govern the open range because the federal government did not have the political will to do so (Anderson and Hill, 2002). More recently, Albertus (2021) considers ‘property without rights,’ but it is really a study of the property rights gap – in legal protection; it reinforces the ideas above, that rights matter for many people who have property, but care deeply about legal recognition.

In each of these cases, property rights emerged but understanding why they were effective requires thinking about the political features of the organizations that enforced those rights. This includes consideration of the features of customary governance in contexts like Afghanistan or cattlemen’s associations in Wyoming and Montana in the 19<sup>th</sup> century. Accordingly, property rights scholarship ought to be concerned with how property ideas influence evolution of property rights, but when it comes down to it, the nature of those rights – including whose rights are enforced – requires us to think to an extent about politics, including the extent to which the governments are capable to defining and enforcing property rights.

## 5. Private property is not the only property

One issue that I would like to see more of in Wilson’s work, here and elsewhere (Wilson, 2020), is to consider explicitly how the idea of property extends beyond mine and thine. Wilson’s works are mostly based on an idea of private property. For example, Wilson’s (2022) article does not mention sharing.

Sharing might not be the first thing people think of when considering ‘property’ but it should be. Property can be thought of as a continuum from excludability in the tradition of Alchian, Barzel, Coase, and Demsetz to Ostromian sharing of commons. Excludability can also include governments deciding to own property so that it can be allocated for private use. One of the significant ‘new’ ideas in property – what Posner and Weyl (2018) call radical markets is not entirely new, as it goes back to Henry George and Leon Walras, both of whom proposed nationalization of property ownership – is that government can impose ownership so that it can be used by individuals. Behind this is the idea that we have to share resources, in this case through imposition of government control of property so that the government has a role in deciding how much and what can be owned.

The issue is that much of the economics of property is trapped in the ideology of possessive individualism, or the idea that ‘progress’ comes from private ownership (Bromley, 2019). It is therefore easy to see how a property on property can be mostly about individual possession, at least implicitly. Here, the issue is not so much to criticize Wilson’s idea about property as a social construct but to generalize it in recognizing that the human mind has through of many property arrangements beyond private property.

## 6. Tying ideas together

A brief example of electromagnetic spectrum government hammers home some of these ideas, including why Wilson's approach is relevant to just about any analysis of property and property rights – as well as how the framework can be improved by a focus on property rights. Spectrum is the ether through which radio and other signals travel. The usual story of spectrum governance in the US is that there were issues with radio interference as commercial radio broadcast became more widespread 1920s. Congress responded by declaring that spectrum would be used for the public interest. By the 1930s, Congress, through its newly created Federal Communications Commission, was allocating slices of spectrum for commercial broadcast through bureaucratic hearings, or 'beauty contests' (Hazlett, 2017).

Ideas about property in spectrum had a significant role on the evolution of spectrum management – though it was not because economists' ideas were immediately accepted. Ronald Coase proposed auctioning off spectrum in the 1950s. Despite his 'disruptive clarity,' Coase's ideas did not translate into spectrum policing until some four decades later once the government finally began to auction rights to spectrum rather than allocate them through committee hearings (Hazlett *et al.*, 2011). Currently, we are in what can be called a liberal licensing regime – excludable rights and markets for them are the predominant institutional arrangement – but spectrum has always involved a continuum from excludable rights to sharing. Indeed, much of spectrum is shared, and much of the policy debate is about how to increase opportunities to share spectrum (Bustamante *et al.*, 2020). Those sharing institutions were initially an idea about what cannot or should not be owned by an individual but shared by a community. Amateur radio shares bandwidth, as does community broadcast, and public interest broadcasting has always been part of spectrum.

Wilson's insight is that ideas about property to spectrum ought to be our focus. But there is no need to think of this as private property, as that would devalue sharing. That would be a major problem, as sharing is mandated in certain bands, including for mobile cell providers, who are by law licensed but do not have any specific rights to particular bands. This also illustrates why we care most about enforceable rights: we certainly believe spectrum anarchy and customs of property are important in spectrum, but it would be a mistake to downplay that billions of dollars have been spent on licenses to spectrum. Property rights in spectrum rule, but it's not just excludable rights (licenses) that matter; sharing is also significant, though the sharing regime also involves rights to share (we could describe the sharing regime in the US as a 'use it or share it' regime). The evolution of spectrum rights also reminds us that understanding why and how property rights in spectrum evolved the way they have is *always* a question of politics.

## 7. Where we go from here

Wilson (2022) reminds us that property is universal. This is important since it is often easy to suggest that property is something that is 'modern,' or European. For example, one might think that colonial governments brought property to North America. This is incorrect, as American Indians had property (Anderson and Leonard, 2016). Wilson's approach avoids this. Indian property rights also show the importance of *rights* and *politics*. The federal government forced specific types of property on Indians (fee simple) until the 1930s, and then after the 1930s, imposed rules that limited ability of Indians to define and enforce property rights on reservations as they saw best, thus contributing to uncertainty about property ownership (Alston *et al.*, 2021). The idea of property has always been present in Indian country, but it is the specific nature of property rights that we rightly direct most of our attention to.

All of this is to say that Bart Wilson has developed a significant, innovative, and useful theory of property that could be made even more useful, in my view, by conceptualizing of his argument as a necessarily complement to the analysis of property rights. Indeed, we should be thinking about how the ideas about property influence the evolution of property rights, and when thinking about property rights, we should always be considering the politics of property. Each of these things are interrelated as well: the ideas about property influence the development of property rights, and new ideas about how property (including what can be owned, what can or should be traded, and what ought to be shared)

surely influence the evolution of property rights. Ultimately, Wilson's theory of property may lead to a richer theory of the process of change in property rights, but to get there, it is important to place the proper value on property rights as well as the proper appreciation of the politics of property rights.

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