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Yaëll Emerich, Conceptualising Property Law: Integrating Common Law and Civil Law Traditions

John A. Lovett

BOOK REVIEW

CONCEPTUALISING PROPERTY LAW: INTEGRATING COMMON LAW AND CIVIL LAW TRADITIONS, by Yaëll Emerich, Elgar, 2018, ISBN 978-1-78811-183-6, 352 pp, £22/$31.

In her newly published book, *Conceptualising Property Law: Integrating Common Law and Civil Law Traditions*, Yaëll Emerich explores the evolution and current status of property law in the civil and common law.[1] The predominant theme that emerges from this impressively learned, eight chapter study is one of convergence. Emerich repeatedly reveals that property—both as a general legal concept and as a set of institutional arrangements governing how people use, manage and exchange both tangible and intangible resources—actually functions in remarkably similar ways in the civil law and common law traditions despite different historical origins and doctrinal labels. Emerich's interest in—and discovery of—this striking commonality originates in her commitment to "transsystemia," an approach to teaching and understanding law that grew out of Quebec's fertile bilingual, bijural mixed jurisdiction.

Many diverse readers will benefit from Emerich's work. Lawyers, judges and traditional doctrinal property law scholars in the largest civil law and common law systems will learn much from Emerich's careful study simply because of its clear, incisive description of so much law. Readers in other mixed jurisdictions, such as Louisiana, Scotland and South Africa, will find the portions of Emerich's book that detail the choices Quebec has made in creating its property law system particularly intriguing. Property theorists will also find Emerich's book rewarding as it points to a number of deep, cross-jurisdictional patterns in the structure of property law.

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1. YAËLL EMERICH, CONCEPTUALISING PROPERTY LAW: INTEGRATING COMMON LAW AND CIVIL LAW TRADITIONS 1 (Edward Elgar Publ'g 2018). As Emerich notes, the 2018 publication is in part a translation of her 2017 book, *Droit commun des biens : perspective transsystémique* (Éditions Yvon Blais 2017), but also contains some substantive changes. *Id.* at vi.

Emerich's method of analysis might be described as an advanced form of functional comparative law. In the six chapters that focus on specific doctrinal categories and questions, Emerich carefully analyzes each subject, combining recent theoretical insights with objective, fair-minded descriptions of the relevant law in Quebec, the rest of Canada, England, and France. She relies on a mixture of sources including scholarly monographs, treatises, textbooks, and law review articles. She frequently dives into the Quebec and French Civil Codes and common law statutes such as the Law of Property Act of 1925 (England and Wales). On occasion, she also discusses judicial decisions in some detail, with particular attention given to decisions from Quebec, the Canadian common law provinces, and the Supreme Court of Canada, along with occasional mention of English, Australian, American, Scottish and French decisions.

The major reward produced by Emerich's methodical analysis is the picture of property's structural unity in the diverse legal systems she studies when viewed at a broad enough scale. Sometimes this structural unity or convergence is explained by cross-system pollination. Other times it appears to result from deeper forces and needs in modern, market-oriented societies governed by the rule of law where legal elites (those who make property law) seek to afford individuals and legal entities a large measure of contractual freedom to arrange their affairs regarding tangible and intangible resources.

Emerich's book is divided into eight chapters. Chapter 1, the introduction, focuses almost entirely on the intellectual history and aims of "transsystemia," which she defines as "a legal approach centred on a dialogue between legal traditions, anchored in a pluralist and non-hierarchical method that celebrates the irreducible differences and similarities between various traditions."[2] Emerich's introductory chapter nicely explains how transsystemia began as a pedagogical experiment at McGill Law School and transitioned into a full-blown "knowledge project" with complex epistemological

2. EMERICH, *supra* note 1, at 1.

aims.[3] In Emerich's telling, transsystemia is an approach to understanding law that seeks to move beyond borders, transcend legal positivism, and reveal underlying conceptual and social commonalities and differences, while embracing dialogue and "dynamic pluralism."[4] A good portion of the introduction explores the subtle distinctions between traditional comparative law as both a method and a science and transsystemic analysis, whose goals embrace "cross-pollination" of legal discourse, decentering legal positivism and deconstructing law itself.[5] Unlike traditional comparative law, transsystemia, as Emerich describes it, is less interested in harmonization or unification of the law and more interested in dialogue and "impregnation of one tradition in another."[6] Emerich's introductory chapter closes with a fascinating discussion of a 1921 decision of the Privy Council,[7] in which common law courts applying Canadian law began their long, and not always successful, attempt to incorporate aboriginal title into Canada's property system. Emerich thus opens another theme that weaves throughout her study, the story of how non-western legal traditions confront western traditions, while often remaining shadowed by precariousness.

The second chapter of Emerich's book, "Historical approach to property," actually consists of three stories, all concerning the basic idea of ownership or title. The first story concerns the development of the Romanist conception of ownership as power over both corporeal and incorporeal things, the challenge posed to this conception by continental feudalism and the recovery of a more unified, absolutist conception of ownership with the French Revolution, and the eventual codification of French law under the Code Napoléon. As she tells this well-known story, Emerich also weaves in the complex

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3. *Id*. at 3.
4. EMERICH, *supra* note 1, at 5.
5. *Id*. at 5–8.
6. *Id*. at 9.
7. Matamajaw Salmond Club v. Duchaine, [1921] 2 A.C. 426. At the end of Chapter 1, Emerich admits that "recognition of Aboriginal law remains precarious in Canada." EMERICH, *supra* note 1, at 14.

story of the development of English common law's more fragmented conception of multiple estates in land growing out of English feudalism. She explains how this fragmented, relational system gradually evolved, with assistance from statutory reform and enlightenment philosophy, into a relatively unitary conception of ownership as a *subjective right* conferring exclusive authority over things, including, when it comes to land, the exclusive authority expressed as the "fee simple" estate.

Many readers will find Emerich's detailed account of the work of the glossators in the 12th and 13th centuries and the post-glossators in the 14th century (namely Bartolus and the French jurist Jean Faure) particularly enlightening as this period of civil law development is often shrouded in mystery.[8] Equally enlightening will be Emerich's rich account of Quebec's reception of a feudal property system in the 17th century, with both French and English feudal elements.[9] Readers will likely find Emerich's bijural account of the development of the idea of ownership as a subjective right compelling as she links jurists as diverse as Ockham, Grotius, Pothier and Blackstone.[10] Emerich closes this historical chapter by returning once more to the problem of how Canadian courts have struggled to accommodate the property claims of its indigenous peoples, the First Nations. According to Emerich, while important conceptual progress has been made by Canadian courts and jurists, there "is still little recognition of actual Aboriginal titles."[11]

In her third chapter, "Origins of title: possession and its effects," Emerich turns to a classic subject of comparative legal analysis. In this highly detailed account, which largely focuses on English and Canadian common law and French and Quebec civil law *notions* of possession and the respective systems' treatment of the *effects* of possession, Emerich finds many convergences and similarities.

8. EMERICH, *supra* note 1, at 25–29.
9. *Id*. at 29–31.
10. *Id*. at 39–41.
11. *Id*. at 45.

Borrowing from the American property law scholar Carol Rose and the French scholar Raymond Saleilles,[12] however, Emerich also explores the theme of possession as a form of communication.

The first part of this chapter reviews the classic elements of the concept of possession in the civil law *(animus* and *corpus*) and common law (*animus domini* and *corpus* or *factum*).[13] This part also explains the subtle distinctions between *animus domini* (the intent to possess as owner), *animus possidendi* (the intent to possess) and *animus excludendi* (the intent to exclude third parties) and the subtle theoretical differences between Savigny's subjective theory of possession, in which the *intent to exercise the right of ownership* is decisive, and Ihering's objective theory of possession, in which the possessor's *carrying out of acts* that a typical owner would carry out is crucial.[14] Although Emerich recognizes the conventional wisdom that Savigny's views prevailed in the civil law jurisdictions of France and Quebec and that Ihering's views prevailed in common law jurisdictions such as England and in some civil law jurisdictions (Germany), she again finds evidence of convergence between the two dominant western views of possession.[15]

The second major part of this chapter addresses the important distinction between possession as a legal fact and ownership as a more abstract right or relationship. It is here that Emerich draws most explicitly on Rose and Saleilles (and to a lesser extent on Holmes and Salmond) to demonstrate that in both the civil law and common law traditions, possession ultimately functions as a form of communication—a way of making claims to third parties about who is master of a thing,[16] or as Emerich puts it finally, "*communication to others of one's intention to exercise control over property*."[17]

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12. *See generally* Carol M. Rose, *Possession As the Origin of Property*, 52 U. CHI. L. REV. 73 (1985); RAYMOND SALEILLES, ÉTUDE SUR LES ÉLÉMENTS CONSTITUTIFS DE LA POSSESSION (Imprimerie de Darantière 1894).
13. EMERICH, *supra* note 1, at 50–53.
14. *Id*. at 51–53.
15. *Id*. at 54–56.
16. *Id*. at 57–61.
17. *Id*. at 64 (emphasis in original).

The remainder of Chapter 3 explores many other nuances of possession and the many practical *effects* (or as Jean Carbonnier would say "blessings") of possession.[18] These topics include: (1) how possession combined with the passage of time leads to the acquisition of ownership through acquisitive prescription and adverse possession; (2) possession's role in the doctrine of relativity of title at common law; (3) the distinction between possession, occupancy and quasi-occupancy in civil law (especially in Quebec); (4) the modalities of the good faith purchaser doctrine in French and Quebec law; (5) the importance of good faith in acquisitive prescriptive and adverse possession in different legal systems; (6) the role of possession in establishing Aboriginal Title in Canadian law; (7) the theoretical justifications for acquisitive prescription and adverse possession and the challenge to those justifications posed by the development of reliable land registration systems in the UK, Australia and Canada; (8) the tenuous case for protecting possession separately from ownership through distinct and non-cumulative possessory and petitory actions; and (9) the requirements for possessory protection and its availability to mere detentors.[19] Louisiana readers will be particularly interested in Emerich's account of how Quebec has rejected the rule preventing the cumulation of possessory and petitory actions and how France has now eliminated possessory actions entirely from its Civil Code.[20]

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18. *Id*. at 47 & n.2 (quoting 2 JEAN CARBONNIER, DROIT CIVIL : LES BIENS, LES OBLIGATIONS, No. 784, at 1720 (Quadrige, Presses Universitaires de France 2004)).

19. EMERICH, *supra* note 1, at 64–78, 81–85.

20. *Id*. at 79–80 (discussing Article 722 of the Quebec Code of Civil Procedure and the law of 16 February 2015). Louisiana, however, still relies upon the anti-cumulation principle, despite its occasionally harsh results. *See* LA. CODE CIV. PROC. ANN. art. 3657; Hooper v. Hero Lands Co., 216 So. 3d 965, 973 (La. App. 4th Cir. 2016) (finding improper cumulation of the possessory and petitory action and thus imposing burden on plaintiff of proving better title than defendant); On Leong Chinese Merchants Ass'n v. AKM Acquisitions, L.L.C., 188 So. 3d 1041 (La. 2016) (recounting long saga involving complex cumulation issues); Goal Properties, Inc. v. Prestridge, 177 So. 3d 126 (La. App. 3d Cir. 2015) (holding that defendant who asserts title in a possessory action converts the action to a petitory action).

Chapter 4 of Emerich's study bears the enigmatic title: "In search of private property: between the civil law and the common law." This provocative chapter compares how property law scholars in both the civil law and common law have theorized the constitutive elements, incidents or characteristics of property and, more particularly, the notion of ownership. Emerich emphasizes several sub-themes in this chapter. First, she points out frequently that even though the common law system of estates seems to create a more relational, fragmented notion of private property with the residuary interest held by the Crown, the modern "fee simple" estate functions more or less like the modern civil law concept of full, unencumbered ownership.[21]

Another sub-theme concerns the bundle of rights conception of ownership in the common law, most famously articulated by Honoré as eleven distinct "incidents" of ownership, and the traditional "Latin triptych" of *usus-fructus-abusus* in the civil law.[22] For Emerich, the ability of theorists, lawyers and lawgivers to conceptualize ownership in terms of these "incidents" or "attributes" again reveals the flexibility of the concepts of property and ownership. Moreover, drawing on both English and American theorists dating back to Hohfeld, and the French "personnalistes" (notably Planiol and Ginossar), Emerich argues that the "fragmentability" of property reveals its fundamental *relational* quality. Her core insight here—one shared, of course, by many property theorists—is that property is a set of relationships between people regarding things, rather than a set of relationships between people and things.[23]

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21. EMERICH, *supra* note 1, at 90, 112–16. In the second meditation on this theme in chapter 4, Emerich also explores the durational quality of ownership, with special attention to the inter-relationship between "imprescriptibility" and potential "perpetuity" of ownership and other real rights. *Id*. at 112–16. As a property law professor who often draws students' attention to these questions, I found this section particularly enlightening.

22. EMERICH, *supra* note 1, at 94–97. Here, Emerich relies on the classic essay: A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107–47 (A. G. Guest ed., Clarendon Press 1961).

23. EMERICH, *supra* note 1, at 99–100

In the last subtheme in this chapter, Emerich argues that the fundamental characteristic of property—its "essence" as she puts it—is that it establishes "a relationship of exclusivity" between owners and non-owners.[24] Here, Emerich uses several leading decisions from Canada and the United States and the work of English property theorist James Penner, among others, to argue that although property is certainly relational, "its uniqueness lies in the creation of an exclusive space relating to things subject to property rights, be they tangible or intangible."[25] By referring to this "uniqueness," and describing property "as a relation of exclusivity," Emerich distinguishes property from other spheres of private law, such as contract and tort, and seems to position her view of property closer to those of some leading U.S. theorists who place exclusion at the core of property.[26]

The final portion of Chapter 4 provides a more classic comparative law analysis of two problems: original acquisition of ownership of movable things or personal property (wild animals, lost and abandoned things, even treasure) and derivative acquisition of ownership through voluntary transfer.[27] Anyone who delights in property law will find Emerich's recounting of the relevant Quebec Civil Code provisions and several curious Quebec cases addressing original acquisition of ownership to be particularly exhilarating.

In her fifth chapter, entitled "Limitations to private property," Emerich pivots away from exclusion and focuses primarily on other

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24. *Id*. at 98.
25. *Id*. at 104.
26. Here Emerich appears to align her claims about the comparative institutional nature of property and the importance of exclusion with American theorists Thomas Merrill and Henry Smith. *See generally* Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998). For an insightful evaluation of the theoretical claims of Merrill and Smith and the reactions to their claims among other American theorists and an argument that Merrill and Smith's claims are more capacious and not as formalistic as some of their critics contend, *see* Katrina M. Wyman, *The New Essentialism in Property*, 9 J. LEGAL ANALYSIS 183 (2017).
27. EMERICH, *supra* note 1, at 116–29.

strategies to regulate property, and in particular on the duties owed by property owners to other property owners and the role of the state and collective decision making in curtailing property owners' sphere of exclusive authority. Emerich's primary subjects of analysis here are the civil law doctrines of "abuse of right" and neighborhood disturbances ("troubles de voisinage") and the common law doctrine of nuisance. Once again, despite their distinct and mixed historical origins and often quite divergent procedural and institutional settings, Emerich ultimately finds more functional similarities than differences. Whether confronted by a potential "neighborhood disturbance" arising under Article 976 of the Quebec Civil Code or a common law "nuisance" case, courts will always struggle to draw the line between mere inconveniences that a neighbor must tolerate and real damage that can be remedied by a monetary award or injunctive relief. Further, Emerich finds that courts will always undertake a deeply relational inquiry to decide these difficult cases.[28]

The second and third parts of Chapter 5 address other limitations on the exclusive rights of private property owners. Here Emerich focuses first on how the right of the state and other state sanctioned entities to acquire ownership of or real rights in private property without the consent of the owner limits private property in both civil

28. *Id*. at 137–46. Although Emerich's explication of the leading English and Quebec cases in this area is exemplary, EMERICH, *supra* note 1, at 138, 140, her inquiry neglects to include consideration of recent developments in Louisiana that challenge her assertion that neighborhood disputes are always resolved using theories of unreasonable harm rather than fault or negligence. *Cf.* LA. CIV. CODE ANN. art. 667 (amended 1996) (incorporating a three-part fault based analysis into the determination of whether a proprietor is "answerable for damage" for a work that "deprives his neighbor of enjoyment or causes damages to him"). *Compare* Rizzo v. Nichols, 867 So. 2d 73 (La. App. 3d Cir. 2004) (applying revised Article 667 to find defendant liable for monetary damages based on fault due to flooding caused by new construction on defendant's property), *with* Taylor v. Haddox, 968 So. 2d 1200, 1203–04 (La. App. 2d Cir. 2007) (distinguishing *Rizzo* and finding that owner of mobile home park was not liable for damages under Article 667 for damages arising from overflow of oxidation ponds because defendant has used reasonable care to prevent runoff, pollution and silting); Fiebelkorn v. Alford, 105 So. 3d 110, 120 (La. App. 2d Cir. 2012) (affirming trial court finding that plaintiff failed to prove that defendant's construction caused water damage on plaintiff's property).

and common law systems. Although she reveals how the historical, constitutional and legislative background and the techniques and nomenclature of "expropriation" in French and Quebec civil law and "compulsory purchase" in English and Canadian common law differ,[29] she still finds much more cross-system similarity, particularly as both the power to expropriate and the scope of property subject to forced transfer in both traditions has tended to expand over time. Emerich also notes the occasional judicial resistance that surfaces when private property owners face overly aggressive coercive transfers or seek protection from technically non-appropriating regulations that nevertheless have the *effect* of eliminating all economic uses of private property.[30]

Emerich concludes Chapter 5 with a description of the limits imposed on property by the "collective interest," by which she means public or state claims to air rights, subsurface mineral rights and water. Even though these resources are connected to land and could, in theory, be the object of private property rights, Emerich details how in all of the systems she studies these resources are either heavily regulated by the state, treated as a common resource, or are owned by the state for the benefit of the public.[31] Emerich also describes a fascinating series of cases from British Columbia, Nova Scotia and Quebec in which Canadian courts were called upon to examine whether environmental regulations restricting property owners' ability to exploit minerals or the surface of the land amounted to an expropriation for which compensation must be paid.[32] Collectively these cases call to mind the

29. EMERICH, *supra* note 1, at 147–52.

30. *Id*. at 152–60. Although one understands Emerich's likely reluctance to delve deeply into the U.S. regulatory takings doctrine, one cannot help but wonder how Emerich's thesis of growing convergence between civil and common law conceptions of expropriation would hold up if applied to recent U.S. Supreme Court decisions. For a recent and authoritative summation of developments in U.S. regulatory takings doctrine and a critique of the dominant approaches to understanding those developments, see Timothy M. Mulvaney, *Property-as-Society*, 2018 WIS. L. REV. 911 (2018).

31. EMERICH, *supra* note 1, at 152–66. Louisiana lawyers will be interested to learn that in France and Quebec both solid minerals and fossil fuels below the surface of land are reserved for the state. EMERICH, *supra* note 1, at 161–62 (discussing Mining Act, CQLR, c. m-131, art. 3 and Fr. Civ. C. art. 552).

32. EMERICH, *supra* note 1, at 167–68.

United States Supreme Court's regulatory takings doctrine yet seem to indicate that Canadian courts are generally quite reluctant to characterize environmental regulation as an expropriation except in the most extreme cases.

Chapter 6 of Emerich's book begins by reviewing the classificatory taxonomies of both civil law and common law property, particularly with respect to "the objects of property rights," the title of the chapter. Emerich first instructs that the immovable and movable distinction in civil law roughly, but not perfectly, mirrors the real property and personal property distinction in common law. Similarly, she notes that the corporeal and incorporeal property distinction in civil law tracks, in large part, the tangible and intangible property distinction in common law.[33] She also points out that in the eyes of most civil law jurists the broad category of property includes not only the material objects of property (things), but also immaterial *rights* in material objects. Indeed, according to Emerich, most civil law purists prefer to conceptualize property as the universe of patrimonial rights, rather than things, since "the value of assets stem more so from rights that one has over a thing than from the thing itself."[34] Despite recent evolution in civilian thought, Emerich still reviews the conventional wisdom of comparative property law that the civil law has tended to reduce the objects of property and ownership to corporeal things (largely because of a mistaken and overly rigid reading of Roman law), whereas the common law has had a much easier time viewing incorporeal rights as objects of property because of (1) the abstract and relational nature of feudalism and its by-product, the estates systems, and (2) the flexibility of concepts such as choses in possession and choses in action.[35] Emerich returns to her core theme of "convergence," however, when she celebrates that a growing number of French and Quebec jurists now recognize that property can be both corporeal and incorporeal and that Quebec now

33. *Id*. at 177–83.
34. *Id*. at 182.
35. *Id*. at 183–89

warmly welcomes the "dematerialization of property law" and thus has caught up to the "dephsyicalisation of property" found in the common law.[36]

Emerich concludes chapter 6 by offering her own list of essential criteria for defining the scope of objects of property. For Emerich, the things and rights (material or immaterial) that can legitimately be understood as objects of property must: (1) have some value (presumably a pecuniary value); (2) be alienable or transferable to some degree; (3) be capable of appropriation; that is, public policy must recognize that the thing or right can be appropriated, or, as James Penner famously theorized,[37] that the thing or right is "only contingently connected to any particular person," and, therefore, could belong to someone else; and (4) be enforceable against third persons (*i.e.*, there must be a way to exclude others from interference with the thing or right).[38] As one would expect given her transsystemic orientation, the sources Emerich identifies in constructing this list of criteria are attractively pluralistic, ranging from American property theorists Thomas Merrill and Henry Smith, to English theorist James Penner, Quebec property scholar David Lametti, traditional French doctrinal scholars Baudry-Lacantinerie and Chauveau, and modern French scholars Frédéric Zenati-Castaing and Thiery Revet.

The penultimate chapter of Emerich's study addresses "Fragmentation and modifications to property," by which she means the variety of "dismemberments of ownership" in the civil law and their "functional equivalents" in the common law. Here, as in many of the other chapters, Emerich deploys her transsystemic method to reveal that, despite their different historical and conceptual origins, a usufruct functions much like a life estate and

36. *Id*. at 189–94.

37. Here, Emerich relies on Penner's famous "separability thesis." *See generally* J.E. PENNER, THE IDEA OF PROPERTY IN LAW 111 (Oxford UP 1997); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 803–07 (1996).

38. EMERICH, *supra* note 1, at 194–98.

that empheteuses in Quebec and emphyteutic and building leases in France function much like leasehold estates in common law jurisdictions.[39] Next, Emerich makes the hardly less surprising finding, given their common Roman law roots, that civil law servitudes and common law easements also perform the same law work.[40] Emerich also argues that profits à prendre and restrictive covenants have functional equivalents in the civil law jurisdictions she studies (Quebec and France) in the concepts of personal servitudes and negative real servitudes or non-compete clauses.[41] Turning to the question of whether, and to what extent, the civil law and common law employ a *numerus clausus* principle—a restricted menu of recognized property forms that can bind successive owners even in the absence of privity of contract, Emerich concludes, like others before her,[42] that regardless of whether each system formally and expressly limits the ability of property owners to create new kinds of innominate real rights (often fishing and hunting rights over land but also increasingly rights in intellectual property), courts will, from time to time, recognize them if the original contracting parties' intentions are clear and third party information processing costs are not too excessive.[43]

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39. *Id*. at 202–11.

40. *Id*. at 211–14.

41. *Id*. at 215–16. In future work, Emerich might benefit from considering developments in the United States, where easements in gross are now widely recognized, *see* RESTATEMENT (THIRD) PROPERTY: SERVITUDES § 1.5(2) (2000) (defining easement in gross); JOSEPH W. SINGER, PROPERTY § 5.5.3, at 211–14 (4th ed., Wolters Kluwer 2014) (discussing distinction between appurtenant easements and easements in gross under American common law), and Louisiana, where servitudes in restraint of trade are now recognized, *see* RCC Properties, L.L.C. v. Wenstar Properties, L.P., 930 So. 2d 1233 (La. App. 2d Cir. 2006); Meadowcrest Center v. Tenet Health System Hospitals, Inc., 902 So. 2d 512, 515 (La. App. 5th Cir. 2005) (discussed in John A. Lovett, *Title Conditions in Restraint of Trade*, in MIXED JURISDICTIONS COMPARED: PRIVATE LAW IN LOUISIANA AND SCOTLAND 30–66 (Vernon Valentine Palmer & Elspeth Christie Reid eds., Edinburgh UP 2009), and where all affirmative predial servitudes, whether formerly characterized as continuous or discontinuous, can now be acquired by acquisitive prescription. LA. CIV. CODE ANN. art. 742.

42. *See generally* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L. J. 1 (2000).

43. EMERICH, *supra* note 1, at 216–23.

Emerich concludes Chapter 7 with a walk through the realm of undivided co-ownership (tenancy in common and its civil law twin ownership in indivision plus common law joint tenancy and the civil law equivalent, the "tontine" or "accretion clause"), divided co-ownership (also known as condominium or commonhold in Canada and England respectively) and superficies (*i.e*., "vertical division" that separates the ownership of buildings and other constructions from ownership of the land on which they are situated).[44] Despite some technical differences here and there, one is struck by the overwhelming cross-jurisdictional similarity of the legal structures currently used to regulate the complex, interrelating needs of persons who must cooperate in the management of overlapping property interests that run concurrently, who must share in the management and upkeep of all or portions of common resources, or who want to divide up interests in complex horizontal or vertical arrangements. Emerich's depiction suggests that some invisible magnet of property ordering in modern, market-oriented societies impels legal systems toward similar structural arrangements regardless of their different historical roots.

Emerich's final chapter addressing "Trusts and fiducia" may be the most impressive in the entire book as here Emerich takes on one of the most complex conceptual challenges in the law of property. In this chapter, Emerich notes how difficult it has been for scholars to conceptualize the rights, powers and duties of the various actors in a trust relationship and how challenging it has been for scholars to trace the institution's evolution in various legal systems, particularly those like Quebec and France, where the trust does not have native roots.[45] Nevertheless, throughout this chapter Emerich convincingly conveys the practical advantages of trusts (or trust-like arrangements) in modern society and works through both the classic definitions, re-definitions and re-conceptualizations of the Roman

44. *Id*. at 223–34.
45. *Id*. at 238–56.

trust, the common law trust, the fideicommisum in Quebec, the new Quebec trust, and the fiducia that has emerged in the French Civil Code.[46] Her eventual "transsystemic" definition of the trust as a "mechanism [or legal relationship] whereby a person holds or possesses property and administers it for the benefit of another person or for some specific purpose,"[47] nicely captures the core conceptual insights she unearths in her comparative journey. Many readers will find her discussion of the recent codification of the fiducia in France especially enlightening. Property theorists from other jurisdictions, particularly in North America, will find her final summation of trustee ownership in Scots law, with its useful and quite comprehensible notion of "dual patrimonies," compelling.[48]

Of course, in any book aiming to offer a compressive account of a broad field from a comparative perspective, some perspectives and some detail must be left out. In this case, some property scholars will no doubt note that there are important exceptions to Emerich's meta-narrative of structural convergence and to her meta-definition of property as a body or rules that establish relationships of exclusion between owners and non-owners. Observers of property law in Scotland, for instance, would draw attention to the remarkable innovation of the Land Reform (Scotland) Act of 2003 which give everyone in Scotland a right of responsible access, for purposes of non-motorized recreational access and travel, to all land in Scotland and thus redefines landownership in a way that makes tangible exclusion somewhat less of a core value.[49] Students of property law in South Africa would likewise point out how that country's new constitution requires property to serve the ends of social transformation, equality and dignity just as strongly as property owners' interest in the exclusive right

46. *Id*. at 238–56.
47. *Id*. at 256.
48. *Id*. at 267–69.
49. *See generally* John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act of 2003*, 89 NEB. L. REV. 739 (2011).

to determine the use of things.[50] Lawyers in Louisiana might note that public access to natural resources like water and water bottoms is far from settled, given the fierce battle over the contested resource of recently submerged land resulting from subsidence and coastal erosion.[51]

At the more theoretical level, it would also be interesting to see how Emerich responds to other major developments in contemporary property theory. Although she successfully integrates Carol Rose's insights on possession in chapter 3 and Merrill and Smith's insights about exclusion and the *numerus clausus* principle in chapters 3 and 6, Emerich does not engage with the powerful explanatory paradigm of property as both commodity and propriety offered by Rose and by Greg Alexander.[52] Nor does she fully grapple with the challenge to Merrill and Smith's theories offered by the followers of the Progressive Property School in the United States and South Africa who contend that property ownership entails as many responsibilities and social obligations to non-owners and the community at large as it does rights of exclusion and authority.[53] Finally, Emerich has not responded to insights of scholars like Katrina Wyman who argue that the differences between information processing, exclusion oriented theorists like Merrill and Smith and their

50. *See generally* A.J. VAN DER WALT, PROPERTY IN THE MARGINS (Hart 2009); A.J. van der Walt, *The Modest Systemic Status of Property Rights*, 1. J. L. PROP. & SOC'Y 15 (2014).

51. *See generally* Jacques Mestayer, *Saving Sportsman's Paradise: Article 450 and Declaring Ownership of Submerged Lands in Louisiana*, 76 LA. L. REV. 889 (2016).

52. *See generally* Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Carol M. Rose, *Property as Wealth, Property as Propriety*, in NOMOS XXXIII 223 (John W. Chapman ed., NYU Press 1991); GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970 (U. of Chicago Press 1997). In a recent article, Frankie McCarthy skillfully uses this paradigm to explore the constitutional property case law of the European Court of Human Rights. *See* Frankie McCarthy, *Protection of Property and the European Convention of Human Rights*, 6 WM. & MARY PROP. RIGHTS CONF. J. 1 (2017).

53. For a detailed account, *see* GREGORY S. ALEXANDER, PROPERTY AND HUMAN FLOURISHING (Oxford UP 2018). For a short synopsis, *see* Lovett, *supra* note 49, at 743-753. *See also* the work of VAN DER WALT, *supra* note 50.

progressive property critics might not be as wide as either camp claims because the exclusion theorists are at heart functionalists who embrace utilitarian cost-benefit analysis when it comes to establishing the boundaries between exclusion and governance strategies in property law.[54]

Finally, it should be noted that Emerich's audience and the real subject matter of her analysis are legal elites—judges, legislators perhaps, property lawyers, and, above all, property scholars. As her title makes clear, she is interested in how judges and jurists have viewed and conceptualized property. She does not claim to explore how property law affects ordinary people as lived experience.[55] Thus she does not examine how the particularities of place, time, social custom and individual context affect how property is actually experienced by those subject to property law. Her approach then is essentially a top down, not a bottom up, one. Although this is certainly a defensible choice, some consequences follow. After all, if a property observer moves to a high enough level of abstraction, the structures and forms of property law may inevitably appear to converge from a functional perspective.[56] A truly bottom up approach might well reveal more divergence than the picture Emerich produces here. But taking a bottom up approach to property would require a completely different kind of book than the compelling and scholarly one Emerich has written. It would, no doubt, also fail to detect the many points of convergence and transsystemic cross-pollination that Emerich has discovered and revealed.

John A. Lovett
Loyola University New Orleans College of Law

54. *See generally* Wyman, *supra* note 26.

55. For a stunning example of this kind of property analysis, *see* DEBBIE BECHER, PRIVATE PROPERTY AND PUBLIC POWER: EMINENT DOMAIN IN PHILADELPHIA (Oxford UP 2014).

56. I am indebted to Jill Robbie, Lecturer at the University of Glasgow Law School, for this insight.