

Data as Property

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Abstract

In the age of the Cambridge Analytica/Facebook scandal and sundry other data breaches at Under Armour, Target, and Best Buy, the issue of security and privacy in consumer data has become increasingly important. For much of the modern era, the development of technology has gone relatively unchecked, with the U.S. having ceded much of the policymaking terrain to Silicon Valley. This has resulted in the unbridled creation of vast amounts of consumer data. Users who engage with tech platforms generate bits and bytes about themselves based on their activities, preferences, and habits. This information—this “data”—is then harnessed by tech companies for a variety of purposes ranging from advertising to market analytics, and more, leaving privacy as an afterthought.

In terms of defining the legal rights around personal data, scholars have argued that the United States abandoned a property law view long ago in preference to a tort-based approach. This has resulted in data protection regimes being focused on liability rules, yielding compensation remedies when electronic information has been used in an unauthorized or impermissible way. Although various efforts have been made to introduce property rules to data in the U.S., they have produced varying results or have failed outright.

But during the 2018 term, the U.S. Supreme Court decided two important cases that, albeit indirectly, edged toward a more robust concept of data as property—*South Dakota v. Wayfair* and *U.S. v. Carpenter*. In both cases, however, the Court struggled with how to articulate this concept. Sometimes the Court appeared to cling tightly to bedrock pillars of property law, such as physicality and alienability. At other times, however, the justices seemed to be treading new ground (or rediscovering old roads), such as with the disaggregation of digital rights and electronic bailments. Building upon the leanings of these recent cases, this Article offers a normative lens through which courts and legislatures can build rules and standards for data as property. To do this, I draw upon the progressive property theory literature and its ideals of social obligations, dignity, and owner responsibility in property rights. Using progressive property theory as a foundation, I then offer some concrete policy examples of how a theory of “data as property” could be operationalized to benefit consumers.

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