THE LAW OF PROPERTY

SUPPLEMENTAL READINGS

Class 04

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emanuel®

law outlines

Property

Ninth Edition

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Wolters Kluwer

CHAPTER 1: INTRODUCTION
II. "PROPERTY" GENERALLY

A. General definition: A person may be said to hold a property interest, in the broadest sense, if he has any ***right*** which the ***law will protect*** against ***infringement by others***. In addition to ***tangible*** property (land and chattels), courts have increasingly recognized broad categories of ***intangible*** property interests.

For instance, a teacher with tenure in a public school system may be found to have a constitutionally-protected property interest in continued employment.

1. Real and personal property:

In this book, we are concerned almost exclusively with rights in tangible property, i.e., all ***real*** property and tangible ***personal*** property.

"Real" property includes land and any structures built upon it.

"Personal" property includes all other kinds of property.

While our discussion of personal property concentrates on tangible property (e.g., an automobile), a few types of intangible property (e.g., bank accounts) are considered.

The bulk of the treatment of personal property is in the following chapter, so that the remainder of the book concentrates heavily on real property.

B. Possession vs. title:

Perhaps the most important distinction which will appear throughout the course of this outline is the distinction between ***possession*** and ***title***.

1. Possession:

There is no precise definition of the term "possession", and its use varies according to the context. However, a person may generally be said to have possession of land or personal property if he has ***dominion and control*** over it.

2. Title:

Title, on the other hand, is roughly synonymous with what the layman thinks of as "ownership."

Thus a tenant in a residential apartment building has possession of the apartment, but the landlord has title to it.

a. Divided title:

A unique feature of Anglo-American property law is that title to a parcel of real estate can be spread among numerous owners and in several different ways.

The chapters on future interests, marital estates and concurrent interests are all illustrations of this fact.

C. Law and equity:

Another frequently-drawn distinction is between ***law*** and ***equity***.

The difference between courts of law and courts of equity is discussed more fully later in this outline.

The basic idea is that a law court awards ***money damages***, and an equity court awards other sorts of relief, usually ***injunctions***.

D. Bundle of rights:

The non-lawyer thinks of property as a single right: one either "owns" personal or real property, or one does not.

But in fact, ownership consists of a number of different rights, often called a ***"bundle"***: the right to ***possess*** the object; the right to ***use*** it; the right to ***exclude*** others from possessing or using it, and the right to ***transfer*** it.

Even the right of transfer has two distinct aspects, the right to make a ***gift***, and the right to ***sell***.

1. Splitting up:

Frequently, an “owner” of real or personal property will be found to have some but not all of these rights.

For instance, one who “owns” a vacant downtown acre in “fee simple” (the broadest form of ownership known to American law does not have the right to erect a 150 story building on the site, if buildings of that height are forbidden by the local zoning code.

Similarly, a person “owns” his kidneys in the sense that government cannot remove a kidney without his consent, yet one may not make a for-profit sale of one's kidney to be transplanted into another.

2. The right to exclude others:

Even the right to ***exclude*** others, which goes to the core of what it means to “own” property, is subject to limits imposed by society.

Most obviously, a property owner must allow fire and police officials on his property in certain circumstances.

Some courts have cut back even further on the owner's right to exclude.

For instance, one court has held that the owner of a farm may not use trespass statutes to keep out private citizens who are trying to furnish medical or legal services to migrant workers living on the farm. (See *State v. Shack*, 277 A.2d 369 (N.J. 1971)).

As the court said in *Shack*, “title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises.”

EXAMPLES & EXPLANATIONS

Property

Second Edition

Barlow Burke and Joseph Snoe

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PUBLISHERS

1

The Law of Property

INTRODUCTION

Some courses on property law begin with the analysis of cases - sometimes they concern the acquisition of personal property, sometimes wild animals; and sometimes they introduce the subject with a U. S. Supreme Court case concerning the Fifth Amendment's takings clause or with a case about Native American claims to property that throws our own American system into perspective.

Historical and philosophical readings about property law's development might also be used to gain perspective.

Different perspectives on the institution or the idea of property have been around for a long time. These perspectives have long been controversial. Plato and Aristotle disagreed as to property's role in society. Since that time, property has been viewed variously as the product of one's labor (John Locke), as an extension of one's will (Georg W. F. Hegel), as the product of a person's settled expectations (Jeremy Bentham), and as the foundation of capitalism and class conflict (Karl Marx). Anthropologists, psychologists, and social scientists from many disciplines have more recently taken a turn at assessing its function. If there ever was an idea that held society in a love hate relationship, it is property; it is something that society lives with uneasily, but cannot live without.

The Ten Commandments do not protect property, but do forbid the stealing of it. Neither does our federal Constitution endorse a right to property, but provides that the state may not take it without due process or payment of just compensation. Property rights have long been regulated, and are not absolute.

In the first year of law school, property is studied along with the two other wide-ranging areas of private and commercial law, the law of torts and the law of contracts. The three subjects are studied in separate classes, but even though the signs on the classroom doors are different, this curricular separation should not lead you to the conclusion that the three subjects are entirely distinct, or intended to baffle you in three distinct ways. They are not. They are constantly intersecting. Property and torts, for example, have in common an historic origin in the cause of action for trespass, and often a substantive statement of a rule of property law begins or ends with the phrase "absent an agreement to the contrary" - meaning that persons involved are free to make a contract providing what the rule does not.

In particular, the law of landlord and tenant (pertaining to leases) is a recently developed combination of contract and property law. As you will learn in your later elective courses, basic property, contract, and tort doctrines constantly arise and intersect in any law practice.

As the previous paragraph indicates, the subject matter of a course on property typically covers several topics. There may be a roadmap to your course in contracts, but with property there is no *one* roadmap; instead, there are at least six road maps. Thus, to the beginning student, the course's subject matter may seem huge. Personal property, common law estates and concurrent interests, landlord and tenant, real estate transactions, easements and covenants, and public land use regulation are the topics most frequently offered in the first-year course on property.

Although some of these subjects will be unfamiliar if you are reading this during your first semester or quarter of law study, once you delve into each of them you will quickly realize that each has its origins in a different historical era of our legal system's development. The economic and social context in which the rules of each arose shaped it in different ways: Each developed in spurts and at different times.

For example, common law estates developed rapidly in the late middle ages, while the law of landlord and tenant developed most quickly over the past several decades. Our legal system's rules for real estate transactions developed in response first to the system of estates, then to the development of the executory contract in the eighteenth century, and finally to American modifications in the English system designed to suit our own needs.

The law of easements and covenants developed rapidly in the nineteenth century in response to the industrialization and urbanization then taking place.

Our system of land use regulation developed gradually over the last century, but did so more rapidly during some decades - the 1920s, the 1950s, and the 1970s - than during others.

Add to this variety of origins the many intersections of property law with that of torts and contracts, and the teaching and study of property law becomes a challenge of a different dimension than is encountered in teaching the latter subjects. As the topics change, beginning students need to treat each change as if it were the start of a new course, steeping themselves in both the context and the body of rules and doctrines governing each new topic.

Putting the various contexts you study into perspective should help you realize that the study of property is often the study of ***tenures*** - using an old-fashioned word for the study of the many ways in which property may be possessed or held - rather than the study of property itself.

Thus the study of property is of the various interests that define the rights of its holder and of the documents conveying various interests in property and defining how it may be used, kept, or sold. It is also the study of deeds, leases, and the various other documents that purport to create or transfer it or an interest in it.

Over the course of history people have wanted property of various kinds and in so many guises that one has to conclude that there is something basic and human at work in its creation and protection. Not every society has used a law of property during its development. China is an example of one that did not. However, there is a correlation between the development of some democratic, non-totalitarian societies and the degree of protection given property; one can't be said to cause the other, but they coexist well.

Property is not a thing wanted for itself, and property law is not about one person's relationship to a thing. Instead, it is about relationships between and among persons with regard to a thing. Put in a more humane way, property is derived from our wanting to be involved with others. Property permits one person to exclude another from using a thing; to use it himself; to gain rents, profits, or income from it; to sell it; or to give it by will to one relative and not another. All this is possible only when one's relationship to property is clear insofar as others are bound to respect it.

Property law is a series of rules defining a person's relationship to a thing that others must respect. The former is called an owner. The primary right of an owner is the right to exclude others from using or profiting from a thing. If the thing is movable, the thing becomes ***personal property.*** Land and the improvements on it become ***real property.*** The study of property generally includes both personal and real property.

Defining property as a three-way relationship (owner to thing, others to thing, others to owner) requires that the legal rules pertaining to it have widespread support. Support in this sense is the result of an appeal to the terms of a legal rule, its underlying policies and historical precedent, the judicial procedures in which the rule was formed, and the philosophy of law or jurisprudence underlying all of these.

Property law is the creation of society, useful to make society function, and not a product of natural law, although most would also say that property supports and enhances a person's identity and that a person's acquisitiveness is as close to a natural instinct as one can come.

COMMON LAW CASES

Property law is largely state law. If the case concerned property, it typically arose in a state court. Each of our states, territories, and the District of Columbia, with the exception of Louisiana, adopted for its legal system the common law of England in all of the jurisdictional, decisional, and analytical senses in which that phrase was used previously. So property law is typically state law, as opposed to federal law.

As in the law of torts or contracts, courts often speak of the New York, the Pennsylvania, or the California rule. Such references make the point that, technically, it is too facile to speak of a law of property - instead, each state in our country has its own law. Even when a federal court decides a case involving property, it uses the law of the state whose law applies and, in the absence of a federal constitutional or statutory issue, must follow state court precedent.

A party who felt the trial court erred as to matter of law or finding of fact can appeal to an appeals or appellate court to review the challenged matter. Most cases reproduced in casebooks are appellate cases. Usually seven to nine judges sit together on a state's intermediate or highest appellate court, the latter typically called the state's supreme court or court of appeals.

An appellate opinion has four parts. First, there is a statement of the facts of the case. These are facts found as such by the jury or, in a nonjury matter, by the judge sitting as a fact-finder in the trial court, and accepted as such by the appellate court. In an appeal from the trial court's decision, the facts are not retried, unless they are so unreasonable that the record of the case in the trial court does not provide any basis for them. The facts recited in an appellate opinion typically accept the factual determinations of the trial court.

Second, there is a statement of the legal issues involved in the case, followed, third, by a statement of the rule(s) resolving the issues and applying the rules to the facts. This third portion may be brief, but sometimes is lengthened into a fourth part of the opinion. There the judge articulates a rationale for the rule - perhaps a public policy underlying it, and an explanation as to why it is fair to apply it to the case at hand; how it promotes ethical behavior in attorneys, litigants, or the public at large; or how it might be efficiently administered or used in the future. Articulating a rationale usually involves the application (or not) of cases with precedential value for the court. The judge here may explain what aspect of the facts is particularly important to the decision or what is not being decided (see below, dicta) in order to throw the decision itself into relief. Finally, the judge writing the opinion gives the holding and the decision in the case.

The cases in casebooks are selected for their facts and details, their analysis, their influence, or their widespread acceptance. They may have more than one opinion - they may produce a (1) majority opinion, in which most of the judges on the court agree on the statement of the law, the analysis, and the result - the judgment or other remedy given in the case; (2) a dissenting opinion, with which some but not most of the judges agree; or (3) a concurring opinion, in which some judges agree with the majority's result, but not with some other aspect of their opinion. If there is more than one, the comparisons and contrasts between them may produce interesting statements as to the law, analysis, or remedies involved.

The cases studied may not represent the law of the state in which you eventually will practice law, but not all judicial opinions are created equal. So hang in there. There are at least two reasons to do this.

First, the United States' more than 50 common law systems have produced many fine judges and attorneys but, yesterday as today, some were and are more famous than others - Kent, Story, Shaw, Cooley, Holmes, and Cardozo, to name a few. Their influence goes beyond the borders of their states.

Second, the precedential rules of authority - looking first to a judge's own state or jurisdiction, then for similar cases in other jurisdictions, then to secondary (or non case) authorities such as law reviews and legal treatises - produce a tendency to make the law of many jurisdictions into one uniform body of law, and many opinions into works of considerable scholarship.

Amid the secondary authorities, some of the more formal organized methods of legal expression, backed by large sectors of the legal profession, also re-enforce this tendency to uniformity.

First, there are the American Law Institute's ***Restatements of the Law.*** Its first Restatement of the Law, Property, was published in 1944. Restatements of the Law (Second), Property, have been published more recently: for Landlord and Tenant in 1977, for Security (Mortgages) in 1996, and for Servitudes (Easements and Covenants) in 1998. Other property subjects are in draft. Restatements are secondary authorities publishing their drafters' versions of the rules of law taken from decided cases, although not always the rule settled by a majority of cases, deciding a particular issue. Sometimes drafters prefer what they see as a trend in the decided cases and extract their rule from the cases they see as representing that trend, rather than a rule representing the law established in a majority of states. Sometimes there is no majority; sometimes the law is unsettled or open. Whatever approach the Restatement takes, its decision is influential and its text will disclose the reasons and the authorities behind its choice.

Second, the Commissioners on ***Uniform State Laws*** have published Model Laws for adoption by American jurisdictions. The Uniform Commercial Code that you study in contracts class is the most successful of these laws. The Uniform Landlord Tenant Act, the Uniform Land Transactions Act, and the Uniform Probate Code are examples that have been influential, if not widely or completely adopted, in the law of property. Such laws may codify, modify, or repeal common law rules and, like the Restatements, may be cited by judges deciding common law cases as embodying a legal rule.

Third, there are ***treatises*** with discussions of the law attempting to make sense of seemingly disparate decisions and statutes. The *American Law of Property* (1952) is a collection of essays by (mostly) law professors specializing in the law of property. *Thompson on Real Property* (1994) is a more recent collection of such essays. More specialized treatises, such as *Friedman on Leases* and *Brown on Personal Property,* perform the same function within narrower limits.

CASE ANALYSIS

Much law is gleaned from the analysis of cases. Case analysis is an essential skill for attorneys. If the case is concerned with the substantive law of property, the case is probably one involving a common law rule - i.e., a rule formulated by judges for cases that they heard and decided.

Case law or ***common law*** are rules established by court decisions, as opposed to those made by legislatures enacting a statute. A judge deciding a case tries to resolve the issues in the case by following or drawing from prior decisions by judges in his or her jurisdiction. This doctrine of precedent is unique to the common law as opposed to civil law or code systems of law used in other countries.

The ***doctrine of precedent*** (or stare decisis) is fundamental to case analysis. It rests on the idea that people in similar situations should receive similar treatment at the hands of a court. Similar cases should be decided in a similar way so that people are treated as equally and fairly as possible, and so that people not in court who find themselves in a situation similar to one that a court has decided may predict what the law will be if and when they go to court. A judicial decision, published or reported in an opinion, not only binds the parties to the litigation that produced it, but also has predictive value for others.

An opinion has predictive value only when another court is bound to follow it. At the state level, this means that the opinion of a state Supreme Court binds itself and all courts lower in the judicial hierarchy of the state, thus binding any intermediate appellate court and all trial courts. A trial court decision, at the other end of that hierarchy, is not binding outside the county or municipality in which the court sits, although it may be ***persuasive authority***.

The root idea is that of providing equality for persons in similar situations. Deciding who is in a similar situation - not an identical situation (that almost never happens) - involves analysis of a reported case. Appellate or reported cases may be distinguished - i. e. , read narrowly to avoid their applications - or applied - i. e. , read for similarities.

Distinguishing case precedent is often necessary because courts have no control over who brings a case to court. In formulating and enacting a regulation or a statute, a legislature or an administrative agency might consider all the possible or predictable situations to which its work product might apply and draft a regulation or statute encompassing them; a court has no such opportunity. If a judge in an opinion writes more generally about the law than the facts of the case require, that part of the opinion will be considered obiter dictum - Latin for a statement "made in passing" - a. k. a ***dicta***. Dicta may be included to explain a decision, or to limit its applicability to the facts found at trial - particularly when the facts were contested at trial. Dicta is not binding as legal precedent, but may be persuasive authority even so.

Lots of cases, with lots of rules, may eventually form a body of law encompassing most aspects of a subject (some attorneys refer to rules synthesized from many cases as legal ***doctrine*** - but such terms of art have various and variable meanings). From many cases, a synthesis of the law may emerge. Producing this synthesis is a form of inductive reasoning - deriving a general rule from the individual cases. The generalization takes place using the materials the judge finds at hand - case(s), statute(s), and secondary authorities. If necessary (nothing else being available), even one case might be generalized for use in an opinion in another case.

Application of a case to another situation is a process of making analogies between the case and the situation at hand. It is often arranged in an opinion as a syllogism, a form of deductive reasoning, as in the following:

(1) Possession of land is necessary to bring an action of trespass.

(2) Alex has possession of land.

(3) Alex may bring an action of trespass.

Here the first proposition (1) is a major or general premise or rule, (2) is a minor or factual premise, and (3) is a conclusion, permitting a general rule to be applied to a particular situation.

The reasoning found in judicial opinions is either deductive or inductive - not unlike the forms of reasoning in other modes of expression. Analysis of any one opinion involves separating it into its parts and extracting its reasoning, but this task is complicated by the use of citation to cases and other authorities as it proceeds, by the judge's doing two or more things at once, and by the opinion's haphazard or blurry organization, as in the following opinion written for illustrative purposes by one of the authors. (The facts in this opinion have been taken from the opening chapter of James Fenimore Cooper's novel ***The Pioneers,*** published in 1826.)

Alex Hunter, Plaintiff v. **Mo Montour**, Defendant

in the Supreme Court of the State of Grace

LEARNED, J. , wrote the opinion of the Court.

The plaintiff, Alex Hunter, was deer hunting in unposted woods in the unincorporated portions of Green County. After spying a large buck, Hunter's son, accompanying him, accidentally tripped and discharged his rifle, grazing the buck's flank and startling it. Hunter aimed at the startled animal, fired and hit it, not where Hunter aimed, but as the buck started and jumped, putting a bullet in its lungs. As a result of being thus fatally hit, the deer ran onto the land of Owen Owner, who held it and reached for a hunting knife.

Just as Owen was about to plunge the knife into the buck, it leaped up a final time and was just about to run into the roadway abutting Owen's land when the passing defendant, Mo Montour, seeing the commotion of all this pursuit, brought his automobile to a halt and sprang from it. The defendant Montour then fired a pistol into the buck's head and seized it, carrying it off from the side of the road.

The plaintiff Hunter brought a complaint sounding in trespass1 against the defendant Montour in order to recover the buck or its value. The defendant Montour moved to dismiss the case, but this motion was denied and it was tried before Judge George Judd, sitting in the Circuit Court of Green County. The Circuit Court jury rendered a verdict for the plaintiff and Judge Judd gave judgment accordingly. The defendant appealed to this court. We now reverse.

Trespass is an action brought for the taking of personal property. It involves carrying off the goods of another. Its first element is a showing that the "goods" in question are in the plaintiff's possession. Spying the buck by the plaintiff's son, for example, did not amount to possession because the son's spying the animal shows neither an intent to possess it nor an act of possession. Both are essential to sustain the plaintiff's complaint. That the buck was unintentionally and slightly wounded adds nothing to the plaintiff's case. However, the plaintiff's fatally wounding it is a different matter. If accomplished intentionally, it shows that the plaintiff did intend to kill the buck and, if pursuit ensues, the pursuit itself might be the functional equivalent of taking actual possession of the buck. Here, however, the wound was accidental, and so the ensuing pursuit proved nothing.

Owner by seizing the buck all but possessed it; but even here, when the animal is still capable of bolting as a wild animal might be expected to do, it is just as likely to regain its natural liberty as lose it. The defendant, seemingly on Owner's behalf, raises another claim: that Owner in any event has a better right to the buck than does the plaintiff. This other claim is to the animal, as one on Owner's land: A landowner has a right to start wild animals naturally on their land, ratione soli.

However, here the animal was not naturally on Owner's land, having been pursued there by the plaintiff Hunter. Moreover, if the buck bolted onto the land of a neighbor, instead of going onto the roadway, Owner's right to it would likely end when Owner began his trespass onto the neighboring land - although this result would be stronger if the neighbor's land was posted, warning off hunters and trespassers. So Owner's claim to the animal by the landowner's right fails. In any event, this is not an argument open to the defendant to make. Owner is no part of this litigation and his rights may be asserted in a future case. The defendant must win this one on his own merits, not on the weakness of the plaintiff's.

Under the law of this state, it is an open and unsettled question as to whether the defendant interfered with the plaintiff's or Owner's hunt. This court need not resolve this issue, however, as the defendant, firing a fatal wound showing his intent to take the buck, was also the first to actually seize the animal.

He there has its possession to a degree that trumps the plaintiffs, and so the plaintiffs right to bring an action of trespass.

The plaintiff's complaint is dismissed. Judgment reversed.

LIVINGOOD, J. , dissenting. I respectfully dissent. If the plaintiff's pursuit was an active one and the defendant had notice of it, I see no reason in law or policy why the defendant should be privileged to interfere with the plaintiff's hunt.

The plaintiff's activity is a lawful one, the land through which it was pursued was unposted, and the plaintiff was in full view of the defendant when he seized the buck. The defendant's interference is to me an event highly likely to result in a breach of the peace, even if it occurred by the side of a public road and did not disturb the rights of an abutting owner.

It might be said that the rule of actual possession laid down by the majority will give the law a crispness and ease of administration that is highly desirable where the public must know the rules of the hunt, but to my mind, the certainty of the law is in no way diminished if a pursuit in plain view of the defendant of a fatally wounded animal is found the equivalent of actual possession. The aim is the capture of the buck, and the animal must first be pursued in order to be captured; otherwise, hunters will go at it with ever more powerful rifles and guns, endangering us all.

Finding a constructive possession in pursuit such as this will surely result in the capture of the buck, without the defendant firing an additional shot. That the additional shot prevented the buck from running onto a public roadway points out that, at the kill, the plaintiff had just as much right to be there as did the defendant.

Finally, if this suit fails as a proposition pied under the law of possession and property, I foresee it refiled as a tort snit in which the quantum of possession required may well be less and in which the plaintiff might well succeed. This being so, it seems to me that the law of property should conform itself to the expectations of the jury below. I would affirm their verdict and the ensuing judgment of Judge Judd.

EXAMPLES

1. Is the ***Hunter*** opinion binding on the courts of another state deciding a case with similar facts? Would it matter whether the other court was a trial or an appellate court?

2. After Hunter v. tvlontour is decided, Owen Owner sues Mo Montour for the buck that the result in the ***Hunter*** opinion permitted him to keep. May Owen do so?

3. Suppose that Owner's land abutted not a road, but Larry Lander's land, and the buck escaped Owner and ran onto Larry's land. Would the ***Hunter*** opinion prevent Owner from pursuing the buck there?

EXPLANATIONS

1. The ***Hunter*** opinion is not binding on the courts of any other jurisdiction. It does not matter whether the other court is a trial court or an appellate court. The ***Hunter*** opinion is binding as legal precedent on all state courts in the State of Grace. The opinion is useful in other states, however, as persuasive authority. A judge in another state may read the opinion for its logic and reasoning, and may decide to agree with the ***Hunter*** opinion and adopt its reasoning as the judge's own.

2. Yes. Owen Owner's rights, including the right to sue, are unaffected by a lawsuit to which he was not made a party. If the court never gained jurisdiction over Owner, its judgment does not bind him. As the facts are stated in the opinion, for example, it is unclear whether Owen's lands were posted, and so it is also unclear whether Mo and Alex were trespassers at the time of the hunt and the kill. Whether Mo was a trespasser would affect his rights to the buck. Moreover, the effect of any trespass, if found, would make the case sufficiently different from the precedent established in the ***Hunter*** opinion, so even if found to be binding on the court in which Owner sues, it need not control the outcome of Owner's suit.

3. Once Owen Owner joins the hunt, as the opinion suggested in dicta, his trespass on the land of another might well prevent him from obtaining legal possession of the buck. The discussion in Hunter as to Owner is dicta, and while persuasive authority to courts in the state of Grace, it is still merely persuasive and not binding authority. Moreover, the ***Hunter*** dicta may not apply to Owner's situation perfectly. For example, Owen might be asserting not only his right to hunt, but also his right to take game from his own lands and, by extension of that right, to take game found on his land that, when pursued there, went elsewhere. If Larry's land were posted, that might prevent Mo and Alex from starting their hunt there, but might not prevent Owen from continuing an ongoing hunt there, pursuing an already wounded animal. So Owen Owner's position is distinguishable from Alex and Mo's: Owner is participating in a hunt that started rightfully, while Alex and Mo's hunt was tainted, with regard to Owner's rights, from the moment they entered the boundaries of Owner's land. Property rights are relative to the rights of other people, particular people, people finding themselves in a context laden with facts. However, if Larry Lander's land were posted - i.e., had signs saying "No trespassing or hunting: Keep out" - the posting would affect Owner's rights.

UNDERSTANDING PROPERTY LAW

FOURTH EDITION

JOHN G. SPRANKLING

A P

Chapter 1
What Is "Property"?

§1.01 An "Unanswerable" Question?

What is "property"?[1] The term is extraordinarily difficult to define. One of America's foremost property law scholars even asserts that "[t]he question is unanswerable."[2] The problem arises because the legal meaning of "property" is quite different from the common meaning of the term. The ordinary person defines property as *things*, while the attorney views property as *rights.*

Most people share an understanding that property means: "*things* that are *owned* by persons."[3] For example, consider the book you are now reading. The book is a "thing." And if you acquired the book by purchase or gift, you presumably consider it to be "owned" by you. If not, it is probably "owned" by someone else. Under this common usage, the book is "property."

In general, the law defines property as rights[4] among people[5] that concern things. In other words, property consists of a package of legally-recognized rights held by one person in relationship to others with respect to some thing or other object. If you purchased this book, you might reasonably believe that you own "the book." But a law professor would explain that technically you own legally-enforceable rights concerning the book.[6] For example, the law will protect your right to prevent others from reading this particular copy of the book.

Notice that the legal definition of "property" above has two parts: (1) *rights* among people (2) that concern *things.* The difficulty of defining "property" in a short, pithy sentence is now more apparent. Both parts of the definition are quite vague. What are the possible *rights* that might arise concerning things? Suppose, for example, that A "owns" a 100-acre tract of forest land. What does it mean to say that A "owns" this land? Exactly what are A's rights with respect to the land? The second part of the definition is equally troublesome. What are the *things* that rights may permissibly concern? For example, could A own legal rights in the airspace above the land, in the wild animals roaming across the land, or in the particular genetic code of the rare trees growing on the land? Indeed, can A own rights in an idea, in a graduate degree, in a job, or in a human kidney? In a sense, this entire book is devoted to answering these and similar questions.

§1.02 Property and Law

[A] Legal Positivism

Law is the foundation of property rights in the United States. Property rights exist only if and to the extent they are recognized by our legal system. As Jeremy Bentham observed: "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."[7] Professor Felix Cohen expressed the same thought more directly: "That is property to which the following label can be attached. To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private citizen. Endorsed: The state."[8] This view that rights, including property rights, arise only through government is known as *legal positivism.*

[B] An Illustration: *Johnson v. M'Intosh*

The Supreme Court's 1823 decision in *Johnson v. M'Intosh*[9] reflects this approach. Two Native American tribes sold a huge parcel of wilderness land to a group of private buyers for $55,000. The federal government later conveyed part of this property to one M'Intosh, who took possession of the land. Representatives of the first buyer group leased the tract to tenants, and the tenants sued in federal court to eject M'Intosh from the land. The case revolved around a single issue: did Native Americans have the power to convey title that would be recognized by the federal courts? The Court held the tribes lacked this power and ruled in favor of M'Intosh.

Writing for the Court, Chief Justice Marshall stressed that under the laws of the United States, only the federal government held title to the land before the conveyance to M'Intosh, while the Native Americans merely held a "right of occupancy" that the federal government could extinguish. The title to lands, he explained, "must be admitted to depend entirely on the law of the nation in which they lie."[10] The Court's decision could not rely merely on "principles of abstract justice" or on Native American law, but rather must rest upon the principles "which our own government has adopted in the particular case, and given us as the rule for our decision."[11] In short, under the laws established by the United States, must a United States court hold that the United States owned the land? For Marshall, the answer was easy: "Conquest gives a title which the Courts of the conqueror cannot deny."[12] Property rights, in short, are defined by law.[13]

[C] Natural Law Theory

In contrast to legal positivism, *natural law theory* posits that rights arise in nature as a matter of fundamental justice, independent of government. As John Locke observed, "[t]he Law of Nature stands as an Eternal Rule to all Men, *Legislators* as well as others."[14] The role of government, Locke argued, was to enforce natural law, not to invent new law. Natural law was a central strand in European philosophy for millennia, linking together Aristotle, Christian theorists, and ultimately Locke, and heavily influencing American political thought during the eighteenth century. As the Declaration of Independence recited, the "unalienable Rights" of "Life, Liberty, and the Pursuit of Happiness" were endowed upon humans "by their Creator"; governments exist merely "to secure these rights."

The Declaration of Independence was the high-water mark of natural law theory in the United States. The Constitution firmly directed the young American legal system toward legal positivism, subject only to the Ninth Amendment's vague assurance that certain rights are "retained by the people." The influence of natural law theory steadily diminished thereafter. By 1823, when deciding *Johnson v. M'Intosh*,[15] the Supreme Court could easily dismiss the natural law argument that "abstract justice" required recognition of Native American land titles.

§1.03 Defining Property: What Types of "Rights" Among People?

[A] Scope of Property Rights

Suppose that O "owns" a house commonly known as Redacre. If we asked an ordinary person what O can legally do with Redacre, the response might be something like this: "O can do anything he wants. After all, it's *his* property. A person's home is his castle." This simplistic view that property rights are *absolute*—that an owner can do "anything he wants" with "his" property—is fundamentally incorrect. Suppose O wants to use his backyard to practice playing the trumpet, while N wants to sleep in her adjacent house. O does not have an absolute right to play his trumpet as loudly as he wishes; nor does N have an absolute right to be free from noise produced by neighbors. Inevitably, property rights sometimes conflict.[16]

Under our legal system, property rights are the product of human invention. As one court explained: "Property rights serve human values. They are recognized to that end, and are limited by it."[17]

Thus, property rights are inherently *limited* in our system. They exist *only to the extent* that they serve a socially-acceptable justification.

As discussed in Chapter 2, the existence of private property rights is supported by a diverse blend of justifications. These justifications share two key characteristics. Each recognizes the value of granting broad decision making authority to the owner. Under our system, a high degree of owner autonomy is both desirable and inevitable. But none of these justifications supports unfettered, absolute property rights. On the contrary, each requires clear limits on the scope of owner autonomy. Indeed, in a sense we can view property law as a process for reconciling the competing goals of individual owners and society in general. Society's concerns for free alienation of land, stability of land title, productive use of land, and related policy themes sometimes outweigh the owner's personal desires.

[B] Property as a "Bundle of Rights"

[1] Overview

It is common to describe property as a "bundle of rights"[18] in relation to things. But which "sticks" make up the metaphorical bundle? We traditionally label these sticks according to the *nature* of the right involved. Under this approach, the most important sticks in the bundle are:

(1) the right to exclude;
(2) the right to transfer;
(3) the right to possess and use; and
(4) the right to destroy.

The rights in the bundle can also be divided in other ways, notably by *time* and by *person.* For example, consider how we could subdivide the right to possess and use based on time (*see* Chapters 8–9, 12–14). Tenant T might have the right to use and possess Greenacre for one year, while landlord L is entitled to use and possession when the year ends. Or we could split up the same right based on the identity of the holders (*see* Chapters 10–11). Co- owners A, B, and C might each hold an equal right to simultaneously use and possess all of Blueacre.

[2] Right to Exclude

One stick in the metaphorical bundle is the right to exclude others from the use or occupancy of the particular "thing."[19] If O "owns" Redacre, O is generally entitled to prevent neighbors or strangers from trespassing (*see* Chapter 30).[20]

In the same manner, if you "own" an apple, you can preclude others from eating it. Of course, the right to exclude is not absolute. For example, police officers may enter Redacre in pursuit of fleeing criminals; and O probably cannot bar entry to medical or legal personnel who provide services to farm workers who reside on Redacre.[21]

Is the right to exclude a necessary component of property? Not at all. O might own title to Redacre subject to an easement that gives others the legal right to cross or otherwise use the land (*see* Chapter 32). Or O might lease Redacre to a tenant for a term of years (*see* Chapter 15), thus surrendering the right to exclude. Similarly, a local rent control law might prevent O from ever evicting his tenant from Redacre, absent good cause (*see* §16.03[B][2], *infra*).

[3] Right to Transfer

A second stick in the "bundle of rights" is the right to transfer the holder's property rights to others. O, our hypothetical owner of Redacre, has broad power to transfer his rights either during his lifetime or at death. For example, O might sell his rights in Redacre to a buyer, donate them to a charity, or devise them to his family upon his death. In our market economy, it is crucial that owners like O can transfer their rights freely (see §9.08[A], infra).

But the law imposes various restrictions on this right. For example, O cannot transfer title to Redacre for the purpose of avoiding creditors' claims. Nor is O free to impose any condition he wishes incident to the transfer; thus, a conveyance "to my daughter D on condition that she never sell the land" imposes an invalid condition (*see* §9.08[B], *infra*). Similarly, for example, O cannot refuse to sell his rights in Redacre because of the buyer's race, color, national origin, religion, or gender (*see* §34.06, *infra*).[22] Some types of property are *market-inalienable*,[23] essentially meaning that they cannot be sold at all (e.g., human body organs),[24] while other types of property cannot be transferred at death (e.g., a life estate).

Is the right to transfer essential? No. For example, although certain pension rights and spendthrift trust interests cannot be transferred, they are still property.[25]

[4] Right to Possess and Use

A third stick is the right to possess and use.[26] As owner of Redacre, O has broad discretion to determine how the land will be used. For example, he might live in the house, plant a garden in the backyard, play tag on the front lawn, install a satellite dish on the roof, and host weekly parties for his friends, all without any

intervention by the law. Similarly, if you "own" an apple, you can eat it fresh, bake it in a pie, or simply let it rot.

Traditional English common law generally recognized the right of an owner to use his land in any way he wished, as long as (a) the use was not a nuisance (*see* Chapter 29) and (b) no other person held an interest in the land (*see* Chapters 8–19, 32–34). Today, however, virtually all land in the United States is subject to statutes, ordinances, and other laws that substantially restrict its use (*see* Chapter 36). For example, local ordinances typically provide that only certain uses are permitted on a particular parcel; if Redacre is located in a residential zone, O cannot operate a store or factory there.

Similarly, Redacre might be subject to private restrictions that dramatically curtail permitted uses; for example, such restrictions might ban gardens, satellite dishes, or even noisy games of tag (*see* Chapter 35).

The right to possess and use is a common—but not a necessary— component of property. If O leases Redacre to tenant T for a 20-year term, O temporarily surrenders his right to possess and use the land; but O still holds property rights in Redacre.

[5] Right to Destroy

A fourth stick in the metaphorical bundle is the right to destroy.[27] Inevitably, most property will be destroyed. For example, suppose you buy a sandwich for lunch; by eating the sandwich, you have effectively destroyed it —which you had the right to do.

But are there any limits on this right? When an owner wants to destroy property that is particularly valuable—like a French Impressionist painting or a historic mansion—problems may arise. Suppose that the fair market value of Redacre is $2,000,000; O now plans to destroy Redacre on a whim, even though this will impoverish his family. Or suppose O plans to destroy a famous Manet painting, wasting a socially- valuable resource and preventing future art lovers from ever viewing it.

The precise scope of the right to destroy remains unclear. In general, the law is reluctant to interfere with an owner's freedom to abuse, or even destroy, her property.[28] But there is a discernable trend toward limiting this right. For example, some courts have refused to enforce provisions in wills that direct the killing of animals[29] or the destruction of houses.[30]

Is the right to destroy an essential component of property? No. For example, if O's home Redacre is a historic structure, the local preservation ordinance may bar O from destroying it. Or Redacre might be subject to private restrictions that similarly curtail O's right to destroy.

[C] From "Rights" to "Relationships"

Attorneys, judges, and even law professors customarily define property in terms of *rights.* But what about *duties*? Suppose landowner L is required by law to preserve the habitat of endangered species, even though this limits her ability to use the land. We might explain this requirement either as a restriction on L's rights or as a duty that L owes. In recent decades, the law has increasingly recognized that property owners both hold rights and owe duties.[31] Perhaps it is more accurate to define property as *relationships* among people that concern things.

Professor Wesley Newcomb Hohfeld revolutionized property law theory in the early twentieth century by envisioning property as a complex web of legally-enforceable relationships.[32] He developed an analytical framework for precisely classifying these relationships. Under this view, a property owner may hold four distinct entitlements: rights, privileges, powers, and immunities. Each entitlement is linked to a "correlative" counterpart: right- duty; privilege-no right; power-liability; and immunity-disability. Although Hohfeld's system was partially adopted by the first Restatement of Property in 1936, it enjoys less influence today. His insight that property consists of relationships among people, however, remains important.

§1.04 Defining Property: Rights in What "Things"?

[A] The Problem

What can permissibly be the subject of property rights? In other words, if "property" consists of legal rights or relationships among people that concern "things," what is the universe of "things"?

The concepts of *value* and *scarcity* are useful tools in thinking about these questions, but do not go far enough. An ordinary person might define property as "things worth money"—land, jewels, cars, and so forth.[33] Yet property rights can exist in things that have no monetary value (e.g., letters from a loved one) or even a negative value (e.g., land heavily contaminated with toxic wastes). Scarcity is a more promising theme. Indeed, one scholar defines property as "a system of rules governing access to and control of scarce material resources."[34]

Certainly, property rights are more likely to develop in things that are scarce (e.g., paintings by Leonardo da Vinci) than in things that are common (e.g., mosquitoes).[35] Yet scarce things may remain unowned (e.g., an idea for a new television series), while property rights might exist in ubiquitous things (e.g., air space).

So what "things" can be the subject of property rights? The law's traditional reply to this question is simple: all property is divided into two categories, *real property* (rights in land) and *personal property* (rights in things other than land). Yet this reply is remarkably unhelpful. The universe of "things" in which property rights can exist does not extend to all "land" or to all "things other than land."

[B] Real Property

Real property consists of rights in land and anything attached to land (e.g., buildings, signs, fences, or trees).[36] It includes certain rights in the land surface, the subsurface (including minerals and groundwater), and the airspace above the surface (*see* Chapter 31).

But how extensive are these rights? If F owns exclusive property rights in 100 acres of land known as Greenacre, does he also own rights in all the airspace 1,000 miles above the land? Or in the soil 1,000 miles below Greenacre? If the wind blows across Greenacre, does F own rights in the wind? Or in the wild bee hive in a Greenacre tree?

Historically, property law was almost exclusively concerned with real property. In feudal England—the birthplace of our property law system— land was the source of political, social, and economic power (*see* Chapter 8). Control over land provided the basis for political sovereignty, the foundation of social status, and the principal form of wealth; accordingly, disputes concerning real property were resolved in the king's courts.

Personal property, in contrast, was relatively unimportant in the feudal era; when a person died, the distribution of his personal property was supervised by church courts. Under these conditions, two distinct branches of property law evolved. Real property law, the dominant branch, became complex and often arcane; in contrast, personal property law remained relatively simple and straightforward.

Thus, the property law that the new United States inherited from England mainly consisted of real property law.

Even today, the standard first-year law school course on "property" mainly examines real property law. This focus may appear anachronistic in our technological age; stocks, bonds, patents, copyrights, and other forms of intangible personal property are increasingly valuable. Yet land remains the single most important resource for human existence. All human activities must occur somewhere. As our population increases and environmental concerns continue, disputes about property rights in our finite land supply will escalate.

[C] Personal Property

[1] Chattels

Items of tangible, visible personal property—such as jewelry, livestock, airplanes, coins, rings, cars, and books—are called *chattels.* Virtually all of the personal property in feudal England fell into this category. Today, property rights can exist in almost any tangible, visible "thing." Thus, almost every moveable thing around you now is a chattel owned by someone. There are two particularly prominent exceptions to this general observation. Even though human kidneys, fingers, ova, sperm, blood cells, and other body parts might be characterized as "tangible, visible things," many courts and legislatures have proven reluctant to extend property rights this far (see Chapter 7). Similarly, deer, foxes, whales, and other wild animals in their natural habitats are deemed unowned (*see* Chapter 3).

[2] Intangible Personal Property

Rights in intangible, invisible "things" are classified as intangible personal property. Stocks, bonds, patents,[37] trademarks, copyrights, trade secrets, debts, franchises, licenses, and other contract rights are all examples of this form of property.[38] The importance of intangible personal property skyrocketed during the twentieth century, posing new challenges that our property law system was poorly equipped to handle.[39]

What are the other intangible "things" in which property rights may exist? The answer to this question is changing quickly. Consider the example of a person's name. Traditionally, property rights could not exist in a name, unless it was used in a special manner (e.g., as a trademark). Today, however, the law protects a celebrity's "right of publicity"—the right to the exclusive use of the celebrity's name and likeness for commercial gain (*see* Chapter 6).[40] But the answers to other questions are less clear.

If spouse A works to finance spouse B's law school education, is B's law degree deemed marital "property" such that A is entitled to a share if he and B divorce? If A works for C for 30 years, does A have a property right in his job?[41] Upon retirement, does A have a property right in Social Security benefits?[42] The universe of intangible things is seemingly endless, and the law in this area will continue to evolve rapidly.

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1. *See generally* John E. Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. Ill. L. Rev. 1; Charles A. Reich, *The New Property*, 73 Yale L.J. 733 (1964); Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 Wash. L. Rev. 481 (1983); Jeremy Waldron, *What Is Private Property*?, 5 Oxford J. Legal Stud. 313 (1985). *See also* John G. Sprankling, The International Law of Property 21–38 (2014).

2. John E. Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. Ill. L. Rev. 1, 1.

3. Thomas C. Grey, *The Disintegration of Property, in* Nomos XXII 69, 69 (J. Roland Pennock & John W. Chapman eds., 1980).

4. While property is commonly discussed in terms of "rights," perhaps "relationships" would be a better term. *See* §1.03[C], *infra.*

5. "People" is used here in a broad sense to include business and governmental entities as well as individuals.

6. Still, even attorneys and legal scholars loosely refer to someone "owning" a particular parcel of land or other thing if the person owns all the legal rights to it. While convenient, this shorthand adds to the semantic confusion.

7. Jeremy Bentham, The Theory of Legislation 69 (Oceana Publications, Inc. 1975) (1802).

8. Felix S. Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357, 374 (1954).

9. 21 U.S. (8 Wheat.) 543 (1823). *See also* Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (holding federal government was not obligated to pay for removal of timber from lands claimed by Native Americans).

10. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 572 (1823). Cf. Kingman Reef Atoll Dev., LLC v. United States, 116 Fed. Cl. 708 (2014) (person who discovered uninhabited island outside the territory of any nation could only acquire title to it by a conveyance from his nation).

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

12. *Id.* at 588.

13. As the Supreme Court explains, "[g]enerally speaking, state law defines property interests." Stop the Beach Renourishment, Inc. v. Florida Dep't Envtl. Protection, 130 S. Ct. 2592, 2597 (2010). Property rights arise under federal law only in specialized contexts, such as copyrights and patents (*see* Chapter 6).

14. John Locke, Two Treatises of Government 358 (Peter Laslett ed., student ed. 1988) (3d ed. 1698).

15. 21 U.S. (8 Wheat.) 543 (1823).

16. As one scholar summarizes: "[T]he property rights of one person impinge on, and interfere with, both the property and personal rights of others. Absolute property rights are self-defeating." Joseph William Singer, *Rent*, 39 B.C. L. Rev. 1, 34 (1997).

17. State v. Shack, 277 A.2d 369, 372 (N.J. 1971).

18. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (referring to the "bundle of rights that are commonly characterized as property"). The bundle of rights metaphor has been criticized by some scholars. *See, e.g.*, Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 Harv. Envtl. L. Rev. 281 (2002); Hanoch Dagan, *The Craft of Property*, 91 Cal. L. Rev. 1517 (2003). *But see* Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. Cin. L. Rev. 57 (2013).

19. *See* Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730 (1998).

20. *See, e.g.*, Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wis. 1997).

21. State v. Shack, 277 A.2d 369 (N.J. 1971).

22. *See also* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (upholding constitutionality of statute prohibiting racial discrimination in sale or other transfer of property).

23. *See* Margaret J. Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849 (1987).

24. *See also* Andrus v. Allard, 444 U.S. 51 (1979) (upholding constitutionality of statute prohibiting sale of endangered species).

25. *See, e.g.*, Broadway Nat'l Bank v. Adams, 133 Mass. 170 (1882) (holding beneficiary's interest in spendthrift trust was not transferable).

26. *See, e.g.*, Henderson v. United States, 135 S. Ct. 1780 (2015) (discussing the difference between the right to possess and the right to transfer).

27. *See* Lior Jacob Strahilevitz, *The Right to Destroy*, 114 Yale L.J. 781 (2005).

28. *See, e.g.*, Carter v. Helmsley-Spear, Inc., 71 F.3d 77 (2d Cir. 1995) (owner of sculpture could destroy it, despite objections of sculptors).

29. *See, e.g.*, In Re Capers Estate, 34 Pa. D. & C.2d 121 (Pa. Ct. Com. Plea 1964) (dogs).

30. *See, e.g.*, Eyerman v. Mercantile Trust Co., 524 S.W.2d 210 (Mo. Ct. App. 1975).

31. *See* Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 Cornell L. Rev. 745 (2009). *See also* Joseph William Singer, Entitlement 18 (2000) ("Owners have obligations; they have always had obligations. We can argue about what those obligations should be, but no one can seriously argue that they should not exist.").

32. *See* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913).

33. *Cf.* Sekhar v. United States, 133 S. Ct. 2720 (2013) (suggesting that any right which has "value" constitutes "property").

34. Jeremy Waldron, *What Is Private Property?*, 5 Oxford J. Legal Stud. 313, 318 (1985).

35. *See generally* Harold Demsetz, *Toward A Theory of Property Rights*, 57 Am. Econ. Rev. 347 (1967).

36. An item of personal property which becomes physically attached to real property—such as a bookshelf or a sink—is called a *fixture.* A fixture is usually treated as real property.

37. *See, e.g.*, Hughes Aircraft Co. v. United States, 717 F.2d 1351 (Fed. Cir. 1983).

38. The fact that intangible personal property is sometimes evidenced by a document (e.g., a stock certificate or promissory note) does not convert it into a chattel.

39. For example, can property rights exist in computer time? *See* Lund v. Commonwealth, 232 S.E.2d 745 (Va. 1977) (overturning defendant's conviction for larceny on the basis that computer time is not a "good" or "chattel").

40. *See, e.g.*, Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

41. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972); Local 1330, United Steel Workers v. United States Steel Corp., 631 F.2d 1264 (6th Cir. 1980); *see generally* Joseph W. Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 614 (1988).

42. *See* Flemming v. Nestor, 363 U.S. 603 (1960) (finding no property right in social security benefits for purposes of Due Process Clause).

Chapter 2
Jurisprudential Foundations of Property Law

§2.01 Why Recognize Private Property?

Consider a 100-acre tract of prairie grassland in the American Midwest known as Goldacre, the perfect site for a wheat field. What alternative models of ownership might apply to this land? One option might be called *no property*: no one has any rights in the parcel. Another possibility is *common property*: every person holds equal rights in the land. A third model is *state property*: the state owns all rights in the tract. The final option is *private property*: one or more persons hold rights in the land. Under our legal system, Goldacre is probably governed by the private property model.

Why does American law recognize private property?[1] We view property as a cluster of legally enforceable rights among people concerning things.[2] But why should government enforce those rights in the first place? In other words, what is the *justification* for private property? The answer to this question is crucial because the *justification* for private property will necessarily affect the *substance* of property law. For example, suppose that we recognize private property solely in order to reward useful labor; if so, all property law rules will be devoted toward implementing this end. In short, the scope and extent of property rights logically turn on the underlying justification for private property.[3]

In reality, American property law is based on a subtle blend of different— and somewhat conflicting—theories. No single approach is accepted as the complete justification for private property. The dominant theory is undoubtedly traditional utilitarianism (*see* §2.04). However, other major theories—including first occupancy (*see* §2.02), labor-desert theory (*see* §2.03), the law and economics variant of utilitarianism (*see* §2.05), civic republican theory (*see* §2.06), and personhood theory (*see* §2.07)—also influence the evolution of property law. Of course, this is far from a complete list.

A variety of other perspectives—including such diverse examples as libertarian theory,[4] Immanuel Kant's categorical imperative approach,[5] natural law theory,[6] the "green property" movement,[7] the critical legal studies approach,[8] and John Rawls' theory of distributive justice[9]—are also important.

Rather than a uniform theory of property, these diverse approaches form a kind of jigsaw puzzle whose pieces do not fit neatly together. As Lawrence Becker laments, each approach is "typically embedded in a general moral theory which makes it difficult to use one argument to support, augment, or restrict another."[10]

Accordingly, while these theories all support the existence of private property in the abstract, they differ widely on how property rights should be defined and allocated.

§2.02 First Occupancy (aka First Possession)

[A] Nature of Theory

Who was first? The first occupancy theory reflects the familiar concept of first-in-time: the first person to take occupancy or possession of something owns it.[11]

Suppose fisherman A uses his fishing gear to catch a wild fish. Under this approach, A owns property rights in the fish simply because he was the first person to capture it. Or suppose F, a farmer in the nineteenth- century West, diverts irrigation water to her land from a nearby river; over time, F acquires water rights under the prior appropriation doctrine merely because she used the water first.

First occupancy theory seeks to explain how rights of private property arise in unowned natural resources. William Blackstone—whose *Commentaries on the Laws of England* quickly became the most popular legal treatise in the young United States—described the process as follows. When the world was in a state of nature, blessed with abundant food and other natural resources but only a small human population, everything was held "in common" by the inhabitants as "the immediate gift of the creator"; thus, any person could take "from the public stock to his own use such things as his immediate necessities required."[12]

If early inhabitant A was hungry, for example, he could simply eat a wild nut from any tree. In a second phase, Blackstone argued, "by the law of nature and reason, he who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer."[13]

Thus, if A picked nuts off the tree, and sat down to eat them, he acquired property rights in the nuts for as long as he continued eating them. Blackstone concluded that as the human population increased, this custom of first occupancy ripened into permanent property rights.

Now, if A labored to pick nuts off the tree, he owned the nuts, whether he ate them immediately or stored them for future use. The same principle applies to property rights in land. Person P acquires ownership rights in the 100-acre prairie tract known as Goldacre simply by occupying it first.

The principle of first occupancy is a fundamental part of American property law today, though in practice it is often blended together with other theories, particularly utilitarianism and the labor theory.

First occupancy theory was particularly influential during the nineteenth century, when it was used to allocate property rights in such diverse resources as wild animals and fish (*see* §3.02), oil and gas (*see* §31.06[B]) and surface water (*see* §31.02[A]). Even today, the first-in-time principle is still the basic rule for determining the respective priority of competing title claims to real property (*see* §24.02).

[B] Critique of Theory

Most legal scholars hold the same opinion of first occupancy theory: while it helps to *explain* how property rights evolved, it does not adequately *justify* the existence of private property.

Suppose vagrant V accidentally kicks over a rock and discovers a gold mine. V's claim is first in time, but why should this make a difference? Why should V own the gold, rather than, for example, the residents of the region or the parents of handicapped children?

Further, the first occupancy approach is counterproductive because it encourages the waste of natural resources. Consider hunting. If property rights in wild animals are allocated to the first successful hunter, then long- term conservation is impossible. Because no hunter can control the conduct of other hunters, each hunter has an incentive to protect his or her individual self-interest by killing as many animals as possible as quickly as possible.

What about oil? If property rights in subsurface oil are acquired by the first person to pump it out of the ground, then no one has an incentive to preserve oil resources for future use. Suppose A, B, and C all own parcels of land overlying an underground oil deposit. If A begins to pump out oil, B and C will rationally do the same; otherwise, A will pump out all the oil, leaving B and C with no rights at all.

Richard Epstein offers at least a lukewarm defense.

Assuming that some system of property rights is necessary, "if only to organize the world in ways that all individuals know the boundaries of their own conduct,"[14] he argues that first occupancy is superior to a system that recognizes original common ownership in all citizens.

First, it places wealth in private hands, which leads to more efficient utilization of resources. Second, the first occupancy rule has become a well-established custom for centuries; whatever its original merits may have been, any attempt to abandon the rule now would upset the stability of private property ownership.

The first occupancy approach is a valuable tool in one setting: it serves as a low-cost "tie breaker." All other things being equal, it offers a quick, clear, and inexpensive method to resolve competing claims to property rights and thereby avoid conflict.[15]

In other words, if the positions of two competing claimants are otherwise identical, the law usually breaks the tie by recognizing the rights of the first-in-time claimant.

2.03 Labor-Desert Theory

[A] Nature of Theory

The labor-desert theory posits that people are entitled to the property that is produced by their labor.

Under this approach, fisherman A owns property rights in the fish he caught because the catch resulted from his labor; A baited the hook, waited patiently, and reeled in the fish. Or suppose sculptor B utilizes her creative powers to transform unowned clay into a valuable statue; again, B owns rights in the statue because of her labor.

The respective property rights of A and B arise as a matter of natural justice because they mixed their labor with unowned raw materials, not simply because they were first in time.

As developed by its foremost exponent, the seventeenth-century philosopher John Locke, the labor theory assumes a world in a state of nature, without private property ownership.[16]

It seeks to explain how unowned natural resources (e.g., wild nuts, game, or unoccupied land) are transformed into private property owned by one person.

The theory proceeds in four basic steps:

(1) every person owns his body;

(2) thus, each person owns the labor that his body performs;

(3) so, when a person labors to change something in nature for his benefit, he "mixes" his labor with the thing; and

(4) by this mixing process, he thereby acquires rights in the thing.

Consider an example. P owns his body, and thus owns his own labor.

When P picks wild nuts from a tree and places them in his sack, he mixes his labor (which he owns) with the nuts (which are unowned), and thereby obtains property rights in the resulting mixture (nuts in the sack).

In the same fashion, Locke concludes: "*As much Land* as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his *Property.* He by his Labour does, as it were, enclose it from the Common."[17] Thus, P can acquire ownership rights in our hypothetical prairie tract, Goldacre, simply by cultivating and harvesting wheat on the land.

Strong traces of the labor theory linger in American property law today, often intermixed with first occupancy theory.[18] Perhaps the clearest example is accession: one who in good faith applies labor to another's chattel receives title to the resulting product if, for example, the labor greatly increases the value of the original item (*see* §7.01).

Other examples include adverse possession (*see* Chapter 27), the good faith improver doctrine (*see* §30.07), and various intellectual property rules (*see* Chapter 6).

[B] Critique of Theory

Legal scholars are almost uniformly critical of Lockean labor theory as a justification for private property rights.[19] At best, critics observe, the theory should permit a person to receive the value that his or her labor adds to a thing, not title to the thing itself.

If P's labor adds only 1% to the value of a thing, why should P receive 100% of the thing? Similarly, if P plants, nurtures, and harvests wheat on unowned land commonly known as Goldacre, at most P should hold rights to the resulting wheat, not to the land itself.

Another line of attack focuses on time. Suppose P acquires title to Goldacre through his labor. P then hires farm workers F and G to grow the next wheat crop on the land. Even though F and G mix their labor with the land, they cannot acquire ownership, because the land is already owned by P. Thus, the labor theory honors only first labor, not all labor. In this sense, it seems to suffer from the same defects as first occupancy theory.

Finally, the labor theory assumes an unlimited supply of land and other natural resources. Thus, if P appropriates Goldacre through his labor, he theoretically causes no harm to other people. Assuming an infinite supply of natural resources, F, G, and others could freely occupy unowned land. However, the twentieth century has taught us that the world is finite. Thus, if the law recognizes P's title to Goldacre, F, G, and others do suffer harm.

§2.04 Utilitarianism: Traditional Theory

[A] Nature of Theory

Utilitarian theory views property "as a means to an end."[20] This is—by far—the dominant theory underlying American property law. Under this approach, private property exists in order to maximize the overall happiness or "utility" of all citizens.

Accordingly, property rights are allocated and defined in the manner that best promotes the general welfare of society. As the New Jersey Supreme Court observed in *State v. Shack*: "Property rights serve human values. They are recognized to that end, and are limited by it."[21]

The modern father of utilitarianism was Jeremy Bentham, an eighteenth- century English philosopher. For Bentham, property rights stemmed not from morality or natural justice, but rather from human invention. Mankind recognizes the existence of private property, he suggested, simply as a convention that promotes social utility.

He observed: "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."[22] In crafting property law, the role of the legislator was to do "what is essential to the happiness of society; when he disturbs it, he always produces a proportionate sum of evil."[23]

Suppose fisherman A catches a wild fish. According to utilitarian theory, society recognizes that A owns rights in the fish because this result promotes overall public happiness.

In general, fishermen derive pleasure from catching fish, and obtain sustenance from eating the fish they catch. Accordingly, society recognizes the ownership rights of all fishermen who successfully catch fish. Perhaps catching the fish made A grumpy or even mad. But the facts relating to A's personal situation are irrelevant. A's property rights stem from a general rule applicable to all citizens.

Conversely, human happiness might require that society restrict or ban fishing, in order to allow an endangered species to recover from over-fishing and thus be available for future generations of fishermen.

The same analysis applies to our hypothetical wheat field, Goldacre. The law recognizes farmer P as the owner of property rights in Goldacre because this result best promotes overall societal happiness, not because P has any natural or moral entitlement.

How so? In general, recognizing private property rights in land produces public benefits. Without private property rights, farmers in general could not bar trespassers from removing their crops; under these conditions, farmers would not invest the time, money, and energy needed to supply society with wheat.

Property rights thus provide farmers with the investment security that induces them to grow wheat to help feed the public. And—as a general matter—farmers presumably derive personal satisfaction and pleasure from owning and farming their lands.

[B] Critique of Theory

How can human happiness be measured? Are the appropriate yardsticks love, wealth, respect, intelligence, leisure time, dignity, self-esteem, health, or other factors?

Critics charge that utilitarian theory is effectively meaningless because it is impossible to assess happiness. For example, a particular law might bring more wealth to one group of citizens, but lessen the self-esteem of another equal-sized group.

Alternatively, a law might increase the dignity, but impair the health, of all citizens. Although there is widespread agreement that utilitarian theory supports the existence of private property as a general matter, critics argue that it offers no guidance about how property rights should be allocated or defined.

One important implication of utilitarian theory is that property rights are not "written in stone," but rather are subject to change.

If property is merely a tool used to engineer maximum human happiness, then new social, economic, or political conditions may require that property rights be reallocated or redefined.

Even assuming that happiness can be measured, are courts and other governmental institutions competent to decide what changes in traditional property rights are necessary or appropriate for the welfare of society?

§2.05 Utilitarianism: Law and Economics Approach

[A] Nature of Theory

The law and economics approach incorporates economic principles into utilitarian theory.[24] While traditional utilitarianism defines human happiness in rather vague terms, the law and economics view essentially assumes that happiness may be measured in dollars. Under this view, private property exists in order to maximize the overall wealth of society.

Richard Posner, the preeminent law and economics scholar, begins by defining property as "rights to the exclusive use of valuable resources."[25] The law enforces property rights in order to motivate individuals to utilize resources "efficiently." In this sense, an "efficient" allocation of resources is one in which "value"—defined as an individual's willingness to pay—is maximized.

For example, if A is willing to pay $100 for a particular widget, while B is willing to pay only $30, value is maximized if A obtains the widget. For Posner, the key to efficient allocation is a truly free market in goods and services. Accordingly, the principal role of property law is to foster voluntary commercial transactions among private parties.

Posner postulates a world filled with economically-rational actors, all constantly seeking to maximize their self-interests. In this setting, an efficient property law system must have three central components: universality, exclusivity, and transferability.

Universality simply means that all property is owned by someone. The second component, *exclusivity*, denotes that the law recognizes the absolute right of an owner to exclude all members of society from the use or enjoyment of the owned resource.

Finally, *transferability* means that property rights are freely transferable, so that a resource can be devoted to the most highly-valued use.

Of course, even if these components are present, the free exchange of property rights may be impaired by *transaction costs* (e.g., the costs of investigating a potential purchase, negotiating a purchase contract, or dealing with the *free rider* (the group member who receives benefit but refuses to pay)).

The Coase Theorem holds that property will eventually be devoted to its highest value use, regardless of how property rights are initially allocated, if no transaction costs exist.

Consider again our hypothetical prairie tract Goldacre. Farmer P is deciding whether to plant wheat on Goldacre. Society will gain wheat—and thus added wealth—if P and similarly-situated farmers have adequate incentive to invest the time, energy, and money necessary to raise crops. In a world without property law, P will worry: strangers might appropriate the harvest, or P might fall ill and be unable to tend the crop.

How can property law encourage P to grow wheat? Posner would answer the question in three steps. First, recognize that P holds property rights in Goldacre. Second, define P's rights so that P has the exclusive right to the use and enjoyment of Goldacre; in this manner, the law will enforce P's exclusive rights to the wheat he grows. Third, allow P to freely transfer his rights in Goldacre to others, so that illness or other calamity does not impair wheat production.

The law and economics approach to utilitarian theory has been quite influential in recent decades, affecting academic debate (and, to a lesser extent, case law) in areas ranging from tenants' rights to land use law.[26] In particular, the concept of *externalities*—that is, economic costs or benefits caused by a person's failure to consider the full impacts of his use of resources—has offered important insights into nuisance law (*see* Chapter 29).

[B] Critique of Theory

The law and economics approach is, to put it mildly, controversial.[27] One major concern is its assumption that social utility or value is appropriately measured by willingness to pay.

Not all human desires or satisfactions can be quantified in dollar terms. Such basic human needs as dignity, love, self- esteem, respect, and honor carry no price tag.

Even if all human happiness could be reduced to dollars, the “willingness to pay” standard is still fundamentally flawed. Why? The existing distribution of wealth in our society is unequal.

Posner tells a parable of two families, each interested in purchasing a very expensive type of pituitary extract that increases the height of children. The poor family is unable to afford the extract, even though without it their son will be a dwarf forever. Conversely, the rich family can afford to purchase the extract, so that their son—a boy of otherwise normal height—can grow a few inches above normal. For Posner, the rich family places more "value" on the extract because it is willing to pay more than the poor family. Thus, value is maximized by allowing the rich family to receive the extract.

Implicit in the law and economics approach is an assumption that increasing overall social wealth will benefit all members of society, a view characterized by some critics as "trickle-down economics."

In other words, if the size of the "pie" increases, the size of each piece of the pie will also increase. However, critics charge that the minimal government intervention championed by law and economics advocates tends to perpetuate the existing unequal distribution of wealth.

Even Posner acknowledges that law and economics theory presents profound moral questions. He concedes that economic analysis cannot answer "the ultimate question of whether an efficient allocation of resources would be socially or ethically desirable."[28] Still, Posner insists that efficiency should be considered an important factor in legal decision making.

§2.06 Liberty or Civic Republican Theory

[A] Nature of Theory

Liberty theory argues that the ownership of private property is necessary for democratic self-government.[29] As it developed before the American Revolution, this approach posited that property rights provided citizens with the economic security that allowed independent political judgment.

Citizen C1, owning 1,000 acres of land, could support his family by farming his own land, without any external assistance. He was accordingly free to serve the common good through voting, political discussion, holding office, and so forth. In contrast, landless citizen C2 would be dependent on the good will of others for sustenance, somewhat like the feudal serf; C2 was thus subject to manipulation, bribery, or other economic pressure. If offered a bribe to vote for a particular candidate, for example, C2 might well prefer his private self- interest over the common good.

For this reason, Thomas Jefferson advocated the distribution of federally- owned public lands to landless citizens.[30] Jefferson envisioned a nation of yeoman farmers, virtuous and independent enough to pursue the public good. His dreams contributed to the generous federal land distribution policies of the eighteenth and nineteenth centuries—notably the Homestead Act of 1862 —by which most of the lands now comprising the United States were transferred into private ownership.[31]

[B] Critique of Theory

The influence of liberty theory waned during the nineteenth century in the face of changing economic, political, and social conditions. Modern scholars are skeptical of the original assumption that property ownership is essential to political freedom.

Developments over the last 50 years—notably the civil rights movement—demonstrate that even our poorest citizens have the political courage to fight for the common good. Moreover, even assuming that economic security is vital for political independence, today most citizens derive that security not from "property" in the traditional sense, but rather from wages earned through relatively secure employment.

Further, taken to its logical conclusion, liberty theory seems to support a redistribution of property from the rich to the poor. If property exists only to ensure democratic government, then each citizen must be allocated a share of society's wealth.[32]

Yet the Takings Clause of the Fifth Amendment— included in the Constitution partly in response to Madison's concerns about potential wealth redistribution (*see* §39.02[B])—bars this outcome.

§2.07 Personhood Theory

[A] Nature of Theory

Personhood theory justifies private property as essential to the full development of the individual. Under this approach, certain things—for example, a wedding ring—are seen as so closely connected to a person's emotional and psychological well-being that they virtually become part of that person.[33]

Thus, a person should have broad property rights over such things.

More than two centuries ago, the German philosopher Georg Hegel argued that a "person has as his substantive end the right of putting his will into any and every thing and thereby making it his."[34]

More recently, Margaret Radin addressed the same theme; she observed that most people "possess certain objects they feel are almost part of themselves," objects that are "closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world."[35]

In short, people define their selves through objects. The emotional and psychological link between a person and certain "things"—for example, a love letter or a family home—is so great, Radin suggests, that a person should be able to control the thing through enhanced property rights.

[B] Critique of Theory

Personhood theory might be classified as a variant on utilitarian theory. It seeks to maximize utility by protecting a person's emotional or psychological happiness.

Yet, at best, it explains the existence of private property rights only in those "things" seen as central to personhood. It does not seek to justify the existence of what Radin terms "fungible property," that is, rights in money, stocks, bonds, commercial real estate, and other "things" that are less connected to personhood.

Like traditional utilitarian theory, the personhood approach also offers little guidance on the allocation or definition of property rights. Radin argues that when a property right is personal, a prima facie case exists that it should be protected to some extent against conflicting fungible property rights held by others.

To what extent? Suppose landlord A leases one of the apartments in his 10-unit building to tenant B on a month-to-month basis. Two years later, A seeks to evict B in order to sell the land to a computer manufacturing company, which will build a factory on the site and provide jobs for 400 neighborhood residents. Assuming the apartment unit is "personhood" property, is B entitled to reside there for as long as she pays rent and otherwise performs the lease terms? In other words, will B's personhood interest override A's "fungible" interest?

1.See generally Gregory S. Alexander & Eduardo M. Peñalver, An Introduction to Property Theory (2012); Lawrence C. Becker, Property Rights: Philosophic Foundations (1977); Robert C. Ellickson, *Property in Land*, 102 Yale L.J. 1315 (1993); Carol M. Rose, *Property as the Keystone Right*?, 71 Notre Dame L. Rev. 329 (1996).

2. *See generally* Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 Cornell L. Rev. 531 (2005).

3. Jurisprudential approaches to property divide into two groups: (a) teleological (or consequentialist) theories and (b) deontological theories. *Teleological* theories (e.g., utilitarianism) support private property because of the beneficial results that property provides. *Deontological* theories (e.g., natural law theory), in contrast, endorse private property because it is inherently right or just, regardless of the results it produces.

4. *See generally* Robert Nozick, Anarchy, State, and Utopia (1974).

5. *See, e.g.*, Peter Halewood, *Law's Bodies: Disembodiment and the Structure of Liberal Property Rights*, 81 Iowa L. Rev. 1331, 1350–57 (1996).

6. *See* §1.02[C], *supra*.

7. *See, e.g.*, J. Peter Byrne, *Green Property*, 7 Const. Commentary 239 (1990); Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450 (1972); *see also* Sierra Club v. Morton, 405 U.S. 727 (1972) (Douglas, J., dissenting) (arguing that concern for environmental protection should lead to the conferral of standing upon "environmental objects" such as trees, rivers, and valleys to sue for their own preservation).

8. *See, e.g.*, Roberto M. Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561 (1983).

9. *See generally* John Rawls, A Theory of Justice (1971).

10. Lawrence C. Becker, Property Rights: Philosophic Foundations 3 (1977).

11. *See, e.g.*, Pierson v. Post, 3 Cai. R. 175 (N.Y. 1805) (discussing rights in wild fox); *cf.* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (discussing rights as among European nations to conquer lands occupied by non-Europeans). *But see* Kingman Reef Atoll Dev., LLC v. United States, 116 Fed. Cl. 708 (2014) (person who discovered uninhabited island outside the territory of any nation could only acquire title to it by a conveyance from his nation).

12. 2 William Blackstone, Commentaries on the Laws of England *3 (Bell ed., 1771).

13. *Id.*

14. Richard A. Epstein, *Possession as the Root of Title*, 13 Ga. L. Rev. 1221, 1238 (1979).

15. *See* Carol M. Rose, *Possession as the Origin of Property*, 52 U. Chi. L. Rev. 73 (1985).

16. *See generally* Walton H. Hamilton, *Property—According to Locke*, 41 Yale L.J. 864 (1932).

17. John Locke, Two Treatises of Government 290–91 (Peter Laslett ed., student ed. 1988) (3rd ed. 1698).

18. *Cf.* Haslem v. Lockwood, 37 Conn. 500, 507 (1871) (holding that plaintiff, who raked abandoned horse manure into piles and thus "greatly increase[d] its value by his labor," could recover the value of the manure from the defendant who carried away the piles).

19. *See generally* Lawrence C. Becker, Property Rights: Philosophic Foundations 36–56 (1977).

20. Lawrence C. Becker, Property Rights: Philosophic Foundations 57 (1977).

21. 277 A.2d 369, 372 (N.J. 1971).

22. Jeremy Bentham, The Theory of Legislation 69 (Oceana Publications, Inc. 1975) (1802).

23. *Id.*

24. *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960); Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347 (1967).

25. Richard A. Posner, Economic Analysis of Law 39 (9th ed. 2014).

26. *See, e.g.*, Chicago Bd. of Realtors, Inc. v. City of Chicago, 819 F.2d 732 (7th Cir. 1987) (Posner, J., concurring).

27. *See, e.g.*, Eduardo M. Peñalver, *Land Virtues*, 94 Cornell L. Rev. 821 (2009); Jeanne L. Schroeder, *Rationality in Law and Economics Scholarship*, 79 Or. L. Rev. 147 (2000).

28. Richard A. Posner, *Economic Analysis of Law* 14 (6th ed. 2003).

29. *See generally* Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. Rev. 273 (1991); William H. Simon, *Social-Republican Property*, 38 UCLA L. Rev. 1335 (1991). *See also* Joseph William Singer, *Property as the Law of Democracy*, 63 Duke L.J. 1287 (2014).

30. *See* Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & Econ. 467 (1976).

31. *Cf.* Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973) (holding tenant in quasi-public housing had property right to continue occupancy there even after termination of lease absent good cause for eviction).

32. *Cf.* Frank I. Michelman, *Property as a Constitutional Right*, 38 Wash. & Lee L. Rev. 1097 (1981); Charles A. Reich, *The New Property*, 73 Yale L.J. 733 (1964).

33. *Cf.* Joseph W. Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 614 (1988) (stressing the importance of individual reliance as a basis for recognizing property rights).

34. Georg W. F. Hegel, The Philosophy of Right 23 (T. Knox ed., 1952) (1821).

35. Margaret J. Radin, *Property and Personhood*, 34 Stan. L. Rev. 957, 959 (1982). *See also* Jeffrey Douglas Jones, *Property and Personhood Revisited*, 1 Wake Forest J.L. & Pol'y 93 (2011).