

# Chapter 1

## What Is “Property”?

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### §1.01 An “Unanswerable” Question?

What is “property”?<sup>1</sup> The term is extraordinarily difficult to define. One of America's foremost property law scholars even asserts that “[t]he question is unanswerable.”<sup>2</sup> 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.”<sup>3</sup> 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<sup>4</sup> among people<sup>5</sup> 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.<sup>6</sup> 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.”<sup>7</sup> 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.”<sup>8</sup> 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*<sup>9</sup> 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.”<sup>10</sup> 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.”<sup>11</sup> 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.”<sup>12</sup> Property rights, in short, are defined by law.<sup>13</sup>

## [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.”<sup>14</sup> 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*,<sup>15</sup> 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.<sup>16</sup>

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.”<sup>17</sup>

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”<sup>18</sup> 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.”<sup>19</sup> If O “owns” Redacre, O is generally entitled to prevent neighbors or strangers from trespassing (see Chapter 30).<sup>20</sup>

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.<sup>21</sup>

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*).<sup>22</sup> Some types of property are *market-inalienable*,<sup>23</sup> essentially meaning that they cannot be sold at all (e.g., human body organs),<sup>24</sup> 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.<sup>25</sup>

### **[4] Right to Possess and Use**

A third stick is the right to possess and use.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> 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<sup>29</sup> or the destruction of houses.<sup>30</sup>

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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> 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.”<sup>34</sup>

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).<sup>35</sup> 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).<sup>36</sup> 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,<sup>37</sup> trademarks, copyrights, trade secrets, debts, franchises, licenses, and other contract rights are all examples of this form of property.<sup>38</sup> The importance of intangible personal property skyrocketed during the twentieth century, posing new challenges that our property law system was poorly equipped to handle.<sup>39</sup>

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).<sup>40</sup> 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?<sup>41</sup> Upon retirement, does A have a property right in Social Security benefits?<sup>42</sup> 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 Env'tl. 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. Env'tl. 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).