Chapter 1

The Right to Exclude

William Blackstone, *Commentaries on the Laws of England*

Vol. 1, pp. 131–136 (1765); vol. 2, p. 2

The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The original of private property is probably founded in nature, as will be more fully explained in the second book of the ensuing commentaries: but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. The laws of England are therefore, in point of honor and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land . . . .

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged,

Figure 1.1: William Blackstone. Source: 6 CASSELL'S ILLUSTRATED HISTORY OF ENGLAND 582 (1865), *link*.

that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this, and similar cases the legislature alone, can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform. . . .

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

Jacque v. Steenberg Homes, Inc.

563 N.W.2d 154 (Wis. 1997)

William A. Bablitch, Justice.

Plaintiffs, Lois and Harvey Jacques, are an elderly couple, now retired from farming, who own roughly 170 acres near Wilke's Lake in the town of Schleswig. The defendant, Steenberg Homes, Inc. (Steenberg), is in the business of selling mobile homes. In the fall of 1993, a neighbor of the Jacques purchased a mobile home from Steenberg. Delivery of the mobile home was included in the sales price.

Steenberg determined that the easiest route to deliver the mobile home was across the Jacques' land . . . because the only alternative was a private road which was covered in up to seven feet of snow and contained a sharp curve which would require sets of "rollers" to be used when maneuvering the home around the curve. Steenberg asked the Jacques on several separate occasions whether it could move the home across the Jacques' farm field. The Jacques refused. . . . On the morning of delivery, . . . the assistant manager asked Mr. Jacque how much money it would take to get permission. Mr. Jacque responded that it was not a question of money; the Jacques just did not want Steenberg to cross their land. . . .

At trial, one of Steenberg's employees testified that, upon coming out of the Jacques' home, the assistant manager stated: "I don't give a —— what [Mr. Jacque] said, just get the home in there any way you can." . . . The employees, after beginning down the private road, ultimately used a "bobcat" to cut a path through the Jacques' snow-covered field and hauled the home across the Jacques' land to the neighbor's lot. . . . Mr. Jacque called the Manitowoc County Sheriff's Department. After interviewing the parties and observing the scene, an officer from the sheriff's department issued a $30 citation to Steenberg's assistant manager.

The Jacques commenced an intentional tort action in Manitowoc County Circuit Court, Judge Allan J. Deehr presiding, seeking compensatory and punitive damages from Steenberg. . . . [Q]uestions of punitive and compensatory damages were submitted to the jury. The jury awarded the Jacques $1 nominal damages and $100,000 punitive damages. Steenberg filed post-verdict motions claiming that the punitive damage award must be set aside because Wisconsin law did not allow a punitive damage award unless the jury also awarded compensatory damages. Alternatively, Steenberg asked the circuit court to remit the punitive damage award. The circuit

court granted Steenberg's motion to set aside the award. Consequently, it did not reach Steenberg's motion for remittitur . . . .

II.

. . . Steenberg argues that, as a matter of law, punitive damages could not be awarded by the jury because punitive damages must be supported by an award of compensatory damages and here the jury awarded only nominal and punitive damages. The Jacques contend that the rationale supporting the compensatory damage award requirement is inapposite when the wrongful act is an intentional trespass to land. We agree with the Jacques.

. . . The rationale for the compensatory damage requirement is that if the individual cannot show actual harm, he or she has but a nominal interest, hence, society has little interest in having the unlawful, but otherwise harmless, conduct deterred, therefore, punitive damages are inappropriate. . . . The Jacques argue that both the individual and society have significant interests in deterring intentional trespass to land, regardless of the lack of measurable harm that results. We agree with the Jacques . . . .

We turn first to the individual landowner's interest in protecting his or her land from trespass. The United States Supreme Court has recognized that the private landowner's right to exclude others from his or her land is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994). This court has long recognized "[e]very person['s] constitutional right to the exclusive enjoyment of his own property for any purpose which does not invade the rights of another person." *Diana Shooting Club v. Lamoreux*, 114 Wis. 44, 59, 89 N.W. 880 (1902) (holding that the victim of an intentional trespass should have been allowed to take judgment for nominal damages and costs). Thus, both this court and the Supreme Court recognize the individual's legal right to exclude others from private property.

Yet a right is hollow if the legal system provides insufficient means to protect it. Felix Cohen offers the following analysis summarizing the relationship between the individual and the state regarding property rights:

[T]hat 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

Felix S. Cohen, *Dialogue on Private Property,* IX Rutgers Law Review 357, 374 (1954). Harvey and Lois Jacque have the right to tell Steenberg Homes and any other trespasser, "No, you cannot cross our land." But that right has no practical meaning unless protected by the State . . . .

The nature of the nominal damage award in an intentional trespass to land case further supports an exception to [the compensatory damage requirement]. Because a legal right is involved, the law recognizes that actual harm occurs in every trespass. The action for intentional trespass to land is directed at vindication of the legal right. . . . Thus, in the case of intentional trespass to land, the nominal damage award represents the recognition that, although immeasurable in mere dollars, actual harm has occurred.

The potential for harm resulting from intentional trespass also supports an exception to [the compensatory damage requirement]. A series of intentional trespasses, as the Jacques had the misfortune to discover in an unrelated action, can threaten the individual's very ownership of the land. The conduct of an intentional trespasser, if repeated, might ripen into prescription or adverse possession and, as a consequence, the individual landowner can lose his or her property rights to the trespasser.

In sum, the individual has a strong interest in excluding trespassers from his or her land. Although only nominal damages were awarded to the Jacques, Steenberg's intentional trespass caused actual harm. We turn next to society's interest in protecting private property from the intentional trespasser.

Society has an interest in punishing and deterring intentional trespassers beyond that of protecting the interests of the individual landowner. Society has an interest in preserving the integrity of the legal system. Private landowners should feel confident that wrongdoers who trespass upon their land will be appropriately punished. When landowners have confidence in the legal system, they are less likely to resort to "self-help" remedies. . . . [O]ne can easily imagine a frustrated landowner taking the law into his or her own hands when faced with a brazen trespasser, like Steenberg, who refuses to heed no trespass warnings.

People expect wrongdoers to be appropriately punished. Punitive damages have the effect of bringing to punishment types of conduct that, though oppressive and hurtful to the individual, almost invariably go un-

punished by the public prosecutor. . . . If punitive damages are not allowed in a situation like this, what punishment will prohibit the intentional trespass to land? Moreover, what is to stop Steenberg Homes from concluding, in the future, that delivering its mobile homes via an intentional trespass and paying the resulting [$30] forfeiture, is not more profitable than obeying the law? Steenberg Homes plowed a path across the Jacques' land and dragged the mobile home across that path, in the face of the Jacques' adamant refusal. A $30 forfeiture and a $1 nominal damage award are unlikely to restrain Steenberg Homes from similar conduct in the future. An appropriate punitive damage award probably will.

In sum, as the court of appeals noted, the [compensatory damage] rule sends the wrong message to Steenberg Homes and any others who contemplate trespassing on the land of another. It implicitly tells them that they are free to go where they please, regardless of the landowner's wishes. As long as they cause no compensable harm, the only deterrent intentional trespassers face is the nominal damage award of $1 . . . and the possibility of a Class B forfeiture under Wis. Stat. § 943.13. We conclude that both the private landowner and society have much more than a nominal interest in excluding others from private land. Intentional trespass to land causes actual harm to the individual, regardless of whether that harm can be measured in mere dollars. Consequently, the [compensatory damage] rationale will not support a refusal to allow punitive damages when the tort involved is an intentional trespass to land. Accordingly, assuming that the other requirements for punitive damages have been met, we hold that nominal damages may support a punitive damage award in an action for intentional trespass to land. . . . Accordingly, we reverse and remand to the circuit court for reinstatement of the punitive damage award.

Reversed and remanded with directions.

Notes and Questions

1.1. Would (or should) the result in *Jacque* have been different if, instead of a mobile home seller making a scheduled delivery to a customer, the defendant had been an ambulance company responding to a call of a suspected heart attack? Of a broken leg? What if the snow-covered private road had instead been a recently collapsed bridge? What if Steenberg had tried to take the road despite the risks, and the truck had accidentally tipped and fallen onto the Jacques' land?

1.2. Would (or should) the result in *Jacque* have been different if, instead of steadfastly refusing to permit Steenberg's delivery truck to cross their land, the Jacques had demanded a large sum of money as a condition of permitting the crossing, which Steenberg refused to pay? Would the ultimate monetary award have been different? If so, what incentive does this case give property owners facing requests from third parties for the use of their otherwise idle resources? Would Steenberg have been better off not asking permission in the first place?

1.3. Blackstone's description of "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" is one of the most famous—and quotable—definitions of property ever written in English. But it is also widely acknowledged to be hyperbolic to the point of falsity. Can you see why? What aspects of Blackstone's own discussion of the "absolute right" of property are inconsistent with the "total exclusion of the right of any other individual in the universe"?

1.4. Would we really want our system of property to give private owners such "sole and despotic dominion . . . over the external things of the world"? The kind of dominion exercised by the Jacques? No matter what? Consider this: what kinds of problems could a motivated and unscrupulous property owner armed with such awesome power cause?

1.1 Terminology

The original *Open Source Property* module on property torts provides a wonderfully detailed history of the causes of action based on property. In modern practice, the key terminology for you to know is as follows.

Terminology-wise, property is divided into **real property**, which refers to rights in land and things like houses attached to it, and **personal property**, which refers to rights in all other physical objects. (Property in intangibles has no conventional general name.) The terms **realty** and **personalty** (note the missing "i" in each) are synonymous; they are sometimes called "immovable" and "movable" property as well.[1] Personal property is also called "chattels," though that term has a problematic history.

For real property, the primary tort is **trespass**. The traditional remedy for trespass is money damages for injuries caused by the trespass. If a landowner hopes to

[1] Classic law school question: what is a mobile home?

have an intruder removed from the land, the cause of action was traditionally called **ejectment**.[2]

For personal property, the tort of **conversion** refers to the wrongdoer taking possession of another's property. The term is commonly used today, and probably originates based on the theory that the wrongdoer has "converted" the property to another use. A less common synonym for conversion is **trover**. If the wrongdoer damages the property without appropriating it, then the action is for **trespass to chattels**. Traditionally, these were both actions for damages, since the property might have been used up, say by being eaten. Recovery of the taken object itself was by the action of **replevin**.

Today, courts have more freedom to award legal and equitable remedies regardless of the phrasing of the complaint—this was the major Civil Procedure reform of 1938. The terminology distinctions are thus generally not controlling. Nevertheless, they are useful terms to know because they will show up in cases and other sources.

Two other terms are important. If there is a dispute over who owns something and a court is called in to decide, that is an action for **quiet title**. Finally, **infringement** is a general-purpose term for any violation of a property right, but it is specifically used to refer to intellectual property violations.

The following table summarizes these torts.

Preferred Remedy	**Type of Property:**	
	Real Property	**Personal Property**
Damages	Trespass	Conversion (or Trover); Trespass to Chattels
Possession	Ejectment	Replevin
Declaration of Rights	Quiet Title	

[2] For historical reasons, ejectment was a cause of action that only a lease tenant could bring, not the actual landowner. As a result, landowners seeking ejectment would (and were allowed to) invent a fictional lessee to be the "plaintiff" in the ejectment case. If you see a case with a caption like *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), that's what the "lessee" was for.

1.2 Limits

Marsh v. Alabama

326 U.S. 501 (1946)

Mr. Justice Black delivered the opinion of the Court.

In this case we are asked to decide whether a State, consistently with the First and Fourteenth Amendments, can impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management. The town, a suburb of Mobile, Alabama, known as Chickasaw, is owned by the Gulf Shipbuilding Corporation. Except for that it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which can not be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.

Appellant, a Jehovah's Witness, came onto the sidewalk we have just described, stood near the post-office and undertook to distribute religious literature. In the stores the corporation had posted a notice which read

as follows: "This Is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted." Appellant was warned that she could not distribute the literature without a permit and told that no permit would be issued to her. She protested that the company rule could not be constitutionally applied so as to prohibit her from distributing religious writings. When she was asked to leave the sidewalk and Chickasaw she declined. The deputy sheriff arrested her and she was charged in the state court with violating Title 14, Section 426 of the 1940 Alabama Code which makes it a crime to enter or remain on the premises of another after having been warned not to do so. Appellant contended that to construe the state statute as applicable to her activities would abridge her right to freedom of press and religion contrary to the First and Fourteenth Amendments to the Constitution. This contention was rejected and she was convicted. The Alabama Court of Appeals affirmed the conviction, holding that the statute as applied was constitutional because the title to the sidewalk was in the corporation and because the public use of the sidewalk had not been such as to give rise to a presumption under Alabama law of its irrevocable dedication to the public. The State Supreme Court denied certiorari, and the case is here on appeal . . . .

Had the title to Chickasaw belonged not to a private but to a municipal corporation and had appellant been arrested for violating a municipal ordinance rather than a ruling by those appointed by the corporation to manage a company-town it would have been clear that appellant's conviction must be reversed. . . . [N]either a state nor a municipality can completely bar the distribution of literature containing religious or political ideas on its streets, sidewalks and public places or make the right to distribute dependent on a flat license tax or permit to be issued by an official who could deny it at will. We have also held that an ordinance completely prohibiting the dissemination of ideas on the city streets can not be justified on the ground that the municipality holds legal title to them. And we have recognized that the preservation of a free society is so far dependent upon the right of each individual citizen to receive such literature as he himself might desire that a municipality could not without jeopardizing that vital individual freedom, prohibit door to door distribution of literature. From these decisions it is clear that had the people of Chickasaw owned all the homes, and all the stores, and all the streets, and all the sidewalks, all those owners together could not have set up a municipal government with suf-

ficient power to pass an ordinance completely barring the distribution of religious literature. Our question then narrows down to this: Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town? For it is the state's contention that the mere fact that all the property interests in the town are held by a single company is enough to give that company power, enforceable by a state statute, to abridge these freedoms.

We do not agree that the corporation's property interests settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We can not accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation . . . .

Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town. The "business block" serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.

Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people

of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.

When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment "lies at the foundation of free government by free men" and we must in all cases "weigh the circumstances and appraise . . . the reasons . . . in support of the regulation of (those) rights." *Schneider v. State*, 308 U.S. 147, 161 (1939). In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute. Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand. The case is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

[Concurring opinion of Justice FRANKFURTER omitted.]

Mr. Justice REED, dissenting.

Former decisions of this Court have interpreted generously the Constitutional rights of people in this Land to exercise freedom of religion, of speech and of the press. It has never been held and is not now by this opinion of the Court that these rights are absolute and unlimited either in respect to the manner or the place of their exercise. What the present decision establishes as a principle is that one may remain on private property against the will of the owner and contrary to the law of the state so long as the only objection to his presence is that he is exercising an asserted right to spread there his religious views. This is the first case to extend by law the privilege of religious exercises beyond public places or to private places without the assent of the owner.

As the rule now announced permits this intrusion, without possibility of protection of the property by law, and apparently is equally applicable

to the freedom of speech and the press, it seems appropriate to express a dissent to this, to us, novel Constitutional doctrine. Of course, such principle may subsequently be restricted by this Court to the precise facts of this case—-that is to private property in a company town where the owner for his own advantage has permitted a restricted public use by his licensees and invitees. Such distinctions are of degree and require new arbitrary lines, judicially drawn, instead of those hitherto established by legislation and precedent. While the power of this Court, as the interpreter of the Constitution to determine what use of real property by the owner makes that property subject, at will, to the reasonable practice of religious exercises by strangers, cannot be doubted, we find nothing in the principles of the First Amendment, adopted now into the Fourteenth, which justifies their application to the facts of this case.

Both Federal and Alabama law permit, so far as we are aware, company towns . . . . These communities may be essential to furnish proper and convenient living conditions for employees on isolated operations in lumbering, mining, production of high explosives and large-scale farming. The restrictions imposed by the owners upon the occupants are sometimes galling to the employees and may appear unreasonable to outsiders. Unless they fall under the prohibition of some legal rule, however, they are a matter for adjustment between owner and licensee, or by appropriate legislation.

Alabama has a statute generally applicable to all privately owned premises. It is Title 14, Section 426, Alabama Code 1940 which so far as pertinent reads as follows:

> Trespass after warning. —Any person who, without legal cause or good excuse, enters into the dwelling house or on the premises of another, after having been warned, within six months preceding, not to do so; or any person, who, having entered into the dwelling house or on the premises of another without having been warned within six months not to do so, and fails or refuses, without legal cause or good excuse, to leave immediately on being ordered or requested to do so by the person in possession, his agent or representative, shall, on conviction, be fined not more than one hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than three months.

Appellant was distributing religious pamphlets on a privately owned passway or sidewalk thirty feet removed from a public highway of the State of Alabama and remained on these private premises after an authorized order to get off. We do not understand from the record that there was objection to appellant's use of the nearby public highway and under our decisions she could rightfully have continued her activities a few feet from the spot she insisted upon using. An owner of property may very well have been willing for the public to use the private passway for business purposes and yet have been unwilling to furnish space for street trades or a location for the practice of religious exhortations by itinerants. The passway here in question was not put to any different use than other private passways that lead to privately owned areas, amusement places, resort hotels or other businesses . . . .

A state does have the moral duty of furnishing the opportunity for information, education and religious enlightenment to its inhabitants, including those who live in company towns, but it has not heretofore been adjudged that it must commandeer, without compensation, the private property of other citizens to carry out that obligation. . . . In the area which is covered by the guarantees of the First Amendment, this Court has been careful to point out that the owner of property may protect himself against the intrusion of strangers. Although in *Martin v. Struthers*, 319 U.S. 141 (1943), an ordinance forbidding the summonsing of the occupants of a dwelling to receive handbills was held invalid because in conflict with the freedom of speech and press, this Court pointed out . . . that after warning the property owner would be protected from annoyance. The very Alabama statute which is now held powerless to protect the property of the Gulf Shipbuilding Corporation, after notice, from this trespass was there cited . . . to show that it would protect the householder, after notice . . . .

Our Constitution guarantees to every man the right to express his views in an orderly fashion. An essential element of "orderly" is that the man shall also have a right to use the place he chooses for his exposition. The rights of the owner, which the Constitution protects as well as the right of free speech, are not outweighed by the interests of the trespasser, even though he trespasses in behalf of religion or free speech. We cannot say that Jehovah's Witnesses can claim the privilege of a license, which has never been granted, to hold their meetings in other private places, merely because the owner has admitted the public to them for other limited pur-

poses. Even though we have reached the point where this Court is required to force private owners to open their property for the practice there of religious activities or propaganda distasteful to the owner, because of the public interest in freedom of speech and religion, there is no need for the application of such a doctrine here. Appellant, as we have said, was free to engage in such practices on the public highways, without becoming a trespasser on the company's property.

The Chief Justice and Mr. Justice Burton join in this dissent.

State of New Jersey v. Shack

58 N.J. 297, 277 A.2d 369 (1971)

Weintraub, C.J.

Defendants entered upon private property to aid migrant farmworkers employed and housed there. Having refused to depart upon the demand of the owner, defendants were charged with violating N.J.S.A. 2A:170—31 which provides that "[a]ny person who trespasses on any lands . . . after being forbidden so to trespass by the owner . . . is a disorderly person and shall be punished by a fine of not more than $50." Defendants were convicted in the Municipal Court of Deerfield Township and again on appeal in the County Court of Cumberland County on a trial *de novo*. We certified their further appeal before argument in the Appellate Division.

Before us, no one seeks to sustain these convictions. The complaints were prosecuted in the Municipal Court and in the County Court by counsel engaged by the complaining landowner, Tedesco. However Tedesco did not respond to this appeal, and the county prosecutor, while defending abstractly the constitutionality of the trespass statute, expressly disclaimed any position as to whether the statute reached the activity of these defendants.

Complainant, Tedesco, a farmer, employs migrant workers for his seasonal needs. As part of their compensation, these workers are housed at a camp on his property.

Defendant Tejeras is a field worker for the Farm Workers Division of the Southwest Citizens Organization for Poverty Elimination, known by the acronym SCOPE, a nonprofit corporation funded by the Office of Economic Opportunity pursuant to an act of Congress, 42 U.S.C. §§ 2861–2864.

The role of SCOPE includes providing for the "health services of the migrant farm worker."

Defendant Shack is a staff attorney with the Farm Workers Division of Camden Regional Legal Services, Inc., known as "CRLS," also a nonprofit corporation funded by the Office of Economic Opportunity pursuant to an act of Congress, 42 U.S.C.A. § 2809(a)(3). The mission of CRLS includes legal advice and representation for these workers.

Differences had developed between Tedesco and these defendants prior to the events which led to the trespass charges now before us. Hence when defendant Tejeras wanted to go upon Tedesco's farm to find a migrant worker who needed medical aid for the removal of 28 sutures, he called upon defendant Shack for his help with respect to the legalities involved. Shack, too, had a mission to perform on Tedesco's farm; he wanted to discuss a legal problem with another migrant worker there employed and housed. Defendants arranged to go to the farm together. Shack carried literature to inform the migrant farmworkers of the assistance available to them under federal statutes, but no mention seems to have been made of that literature when Shack was later confronted by Tedesco.

Defendants entered upon Tedesco's property and as they neared the camp site where the farmworkers were housed, they were confronted by Tedesco who inquired of their purpose. Tejeras and Shack stated their missions. In response, Tedesco offered to find the injured worker, and as to the worker who needed legal advice, Tedesco also offered to locate the man but insisted that the consultation would have to take place in Tedesco's office and in his presence. Defendants declined, saying they had the right to see the men in the privacy of their living quarters and without Tedesco's supervsion. Tedesco thereupon summoned a State Trooper who, however, refused to remove defendants except upon Tedesco's written complaint. Tedesco then executed the formal complaints charging violations of the trespass statute.

I.

The constitutionality of the trespass statute, as applied here, is challenged on several scores.

It is urged that the First Amendment rights of the defendants and of the migrant farmworkers were thereby offended. Reliance is placed on *Marsh v. Alabama*, 326 U.S. 501 (1946) [and its progeny.] Those cases rest upon the

fact that the property was in fact opened to the general public. There may be some migrant camps with the attributes of the company town in *Marsh* and of course they would come within its holding. But there is nothing of that character in the case before us, and hence there would have to be an extension of *Marsh* to embrace the immediate situation.

Defendants also maintain that the application of the trespass statute to them is barred by the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, and this on the premise that the application of the trespass statute would defeat the purpose of the federal statutes, under which SCOPE and CRLS are funded, to reach and aid the migrant farmworker. . . .

These constitutional claims are not established by any definitive holding. We think it unnecessary to explore their validity. The reason is that we are satisfied that under our State law the ownership of real property does not include the right to bar access to governmental services available to migrant workers and hence there was no trespass within the meaning of the penal statute. The policy considerations which underlie that conclusion may be much the same as those which would be weighed with respect to one or more of the constitutional challenges, but a decision in nonconstitutional terms is more satisfactory, because the interests of migrant workers are more expansively served in that way than they would be if they had no more freedom than these constitutional concepts could be found to mandate if indeed they apply at all.

II.

Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law. Indeed the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity.

Here we are concerned with a highly disadvantaged segment of our society. We are told that every year farmworkers and their families numbering more than one million leave their home areas to fill the seasonal demand for farm labor in the United States. The migrant farmworkers come to New Jersey in substantial numbers. . . . The migrant farmworkers are a community within but apart from the local scene. They are rootless and

isolated. Although the need for their labors is evident, they are unorganized and without economic or political power. It is their plight alone that summoned government to their aid. In response, Congress provided under Title III—B of the Economic Opportunity Act of 1964 (42 U.S.C.A. § 2701 et seq.) for "assistance for migrant and other seasonally employed farmworkers and their families." . . . As we have said, SCOPE is engaged in a program funded under this section, and CRLS also pursues the objectives of this section although, we gather, it is funded under s 2809(a)(3), which is not limited in its concern to the migrant and other seasonally employed farmworkers and seeks "to further the cause of justice among persons living in poverty by mobilizing the assistance of lawyers and legal institutions and by providing legal advice, legal representation, counseling, education, and other appropriate services."

These ends would not be gained if the intended beneficiaries could be insulated from efforts to reach them. It is in this framework that we must decide whether the camp operator's rights in his lands may stand between the migrant workers and those who would aid them. . . .

A man's right in his real property of course is not absolute. It was a maxim of the common law that one should so use his property as not to injure the rights of others. Broom, Legal Maxims (10th ed. Kersley 1939), p. 238; 39 Words and Phrases, "Sic Utere Tuo ut Alienum Non Laedas," p. 335. Although hardly a precise solvent of actual controversies, the maxim does express the inevitable proposition that rights are relative and there must be an accommodation when they meet. Hence it has long been true that necessity, private or public, may justify entry upon the lands of another . . . .

We see no profit in trying to decide upon a conventional category and then forcing the present subject into it. That approach would be artificial and distorting. The quest is for a fair adjustment of the competing needs of the parties, in the light of the realities of the relationship between the migrant worker and the operator of the housing facility.

Thus approaching the case, we find it unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker's well-being. The farmer, of course, is entitled to pursue his farming activities without interference, and this defendants readily concede. But we see no legitimate need for a right in the farmer to deny the worker the opportunity for aid available from federal, State, or local services, or from recognized charitable groups seeking to assist him.

Hence representatives of these agencies and organizations may enter upon the premises to seek out the worker at his living quarters. So, too, the migrant worker must be allowed to receive visitors there of his own choice, so long as there is no behavior hurtful to others, and members of the press may not be denied reasonable access to workers who do not object to seeing them.

It is not our purpose to open the employer's premises to the general public if in fact the employer himself has not done so. We do not say, for example, that solicitors or peddlers of all kinds may enter on their own; we may assume or the present that the employer may regulate their entry or bar them, at least if the employer's purpose is not to gain a commercial advantage for himself or if the regulation does not deprive the migrant worker of practical access to things he needs.

And we are mindful of the employer's interest in his own and in his employees' security. Hence he may reasonably require a visitor to identify himself, and also to state his general purpose if the migrant worker has not already informed him that the visitor is expected. But the employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens. These rights are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties.

It follows that defendants here invaded no possessory right of the farmer-employer. Their conduct was therefore beyond the reach of the trespass statute. The judgments are accordingly reversed and the matters remanded to the County Court with directions to enter judgments of acquittal.

Notes and Questions

1.5. Why did the property owner win in *Jacque* but lose in *Marsh* and *Shack*? Isn't the property right at issue in each of these cases the same—i.e., isn't it the right to *exclude*?

1.6. What types of competing principles, policies, or interests will justify a limit on the right to exclude? Who should decide when such a limit is justified, and how? Who decided in *Marsh*? In *Shack*?

1.7. While *Shack* presents a limitation on the right to exclude by judicial analysis, legislatures can also limit the right to exclude by statute. The Civil Rights Act of 1964, for example, provides:

> All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

The term "place of public accommodation" includes hotels, restaurants, theaters, and entertainment venues, among other places, but excludes any "private club or other establishment not in fact open to the public." 42 U.S.C. § 2000a.

Similarly, the Americans with Disabilities Act of 1990 prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." In addition to this restriction on the right to exclude, the statute requires covered property owners to take affirmative steps to make their facilities accessible. 42 U.S.C. §§ 12182–12183.

One way of thinking of these statutes is that they are interventions to the property right to exclude, serving different normative values like equality and nondiscrimination that otherwise conflict with property ownership. Is that conflict necessary? Could you imagine a concept of "property" that incorporates these values?

1.3 Intellectual Property

Campbell v. Acuff-Rose Music, Inc.

510 U.S. 569 (1994)

JUSTICE SOUTER delivered the opinion of the Court.

We are called upon to decide whether 2 Live Crew's commercial parody of Roy Orbison's song, "Oh, Pretty Woman," may be a fair use within the meaning of the Copyright Act of 1976, 17 U. S. C. § 107 . . . .

I

In 1964, Roy Orbison and William Dees wrote a rock ballad called "Oh, Pretty Woman" and assigned their rights in it to respondent Acuff-Rose

Music, Inc. See Appendix A, *infra*, at 594. Acuff-Rose registered the song for copyright protection.

Petitioners Luther R. Campbell, Christopher Wongwon, Mark Ross, and David Hobbs are collectively known as 2 Live Crew, a popular rap music group. In 1989, Campbell wrote a song entitled "Pretty Woman," which he later described in an affidavit as intended, "through comical lyrics, to satirize the original work . . . ." [Negotiations between 2 Live Crew and Acuff-Rose failed.]

Almost a year later, after nearly a quarter of a million copies of the recording had been sold, Acuff-Rose sued 2 Live Crew and its record company, Luke Skyywalker Records, for copyright infringement. . . .

II

It is uncontested here that 2 Live Crew's song would be an infringement of Acuff-Rose's rights in "Oh, Pretty Woman," under the Copyright Act of 1976, but for a finding of fair use through parody. From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, "[t]o promote the Progress of Science and useful Arts . . . ." U. S. Const., Art. I, § 8, cl. 8.[6] For as Justice Story explained, "[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." *Emerson* v. *Davies*, 8 F. Cas. 615, 619 (No. 4,436) (CCD Mass. 1845). . . .

In *Folsom* v. *Marsh*, 9 F. Cas. 342 (No. 4,901) (CCD Mass. 1841), Justice Story distilled the essence of law and methodology from the earlier cases: "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work." Thus expressed, fair use remained exclusively judge-made doctrine until the passage of the 1976 Copyright Act, in which Justice Story's summary is discernible:

§ 107. Limitations on exclusive rights: Fair use

[6]The exclusion of facts and ideas from copyright protection serves that goal as well. See *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 499 U. S. 340, 359 (1991) . . . .

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U. S. C. § 107.

Congress meant § 107 "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way" and intended that courts continue the common-law tradition of fair use adjudication. The fair use doctrine thus permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.

The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. . . .[11]

[11]Because the fair use enquiry often requires close questions of judgment as to the extent of permissible borrowing in cases involving parodies (or other critical works), courts may also wish to bear in mind that the goals of the copyright law, to stimulate the creation and publication of edifying matter, are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use.

A

The first factor in a fair use enquiry is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." The central purpose of this investigation is to see whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990). Such works lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use. . . .

The germ of parody lies in the definition of the Greek *parodeia*, quoted in Judge Nelson's Court of Appeals dissent, as "a song sung alongside another." Modern dictionaries accordingly describe a parody as a "literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule," or as a "composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous." For the purposes of copyright law, the nub of the definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works. If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger. Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.[16]

[16]Satire has been defined as a work "in which prevalent follies or vices are assailed with ridicule," or are "attacked through irony, derision, or wit."

The fact that parody can claim legitimacy for some appropriation does not, of course, tell either parodist or judge much about where to draw the line. Like a book review quoting the copyrighted material criticized, parody may or may not be fair use, and petitioners' suggestion that any parodic use is presumptively fair has no more justification in law or fact than the equally hopeful claim that any use for news reporting should be presumed fair, The Act has no hint of an evidentiary preference for parodists over their victims, and no workable presumption for parody could take account of the fact that parody often shades into satire when society is lampooned through its creative artifacts, or that a work may contain both parodic and nonparodic elements. Accordingly, parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.

. . . . The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived. Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use. As Justice Holmes explained, "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke." *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239, 251 (1903) . . . .

While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree. 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naivete of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies. It is this joinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.

The Court of Appeals, however, immediately cut short the enquiry into 2 Live Crew's fair use claim by confining its treatment of the first factor essentially to one relevant fact, the commercial nature of the use. . . . [But] the

language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character. . . . The mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness. If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities "are generally conducted for profit in this country." Congress could not have intended such a rule . . . .

B

The second statutory factor, "the nature of the copyrighted work," . . . calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied. We agree with both the District Court and the Court of Appeals that the Orbison original's creative expression for public dissemination falls within the core of the copyright's protective purposes. This fact, however, is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.

C

The third factor asks whether "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." . . . Here, attention turns to the persuasiveness of a parodist's justification for the particular copying done, and the enquiry will harken back to the first of the statutory factors, for, as in prior cases, we recognize that the extent of permissible copying varies with the purpose and character of the use. . . .

Parody presents a difficult case. Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to "conjure up" at least enough of that original to make the object of its critical wit recognizable. What makes

for this recognition is quotation of the original's most distinctive or memorable features, which the parodist can be sure the audience will know. Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original. But using some characteristic features cannot be avoided.

. . . .

Suffice it to say here that, as to the lyrics, we think the Court of Appeals correctly suggested that no more was taken than necessary, but just for that reason, we fail to see how the copying can be excessive in relation to its parodic purpose, even if the portion taken is the original's heart. As to the music, we express no opinion whether repetition of the [original song's] bass riff is excessive copying, and we remand to permit evaluation of the amount taken, in light of the song's parodic purpose and character, its transformative elements, and considerations of the potential for market substitution sketched more fully below.

D

The fourth fair use factor is the effect of the use upon the potential market for or value of the copyrighted work. It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original. The enquiry must take account not only of harm to the original but also of harm to the market for derivative works.

. . . When a commercial use amounts to mere duplication of the entirety of an original, it clearly supersedes the objects of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur. But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred. Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it. This is so because the parody and the original usually serve different market functions.

We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. . . . This distinction between potentially remediable displacement and unremediable disparagement is reflected in the rule that there is no protectible derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market. . . .[23]

[Here,] 2 Live Crew's song comprises not only parody but also rap music, and the derivative market for rap music is a proper focus of enquiry. Evidence of substantial harm to it would weigh against a finding of fair use, because the licensing of derivatives is an important economic incentive to the creation of originals. Of course, the only harm to derivatives that need concern us, as discussed above, is the harm of market substitution. The fact that a parody may impair the market for derivative uses by the very effectiveness of its critical commentary is no more relevant under copyright than the like threat to the original market.

[The Court remanded the case to determine whether 2 Live Crew's song harmed "the market for a non-parody rap version" of the original song, and for further determinations on other issues identified above. Justice Kennedy's concurrence is omitted.]

Notes and Questions

1.8. The Supreme Court's original opinion contained an appendix reprinting the lyrics of both the original Roy Orbison song and 2 Live Crew's version. They are omitted from the text to save space, but are worth a look if you're interested.

Was it copyright infringement for the Court to reprint the lyrics? Try applying the fair use doctrine.

1.9. As this case makes clear, copyright protection can exclude not just exact copies of a work, but also "derivative works" like translations, movie adaptations,

[23]We express no opinion as to the derivative markets for works using elements of an original as vehicles for satire or amusement, making no comment on the original or criticism of it.

summaries, or sequels. That copyright protection extends beyond exact copying ought to be intuitive: Others should not be able to get around a copyright just by changing a few words or paint strokes. But it presents a tremendous boundary problem for copyright. How does one know where infringement ends and permissible uses begin? What's the difference between plagiarism and research?

The answer to the copyright boundary question is a complex mix of statutory and case law, which is beyond the scope of a survey text on property. But what does the vagueness of copyright boundaries tell you about copyright as a species of property? Are property boundaries similarly vague for other types of property? Should uncertainty about how far any given copyright reaches affect the right to exclude?

1.10. The fair use doctrine has been used in a wide range of seemingly unrelated situations. Consider the following activities that courts have considered fair use:

- Recording a television show to videocassette, in order to watch it later. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).
- Libraries scanning and digitizing books for full-text searching and accessibility for print-disabled patrons. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).
- Replicating key parts of a copyright-protected package of computer software, in order to make it easier for third-party programmers to switch from one software package to the other one. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021).
- Collecting student essays to build a plagiarism detection system. *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

1.11. In patent law, if a patent holder is denied injunctive relief, it is still possible for a court to award a "reasonable royalty" payment. If a copyright holder cannot exclude another's use due to the fair use doctrine, should the copyright holder receive a reasonable royalty or other compensation for the use?

1.12. Copyright law's right to exclude proscribes speech. Why doesn't copyright run afoul of the First Amendment? In *Golan v. Holder*, the Supreme Court observed that the fair use doctrine helps to resolve the tension between copyright law and freedom of speech. *See* 565 U.S. 302 (2012). Similarly, in *Marsh*, we saw how the right to exclude from real property can conflict with the First Amendment. What other constitutional rights might come into conflict with intellectual property rights, or property rights generally?

1.13. In several of the footnotes, Justice Souter carefully distinguishes parody, which (roughly) mocks the original work, from satire, which (again roughly) uses a spin on the original work to make other commentary. What do you think of this distinction? Should satire be fair use? Should it be within the scope of a copyright holder's right to exclude?

Consider, in particular, the mashup book *Oh, the Places You'll Boldly Go!*, which cast the classic Dr. Seuss picture book *Oh, the Places You'll Go!* in combination with elements from the television show *Star Trek*. The Ninth Circuit appellate court held the mashup not to be fair use. *See Dr. Seuss Enters., LP v. ComicMix LLC*, 983 F.3d 443 (9th Cir. 2020). Do you agree? What justifications or theories of property ownership explain the estate of Dr. Seuss wielding veto power over mashups? Are there countervailing policy concerns?

Chapter 2

Possession of Personal Property

Property ownership is distinct from physical **possession**. Someone other than the owner of land may be standing on it, occupying space and preventing the owner from using the land; someone other than the owner of personal property may be holding it, preventing the owner from accessing and using it. This other person may possess the property with permission from the owner, against the owner's will, or without the owner's knowledge.

Physical possession may seem irrelevant for property law—after all, isn't the whole point of the rule of law that legal rights, not physical might, are determinative? And yet possession alone can, in some situations, give rise to legal rights over things, rights that can properly be deemed "property rights." With respect to land, physical possession in the right conditions can turn into actual ownership by the doctrine of adverse possession.[1] And the story for personal property is even more interesting, because of the number of ways in which movable items can come into someone else's possession. They can be lost, found, borrowed, stored, stolen, mixed up with other things, and more.

This chapter will consider three ways in which possession can give rise to property rights in personalty: finding lost items, improvements, and bailment arrangements such as lending. In each of these situations, identify the circumstances that give the physical possessor rights, what rights the possessor has, and against whom those rights apply. What legal relationship does the possessor have with respect to the true owner, and what rights does the possessor have against third parties?

[1] Adverse possession of personal property is also possible, though somewhat more complicated. *See O'Keeffe v. Snyder*, 416 A.2d 862 (N.J. 1980).

2.1 Finders

Finders keepers, losers weepers?

Armory v. Delamirie

(1722) 1 Strange 505, 93 Eng. Rep. 664 (K.B.)

The plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect.

3. As to the value of the jewel several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.

Notes and Questions

2.1. One way of describing the holding of *Armory* is that it sets out the rights of **finders**. Suppose that the "rightful owner" of the jewel, Lord Hobnob, had shown up in the shop while the chimney-sweep and the apprentice were arguing over the jewel. Who would have been entitled to the jewel? If the chimney-sweep is not the "rightful owner," why does he still win the case? What kind of interest does he have in the jewel?

2.2. A second way of describing of describing the holding of *Armory* is that it illustrates **relativity of title**. As between the plaintiff and the defendant, the party

with the relatively better claim to title wins, even if their title is in some sense defective in an absolute sense. Relativity of title is intimately connected to the idea of "chains of title": competing claimants to a piece of property each do their best to trace their claims back to a rightful source. What is the source of the chimney-sweep's claim to the jewel? And the jeweler's? Does this explain the outcome of the case? What result if the jeweler had proven that he had signed a contract to purchase the jewel from Lord Hobnob but that Lord Hobnob had lost the jewel before delivering it?

2.3. A third way of describing the holding of *Armory* is that it rejects the jeweler's attempt to assert a *jus tertii* (Latin for "right of a third party") defense. The defendant cannot defeat the plaintiff's otherwise-valid claim to the jewel by arguing that a third party—Lord Hobnob—has an even better claim. Put differently, we might say that "as against a wrongdoer, possession is title." *Jeffries v. Great W. Ry. Co.*, (1856) 119 Eng. Rep. 680, 681 (Q.B.). Does this narrowing of focus to the parties before the court make sense?

Here is one way to think about it. Suppose that Lord Hobnob shows up in court while *Armory* is being argued and explains that the jewel slipped from his finger while he was strolling in Lincoln's Inn Fields. Who is entitled to the jewel? What if Lord Hobnob shows up and explains that he tossed the jewel aside in the mud, saying "I have become tired of this bauble; it bores me and I no longer wish to have it." What if he explains that he handed it to the chimney-sweep, saying "I wish you to have this jewel; may it serve you better than it has me." But recall that in the actual case, Lord Hobnob was nowhere to be found; no one even knew his identity. Does it matter to the outcome of *Armory v. Delamirie* how the jewel passed from Lord Hobnob's hands to the chimney-sweep's?

If you are still not convinced, consider this. If the jeweler could set up Lord Hobnob's title to show that the chimney-sweep's title was defective, would the chimney-sweep be entitled to present evidence that Lord Hobnob's title was defective, say because Lord Hobnob stole the jewel from a visiting Frenchman in 1693? Cutting off inquiry into third parties' claims also helps cut off inquiry into old claims. Can you see why this might be an appealing choice for a system of property law?

2.4. We are not quite done with Lord Hobnob. Consider the remedy the plaintiff obtains: an award of the value of the jewel, rather than the jewel itself. This is in effect a forced sale of the jewel, which the defendant can keep after paying the plaintiff's damage award. *Now* who owns the jewel? What if Lord Hobnob shows up now? Can he also bring trover, and if so, will the jeweler be forced to pay out a second time? In fact, why is Paul de Lamerie, the goldsmith whose name the court

mangles, on the hook for his apprentice's wrongdoing? What if the apprentice pocketed the jewel and never turned it over to the master?

2.5. About that damage award. Why is the jury instructed to presume that the jewel was "of the finest water?" (i.e. highest quality)?

Other Variations on *Armory*

Just how far does the holding of *Armory v. Delamirie* ("That the finder of [property], though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner") go? Consider three nineteenth-century cases about lost lumber. Are they required by *Armory*? Consistent with *Armory*? Consistent with each other? Which is most persuasive?

In *Clark v. Maloney*, 3 Del. 68 (1840), the plaintiff found ten logs floating in a bay after a storm. He tied them up in the mouth of a creek, but they (apparently) got free again and the defendants (apparently) found them floating up the creek. *Held*, the plaintiffs were entitled to the logs:

> Possession is certainly prima facie evidence of property. It is called *prima facie* evidence because it may be rebutted by evidence of better title, but in the absence of better title it is as effective a support of title as the most conclusive evidence could be. It is for this reason, that *the finder of a chattel, though he does not acquire an absolute property in it, yet has such a property, as will enable him to keep it against all but the rightful owner.* The defence consists, not in showing that the defendants are the rightful owners, or claim under the rightful owner; but that the logs were found by them adrift in Mispillion creek, having been loosened from their fastening either by accident or design, and they insist that their title is as good as that of the plaintiff. But it is a well settled rule of law that the loss of a chattel does not change the right of property; and for the same reason that the original loss of these logs by the rightful owner, did not change his absolute property in them, but he might have maintained trover against the plaintiff upon refusal to deliver them, so the subsequent loss did not divest the *special* property of the plaintiff. It follows, therefore, that as the plaintiff has shown a special property in

> these logs, which he never abandoned, and which enabled him to keep them against all the world but the rightful owner, he is entitled to a verdict.

In *Anderson v. Gouldberg*, 53 N.W. 636 (Minn. 1892), the defendants took ninety-three logs from the plaintiff's mill. The defendants claimed that the plaintiff had cut the logs on their land, but the plaintiff replied (and a jury agreed) that he had actually cut the logs by trespassing on the land of a third party. *Held*: the plaintiff was entitled to the logs:

> Therefore the only question is whether bare possession of property, though wrongfully obtained, is sufficient title to enable the party enjoying it to maintain replevin against a mere stranger, who takes it from him. We had supposed that this was settled in the affirmative as long ago, at least, as the early case of *Armory v. Delamirie*, so often cited on that point. When it is said that to maintain replevin the plaintiff's possession must have been lawful, it means merely that it must have been lawful as against the person who deprived him of it; and possession is good title against all the world except those having a better title. Counsel says that possession only raises a presumption of title, which, however, may be rebutted. Rightly understood, this is correct; but counsel misapplies it. One who takes property from the possession of another can only rebut this presumption by showing a superior title in himself, or in some way connecting himself with one who has. One who has acquired the possession of property, whether by finding, bailment, or by mere tort, has a right to retain that possession as against a mere wrongdoer who is a stranger to the property. Any other rule would lead to an endless series of unlawful seizures and reprisals in every case where property had once passed out of the possession of the rightful owner.

Anderson states what is overwhelmingly the majority rule. Seven years after *Anderson*, North Carolina took the opposite course. In *Russell v. Hill*, 34 S.E. 640 (N.C. 1899), two different people held what appeared to be state grants to the same tract of land, and the plaintiff cut timber on the land with the wrong one's permission. While the logs were floating in a river, the defendants—unconnected with either of

the purported landowners—took them away and sold them. *Held*: the defendants were entitled to the logs (internal quotation marks omitted):

> In some of the English books, and in some of the Reports of our sister states, cases might be found to the contrary, but that those cases were all founded upon a misapprehension of the principle laid down in the case of *Armory v. Delamirie*. There a chimney sweep found a lost jewel. He took it into his possession, as he had a right to do, and was the owner, because of having it in possession, unless the true owner should become known. That owner was not known, and it was properly decided that trover would lie in favor of the finder against the defendant, to whom he had handed it for inspection, and who refused to restore it. But the court said the case would have been very different if the owner had been known.

Is this an accurate reading of *Armory*? The court also expressed concern about the defendant's potential liability to the true owner:

> It is true that, as possession is the strongest evidence of the ownership, property may be presumed from possession. . . . But if it appears on the trial that the plaintiff, although in possession, is not in fact the owner, the presumption of title inferred from the possession is rebutted, and it would be manifestly wrong to allow the plaintiff to recover the value of the property; for the real owner may forthwith bring trover against the defendant, and force him to pay the value the second time, and the fact that he paid it in a former suit would be no defense. Consequently trover can never be maintained unless a satisfaction of the judgment will have the effect of vesting a good title in the defendant.

Is the fear of double liability sufficient reason to allow the defendant to escape liability entirely? Based on a review of the court records in the case, John V. Orth writes that the true owner in *Russell v. Hill* was "no bodiless abstraction but had in fact a name and identity: [Fabius Haywood] Busbee, one of the state's leading lawyers, a man well known to every member of the supreme court that decided the case." John V. Orth, Russell v. Hill *(N.C. 1899): Misunderstood Lessons*, 73 N.C. L. REV. 2031, 2034 (1995). Does this help explain *Russell*?

Professor Orth, arguing for a middle ground between *Anderson* and *Russell*, argues that *Armory* should protect only prior possessors who took the property in good faith: "A technical wrongdoing, such as an innocent trespass, as the source of possession should not disable the possessor from securing judicial protection against an unauthorized taking, but a willful trespass at the root of title should. Plaintiff in *Russell*, in other words, deserved a new trial at which to show, not his title, but his *bona fides*." *Id.* at 2060. Is this a better rule?

McAvoy v. Medina

93 Mass. (11 Allen) 548 (1866)

Tort to recover a sum of money found by the plaintiff in the shop of the defendant.

[I]t appeared that the defendant was a barber, and the plaintiff, being a customer in the defendant's shop, saw and took up a pocket-book which was lying upon a table there, and said, "See what I have found." The defendant came to the table and asked where he found it. The plaintiff laid it back in the same place and said, "I found it right there." The defendant then took it and counted the money, and the plaintiff told him to keep it, and if the owner should come to give it to him; and otherwise to advertise it; which the defendant promised to do. Subsequently the plaintiff made three demands for the money, and the defendant never claimed to hold the same till the last demand. It was agreed that the pocket-book was placed upon the table by a transient customer of the defendant and accidentally left there, and was first seen and taken up by the plaintiff, and that the owner had not been found. . . .

Dewey, J.

It seems to be the settled law that the finder of lost property has a valid claim to the same against all the world except the true owner, and generally that the place in which it is found creates no exception to this rule.

But this property is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This property was voluntarily placed upon a table in the defendant's shop by a customer of his who accidentally left the same there and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the

shop, but it was rather the duty of the defendant, when the fact became thus known to him, to use reasonable care for the safe keeping of the same until the owner should call for it. In the case of *Bridges v. Hawkesworth*, 7 Eng. Law & Eq. R. 424, the property, although found in a shop, was found on the floor of the same, and had not been placed there voluntarily by the owner, and the court held that the finder was entitled to the possession of the same, except as to the owner. But the present case more resembles that of *Lawrence v. The State*, 1 Humph. (Tenn.) 228, and is indeed very similar in its facts. The court there take a distinction between the case of property thus placed by the owner and neglected to be removed, and property lost. It was there held that "to place a pocket-book upon a table and to forget to take it away is not to lose it, in the sense in which the authorities referred to speak of lost property."

We accept this as the better rule, and especially as one better adapted to secure the rights of the true owner.

In view of the facts of this case, the plaintiff acquired no original right to the property, and the defendant's subsequent acts in receiving and holding the property in the manner he did does not create any.

Notes and Questions

2.6. In *Lawrence v. State*, on which *McAvoy* relies, the customer did come back for his lost pocketbook containing $480 in bank notes, which he had left on a table while the barber went out to make change. To quote the court: "The barber left the shop to get the bill changed, and, a fight occurring in the streets, the [customer's] attention was arrested thereat and he left the shop, his pocket-book lying on the table." When he returned, the barber "denied all knowledge of the pocket-book" but then "expended [the bank notes] in the purchase of confections, etc." A criminal prosecution for grand larceny followed, and the barber argued that the pocketbook had been lost because larceny only applies when the defendant takes property from the possession of the victim. The court held that because the pocketbook on a table was merely **mislaid**, rather than "lost," it was still within the customer's "constructive possession." First of all, is this plausible? And second, is this a good fit for the facts of *McAvoy*?

2.7. By way of contrast, in *Bridges v. Hawkesworth*, which *McAvoy* distinguishes, the plaintiff found a small parcel on the floor of the defendant's shop and immediately showed it to the defendant's employee. The parcel contained bank notes; the

plaintiff "requested the defendant to deliver them to the owner." Three years later, with no owner having returned, the court held the plaintiff as finder was entitled to the notes. "If the notes had been accidentally kicked into the street, and then found by someone passing by, could it be contended that the defendant was entitled to them, from the mere fact of their having been dropped in his shop? . . . Certainly not. The notes were never in the custody of the defendant, nor within the protection of his house before they were found, as they would have had they been intentionally deposited there, and the defendant has come under no responsibility." First, what do you make of the *Bridges* court's argument that the shopkeeper's entitlement to the notes should turn on whether he would have been held responsible to the true owner for losing them? And second, is this any better a fit for the facts of *McAvoy*?

2.8. What do you make of the argument that awarding the pocket-book to the shopkeeper is "one better adapted to secure the rights of the true owner?"

2.9. In addition to lost and mislaid property, there is also abandoned property: property which the owner has voluntarily relinquished with no intent to reclaim. Since abandoned property is again unowned, the usual rules of first possession apply. (These rules themselves are not as simple as "first possessor wins."). How easy is it to tell the three apart? Why?

2.10. In *Benjamin v. Lindner Aviation*, 534 N.W.2d 400 (Iowa 1995) in which an airplane inspector found $18,000 in cash inside the wing of an airplane in 1992 while the plane was parked in his employer's hangar for maintenance. The money, which consisted primarily of $20 bills dating to the 1950s and 1960s, was in two four-inch packets wrapped in handkerchiefs and tied with string and then wrapped again in aluminum foil. The packets were inserted behind a panel on the underside of the plane's wing; the panel was secured with rusty screws that had not been removed in several years. The inspector, the employer, and the bank that owned the plane (after repossessing it from a prior owner who had defaulted on a loan) all made claims to the money. Was it lost, mislaid, or abandoned, and who was entitled to it?

2.11. Another category sometimes mentioned in the found-property caselaw is treasure trove: money, gold, or silver intentionally placed underground, which is found long enough later that it is likely the owner is dead or will never return for it. At common law in England, treasure trove belonged to the King. Most American states now treat treasure trove like any other found property. Is this a sensible rejection of an archaic and pointless quirk of the common-law, or was there something to the doctrine?

2.12. In *Hannah v. Peel*, [1945] K.B. 509, the British government requisitioned Gwernhaylod House in 1940 for use during World War II and paid the owner, Major

Hugh Edward Ethelston Peel £250 per year. The house had been conveyed to Major Peel in 1938 but it was unoccupied from then until when it was requisitioned. Duncan Hannah, a lance-corporal with the Royal Artillery, was stationed in the house and was adjusting a blackout curtain in August 1940 when he found something loose in a crevice on top of the window-frame. It turned out to be a brooch covered in cobwebs and dirt; he informed his commanding officer and then turned it over to the police. Two years later, the police gave it to Major Peel, who sold it for £66. Lance-Corporal Hannah sued and was awarded the value of the brooch. The court discussed numerous cases, including *Bridges v. Hawkesworth* and *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q.B. 44, which awarded two rings found by a workman embedded in the mud at the bottom of a pool to the company that owned the land. From them, it extracted a rule that "a man possesses everything which is attached to or under his land." Since Major Peel "was never physically in possession of these premises" and hence had no "prior possession" of the brooch, Lance-Corporal Hannah was entitled to it as a finder. Is this possession-based approach a better way of analyzing found-property cases than the categorical lost-vs-mislaid American approach exemplified by *McAvoy*? Or is *Hannah* an oddball outlier driven by the court's desire to do right by a wartime serviceman "whose conduct was commendable and meritorious," especially as against an absentee landlord from the local gentry?

2.2 Improvers

A chimney-sweep finds a jewel. He gives it to his friend, a jeweler, who designs and crafts a gold ring around the jewel's unique shape. One day, Jeremiah Hobnob recognizes the jewel he lost last month and demands it back. As against the chimney-sweep, this is an easy case; nowhere near enough time has passed to satisfy the statute of limitations, even in a jurisdiction that imposes a stringent duty of diligent search on owners. But the question is more difficult with respect to the jeweler, who has invested gold and labor to turn the jewel into a ring. If Hobnob is entitled to the now-improved jewel, the jeweler will end up poorer, while Hobnob will receive a windfall.

The common law mitigated the harshness of this result with the rule of **accession**, which provides that someone who sufficiently improves another person's property is allowed to keep it. Importantly, the hornbook rule is that accession only operates in favor of *good faith* improvers; someone who knows the property is not hers acts at her own peril when she combines it with her own property or labor. The

jeweler is potentially protected by accession. Also, observe that while ownership of the property may be the primary question in these cases, it is often not the only issue. Once ownership is allocated, courts often require restitutionary payments to shift losses from more innocent to more culpable parties.

Wetherbee v. Green

22 Mich. 311 (1871)

This was an action of replevin, brought by George Green, Charles H. Camp and George Brooks, in the circuit court for the county of Bay, against George Wetherbee, for one hundred and fifty-eight thousand black ash barrel-hoops, alleged to be of the value of eight hundred dollars. . . .

Cooley, J.:

The defendants in error replevied of Wetherbee a quantity of hoops, which he had made from timber cut upon their land. Wetherbee defended the replevin suit on two grounds. First, he claimed to have cut the timber under a license from one Sumner, who was formerly tenant in common of the land with Green, and had been authorized by Green to give such license. [This defense failed; Sumner was not authorized to let Wetherbee cut timber on the land.]

But if the court should be against him on this branch of the case, Wetherbee claimed further that replevin could not be maintained for the hoops, because he had cut the timber in good faith, relying upon a permission which he supposed proceeded from the parties having lawful right to give it, and had, by the expenditure of his labor and money, converted the trees into chattels immensely more valuable than they were as they stood in the forest, and thereby he had made such chattels his own. And he offered to show that the standing timber was worth twenty-five dollars only, while the hoops replevied were shown by the evidence to be worth near seven hundred dollars; also [facts tending to show Wetherbee's lack of knowledge of Sumner's duplicity]. The evidence offered to establish these facts was rejected by the court, and the plaintiffs obtained judgment.

The principal question which, from this statement, appears to be presented by the record, may be stated thus: Has a party who has taken the property of another in good faith, and in reliance upon a supposed right, without intention to commit wrong, and by the expenditure of his money or labor, worked upon it so great a transformation as that which this timber

underwent in being transformed from standing trees into hoops, acquired such a property therein that it cannot be followed into his hands and reclaimed by the owner of the trees in its improved condition?

The objections to allowing the owner of the trees to reclaim the property under such circumstances are, that it visits the involuntary wrong-doer too severely for his unintentional trespass, and at the same time compensates the owner beyond all reason for the injury he has sustained. In the redress of private injuries the law aims not so much to punish the wrong-doer as to compensate the sufferer for his injuries; and the cases in which it goes farther and inflicts punitory or vindictive penalties are those in which the wrong-doer has committed the wrong recklessly, willfully, or maliciously, and under circumstances presenting elements of aggravation. Where vicious motive or reckless disregard of right are not involved, to inflict upon a person who has taken the property of another, a penalty equal to twenty or thirty times its value, and to compensate the owner in a proportion equally enormous, is so opposed to all legal idea of justice and right and to the rules which regulate the recovery of damages generally, that if permitted by the law at all, it must stand out as an anomaly and must rest upon peculiar reasons.

As a general rule, one whose property has been appropriated by another without authority has a right to follow it and recover the possession from any one who may have received it; and if, in the mean time, it has been increased in value by the addition of labor or money, the owner may, nevertheless, reclaim it, provided there has been no destruction of substantial identity. So far the authorities are agreed. A man cannot generally be deprived of his property except by his own voluntary act or by operation of law; and if unauthorized parties have bestowed expense or labor upon it, that fact cannot constitute a bar to his reclaiming it, so long as identification is not impracticable. But there must, nevertheless, in reason be some limit to the right to follow and reclaim materials which have undergone a process of manufacture. Mr. Justice Blackstone lays down the rule very broadly, that if a thing is changed into a different species, as by making wine out of another's grapes, oil from his olives, or bread from his wheat, the product belongs to the new operator, who is only to make satisfaction to the former proprietor for the materials converted: 2 Bl. Com., 404. We do not understand this to be disputed as a general proposition, though there are some authorities which hold that, in the case of a willful

appropriation, no extent of conversion can give to the willful trespasser a title to the property so long as the original materials can be traced in the improved article. The distinction thus made between the case of an appropriation in good faith and one based on intentional wrong, appears to have come from the civil law, which would not suffer a party to acquire a title by accession, founded on his own act, unless he had taken the materials in ignorance of the true owner, and given them a form which precluded their being restored to their original condition: 2 Kent, 363. While many cases have followed the rule as broadly stated by Blackstone, others have adopted the severe rule of the civil law where the conversion was in willful disregard of right. The New York cases of *Betts v. Lee*, 5 Johns., 348; *Curtis v. Groat*, 6 Johns., 168, and *Chandler v. Edson*, 9 Johns., 362, were all cases where the willful trespasser was held to have acquired no property by a very radical conversion, and in *Silsbury v. McCoon*, 3 N. Y., 378, 385, the whole subject is very fully examined . . . . [In *Silsbury*, a thief who turned the plaintiff's corn into whiskey did not thereby acquire ownership of it.] But we are not called upon in this case to express any opinion regarding the rule applicable in the case of a willful trespasser, since the authorities agree in holding that, when the wrong had been involuntary, the owner of the original materials is precluded, by the civil law and common law alike, from following and reclaiming the property after it has undergone a transformation which converts it into an article substantially different.

The cases of confusion of goods are closely analogous. It has always been held that he who, without fraud, intentional wrong, or reckless disregard of the rights of others, mingled his goods with those of another person, in such manner that they could not be distinguished, should, nevertheless, be protected in his ownership so far as the circumstances would permit. The question of motive here becomes of the highest importance; for, as Chancellor Kent says, if the commingling of property "was willfully made without mutual consent, . . . the common law gave the entire property, without any account, to him whose property was originally invaded, and its distinct character destroyed: Popham's Rep. 38, Pl. 2. If A will willfully intermix his corn or hay with that of B, or casts his gold into another's crucible, so that it becomes impossible to distinguish what belonged to A from what belonged to B, the whole belongs to B."* But this rule only applies to

*The original case report omits the closing quotation mark and citation to 2 James Kent, Commentaries on American Law 364–365 (O. Halsted, 2d ed. 1832). —Eds.

wrongful or fraudulent intermixtures. There may be an intentional intermingling, and yet no wrong intended, as where a man mixes two parcels together, supposing both to be his own; or, that he was about to mingle his with his neighbor's, by agreement, and mistakes the parcel. In such cases, which may be deemed accidental intermixtures, it would be unreasonable and unjust that he should lose his own or be obliged to take and pay for his neighbor's, as he would have been under the civil law: In many cases there will be difficulty in determining precisely how he can be protected with due regard to the rights of the other party; but it is clear that the law will not forfeit his property in consequence of the accident or inadvertence, unless a just measure of redress to the other party renders it inevitable.

The important question on this branch of the case appears to us to be, whether standing trees, when cut and manufactured into hoops, are to be regarded as so far changed in character that their identity can be said to be destroyed within the meaning of the authorities. And as we enter upon a discussion of this question, it is evident at once that it is difficult, if not impossible, to discover any invariable and satisfactory test which can be applied to all the cases which arise in such infinite variety. "If grain be taken and made into malt, or money taken and made into a cup, or timber taken and made into a house, it is held in the old English law that the property is so altered as to change the title:" 2 Kent, 363. But cloth made into garments, leather into shoes, trees hewn or sawed into timber, and iron made into bars, it is said may be reclaimed by the owner in their new and original shape: Some of the cases place the right of the former owner to take the thing in its altered condition upon the question whether its identity could be made out by the senses. But this is obviously a very unsatisfactory test, and in many cases would wholly defeat the purpose which the law has in view in recognizing a change of title in any of these cases. That purpose is not to establish any arbitrary distinctions, based upon mere physical reasons, but to adjust the redress afforded to the one party and the penalty inflicted upon the other, as near as circumstances will permit, to the rules of substantial justice[.]

It may often happen that no difficulty will be experienced in determining the identity of a piece of timber which has been taken and built into a house; but no one disputes that the right of the original owner is gone in such a case. A particular piece of wood might, perhaps, be traced without trouble into a church organ, or other equally valuable article; but no

one would defend a rule of law which, because the identity could be determined by the senses, would permit the owner of the wood to appropriate a musical instrument, a hundred or a thousand times the value of his original materials, when the party who, under like circumstances, has doubled the value of another man's corn by converting it into malt, is permitted to retain it, and held liable for the original value only. Such distinctions in the law would be without reason, and could not be tolerated. When the right to the improved article is the point in issue, the question, how much the property or labor of each has contributed to make it what it is, must always be one of first importance. The owner of a beam built into the house of another loses his property in it, because the beam is insignificant in value or importance as compared to that to which it has become attached, and the musical instrument belongs to the maker rather than to the man whose timber was used in making it—not because the timber cannot be identified, but because, in bringing it to its present condition the value of the labor has swallowed up and rendered insignificant the value of the original materials. The labor, in the case of the musical instrument, is just as much the principal thing as the house is in the other case instanced; the timber appropriated is in each case comparatively unimportant.

No test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession, unless it keeps in view the circumstance of relative values. When we bear in mind the fact that what the law aims at is the accomplishment of substantial equity, we shall readily perceive that the fact of the value of the materials having been increased a hundred-fold, is of more importance in the adjustment than any chemical change or mechanical transformation, which, however radical, neither is expensive to the party making it, nor adds materially to the value. There may be complete changes with so little improvement in value, that there could be no hardship in giving the owner of the original materials the improved article; but in the present case, where the defendant's labor—if he shall succeed in sustaining his offer of testimony—will appear to have given the timber in its present condition nearly all its value, all the grounds of equity exist which influence the courts in recognizing a change of title under any circumstances.

We are of opinion that the court erred in rejecting the testimony offered. The defendant, we think, had a right to show that he had manufactured the hoops in good faith, and in the belief that he had the proper

authority to do so; and if he should succeed in making that showing, he was entitled to have the jury instructed that the title to the timber was changed by a substantial change of identity, and that the remedy of the plaintiff was an action to recover damages for the unintentional trespass. . . .

Notes and Questions

2.13. What factors matter most to the court's holding? Is this a case about the relative value contributed by the plaintiff and defendant, about the difficulty of identifying the plaintiff's original property, about the difficulty of separating it, or about the degree to which it has been physically altered? Consider *Atlas Assurance Co. v. Gibbs*, 183 A. 690 (Conn. 1936), which involved the engine from a damaged car (the Hibben car) that had been properly sold and the body of a car (the Sherline car) that had been stolen. The defendant's predecessor in title combined the two to make one working car. In an action for replevin by the assignee of title to the Sherline car, who should get what?

2.14. How important is Wetherbee's good faith? What if he had been told by Green that Sumner lacked authority, but had examined Sumner's title in some detail and concluded that Green was wrong? What if Wetherbee steals a set of paints and uses it to create a portrait that sells for $500,000?

2.15. Note that Green retains "an action to recover damages for the unintentional trespass." What is the measure of those damages? Given that Wetherbee owns the hoops via accession, why does he need to pay? Or, to look at it another way, why *doesn't* an adverse possessor need to pay for the value of the property he retains after the statute of limitations has run?

2.16. Sometimes property transforms itself. A cow from Farmer Jones's herd wanders onto Farmer Smith's land, where it is impregnated by Farmer Smith's bull. Who owns the calf? Does it matter where the cow gives birth? Felix Cohen, in *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954), claimed that every legal system in human history appears to have resolved these cases in the same way. Compare the case in which Farmer Smith's bull kicks Farmer Jones's cow and badly injures it. What result then?

2.17. Another theme in confusion cases involves the distinction between unique and fungible property. If I mistakenly pour your 55-gallon drum of water into my storage tank, you are entitled to draw 55 gallons of water from the tank, even though it is astoundingly improbable that you will get back the same water molecules you started with. Water is water. If I mistakenly mix your your bottle of

1967 Chateau de Snoot wine with my bottle of 2015 Rotgut Red, I can't give you a bottle of the resulting mixture and call it even. (What *are* you entitled to?)

But note that uniqueness is something courts create as well as discover. At the start of the 19th century, wheat and other grains were stored and sold as though they were unique goods; each farmer's and merchant's sacks of grain were treated as distinct from each other's. Today, grain has been standardized and is sold as a commodity: a merchant could order 100 bushels of U.S. No. 1 Hard Red Spring Wheat without needing to specify or worry about what particular farms it came from. A key to this shift was courts' willingness to treat grain (and many other agricultural commodities) as fungible. A merchant whose sacks of wheat were dumped into a grain elevator without his consent would be entitled to the same quantity of wheat of the same standard class, not to his specific sacks or even to wheat with the same more specific characteristics. What was gained and what was lost in this shift?

2.3 Bailments

A **bailment** is an arrangement where the owner of personal property entrusts the property to another. The owner is called the **bailor**, while the recipient is called the **bailee**. Common bailees include delivery services, dry cleaners, and friends who borrow others' casebooks. These arrangements split full ownership from physical possession, and raise several issues regarding the parties' respective rights. What are the duties between the bailor and bailee? And what rights and duties do each of them have with respect to third parties?

Allen v. Hyatt Regency-Nashville Hotel

668 S.W.2d 286 (Tenn. 1984)

Harbison, Justice.

In this case the Court is asked to consider the nature and extent of the liability of the operator of a commercial parking garage for theft of a vehicle during the absence of the owner. Both courts below, on the basis of prior decisions from this state, held that a bailment was created when the owner parked and locked his vehicle in a modern, indoor, multi-story garage operated by appellant in conjunction with a large hotel in downtown Nashville. We affirm.

There is almost no dispute as to the relevant facts. Appellant is the owner and operator of a modern high-rise hotel in Nashville fronting on the south side of Union Street. Immediately to the rear, or south, of the main hotel building there is a multi-story parking garage with a single entrance and a single exit to the west, on Seventh Avenue, North. As one enters the parking garage at the street level, there is a large sign reading "Welcome to Hyatt Regency-Nashville." There is another Hyatt Regency sign inside the garage at street level, together with a sign marked "Parking." The garage is available for parking by members of the general public as well as guests of the hotel, and the public are invited to utilize it.

On the morning of February 12, 1981, appellee's husband, Edwin Allen, accompanied by two passengers, drove appellee's new 1981 automobile into the parking garage. Neither Mr. Allen nor his passengers intended to register at the hotel as a guest. Mr. Allen had parked in this particular garage on several occasions, however, testifying that he felt that the vehicle would be safer in an attended garage than in an unattended outside lot on the street.

The single entrance was controlled by a ticket machine. The single exit was controlled by an attendant in a booth just opposite to the entrance and in full view thereof. Appellee's husband entered the garage at the street level and took a ticket which was automatically dispensed by the machine. The machine activated a barrier gate which rose and permitted Mr. Allen to enter the garage. He drove to the fourth floor level, parked the vehicle, locked it, retained the ignition key, descended by elevator to the street level and left the garage. When he returned several hours later, the car was gone, and it has never been recovered. Mr. Allen reported the theft to the attendant at the exit booth, who stated, "Well, it didn't come out here." The attendant did not testify at the trial.

Mr. Allen then reported the theft to security personnel employed by appellant, and subsequently reported the loss to the police. Appellant regularly employed a number of security guards, who were dressed in a distinctive uniform, two of whom were on duty most of the time. These guards patrolled the hotel grounds and building as well as the garage and were instructed to make rounds through the garage, although not necessarily at specified intervals. One of the security guards told appellee's husband that earlier in the day he had received the following report:

> He said, "It's a funny thing here. On my report here a lady called me somewhere around nine-thirty or after and said that there was someone messing with a car."

The guard told Mr. Allen that he closed his office and went up into the garage to investigate, but reported that he did not find anything unusual or out of the ordinary.

Customers such as Mr. Allen, upon entering the garage, received a ticket from the dispensing machine. On one side of this ticket are instructions to overnight guests to present the ticket to the front desk of the hotel. The other side contains instructions to the parker to keep the ticket and that the ticket must be presented to the cashier upon leaving the parking area. The ticket states that charges are made for the use of parking space only and that appellant assumes no responsibility for loss through fire, theft, collision or otherwise to the car or its contents. The ticket states that cars are parked at the risk of the owner, and parkers are instructed to lock their vehicles. The record indicates that these tickets are given solely for the purpose of measuring the time during which a vehicle is parked in order that the attendant may collect the proper charge, and that they are not given for the purpose of identifying particular vehicles.

The question of the legal relationship between the operator of a vehicle which is being parked and the operator of parking establishments has been the subject of frequent litigation in this state and elsewhere. The authorities are in conflict, and the results of the cases are varied.

It is legally and theoretically possible, of course, for various legal relationships to be created by the parties, ranging from the traditional concepts of lessor-lessee, licensor-licensee, bailor-bailee, to that described in some jurisdictions as a "deposit." Several courts have found difficulty with the traditional criteria of bailment in analyzing park-and-lock cases. One of the leading cases is *McGlynn v. Parking Authority of City of Newark*, 432 A.2d 99 (N.J. 1981). There the Supreme Court of New Jersey reviewed numerous decisions from within its own state and from other jurisdictions, and it concluded that it was more "useful and straightforward" to consider the possession and control elements in defining the duty of care of a garage operator to its customers than to consider them in the context of bailment. That Court concluded that the "realities" of the relationship between the parties gave rise to a duty of reasonable care on the part of operators of parking garages and parking lots. It further found that a garage owner is

usually better situated to protect a parked car and to distribute the cost of protection through parking fees. It also emphasized that owners usually expect to receive their vehicles back in the same condition in which they left them and that the imposition of a duty to protect parked vehicles and their contents was consistent with that expectation. The Court went further and stated that since the owner is ordinarily absent when theft or damage occurs, the obligation to come forward with affirmative evidence of negligence could impose a difficult, if not insurmountable, burden upon him. After considering various policy considerations, which it acknowledged [to] be the same as those recognized by courts holding that a bailment is created, the New Jersey Court indulged or authorized a presumption of negligence from proof of damage to a car parked in an enclosed garage.

Although the New Jersey Court concluded that a more flexible and comprehensive approach could be achieved outside of traditional property concepts, Tennessee courts generally have analyzed cases such as this in terms of sufficiency of the evidence to create a bailment for hire by implication. We believe that this continues to be the majority view and the most satisfactory and realistic approach to the problem, unless the parties clearly by their conduct or by express contract create some other relationship.

The subject has been discussed in numerous previous decisions in this state. One of the leading cases is *Dispeker v. New Southern Hotel Co.*, 373 S.W.2d 904 (Tenn. 1963). In that case the guest at a hotel delivered his vehicle to a bellboy who took possession of it and parked it in a lot adjoining the hotel building. The owner kept the keys, but the car apparently was capable of being started without the ignition key. The owner apparently had told the attendant how to so operate it. Later the employee took the vehicle for his own purposes and damaged it. Under these circumstances the Court held that a bailment for hire had been created and that upon proof of misdelivery of the vehicle the bailee was liable to the customer.

In the subsequent case of *Scruggs v. Dennis*, 440 S.W.2d 20 (Tenn. 1969), upon facts practically identical to those of the instant case, the Court again held that an implied bailment contract had been created between a customer who parked and locked his vehicle in a garage. Upon entry he received a ticket dispensed by a machine, drove his automobile to the underground third level of the garage and parked. He retained his ignition key, but when he returned to retrieve the automobile in the afternoon it had

disappeared. It was recovered more than two weeks later and returned to the owner in a damaged condition.

In that case the operator of the garage had several attendants on duty, but the attendants did not ordinarily operate the parked vehicles, as in the instant case.

Although the Court recognized that there were some factual differences between the *Scruggs* case and that of *Dispeker v. New Southern Hotel Co.*, *supra*, it concluded that a bailment had been created when the owner parked his vehicle for custody and safe keeping in the parking garage, where there was limited access and where the patron had to present a ticket to an attendant upon leaving the premises.

A bailment relationship was also found in *Jackson v. Metropolitan Government of Nashville*, 483 S.W.2d 92 (Tenn. 1972), when faculty members of a high school conducted an automobile parking operation for profit upon the high school campus. A customer who parked his vehicle there was allowed recovery for theft, even though he had parked the vehicle himself after paying a fee, had locked the vehicle and had kept the keys.

On the contrary, in the case of *Rhodes v. Pioneer Parking Lot, Inc.*, 501 S.W.2d 569 (Tenn. 1973), a bailment was found not to exist when the owner left his vehicle in an open parking lot which was wholly unattended and where he simply inserted coins into a meter, received a ticket, then parked the vehicle himself and locked it.

Denying recovery, the Court said:

> In the case at bar, however, we find no evidence to justify a finding that the plaintiff delivered his car into the custody of the defendant, nor do we find any act or conduct upon the defendant's part which would justify a reasonable person believing that an obligation of bailment had been assumed by the defendant. 501 S.W.2d at 571.

In the instant case, appellee's vehicle was not driven into an unattended or open parking area. Rather it was driven into an enclosed, indoor, attended commercial garage which not only had an attendant controlling the exit but regular security personnel to patrol the premises for safety.

Under these facts we are of the opinion that the courts below correctly concluded that a bailment for hire had been created, and that upon proof of nondelivery appellee was entitled to the statutory presumption of negligence provided in T.C.A. § 24-5-111.

We recognize that there is always a question as to whether there has been sufficient delivery of possession and control to create a bailment when the owner locks a vehicle and keeps the keys. Nevertheless, the realities of the situation are that the operator of the garage is, in circumstances like those shown in this record, expected to provide attendants and protection. In practicality the operator does assume control and custody of the vehicles parked, limiting access thereto and requiring the presentation of a ticket upon exit. As stated previously, the attendant employed by appellant did not testify, but he told appellee's husband that the vehicle did not come out of the garage through the exit which he controlled. This testimony was not amplified, but the attendant obviously must have been in error or else must have been inattentive or away from his station. The record clearly shows that there was no other exit from which the vehicle could have been driven.

Appellant made no effort to rebut the presumption created by statute in this state (which is similar to presumptions indulged by courts in some other jurisdictions not having such statutes). While the plaintiff did not prove positive acts of negligence on the part of appellant, the record does show that some improper activity or tampering with vehicles had been called to the attention of security personnel earlier in the day of the theft in question, and that appellee's new vehicle had been removed from the garage by some person or persons unknown, either driving past an inattentive attendant or one who had absented himself from his post, there being simply no other way in which the vehicle could have been driven out of the garage.

Under the facts and circumstances of this case, we are not inclined to depart from prior decisions or to place the risk of loss upon the consuming public as against the operators of commercial parking establishments such as that conducted by appellant. We recognize that park-and-lock situations arise under many and varied factual circumstances. It is difficult to lay down one rule of law which will apply to all cases. The expectations of the parties and their conduct can cause differing legal relationships to arise, with consequent different legal results. We do not find the facts of the present case, however, to be at variance with the legal requirements of the traditional concept of a bailment for hire. In our opinion it amounted to more than a mere license or hiring of a space to park a vehicle, unaccompanied by any expectation of protection or other obligation upon the operator of the establishment.

The judgment of the courts below is affirmed at the cost of appellant. The cause will be remanded to the trial court for any further proceedings which may be necessary.

Drowota, Justice, dissenting.

In this case we are asked to consider the nature and extent of liability of the operator of a commercial "park and lock" parking garage. In making this determination, we must look to the legal relationship between the operator of the vehicle and the operator of the parking facility. The majority opinion holds that a bailment contract has been created, and upon proof of non-delivery Plaintiff is entitled to the statutory presumption of negligence provided in T.C.A. § 24-5-111. I disagree, for I find no bailment existed and therefore the Plaintiff does not receive the benefit of the presumption. Consequently, the Plaintiff had the duty to prove affirmatively the negligence of the operator of the parking facility and this Plaintiff failed to do.

The majority opinion states that "courts have found difficulty with the traditional criteria of bailment in analyzing park and lock cases." The majority discusses the case of *McGlynn v. Parking Authority of City of Newark*, 86 N.J. 551, 432 A.2d 99 (1981), which suggests that bailment is an outmoded concept for analyzing parking lot and garage cases. In *Garlock v. Multiple Parking Services, Inc.*, 427 N.Y.S.2d 670, 677 (1980), the court stated that "the 'bailment theory' as a basis for recovery in parking lot cases is no longer appropriate." That court concluded that since the concept of bailment is no longer a viable theory in application to a very real modern problem that the proper standard to be followed in such cases is "reasonable care under the circumstances whereby foreseeability shall be a measure of liability." *Id.*, 427 N.Y.S.2d at 678.

Even though some courts now suggest that the theory of bailment is an archaic and inappropriate theory upon which to base liability in modern park and lock cases, the majority opinion states that "'Tennessee courts generally have analyzed cases such as this in terms of sufficiency of the evidence to create a bailment for hire by implication,'" and concludes that this is "the most satisfactory and realistic approach to the problem." I do not disagree with the longstanding use of the bailment analysis in this type of case. I do disagree, however, with the majority's conclusion that a bailment for hire has been created in this case.

The record shows that upon entering this parking garage a ticket, showing time of entry, is automatically dispensed by a machine. The ticket states that charges are made for the use of a parking space only and that the garage assumes no responsibility for loss to the car or its contents. The ticket further states that cars are parked at the risk of the owner, and parkers are instructed to lock their vehicles. The majority opinion points out that it is not insisted that this language on the ticket is sufficient to exonerate the garage, since the customer is not shown to have read it or to have had it called to his attention. *Savoy Hotel Corp. v. Sparks*, 421 S.W.2d 98 (Tenn. Ct. App. 1967). The ticket in no way identifies the vehicle, it is given solely for the purpose of measuring the length of time during which the vehicle is parked in order that a proper charge may be made.

In this case Mr. Allen, without any direction or supervision, parked his car, removed his keys, and locked the car and left the parking garage having retained his ignition key. The presentation of a ticket upon exit is for the sole purpose of allowing the cashier to collect the proper charge. The cashier is not required to be on duty at all times. When no cashier is present, the exit gate is opened and no payment is required.[1] As the majority opinion states, the ticket is "not given for the purpose of identifying particular vehicles." The ticket functioned solely as a source of fee computation, not of vehicle identification.

The majority opinion states: "[W]e do not find the facts of the present case to be at variance with the legal requirements of the concept of a bailment for hire." I must disagree, for I feel the facts of the present case are clearly at variance with what I consider to be the legal requirements of the traditional concept of a bailment for hire.

Bailment has been defined by this Court in the following manner:

> The creation of a bailment in the absence of an express contract requires that possession and control over the subject matter pass from the bailor to the bailee. In order to constitute a sufficient delivery of the subject matter there must be a full transfer, either actual or constructive, of the property to the bailee so as to exclude it from the possession of the owner and

[1]Between one or two in the morning and six or seven a.m., the garage is entirely open without a cashier to collect parking fees. During the day if the cashier leaves his or her post on a break, the exit gate is opened and the vehicle owner may exit without payment.

> all other persons and give to the bailee, for the time being, the sole custody and control thereof.
>
> In parking lot and parking garage situations, a bailment is created where the operator of the lot or garage has knowingly and voluntarily assumed control, possession, or custody of the motor vehicle; if he has not done so, there may be a mere license to park or a lease of parking space.

Rhodes v. Pioneer Parking Lot, Inc., 501 S.W.2d 569, 570 (Tenn. 1973).

From its earliest origins, the most distinguishing factor identifying a bailment has been delivery. Our earliest decisions also recognize acceptance as a necessary factor, requiring that possession and control of the property pass from bailor to bailee, to the exclusion of control by others. The test thus becomes whether the operator of the vehicle has made such a delivery to the operator of the parking facility as to amount to a relinquishment of his exclusive possession, control, and dominion over the vehicle so that the latter can exclude it from the possession of all others. If so, a bailment has been created.

When the automobile began replacing the horse and buggy, our courts allowed bailment law to carry over and govern the parking of vehicles. In cases such as *Old Hickory Parking Corp. v. Alloway*, 177 S.W.2d 23 (Tenn. Ct. App. 1943), and *Savoy Hotel v. Sparks*, 421 S.W.2d 98 (Tenn. Ct. App. 1967), where the operator of the vehicle left his vehicle with an attendant and left the keys for the attendant to move the vehicle as he wished, the bailment relationship was evident for we had a clear delivery, acceptance of possession, control, and exercise of dominion over the vehicle—all the traditional elements of a bailment. In *Dispeker v. New Southern Hotel Company*, 373 S.W.2d 904 (Tenn. 1963), a bellboy parked plaintiff's car, plaintiff retained the keys but explained to the bellboy that the car could be operated without the key, and apparently showed him how to operate it. The bellboy went off duty, then returned and stole the car. Once again, the traditional elements of delivery and control were present.

These cases involving parking attendants and personalized service have caused us no problems. The problem arises in this modern era of automated parking, when courts have attempted to expand the limits of existing areas of the law to encompass technological and commercial advances. Such is the case of *Scruggs v. Dennis*, 440 S.W.2d 20 (Tenn. 1969), relied upon in the majority opinion. In *Scruggs*, as in this case, the entire operation is

automated, with the exception of payment upon departure. The operation bears little, if any, resemblance to the circumstances found in *Old Hickory Parking Corp.*, *Savoy Hotel*, and *Dispeker*. Yet the Court in Scruggs, in quoting extensively from the *Dispeker* opinion, states that "There are some minute differences of fact . . . " Id., 440 S.W.2d at 22. As pointed out above, the differences of fact in *Dispeker* are not minute or so similar as the *Scruggs* court would suggest. Delivery, custody and control are clearly present in *Dispeker*. I fail to find such delivery, custody and control in *Scruggs* or in the case at bar. In *Dispeker*, the vehicle was actually taken from the owner by an attendant. I believe the *Scruggs* court and the majority opinion today attempt to apply bailment law in situations where there is not a true bailment relationship. . . .

The majority opinion, as did the *Scruggs* court, finds custody and control implied because of the limited access and because "the presentation of a ticket upon exit" is required. I cannot agree with this analysis as creating a bailment situation. I do not believe that based upon the fact that a ticket was required to be presented upon leaving, that this factor created a proper basis upon which to find a bailment relationship. The ticket did not identify the vehicle or the operator of the vehicle, as do most bailment receipts. The cashier was not performing the traditional bailee role or identifying and returning a particular article, but instead was merely computing the amount owed and accepting payment due for use of a parking space. I do not believe the Defendant exercised such possession and control over Plaintiff's automobile as is necessary in an implied bailment. . . .

The full transfer of possession and control, necessary to constitute delivery, should not be found to exist simply by the presentation of a ticket upon exit. In the case at bar, I find no such delivery and relinquishment of exclusive possession and control as to create a bailment. Plaintiff parked his car, locked it and retained the key. Certainly Defendant cannot be said to have sole custody of Plaintiff's vehicle, for Defendant could not move it, did not know to whom it belonged, and did not know when it would be reclaimed or by whom. Anyone who manually obtained a ticket from the dispenser could drive out with any vehicle he was capable of operating. Also, a cashier was not always on duty. When on duty, so long as the parking fee was paid—by what means could the Defendant reasonably exercise control? The necessary delivery and relinquishment of control by

the Plaintiff, the very basis upon which the bailment theory was developed, is missing.

We should realize that the circumstances upon which the principles of bailment law were established and developed are not always applicable to the operation of the modern day automated parking facility. The element of delivery, of sole custody and control are lacking in this case.

Notes and Questions

2.18. Bailments raise interesting issues about the bailor's and bailee's relationships with third parties. Suppose Lord Hobnob takes a valuable jewel to a jewelry shop for repair. While it is there, a chimney-sweep smashes the window and runs off with it. Obviously Lord Hobnob can presently sue the chimney-sweep to recover the jewel or its value. (*Is* this so obvious?) But what about the jeweler? He's admittedly not the owner of the jewel. Should he nonetheless be allowed to sue the chimney-sweep? If the answer is yes, and he wins damages, can he keep the money? If the jeweler wins damages from the chimney-sweep, can the chimney-sweep be held liable in a subsequent suit by Lord Hobnob for the same amount?

2.19. Here's another variation. Suppose a chimney-sweep finds a jewel and gives it to a jeweler for safekeeping. Lord Hobnob, the true owner, shows up in a carriage and a huff, and demands the jewel from the jeweler. Can the jeweler turn it over? Must he? If he does, is he liable to his bailor, the chimney-sweep, for misdelivery? Consider *The Winkfield*, [1902] P. 42 (C.A. 1901), in which the *Winkfield*, a government ship carrying mail, was damaged in a collision with the *Mexican*. The government sued the owners of the *Mexican* and included a claim for mail lost as a result of the collision. The *Mexican*'s owners responded that the government was not liable to the parties whose mail was lost, and so had suffered no compensable damages. Is this a persuasive objection?

2.20. For time immemorial, potential bailees have attempted to limit their potential liability by contract. Why didn't the ticket in *Allen* suffice to protect the hotel from liability for the lost car?

2.21. A common concern of bailees is taking responsibility for unexpectedly valuable items. In *Peet v. Roth Hotel*, 253 N.W. 546 (Minn. 1934), the plaintiff left her engagement ring with a hotel employee with instructions to give it to a jeweler who paid regular visits to the hotel and was known to its employees. She testified:

> I had it [the ring] on my finger, and took it off my finger. The Cashier—I told the Cashier that it was for Mr. Ferdinand Hotz.

> She took out an envelope and wrote "Ferdinand Hotz." I remember spelling it to her, and then I left. . . . I handed the ring to the Cashier, and she wrote on the envelope. . . . The only instructions I remember are telling her that it was for Mr. Ferdinand Hotz who was stopping at the hotel.

The ring was stolen while in the hotel's possession and a jury awarded $2,140.66 in damages. The hotel objected, arguing that plaintiff "failed to divulge the unusual value of her ring when she left it with [the cashier, who] testified that, at the moment, she did not realize its value." The court was unsympathetic, writing, "No decision has been cited and probably none can be found where the bailee of an article of jewelry, undeceived as to its identity, was relieved of liability because of his own erroneous underestimate of its value." Is this fair? Compare Minnesota's modern statute on innkeepers' liability, in Minn. Stat. § 327.71(1):

> No innkeeper who has in the establishment a fireproof, metal safe or vault, in good order and fit for the custody of valuables, and who keeps a copy of this subdivision clearly and conspicuously posted at or near the front desk and on the inside of the entrance door of every bedroom, shall be liable for the loss of or injury to the valuables of a guest unless: (1) the guest has offered to deliver the valuables to the innkeeper for custody in the safe or vault; and (2) the innkeeper has omitted or refused to take the valuables and deposit them in the safe or vault for custody and to give the guest a receipt for them. Except as otherwise provided in subdivision 6, the liability of an innkeeper for the loss of or injury to the valuables of a guest shall not exceed $1,000. No innkeeper shall be required to accept valuables for custody in the safe or vault if their value exceeds $1,000, unless the acceptance is in writing.

Would this statute have changed the result in *Peet*? How does it alter the relationship between hotels and guests? Does it explain why hotel rooms typically have a statement of this sort posted on the inside of their doors?

Here is part of the Uniform Commercial Code's take on the issue (in the context of carriers' liability for lost or damaged goods given to them for delivery):

> Damages may be limited by a term in the bill of lading or in a transportation agreement that the carrier's liability may not exceed a value stated in the bill or transportation agreement if the

> carrier's rates are dependent upon value and the consignor is afforded an opportunity to declare a higher value and the consignor is advised of the opportunity. However, such a limitation is not effective with respect to the carrier's liability for conversion to its own use. . . .

UCC § 7-309(b). What do you think of this solution?

Chapter 3

Conflicts Across Property Types

3.1 Ratione Soli

Ratione soli is the principle that the right to take possession of wild animals belongs to the owner of the land where the animal may be found; thus title to any animals captured or killed on owned land automatically vests in the landowner. The English rule is in stark opposition to the civil (i.e., Roman) law rule, reflected in the Institutes of Justinian,[1] which is that the captor of a wild animal acquires property rights in the animal wherever captured, though he may be liable in trespass to the owner of the real property on which the animal was pursued or taken. This distinction affects not only the right to possession of the animal itself, but also the measure of damages, because the damages from the trespass may be less than the value of the animal.

A strong principle of *ratione soli* was consolidated in mid-19th century England as part of the class wars between the landed gentry—who passionately defended game hunting as an exclusive sport for the aristocracy—and the upwardly-mobile merchant classes and more desperate farmers and poachers—who saw game as a token of luxury and a means of sustenance, respectively. *See generally* Chester

[1] J. Inst. 2.1.12. The *Institutes* are a portion of the massive codification of Roman law under Byzantine (Roman) Emperor Justinian I: the *Corpus Iuris Civilis*. The *Corpus*, in turn, is an important predecessor of most modern civil law systems, which prevail in Continental European nations and many of their former colonies. Unlike common-law systems, which prevail in England and most of its former colonies (including the United States, with the exception of Louisiana), legal authority in civil law systems derives not from caselaw, but from comprehensive statutory codes. A primary distinction between common law and civil law systems is the sharply diminished role of precedent in civil law adjudication. (Recall note **??** on page **??**, *supra*.)

Kirby, *The English Game Law System*, 38 AM. HIST. REV. 240 (1933). The aristocrats won a decisive victory in a suit by a game merchant against certain servants of the Marquis of Exeter, who had forcibly seized several dozen rabbits purchased by the merchant for resale, on grounds that they had been poached from the Marquis's lands. Blades v. Higgs, (1865) 11 Eng. Rep. 1474, 11 H.L.Cas. 621. The Law Lords ruled that wild animals are the property of the owner of the land on which they are taken, and that the Marquis's servants were therefore within their rights in repossessing the rabbits.

Ratione soli was initially rejected by the newly independent American states, in favor of a rule of **free taking**. This made some sense in the America of John Locke's imagination: a vast, naturally bountiful, largely undeveloped, and sparsely populated continent. Moreover, "[i]n the New World, game was no sporting matter, but rather a source of food and clothing." Thomas A. Lund, *Early American Wildlife Law*, 51 N.Y.U. L. REV. 703 (1976). Thus, for the first century of the new Republic's life, landowners for the most part enjoyed no special privileges to wild animals on their otherwise idle land; hunters were presumed to be free to enter or cross unenclosed and undeveloped land in pursuit of game, even where that land was privately owned. Landowners could defeat this presumption by posting notices of their intent to exclude hunters at the boundaries of their property, but in practice posting was uncommon and generally ineffective for large holdings in the wilds of the frontier. *Id.* at 712-14.

Over time, even the vast American continent saw its natural resources threatened with depletion by overexploitation, and its lands subject to increased development that conflicted with the free taking regime. Nevertheless, while a small number of American cases adopted *ratione soli* (*see, e.g.*, *Rexroth v. Coon*, 23 A. 37 (R.I. 1885) (bees); *Schulte v. Warren*, 75 N.E. 783 (Ill. 1905) (fish)), the rule never took hold here as it did in England. Today, wild animals are subject to a variety of state and federal regulations that fairly comprehensively govern whether, when, and under what circumstances they may be hunted or captured, on the theory that wildlife is a common resource to be managed by the government for the benefit of the people. *See generally* Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVIRON. L. 673 (2005). But a majority of states still allow licensed hunters to take or pursue game on unenclosed private land unless the landowner has posted against hunting or trespassing. Mark R. Sigman, Note, *Hunting and Posting on Private Land in America*, 54 DUKE L. J. 549, 558-68 (2004).

One possible virtue of the doctrine of *ratione soli* is the same as the virtue of the punitive damages award in *Jacque v. Steenberg Homes*: it may marginally discourage trespasses on land by those who would trespass for the purpose of capturing wild animals. But at what cost? And do we really need *ratione soli* when, as *Jacque* makes clear, punitive damages are already available against trespassers? Or when there are other legal remedies available against those who interfere with landowners' efforts to exploit wild animals on their land? Is there any other principled justification for either *ratione soli* or free taking, or are the rules merely sops to particular political interests? In light of all this history, what do you think *ought* to be the legal rights of landowners with respect to wild animals that happen to be on their land? Why? Is there any reason landowners should have a superior claim to anyone else?

3.2 Fugitive Resources

We have studied a fair number of cases about property rights in wild animals. By now you may be asking yourself: who cares? This is, after all, an area of legal doctrine that you will almost certainly never encounter in your future career as a lawyer. Are we wasting your time?

Obviously we don't think so. Lawyers typically reason about novel cases by *analogy* to past cases in the same general doctrinal field. We have seen this type of reasoning by analogy already, in *Popov v. Hayashi*: a baseball is not a wild animal, but Judge McCarthy thought cases about wild animals provided instruction for the dispute before him. (Query: Why might he have thought so?) With respect to the intersection of land and chattels, we can similarly see *Keeble* and the doctrines of *ratione soli* and free taking as reflecting principles applicable to **fugitive resources**: chattels that can move of their own accord from place to place, sometimes taking them onto owned land. There are plenty of valuable resources that share this quality, and many of them are the subject of heated legal disputes even today. We will focus here on two: water and oil.

Water is essential to life, but it can also be put to a variety of other practical uses: irrigating farmland, extracting minerals from mines and oil or gas from wells, powering dams and mills, cooling industrial equipment, and as an input to manufacturing, for example. Fresh water from rainfall and snowmelt may flow over the surface of land, either free-flowing (particularly during heavy rains or spring thaws) or in defined channels as streams and lakes. Rain and snowmelt can also seep down and be absorbed by the earth as subsurface groundwater or deep aquifers. In either

case, water has a fundamental physical connection to land, but it also moves freely over, under, and across land. (Sound familiar?)

Both surface and subsurface waters are renewable; they are replenished by precipitation. But they're still scarce. This scarcity comes in two basic forms, which map to the economic categories of **stocks** and **flows**. Depletion of a groundwater source at a rate exceeding its natural replenishment will eventually exhaust the stock—or finite total *amount*—of water at that source. A stream flows at a particular (though perhaps variable) rate, but that rate is primarily determined by ecological rather than human processes, so adding more users or more intense uses may not threaten *future* flows but does reduce the share of the flow available to each at any given time. Given these forms of scarcity, competition over water resources is inevitable, and property law may be called on to regulate that competition.

Complicating the matter, the rate of renewal of water stocks and the magnitude of water flows vary from time to time and place to place: Hawaii gets a lot more rain than Nevada, and California got a lot more rain in 1983 than it did in 2013. Reflecting this natural diversity, the American states have devised two broad categories of common-law responses to the challenge of managing conflicts over access to water, epitomized by the two cases below. The first response, **riparian rights**, dominates in the wetter, eastern states, and was firmly established by our first case, *Tyler v. Wilkinson*. The second response, **prior appropriation**, prevails in the more arid western states, and is sometimes referred to as the "Colorado Rule" given its historic association with our second case, *Coffin v. Left Hand Ditch Co*. Both cases deal with rights to flows, in particular the flow of a river. As you read these cases, try to understand how the two systems differ, and what might explain or justify the difference.

Tyler v. Wilkinson

24 F. Cas. 472, 4 Mason 397 (D.R.I. 1827)

STORY, Circuit Justice.

[The Pawtucket River forms part of the boundary between Rhode Island and Massachusetts. Plaintiffs owned several mills on the Massachusetts side of the river. For over a century, mills on both sides of the river had been powered by the flow of the Pawtucket as directed by a dam (the "lower dam"). Defendants owned several mills upstream of the plaintiffs on the Rhode Island side of the river and on a man-made canal called Sergeant's Trench, which bypassed the lower dam on the western bank.

Defendants erected a new dam (the "upper dam") to direct the flow of water toward their mills, interfering with the ability of plaintiffs to rely on the flow of the Pawtucket to the lower dam to power the plaintiffs' mills. Plaintiffs sued for a declaration that by "ancient usage" they had a superior claim to the waters of the Pawtucket over the defendants, whom the plaintiffs alleged were entitled only to "wastewater," or so much of the flow as was not needed by the plaintiffs. Supreme Court Justice Joseph Story, riding circuit, heard the dispute and rendered the following opinion.]

Before proceeding to an examination of these points, it may be proper to ascertain the nature and extent of the right, which riparian proprietors generally possess, to the waters of rivers flowing through their lands . . . .

Prima facie every proprietor upon each bank of a river is entitled to the land, covered with water, in front of his bank, to the middle thread of the stream, or, as it is commonly expressed, *usque ad filum acquae*. In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself; but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial, whether the party be a proprietor above or below, in the course of the river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that, which is common to all. The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed, by operation of law, to the land itself. When I speak of this common right, I do not mean to be understood, as holding the doctrine, that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows; for that would be to deny any valuable use of it. There may be, and there must be allowed of that, which is common to all, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not. . . . The maxim is applied, "*Sic utere tuo, ut non alienum laedas*."

But of a thing, common by nature, there may be an appropriation by general consent or grant. Mere priority of appropriation of running wa-

ter, without such consent or grant, confers no exclusive right. It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupancy. That supposes no ownership already existing, and no right to the use already acquired. But our law annexes to the riparian proprietors the right to the use in common, as an incident to the land; and whoever seeks to found an exclusive use, must establish a rightful appropriation in some manner known and admitted by the law. Now, this may be, either by a grant from all the proprietors, whose interest is affected by the particular appropriation, or by a long exclusive enjoyment, without interruption, which affords a just presumption of right. By our law, upon principles of public convenience, the term of twenty years of exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant or right . . . .

With these principles in view, the general rights of the plaintiffs cannot admit of much controversy. They are riparian proprietors, and, as such, are entitled to the natural flow of the river without diminution to their injury. As owners of the lower dam, and the mills connected therewith, they have no rights beyond those of any other persons, who might have appropriated that portion of the stream to the use of their mills. That is, their rights are to be measured by the extent of their actual appropriation and use of the water for a period, which the law deems a conclusive presumption in favor of rights of this nature. In their character as mill-owners, they have no title to the flow of the stream beyond the water actually and legally appropriated to the mills; but in their character as riparian proprietors, they have annexed to their lands the general flow of the river, so far as it has not been already acquired by some prior and legally operative appropriation. No doubt, then, can exist as to the right of the plaintiffs to the surplus of the natural flow of the stream not yet appropriated. Their rights, as riparian proprietors, are general; and it is incumbent on the parties, who seek to narrow these rights, to establish by competent proofs their own title to divert and use the stream.

And this leads me to the consideration of the nature and extent of the rights of the trench owners. There is no doubt, that in point of law or fact, there may be a right to water of a very limited nature, and subservient to the more general right of the riparian proprietors. . . . But the presumption of an absolute and controlling power over the whole flow, a continuing power of exclusive appropriation from time to time, in the riparian propri-

etor, as his wants or will may influence his choice, would require the most irresistible facts to support it. Men who build mills, and invest valuable capital in them, cannot be presumed, without the most conclusive evidence, to give their deliberate assent to the acceptance of such ruinous conditions. The general presumption appears to me to be that which is laid down by Mr. Justice Abbott in *Saunders v. Newman*, 1 Barn. & Ald. 258: "When a mill has been erected upon a stream for a long period of time, it gives to the owner a right, that the water shall continue to flow to and from the mill in the manner in which it has been accustomed to flow during all that time. The owner is not bound to use the water in the same precise manner, or to apply it to the same mill; if he were, that would stop all improvements in machinery. If, indeed, the alterations made from time to time prejudice the right of the lower mill (i.e. by requiring more water), the case would be different."

In this view of the matter, the proprietors of Sergeant's trench are entitled to the use of so much of the water of the river as has been accustomed to flow through that trench to and from their mills (whether actually used or necessary for the same mills or not), during the twenty years last before the institution of this suit, subject only to such qualifications and limitations, as have been acknowledged or rightfully exercised by the plaintiffs as riparian proprietors, or as owners of the lower mill-dam, during that period. But here their right stops; they have no right farther to appropriate any surplus water not already used by the riparian proprietors, upon the notion, that such water is open to the first occupiers. That surplus is the inheritance of the riparian proprietors, and not open to occupancy.

. . . My opinion accordingly is, that the trench owners have an absolute right to the quantity of water which has usually flowed therein, without any adverse right on the plaintiffs to interrupt that flow in dry seasons, when there is a deficiency of water. But the trench owners have no right to increase that flow; and whatever may be the mills or uses, to which they may apply it, they are limited to the accustomed quantity, and may not exceed it . . . . [I]f there be a deficiency, it must be borne by all parties, as a common loss, wherever it may fall, according to existing rights . . . and that the plaintiffs to this extent are entitled to have their general right established, and an injunction granted.

It is impracticable for the court to do more, in this posture of the case, than to refer it to a master to ascertain, as near as may be, and in conformity

with the suggestions in the opinion of the court, the quantity to which the trench owners are entitled, and to report a suitable mode and arrangement permanently to regulate and adjust the flow of the water, so as to preserve the rights of all parties.

. . . The decree of the court is to be drawn up accordingly; and all further directions are reserved to the further hearing upon the master's report, &c. Decree accordingly.

Coffin v. Left Hand Ditch Co.

6 Colo. 443 (1882)

HELM, J.

Appellee, who was plaintiff below, claimed to be the owner of certain water by virtue of an appropriation thereof from the south fork of the St. Vrain creek. It appears that such water, after its diversion, is carried by means of a ditch to the James creek, and thence along the bed of the same to Left Hand creek, where it is again diverted by lateral ditches and used to irrigate lands adjacent to the last named stream. Appellants are the owners of lands lying on the margin and in the neighborhood of the St. Vrain below the mouth of said south fork thereof, and naturally irrigated therefrom.

In 1879 there was not a sufficient quantity of water in the St. Vrain to supply the ditch of appellee and also irrigate the said lands of appellant. A portion of appellee's dam was torn out, and its diversion of water thereby seriously interfered with by appellants. The action is brought for damages arising from the trespass, and for injunctive relief to prevent repetitions thereof in the future. . . . [T]rial was had before a jury . . . , and verdict and judgment given for appellee. Such recovery was confined, however, to damages for injury to the dam alone, and did not extend to those, if any there were, resulting from the loss of water.

. . . It is contended by counsel for appellants that the common law principles of riparian proprietorship prevailed in Colorado until 1876, and that the doctrine of priority of right to water by priority of appropriation thereof was first recognized and adopted in the constitution. But we think the latter doctrine has existed from the date of the earliest appropriations of water within the boundaries of the state. The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive; except in a few favored sections, artificial irrigation for agriculture is an absolute

necessity. Water in the various streams thus acquires a value unknown in moister climates. Instead of being a mere incident to the soil, it rises, when appropriated, to the dignity of a distinct usufructuary estate, or right of property. It has always been the policy of the national, as well as the territorial and state governments, to encourage the diversion and use of water in this country for agriculture; and vast expenditures of time and money have been made in reclaiming and fertilizing by irrigation portions of our unproductive territory. Houses have been built, and permanent improvements made; the soil has been cultivated, and thousands of acres have been rendered immensely valuable, with the understanding that appropriations of water would be protected. Deny the doctrine of priority or superiority of right by priority of appropriation, and a great part of the value of all this property is at once destroyed.

. . . We conclude, then, that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith. And we hold that, in the absence of express statutes to the contrary, the first appropriator of water from a natural stream for a beneficial purpose has, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation.

. . . It is urged, however, that even if the doctrine of priority or superiority of right by priority of appropriation be conceded, appellee in this case is not benefited thereby. Appellants claim that they have a better right to the water because their lands lie along the margin and in the neighborhood of the St. Vrain. They assert that, as against them, appellee's diversion of said water to irrigate lands adjacent to Left Hand creek, though prior in time, is unlawful.

In the absence of legislation to the contrary, we think that the right to water acquired by priority of appropriation thereof is not in any way dependent upon the locus of its application to the beneficial use designed. And the disastrous consequences of our adoption of the rule contended for, forbid our giving such a construction to the statutes as will concede the same, if they will properly bear a more reasonable and equitable one.

The doctrine of priority of right by priority of appropriation for agriculture is evoked, as we have seen, by the imperative necessity for artifi-

cial irrigation of the soil. And it would be an ungenerous and inequitable rule that would deprive one of its benefit simply because he has, by large expenditure of time and money, carried the water from one stream over an intervening watershed and cultivated land in the valley of another. It might be utterly impossible, owing to the topography of the country, to get water upon his farm from the adjacent stream; or if possible, it might be impracticable on account of the distance from the point where the diversion must take place and the attendant expense; or the quantity of water in such stream might be entirely insufficient to supply his wants. It sometimes happens that the most fertile soil is found along the margin or in the neighborhood of the small rivulet, and sandy and barren land beside the larger stream. To apply the rule contended for would prevent the useful and profitable cultivation of the productive soil, and sanction the waste of water upon the more sterile lands. It would have enabled a party to locate upon a stream in 1875, and destroy the value of thousands of acres, and the improvements thereon, in adjoining valleys, possessed and cultivated for the preceding decade. Under the principle contended for, a party owning land ten miles from the stream, but in the valley thereof, might deprive a prior appropriator of the water diverted therefrom whose lands are within a thousand yards, but just beyond an intervening divide.

. . . The judgment of the court below will be affirmed.

Notes and Questions

3.1. **Different Strokes for Different Folks.** Why is the rule for control and use of surface waters different in the Eastern United States than it is in the West? Why is it different for water in New England than it is for wild animals in (old) England? Is the "priority of appropriation" rule in Colorado the same as the "free taking" rule for game in the early American frontier? If not, how and why does it differ?

One of the important skills of lawyers (and legal scholars) is to identify *distinctions* among seemingly analogous fact patterns that could account for courts' selection of the rules they apply to those facts. So: can we identify some distinctions in the facts of these two cases that might account for the difference between, say, the eastern (riparian) rule and the western (priority of appropriation) rule for water? (Did Justice Helm identify any such distinctions in *Coffin*?)

We might examine at least three different grounds for distinguishing these types of cases from one another. First, the characteristics of the *resource itself* may

be different. That may be a relevant basis for distinguishing wild animals from water; as we will see it may also be a basis for distinguishing both of those resources from oil and gas. Second, the characteristics of the *society* in which the resource is being exploited may be different. As we have already noted, the interior of the American continent in the 18th century was a very different place than the English countryside—in terms of its population density and in terms of the level of development and exploitation of existing natural resources. And as the *Coffin* court noted, the quality and distribution of arable soil in the mountain west makes irrigation an "imperative necessity" to agriculture in a way "unknown to" the riparian east. Third, the particular uses of the resource may differ from one social context to another. For example, in New England, where surface water is plentiful, streams were mainly used *non-consumptively* to power industrial plants in the 19th century; in Colorado, where water is scarce, streams were used primarily for consumptive purposes—mining, farming, and drinking. *See* Carol M. Rose, *Energy And Efficiency in the Realignment of Common-Law Water Rights*, 19 J. Leg. Stud. 261, 290-93 (1990). Any of these types of distinctions could justify a change in legal rules from one case to another. Which—if any—do you think best explain the difference between *Tyler* and *Coffin*?

3.2. **Stock Resources.** *Tyler* and *Coffin* deal with allocation of the right to a share of the flow of a natural watercourse. But much water use depends not on surface waters, but on groundwater, extracted by means of wells and pumps. Such groundwater can behave more like a stock resource than a flow resource; excessive extraction by any one claimant *today* threatens the availability of the resource for *all* claimants *in the future*. Indeed, extraction of groundwater—and even collection of precipitation—can alter the flows of surface channels, threatening the rights of remote riparians or prior appropriators. For this reason, some states—particularly in the more arid Western United States—have enacted comprehensive statutory codes and administrative regulations allocating water rights. California's system is among the most complex, layering early common-law riparian rights with later common-law prior appropriation rights and a subsequent statutory code administered by a powerful administrative agency with significant discretion to alter and limit water uses to respond to changing conditions. The state's regulatory reach is profound; in May of 2015 the Water Board responded to serious drought conditions by adopting emergency regulations requiring residents to refrain from most outdoor uses of water and requiring businesses to reduce their potable water usage by 25%, all on pain of a fine of $500 per day. State Water Resources Control Bd. Res. No. 2015-0032:

TO ADOPT AN EMERGENCY REGULATION FOR STATEWIDE WATER CONSERVATION (May 5, 2015), *link*.

3.3. **Non-Renewable Fugitive Resources.** For our next category of fugitive resource—oil and gas—stock depletion is the standard state of affairs, exacerbated by the fact that oil stocks do not replenish themselves the way water stocks do. As you read, consider how this characteristic of fossil fuels affect the justifications for allocating them to one claimant or another.

Briggs v. Southwestern Energy Production Company

224 A.3d 334 (Pa. 2020)

Chief Justice SAYLOR.

In this appeal by allowance, we consider whether the rule of capture immunizes an energy developer from liability in trespass, where the developer uses hydraulic fracturing on the property it owns or leases, and such activities allow it to obtain oil or gas that migrates from beneath the surface of another person's land.

I. Background

A. The Rule of Capture

Oil and gas are minerals, and while in place they are considered part of the land. They differ from coal and other substances with a fixed situs in that they are fugacious in nature—meaning they tend to seep or flow across property lines beneath the surface of the earth. Such underground movement is known as "drainage." Drainage stems from a physical property of fluids in that they naturally move across a pressure gradient from high to low pressure. Indeed, the extraction of oil or gas by drilling is based, at least in part, on creating a low-pressure pathway from the mineral's subterranean location to the earth's surface.

Oil and gas have thus been described as having a "fugitive and wandering existence," *Brown v. Vandergrift*, 80 Pa. 142, 147 (Pa. 1875), and have been compared to wild animals which move about from one property to another. *See Westmoreland & Cambria Nat. Gas Co. v. DeWitt*, 130 Pa. 235, 249, 18 A. 724, 725 (1889) ("In common with animals, and unlike other minerals, [oil, gas, and water] have the power and the tendency to escape without the volition of the owner."). Accordingly, such minerals are subject to the rule of capture, which is

> [a] fundamental principle of oil-and-gas law holding that there is no liability for drainage of oil and gas from under the lands of another so long as there has been no trespass . . . .

Black's Law Dictionary 1358 (8th ed. 2004); *accord Brown v. Spilman*, 155 U.S. 665, 669-70 (1895).[1] A corollary to this rule is that an aggrieved property owner's remedy for the loss, through drainage, of subsurface oil or gas has traditionally been to offset the effects of the developer's well by drilling his or her own well, often termed an "offset well." *See Barnard v. Monongahela Gas Co.*, 216 Pa. 362, 365, 65 A. 801, 803 (1907) ("What then can the neighbor do? Nothing; only go and do likewise.").

The reference to "the lands of another" in the above quote does not suggest a developer may invade the subsurface area of a neighboring property by drilling at an angle rather than vertically (referred to as slant drilling or slant wells), or by drilling horizontally beneath the surface. This is because the title holder of a parcel of land generally owns everything directly beneath the surface. Rather, and as suggested by the "no trespass" predicate, it refers to the potential for oil and gas to migrate from the plaintiff's property to the developer's land when extracted from a common pool or reservoir spanning both parcels.

B. Hydraulic fracturing

One of the central questions in this matter involves how these principles apply where hydraulic fracturing is used to extract oil or gas from subsurface geological formations. According to the federal government, hydraulic fracturing is used in "unconventional" gas production. "Unconventional" reservoirs can cost-effectively produce gas only by using a special stimulation technique, like hydraulic fracturing . . . . This is often because the gas is highly dispersed in the rock, rather than occurring in a concentrated underground location. United States Environmental Protection Agency (the "EPA"), *The Process of Unconventional Natural Gas Production*, *link* (viewed Oct. 22, 2019). In terms of how the technique works, the EPA continues:

> Fractures are created by pumping large quantities of fluids at high pressure down a wellbore and into the target rock forma-

[1]The term "capture" is also drawn from an analogy to wild animals. At common law, a person could acquire title to such an animal by reducing it to possession.

> tion. Hydraulic fracturing fluid commonly consists of water, proppant and chemical additives that open and enlarge fractures within the rock formation. These fractures can extend several hundred feet away from the wellbore. The proppants—sand, ceramic pellets or other small incompressible particles—hold open the newly created fractures.

Id.

After injection, fluid is withdrawn from the well while leaving the proppants in place to hold the fissures open. This enhances the drainage of oil or gas into the wellbore where it can be captured.

C. Factual and Procedural History of This Case

(i) Introduction

The parties presently favor essentially the same rule of law: they both, in substance, argue that the traditional rule of capture should apply, subject to the common-law standard for trespass of real property based on physical intrusion onto another's land. Each party, moreover, depicts the other as erroneously suggesting that an exception to this framework should pertain where hydraulic fracturing is used to obtain oil or natural gas. In particular, the plaintiffs suggest that Southwestern wishes to convert the rule of capture into a precept whereby energy developers may physically invade the property of others to capture natural gas so long as they are using hydraulic fracturing. For its part, Southwestern portrays the plaintiffs and the Superior Court decision from which it appeals as positing that the rule of capture simply does not apply when hydraulic fracturing is used for energy development on one's own land.

(ii) Undisputed Facts

Adam, Paula, Joshua, and Sarah Briggs ("Plaintiffs") own a parcel of real estate consisting of approximately eleven acres in Harford Township, Susquehanna County. During all relevant times, Plaintiffs have not leased their property to any entity for natural gas production. Plaintiffs' property is adjacent to a tract of land leased by Appellant Southwestern Energy Production Company for natural gas extraction (the "Production Parcel"). Southwestern maintains wellbores on the Production Parcel and has used

hydraulic fracturing to boost natural gas extraction from the Marcellus Shale formation through those wellbores.

(iii) Proceedings Before the Court of Common Pleas

In November 2015, Plaintiffs commenced an action against Southwestern in which they stated two causes of action, trespass and conversion. In Count I (the trespass claim), Plaintiffs averred that Southwestern's actions constituted a trespass which deprived Plaintiffs of the value of the "natural gas extracted from under their land[.]"In Count II (the conversion claim), Plaintiffs alleged that, through its drilling activities, Southwestern had deprived Plaintiffs of their possession and use of the natural gas and converted it to Southwestern's use. Notably, Plaintiffs did not expressly allege that Southwestern's activities had caused a physical intrusion into Plaintiffs' property.

Southwestern filed a responsive pleading denying it had extracted gas from Plaintiffs' land and denying it had trespassed upon Plaintiffs' property or converted their natural gas. Southwestern specifically denied it had drilled underneath Plaintiffs' property and stated, further, that it had "only drilled for oil, gas or minerals from under properties for which [Southwestern] has leases."

After the parties engaged in discovery, Southwestern filed a motion for summary judgment and a supporting brief in which it argued that it did not physically invade Plaintiffs' property and, to the extent that it had recovered any gas through drainage from that property to the Production Parcel, again, it was entitled to judgment as a matter of law under the rule of capture. Plaintiffs . . . filed their own motion for partial summary judgment as to liability, asserting that courts should not apply the rule of capture in circumstances where gas has been captured through the use of hydraulic fracturing.

By order and opinion, the common pleas court granted Southwestern's motion for summary judgment, and denied Plaintiffs' motion for partial summary judgment . . . . Plaintiffs filed a notice of appeal, . . . in which they raised a single issue: whether the trial court erred in determining that the rule of capture precluded liability under theories of trespass and conversion, where Southwestern had used hydraulic fracturing to obtain natural gas which originated under Plaintiffs' land.

(iv) Proceedings Before the Superior Court

A two-judge panel of the Superior Court reversed in a published decision. . . . The court noted, however, that the record did not indicate whether Southwestern's operations had resulted in a subsurface intrusion into Plaintiffs' property, going so far as to express that "[t]here does not appear to be *any evidence, or even an estimate*, as to how far the subsurface fractures extend from each of the wellbore [sic] on Southwestern's lease." . . . Accordingly, the panel reversed the trial court's order and remanded for additional factual development.

. . . [T]he Superior Court panel's analysis can reasonably be viewed as embodying two distinct, but interrelated, holdings: first, that whenever "artificial means," such as hydraulic fracturing, are used to stimulate the flow of underground resources, the rule of capture does not apply because drainage does not occur through the operation of "natural agencies," and second, that in this particular case summary judgment was premature in light of certain unspecified allegations relating to cross-boundary intrusions into Plaintiffs' land.

II. Preliminary Discussion

A. Trespass

In Pennsylvania, a trespass occurs when a person who is not privileged to do so intrudes upon land in possession of another, whether willfully or by mistake. This conception of trespass is not disputed by the parties. Nevertheless, meaningful appellate review at this stage is not straightforward for multiple reasons.

B. Pleading Deficiencies, Decisional Irregularities, and Issue Limitation

. . . Plaintiffs did not assert . . . in their pleadings . . . that Southwestern had effectuated a physical intrusion onto (or into) their property. The Superior Court panel recognized this aspect of Plaintiffs' litigation position, but raised and resolved, *sua sponte*, an issue based on the opposite premise, that Plaintiffs *had* alleged a physical intrusion. Then, stating that there was no record evidence that such an intrusion had taken place, and without referencing any specific aspect of the pleadings, the panel indicated that the

Complaint's allegations were alone sufficient to raise a genuine issue of fact so as to preclude summary judgment.

This is in some tension with the governing summary-judgment standard which generally centers on whether the adverse party has produced enough evidence to raise a question of material fact as to each element of the claim.

. . . [M]oreover, Southwestern articulated the issue for this Court's consideration in terms of whether the rule of capture should be applied in the same manner it has always been applied: to allow for the capture of oil and gas which merely drains from an adjacent property after the completion of a well using hydraulic fracturing *solely within the developer's property*. This is an issue, again, on which the parties do not presently diverge: they both answer in the affirmative. Their disagreement is limited to whether any physical intrusion has taken place—a question that is not fairly subsumed within the issue framed for our review.

III. Analysis

The issue as stated by Southwestern should nonetheless be resolved for purposes of this dispute—and to provide guidance to the bench and bar—because at least part of the Superior Court's opinion can reasonably be construed as setting forth a *per se* rule foreclosing application of the rule of capture in hydraulic fracturing scenarios, and that rule rests on faulty assumptions. In particular, and most saliently, the panel appears to have indicated that one litmus for whether the rule of capture applies is whether the defendant's gas extraction methodology relies only on the natural drainage of oil or gas within a conventional pool or reservoir, or whether instead those methods utilize some means of artificial stimulation to induce drainage.

The Superior Court's position in this respect logically rests on one of two grounds: (a) the act of artificially stimulating the cross-boundary flow through the use of hydraulic fracturing solely on the developer's property in and of itself renders the rule of capture inapplicable; or (b) as Plaintiffs argue, any time natural gas migrates across property lines resulting, directly or indirectly, from hydraulic fracturing, a physical intrusion into the plaintiff's property must necessarily have taken place.

As to the first proposition, all drilling for subsurface fugacious minerals involves the artificial stimulation of the flow of that substance. The

mere act of drilling interferes with nature and stimulates the flow of the minerals toward artificially-created low pressure areas, most notably, the wellbore. This Court has held that the rule of capture applies although the driller uses further artificial means, such as a pump, to enhance production from a source common to it and the plaintiff—so long as no physical invasion of the plaintiff's land occurs. *See Jones*, 194 Pa. at 384, 44 A. at 1075 (indicating that, absent physical intrusion, a developer may use "all the skill and invention of which a man is capable" to appropriate resources from under his own property). There is no reason why this precept should apply any differently to hydraulic fracturing conducted solely within the driller's property.

. . . Accordingly, we reject as a matter of law the concept that the rule of capture is inapplicable to drilling and hydraulic fracturing that occurs entirely within the developer's property solely because drainage of natural resources takes place as the direct or indirect result of hydraulic fracturing, or that such drainage stems from less "natural" means than conventional drainage.

The second predicate—that drainage from under a plaintiff's parcel can only occur if the driller first physically invades that property—does not lend itself to a purely legal resolution. . . . By design, hydraulic fracturing creates fissures in rock strata which store hydrocarbons within their porous structure. On the state of the present record, this alone does not establish that a physical intrusion into a neighboring property is necessary for such action to result in drainage from that property. We cannot rule out, for example, that a fissure created through the injection of hydraulic fluid entirely within the developer's property may create a sufficient pressure gradient to induce the drainage of hydrocarbons from the relevant stratum of rock underneath an adjacent parcel even absent physical intrusion. Nor can we discount the possibility that a fissure created within the developer's property may communicate with other, pre-existing fissures that reach across property lines. Whether these, or any other non-invasive means of drainage occasioned by hydraulic fracturing, are physically possible in a given case is a factual question to be established through expert evidence.

The Superior Court panel appears to have assumed, if implicitly, that such occurrences were impossible—but, again, there is no basis in the record for such an assumption. In all events, a plaintiff asserting a cause

of action "must be able to prove all the elements of his case by proper evidentiary standards." *Papieves v. Lawrence*, 437 Pa. 373, 379, 263 A.2d 118, 121 (1970). Thus, to the extent this lawsuit goes forward on Plaintiffs' new, physical-intrusion theory, Plaintiffs will bear the burden of demonstrating that such an intrusion took place.

We have not overlooked Southwestern's argument that trespass should not be viewed as occurring miles beneath the surface of the earth. As Southwestern observes, in some jurisdictions traditional concepts of physical trespass have been relaxed where activities take place miles below the surface and the plaintiff is not deprived of the use and enjoyment of the land. Southwestern posits that this is analogous to the principle that trespass does not arise high above the surface. *See Causby*, 328 U.S. at 260-61. It emphasizes that other socially useful endeavors—such as carbon sequestration projects, energy storage wells, and waste disposal sites—could be jeopardized if the rule against trespass were to be enforced in an unduly stringent manner where deep subsurface activities are concerned.

Without speaking to the merit of such a claim, we note that this Court is limited to the issue as it was framed in the petition for allowance of appeal, and Southwestern has not articulated any reason an exception should be made in the present dispute. Thus, to the extent Southwestern argues it should be permitted to escape liability even if it is ultimately found to have effectuated a physical intrusion into Plaintiff's subsurface property, its claim in this regard has not been preserved for review by this Court.

This brings us to the question of whether the lawsuit can, indeed, progress on a theory of trespass by physical intrusion, and by extension, to the question of the appropriate mandate from this Court. Ordinarily, and for the reasons explained, we would deem any such contention to be absent from the litigation, as it does not appear to have been mentioned in Plaintiffs' pleadings or argued as a basis to deny Southwestern's motion for summary judgment. The Superior Court, however, evidently believed there was some legitimate basis to dispose of the appeal on the presupposition that Southwestern was alleged to have physically invaded Plaintiffs' subsurface property with hydraulic fracturing liquid and proppants; and, as noted, Southwestern has not challenged the intermediate court's action in this respect.

That being the case, . . . we find that the appropriate action at this juncture is to vacate the Superior Court's order and remand for reconsideration

in light of the guidance provided in this opinion, and the certified record on appeal . . . .

Justice DOUGHERTY[, concurring in part and dissenting in part:]

I join the majority's holding that the rule of capture remains effective in Pennsylvania to protect a developer from trespass liability where there has been no physical invasion of another's property. In so holding, the majority correctly recognizes that if there **is** such a physical invasion the rule of capture will **not** insulate a developer engaged in hydraulic fracturing from trespass liability. As I agree with both propositions, I also agree the matter should be remanded for further proceedings involving a specific inquiry into a physical invasion. I respectfully dissent, however, from the notion that this question must be determined by the Superior Court on the present record . . . . Given the state of the record, which was apparently not complete at the time the trial court erroneously entered summary judgment, I would remand the matter to that court for further proceedings, including the completion of discovery on the factual question of physical invasion, and trial thereon as necessary.

Notes and Questions

3.4. **Questions of Fact; Questions of Law.** Do Chief Justice Saylor and Justice Dougherty disagree on the content of the legal rules in Pennsylvania regarding the ownership of oil and gas? Do they disagree on the law of trespass as it applies to mineral extraction? If the answer to both these questions is no, what is their disagreement about?

In considering these questions, ask yourself what *actually happened* to the Briggses and their land in this case. Are you confident you can answer that question? If not, it may be difficult to say whether they should prevail on their trespass or conversion claims. This is not because the legal rule is unclear; rather it is because it may be unclear whether the rule is satisfied *given the facts in the record*. This distinction between *legal* issues and *factual* issues is central to the practice of law, and you will surely learn more about it in your civil procedure class. How does the court's resolution of the *legal* issues in the case affect the *factual questions* that the parties must answer in litigation? How should they go about answering those questions? What is likely to happen to the Briggses' claim on remand, and what would have happened if Justice Dougherty's opinion had instead carried a majority

Figure 3.1: Signal Hill, California, c. 1923. Source: U.S. Library of Congress PPOC, *link*.

of the court? (Hint: The answer to this last question has less to do with the law of property and more to do with the law of civil procedure.)

3.5. **I Drink Your Milkshake.**[2] *Briggs* reaffirms a principle of long standing in oil and gas law. Imagine Alice and Bob are neighboring landowners in an oil-rich region. Alice drills an oil well at an angle, such that the wellhead is on Alice's land, but the bottom of the wellbore, from which the pipe draws oil, is under Bob's land. Bob sues Alice to enjoin the continued operation of the well and to recover the value of the oil already extracted. Under the rule of capture and the definition of trespass as discussed in *Briggs*, what result and why? *See* 1 Summers Oil and Gas § 2:3 (3d ed.) ("[I]f a well deviates from the vertical and produces oil or gas from under the surface of another landowner, that is a trespass for which the adjacent owner is entitled to damages, an accounting and injunction."). Why might it be acceptable to use a well on your land to draw the oil from under your neighbor's land, but not to drill the bottom of your well under the surface owned by your neighbor to extract the very same oil? Does the distinction have any practical effect? Does the advent of fracking technology change your answer?

3.6. **Incentives Again.** Given that any landowner can lawfully extract all the oil and gas under not only her land, but potentially under the land of any neighboring landowners who occupy the surface over the same geologic formation, what incentive does each landowner over a large formation have with respect to that underlying oil and gas? In early-20th-century California, we found out.

Figure 3.1 is an image of Signal Hill, California, one of the richest oil fields ever discovered, around the peak of its productivity in 1923. Why do you think there are so many oil derricks in such close proximity to each other? Do you think this quan-

[2] There Will Be Blood (Paramount Vantage/Miramax Films 2007).

tity and density of wells are necessary to extract the oil underground? If not, isn't this duplication of investment and effort *wasteful?* Couldn't the oil be just as easily extracted with one (or at least far fewer) wells? If so, why did the people of Signal Hill build so many? Could property law be playing a role?

3.7. **The Tragedy of the Commons.** The race to drill in Signal Hill evokes one of the key set-pieces invoked by economists to justify private property rights: the **tragedy of the commons**, famously described in an essay of the same name:

> Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. . . . As a rational being, each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously, he asks, "What is the utility to me of adding one more animal to my herd?" . . . [T]he herdsman receives all the proceeds from the sale of the additional animal . . . . Since, however, the effects of overgrazing are shared by all the herdsmen, . . . any particular decision-making herdsman [bears] only a fraction of [the negative effects of his additional animal]. . . . [T]he rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another . . . . But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited.

Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

The negative effects of each additional animal, which are suffered by all the common owners collectively, are what economists refer to as an **externality**. Some of the things we do with the resources we control can make *others* better or worse off. If I divert a stream to my mine, your crops may wither; if I plant a rosebush in my garden, you may enjoy the smell of my flowers on your way to work each day. The key point to keep in mind about these externalities caused by my conduct is that *I care about them less than you do*. I am better off if the stream I diverted makes my mine more productive; the fact that the diversion causes your crops to die doesn't affect me directly, or perhaps at all.

Externalities can lead to the kind of misallocation of investment and effort we see in Signal Hill or the overcrowded pasture: in deciding whether to engage in an activity, I am unlikely to take sufficient account of the effects of my activity on others. This, in turn, can lead to bad *aggregate* outcomes: I may impose large costs on

all my neighbors by engaging in an activity that is of only moderate benefit to me, or I may refrain from an activity that would confer large benefits on many people at only moderate cost to myself. The trouble is that I have no *incentive* to weigh the cost of your dying crops, your starving animals, or your dried-up well.

The economist's solution to this problem is to *internalize the externalities* that result from resource use. That is, to find some way to make the effects of a person's actions hit that person in the pocketbook, for good or for ill. One way to internalize the externalities that generate the tragedy of the commons is to convert the commons to private ownership. Knowing that pasturing too many animals today would leave nothing for his animals to eat tomorrow, a rational *owner* of the pasture would calibrate the number of animals he keeps to maximize their number today while ensuring a stable supply of fodder into the future. Indeed, Professor Harold Demsetz famously argued that property rights arise precisely when the benefits of exploiting a scarce resource have increased in value (due to increasing demand or decreasing supply) to the point where the right to control that value would be a sufficient incentive to undertake the costs of responsibly managing the resource (i.e., where an owner would be willing to internalize the externalities of using the resource). *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347 (1967).

So goes the theory, at any rate. But this theory leaves open a host of practical questions, primarily about *allocation* of these theoretically attractive private property rights. Does it make the most sense to have one owner of the whole pasture? Should the pasture be divided into parcels, and if so, how many and how should they be assigned? What if dividing the pasture into smaller parcels leaves each owner with insufficient space to pasture animals? If there is just one owner, how are we supposed to choose the lucky winner? And once the winner is chosen, what is everyone else supposed to do? Finally, who has the authority to decide all these questions?

We can apply these questions to our oil and gas example. If you were trying to avoid overexploitation of the oil field at Signal Hill in 1923, would you assign private property rights over the entire oil field? How? To whom? Is there an alternative to private property rights that can avoid inefficient overexploitation? Might the experience of other societies whose territory includes valuable fossil fuel reserves be instructive? *See* Helge Ryggvik, *A Short History of the Norwegian Oil Industry: From Protected National Champions to Internationally Competitive Multinationals*, 89 Bus. Hist. Rev. 3 (2015).

3.8. **Hardin's Problematic Legacy.** Garrett Hardin's metaphor of the overburdened pasture was one piece of a broader worldview expressed in his writings that

strikes many today as deeply problematic. Like many mid-20th-century residents of rich countries, Hardin was concerned about a supposed "population bomb": a postwar trend of higher population growth in poorer countries relative to richer countries. Some predicted that this population growth would generate levels of consumption that would overburden the earth's resources (particularly its capacity to produce food), leading to exhaustion of those resources and widespread pollution, famine, and poverty.

Hardin's reaction to those predictions was to see developing nations as adversaries in a global competition for resources, and to urge national and even ethnic solidarity within rich countries to resist the developing world's demands for access to those resources. Though few read the full essay today, *The Tragedy of the Commons* is ultimately an argument in favor of compulsory restraints on procreation. Its final sections equate "breeding" with bank robbery, and conclude: "The only way we can preserve and nurture other and more precious freedoms is by relinquishing the freedom to breed, and that very soon." Hardin, *supra*, at 1248. Hardin thought rich countries should refuse to grant foreign aid, limit immigration from poor countries, impose compulsory measures to reduce fertility rates, and harden their hearts against any moral pangs arising from the resulting suffering of the world's poor—policies that went hand-in-hand with his view of resource competition as the struggle of rich societies against poor societies for survival. In his own words:

> Metaphorically each rich nation can be seen as a lifeboat full of comparatively rich people. In the ocean outside each lifeboat swim the poor of the world, who would like to get in, or at least to share some of the wealth. What should the lifeboat passengers do? . . . Suppose we decide to preserve our small safety factor and admit no more to the lifeboat. Our survival is then possible although we shall have to be constantly on guard against boarding parties.

Garrett Hardin, *Lifeboat Ethics*, PSYCHOLOGY TODAY (Sept. 1974), *link*.

Today, many critics note that Hardin's arguments smack of eugenics and imperialism. In his non-academic writings, Hardin was outspoken in his opposition to ethnic diversity and his support of restricting non-European immigration to the United States, and the Southern Poverty Law Center identifies him as a white nationalist extremist. Southern Poverty Law Center, *Extremist Files: Garrett Hardin*, *link*. One critic rejects Hardin's argument about the tragedy of the commons as a product of his chauvinist politics: "[R]acist, eugenicist, nativist and Islamophobe . . . [h]is writings and political activism helped inspire the anti-immigrant

hatred spilling across America today . . . . Hardin wasn't making an informed scientific case. Instead, he was using concerns about environmental scarcity to justify racial discrimination." Matto Mildenberger, *The Tragedy of* The Tragedy of the Commons, Scientific American: Voices (April 23, 2019), *link*.

Does the fact that Hardin held deplorable social and political views detract from the force of his arguments about resource management? Your answer may depend on whether you believe the two are related—whether his solutions to the problem of stewarding the Earth's scarce resources were really just a means to the particular (and contestable) ends contemplated by his political views. There is a plausible argument that they were: that his theoretical model of overconsumption in a commons is an abstraction of his concern that growing resource consumption by developing Latin American, Asian, and African societies posed a threat to the ability of rich European and North American societies to maintain the far higher per capita levels of consumption they enjoy. In this view, Hardin's proposed solution—giving some privileged consumers the power to exclude others—seems conveniently designed to justify rich countries' privileged consumption levels. The very term "population bomb," popularized in a bestselling book published in the same year as *The Tragedy of the Commons* (Paul R. Ehrlich, The Population Bomb (1968)), reflects a view of the developing world as a deadly threat, and implies that the solution lies, not in reduced consumption by rich countries, or in reallocation of resources more generally, but in limiting the number of competitors for scarce resources.

This view has had serious world-historical consequences. Over the second half of the 20th century, population control was enthusiastically promoted by Western countries, by philanthropic organizations such as the Rockefeller Foundation and the Ford Foundation, and by the United Nations. The governments of developing countries such as India and China—often with the support and financial encouragement of Western-led institutions such as the World Bank—implemented decades-long programs of incentivized or compulsory sterilization and abortion—with mixed results, and at great cost. *See generally* Matthew Connelly, Fatal Misconception: The Struggle to Control World Population (2008).

But as it turned out, Hardin and the other doomsayers were wrong in their predictions of global famine and resource collapse. Technological advances in food production and pollution control, as well as social and political changes such as conservation programs, democratization, and reductions in armed conflict, ultimately put the lie to many of their direst predictions. Food insecurity and extreme poverty have steadily *declined* worldwide since the 1960s. Population growth rates have also steadily declined worldwide, notably in inverse correlation with in-

creases in income and in women's educational attainment. But even today, similar fears and analogous political concerns pervade debates over problems of great importance—particularly climate change—in which resource allocation and stewardship play a crucial role.

3.9. **The Comedy of the Commons.** Whether or not one finds Hardin's arguments morally repugnant, his analyses have also been criticized as bad social science. It turns out that the free-for-all common pasture of Hardin's essay lacks a historical antecedent: medieval English commons were actually a form of community resource management based on ancient rules and customs that served to preserve the commons for future generations. *See* Susan Jane Buck Cox, *No Tragedy on the Commons*, 7 ENVTL. ETHICS 49 (1985). And such community management arrangements are not unusual.

Some of the most groundbreaking work in economics in the past half-century—such as the Nobel Prize-winning work of Dr. Elinor Ostrom—has demonstrated how community resource management actually works surprisingly well in contexts as diverse as Swiss mountain farms, Filipino irrigation canals, and Turkish fisheries. *See generally* ELINOR OSTROM, GOVERNING THE COMMONS (1990). Indeed, some resources—infrastructure such as roads and waterways, recreational facilities such as parks and beaches, and social spaces such as public squares—may have characteristics of a "comic" commons in that the more people use them, the more valuable they become (at least within a finite community). *See generally, e.g.*, Carol Rose, *The Comedy of the Commons: Commerce, Custom, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

Given the practical problems of allocation raised by efforts to privatize resources, and the availability of alternative management schemes for at least some such resources, we might well question whether the absence of property rights over scarce resources necessarily results in tragedy. In any case, we ought to be skeptical of the argument that the tragedy of the commons must affect all resources, in all societies, at all times.

3.10. Are the doctrines we have studied regarding allocation of fugitive resources property-based or commons-based? Take, for example, the riparian doctrine of reasonable use: can riparian owners take as much of the waters flowing past their land as they want, whenever they wish? Is there any middle ground between the "sole and despotic dominion" of Blackstone's private property and the tragic spiraling waste of Hardin's unregulated pasture? If so, how does the law decide who gets what?

What about the prior appropriation rule governing water rights in western states? Is it an instance of law stepping in to prevent a tragedy of the commons? That is certainly one conventional interpretation of the rule. But Professor David Schorr recently argued that early settlers in Colorado had informally worked out relatively egalitarian water allocation arrangements, which the *Coffin* court was merely protecting against destabilizing intrusions by new arrivals and powerful corporate interests. *See generally* David Schorr, The Colorado Doctrine (2012). Which makes more sense to you: that the *Coffin* court was setting economic policy to avoid overuse of scarce water, or that it was protecting the past investments and future expectations of the state's most established citizens? If you were a newly arrived farmer in Colorado when *Coffin* was announced, how would you react to the opinion?

3.3 Intellectual Property Exhaustion

Impression Products, Inc. v. Lexmark International, Inc.

137 S.Ct. 1523 (2017)

Chief Justice Roberts delivered the opinion of the Court.

A United States patent entitles the patent holder (the "patentee"), for a period of 20 years, to "exclude others from making, using, offering for sale, or selling [its] invention throughout the United States or importing the invention into the United States." Whoever engages in one of these acts "without authority" from the patentee may face liability for patent infringement.

When a patentee sells one of its products, however, the patentee can no longer control that item through the patent laws—its patent rights are said to "exhaust." The purchaser and all subsequent owners are free to use or resell the product just like any other item of personal property, without fear of an infringement lawsuit.

[The question in this case is] whether a patentee that sells an item under an express restriction on the purchaser's right to reuse or resell the product may enforce that restriction through an infringement lawsuit.*

*The case considered a second question regarding sales outside the United States, not reproduced here. —Eds.

I

The underlying dispute in this case is about laser printers—or, more specifically, the cartridges that contain the powdery substance, known as toner, that laser printers use to make an image appear on paper. Respondent Lexmark International, Inc. designs, manufactures, and sells toner cartridges to consumers in the United States and around the globe. It owns a number of patents that cover components of those cartridges and the manner in which they are used.

When toner cartridges run out of toner they can be refilled and used again. This creates an opportunity for other companies—known as remanufacturers—to acquire empty Lexmark cartridges from purchasers in the United States and abroad, refill them with toner, and then resell them at a lower price than the new ones Lexmark puts on the shelves.

Not blind to this business problem, Lexmark structures its sales in a way that encourages customers to return spent cartridges. It gives purchasers two options: One is to buy a toner cartridge at full price, with no strings attached. The other is to buy a cartridge at roughly 20-percent off through Lexmark's "Return Program." A customer who buys through the Return Program still owns the cartridge but, in exchange for the lower price, signs a contract agreeing to use it only once and to refrain from transferring the empty cartridge to anyone but Lexmark. To enforce this single-use/no-resale restriction, Lexmark installs a microchip on each Return Program cartridge that prevents reuse once the toner in the cartridge runs out.

Lexmark's strategy just spurred remanufacturers to get more creative. Many kept acquiring empty Return Program cartridges and developed methods to counteract the effect of the microchips. With that technological obstacle out of the way, there was little to prevent the remanufacturers from using the Return Program cartridges in their resale business. After all, Lexmark's contractual single-use/no-resale agreements were with the initial customers, not with downstream purchasers like the remanufacturers.

Lexmark, however, was not so ready to concede that its plan had been foiled. In 2010, it sued a number of remanufacturers, including petitioner Impression Products, Inc., for patent infringement with respect to two groups of cartridges. One group consists of Return Program cartridges that Lexmark sold within the United States. Lexmark argued that, because it expressly prohibited reuse and resale of these cartridges, the remanufacturers

infringed the Lexmark patents when they refurbished and resold them. The other group consists of all toner cartridges that Lexmark sold abroad and that remanufacturers imported into the country. Lexmark claimed that it never gave anyone authority to import these cartridges, so the remanufacturers ran afoul of its patent rights by doing just that.

Eventually, the lawsuit was whittled down to one defendant, Impression Products, and one defense: that Lexmark's sales, both in the United States and abroad, exhausted its patent rights in the cartridges, so Impression Products was free to refurbish and resell them, and to import them if acquired abroad. [The district court held that Lexmark's patent rights were exhausted; the Federal Circuit reversed.]

We granted certiorari to consider the Federal Circuit's decisions . . . and now reverse.

II

A

We conclude that Lexmark exhausted its patent rights in [the Return Program] cartridges the moment it sold them. The single-use/no-resale restrictions in Lexmark's contracts with customers may have been clear and enforceable under contract law, but they do not entitle Lexmark to retain patent rights in an item that it has elected to sell.

The Patent Act grants patentees the "right to exclude others from making, using, offering for sale, or selling [their] invention[s]." For over 160 years, the doctrine of patent exhaustion has imposed a limit on that right to exclude. See *Bloomer v. McQuewan*, 14 How. 539, 14 L.Ed. 532 (1853). The limit functions automatically: When a patentee chooses to sell an item, that product "is no longer within the limits of the monopoly" and instead becomes the "private, individual property" of the purchaser, with the rights and benefits that come along with ownership. A patentee is free to set the price and negotiate contracts with purchasers, but may not, "*by virtue of his patent*, control the use or disposition" of the product after ownership passes to the purchaser. The sale "terminates all patent rights to that item."

This well-established exhaustion rule marks the point where patent rights yield to the common law principle against restraints on alienation. The Patent Act "promote[s] the progress of science and the useful arts by granting to [inventors] a limited monopoly" that allows them to "secure

the financial rewards" for their inventions. But once a patentee sells an item, it has "enjoyed all the rights secured" by that limited monopoly. Because "the purpose of the patent law is fulfilled . . . when the patentee has received his reward for the use of his invention," that law furnishes "no basis for restraining the use and enjoyment of the thing sold."

We have explained in the context of copyright law that exhaustion has "an impeccable historic pedigree," tracing its lineage back to the "common law's refusal to permit restraints on the alienation of chattels." *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 538 (2013). As Lord Coke put it in the 17th century, if an owner restricts the resale or use of an item after selling it, that restriction "is voide, because . . . it is against Trade and Traffique, and bargaining and contracting betweene man and man." 1 E. Coke, Institutes of the Laws of England § 360, p. 223 (1628); see J. Gray, Restraints on the Alienation of Property § 27, p. 18 (2d ed. 1895) ("A condition or conditional limitation on alienation attached to a transfer of the entire interest in personalty is as void as if attached to a fee simple in land").

This venerable principle is not, as the Federal Circuit dismissively viewed it, merely "one common-law jurisdiction's general judicial policy at one time toward anti-alienation restrictions." Congress enacted and has repeatedly revised the Patent Act against the backdrop of the hostility toward restraints on alienation. That enmity is reflected in the exhaustion doctrine. The patent laws do not include the right to "restrain[] . . . further alienation" after an initial sale; such conditions have been "hateful to the law from Lord Coke's day to ours" and are "obnoxious to the public interest." *Straus v. Victor Talking Machine Co.*, 243 U.S. 490, 501 (1917). "The inconvenience and annoyance to the public that an opposite conclusion would occasion are too obvious to require illustration."

But an illustration never hurts. Take a shop that restores and sells used cars. The business works because the shop can rest assured that, so long as those bringing in the cars own them, the shop is free to repair and resell those vehicles. That smooth flow of commerce would sputter if companies that make the thousands of parts that go into a vehicle could keep their patent rights after the first sale. Those companies might, for instance, restrict resale rights and sue the shop owner for patent infringement. And even if they refrained from imposing such restrictions, the very threat of patent liability would force the shop to invest in efforts to protect itself from hidden lawsuits. Either way, extending the patent rights beyond the

first sale would clog the channels of commerce, with little benefit from the extra control that the patentees retain. And advances in technology, along with increasingly complex supply chains, magnify the problem.

This Court accordingly has long held that, even when a patentee sells an item under an express restriction, the patentee does not retain patent rights in that product. . . . Our recent decision in *Quanta Computer, Inc. v. LG Electronics, Inc.* settled the matter. In that case, a technology company—with authorization from the patentee—sold microprocessors under contracts requiring purchasers to use those processors with other parts that the company manufactured. One buyer disregarded the restriction, and the patentee sued for infringement. Without so much as mentioning the lawfulness of the contract, we held that the patentee could not bring an infringement suit because the "authorized sale . . . took its products outside the scope of the patent monopoly." 553 U.S., at 638.

Turning to the case at hand, we conclude that this well-settled line of precedent allows for only one answer: Lexmark cannot bring a patent infringement suit against Impression Products to enforce the single-use/no-resale provision accompanying its Return Program cartridges. Once sold, the Return Program cartridges passed outside of the patent monopoly, and whatever rights Lexmark retained are a matter of the contracts with its purchasers, not the patent law.

B

The Federal Circuit reached a different result largely because it got off on the wrong foot. The "exhaustion doctrine," the court believed, "must be understood as an interpretation of" the infringement statute, which prohibits anyone from using or selling a patented article "without authority" from the patentee. Exhaustion reflects a default rule that a patentee's decision to sell an item "*presumptively* grant[s] 'authority' to the purchaser to use it and resell it." But, the Federal Circuit explained, the patentee does not have to hand over the full "bundle of rights" every time. If the patentee expressly withholds a stick from the bundle—perhaps by restricting the purchaser's resale rights—the buyer never acquires that withheld authority, and the patentee may continue to enforce its right to exclude that practice under the patent laws.

The misstep in this logic is that the exhaustion doctrine is not a presumption about the authority that comes along with a sale; it is instead a

limit on "the scope of the *patentee's rights.*" The right to use, sell, or import an item exists independently of the Patent Act. What a patent adds—and grants exclusively to the patentee—is a limited right to prevent others from engaging in those practices. Exhaustion extinguishes that exclusionary power. As a result, the sale transfers the right to use, sell, or import because those are the rights that come along with ownership, and the buyer is free and clear of an infringement lawsuit because there is no exclusionary right left to enforce.

In sum, patent exhaustion is uniform and automatic. Once a patentee decides to sell—whether on its own or through a licensee—that sale exhausts its patent rights, regardless of any post-sale restrictions the patentee purports to impose, either directly or through a license.

Notes and Questions

3.11. Initially, consider Lexmark's business model that gave rise to this case. Lexmark discounts its printers heavily, sometimes selling them at or below cost. It then marks up the prices of consumable supplies like toner and ink, recovering any losses on the printer and making the company's profits. This is known as the "razor and blades business model" (sell the razor handles cheaply, and then mark up the blades), and companies use it for a wide variety of products. (Single-serve coffee pods are another classic example.)

This business model is why Lexmark pursued the toner refillers so vigorously. Competitors can supply the consumable parts at much cheaper prices, because the original manufacturer is overpricing those parts as part of the business model. But if consumers buy from those competitors, then the original manufacturer never recovers the initial loss. So the razor and blades model depends on some mechanism of exclusion—some property right, perhaps—that keeps competitors out.

Why use this business model? Couldn't Lexmark just charge more for the printers?

3.12. What else might post-sale restrictions be used for, besides preventing resale or repair? In *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*, the patent holder held patents on movie projectors, and imposed a condition on theaters that they only use licensed projectors on the patent holder's terms. *See* 243 U.S. 502, 506–07 (1917). The patent holder, a licensing firm created and run by Thomas Edison, wielded extraordinary power over the motion picture industry during the early 1900s, unilaterally deciding what films would be made, which actors

would be promoted, and which theaters would be allowed to operate. *See* Ralph Cassady, *Jr., Monopoly in Motion Picture Production and Distribution: 1908–1915*, 32 S. Cal. L. Rev. 325 (1959).

Should a patent's right to exclude entail this level of industry control?

3.13. *Impression* does not just pit two types of property against each other—it pits two specific rights of property against each other. The toner cartridge owner enjoys a right to alienate to a refiller or anyone else. Lexmark, on the other hand, enjoys a right to subdivide its patent interest, in the same way that a landlord can lease one room of a house and retain the rest of it.

The Court holds that the right to alienate personal property overrides the right to subdivide intellectual property. Do you agree? Can you think of a basis for prioritizing one right over the other? One point to consider: The right to subdivide is not absolute, as the *numerus clausus* principle and menu of estates in land demonstrate. But neither is the right to alienate—regulations such as drug approval can prohibit sales of products.

3.14. Patents are far from the only vehicle for imposing post-sale restraints on consumer goods. Copyright holders have sought to use their copyrights to prevent resale of books or to enforce minimum retail prices. The Supreme Court held such copyright-based restraints unenforceable, in a case about resale of used textbooks. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013). Other statutes, including the Digital Millennium Copyright Act and the Computer Fraud and Abuse Act, have been used to restrict consumers from reselling their purchased goods or using those goods in ways contrary to the manufacturers' wishes. *See generally* Aaron Perzanowski & Jason Schultz, The End of Ownership: Personal Property in the Digital Economy (2016); Molly Shaffer Van Houweling, *The New Servitudes*, 96 Geo. L.J. 885 (2008).

3.15. If you were representing Lexmark, how would you advise the company to proceed after this decision? Can you come up with another legal arrangement that prevents refilling? Look back through the property materials you've learned so far.

Chapter 4

Fundamental Rights

4.1 Racially Restrictive Covenants

Shelley v. Kraemer
334 U.S. 1 (1948)

Mr. Chief Justice Vinson delivered the opinion of the Court.

These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. Basic constitutional issues of obvious importance have been raised.

The first of these cases comes to this Court on certiorari to the Supreme Court of Missouri. On February 16, 1911, thirty out of a total of thirty-nine owners of property fronting both sides of Labadie Avenue between Taylor Avenue and Cora Avenue in the city of St. Louis, signed an agreement, which was subsequently recorded, providing in part:

> . . . the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to as (sic) not in subsequent conveyances and shall attach to the land, as a condition precedent to the sale of the same, that hereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to

> restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.

. . . On August 11, 1945, pursuant to a contract of sale, petitioners Shelley, who are Negroes, for valuable consideration received from one Fitzgerald a warranty deed to the parcel in question. The trial court found that petitioners had no actual knowledge of the restrictive agreement at the time of the purchase.

On October 9, 1945, respondents, as owners of other property subject to the terms of the restrictive covenant, brought suit in Circuit Court of the city of St. Louis praying that petitioners Shelley be restrained from taking possession of the property and that judgment be entered divesting title out of petitioners Shelley and revesting title in the immediate grantor or in such other person as the court should direct. The trial court denied the requested relief on the ground that the restrictive agreement, upon which respondents based their action, had never become final and complete because it was the intention of the parties to that agreement that it was not to become effective until signed by all property owners in the district, and signatures of all the owners had never been obtained.

The Supreme Court of Missouri sitting en banc reversed and directed the trial court to grant the relief for which respondents had prayed. That court held the agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to petitioners by the Federal Constitution. At the time the court rendered its decision, petitioners were occupying the property in question.

. . . Petitioners have placed primary reliance on their contentions, first raised in the state courts, that judicial enforcement of the restrictive agreements in these cases has violated rights guaranteed to petitioners by the Fourteenth Amendment of the Federal Constitution and Acts of Congress passed pursuant to that Amendment. Specifically, petitioners urge that they have been denied the equal protection of the laws, deprived of property without due process of law, and have been denied privileges and immunities of citizens of the United States. We pass to a consideration of those issues.

I.

Whether the equal protection clause of the Fourteenth Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color is a question which this Court has not heretofore been called upon to consider.

. . . It should be observed that these covenants do not seek to proscribe any particular use of the affected properties. Use of the properties for residential occupancy, as such, is not forbidden. The restrictions of these agreements, rather, are directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color; "simply that and nothing more."

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. Thus, § 1978 of the Revised Statutes, derived from § 1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was also under consideration, provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

This Court has given specific recognition to the same principle.

It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance. We do not understand respondents to urge the contrary.

. . . But the present cases . . . do not involve action by state legislatures or city councils. Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so

defined. The crucial issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the Fourteenth Amendment.

Since the decision of this Court in the *Civil Rights Cases*, 1883, 109 U.S. 3, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.

But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment. Finally, it is suggested, even if the States in these cases may be deemed to have acted in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the Fourteenth Amendment. We move to a consideration of these matters . . . .

III.

. . . We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose

such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions. In the Missouri case, enforcement of the covenant was directed in the first instance by the highest court of the State . . . . The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color. . . .

The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers

sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind. Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment. Having so decided, we find it unnecessary to consider whether petitioners have also been deprived of property without due process of law or denied privileges and immunities of citizens of the United States.

For the reasons stated, the judgment of the Supreme Court of Missouri and the judgment of the Supreme Court of Michigan must be reversed.

Mr. Justice REED, Mr. Justice JACKSON, and Mr. Justice RUTLEDGE took no part in the consideration or decision of these cases.

Notes and Questions

4.1. Racially restrictive covenants were widespread in the United States in the first half of the twentieth century. *See generally* Michael Jones-Correa, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 POL. SCI. Q. 541 (2001). Indeed, just two decades prior to its decision in *Shelley*, in the case of *Corrigan v. Buckley*, 271 U.S. 323 (1926), the Supreme Court had affirmed the enforcement of such a covenant (against the original covenantor) in the District of Columbia (on grounds that the Equal Protection Clause of the 14th Amendment was inapplicable to the federal government—a proposition the Court retreated from in *Bolling v. Sharpe*, 347 U.S. 497 (1954)). And in the years leading up to *Shelley* it was federal government policy to encourage mortgage lenders to insist on the inclusion of racially restrictive covenants in the deeds to homes that were to serve as collateral for federally-insured loans.

Note that three justices recused themselves from consideration of *Shelley*. Justice John Paul Stevens, in his memoir, surmises that they had to do so because they owned homes burdened (and, in the view of many white Americans of the day, benefited) by racially restrictive covenants. JUSTICE JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 69 (2011).

4.2. Does *Shelley* provide useful guidance on what types of privately agreed restrictions will be enforced and what types will go unenforced on constitutional or public policy grounds? Does the Restatement do any better?

4.3. Like racism, racially restrictive covenants have not gone away. Though unenforceable in court, they remain in the chain of title of much residential real estate today, and linger in historical title records. Several universities and public interest organizations have undertaken the work of identifying these lingering covenants in the hopes of removing them from title records. Examples include the University of Minnesota's Mapping Prejudice project (*link*), the University of Washington's Seattle Civil Rights & Labor History Project (*link*), and Prologue DC's Mapping Segregation project (*link*).

In the wake of white supremacist violence in Charlottesville, Virginia, in August of 2017, Charlottesville resident and legal commentator Dahlia Lithwick recounted:

> Our lawyer once told us, when we purchased our home in Charlottesville, that the house to this day carries a racially restrictive covenant. No blacks, no Jews. That covenant is illegal and unenforceable. And so I have a house in Charlottesville that could once have been taken from me by the force of law.

Dahlia Lithwick, *They Will Not Replace Us*, SLATE (Aug. 13, 2017), *link*. The white supremacists had descended on Charlottesville as a show of force centered on an equestrian statute of Confederate general Robert E. Lee, which the city had voted to remove. Jacey Fortin, *The Statue at the Center of Charlottesville's Storm*, N.Y. TIMES (Aug. 13, 2017), *link*. In recent years, the law's treatment of racially restrictive covenants has come to take on some of the features of the culture war over the removal of Jim-Crow-era monuments to the Confederacy.

As we will see in the next section, removing a restrictive covenant from a chain of title can be quite difficult. In recent years, as attention has been drawn to the perpetuation of unenforceable racially restrictive covenants in title records, a number of states have enacted laws to make it easier—and in some cases mandatory—to file replacement deeds and other title documents with such covenants removed or stricken. *See, e.g.*, CAL. GOV'T CODE § 12956.2; CAL. CIV. CODE § 4225; MD. CODE ANN., REAL PROP. §§ 3-112, 11B-113.3; MINN. STAT. § 507.18; NEV. REV. STAT. § 111.237(3); VA. CODE ANN. § 36-96.6. Note that under such statutes, the original instrument containing the covenant is not *removed* from the title records; the new document is simply *added* to the record with a reference to the location of the original, while the index is amended to point to the modified instrument rather than (or in addition to) the original instrument.

In the absence of such statutory intervention, however, it can be a challenge to remove racially restrictive language from title documents, even though—and perhaps even *because*—such language is unenforceable. In *Mason v. Adams Cty. Recorder*, 901 F.3d 753 (6th Cir. 2018), a suit seeking to compel county recorders in Ohio to "stop printing and publishing historical documents that contain racially restrictive covenants, to remove all such records from public view, and to permit the inspection and redaction of such documents" had been dismissed for lack of standing. In an opinion by Judge Boggs, the Court of Appeals affirmed the dismissal, explaining:

> In ancient Rome, the practice of *damnatio memoriae*, or the condemnation of memory, could be imposed on felons whose very existence, including destruction of their human remains, would literally be erased from history for the crimes they had committed. Land title documents with racially restrictive covenants that we now find offensive, morally reprehensible, and repugnant cannot be subject to *damnatio memoriae*, as those documents are part of our living history and witness to the evolution of our cultural norms. Mason's feeling of being unwelcomed may be real. A feeling cannot be unfelt. But Mason's discomfort at the expression of historical language does not create particularized injury. The language in question is purely historical and is unenforceable and irrelevant in present-day land transactions.

901 F.3d at 757 (footnote omitted). In a concurrence, Judge Clay agreed that the plaintiff had not adequately pleaded a particularized injury, but held open the possibility that he *could* do so:

> Justice may require us to repudiate or revise elements of our "living history" if those elements—whether they be public records, flags, or statutes—are shown to encourage or perpetuate discrimination or the badges and incidents of slavery; indeed, racial epithets that were once accepted as commonplace have not been preserved, and they have sometimes been stricken from our modern vernacular. We apply an even stricter standard where, as here, the government is the source of, or has ratified, language that has the purpose or effect of encouraging racial animus. We need not erase our history in order to disarm its harmful legacy, but victims of invidious discrimination who

> have suffered particularized injury as a result of the application of historical language should be able to seek redress, consistent with the context and the factual circumstances of their cases.

Id. at 758 (Clay, J. concurring). The debate between these two opinions—over the nature and gravity of the harms caused by the persistence of racist symbols, the appropriate response to those harms, and the nature of our obligations to preserve historical memory—is strikingly (and probably intentionally) similar to the debate over the removal of Confederate monuments. Is this debate helpful in determining what to do about title records? Are the issues presented by title records the same as those presented by statues of Confederate generals? If not, how do they differ?

4.4. Precisely because they remain in the chain of title for many parcels of real property, these types of discriminatory covenants still occasionally lead to disputes, particularly where residents continue to believe they are a good idea. For example, the Long Island, NY village of Yaphank, founded in the 1930s as "Camp Siegfried," owes its origin to the expression of Nazi sympathies. This German-American community started as a summer camp for would-be Hitler Youth, and was financed by the German-American Bund party (a pro-Nazi organization). *See* Nicholas Casey, *Buyers' Rule in L.I. Town Is Relic of Its Nazi Past*, N.Y. Times, Oct. 20, 2015, at A1, *link*. The land comprising village's residential subdivision of about 50 homes is actually owned by the "German American Settlement League, Inc." whose bylaws restricted residency to League members, and restricted League membership "primarily" to people "of German extraction." Yaphank residents owned, and could sell, the *structures* on their lots, but in order to take possession the buyer needed a lease to the underlying land, which the League controlled.

In 2015, the nonprofit advocacy organization Long Island Housing Services sued the German American Settlement League on behalf of two homeowners (both of German extraction) who were having difficulty selling their home subject to the restrictions. In 2016, the plaintiffs secured a settlement in which the League agreed to remove the racial restrictions from its bylaws and to comply with fair housing laws. LIHS's complaint is available here, *link* and the settlement is available here, *link*.

Figure 4.1: Robin Hutton, Shaved Head Family stickers 2 (Sept. 25, 2012), available under a Creative Commons Attribution, Non-Commercial, No-Derivatives 2.0 Generic License *link*.

4.2 Family Status Zoning

Any zoning scheme which creates a single-family zoning district, or even a standard for what single-family homes must look like, must contain a definition of family.

City of Ladue v. Horn

720 S.W.2d 745 (Mo. Ct. App. 1986)

Defendants, Joan Horn and E. Terrence Jones, appeal from the judgment of the trial court in favor of plaintiff, City of Ladue (Ladue), which enjoined defendants from occupying their home in violation of Ladue's zoning ordinance and which dismissed defendants' counterclaim. We affirm.

The case was submitted to the trial court on stipulated facts. Ladue's Zoning Ordinance No. 1175 was in effect at all times pertinent to the present action. Certain zones were designated as one-family residential. The zoning ordinance defined family as: "One or more persons related by blood, marriage or adoption, occupying a dwelling unit as an individual housekeeping organization." The only authorized accessory use in residen-

tial districts was for "[a]ccommodations for domestic persons employed and living on the premises and home occupations." The purpose of Ladue's zoning ordinance was broadly stated as to promote "the health, safety, morals and general welfare" of Ladue.

In July, 1981, defendants purchased a seven-bedroom, four-bathroom house which was located in a single-family residential zone in Ladue. Residing in defendants' home were Horn's two children (aged 16 and 19) and Jones's one child (age 18). The two older children attended out-of-state universities and lived in the house only on a part-time basis. Although defendants were not married, they shared a common bedroom, maintained a joint checking account for the household expenses, ate their meals together, entertained together, and disciplined each other's children. Ladue made demands upon defendants to vacate their home because their household did not comprise a family, as defined by Ladue's zoning ordinance, and therefore they could not live in an area zoned for single-family dwellings. When defendants refused to vacate, Ladue sought to enjoin defendants' continued violation of the zoning ordinance. Defendants counterclaimed, seeking a declaration that the zoning ordinance was constitutionally void. They also sought attorneys' fees and costs. The trial court entered a permanent injunction in favor of Ladue and dismissed defendants' counterclaim. Enforcement of the injunction was stayed pending this appeal.

. . . In Missouri, the scope of appellate review in zoning matters is limited; and the reviewing court may not substitute its judgment for that of the zoning authority. A zoning ordinance is presumed valid. The legislative body is vested with broad discretion and the appellate court cannot interfere unless it is shown that the legislative body has acted arbitrarily. "If the council's action is fairly debatable, the court cannot substitute its opinion."

. . . Capsulated, defendants' attack on Ladue's ordinance is three-pronged. First, the zoning limitations foreclose them from exercising their right to associate freely with whomever they wish. Second, their right to privacy is violated by the zoning restrictions. Third, the zoning classification distinguishes between related persons and unrelated persons. Defendants allege that the United States and Missouri Constitutions grant each of them the right to share his or her residence with whomever he or she chooses. They assert that Ladue has not demonstrated a compelling, much

less rational, justification for the overly proscriptive blood or legal relationship requirement in its zoning ordinance.

Defendants posit that the term "family" is susceptible to several meanings. They contend that, since their household is the "functional and factual equivalent of a natural family," the ordinance may not preclude them from living in a single-family residential Ladue neighborhood. Defendants argue in their brief as follows:

> The record amply demonstrates that the private, intimate interests of Horn and Jones are substantial. Horn, Jones, and their respective children have historically lived together as a single family unit. They use and occupy their home for the identical purposes and in the identical manners as families which are biologically or maritally related.

To bolster this contention, defendants elaborate on their shared duties, as set forth earlier in this opinion. Defendants acknowledge the importance of viewing themselves as a family unit, albeit a "conceptual family" as opposed to a "true non-family," in order to prevent the application of the ordinance.[3]

The fallacy in defendants' syllogism is that the stipulated facts do not compel the conclusion that defendants are living as a family. A man and woman living together, sharing pleasures and certain responsibilities, does not per se constitute a family in even the conceptual sense. To approximate a family relationship, there must exist a commitment to a permanent relationship and a perceived reciprocal obligation to support and to care for each other. Only when these characteristics are present can the conceptual family, perhaps, equate with the traditional family. In a traditional family, certain of its inherent attributes arise from the legal relationship of the family members. In a non-traditional family, those same qualities arise in fact, either by explicit agreement or by tacit understanding among the parties.

While the stipulated facts could arguably support an inference by the trial court that defendants and their children comprised a non-traditional

[3]The distinction between "conceptual" or "non-traditional" families and true non-families may well be a distinction without a difference, the distinction resting in speculation and sterotypical presumptions. Further, recognition of the conceptual family suffers from the defect of commanding inquiry into who are the users rather than focusing on the use itself. *See generally* Note, *City of Santa Barbara v. Adamson: An Associational Right of Privacy and the End of Family Zones*, 69 Calif. L. Rev. 1052, 1068–70 (1981).

family, they do not compel that inference. . . . We assume, arguendo, that the sole basis for the judgment entered by the trial court was that defendants were not related by blood, marriage or adoption, as required by Ladue's ordinance.

We first consider whether the ordinance violates any federally protected rights of the defendants. Generally, federal court decisions hold that a zoning classification based upon a biological or a legal relationship among household members is justifiable under constitutional police powers to protect the public health, safety, morals or welfare of the community.

More specifically, the United States Supreme Court has developed a two-tiered approach by which to examine legislation challenged as violative of the equal protection clause. If the personal interest affected by the ordinance is fundamental, "strict scrutiny" is applied and the ordinance is sustained only upon a showing that the burden imposed is necessary to protect a compelling governmental interest. If the ordinance does not contain a suspect class or impinge upon a fundamental interest, the more relaxed "rational basis" test is applied and the classification imposed by the ordinance is upheld if any facts can reasonably justify it. Defendants urge this court to recognize that their interest in choosing their own living arrangement inexorably involves their fundamental rights of freedom of association and of privacy.

In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the United States Supreme Court also established the due process parameters of permissible legislation. The ordinance in question must have a "foundation in reason" and bear a "substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."

In the *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the court addressed a zoning regulation of the type at issue in this case. The court held that the Village of Belle Terre ordinance involved no fundamental right, but was typical of economic and social legislation which is upheld if it is reasonably related to a permissible governmental objective. The challenged zoning ordinance of the Village of Belle Terre defined family as:

> One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit [or] a number of persons but not exceeding two (2) living and cook-

> ing together as a single housekeeping unit though not related by blood, adoption, or marriage . . . .

The court upheld the ordinance, reasoning that the ordinance constituted valid land use legislation reasonably designed to maintain traditional family values and patterns.

The importance of the family was reaffirmed in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), wherein the United States Supreme Court was confronted with a housing ordinance which defined a "family" as only certain closely related individuals. Consequently, a grandmother who lived with her son and two grandsons was convicted of violating the ordinance because her two grandsons were first cousins rather than brothers. The United States Supreme Court struck down the East Cleveland ordinance for violating the freedom of personal choice in matters of marriage and family life. The court distinguished *Belle Terre* by stating that the ordinance in that case allowed all individuals related by blood, marriage or adoption to live together; whereas East Cleveland, by restricting the number of related persons who could live together, sought "to regulate the occupancy of its housing by slicing deeply into the family itself." The court pointed out that the institution of the family is protected by the Constitution precisely because it is so deeply rooted in the American tradition and that "[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family."

Here, because we are dealing with economic and social legislation and not with a fundamental interest or a suspect classification, the test of constitutionality is whether the ordinance is reasonable and not arbitrary and bears a rational relationship to a permissible state objective. "[E]very line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function."

Ladue has a legitimate concern with laying out guidelines for land use addressed to family needs. "It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." The question of whether Ladue could have chosen more precise means to effectuate its legislative goals is immaterial. Ladue's zoning ordinance is rationally related to its expressed purposes and violates no provisions of the Constitution of the United States. Further, defendants' assertion that they have a constitutional right to share their

residence with whomever they please amounts to the same argument that was made and found unpersuasive by the court in *Belle Terre*.

. . . The essence of zoning is selection; and, if it is not invidious or discriminatory against those not selected, it is proper. There is no doubt that there is a governmental interest in marriage and in preserving the integrity of the biological or legal family. There is no concomitant governmental interest in keeping together a group of unrelated persons, no matter how closely they simulate a family. Further, there is no state policy which commands that groups of people may live under the same roof in any section of a municipality they choose.

The stated purpose of Ladue's zoning ordinance is the promotion of the health, safety, morals and general welfare in the city. Whether Ladue could have adopted less restrictive means to achieve these same goals is not a controlling factor in considering the constitutionality of the zoning ordinance. Rather, our focus is on whether there exists some reasonable basis for the means actually employed. In making such a determination, if any state of facts either known or which could reasonably be assumed is presented in support of the ordinance, we must defer to the legislative judgment. We find that Ladue has not acted arbitrarily in enacting its zoning ordinance which defines family as those related by blood, marriage or adoption. Given the fact that Ladue has so defined family, we defer to its legislative judgment.

The judgment of the trial court is affirmed.

Notes and Questions

4.5. **Further background on the Supreme Court cases.** *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), was primarily concerned with the Village's attempts to exclude groups of unrelated college students from living together. The Supreme Court cited *Euclid* and similar cases in support of its holding that the legislature can decide what kinds of uses are detrimental to the peaceful and attractive character of the area:

> The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds . . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is

> ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Are college students nuisance-like? The *Belle Terre* Court said the ordinance in that case showed no animosity towards unmarried couples, as proven by its inclusion of two unmarried people in its definition of "family." But what about an unmarried couple with children, as in *Ladue*?

4.6. Justice Marshall's vigorous dissent in *Belle Terre* would have distinguished between "uses of land . . . , for example, the number and kind of dwellings to be constructed in a certain neighborhood or the number of persons who can reside in those dwellings," which zoning authorities could validly regulate, and "who those persons are, what they believe, or how they choose to live, whether they are Negro or white, Catholic or Jew, Republican or Democrat, married or unmarried," which he would have found they could not. In Justice Marshall's view, a neutral ordinance regulating density, noise, etc. could accomplish all the town's goals. "The burden of such an ordinance would fall equally upon all segments of the community. It would surely be better tailored to the goals asserted by the village than the ordinance before us today, for it would more realistically restrict population density and growth and their attendant environmental costs."

4.7. In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), Justice Marshall joined the plurality opinion of the Court striking down East Cleveland's more limited definition of "family," over several dissents.[1] In that case, Inez Moore lived with her son, Dale Moore, Sr., and her two grandsons, Dale, Jr., and John Moore, Jr. The two boys were first cousins, rather than brothers; John came to live with his grandmother and the elder and younger Dale Moores after his mother's death. This caused the household to violate East Cleveland's family ordinance, resulting in criminal charges against Mrs. Moore. The Court distinguished *Belle Terre* by reasoning that East Cleveland "has chosen to regulate the occupancy of its housing by slicing deeply into the family itself."

The doctrine of substantive due process, which protects fundamental rights against government intrusion, could not stop at the "first convenient, if arbitrary boundary—the boundary of the nuclear family." Justices Brennan and Marshall, in concurrence, specifically pointed out that the "nuclear family" was really the pattern of "white suburbia," which could not impose its preference on others, and

[1] The relevant ordinance defined "family" as "a number of individuals related to the nominal head of the household or to the spouse" thereof, and further enumerated specific relatives that could qualify as part of the statutorily defined family.

noted traditions among immigrants and African-Americans of living together in multigenerational arrangements as a matter of survival. The concurrence touted multigenerational families as stronger and more beneficial for children than isolated nuclear families. Ultimately, the plurality wrote, "the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns."

Justice Stewart, joined by then-Justice Rehnquist, would have upheld the ordinance, rejecting the theory that "that the biological fact of common ancestry necessarily gives related persons constitutional rights of association superior to those of unrelated person." The interests of a grandmother in living with her grandchildren were simply not sufficient, in the dissenters' view, to justify invalidating a zoning ordinance. If the city was required to include grandchildren, why not longtime friends? A line had to be drawn somewhere, and this one was rational, especially since the grandmother could seek a variance if the application of the ordinance to her wouldn't further its goals.

4.8. Given this further detail about *Belle Terre* and *Moore*, do you think *Ladue v. Horn* reached the right conclusion? Consider Paul Boudreaux, The Housing Bias: Rethinking Land Use Laws for a Diverse New America (2011):

> [Restrictive single family] regulations provide a fascinating perspective into the unique powers that America gives to laws governing "land use." Government cannot, of course, tell you what kind of car to drive, what to cook for dinner, whether to watch reality TV, whether to fill the living room with ceramic gnomes or tchotchkes, or whether to pay for your kid's college education. All these things are considered, and rightly so, within the realm of human privacy and basic human freedom. But under the label of land use law, governments are able to tell you who to consider your family and who can live in your house. . . . Why can government be so intrusive? Because the neighbors might not like how you live and because they have pushed the local government, through civic local democracy, into passing a law regulating your household. It's an accepted exercise of the police power.

4.9. **More recent events**. Ladue's current (as of 2023) ordinance allows "[o]ne or more persons related by blood, marriage or legal adoption, or any number of persons so related plus one unrelated person, or two unrelated persons, occupying a dwelling unit as an individual housekeeping organization." Is it constitutional to

force an unmarried couple to leave if they each have a child from a prior relationship, or a married couple after they take foster children into their home? In 2006, a lesbian couple with a child was excluded from Ladue because of its family composition ordinance, and the same year an unmarried couple with two children was told they had to leave the home they'd bought in Black Jack, Missouri, another St. Louis suburb.[2]

The American Civil Liberties Union sued Black Jack. Discovery revealed that at least four other couples had been denied occupancy permits to live in Black Jack because they were unmarried and living with children, including a couple who were the parents of triplets. *Dispatch From Black Jack, MO*, L.A. TIMES A12 (May 21, 2006). Black Jack agreed to change its ordinance to settle the litigation.

Now that the lesbian couple in Black Jack can legally marry, can Black Jack go back to requiring couples to be married if they want to live in Black Jack with their children?

4.10. **States' varying treatment of family composition rules**. A number of other states, either on federal or state constitutional grounds, have instead drawn the line at "single housekeeping units" or "functional families." *See, e.g.*, *Delta Charter T'ship v. Dinolfo*, 351 N.W.2d 831 (Mich. 1984) (no rational basis to preclude four childhood friends from living together). The Court of Appeals of New York has been particularly protective of individual choice of living arrangements. *See, e.g.*, *Group House of Port Washington v. Board of Zoning and Appeals*, 380 N.E.2d 207 (N.Y. 1978) (a house consisting of two surrogate parents and seven emotionally disturbed children was "the functional and factual equivalent of a natural family, and to exclude it from a residential area would be to serve no valid purpose"). Many New York municipalities now presume that a group of individuals smaller than four is a functional family, and presume that a larger group is not but allow it to rebut that presumption. *See, e.g.*, *Unification Theological Seminary v. City of Poughkeepsie*, 607 N.Y.S.2d 383 (N.Y. App. Div. 1994) (upholding this practice, where the ordinance provided that the zoning administrator should consider whether the group shares the entire house; lives and cooks together as a single housekeeping unit; shares expenses for food, rent, utilities or other household expenses; and is permanent and stable).

However, a number of states still follow *Belle Terre* when a jurisdiction's family composition ordinance is challenged. The litigated cases tend to be older, and

[2] *See, e.g.*, Nancy Larson, *Gay Couples Keep Out!*, ADVOCATE 34 (Jul. 18, 2006) (discussing lesbian couple and daughter who were warned by real estate agents that Ladue would prevent them from living together); Eun Kyung Kim, *Law Means Unwed Couple, 3 Kids May Be . . . Booted From Black Jack*, ST. LOUIS POST-DISPATCH A1 (Feb. 22, 2006).

even in the 1990s enforcement often drew incredulous media coverage, but there are a few recent cases upholding restrictive definitions of family. *See, e.g.*, *City of Baton Rouge/Parish of East Baton Rouge v. Myers*, 145 So. 3d 320 (La. 2014) (upholding single-family ordinance that allowed (1) an unlimited number of related people or (2) no more than four unrelated people in a single housekeeping unit, if the owner occupied the premises). Some jurisdictions have even tightened their definitions. *See, e.g.*, Stephanie McCrummen, *Manassas Changes Definition of Family*, Wash. Post A1 (Dec. 28, 2005) (newly enacted Manassas, VA zoning law prevented couple from living with woman's nephew; opponents attributed enactment to discrimination against immigrants); *see generally* Rigel C. Oliveri, *Single Family Zoning, Intimate Association, and the Right To Choose Household Companions*, Fla. L. Rev. (2015); Adam Lubow, *". . . Not Related by Blood, Marriage, or Adoption": A History of the Definition of "Family" in Zoning Law*, 16 J. Afford. Hous. & Comm. Dev. Law 144 (2007). In other instances, zoning authorities have focused on excluding groups of college students, not others. *See, e.g.*, *Rosenberg v. City of Boston*, 2010 WL 2090956 (Mass. Land. Ct. 2010) (upholding the constitutionality of excluding only "five or more persons who are enrolled as full-time undergraduate students at a post-secondary educational institution" from living together in a dwelling unit).

4.11. The Supreme Court, in *Obergefell v. Hodges*, rejected arguments that bans on same-sex marriage protected children, because of the numerous children living with same-sex couples whose interests were harmed by discrimination against their parents. Does the same rationale apply here to invalidate family composition ordinances, at least as applied to households with children?

4.12. **The Fair Housing Act and the Americans with Disabilities Act**. The FHA and the ADA may also limit family composition rules, as applied to group homes for people with disabilities. Disability-related zoning litigation often involves residents of group homes, who routinely experience discrimination, either overt or simply through indifference, usually in the form of bans on group living arrangements. *See, e.g.*, *Oxford House v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993) (finding that town's family composition ordinance discriminated against individuals recovering from drug or alcohol addition because of their handicap). While pure density regulations capping the number of occupants per dwelling are exempt from the FHA, family definitions are not pure density regulations and thus reasonable accommodations to them may be required. *City of Edmonds v. Oxford House*, 514 U.S. 725 (1995).

In order to deal with repeated FHA litigation around group homes, Missouri amended its zoning authorization statute, providing comprehensive definitions and limiting localities' power to exclude group homes:

> For the purpose of any zoning law, ordinance or code, the classification single family dwelling or single family residence shall include any home in which eight or fewer unrelated mentally or physically handicapped persons reside, and may include two additional persons acting as house parents or guardians who need not be related to each other or to any of the mentally or physically handicapped persons residing in the home. In the case of any such residential home for mentally or physically handicapped persons, the local zoning authority may require that the exterior appearance of the home and property be in reasonable conformance with the general neighborhood standards. Further, the local zoning authority may establish reasonable standards regarding the density of such individual homes in an specific single family dwelling neighborhood.

Section 89.020.2. Does this adequately address problems of potential discrimination, including the obligation to provide reasonable accommodation?

4.3 The Fair Housing Act

The Fair Housing Act of 1968

42 U.S.C. §§ 3601–3619

§ 3601. DECLARATION OF POLICY.—It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

§ 3602. DEFINITIONS.—As used in this subchapter . . .

(c) "Family" includes a single individual. . . .

(h) "Handicap" means, with respect to a person—

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

(2) a record of having such an impairment, or

(3) being regarded as having such an impairment,

but such term does not include current, illegal use of or addiction to a controlled substance* . . . .

(k) "Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with—

(1) a parent or another person having legal custody of such individual or individuals; or

(2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

§ 3604. Discrimination in the sale or rental of housing and other prohibited practices.—[Subject to certain exceptions], it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin [hereinafter RCRSFSNO].

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of [RCRSFSNO].

(c) To [publish an] advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on [RCRSFSNO or handicap], or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of [RCRSFSNO or handicap] that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular [RCRSFSNO or handicap].

*"Controlled substance" is defined generally to include regulated drugs but not alcohol. —Eds.

§ 3603(b). Nothing in section 3604 of this title (other than subsection (c)) shall apply to—

> (1) any single-family house sold or rented by an owner [so long as the owner meets a variety of tests intended to distinguish a "private individual owner" from a commercial real estate dealer]; or
>
> (2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

Notes and Questions

4.13. You may have noticed the omission of "handicap" from § 3604(a) and (b). Paragraph (f) fills this gap, making it also unlawful to "discriminate in the sale or rental" of a dwelling, or the terms thereof, "because of on a handicap of the buyer or renter," or someone related to the buyer or renter. Discrimination includes a refusal to make policy accommodations or to permit modifications to the premises, if those accommodations or modifications are "reasonable" and "necessary" to afford "full enjoyment of the premises." Certain newly-constructed multifamily dwellings must also be designed according to accessibility standards, per § 3604(f)(3)(C).

4.14. There are several exceptions, such as for religious organizations and "housing for older persons." § 3607(a), (b)(1). The most controversial of these, colloquially known as the "Mrs. Murphy exemption," is in § 3603(b) above. What does this exemption allow? If the act is intended to root out pernicious discrimination, why include this provision?

It is crucial to note that the plain text of the Mrs. Murphy exemption states that it does not apply to § 3604(c)—the subsection that prohibits discriminatory advertising. Thus, although certain categories of landlords are exempted from the statute's basic framework, they are still not allowed to post discriminatory advertisements.

4.15. The Civil Rights Act of 1866, codified at 42 U.S.C. § 1982, "bars all racial discrimination, private as well as public, in the sale or rental of property." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968). Unlike the Fair Housing Act, it has no exceptions or limitations, but it "deals only with racial discrimination," and not other forms. *Id.*

For Rent Seeking tenant for 1 bed apt. $500/m. I only rent to black people.	**For Rent** New apartment building. $650/m. Walking distance to synagogue. Great amenities.
For Rent Great deal! Apt. in exclusive Danbury area. Very selective. Contact ASAP. $700/m	**For Rent** Perfect apt. for rent. Near park. $400/m. Absolutely no pets.
For Rent Snazzy digs near downtown! Looking for muscular football players to rent rooms. 500/m	**For Rent** Looking for tenants. Absolutely no lawyers. Only couples. Must show income 3x monthly rent.
For Rent Seeking new tenants for 2 br. Pref for women—I'm female & want female tenants!	**For Rent** Great place by University. $600/m. Kids ok, but must pay 2x security dep. Kids = trouble

Figure 4.2: Hypothetical classified advertisements.

An Exercise in Advertising

Imagine that you are a lawyer for a newspaper in a large metropolitan area. The local chapter of the ACLU has raised concerns that some advertisements in the classifieds section of your paper violate the Fair Housing Act.[3] Your boss has asked you to review the ads in Figure 4.2 for any offending language. Which of the following would you feel comfortable printing?[4]

What about this ad for a roommate on Craigslist? Is it objectionable to you? Does it violate the FHA? Does it matter that the poster is looking for a *roommate*? Would your answers change if the advertisement read, "Have a room available for an able-bodied white man with no children?"

[3]Would any of these ads violate the Civil Rights Act of 1866?

[4]The government does provide some guidance to landlords worried about triggering FHA liability through their advertisements. There are, for example, published lists of "words to avoid" and "acceptable language." Although context is important, landlords can generally use these phrases: good neighborhood, secluded setting, single family home, quality construction, near public transportation, near places of worship, and assistance animals only.

$650 / 1010 sq. ft. – Have a room available for female Christian elderly woman none smoker

Nice comfortable furnished room available access to patio, backyard, 1/2 bath & full bath available, wyfi available, cable TV available, This is all for that special Christian elderly none smoking or drinking church going female. Thank you

Serious inquiries only!!!

Fair Housing Council v. Roommate.com, LLC

666 F.3d 1216 (9th Cir. 2012)

KOZINSKI, Chief Judge:

There's no place like home. In the privacy of your own home, you can take off your coat, kick off your shoes, let your guard down and be completely yourself. While we usually share our homes only with friends and family, sometimes we need to take in a stranger to help pay the rent. When that happens, can the government limit whom we choose? Specifically, do the anti-discrimination provisions of the Fair Housing Act ("FHA") extend to the selection of roommates?

Roommate.com, LLC ("Roommate") operates an internet-based business that helps roommates find each other. Roommate's website receives over 40,000 visits a day and roughly a million new postings for roommates are created each year. When users sign up, they must create a profile by answering a series of questions about their sex, sexual orientation and whether children will be living with them. An open-ended "Additional Comments" section lets users include information not prompted by the questionnaire. Users are asked to list their preferences for roommate characteristics, including sex, sexual orientation and familial status. Based on the profiles and preferences, Roommate matches users and provides them a list of housing-seekers or available rooms meeting their criteria. Users can also search available listings based on roommate characteristics, including sex, sexual orientation and familial status. The Fair Housing Councils of San Fernando Valley and San Diego ("FHCs") sued Roommate in federal court, alleging that the website's questions requiring disclosure of sex, sexual orientation and familial status, and its sorting, steering and matching of users based on those characteristics, violate the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 et seq. . . .

Analysis

If the FHA extends to shared living situations, it's quite clear that what Roommate does amounts to a violation. The pivotal question is whether the FHA applies to roommates.

I

The FHA prohibits discrimination on the basis of "race, color, religion, sex, familial status, or national origin" in the "sale or rental *of a dwelling*." 42 U.S.C. § 3604(b) (emphasis added). The FHA also makes it illegal to:

> make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental *of a dwelling* that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

Id. § 3604(c) (emphasis added). The reach of the statute turns on the meaning of "dwelling."

The FHA defines "dwelling" as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families." Id. § 3602(b). A dwelling is thus a living unit designed or intended for occupancy by a family, meaning that it ordinarily has the elements generally associated with a family residence: sleeping spaces, bathroom and kitchen facilities, and common areas, such as living rooms, dens and hallways.

It would be difficult, though not impossible, to divide a single-family house or apartment into separate "dwellings" for purposes of the statute. Is a "dwelling" a bedroom plus a right to access common areas? What if roommates share a bedroom? Could a "dwelling" be a bottom bunk and half an armoire? It makes practical sense to interpret "dwelling" as an independent living unit and stop the FHA at the front door.

There's no indication that Congress intended to interfere with personal relationships inside the home. Congress wanted to address the problem of landlords discriminating in the sale and rental of housing, which deprived protected classes of housing opportunities. But a business transaction between a tenant and landlord is quite different from an arrangement between two people sharing the same living space. We seriously

doubt Congress meant the FHA to apply to the latter. Consider, for example, the FHA's prohibition against sex discrimination. Could Congress, in the 1960s, really have meant that women must accept men as roommates? Telling women they may not lawfully exclude men from the list of acceptable roommates would be controversial today; it would have been scandalous in the 1960s.

While it's possible to read dwelling to mean sub-parts of a home or an apartment, doing so leads to awkward results. . . . Nonetheless, this interpretation is not wholly implausible and we would normally consider adopting it, given that the FHA is a remedial statute that we construe broadly. Therefore, we turn to constitutional concerns, which provide strong countervailing considerations.

II

The Supreme Court has recognized that "the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987). "[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984). Courts have extended the right of intimate association to marriage, child bearing, child rearing and cohabitation with relatives. *Id.* While the right protects only "highly personal relationships," *IDK, Inc. v. Clark Cnty.*, 836 F.2d 1185, 1193 (9th Cir. 1988) (quoting *Roberts*, 468 U.S. at 618), the right isn't restricted exclusively to family, *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 545. The right to association also implies a right not to associate. *Roberts*, 468 U.S. at 623.

To determine whether a particular relationship is protected by the right to intimate association we look to "size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship." *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 546. The roommate relationship easily qualifies: People generally have very few roommates; they are selective in choosing roommates; and non-roommates are excluded from the critical aspects of the relationship, such as using the living spaces. Aside from immediate family or a romantic partner, it's hard to imagine a relationship more inti-

mate than that between roommates, who share living rooms, dining rooms, kitchens, bathrooms, even bedrooms.

Because of a roommate's unfettered access to the home, choosing a roommate implicates significant privacy and safety considerations. The home is the center of our private lives. Roommates note our comings and goings, observe whom we bring back at night, hear what songs we sing in the shower, see us in various stages of undress and learn intimate details most of us prefer to keep private. . . .

Equally important, we are fully exposed to a roommate's belongings, activities, habits, proclivities and way of life. This could include matter we find offensive (pornography, religious materials, political propaganda); dangerous (tobacco, drugs, firearms); annoying (jazz, perfume, frequent overnight visitors, furry pets); habits that are incompatible with our lifestyle (early risers, messy cooks, bathroom hogs, clothing borrowers). When you invite others to share your living quarters, you risk becoming a suspect in whatever illegal activities they engage in.

Government regulation of an individual's ability to pick a roommate thus intrudes into the home, which "is entitled to special protection as the center of the private lives of our people." *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring). . . . Holding that the FHA applies inside a home or apartment would allow the government to restrict our ability to choose roommates compatible with our lifestyles. This would be a serious invasion of privacy, autonomy and security.

For example, women will often look for female roommates because of modesty or security concerns. As roommates often share bathrooms and common areas, a girl may not want to walk around in her towel in front of a boy. She might also worry about unwanted sexual advances or becoming romantically involved with someone she must count on to pay the rent.

An orthodox Jew may want a roommate with similar beliefs and dietary restrictions, so he won't have to worry about finding honey-baked ham in the refrigerator next to the potato latkes. Non-Jewish roommates may not understand or faithfully follow all of the culinary rules, like the use of different silverware for dairy and meat products, or the prohibition against warming non-kosher food in a kosher microwave. . . .

It's a "well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Frisby v. Schultz*, 487 U.S. 474, 483 (1988). "[W]here an otherwise acceptable construction of a statute would raise se-

rious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989). Because the FHA can reasonably be read either to include or exclude shared living arrangements, we can and must choose the construction that avoids raising constitutional concerns. . . . Reading "dwelling" to mean an independent housing unit is a fair interpretation of the text and consistent with congressional intent. Because the construction of "dwelling" to include shared living units raises substantial constitutional concerns, we adopt the narrower construction that excludes roommate selection from the reach of the FHA. . . .

As the underlying conduct is not unlawful, Roommate's facilitation of discriminatory roommate searches does not violate the FHA.

Notes and Questions

4.16. **What's a dwelling?** The FHA defines "dwelling" as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families." Id. § 3602(b). Do you think the FHA applies to college dormitories? Is it illegal to reserve some dormitories for women or to have ethnic-themed dorms?

4.17. **A broader Craigslist problem.** It's not unusual to stumble across advertisements for apartments (as opposed to just roommate ads) on Craigslist that violate the FHA. If a local newspaper published similar ads they would be liable under the FHA for publishing discriminatory material. Why doesn't anyone sue Craigslist? The answer is that section 230(c) of the Communications Decency Act provides internet service providers and website owners with broad immunity from liability for content posted by third parties. Craigslist and other similar sites may voluntarily remove offending posts, but they are not required to do so.

Chapter 5

The Commons

Over half a millennium, a revolution in land occurred across England. Fields that had by custom and tradition been held as a **commons**, available to all commoners for grazing, farming, and other uses, were enclosed and converted to private ownership, primarily by lords and nobles. Enclosure of the commons sometimes happened by erection of physical barriers like fences, sometimes by agreement with the local farmers and commoners, and sometimes by acts of Parliament. The enclosure movement was controversial, arguably increasing productivity of land but also sparking riots among those losing rights. But the result was that, by the end of the 19th century, the commons had largely turned into private land. *See generally* Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law*, 43 Clev. State L. Rev. 221, 252–61 (1995); James Boyle, *The Second Enclosure Movement*, 66 Law & Contemp. Probs. 33, 34–36 (2003).

Property law is roughly concerned with private rights in resources. A commons[1] seems the opposite of that—a resource for which no one holds a right to exclude. As such, the notion of a commons seems to fly in the face of theories justifying property ownership as an institution. Indeed, the **tragedy of the commons** concept, discussed above, p. 81, would suggest that a commons is an inferior manner of resource management compared to private ownership.

Yet commons are, for lack of a better term, common. A commons can arise because a resource is too hard to appropriate to one owner (like the air), because society agrees to treat a resource as non-appropriable (like a public park), or because legal institutions insufficiently govern the resource (like the deep sea or space, though some treaties govern those). Especially in the world of intellectual property,

[1] Despite its appearance, "commons" is typically treated as a singular noun.

tremendous swaths of information are in the commons, owned by no one. Among other things, that is why you are free to learn all the property law doctrines and ideas you could possibly desire.

Theories of the commons—why they arise, how they operate, who manages them, why they survive despite the tragedy of the commons—are extensive and complex. The focus of this chapter is narrower. It considers how law, and property law in particular, interacts with a commons. How do laws divide the realm of private ownership from the commons? What happens when a property owner interferes with access to a commons? And to what extent can interests in a commons be understood as property rights?

5.1 Public Use Rights to Water

Waterways are a classic example of a commons. Generally there is no need for permission to sail a boat down a river or swim in a lake—even if, as seen in *Tyler v. Wilkinson*, nearby landowners may have property rights in the water. The **public trust** doctrine explains why.

Lawrence v. Clark County

254 P.3d 606, 608-09 (Nev. 2011)

The public trust doctrine is an ancient principle thought to be traceable to Roman law and the works of Emperor Justinian. *See State v. Sorensen*, 436 N.W.2d 358, 361 (Iowa 1989). Justinian derived the doctrine from the principle that the public possesses inviolable rights to certain natural resources, noting that "[b]y the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea." The Institutes of Justinian, Lib. II, Tit. I, § 1 (Thomas Collett Sandars trans. 5th London ed. 1876). He also stated that "rivers and ports are public; hence the right of fishing in a port, or in rivers, is common to all men." *Id.* § 2.

The doctrine was thereafter adopted by the common law courts of England, which espoused the similar principle that "title in the soil of the sea, or of arms of the sea, below ordinary high-water mark, is in the King" and that such title "is held subject to the public right." *Shively v. Bowlby*, 152 U.S. 1, 13 (1894). . . .

Courts in this country have readily embraced the public trust doctrine. In 1821, in the first notable American case to express public trust principles,

the Supreme Court of New Jersey observed that citizens have a common right to sovereign-controlled waterways:

> The sovereign power itself . . . cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.

Arnold v. Mundy, 6 N.J.L. 1, 78 (N.J. 1821).

Thereafter, the United States Supreme Court similarly recognized that "when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use." *Martin et al. v. Waddell*, 41 U.S. 367, 410, 16 Pet. 367, 10 L.Ed. 997 (1842).

Fifty years later, in what has become the seminal public trust doctrine case, the Supreme Court decided *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). In *Illinois Central* the Court noted that because the State of Illinois was admitted to the United States on "equal footing" with the original 13 colonies, it, like the colonies, was granted title to the navigable waters and the lands underneath them. For Illinois, that meant that upon its admission, it held title to its portion of the waters of and lands beneath Lake Michigan. However, the waters and lands underneath Lake Michigan were not freely alienable by the State of Illinois—its title to those areas was "different in character from that which the State holds in lands intended for sale." More specifically, it possessed only "title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." As a result, the Court concluded that the Illinois Legislature's attempted relinquishment of such trust property to the Illinois Central Railroad

> is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public . . . . The State can no more abdicate its trust over property in which the whole people are interested than it can abdicate its police powers in the administration of government and the preservation of the peace.

While the Court noted that such lands need not, under all circumstances, be perpetually held in trust, it recognized that in effecting transfers, the public interest is always paramount, providing that "[t]he control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." *Id.*

Note

As public uses of waters expanded, so too did the public trust doctrine. In New Jersey, the courts extended the public trust doctrine to protect recreational uses. It then extended the public's right to access the "wet sands," which is land extending from the ocean to the average high tide water mark, to include access via certain "dry sands."

Matthews v. Bay Head Imp. Ass'n

471 A.2d 355 (N.J. 1984)

. . . In order to exercise these rights guaranteed by the public trust doctrine, the public must have access to municipally-owned dry sand areas as well as the foreshore. The extension of the public trust doctrine to include municipally-owned dry sand areas was necessitated by our conclusion that enjoyment of rights in the foreshore is inseparable from use of dry sand beaches. . . . We [previously] held that where a municipal beach is dedicated to public use, the public trust doctrine "dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible." 61 N.J. at 309, 294 A.2d 47. . . .

We now address the extent of the public's interest in privately-owned dry sand beaches. This interest may take one of two forms. First, the public may have a right to cross privately owned dry sand beaches in order to gain access to the foreshore. Second, this interest may be of the sort enjoyed by the public in municipal beaches . . . namely, the right to sunbathe and generally enjoy recreational activities.

Beaches are a unique resource and are irreplaceable. The public demand for beaches has increased with the growth of population and improvement of transportation facilities. . . .

Exercise of the public's right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless. To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine. This does not mean the public has an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied so long as there is reasonable access to the sea. . . .

The bather's right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge. The unavailability of the physical situs for such rest and relaxation would seriously curtail and in many situations eliminate the right to the recreational use of the ocean. This was a principal reason why in [earlier cases] we held that municipally-owned dry sand beaches "must be open to all on equal terms . . . ." We see no reason why rights under the public trust doctrine to use of the upland dry sand area should be limited to municipally-owned property. It is true that the private owner's interest in the upland dry sand area is not identical to that of a municipality. Nonetheless, where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner.

We perceive no need to attempt to apply notions of prescription, *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974), dedication, *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970), or custom, *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969), as an alternative to application of the public trust doctrine. Archaic judicial responses are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be "fixed or static," but one to "be molded and extended to meet changing conditions and needs of the public it was created to benefit." *Avon*, 61 N.J. at 309, 294 A.2d 47.

Precisely what privately-owned upland sand area will be available and required to satisfy the public's rights under the public trust doctrine will

depend on the circumstances. Location of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner are all factors to be weighed and considered in fixing the contours of the usage of the upper sand.

Today, recognizing the increasing demand for our State's beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary. While the public's rights in private beaches are not coextensive with the rights enjoyed in municipal beaches, private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand.

Notes and Questions

5.1. Do the rights covered by the public trust doctrine preexist the state, or are they pure creatures of law? When may courts change public trust rules? When they do so, are the rules changing or is the court explaining that the rule "always" thus, but is only now being announced? Does anything turn on this distinction? As we will see, how we define such changes has implications on whether a property owner may claim that the state is committing a constitutional violation by "taking" land without just compensation.

5.2. When a court alters preexisting conceptions of the right to exclude should anything be due to the property owner? Does your conception of what the public trust doctrine is help determine your answer to this question?

5.3. **Other theories of expanding public access rights.** Courts have used other doctrines to expand public access to private lands, including theories of prescriptive easements, "implied dedication," and customary uses. *See generally* 4-34 POWELL ON REAL PROPERTY § 34.11. As an example of implied dedication, the California Supreme Court declared:

> Although "No Trespassing" signs may be sufficient when only an occasional hiker traverses an isolated property, the same action cannot reasonably be expected to halt a continuous influx of beach users to an attractive seashore property. If the fee owner proves that he has made more than minimal and ineffectual efforts to exclude the public, then the trier of fact must decide

> whether the owner's activities have been adequate. If the owner has not attempted to halt public use in any significant way, however, it will be held as a matter of law that he intended to dedicate the property or an easement therein to the public, and evidence that the public used the property for the prescriptive period is sufficient to establish dedication.

Gion v. City of Santa Cruz, 2 Cal. 3d 29, 41, 465 P.2d 50, 58 (1970). On custom, *see, e.g.*, *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974) ("The general public may continue to use the dry sand area for their usual recreational activities, not because the public has any interest in the land itself, but because of a right gained through custom to use this particular area of the beach as they have without dispute and without interruption for many years.").

5.4. **Politics!** Do not overlook the role of the political process in questions of beach access. Following the *Gion* ruling noted above, the California legislature added Cal. Civ. Code § 1009, which opines that "[o]wners of private real property are confronted with the threat of loss of rights in their property if they allow or continue to allow members of the public to use, enjoy or pass over their property for recreational purposes" and that the "stability and marketability of record titles is clouded by such public use, thereby compelling the owner to exclude the public from his property." It therefore provides that "no use of such property by the public after the effective date of this section shall ever ripen to confer upon the public or any governmental body or unit a vested right to continue to make such use permanently, in the absence of an express written irrevocable offer of dedication of such property to such use." Does the availability of a legislative remedy if landowners organize and convince the legislature to act suffice to address the concerns about cases like *Matthews*?

5.5. **Conflicting uses.** Once the public has the right of access to private land, what other limits on private ownership follow? *See, e.g.*, *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974) (private landowner's construction of tower on beach did not interfere with customary public rights).

5.6. **Public Policy.** Are expansions of public access rights by the courts beneficial? What kinds of incentives do they create? Consider the following criticism:

> Commentators were severe in their criticism of *Gion-Dietz*, noting not only departure from precedent, the failure to consider total loss to the owner, and the prohibition of taking property without compensation, but also that the case created an ob-

> vious inequity and would prove counterproductive to the public policy espoused. [Citations of critical commentary omitted.]
>
> The inequity addressed by commentators appears when weighing penalties against rewards to landowners having no immediate use for their property so that permitting public use poses no interference or impairment. Those landowners who were neighborly and hospitable in permitting public use were penalized by *Gion-Dietz* by loss of their land, while those excluding the public by fencing or other means were rewarded by retention of their exclusive use. While virtue is usually its own reward, the law does not usually penalize the virtuous. The decision was asserted to be counterproductive because landowners to avoid prescriptive dedication would now exclude the public from using open and unimproved property for recreation purposes. Thus the very policy sought to be furthered would be defeated. (*County of Orange v. Chandler-Sherman Corp.* (1976) 54 Cal.App.3d 561, 564, 126 Cal.Rptr. 765, 767, points out that one of the reactions to *Gion-Dietz* was "soaring sales of chain link fences.")

Cnty. of Los Angeles v. Berk, 26 Cal. 3d 201, 228-31, 605 P.2d 381, 398-401 (1980) (Clark, J., dissenting). But expanding access offers benefits of its own:

> The law of beach access in Hawaii has an enormous, incalculable impact on social life. Though the law limits the property rights of beachfront owners as they are defined elsewhere, it increases the wealth of every single person in the state by giving them a right to go to the beach anywhere in the state. Everyone, no matter how poor, has a backyard on the beach. Individuals and families go the shore in the morning to swim or surf before work. Families gather to watch the sun go down in the evening. Even if they only have a small apartment inland, they have a right to sit outside on the beach wherever they please. It affects the range of options people have, their daily routine, and the sense of satisfaction of almost everyone.

Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1329 (2014).

5.7. Many European nations recognize (either by tradition or statute) a "right to roam" on private lands (excluding homestead or cultivated areas). Heidi Gorovitz Robertson, *Public Access to Private Land for Walking: Environmental and Individual Responsibility As Rationale for Limiting the Right to Exclude*, 23 Geo. Int'l Envtl. L. Rev. 211 (2011). The right to roam often encompasses the picking of berries, mushrooms, and the like. Open access used to be the norm for unenclosed land in the United States until the late 1800s; open range laws allowed cattle grazing on unimproved lands. Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 Temp. L. Rev. 665, 674 (2011); *Nashville & C.R. Co. v. Peacock*, 25 Ala. 229, 232 (1854) ("Our present Code contains similar provisions, which show conclusively that the unenclosed lands of this State are to be treated as common pasture for the cattle and stock of every citizen."). Pressure to close the range and forbid the crossing of uncultivated or unenclosed land came from three sources: farmers, who were relying less on free range livestock; railroads, who wished to avoid liability for cattle collisions; and southern planters, who viewed closed range laws as a mechanism for limiting the independence of newly emancipated African-American farmers. Sawers, *supra*, at 681-84; R. Ben Brown, *Free Men and Free Pigs: Closing the Southern Range and the American Property Tradition*, 108 Radical Hist. Rev. 117, 119 (Fall 2010) ("When the most important political and economic project of the post-Reconstruction era became recapturing the labor of African Americans to produce staple crops, restricting African American access to open range resources became a priority.").

5.2 Public Lands

Iron Bar Holdings, LLC v. Cape

131 F.4th 1153 (10th Cir. 2025)

Tymkovich, Circuit Judge.

The American West contains millions of acres platted into alternating squares of public and private land in a manner resembling a checkerboard. The question presented is whether a private landowner can prevent a person from stepping across adjoining corners of federal public land—a technique called "corner-crossing."

Appellant Iron Bar Holdings, LLC, owns a checkerboarded ranch in south-central Wyoming. Enmeshed within its holdings are federal and state public plats. The only way to access the federal or state land, other than aircraft, is by corner-crossing.

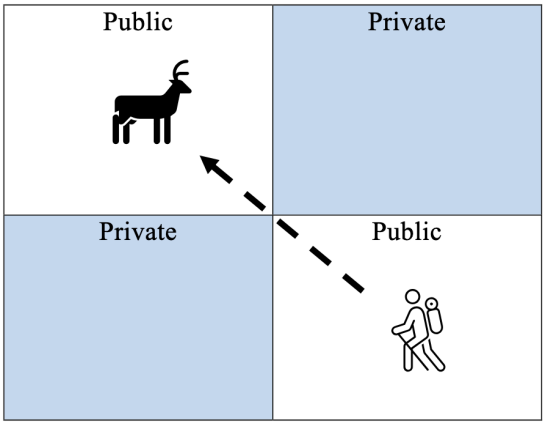

Figure 5.1: The court's diagram of corner-crossing.

Anyone familiar with the game checkers can visualize this corner-crossing problem: to move diagonally across the board, a piece must momentarily occupy the space on and above the opponent's squares. If the opposing player could foreclose that move, the opponent would be unable to travel the board.

Iron Bar seeks to prevent elk hunters, like Appellees, from corner-crossing under the theory that diagonal moves on the checkerboarded land are a trespass. The district court granted Appellees access. While the dispute may seem trivial, at its core, it implicates centuries of property law and the settlement of the American West.

This case turns on the interplay of state and federal law enacted against the backdrop of private settlement of public lands and the property disputes that inevitably followed among rival interests. Over a century ago, the Supreme Court held that private landowners cannot erect barriers which bar complete access to public lands based on the 1885 Unlawful Inclosures Act. And the Tenth Circuit has interpreted the UIA to allow corner-crossing if access to public lands is otherwise restricted. Those cases control and require us to affirm the district court.

Figure 5.2: Photographs from the 10th Circuit's opinion.

I. Background

[The Tenth Circuit offers a fascinating history of the checkerboard distribution of land. All you need to know is that Iron Bar's holdings prevent access to some public parcels except by corner-crossing.]

In the fall of 2020, Bradley Cape, Zachary Smith, and Phillip Yeomans traveled from Missouri to Elk Mountain to hunt elk. Upon arriving in Wyoming, the Hunters [made their way to the USGS marker indicating the public–private land corner.] In seeking to prohibit corner-crossing, Iron Bar had erected signposts over the United States Geological Survey marker [as shown in Figure 5.2]. . . . The Hunters could not fit between the signposts and under the chain to corner-cross, but they were undeterred by this odd barricade: "one by one, each grabbed one of the steel posts and swung around it, planting their feet only" on [public land], but passing through the airspace above Iron Bar's [land]. There is no showing that the Hunters did any damage to Iron Bar's property. . . .

The Hunters returned to the area in 2021. This time, they brought a steel A-frame ladder to avoid even touching Iron Bar's signposts [as shown in Figure 5.2].

Iron Bar's staff . . . confronted the Hunters multiple times. They also interfered with the Hunters' activities by driving motorized vehicles across

public parcels to scare away game. As in 2020, there is no evidence the Hunters made physical contact with or damaged Iron Bar's property.

[Iron Bar tried to have the Hunters prosecuted for trespassing, but the Hunters were acquitted. Iron Bar then sued the Hunters for civil trespass.]

II. Analysis

[The court held that Iron Bar had property rights in airspace, so therefore] the Hunters' stepping through Iron Bar's airspace would be a civil trespass. [Nevertheless, we] conclude the district court did not err in dismissing Iron Bar's claims despite Wyoming civil trespass law. The UIA and case law interpreting it have overridden the state's civil trespass regime in this context.

1. The Unlawful Inclosures Act (1885)

As discussed above, the UIA was passed to harmonize the rights of private landowners and those accessing public lands. The UIA, 43 U.S.C. §§ 1061-1066, declares "[a]ll inclosures of any public lands . . . to be unlawful." The Act, accordingly, prohibits:

> the maintenance, erection, construction, or control of any such inclosure . . . ; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and prohibited.

The UIA also restricts obstruction of settlement on or transit over public lands:

> No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, *or shall prevent or obstruct free passage or transit over or through the public lands* . . . .

In short, the two sections together provide that any inclosure of public land is prohibited, and no one may completely prevent or obstruct another from peacefully entering or freely passing over or through public lands.

We ask then, what is an *inclosure*? The textual inquiry begins with dictionary definitions, so we start there. Black's Law Dictionary contemporaneously defined "inclosure" as "the act of freeing land from rights of common, commonable rights, and generally all rights which obstruct cultivation and the productive employment of labor on the soil."[25]

Iron Bar argues the district court erred in finding for the Hunters because the term "inclosure" is limited to fenced-in tracts of land. While a fence may be the most common way of creating an inclosure, the term's definition does not limit the meaning in such a manner. Importantly, the UIA's text makes plain in two ways that inclosure does not refer solely to physical fencing. First, § 1063 explicitly prohibits obstructing "transit over public lands . . . by force, threats, intimidation, or by any fencing *or inclosing*." If "fencing" was coextensive with "inclosing" the statute would not include both "fencing *or* inclosing." Second, § 1061 makes clear that the statute applies to "all inclosures of any public land," not just those done through fencing. As Wyoming territorial justices observed long ago, "[t]he fence is made for beasts; the law is made for man." *United States v. Douglas-Willan Sartoris Co.*, 22 P. 92, 97 (Wyo. 1889). So a purely legal barrier erected by "no trespassing" signs—like a virtual wall—could be considered an inclosure under the UIA.

. . . .

D. Federal Courts and the Checkerboard

[The court reviewed multiple cases on the UIA; only the relevant ones are below.]

[In 1897], the Supreme Court interpreted the UIA for the first time. *Camfield v. United States*, 167 U.S. 518 (1897). The government accused a rancher-defendant of building a fence that "inclosed and appropriated to the[ir] exclusive use and benefit" about "20,000 acres of public lands" in

[25]This definition also accords with the traditional Lockean conception of "common" property. John Locke, *Of Property, in* Second Treatise on Government 34 ch. V (London 1690) ("It is true, in land that is common in England or any other country, where there are plenty of people under government who have money and commerce, no one can enclose or appropriate any part without the consent of his fellow-commoners; because that is left common by compact—*i.e.*, by the law of the land, which is not to be violated.").

Colorado. . . . The Court held that, in passing the UIA, "[C]ongress exercised its constitutional right of protecting the public lands from nuisances erected upon adjoining property." Put another way, the UIA constitutionally proscribes *nuisances* effecting public land inclosures. The Court found that Camfield's fence was "clearly a nuisance" considering "the obvious purposes of this structure, and the necessities of preventing the inclosure of public lands."

Leo Sheep is the Supreme Court's most recent case on the UIA. *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979). [The public land was the Seminoe River, surrounded on its southeast side by land privately owned by different parties. When the landowners stopped permitting the public to pass, the government built a dirt road to the river, over Leo Sheep's land.] [The] government argued that "settled rules of property law"—including the easement by necessity doctrine and the UIA—established an implicit easement to build a road. The Court held that the government does not have "an implied easement to build a road across land" in the checkerboard. *Id.* The Court held that the easement by necessity doctrine is generally not available to the sovereign because the "[g]overnment has the power of eminent domain."* [Nor did the UIA reserve a right of roadbuilding.] With this holding, *Camfield* and the UIA were left intact because both were not "of any significance in this controversy" given that Leo Sheep's "unwillingness to entertain a public road without compensation can[not] be a violation of" the UIA.

U.S. ex rel. Bergen v. Lawrence, 848 F.2d 1502 (10th Cir. 1988), [confirmed *Camfield*'s holding that a fence on private lands that prevents corner-crossing violates the UIA. In particular,] we held that *Leo Sheep* was limited in its application to the government's assertion of an implied easement, which is a permanent, physical intrusion on private property. Outside of that context, *Camfield* controls.

E. Application

As our review of these cases demonstrate, courts have not been entirely consistent in their review of checkerboard cases. Courts have analyzed similar fact patterns under both a nuisance law approach, such as in *Camfield*, and a no-implied-easement approach, such as in *Leo Sheep*. However in-

*Eminent domain is the government power to take private property. Under the Fifth Amendment, the government can do so but must compensate the owner. —Eds.

congruous those cases are in theory, their application to Iron Bar's claim is made straightforward by *Bergen*: a barrier to access, even a civil trespass action, becomes an abatable federal nuisance in the checkerboard when its effect is to inclose public lands by completely preventing access for a lawful purpose.

Iron Bar urges us to broadly apply *Leo Sheep* and reject the nuisance-oriented approach set forth in *Camfield* and adopted by *Bergen.* It contends that *Camfield* and *Bergen* are just "fence cases" and should not be extended to private party trespasses. But we are bound by *Bergen* absent en banc review by this court.

The core principle of the UIA, as reiterated in *Bergen*, is that a landowner cannot maintain a barrier "which encloses public lands and prevents" access for a "lawful purpose." The barrier itself is not a UIA violation—but it becomes one when its effect is to inclose. That was simply not at issue in *Leo Sheep*.

In *Bergen*, we found *Camfield* was dispositive while *Leo Sheep* was "inapplicable" to the case because the UIA did not create easements or servitudes. In other words, *Bergen* concluded the easement question was "simply not at issue" because "the district court did not grant . . . any easement across [the] private lands . . . ."

Bergen's logic can perhaps be best explained the following way. *Leo Sheep*'s holding is narrow; the government does not have an "*implied* easement" to "construct a road for public access" in the checkerboard. That makes sense since the effect of the road would have been a permanent, physical appropriation of Leo Sheep's property with no corresponding benefit. In those cases, the "traditional rule" generally governs: If "the government appropriate[s] a right to invade, compensation [is] due." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 156 (2021). Even the nuisance cases would have required those crossing the checkerboard to pay for damages to private property. But that the government lacks "an implied easement to build a road across" the transcontinental railroad grants does not foreclose all physical invasions.

Even so, Iron Bar points to language in *Leo Sheep* suggesting that *no* access right survives its holding. Yet the Court carefully explained that "*[t]hese* rights-of-way are referred to as 'easements by necessity.' " *Leo Sheep*, 440 U.S. at 679 (emphasis added). The UIA, in contrast, contemplates a limited physical intrusion necessary to abate a nuisance—inclosure of the

public lands. *Camfield*, 167 U.S. at 525. And the Court has repeatedly held that "many government-authorized physical invasions . . . are consistent with longstanding background restrictions on property rights"—including "requiring him to abate a nuisance." *Cedar Point Nursery*, 594 U.S. at 160. Iron Bar's argument ignores that the reciprocal of preventing the right to exclude is to permit access. If a checkerboard landowner cannot impede access to public lands, then there is impliedly an access right.

Ultimately, we find that corner-crossing does not rise to the level of "an implied easement to build a road across land that was originally granted to the Union Pacific Railroad." *Leo Sheep*, 440 U.S. at 669. While we recognize the doctrinal inconsistencies at play and that the access right here functionally operates like a limited easement, *Bergen* forecloses that approach.

Further, *Leo Sheep*'s fact pattern took the landowner's conduct outside the realm of nuisance law. There, the government bulldozed

> a dirt road extending from a local county road to the reservoir across both public domain lands and fee lands of the Leo Sheep Co. It also erected signs inviting the public to use the road as a route to the reservoir.

The Court was plainly rejecting the government's overreach. Moreover, it carefully explained that the UIA concerned "the type of incursions on private property necessary to reach public land." Nothing in the UIA case law suggests the government has the power to build a public road without compensation. If that was what the Hunters were asking for—rather than a momentary corner-cross—*Leo Sheep* may well foreclose their case.

[The Court rejected various other arguments, and held that the UIA was not a taking under the Fifth Amendment.]

III. Conclusion

The western checkerboard and UIA reflect a storied period of our history. Whatever the UIA's merits today, it—and the case law interpreting it—remain good federal law. Applying that law here, Iron Bar cannot implement a program which has the effect of "deny[ing] access to [federal] public lands for lawful purposes[.]" So the district court was correct to hold that the Hunters could corner-cross as long as they did not physically touch Iron Bar's land.

We affirm.

Notes and Questions

5.8. As discussed with respect to the public trust doctrine, the law of trusts and easements can be invoked to protect public rights to use privately owned land. *Iron Bar*, on the other hand, rejects an easement-based characterization and instead draws from the doctrine of nuisance. Does one approach strike you as better than the others? Indeed, do any of these doctrines fit these situations precisely? What is the value of using existing property concepts to describe the public right, rather than just coming up with a new concept?

5.9. The court concludes that corner-crossing is a trespass under Wyoming law, despite the public right to access public lands. Is that necessarily correct? Recall *State of New Jersey v. Shack*, which held that entering a farmer's land was not a trespass when done to provide essential services to migrant workers living there. Could you plausibly define "trespass" so as not to exclude corner-crossing as well?

5.10. Is there a limit to the public's right of corner-crossing? What if thousands of people a day start climbing ladders over Iron Bar's ranch? What if the volume of crossers interferes with Iron Bar's operations—perhaps constituting a nuisance? Does Iron Bar have any remedies, and against whom?

5.3 Human Genes

Ass'n for Molecular Pathology v. Myriad Genetics, Inc.

569 U.S. 576 (2013)

Justice Thomas delivered the opinion of the Court.

Respondent Myriad Genetics, Inc. (Myriad), discovered the precise location and sequence of two human genes, mutations of which can substantially increase the risks of breast and ovarian cancer. Myriad obtained a number of patents based upon its discovery. This case involves claims from three of them and requires us to resolve whether a naturally occurring segment of deoxyribonucleic acid (DNA) is patent eligible under 35 U.S.C. § 101 by virtue of its isolation from the rest of the human genome. . . .

I

Myriad discovered the precise location and sequence of what are now known as the BRCA1 and BRCA2 genes.* Mutations in these genes can dramatically increase an individual's risk of developing breast and ovarian cancer. The average American woman has a 12- to 13-percent risk of developing breast cancer, but for women with certain genetic mutations, the risk can range between 50 and 80 percent for breast cancer and between 20 and 50 percent for ovarian cancer. Before Myriad's discovery of the BRCA1 and BRCA2 genes, scientists knew that heredity played a role in establishing a woman's risk of developing breast and ovarian cancer, but they did not know which genes were associated with those cancers.

Myriad identified the exact location of the BRCA1 and BRCA2 genes on chromosomes 17 and 13. . . . Knowledge of the location of the BRCA1 and BRCA2 genes allowed Myriad to determine their typical nucleotide sequence.[1] That information, in turn, enabled Myriad to develop medical tests that are useful for detecting mutations in a patient's BRCA1 and BRCA2 genes and thereby assessing whether the patient has an increased risk of cancer.

Once it found the location and sequence of the BRCA1 and BRCA2 genes, Myriad sought and obtained a number of patents. Nine composition claims from three of those patents are at issue in this case. Claims† 1, 2, 5, and 6 from [Myriad's] patent are representative. The first claim asserts a patent on "[a]n isolated DNA coding for a BRCA1 polypeptide," which has "the amino acid sequence set forth in SEQ ID NO:2." SEQ ID NO:2 sets forth a list of 1,863 amino acids that the typical BRCA1 gene encodes. Put

*On the assumption that most people know what genes are these days, the Court's extensive discussion of the science of genetics has been omitted. If you would like a summary or refresher, here is one. Inside all human cells (as well as the cells of any living thing) are molecules called DNA. A DNA molecule is made up of small chemicals called nucleotides, which are sequentially strung together. There are four such nucleotides, abbreviated A, T, G, and C. A "gene" is the informational sequence of these nucleotides, which determines how the cell will construct protein molecules. —Eds.

[1]Technically, there is no "typical" gene because nucleotide sequences vary between individuals, sometimes dramatically. Geneticists refer to the most common variations of genes as "wild types."

†Recall that "claims" in patents are the legally operative language that defines the scope of what infringes, akin to a property boundary. —Eds.

differently, claim 1 asserts a patent claim on the DNA code that tells a cell to produce the string of BRCA1 amino acids listed in SEQ ID NO:2.

[The other patent claims describe different parts of the BRCA1 and BRCA2 gene sequences.]

Myriad's patents would, if valid, give it the exclusive right to isolate an individual's BRCA1 and BRCA2 genes (or any strand of 15 or more nucleotides within the genes) . . . . But isolation is necessary to conduct genetic testing, and Myriad was not the only entity to offer BRCA testing after it discovered the genes. [So did one of the defendants, Dr. Harry Ostrer, thereby prompting this case.]

II

A

Section 101 of the Patent Act provides:

> Whoever invents or discovers any new and useful . . . composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

We have "long held that this provision contains an important implicit exception[:] Laws of nature, natural phenomena, and abstract ideas are not patentable." Rather, " 'they are the basic tools of scientific and technological work' " that lie beyond the domain of patent protection. As the Court has explained, without this exception, there would be considerable danger that the grant of patents would "tie up" the use of such tools and thereby "inhibit future innovation premised upon them." This would be at odds with the very point of patents, which exist to promote creation. *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980) (Products of nature are not created, and " 'manifestations . . . of nature [are] free to all men and reserved exclusively to none' ").

The rule against patents on naturally occurring things is not without limits, however, for "all inventions at some level embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas," and "too broad an interpretation of this exclusionary principle could eviscerate patent law." As we have recognized before, patent protection strikes a delicate balance between creating "incentives that lead to creation, invention,

and discovery" and "imped[ing] the flow of information that might permit, indeed spur, invention." We must apply this well-established standard to determine whether Myriad's patents claim any "new and useful . . . composition of matter," or instead claim naturally occurring phenomena.

B

It is undisputed that Myriad did not create or alter any of the genetic information encoded in the BRCA1 and BRCA2 genes. The location and order of the nucleotides existed in nature before Myriad found them. Nor did Myriad create or alter the genetic structure of DNA. Instead, Myriad's principal contribution was uncovering the precise location and genetic sequence of the BRCA1 and BRCA2 genes within chromosomes 17 and 13. The question is whether this renders the genes patentable.

Myriad recognizes that our decision in *Chakrabarty* is central to this inquiry. In *Chakrabarty*, scientists added four plasmids to a bacterium, which enabled it to break down various components of crude oil. The Court held that the modified bacterium was patentable. It explained that the patent claim was "not to a hitherto unknown natural phenomenon, but to a non-naturally occurring manufacture or composition of matter—a product of human ingenuity 'having a distinctive name, character [and] use.' " The *Chakrabarty* bacterium was new "with markedly different characteristics from any found in nature," due to the additional plasmids and resultant "capacity for degrading oil." In this case, by contrast, Myriad did not create anything. To be sure, it found an important and useful gene, but separating that gene from its surrounding genetic material is not an act of invention.

Groundbreaking, innovative, or even brilliant discovery does not by itself satisfy the § 101 inquiry. In *Funk Brothers Seed Co. v. Kalo Inoculant Co.*, this Court considered a composition patent that claimed a mixture of naturally occurring strains of bacteria that helped leguminous plants take nitrogen from the air and fix it in the soil. The ability of the bacteria to fix nitrogen was well known, and farmers commonly "inoculated" their crops with them to improve soil nitrogen levels. But farmers could not use the same inoculant for all crops, both because plants use different bacteria and because certain bacteria inhibit each other. Upon learning that several nitrogen-fixing bacteria did not inhibit each other, however, the patent applicant combined them into a single inoculant and obtained a patent. The Court held that the composition was not patent eligible be-

cause the patent holder did not alter the bacteria in any way. His patent claim thus fell squarely within the law of nature exception. So do Myriad's. Myriad found the location of the BRCA1 and BRCA2 genes, but that discovery, by itself, does not render the BRCA genes "new . . . composition[s] of matter," § 101, that are patent eligible.

Indeed, Myriad's patent descriptions highlight the problem with its claims. For example, a section of [Myriad's] patent's Detailed Description of the Invention indicates that Myriad found the location of a gene associated with increased risk of breast cancer and identified mutations of that gene that increase the risk. In subsequent language Myriad explains that the location of the gene was unknown until Myriad found it among the approximately eight million nucleotide pairs contained in a subpart of chromosome 17. . . . Many of Myriad's patent descriptions simply detail the "iterative process" of discovery by which Myriad narrowed the possible locations for the gene sequences that it sought. Myriad seeks to import these extensive research efforts into the § 101 patent-eligibility inquiry. But extensive effort alone is insufficient to satisfy the demands of § 101.

Nor are Myriad's claims saved by the fact that isolating DNA from the human genome severs chemical bonds and thereby creates a nonnaturally occurring molecule. Myriad's claims are simply not expressed in terms of chemical composition, nor do they rely in any way on the chemical changes that result from the isolation of a particular section of DNA. Instead, the claims understandably focus on the genetic information encoded in the BRCA1 and BRCA2 genes. If the patents depended upon the creation of a unique molecule, then a would-be infringer could arguably avoid at least Myriad's patent claims on entire genes (such as claims 1 and 2 of [Myriad's] patent) by isolating a DNA sequence that included both the BRCA1 or BRCA2 gene and one additional nucleotide pair. Such a molecule would not be chemically identical to the molecule "invented" by Myriad. But Myriad obviously would resist that outcome because its claim is concerned primarily with the information contained in the genetic *sequence*, not with the specific chemical composition of a particular molecule.

Finally, Myriad argues that the PTO's past practice of awarding gene patents is entitled to deference . . . . We disagree. . . . Congress has not endorsed the views of the PTO in subsequent legislation. . . . Further undercutting the PTO's practice, the United States argued in the Federal Circuit and in this Court that isolated DNA was *not* patent eligible under § 101,

and that the PTO's practice was not "a sufficient reason to hold that isolated DNA is patent-eligible." These concessions weigh against deferring to the PTO's determination.[7]

. . . .

III

It is important to note what is *not* implicated by this decision. First, there are no method claims before this Court. Had Myriad created an innovative method of manipulating genes while searching for the BRCA1 and BRCA2 genes, it could possibly have sought a method patent. But the processes used by Myriad to isolate DNA were well understood by geneticists at the time of Myriad's patents "were well understood, widely used, and fairly uniform insofar as any scientist engaged in the search for a gene would likely have utilized a similar approach," and are not at issue in this case.

Similarly, this case does not involve patents on new *applications* of knowledge about the BRCA1 and BRCA2 genes. Judge Bryson aptly noted that, "[a]s the first party with knowledge of the [BRCA1 and BRCA2] sequences, Myriad was in an excellent position to claim applications of that knowledge. Many of its unchallenged claims are limited to such applications."

Nor do we consider the patentability of DNA in which the order of the naturally occurring nucleotides has been altered. Scientific alteration of the genetic code presents a different inquiry, and we express no opinion about the application of § 101 to such endeavors. We merely hold that genes and the information they encode are not patent eligible under § 101 simply because they have been isolated from the surrounding genetic material.

[Justice Scalia's concurrence is omitted.]

Notes and Questions

5.11. The doctrine of "patent eligibility" (also called "subject matter eligibility"), at issue in *Myriad*, has been applied to exclude patenting of computer-implemented financial processes, *see Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S.

[7]Myriad also argues that we should uphold its patents so as not to disturb the reliance interests of patent holders like itself. Concerns about reliance interests arising from PTO determinations, insofar as they are relevant, are better directed to Congress.

208 (2014), and diagnostic methods of adjusting drug dosages, *see Mayo Collaborative Servs. v. Prometheus Lab'ys, Inc.*, 566 U.S. 66 (2012). The effect of these decisions is to place these ideas and others into an "information commons" that is not subject to patent protection, and thus available to anyone to use. Such exclusions of subject matter from patentability have been controversial, with Congress regularly considering legislation to overturn these decisions.

5.12. The Court's rationale for excluding certain ideas from patent eligibility is fundamentally an economic one: the "basic tools of scientific and technological work" must remain open to everyone so that "future innovation premised upon" those basic tools can occur. This is sometimes called a concern for **downstream innovation**—that exclusive property rights can prevent non-owners from being socially productive. Do you agree? Consider the following possible responses:

- Without the economic incentive of patent protection, no one would put in the effort to make discoveries of natural phenomena like the BRCA genes.
- Patent protection enables firms to invest time and money to turn scientific discoveries into commercial products—running clinical trials, getting regulatory approval, marketing, and so on. (This is called **commercialization** theory.)
- Even if downstream innovation is a concern, it would be better to have a single firm coordinating all the downstream researchers to make sure that everyone is working as productively as possible without duplication; a single patent-holding firm can do this. (This is a response to the tragedy of the commons.)

5.13. On the flip side, the downstream innovation rationale is not the only one that justifies the patent ineligibility of human genes. Perhaps the most obvious explanation is that natural phenomena simply exist in nature; they preexist any human activity and thus belong to no one. This is a traditional explanation, which applies to a wide variety of natural products and phenomena. But human genes add another dimension—they are a part of people, and the idea that some company can get a patent on something *inside your body* is intuitively strange at best. Indeed, it was this latter concern that motivated the American Civil Liberties Union to litigate the *Myriad* case in the first place. *See* Jorge Contreras, The Genome Defense 12–13 (2021).

Notice that these arguments are property-based arguments—human genes ought not be patentable, either because they belong to the common heritage of all humanity, or because genes belong to individuals as part of their bodies. Even though a commons operates like nobody owns it, it is often justified on the theory

that everyone owns it. How well do these arguments translate to physical resource commons, like water and public lands?

5.4 Text of the Law

State of Georgia v. Public.Resource.Org, Inc.

590 U.S. 255 (2020)

Chief Justice ROBERTS delivered the opinion of the Court.

. . . .

The State of Georgia has one official code—the "Official Code of Georgia Annotated," or OCGA. The first page of each volume of the OCGA boasts the State's official seal and announces to readers that it is "Published Under Authority of the State."

The OCGA includes the text of every Georgia statute currently in force, as well as various non-binding supplementary materials. At issue in this case is a set of annotations that appear beneath each statutory provision. The annotations generally include summaries of judicial decisions applying a given provision, summaries of any pertinent opinions of the state attorney general, and a list of related law review articles and similar reference materials. In addition, the annotations often include editor's notes that provide information about the origins of the statutory text, such as whether it derives from a particular judicial decision or resembles an older provision that has been construed by Georgia courts.

The annotations in the current OCGA were prepared in the first instance by Matthew Bender & Co., Inc., a division of the LexisNexis Group, pursuant to a work-for-hire agreement with the [Code Revision Commission, an office created by and part of the Georgia Legislature]. The agreement between Lexis and the Commission states that any copyright in the OCGA vests exclusively in "the State of Georgia, acting through the Commission." Lexis and its army of researchers perform the lion's share of the work in drafting the annotations, but the Commission supervises that work and specifies what the annotations must include in exacting detail. Under the agreement, Lexis enjoys the exclusive right to publish, distribute, and sell the OCGA. In exchange, Lexis has agreed to limit the price it may charge for the OCGA and to make an unannotated version of the statutory

text available to the public online for free. A hard copy of the complete OCGA currently retails for $412.00.

B

Public.Resource.Org (PRO) is a nonprofit organization that aims to facilitate public access to government records and legal materials. Without permission, PRO posted a digital version of the OCGA on various websites, where it could be downloaded by the public without charge. PRO also distributed copies of the OCGA to various organizations and Georgia officials.

[Georgia and the Code Revision Commission sued PRO for copyright infringement, and the Supreme Court granted certiorari.]

II

We hold that the annotations in Georgia's Official Code are ineligible for copyright protection . . . . A careful examination of our government edicts precedents reveals a straightforward rule based on the identity of the author. Under the government edicts doctrine, judges—and, we now confirm, legislators—may not be considered the "authors" of the works they produce in the course of their official duties as judges and legislators. That rule applies regardless of whether a given material carries the force of law. And it applies to the annotations here because they are authored by an arm of the legislature in the course of its official duties.

A

We begin with precedent. The government edicts doctrine traces back to a trio of cases decided in the 19th century. In this Court's first copyright case, *Wheaton v. Peters*, the Court's third Reporter of Decisions, Wheaton, sued the fourth, Peters, unsuccessfully asserting a copyright interest in the Justices' opinions. In Wheaton's view, the opinions "must have belonged to some one" because "they were new, original," and much more "elaborate" than law or custom required. Wheaton argued that the Justices were the authors and had assigned their ownership interests to him through a tacit "gift." The Court unanimously rejected that argument, concluding that "no reporter has or can have any copyright in the written opinions delivered by this court" and that "the judges thereof cannot confer on any reporter any such right."

That conclusion apparently seemed too obvious to adorn with further explanation, but the Court provided one a half century later in *Banks v.*

Manchester. That case concerned whether Wheaton's state-court counterpart, the official reporter of the Ohio Supreme Court, held a copyright in the judges' opinions and several non-binding explanatory materials prepared by the judges. The Court concluded that he did not, explaining that "the judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case and the syllabus or head note" cannot "be regarded as their author or their proprietor, in the sense of [the Copyright Act]." Pursuant to "a judicial *consensus*" dating back to *Wheaton*, judges could not assert copyright in "whatever work they perform in their capacity as judges." Rather, "[t]he whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all."

In a companion case decided later that Term, *Callaghan v. Myers*, the Court identified an important limiting principle. As in *Wheaton* and *Banks*, the Court rejected the claim that an official reporter held a copyright interest in the judges' opinions. But, resolving an issue not addressed in *Wheaton* and *Banks*, the Court upheld the reporter's copyright interest in several explanatory materials that the reporter had created himself: headnotes, syllabi, tables of contents, and the like. Although these works mirrored the judge-made materials rejected in *Banks*, they came from an author who had no authority to speak with the force of law. Because the reporter was not a judge, he was free to "obtain[] a copyright" for the materials that were "the result of his [own] intellectual labor."

These cases establish a straightforward rule: Because judges are vested with the authority to make and interpret the law, they cannot be the "author" of the works they prepare "in the discharge of their judicial duties." This rule applies both to binding works (such as opinions) and to nonbinding works (such as headnotes and syllabi). It does not apply, however, to works created by government officials (or private parties) who lack the authority to make or interpret the law, such as court reporters.

The animating principle behind this rule is that no one can own the law. "Every citizen is presumed to know the law," and "it needs no argument to show . . . that all should have free access" to its contents. Our cases give effect to that principle in the copyright context through construction of the statutory term "author." Rather than attempting to catalog the materials that constitute "the law," the doctrine bars the officials responsible for creating the law from being considered the "author[s]" of "*whatever*

work they perform in their capacity" as lawmakers. Because these officials are generally empowered to make and interpret law, their "whole work" is deemed part of the "authentic exposition and interpretation of the law" and must be "free for publication to all."

If judges, acting as judges, cannot be "authors" because of their authority to make and interpret the law, it follows that legislators, acting as legislators, cannot be either. Courts have thus long understood the government edicts doctrine to apply to legislative materials.

Moreover, just as the doctrine applies to "whatever work [judges] perform in their capacity as judges," it applies to whatever work legislators perform in their capacity as legislators. That of course includes final legislation, but it also includes explanatory and procedural materials legislators create in the discharge of their legislative duties. In the same way that judges cannot be the authors of their headnotes and syllabi, legislators cannot be the authors of (for example) their floor statements, committee reports, and proposed bills. These materials are part of the "whole work done by [legislators]," so they must be "free for publication to all."

Under our precedents, therefore, copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties.

B

[The Court concluded that the Code Revision Commission was tantamount to the Georgia legislature, and therefore was a "legislator" for purposes of the above rule.]

The second step is to determine whether the Commission creates the annotations in the "discharge" of its legislative "duties." It does. Although the annotations are not enacted into law through bicameralism and presentment, the Commission's preparation of the annotations is under Georgia law an act of "legislative authority," and the annotations provide commentary and resources that the legislature has deemed relevant to understanding its laws. Georgia and Justice Ginsburg emphasize that the annotations do not purport to provide authoritative explanations of the law and largely summarize other materials, such as judicial decisions and law review articles. But that does not take them outside the exercise of legislative duty by the Commission and legislature. Just as we have held that the "statement of the case and the syllabus or head note" prepared by judges

fall within the "work they perform in their capacity as judges," so too annotations published by legislators alongside the statutory text fall within the work legislators perform in their capacity as legislators.

In light of the Commission's role as an adjunct to the legislature and the fact that the Commission authors the annotations in the course of its legislative responsibilities, the annotations in Georgia's Official Code fall within the government edicts doctrine and are not copyrightable.

III

[The Court rejected Georgia's statutory interpretation arguments that the Copyright Act had abrogated the edicts of government doctrine.]

Georgia also appeals to the overall purpose of the Copyright Act to promote the creation and dissemination of creative works. Georgia submits that, without copyright protection, Georgia and many other States will be unable to induce private parties like Lexis to assist in preparing affordable annotated codes for widespread distribution. That appeal to copyright policy, however, is addressed to the wrong forum. As Georgia acknowledges, "[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." And that principle requires adherence to precedent when, as here, we have construed the statutory text and "tossed [the ball] into Congress's court, for acceptance or not as that branch elects."

Turning to our government edicts precedents, Georgia insists that they can and should be read to focus exclusively on whether a particular work has "the force of law." . . . But that framing has multiple flaws.

Most obviously, it cannot be squared with the reasoning or results of our cases—especially *Banks*. *Banks*, following *Wheaton* and the "judicial consensus" it inspired, denied copyright protection to judicial opinions without excepting concurrences and dissents that carry no legal force. As every judge learns the hard way, "comments in [a] dissenting opinion" about legal principles and precedents "are just that: comments in a dissenting opinion." Yet such comments are covered by the government edicts doctrine because they come from an official with authority to make and interpret the law. . . .

The same goes for non-binding legislative materials produced by legislative bodies acting in a legislative capacity. There is a broad array of such works ranging from floor statements to proposed bills to committee

reports. Under the logic of Georgia's "force of law" test, States would own such materials and could charge the public for access to them. . . .

Georgia minimizes the OCGA annotations as non-binding and non-authoritative, but that description undersells their practical significance. Imagine a Georgia citizen interested in learning his legal rights and duties. If he reads the economy-class version of the Georgia Code available online, he will see laws requiring political candidates to pay hefty qualification fees (with no indigency exception), criminalizing broad categories of consensual sexual conduct, and exempting certain key evidence in criminal trials from standard evidentiary limitations—with no hint that important aspects of those laws have been held unconstitutional by the Georgia Supreme Court. Meanwhile, first-class readers with access to the annotations will be assured that these laws are, in crucial respects, unenforceable relics that the legislature has not bothered to narrow or repeal.

If everything short of statutes and opinions were copyrightable, then States would be free to offer a whole range of premium legal works for those who can afford the extra benefit. A State could monetize its entire suite of legislative history. With today's digital tools, States might even launch a subscription or pay-per-law service.

There is no need to assume inventive or nefarious behavior for these concerns to become a reality. Unlike other forms of intellectual property, copyright protection is both instant and automatic. It vests as soon as a work is captured in a tangible form, triggering a panoply of exclusive rights that can last over a century. If Georgia were correct, then unless a State took the affirmative step of transferring its copyrights to the public domain, all of its judges' and legislators' non-binding legal works would be copyrighted. And citizens, attorneys, nonprofits, and private research companies would have to cease all copying, distribution, and display of those works or risk severe and potentially criminal penalties. Some affected parties might be willing to roll the dice with a potential fair use defense. But that defense, designed to accommodate First Amendment concerns, is notoriously fact sensitive and often cannot be resolved without a trial. The less bold among us would have to think twice before using official legal works that illuminate the law we are all presumed to know and understand.

Thankfully, there is a clear path forward that avoids these concerns—the one we are already on. Instead of examining whether given material

carries "the force of law," we ask only whether the author of the work is a judge or a legislator. If so, then whatever work that judge or legislator produces in the course of his judicial or legislative duties is not copyrightable. That is the framework our precedents long ago established, and we adhere to those precedents today.

[Dissents by Justices Thomas and Ginsburg are omitted.]

Notes and Questions

5.14. **Where do laws come from?** You probably take for granted that you have access to cases, statutes, and regulations through electronic databases. But how do those texts of the law get from lawmakers to you?

For legislation, the Government Publishing Office publishes statutes, in the order of enactment, in a book series called the *Statutes at Large*. Some statutes never make it past this point, but the text of some important statutes are rearranged by topic and reprinted every six years in another government publication, the *U.S. Code*. In other words, the *Statutes at Large* are the actual enactments, while the *Code* is technically just a helpful guide.[2] The *U.S. Code Annotated* and *U.S. Code Service* are independent, privately published books by West and LexisNexis, respectively. They generally use the same volume and section numbers as the *U.S. Code*, but contain additional annotations and other materials.

Regulations and other federal agency decisions are published in order of issuance in the *Federal Register*, another government publication. Again as a matter of convenience, some regulations are reorganized by topic and published annually in the *Code of Federal Regulations*. While most agencies publish through the *Federal Register*, a few maintain their own publications (the *Federal Communications Commission Record*, for example), and the some like the Department of Justice have no official form of promulgation at all.

Judicial decisions are the most complicated. When a federal judge today issues an opinion, it is posted on PACER, the federal electronic docket service (or, in the case of the Supreme Court, just on its website).[3] A "reporter" collects these opin-

[2] This is complicated by the fact that Congress has enacted some of the titles of the *U.S. Code* into positive law. Even in those cases, though, the text of the session law is still definitive; the difference is that the session law is written in the form of instructions for amending the *U.S. Code*.

[3] In the old days, judges didn't write opinions, instead delivering them orally from the bench. There was no official record of decisions. Instead, attorneys would sit in the courtroom and take notes on decisions the judges rendered. Often the notes would only circulate among colleagues, but some especially entrepreneurial lawyers would publish their notes. These are called "nominative

ions and publishes them in a volume. For the Supreme Court, there is an official reporter who publishes the *U.S. Reports*. There are also two private reporters of Supreme Court decisions: the *Supreme Court Reporter* by West and the *Lawyers' Edition* by LexisNexis. There is no official reporter for other decisions; the *Federal Reporter* and *Federal Supplement* for appellate and district court decisions are privately published by West.

This of course just covers print publications; electronic media are yet another story. And we haven't even touched on state law yet. What a mess! Does this strike you as a tragedy of the commons, borne of a lack of property rights in legal texts? Or corporate meddling with a resource that belongs to the public?

5.15. According to Chief Justice Roberts, "it needs no argument to show . . . that all should have free access" to the law. Let's make the argument anyway. Here are a few possibilities:

- Due process: government cannot hold people liable for violations of law that they cannot read.
- Equal protection: those of less financial means still deserve "first-class" access to the law.
- Free speech: political discourse and self-governance require that citizens be able to know the laws.
- We the people: since sovereign power arises from the people, the people own the laws that they write.

Can you think of other rationales? How do these apply with respect to the nonbinding annotations at issue in the case? For that matter, do any of these rationales seem applicable to other forms of property?

5.16. What if a private entity writes a model code that is subsequently incorporated into the law? For example, the International Code Council is a private organization that writes a variety of building and housing safety codes. As written, ICC's codes are just recommendations; they are also properly the subject of copyrights owned by ICC. But almost all U.S. jurisdictions mandate compliance with ICC codes. Is there a public right to access or redistribute a mandatory, private building code without permission? *See Am. Soc'y for Testing & Materials v. Pub.Res.Org, Inc.*, 84 F.4th 1262 (2023).

---

reports" because they are typically referenced by the compiler's name. For most of English history, this is how judicial decisions were reported. This explains why *Armory v. Delamirie* is so short—it's not an opinion, but just John Strange's notes.