

Integrating Spaces: New Perspectives on Race in the Property Curriculum

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Introducing the Property Course: Of Evictions, Native Land Rights, and Slavery

Of Blackstone's Absolutism and Ellison's Questions

Many property classes begin with a statement about the importance of property from William Blackstone, about the seemingly absolute rights associated with property:

This 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 exercises over the external things of the world, in total exclusion of any other individual in the universe.¹

Despite those broad rights, Blackstone observed the seeming fragility of the intellectual foundation of property rights:

Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some element in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built.²

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1. See, e.g., A. James Casner et al., *Cases and Text on Property* 785-838 (5th ed., New York, 2004) [hereinafter *Casner and Leach*] (quoting 2 William Blackstone, *Commentaries on the Laws of England* *2 (Oxford, 1765)); John E. Cribbet et al., *Property: Cases and Materials* 3-4 (7th ed., New York, 1996) (same). Dwyer and Menell delay their discussion of absolutism of property until well into their book. See John Dwyer and John Menell, *Property Law and Policy: A Comparative Institutional Perspective* 273 (Westbury, N.Y., 1997).
2. Blackstone, *Commentaries*, *supra* note 1, at *2.

Indeed, Blackstone accepted the utility of refusing to interrogate the source of title. For, presumably, such an inquiry might destabilize respect for property.³ But Blackstone also thought it worthwhile for students of law to go further. “When law is to be considered not only as a matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of those positive constitutions of society.”⁴

Buried in the rights of exclusion that Blackstone exalts is an extraordinary disposition towards vested rights. Blackstone’s focus is on the person doing the excluding. One might alternatively begin a meditation on property law with the eviction scene from Ralph Ellison’s *Invisible Man*, which explores the meaning of those rights of exclusion for the people being excluded. It illustrates how the rights of property might conflict with ideas of humanity. It also sets up well the material later in the course on eviction.⁵

The *Invisible Man* comes upon an elderly couple being evicted from a tiny apartment in Harlem. The couple’s meager possessions, including the husband’s manumission papers, a card dedicated to grandma, a ticket to the St. Louis World’s Fair, a breast pump, and pictures of Abraham Lincoln and Marcus Garvey, are strewn in the street outside their apartment.⁶ This is a catalog of the stuff of life for African Americans, from the days of slavery through the Great Depression. The possessions link past to present and remind us how close in time the couple is to slavery. *Invisible Man* wonders about it; weren’t the days of slavery longer ago than that? No, he realizes, they weren’t.⁷

Invisible Man wonders why the couple are being evicted. “Dispossessed?” he cried. “Dispossessed! ‘Dispossessed,’ eighty-seven years and dispossessed of what? They ain’t *got* nothing, they caint *get* nothing, they never *had* nothing. So who was dispossessed.” The dispossession took place by order of the “laws”—law enforcement officers. Ellison set up a conflict between the law-abiding couple and the dictates of “laws”:

Look at them, they look like my mama and my papa and my grandma and grandpa, and I look like you and you look like me. Look at them but remem-

3. Blackstone, Commentaries, *supra* note 1, at *2 (“It is well if the most of mankind will obey the laws when made, without searching too nicely into the reasons of making them.”). I am grateful to John C.P. Goldberg for reminding me of the context of Blackstone’s broad statement.
4. *Id.*
5. One might, of course, begin a course in property in many places—with the origins of title, as Blackstone did, Commentaries, *supra* note 1, at *2-15, or with a comparison of property regimes. See, e.g., Dwyer and Menell, Property, *supra* note 1, at 56-67 (comparing property rights in whaling, oyster, and lobster industries, following a brief introduction on philosophical perspectives). See generally Joseph Singer, Starting Property, 46 St. Louis U. L. Rev. 565 (2002) (discussing points where one might begin property study); John Dwyer and Peter Menell, Reunifying Property, 46 St. Louis U. L. Rev. 599 (2002).
6. Ralph Ellison, *Invisible Man* 271 (New York, 1952).
7. *Id.* at 272.

ber that we're a wise, law-abiding group of people. And remember it when you look up there in the doorway at that law standing there with his forty-five. Look at him, standing with his blue steel pistol and his blue serge suit, or one forty-five, you see ten for every one of us, ten guns and ten warm suits and ten fat bellies and ten million laws.⁸

Ellison illustrated the stark contrast between the landlord's property rights, as enforced by police officers, and the poverty of the nameless tenants. The eviction scene, like much of *Invisible Man*, contains much wisdom about the nature of legal thought and reminds us of the centrality of property rights in American thought.⁹ Ellison asks a question, which might motivate property students as well, "what is to be done?"¹⁰

The eviction scene is a vehicle for thinking about property, about the right of exclusion and its meaning for tenants, as well as the means by which the state protects property and the mechanisms by which eviction takes place.¹¹

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This paper suggests some of the ways property law has been shaped by often-forgotten issues of race and some places where one might introduce the history of race (and an occasional contemporary case), into property and wills classes. The cases discussed here serve several purposes. Some illustrate meta-

8. *Id.* at 278.

9. *Id.* at 269-70. One might also begin property class with a reading from Herman Melville's chapter "Fast-Fish, Loose-Fish" from *Moby Dick*. See Dwyer and Menell, Property, *supra* note 1, at 57-59 (Herman Melville, *Moby Dick* chap. 89 (1851)). See also Carol M. Rose, Possession as the Origin of Property, 52 U. Chi. L. Rev. 73, 88 (1985); Tamara R. Piety, Something Fishy, or Why I Make My Students Read Fast-Fish and Loose-Fish, 29 Vt. L. Rev. 33 (2004). In contemplating racial aspects of property, it might be valuable to recall that Melville likened slaves to "fast fish"—that is, to property that was in the possession of another. He grimly concluded, "you and I are nothing but fast fish or loose fish." See Melville, *supra*.

One might also begin with Harriet Beecher Stowe's obscure short story, *Love versus Law*, which is about a lawsuit among neighbors. The suit involves claims of title and flooding, which is resolved through a settlement. See Harriet Beecher Stowe, *Love versus Law*, in *The Mayflower; or, Sketches of Scenes and Characters among the Descendants of the Pilgrim* (Harriet Beecher Stowe ed., New York, 1843). The story has no racial aspects, but illustrates well the conflicting personalities and principles that set off suits, as well as the ways they are resolved.

10. Ellison, *Invisible Man*, *supra* note 6, at 277.

11. See, e.g., Richard Chused, *Cases, Materials and Problems in Property* 617-19 (2nd ed., New York, 1999) (discussing dispossession). And if one begins the course with Ellison, one might follow it with the landlord-tenant materials, where African Americans sometimes appear as tenants. See, e.g., *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), *reprinted in* James C. Smith, Edward J. Larson, John Copeland Nagle, and John A. Kidwell, *Property: Cases and Materials* 508 (New York, 2004); Casner and Leach, *Cases and Text on Property*, *supra* note 1, at 426; discussed in Richard H. Chused, *Saunders (a.k.a. Javins) v. First National Realty Corporation*, 11 Geo. J. on Poverty L. & Pol'y 191-247 (2004). See also *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), *reprinted in* Smith, *Property Cases and Materials*, *supra* at 503.

themes in property, such as the importance of the long-term use of property and of community understanding in defining and protecting property, as well as the limitations that exist (or do not exist) on an owner's right to use property. Others illustrate the centrality of race in bending or reshaping property doctrine. Still others show how courts have dealt with attempts to regulate race and have limited (or failed to limit) such regulation. Studying cases involving race can teach us about property doctrine more generally while also alerting us to ways that law is affected by considerations of race.¹²

While there is much discussion about the ways that critical race scholarship might be made useful and effective, its greatest impact may be at the margins, at places where there may be incremental changes and at places where students, who will be lawyers, judges, and legislators, might be taught to appreciate its insights.¹³ We might seek to uncover with our students the multiple, hidden ways in which issues of race, class, and gender affect the development of property principles and the outcome of cases. Part of that involves recognizing the ways that property law has been used to facilitate racial subjugation. We can also use cases to play against students' expectations and ways of thinking and to illustrate the ways that property principles facilitate fair and equal treatment.

On the Property Rights of Native Americans, Slaves, and Slave-Owners

I begin my property course with a segment on "property rights versus civil rights," an idea adapted from the Donahue, Kauper, and Martin casebook.¹⁴ We explore the competing rights of property owners to the exclusive use of their property with the interests of others. I assemble readings from several sections of the property book, so we explore Native American property rights (or non-rights);¹⁵ migrant farm workers' rights to have visitors at their homes;¹⁶ the right of the state to zone;¹⁷ and the limits on the right of others to govern

12. I leave aside the Fair Housing Act and the invalidation of racially restrictive covenants, which are well documented in first year casebooks.
13. Such is one of the goals of many of those who seek to integrate race more fully into the curriculum. See generally Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 Cal. L. Rev. 1511 (1991); Kimberle Williams Crenshaw, *Foreword: Toward a Race-conscious Pedagogy in Legal Education*, 4 S. Cal. Rev. L. & Women's Stud. 33 (1994).
14. Charles Donahue, Thomas E. Kauper, and Peter W. Martin, *Property: An Introduction to the Concept and the Institution 230-80* (2nd ed., St. Paul, 1983). One casebook puts the Fair Housing Act together with zoning, under the heading "Limiting the Use of Property in the Public Interest." See J. Gordon Hylton, David L. Callies, Daniel R. Mandelker, and Paula A. Franzese, *Property Law and the Public Interest 621* (Charlottesville, Va., 2003).
15. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 542 (1823), discussed at notes 23-28 below.
16. *State v. Shack*, 277 A.2d 369 (N.J. 1971), *reprinted in* Casner and Leach, *Cases and Text on Property supra* note 1, at 12; Cribbitt, *Property, supra* note 1, at 14.
17. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), *reprinted in* Casner and Leach, *Cases and Text on Property, supra* note 1, at 1115. One might note about *Ambler* that it was written by Justice Sutherland, whose credentials as a defender of property rights ought not

use of property.¹⁸ One might also include the Civil Rights Act of 1964, which limited the right to exclude,¹⁹ as well as the Civil Rights Act of 1866, which prohibited discrimination in the selling or leasing of property.²⁰ Property theorists have explored the right of exclusion and its implications for civil rights as well.²¹ I seek to illustrate the ways that property rights exist in a larger context of competing public and private rights. One might just as easily use *Buchanan v. Warley*, a 1917 United States Supreme Court decision that struck down a racial zoning ordinance, to show the limitations on the government's power to exclude, although it implicitly accepts the power to zone.²²

The first case assigned in many property courses is Chief Justice John Marshall's opinion in *Johnson v. McIntosh*, which dealt with a conflict between grantees who had received title to the same land from the federal government and from Native Americans.²³ The case presented a conflict between two white people regarding who had the superior claim: the man who traced his title from a grant from the Illinois and Piankeshaw Indians in 1775 or the man who traced his title to a grant from the United States in 1819. Marshall began his analysis by reciting the rule long followed by European nations that discov-

to be subject to question. See *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 430 (1934). It also appears to spring from same desire to use government planning to maintain middle class communities that motivated *Buchanan v. Warley*, 245 U.S. 60 (1917). See Richard H. Chused, *Euclid's Historical Imagery*, 51 Case W. Res. L. Rev. 597 (2001).

18. *Shelley v. Kraemer*, 334 U.S. 1 (1948), reprinted in Casner and Leach, *Cases and Text on Property*, *supra* note 1, at 786. *Shelley* illustrates the limits that courts place on the right of others (those who hold the dominant estate) to exclude. The right of those dominant estate holders are small; they held not fee simple title, but only a limited right to exclude others. (The covenant in question in *Shelley* was a restraint on use, not alienation.) Thus, *Shelley* involved a limitation on a lesser estate in favor of the greater estate. *Shelley* thus invites class discussion about the ways that judges deal with competing policies of exclusion and rights use. It becomes a complex and controversial state action doctrine. *Shelley's* reasoning was applied in cases involving restraints on cemetery plots as well. *Shelley* might have been more modestly decided, as a case involving unreasonable restriction on alienation, because the restraint on use imposed a significant burden on sale. But see *Los Angeles Investment Co. v. Gary*, 186 P. 596 (1943) (upholding racial restraint on use, but striking down racial restraint on sale).
19. See Civil Rights Act of 1964, 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a-d, 2000a-h; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1963); Donahue, *Property*, *supra* note 14, at 205; Joseph Singer, *Property Law: Rules, Policies, and Practices* 128-29 (3rd ed., New York, 2002).
20. 42 U.S.C. § 1982; *Jones v. Alfred Mayer*, 392 U.S. 409 (1968).
21. See, e.g., Carol M. Rose, *Canons of Property Talk, or Blackstone's Anxiety*, 108 Yale L. J. 601 (1998); Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 Notre Dame L. Rev. 1033 (1996); Joan Williams, *The Rhetoric of Property*, 83 Iowa L. Rev. 277, 280 (1998).
22. *Buchanan v. Warley*, 245 U.S. 60 (1917).
23. See, e.g., *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823). *Johnson* appears in Jesse Dukeminier and James A. Krier, *Property* 3 (5th ed., New York, 2002); Casner and Leach, *Cases and Text on Property*, *supra* note 1, at 116; Singer, *Property Law*, *supra* note 19, at 4; Cribbet, *Property: Cases and Materials*, *supra* note 1, at 77; Dorothy Brown, *Critical Race Theory: Cases Materials and Problems* 288 (New York, 2003).

ery gave a right to the “discovering” nation to confirm its title to the land by conquering (or purchasing from) the native inhabitants. Marshall recognized some of the seeming oddness, perhaps even injustice, of taking land from the Natives, for in announcing the rule, he acknowledged how “extravagant the pretension of converting the discovery of an inhabited country into conquest may appear.”²⁴ He further acknowledged how the conclusion that the Natives were merely occupiers, not owners of the land, “may be opposed to natural right, and to the usages of civilized nations.” But he thought no other rule could be applied. For if a holding “be indispensable to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.”

Marshall thus announced a two part rule: discovery plus confirmation of title, which might happen by conquest as well as by purchase. Conquest presented an imperative rule: “Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.”²⁵ He had no desire to issue a decision at odds with either long-term prescription or public opinion. As he concluded, “if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.”²⁶

There is much in *Johnson* that is useful in introducing the property course: the idea that property rules are dictated by the state and that they are confirmed by long-term usage; the respect given rights that are acquired under that usage; the extent to which courts will, of necessity, support property and long-term usage. *Johnson* can set many themes for a course, as well as teach about the power of the right of property. *Johnson* is worthy of sustained exploration and Lindsay Robertson’s study is a fine companion to assign with the case.²⁷ *Johnson* has a twentieth-century analog in *Tee-Hit-Ton Indians v. United States*, which suggests that, even in the absence of conquest, the sovereign’s claim to property will prevail over the claim of Natives.²⁸

24. Others have commented on Marshall’s ambivalence. See, e.g., Joshua L. Seifert, *The Myth of Johnson v. M’Intosh*, 52 U.C.L.A. L. Rev. 289 (2004). For a more critical reading, see David Wilkins, *Quit-Claiming the Doctrine of Discovery: A Treaty-Based Reappraisal*, 23 Okla. City U. L. Rev. 277, 283 (1998).

25. 21 U.S. at 588.

26. 21 U.S. at 591.

27. See Lindsay Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (Oxford, 2005). See also Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, Mass, 2005); William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York, 1983), excerpted in Dwyer and Menell, *Property*, *supra* note 1, at 21.

28. *Tee-Hit-Ton Indians v. United States*, (1955), excerpted in Curtis Berger and Joan Williams, *Property: Land Ownership and Use* 20 (4th ed., New York, 1997); Singer, *Property Law*, *supra* note 19, at 15; Brown, *Critical Race Theory*, *supra* note 23, at 297.

One might also begin a class in property with an exploration of rights of ownership in humans, such as cases dealing with large issues in slavery, or the origins of property rights in humans. To do that, one might look to cases defining slavery and protecting owners' rights in slaves, which might provide a sort of an intellectual companion to Marshall's opinion in *Johnson v. McIntosh*. There are a couple of ways to approach these issues. One might use cases dealing with how Europeans acquired the right to enslave Africans. One might also use cases dealing with the scope of owners' rights in humans. Chief Justice Marshall's opinion in *The Antelope* is one provocative point of entry.²⁹

The Antelope involved the international slave trade and claims by many people to the cargo of approximately 280 humans aboard a slave ship. *The Antelope*, a Spanish ship, was carrying approximately ninety slaves off the coast of Africa when it was captured by *The Arraganta*, a ship run by privateers that was flying the flag of an obscure South American republic. The *Arraganta* had previously captured a Portugese ship and a United States ship, the *Bristol*, which was illegally engaged in the slave trade. Then the *Arraganta* and *Antelope* both sailed for Brazil. The *Arraganta* ran aground and its crew were arrested. In the meantime, much of its human cargo was transferred to *The Antelope*, which, in turn, was captured by a United States revenue ship off the coast of Florida. The claimants included the United States, Spain, Portugal, and the privateer's captain. The case raised issues of when and how the United States courts should recognize property rights acquired through the international slave trade.

As former Attorney General William Wirt argued to the Supreme Court, the case posed a conflict between "a claim to freedom or a claim to property."³⁰ Marshall's opinion phrased the conflict as one between natural law and the law of nations. While the slave trade might be viewed as abhorrent, it was not outlawed as part of the law of nations. Marshall recognized that the slave trade was condemned by many. "Public sentiment . . . kept pace with the measures of government; and the opinion is extensively, if not universally entertained, that this unnatural traffic ought to be suppressed."³¹ Long prescriptive use had sanctioned the trade, so that Marshall would recognize the rights of Spain (and Portugal, though no one appeared to claim the Portugese slaves). After surveying the history of slavery, Marshall stated that "Slavery, then, has its origin in force; but as the world has agreed that it is a legitimate result of force, the state of things which is thus produced by general consent, cannot be pronounced unlawful."³² Thus, as in *Johnson*, we receive a lesson on the sources

29. 23 U.S. (10 Wheat) 66 (1825). See also G. Edward White, *The Marshall Court and Cultural Change, 1815-1835*, at 693-701 (New York, 1988); John Noonan, *The Antelope: The Ordeal of the Recaptured Africans in the Administrations of James Madison and John Quincy Adams* (Berkeley, Ca., 1978); Hon. Michael Hawkins, *John Quincy Adams and the Antebellum Maritime Slave Trade: The Politics of Slavery and the Slavery of Politics*, 25 Okla. City U. L. Rev. 1 (2000) (discussing Adams' role in *The Antelope*).

30. 23 U.S. at 81.

31. *Id.* at 116.

32. 23 U.S. at 121.

of law—the importance of long-term use, of acquiescence in rules—and on the superiority of positive commands over notions of humanity. It is an important positivist statement about the sources of property law and the power of those rules. Marshall divides the opinion into questions of abiding by his duty of following law or “yielding to feelings which might seduce [him] from the path of duty.”³³ Marshall concluded that he had to follow the law:

Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution, in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself as a part, and to whose law the appeal is made. If we resort to this standard as the test of international law, the question, as has already been observed, is decided in favour of the legality of the trade. Both Europe and America embarked in it; and for nearly two centuries, it was carried on without opposition, and without censure. A jurist could not say, that a practice thus supported was illegal, and that those engaged in it might be punished, either personally, or by deprivation of property.³⁴

In the end, all the slaves on the ship, except those who came from the Spanish ship, were freed. The slaves from the United States ship were free, because the United States outlawed the slave trade. No one from Portugal claimed the slaves from the Portugal ship. Slaves captured as they were being imported into the United States were freed. But the slaves from the Spanish ship were brought here without their owners’ consent, and a treaty with Spain protected the Spanish owners’ rights. Marshall required that Spain produce evidence to prove its claim to each slave it claimed; by the end of the case, it was entitled to only about fifty of the slaves.³⁵

The Antelope appears in no property casebooks. Indeed cases involving slavery rarely appear in property casebooks.³⁶ Joan Williams uses North Carolina Justice Thomas Ruffin’s 1829 opinion in *State v. Mann*, which deals with the criminal liability (or non-liability) of a person who rented a slave and then physically abused her.³⁷ *Mann* is a critically important case when one seeks to peer inside the slave system, as commentators since the antebellum era have recognized.³⁸ The case shows the breadth of authority given to whites over

33. See also Alfred L. Brophy, Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists, 79 B.U. L. Rev. 1161, 1179 (1999) (discussing Marshall’s distinction between law and sentiment in *The Antelope*).

34. 23 U.S. at 121-22.

35. See White, The Marshall Court, *supra* note 29, at 697.

36. Richard Chused, Joseph Singer, and James Smith’s casebooks all use *Dred Scott*; however their excerpts from Chief Justice Taney’s majority opinion deal with issues of slave citizenship and thus address identity and personhood rather than the origins of property. See Chused, Cases, Materials and Problems in Property, *supra* note 19, at 1081; Singer, Property Law, *supra* note 19, at 1264; Smith, Property, *supra* note 11, at 328.

37. See Berger and Williams, Property: Land Ownership and Use, *supra* note 28, at 1112.

38. See, e.g., Mark Tushnet, Slave Law in the American South: *State v. Mann* in History and Lit-

slaves. One might paint a more detailed picture through cases of whites who had no supervisory authority over slaves and through cases dealing with civil (rather than criminal) liability.³⁹

One might also look into the cases decided on the eve of the Civil War, when southern state courts dealt with questions about slaves whose owners had taken them voluntarily into free states (where the slaves could have asserted their freedom) and then returned to a slave state. Those cases explore in some depth the questions of slavery's relationship to positive law, the owner's interest, and the nature of a claim to another person.⁴⁰

One illuminating case, *Neal v. Farr*, involves a narrower question: could an owner be liable for common law homicide against a slave?⁴¹ Owners were liable by Georgia statute for homicide, so *Neal* did not present a question of whether there was criminal liability. Georgia did not permit a suit for damages until the prosecution of a common law homicide had been completed. Thus, the answer to whether there was a common law homicide determined whether an owner suing for wrongful death of his slave had to wait until the criminal prosecution was completed. Decided by Justice Nisbet of the Georgia Supreme Court in 1851, *Neal* began by addressing the scope of the owners' rights using precedent from Great Britain and other states, as well as Georgia; it then turned to the scope of the owner's property right from a more limited perspective. There are two lessons buried in *Neal*: the power of the state to define ownership and the strong nature of precedent. *Neal* concluded that there was no common law prohibition on homicide of a slave.

Devises During the Eras of Slavery and Jim Crow

Restrictions on Testators' Intent to Free Slaves

In a series of cases, southern states, courts, and legislatures addressed restrictions on testator's power to emancipate slaves. One particularly poignant case, *Hinds v. Brazealle*, involved the will of a white man, Elisha Brazealle, who took an unnamed slave and her son, John Munroe Brazealle, to Ohio in 1826 and emancipated them there. All three returned to Mississippi. When Elisha died, his will confirmed again his emancipation and then left his entire estate to his son, John Munroe. Elisha's intestate heirs challenged the acts of emancipation and Elisha's will. The Mississippi Supreme Court concluded that the

erature (Lawrence, Kan., 2003); Eugene Genovese, *Roll, Jordan, Roll: The Life the Slaves Made* 35-36 (New York, 1972); Alfred L. Brophy, *Humanity, Utility, and Logic: Harriet Beecher Stowe's Vision in Dred: A Tale of the Great Dismal Swamp*, 78 B.U. L. Rev. 1113 (1998).

39. See, e.g., *Tate v. O'Neal*, 3 N.C. 220 (1821) (liability of patrollers for harm to a slave), noted in Chused, *Materials and Problems in Property*, *supra* note 19, at 1096.

40. See, e.g., *Mitchell v. Wells*, 37 Miss. 235 (1859); *Bryan v. Walton*, 14 Ga. 185 (1853); *Charlotte v. Chouteau*, 11 Mo. 193 (1847); *Charlotte v. Chouteau*, 21 Mo. 590 (1855).

41. *Neal v. Farr*, 9 Ga. 555 (1851).

Ohio emancipation was invalid and denied any other attempted emancipation of John Munroe and his mother.

Hinds is constructed around several principles.⁴² First, Mississippi allowed emancipation in only limited circumstances. Thus, emancipation of the family in Ohio was contrary to public policy and the attempted emancipation was void. Second, a slave cannot take property. Thus, Brazealle's attempt to leave property to his family is invalid.⁴³ The court coldly concluded, "The consequence is, that the negroes John Munroe and his mother, are still slaves, and a part of the estate of Elisha." The decision put Brazealle's family back into slavery and made them the property of Brazealle's relatives.

Hinds caught the attention of abolitionists; Harriet Beecher Stowe made it a part of her 1856 novel, *Dred: A Tale of the Great Dismal Swamp*.⁴⁴ *Hinds* is a lesson in how slavery warped the basic wills principle that a testator may distribute property however she wants. Through *Hinds* we learn that property is not an exclusive right as the state reserves an interest.⁴⁵

How, one might ask a student in a class on wills and estates, do we square this decision with the right to dispose of property as the testator wishes? The answer is that some courts did allow the manumission, but in most instances, the answer turned on a particular state's public policy regarding manumission.⁴⁶ Why does the state have an interest in prohibiting emancipation? The long-standing state policy, as expressed in legislation limiting manumission, is the answer the court gives. Thus, while courts might say they give great deference to testators' wishes and to their right to dispose of property as they wished, courts in some instances imposed substantial restrictions on slave owners' property rights.

The idea of the states' interest in regulating manumission is raised in greater depth—and more agreeable result—in *Fisher's Negroes v. Dabbs*. In that case, Justice John Catron of the Tennessee Supreme Court (and later the U.S. Supreme Court) interpreted John Fisher's 1827 will providing for emancipation of his slaves. In 1829, after Fisher's executor refused to free the slaves because he did not want to post the bond necessary to emancipate them, the Tennessee

42. *Hinds v. Brazealle*, 3 Miss. (2 How.) 837 (1838).

43. *Id.* (citing 4 Desaus. Rep. 266).

44. See Brophy, *Humanity, Utility, and Logic*, *supra* note 38, at 1119 (discussing Stowe's use of *Hinds*).

45. See also Adrienne Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 *Stan. L. Rev.* 221 (1999). Professor Davis' article explores in depth intestate inheritance from former slaves and to former slaves, as well as testate devises to former slaves. It is important reading for those looking for further explorations of these complex issues. Mitchell Crusto has recently published a book-length article exploring the nineteenth-century property law of white men and black women.

46. There were a series of similar cases. See, e.g., *Carroll v. Brumby*, 13 Ala. 102 (1848); *Creswell's Exec v. Walker*, 32 Ala. 229 (1861); *Bailey v. Poindexter's Ex'r*, 14 Grat. 132 (Va. 1858). Some judges upheld such trusts. See, e.g., *Carmille v. Carmille*, 27 S.C.L. 190 (1842).

legislature passed an act that allowed guardians to file lawsuits for freedom. It subsequently passed an act in 1831 that clarified the 1829 act, made the 1829 act prospective only, and ordered the dismissal of lawsuits filed under the 1829 act. Justice Catron upheld the emancipation as long as the slaves were transported to Africa. Catron thus added an important condition to the will. *Fisher's Negroes* and *Hinds* both raise the question of whether there are additional ways of approaching emancipation. Some way to accomplish testator's purpose? Perhaps that most flexible and use of devices, a trust?⁴⁷

Francis Gideon left such a will when he died in 1853 in Georgia. He devised "his" humans to the American Colonization Society, so that the society might free his former slaves and send them to Africa. Georgia statutes prohibited emancipating any slaves via will. Justice Joseph Lumpkin looked to the American Colonization Society's charter, which was limited to "colonizing, with their own consent, in Africa, the free people of color." The court would not allow the ACS to take title nor would it substitute another corporation so that the enslaved humans might be transported elsewhere and emancipated. Neither would the court allow a middle course of *cy pres*, where the testator's intent of freeing the slaves and transporting them to Liberia, might follow as closely as possible. Those cases, interpreting wills that attempted to emancipate slaves, illustrate the restrictions courts imposed on testators' intent, as well as the interest communities sometimes exercise in the disposition of private property.

The post-war version of these restrictions came with anti-miscegenation statutes, which prohibited interracial marriages. One key effect of those statutes was the invalidation of the marriage and the deprivation of surviving family members (wives and children) of intestate inheritance.⁴⁸

47. Trusts were sometimes used to avoid prohibitions on alien ownership of land. See, e.g., Bill Ong Hing, *Rebellious Lawyering, Settlement & Reconciliation: Soko Bukai v. YWCA*, 5 Nev. L.J. 172 (2004); Brant T. Lee, *A Racial Trust: The Japanese YWCA and the Alien Land Law*, 7 Asian Pac. Am. L.J. 1 (2001); Keith Aoki, *No Right to Own? The Early Twentieth-Century "Alien Land Laws" as a Prelude to Interment*, 19 B.C. Third World L.J. 37 (1998).
48. See, e.g., *Locklayer v. Locklayer*, 35 So. 1008 (Ala. 1904) (denying surviving spouse, a white woman, an intestate share of estate of decedent husband, a black man, because their relationship "was clearly illegal and adulterous" because of Alabama's anti-miscegenation statute). *Locklayer* and other cases are discussed in J. Allen Douglas, *The "Most Valuable Sort of Property": Constructing White Identity in American Law, 1880-1940*, 40 San Diego L. Rev. 881, 932 (2004). Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 J. Am. Hist. 44 (1996). Even beyond miscegenation statutes, courts were suspicious of interracial devises. See also *Succession of Filhiol*, 44 So. 843 (La. 1907) (interpreting Louisiana statute, which prohibits, essentially, men from devising real property to women with whom they live in "concubinage"); *Smith v. DuBose*, 3 S.E. 309 (Ga. 1887); *Ray Madoff, Unmasking Undue Influence*, 81 Minn. L. Rev. 571, 576-77 (1997). At other times, upheld unusual interracial devises. See, e.g., *Sporn's Estate v. Herndon*, 121 P.2d 602, 605 (Okla. 1942). In *Herndon*, the court commented on the unusual nature of a devise from a white man to several African Americans:

The will is a very unusual one, in that deceased, a white man, left surviving him a brother and sister and descendents of two deceased brothers, but left a substantial portion of an estate, of the value of approximately \$50,000, to Helen Herndon, a negro woman,

Reversion Rather than Integration in Charitable Gifts

Having seen the limitations that southern courts placed on the power of testators to dispose of their property as they would like, one can turn to the Jim Crow era when grants were made with restrictions on use of property. In 1911, Senator Augustus O. Bacon of Macon, Georgia, devised land to the city of Macon to be used as a public park, “Baconsfield,” with a restriction that the park was for white people only. When that restriction became unenforceable as a result of the 1966 United States Supreme Court case *Evans v. Newton*, Senator Bacon’s heirs sought to enforce a reversion. In 1970, the United States Supreme Court upheld the reversion in *Evans v. Abney*.⁴⁹ Because the devise contained Senator Bacon’s “own full-blown social philosophy,” and the termination of the trust for the park terminated discrimination, and was a loss borne by all, the Supreme Court thought there was no unconstitutional state action in enforcing the reversion.⁵⁰ Lest one think that *Evans v. Abney* is part of the distant past, within my memory the Virginia Supreme Court upheld a reversion of a devise to a segregation academy. Another charity obtained the property when the academy began to admit black students. That case, *Heritage Methodist Homes v. Dominion Trust Company*, is not reprinted in any wills or property casebooks, although Joseph Singer notes it in his *Property Law* casebook.⁵¹

Jim Crow Property Discrimination

During the Jim Crow era, states and private individuals took extraordinary action to establish a strict line separating black and white. The line was drawn on street cars, in schools, along city blocks, and at the borders of cemeteries.

who had been employed by him as servant and housekeeper, and gave, devised and bequeathed all the residue of said estate to the three trustees named therein (one of them being the said Helen Herndon) in trust for the benefit of said Helen Herndon and Wayne Lee Maxwell, a negro boy then about ten years of age, a son of a sister of said Helen Herndon.

Deceased had been twice married, but no children were born to either marriage. The first wife had died and the second marriage was dissolved by divorce.

Still, *Herndon* upheld the will, “unusual and strange as [it] may be.” *Id.*

49. 396 U.S. 435 (1970), reprinted in Singer, *Property Law*, *supra* note 19, at 499, and noted in Lawrence W. Waggoner, Gregory S. Alexander, Mary Louise Fellows, and Thomas P. Gallanis, *Family Property Law: Cases and Materials on Wills, Trusts, and Future Interests* 953 (3rd ed., New York, 2002). Some cases modify testators’ racially discriminatory bequests. See, e.g., *Tramwell v. Elliot*, 199 S.E. 2d 194 (Ga. 1973); *Tinnin v. First United Bank*, 502 So.2d 654 (Miss. 1987), reprinted in Waggoner, *Family Property Law*, *supra*, at 954, 955.
50. See 396 U.S. at 445. A similar argument was made in *Charlotte Park and Recreation Commission v. Barringer*, 88 S.E.2d 114 (N.C. 1955), reprinted in Chused, *Cases, Materials, and Problems*, *supra* note 11, at 352. Contrast *Capital Federal Savings and Loan Ass’n v. Smith*, 316 P.2d 252 (Colo. 1957). Both discussed in Singer, *Property Law*, *supra* note 19, at 627-29.
51. 387 S.E.2d 740 (Va. 1990), discussed in Singer, *supra* note 11, at 629; Jonathan Entin, *Defeasible Fees, State Action, and the Legacy of Massive Resistance*, 34 Wm. & Mary L. Rev. 769 (1993); Florence Wagman Roisman, *The Impact of the Civil Rights Act of 1866 on Racially Discriminatory Donative Transfers*, 53 Ala. L. Rev. 463 (2002).

There are important stories buried in the invalidation of those Jim Crow era statutes and private discriminatory action.

Zoning Ordinances and Nuisance Actions

Beginning in the early twentieth century, many cities passed racially restrictive zoning ordinances. The ordinances typically took the form of restrictions that prohibited members of one race from occupying a block on which a majority (or 75 percent) of houses were occupied by members of another race. Over time, those ordinances would cause blocks to turn all white or all black. They were struck down as unequal state action in the 1917 United States Supreme Court decision in *Buchanan v. Warley*. In part, the growth of private covenants was a response to *Buchanan*. Despite that clear precedent, some cities continued to pass and enforce racially restrictive zoning ordinances. Oklahoma City's ordinance, passed in the early 1930s, was struck down in 1935.⁵² Birmingham, Alabama's ordinance was enforced into the 1950s.⁵³

But even in cases where zoning boards did not use explicitly racial ordinances, they sometimes tried to use zoning to regulate African Americans, such as ordinances that regulated jazz clubs.⁵⁴ A California court applied the overbreadth doctrine to strike down Pasadena's ordinance strictly limiting such clubs' hours of operation and location.⁵⁵ The decision had obvious racial implications and was one case where respect for property rights and free expression protected racial minorities. Courts then sought to regulate jazz through the doctrine of nuisance.⁵⁶

Plaintiffs also attempted to use the nuisance doctrine to restrict the rights of blacks. In the early twentieth century (one of the high-water marks of racial discrimination), courts held that the race of property owners did not by itself constitute a nuisance.⁵⁷ One 1922 Texas opinion provides a particularly full

52. See *Allen v. Oklahoma City*, 52 P.2d 1054, 1058 (Okla. 1935).

53. J. Mills Thornton, *Dividing Lines: Municipal Politics and the Struggle for Civil Rights in Montgomery, Birmingham, and Selma 158-63* (Tuscaloosa, 2002) (discussing Birmingham's ordinance, invalidated by *City of Birmingham v. Monk*, 185 F.2d 859 (5th Cir. 1950)). More recent zoning has been closely connected to race as well. Sometimes the Fair Housing Act has been used to control zoning that has a disparate racial impact. See, e.g., *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2nd Cir. 1988), *reprinted in* Singer, *Property Law*, *supra* note 19, at 997. Cf. Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 *Minn. L. Rev.* 739 (1993).

54. The examples in this paragraph are all drawn from Amy Wilson's note on jazz and property. See Amy Leigh Wilson, *A Unifying Anthem or Path to Degredation? The Jazz Influence in American Property Law*, 55 *Ala. L. Rev.* 425-44 (2004).

55. *Ex parte Hall*, 195 P. 975 (Cal. Ct. App. 1920).

56. See, e.g., *Phelps v. Winch*, 140 N.E. 847 (Ill. 1921); *Truehart v. Parker*, 257 S.W. 640 (Tex. App. 1923). See also *W.S. Douglas Shoe Co. v. Vredenberg*, 104 S. 309 (La. 1925) (concluding that jazz hall violated lease and upholding eviction).

57. See *Falloon v. Schilling*, 29 Kan. 292 (Kan. 1883) ("A negro family is not, per se, a nuisance;

exploration of the prejudices that motivated the attempt to use nuisance to exclude blacks from a residence. The plaintiffs complained that:

That negroes were ordinarily loud, boisterous, coarse, noisome, and immodest in their conduct and in their modes and habits of living, and are therefore undesirable as close neighbors; that negroes are ordinarily musical, and are attracted by cheap phonographs, victrolas, and other cheap musical instruments, the playing of which at close quarters is annoying and irritating and distressing to white people; that the odor from negroes' living quarters is offensive, objectionable, and undesirable, and in a southern climate is so bad as to destroy the comfortable enjoyment of life in close proximity thereto, and is offensive at a distance of 10 or 15 feet to white persons of ordinary sensibilities, and of ordinary tastes and habits; that in the hot Texas summers it is necessary for people to leave their windows open in daytime and night in order to have free ventilation, etc.; and that the close proximity of the negroes sleeping 10 feet away would be intolerable; that the effect of building this negro servant's house within 10 feet of the sleeping quarters of white people would put the negro sleeping quarters in such close proximity to the Harwood residence as would be objectionable and would constitute a nuisance.⁵⁸

That graphic appeal to white supremacy, which invoked numerous stereotypes, was rejected, even though the court was sympathetic to the plaintiffs. Despite the Texas court's sentiments in favor of the plaintiff, the court concluded that:

[W]e, as a court, must follow, as our only guide, the rules of law applicable alike to all, bearing in mind that the law is no respecter of persons and was not made to apply to one caste to the exclusion of another. We feel constrained to say that the record in this case discloses the inefficacy of the law to prevent all acts of injustice from being inflicted, and that, where the law is powerless in its application to prevent such injuries, the observance of the "Golden Rule" can only be looked to as a panacea in that portion of our country where there exists a just and a well-defined impassable gulf between the white element of its population and the negro race. But, as the hand of our invisible Guide leads us, we must follow on to a conclusion, ascertaining and declaring the rights of litigants as justified and determined by the established rules of law.⁵⁹

and a white man cannot prevent his neighbor from renting his home to a negro family any more than he can to a German, an Irish, or a French family. The law makes no distinction on account of race or color, and recognizes no prejudices arising therefrom. As long as that neighbor's family is well behaved, it matters not what the color, race, or habits may be, or how offensive personally or socially it may be to plaintiff; plaintiff has no cause of complaint in the courts."). The attempt to use nuisance to exclude black families and churches was part of a substantially larger movement regarding conflicting public and private rights. See, e.g., Peter C. Hennigan, *Property Wars: Prostitution, Red-Light Districts, and the Transformation of Public Nuisance Law in the Progressive Era*, 16 *Yale J. L. & Hum.* 123 (2004); Robert Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920*, 59 *S. Cal. L. Rev.* 1101 (1986).

58. *Lancaster v. Harwood*, 245 S.W. 755 (Tex. Civ. App. 1922).

59. *Id.*

Despite the consistent rejection of nuisance as a basis for excluding blacks from living in a neighborhood, it was sometimes successfully used against black churches. A black church established in a white neighborhood in Columbia, South Carolina, in 1933 was enjoined as a public nuisance, with allegations that “the plaintiffs dance in the church, and, in the course of the meeting, give forth weird and unearthly outcries.”⁶⁰ The court elaborated the nature of the nuisance:

There is loud shouting, clapping of hands in unison, and stamping of feet. The incessant use of drums, timbrels, trombones, horns, scrubbing boards and wash tubs add to the general clamor. Some of the votaries are moved to testify; others enter an hypnotic trance. The central pillars of the church are padded to protect them from injury during their transports. The tumult can be heard for many city blocks. Meetings are carried on daily from early hours in the evening until the early hours of the morning. Boisterous and disorderly throngs, unable to enter the crowded building, congregate in the adjoining streets. Fights often occur. White residents who live in the vicinity testified that life is made unbearable by the continual din, which deprives them of all peace and tranquility, and makes sleep impossible.⁶¹

Riots

Riots occurred in part because of housing segregation. The Tulsa riot of 1921 provides a fine case study, as that destructive riot can be placed into a context of housing segregation and white anger towards the growing pride and wealth of the Tulsa black community. The story of Tulsa is complex. In a nutshell, the riot sprang from a long-simmering conflict between black and white Tulsa over the status of the black community. In the aftermath of World War I, the black community, infused with veterans of the war who took pride in their role in making Europe safe for democracy, took a stand against lynching and in favor of social equality. Those tensions came to a head at the end of May 1921 when a young black man was jailed on fantastic charges of attacking a young white woman. Both black and white communities thought there was great likelihood of a lynching and they clashed outside the Tulsa courthouse on the evening of May 31. That set off a riot in which the Tulsa police department, in conjunction with several hundred deputies, rounded up every black person they could find in the city and took them to what newspapers called “concentration camps,” where they were interned. Afterwards, “Little Africa,” as the black section was known by whites, was looted and burned. More than thirty-five blocks were destroyed and thousands were left homeless. What followed was a new building ordinance, which prohibited rebuilding in the burned district unless fireproof (and hence expensive) material was used.

60. See *Morison v. Rawlinson*, 7 S.E.2d 635 (S.C. 1940).

61. *Id.* See also *Spencer Chapel M.E. Church v. Brogan*, 231 P. 1074 (Okla. 1924) (overturning finding that black church located in a white neighborhood was a nuisance); *Boyd v. City of Frankfort*, 77 S. W. 669 (Ky. 1903) (concluding black church not a nuisance).

That restriction was eventually overturned as an interference with the owners' property rights.⁶²

*Race and the City of the Dead: Integrating and Accessing the Cemetery*⁶³

In the years after *Shelley v. Kramer* invalidated judicial enforcement of racially restrictive private covenants, similar covenants regarding burial in cemeteries were also struck down.⁶⁴ In cases after the mid-1960s, the Civil Rights Act of 1866 created liability for a cemetery that refused to sell to black families.⁶⁵ The cemetery cases are a hidden place where students can explore *Shelley's* implications and the reach of the civil rights statutes.

There is one other relevant area of cemetery law, where those interested in reparations will find a very useful precedent: the right of descendants of those buried on private property to access their ancestors' graves.⁶⁶ Suits for access to slave cemeteries remind us of the connections between the slave past and today. So watch for the descendants of slaves to begin visiting the plantations where their ancestors labored. Moreover, watch for property casebooks to begin talking about the right of access to cemeteries on private property because it is one of the rare background principles in the common law that permits non-owners to access private property.⁶⁷

62. See generally Alfred L. Brophy, *Reconstructing the Dreamland: The Tulsa Riot of 1921—Race, Reparations, Reconciliation* (Oxford, 2002); *Alexander v. Oklahoma*, 382 F.3d 1206, reh'g denied, 391 F.3d 1155 (10th Cir. 2004) (affirming dismissal of lawsuit by Tulsa riot victims).

63. See Katherine Rogers, *Integrating the City of the Dead: The Integration of Cemeteries, 1900-1969*, forthcoming *Ala. L. Rev.* (2005).

64. See, e.g., *Erickson v. Sunset Memorial Park Assn.*, 259 Minn. 532 (1961). Courts came to apply *Shelley* relatively late, however. In 1953, the Iowa Supreme Court was still upholding a racially restrictive covenant in a cemetery, reasoning that “people, like animals, prefer to be with their own kind.” *Rice v. Sioux City Mem. Park*, 60 N.W.2d 110, 114 (Iowa 1953).

65. See, e.g., *Terry v. Elmwood Cemeteries*, 307 F.Supp. 370 (N.D. Ala. 1969).

66. See, e.g., *Whit v. Hulsey*, 519 So.2d 901 (Ala. 1987). The right of access, essentially an easement in gross, appears limited to descendants of those buried on the property. Sometimes it is justified as an implied reservation. It is a common law right in many states, a statutory right in others.

Cemetery law is nearly absent from property casebooks. Joseph Singer notes some of the limited state statutes protecting unmarked graveyards. See Singer, *Property Law*, *supra* note 19, at 1297.

67. Cemetery access cases fit well with other cases involving access to private property, such as the NLRB cases that permit employees to access employers' property, *Hudgens v. NLRB*, 424 U.S. 507 (1976), those that permit tenant farmers to have visitors, *State v. Shack*, 277 A2d 369 (N.J. 1971), those that permit political leafleting, *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), those that prohibit private clubs from excluding people based on race and gender, *Watson v. Farnal Order of Eagles*, 415 F.2d 235 (6th Cir. 1990), and access to beaches, *Mathews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984). See also *Oregon ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969), *reprinted in Chused, Cases and Materials*, *supra* note 11, at 105.

Federal Housing Authority

Property class invites consideration of the distribution of property along racial lines in the United States. According to the 2000 United States census, for example, the median value of white, non-Hispanic homes was \$123,400; the median value for black homes was \$80,600; for Native American homes it was \$81,000; and for Asian American homes it was \$199,300.⁶⁸ Such stark differences illustrate the disparity in income and wealth between whites and racial minorities. The Fair Housing Act illustrates the ways that equal treatment (as in equal rules, equally applied) will knock down some of the unfairness of property rules. Civil rights statutes, like the Fair Housing Act, the Civil Rights Act of 1866, and the Civil Rights Act of 1964, have dramatically altered the common law right of exclusion from private property. The alteration of the right of the public to access and use private property would be remarkable if not so much a part of our understanding of property law.⁶⁹

Of course, there is grossly unequal initial distribution of property; and that unequal distribution is likely to continue for generations. We have known for a long time that housing is an important correlate with income and educational achievement. Douglas Massey and Nancy Denton's 1993 book *American Apartheid* illustrates the origins and continuing power of housing segregation.⁷⁰ It blames housing segregation for much of the continued inequality in income and educational achievement between blacks and whites. Massey and Denton makes for a good supplemental reading assignment (as does Kenneth Jackson's *Crabgrass Frontier: The Suburbanization of the United States*) because it exposes students to social science research methods and to the effect of private and federal and state financing and housing decisions.

The good news is that we are freed from the elements of overt discrimination. And there are extensive rights against overt discrimination in the sale, rental, and advertising of residential real estate. There is, obviously, much that can be done with the Fair Housing Act materials, including the restrictions against advertising a preference based on race and the refusal to rent based on gender. Moving beyond the Fair Housing Act, there are important cases on exclusionary zoning, which derive from state law.⁷¹

68. See House Values: 2000 3 figure 4 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-20.pdf>. (last visited Jan. 17, 2006).

69. One obtains a particular sense of the change in property law and in thinking about it by comparing pre-civil rights era property casebooks with those published after 1970. One looking for a sense of a Green Party conception of property might do well to look to Gerald Lefcoe's *American Land Law: Cases and Materials* (Indianapolis, 1974), which emphasizes rent control, the rights of the public to access private property, and limitations on private property.

70. Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge, Ma., 1993).

71. See, e.g., *Southern Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d 713 (N.J. 1975), reprinted in Casner and Leach, *Cases and Text on Property*, *supra* note 1, at 1256.

The federal government's involvement in housing discrimination in other areas is less well known. Students might benefit from learning about the history of the Federal Housing Authority (FHA). One important area is the FHA's racially discriminatory funding. The mechanisms were complex, but at the center was the FHA's insuring private mortgages. It used a standardized set of criteria for judging risks and for determining which mortgages they would insure. Homes in declining neighborhoods, where minorities were concentrated, were not eligible for FHA support. That led in turn to "red-lining," the practice of outlining in red the neighborhoods that are bad credit risks. As Kenneth Jackson has said, "The lasting damage done by the national government was that it put its seal of approval on ethnic and racial discrimination and developed policies which had the result of the practical abandonment of large sections of older, industrial cities."⁷²

Remedies, Reparations, Property, and Slavery

Discussion of property law's support of slavery and Jim Crow racial crimes, when coupled with the recent discussion in the legal academy of reparations,⁷³ might cause a professor to seek to incorporate some elements of that debate in the property curriculum. Slavery was, of course, partly about the deprivation of one's labor and the ownership of another human. There is a vast literature on the property law of slavery, little of which appears in any property casebook. I suspect that is largely because there are no direct, contemporary implications of the cases. They may nevertheless tell us a great deal about property theory, and about how American law justified the ownership of four million humans in 1861. It strikes me as important to at least acknowledge that important part of property's history. One way we can do this is through a case that deals with those conflicting property rights, such as an unjust enrichment case. One case, *Seay v. Marks*, placed a slave owner in conflict with a person who rented his slave; the issue was whether the slave had been used in a way inconsistent with his contract for hire.⁷⁴

Another way of linking the centrality of slaves as property is through an owner's seeking of compensation for a slave who is punished for a crime. In some cases, the owners were expected to bear that cost themselves, a further illustration of the multiple interests of the community in forms of property.⁷⁵

72. Kenneth Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 217 (New York, 1985).

73. See, e.g., Roy L. Brooks, *Atonement and Forgiveness: A New Model for Black Reparations* (Berkeley, 2004); Alfred L. Brophy, *Losing the Understanding [of the Importance of] Race: Evaluating the Significance of Race and the Utility of Reparations*, 79 *Tex. L. Rev.* 911 (2002).

74. *Seay v. Marks*, 23 Ala. 532, 536-37 (1853).

75. See, e.g., *United States v. Amy*, 24 F. Cas. 792, 809-10 (C.C.D. Va. 1859) (No. 14,445). For previous discussions of *Amy*, see Alfred L. Brophy, Note, *Let Us Go Back and Stand upon the Constitution: Federal-state Relations in Scott v. Sandford*, 90 *Colum. L. Rev.* 192, 194 n.9 (1990); Natsu Taylor Saito, *From Slavery and Seminoles to Aids in South Africa: An Essay*

And there are occasional cases in which slaves, who should have been freed, recovered the value of their services.⁷⁶

In connection with reparations for slavery, one will want to talk about the promises of compensation to newly freed slaves. General Sherman's Field Order 15 provided for distribution to land confiscated from Confederate loyalists to newly free slaves. President Johnson quickly rescinded that order. The role of the federal government during Reconstruction land "reform" is mostly one of requiring the newly freed slaves to sign long-term labor contracts with their former owners and then returning land to its former owners. One of the most significant acts of reparations for slavery is the 1862 Act to compensate slave owners in the District of Columbia who were loyal to the union for their emancipated slaves.⁷⁷ Ultimately, of course, the Thirteenth Amendment provided no compensation to slaveholders. For, as Senator Charles Sumner said, "If money is to be paid as compensation, clearly it cannot go to the master, who for generations robbed the slave of his toil and all its fruits, so that, in justice, he may be regarded now as the trustee of accumulated earnings with interest which he has never paid over. Any compensation paid must belong, every dollar of it, to the slave."⁷⁸

There are more concrete ways of bringing reparations discussion into property. The Native American Grave Repatriation Act provides for the return of cultural artifacts that are held by organizations that receive federal funding.⁷⁹ Several casebooks deal with the return of mosaics taken from a Greek Orthodox Church in Cyprus before World War II. The identity of the possessor of the property was not discovered until the 1980s, and the Indiana court hearing the claim held that the statute of limitations on adverse possession of chattels does not begin to run until the identity of the possessor is discovered (or should reasonably have been discovered).⁸⁰

on Race and Property in International Law, 45 Vill. L. Rev. 1135, 1147 n.61 (2000).

76. *Thompson v. Wilmot*, 4 Ky. (1 Bibb.) 422 (Ky. 1809). Andrew Kull discusses *Thompson* and several similar cases in *Restitution in Favor of Former Slaves*, 84 B.U. L. Rev. 1277 (2004).
77. *An Act for the Release of Certain Persons Held to Labor in the District of Columbia*, 12 Stat. 376-78 (1862).
78. *Congressional Globe*, 38th Cong., 1st Sess., 1481 (April 8, 1864), referenced in Michael Vorenberg, *Final Freedom: The Civil War, The Abolition of Slavery, and the Thirteenth Amendment* 108-09 (Cambridge, 2001).
79. 25 U.S.C. §§ 3001-3013, noted in Dukeminier and Krier, *supra* note 23, at 176-77; Singer, *Property Law*, *supra* note 19, at 1297; Smith, *Property*, *supra* note 11, at 223.
80. *Autocephalous Greek Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 717 F.Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990), reprinted in Casner and Leach, *Cases and Text on Property*, *supra* note 1, at 157; noted in Dukeminier and Krier, *Property*, *supra* note 23, at 175; Smith, *Property*, *supra* note 11, at 170; Singer, *Property Law*, *supra* note 19, at 103.

Contemporary Examples of Race in the Property Curriculum

Partition of Family Farms

Particularly in the rural south, family farms are being lost through partition. When farm owners die intestate, as often happens, the farm often descends in small parts to a series of children and grandchildren. After several generations, the farms are often owned by more than a dozen people, only a few of whom live on the property. One or a few people will sell to an outsider, who then petitions for partition of the property by sale. Because partition in kind (that is, by dividing into separate parcels) is impracticable, courts typically order partition by sale.⁸¹ The racial implications and the rules regarding partition of property have generally been overlooked by property casebooks.

While land loss, particularly by African American farmers, is a topic of great concern, cases rarely reach the appellate level.⁸² In Alabama—the state I know best and a state that is particularly plagued by these issues—partition by sale will be granted when partition in kind is inequitable. Partition in kind is deemed inequitable when the sum of the individual parcels is deemed to be worth less than the entire parcel. Hence, the Alabama cases illustrate the preference for maximizing the sale price of property, while neglecting preservation of co-tenants' interest in living on the property.⁸³ A few states give more weight to the interests of the co-tenants who want to stay on the land.⁸⁴ A case like *Ragland v. Walter* illustrates the ways that property owners who want to stay on the land are disadvantaged compared to those who merely wish to sell.⁸⁵ *Ragland* might be used more effectively than other cases to illustrate the traditional requirements for partition by sale (that partition in kind is impracticable and that partition by sale best preserves the rights of the co-tenants), as well as how they are applied by courts in practice.⁸⁶

81. See, e.g., *Wilk v. Wilk*, 795 A.2d 1191 (Vt. 2002).

82. The literature on farm loss through sale by partition emphasizes the problems for black families, but identifies few appellate cases involving black families. See, e.g., Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 Nw. U. L. Rev. 505 (2001); Phyllis Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 Wash. U. L. Q. 737, 760-69 (2000); John A. Casagrande, *Acquiring Property Through Forced Partition Sales: Abuse and Remedies*, 23 B.C. L. Rev. 755 (1986).

83. See, e.g., *Ragland v. Walter*, 411 So. 106 (Ala. 1982); *Black v. Stimpson*, 602 So.2d 368 (Ala. 1992). Professor Craig-Taylor also cites *Fine v. Shearer*, 571 P.2d 1252 (Or. 1977) as an example of a black family who lost their property through partition. See Craig-Taylor, *Through a Colored Looking Glass*, *supra* note 82, at 773 n.209.

84. See, e.g., *Eli v. Eli*, 557 N.W.2d 405 (S.D. 1997), *noted in* John W. Bruce and James W. Ely, *Cases and Materials on Modern Property Law* 283 (5th ed., St. Paul, 2003); Casner, *Cases and Text on Property*, *supra* note 1, at 567.

85. 411 So. 106 (Ala. 1982).

86. See, e.g., *Delfino v. Vealencis*, 436 A.2d 27 (Conn. 1980), *reprinted in* Dukeminier and Krier,

Other Faces in the Class

Students may also want to read cases in which racial minorities appear as people other than tenants. Several casebooks have cases in which Native Americans appear as important actors. For instance, Joan Williams' casebook discusses Native American tribal ownership of property.⁸⁷ Joseph Singer includes *Nome v. Fagerstrom*,⁸⁸ which deals with an adverse possession claim in Alaska. The claimants are Native Americans who have used the property in a fashion characteristic of Natives, although their occupation has not been as great as one might expect under "European" standards of occupation of the land. The Alaska Supreme Court upheld a finding of adverse possession. *Nome* illustrates how an alternative perspective on use can bend property law. Sometimes it is just important to include a case involving Native Americans to suggest that the problems of importance to whites are of importance to other people as well. Winokur includes *Caywood v. January*, an Oklahoma case that dealt with adverse possession against a co-tenant. All the parties were Cherokee; in fact, the co-tenancy arose because of inheritance of allotted lands.⁸⁹

Equalizing Principles: Counter-Principles to Property's Exclusion

Amidst all of the property doctrine that excludes or maintains the current distribution of wealth, it is easy to forget that property law also contains important counter-doctrines. Some common-law principles limit private property rights for the benefit of the larger community. Those principles include

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- Property, *supra* note 23, at 359; Casner, Cases and Text on Property, *supra* note 1, at 563; Grant S. Nelson, William B. Stoebuck, and Dale A. Whitman, Contemporary Property 368 (2nd ed., St. Paul, 2002); Von Behren v. Oberg, 902 S.W.2d 338 (Mo. 1995), *reprinted in* Bruce and Ely, Case and Materials on Modern Property Law, *supra* note 84, at 280.
87. See Chilkat Indian Village, *IRA v. Johnson*, No. 90-01 (Chilkat Tribal Court, Nov. 3, 1993), *reprinted in* Berger and Williams, Property: Land Ownership and Use, *supra* note 28, at 1166.
88. 799 P.2d 304 (Alaska 1990), *reprinted in* Singer, Property Law, *supra* note 19, at 208; Casner and Leach, Cases and Text on Property, *supra* note 1, at 131. See also John Sprankling, An Environmental Critique of Adverse Possession, 79 Cornell L. Rev. 616 (1994). Another case, which is useful in teaching the basics of adverse possession, is *Teson v. Vasquez*, 561 S.W.2d 119 (Ct. App. Mo. 1977), *reprinted in* Sandra H. Johnson, Timothy S. Jost, Peter W. Salsich, and Thomas L. Shaffer, Property Law 39 (1992). *Lilly v. Palmer*, 495 So.2d 522 (Ala. 1986), provides an illuminating exchange between a white lawyer and a black plaintiff on adverse possession.
89. 455 P.2d 49 (Okla. 1969), *reprinted in* James L. Winokur, R. Wilson Freyermuth, and Jerome M. Organ, Property and Lawyering 393 (St. Paul, Minn., 2002) (adverse possession against co-tenants).

restraints on alienation,⁹⁰ changed conditions,⁹¹ nuisance,⁹² and the restrictions on dead hand control, such as rule against perpetuities. At other times, perhaps more commonly, those results are reached through statutes, such as the Fair Housing Act. One popular case involving a group home for disabled people, *Hill v. Community of Damion Molokai*, illustrates the power of the Fair Housing Act.⁹³ Neighbors of the group home sought an injunction, claiming that the home violated a restrictive covenant limiting use of the property to single family residences. The court held that group homes are protected by the Fair Housing Act, illustrating that anti-discrimination protections originally limited to race have been expanded through legislation to protect many other groups. But there is much more buried in the case, which suggests the power of common law property to permit relaxation of restrictions on use. First, the New Mexico Supreme Court interpreted the term “single family” broadly to include relationships beyond those related by blood or marriage. That part of the opinion invites discussion of the meaning of family, but it also invites discussion of the possibility of an estoppel argument. The home might have sought evidence that other homes covered by the covenant have also been occupied by people who were unrelated by blood or marriage. Such evidence could probably have been found, at least by showing that unmarried adult couples lived in the neighborhood. And once that evidence is established, estoppel would likely prohibit further enforcement against group homes. *Hill* unfolds the wide protection given by property law to those who seek to use their property. It opens up discussions of uses of traditional doctrines.

And then every once in a while we come across a case that surprises us. In 1920 the Mississippi Supreme Court upheld a devise by a wealthy white man

90. Several cases struck down covenants that prohibited African Americans from purchasing or renting property, as restraints on alienation. See, e.g., *Los Angeles Investment Co. v. Gary*, 186 P. 596 (Cal. 1919) (striking restraints on sale to African Americans as undue restraint on alienation, but still allowing restraint on use by African Americans). In the pre-Shelley era, however, restrictions on use were upheld against challenges that they were unreasonable, indirect restraints on alienation. See, e.g., *Meade v. Dennistone*, 196 A. 330, 335 (Md. 1938).
91. See, e.g., *Letteau v. Ellis*, 122 Cal.App. 584, 588-89 (Cal.App. 1st Dist. 1932) (refusing to enforce a racially restrictive covenant on the basis of changed conditions and noting that a “principle of broad public policy has intervened to the extent that modern progress is deemed to necessitate a sacrifice of many former claimed individual rights”).
92. Rachel D. Godsil, *Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 *Emory L.J.* 1807 (2004).
93. 911 P.2d 861 (N.M. 1996), *reprinted in* Casner, *Cases and Text on Property*, *supra* note 1, at 801; Dukeminier and Krier, *Property*, *supra* note 23, at 893. *Hill* illustrates property doctrine’s emphasis on reasonableness. Other illustrations of that principle include limitations on harsh servitudes through the change conditions doctrine, *El Di, Inc. v. Town of Bethany Beach*, 477 A.2d 1066 (Del. 1984), *reprinted in* Singer, *Property Law*, *supra* note 19, at 467, the invalidation of unreasonably burdensome covenants, *Petersen v. Beekmere, Inc.*, 283 A.2d 811 (N.J. 1971), *reprinted in* Chused, *Cases, Materials, and Problems*, *supra* note 11, at 456, and restraints on alienation. See, e.g., *Casey v. Casey*, *reprinted in* Bruce and Ely, *supra* note 84, at 613.

to a black woman who cared for him.⁹⁴ The court recited the facts surrounding the claims of undue influence by the testator's family against the testator's caretaker. Then it rejected them:

Mr. Gathings lived in a community where white settlers were few and where the colored population largely predominated and furnished the labor. The testimony shows that the very kin who filed this contest had moved out of the state many years before testator's death and rarely visited Mr. Gathings at his home. For two or three years prior to his death there was very little communication between the members of the family, and none of the contestants was present or in any position to administer to the bodily needs and comfort the old man in his declining days and last illness. He had no child to lean upon. Roxie Howard was his only help. That she was faithful in cooking his meals, attending to the stock, and running the place generally is beyond question. At the time the will was executed Gathings himself was over 60 years of age and Roxie Howard was an aged negro woman. She had her cabin in the yard, much upon the order of colonial days in the South. There is some testimony that if he desired to borrow a horse or to know about anything on the place Mr. Gathings would reply "Ask Roxie"; and that he appeared to leave the management of everything to her. This is a poor showing of undue influence...⁹⁵

There is much one might make of such cases. Perhaps one explains the result because the donees fit the prejudices of judges who recognized and rewarded patterns of deference. Or perhaps this is further evidence of the more positive, long-standing tradition of judges to decide according to well-established legal principles, in spite of appeals to white supremacy. At the least, they remind us of just how rich and complex the legal history of race is. And that sometimes judges see humanity in places we might not at first expect it.

94. *Gathings v. Howard*, 84 So. 240, 246 (Miss. 1920).

95. *Id.* at 246. See also *Alen v. Scruggs*, 76 So. 301 (Ala. 1914); *Dees v. Metts*, 17 So. 2d 137 (Ala. 1944).