aesthetic reasons. By the same token, our law protects from interference a record titleholder's interest in small, completely landlocked natural . . . lakes.

In *Dycus* the court concluded that the fishing hole in question (which covered 92 acres) fell within the category of "natural landlocked" bodies of water even though Corps of Engineers dredging had opened a channel allowing boats to pass from an adjacent lake. This supported the plaintiff's action to enjoin the defendant's fishing. In such a situation is the ownership of the fish an issue? Would it be an issue if the plaintiff's action were for the value of fish taken from their fishing hole? *See Commonwealth v. Agway*, *infra*, p. S32, and the notes following.

Land ownership also figured in an early Minnesota duck shooting case. In Lamprey v. Danz, 86 Minn. 317, 90 N.W. 578 (1902) the defendant was enjoined from "shooting ducks or any other game on or over the land of the plaintiff" on the basis of the landowner's "exclusive right of hunting and fishing on his land, and the waters covering it." (Emphasis added.) How different is this from the situation and legal theory of *Keeble*?

The most important recent developments concerning the law of wild animals, however, have not concerned suits between individuals but rather regulation of hunting and conservation by the state.

B. PUBLIC REGULATION OF THE CAPTURE OF WILD ANIMALS

COMMONWEALTH v. AGWAY, INC.

Superior Court of Pennsylvania.
210 Pa. Super. 150, 232 A.2d 69 (1967).

JACOBS, J. The Commonwealth of Pennsylvania brought this suit in trespass to recover damages for the value of fish killed as a result of pollution of the South Branch of French Creek and French Creek near Union City. The complaint alleged that the discharge of certain chemicals into the creek caused the death of some 12,000 fish and 60,000 minnows, all such fish being in a state of freedom in the inland waters of the Commonwealth.

The court below dismissed the complaint on the grounds that the Commonwealth did not have a property interest in such ferae naturae that would support a suit in trespass for damages, and that the exclusive remedy for the Commonwealth was the penal provisions of The Fish Law of 1959, Act of December 15, 1959, P.L. 1779, as amended, 30 P.S. § 1 et seq.[1]

The controlling question in this case is whether the Commonwealth has a property interest in fish in a state of freedom, the invasion of which will [p*31] support an action in trespass for

[1] That act provides, inter alia: "§ 200. No person shall put or place in any waters within or on the boundaries of this Commonwealth any electricity, explosives or any poisonous substances whatsoever for the purpose of catching, injuring or killing fish. . . . No person shall allow any substance of any kind or character, deleterious, destructive or poisonous to fish, to be turned into or allowed to run, flow, wash or be emptied into any waters within this Commonwealth, unless it is shown to the satisfaction of the Commission or to the proper court that every reasonable and practicable means has been used to abate and prevent the pollution of waters in question by the escape of deleterious substances.

"§ 202. Any person violating the preceding provisions of this article shall, on conviction as provided in chapter 14 of this act, be sentenced to pay a fine of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00).

"§ 310. It is the intent of this act to prescribe an exclusive system for the angling, catching and taking of fish, and for their propagation, management and protection in waters within, bounding on, or adjacent to, this Commonwealth. . . ."

monetary damages. We agree with the court below that the Commonwealth has no such property interest and affirm the dismissal of the complaint.

Fish running wild in the streams of a state or nation are ferae naturae. 2 Blackstone, Commentaries 403. They are not the subject of property until they are reduced to possession, Wallace v. Mease, 3 Binney 546 (1811), and, if alive, property in them exists only so long as possession continues. *See, e.g,* Mullett v. Bradley, 24 Misc. 695, 53 N.Y.S. 781 (1898); Reese v. Hughes, 144 Miss. 304, 109 So. 731 (1926); James v. Wood, 82 Me. 173, 19 A. 160 (1889); Young v. Hichens, 1 Dav. & Mer. 592, 6 Q.B. 606 (1844). The Commonwealth does not allege a property interest by way of possession of the fish. Instead, it admits the fish were in a state of freedom in Pennsylvania waters, but asserts that it has a property interest either as sovereign or proprietor in all wild game and fish in the Commonwealth sufficient to allow its recovery of damages.

Neither this court nor the court below nor the Commonwealth has discovered any case which has held that a state has such a property interest in wild game and fish that it could be the subject of a tortious invasion. To support its position the Commonwealth relies on cases involving the validity of regulatory measures enacted by states to preserve and protect wild game, and argues that since such cases refer to wild game as the property of the state, it follows that the state also "owns" wild game for purposes of a suit in trespass.

Game and fish in a wild state often have been described as the property of the state, but an examination of the cases demonstrates that the interest of the state is that of a sovereign, not an owner. Thus in Commonwealth v. Papsone, 44 Pa. Superior Ct. 128 (1910), aff'd, 231 Pa. 46, 79 A. 928, 232 U.S. 138, 34 S.Ct. 281, 58 L.Ed. 539 (1910), although this court referred to wild animals as the property of the sovereign, the case itself involved only the validity of hunting regulations and the holding was based solely on the sovereign power of the state to regulate and prohibit hunting and did not depend on any state property rights in the wild game.

In McCready v. Virginia, 94 U.S. 391, 24 L.Ed. 248 (1877), all that was decided was that the state could reserve to its own residents the exclusive right to grow oysters on the bed of a tidal river. While the case refers to the state as owning the tide waters and the fish in them it recognizes the limited meaning of such ownership by saying "so far as they are capable of ownership while running." Likewise in Geer v. Connecticut, 161 U.S. 519, 16 S. Ct. 600, 40 L. Ed. 793 (1896), in holding that Connecticut could prohibit the transportation of any killed game beyond the state the court based its decision on the power of the state to regulate the acquisition of title by an individual. Both cases demonstrate the exercise of the sovereign power and not the assertion of proprietary rights of the state.

In two instances the United States Supreme Court has referred to state ownership of wild game with some skepticism. In Missouri v. Holland, 252 U.S. 416, 434, 40 S. Ct. 382, 64 L. Ed. 641, 648 (1920), Justice Holmes said of the proposition that states own wild game: "To put the claim of the state upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership." In Toomer v. Witsell, 334 U.S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948), the Supreme Court found a violation of the Privileges and Immunities Clause in a South Carolina statute which imposed a fishing license fee on nonresidents 100 times greater than the fee imposed on residents. The court said there: [p*32] "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a state have power to preserve and regulate the exploitation of an important resource." 334 U.S. 402, 92 L. Ed. 1474. The confusion as to whether a state owns fish in the sense of owning other state property was traced by the court to Roman times: "The fiction apparently gained currency partly as a result of the confusion between the Roman term imperium, or governmental power to regulate, and dominium or ownership. Power over fish and game was, in origin, imperium." Ibid. at footnote 37.

Regardless of the terminology historically applied, we deal here with a power of the state to preserve and control a natural resource for the enjoyment of all citizens. The Commonwealth has the power for the common good to determine when, by whom and under what conditions fish running wild may be captured and thus owned and the power to control the resale and transportation of such fish thereby qualifying the ownership of the captor. It has this power as a result of its sovereignty over the land and the people. But it is not the owner of the fish as it is of its lands and buildings so as to support a civil action for damages resulting from the destruction of those fish which have not been reduced to possession.

Affirmed.

WRIGHT, J., concurring. I am not prepared to agree with the majority that the Commonwealth lacks sufficient property interest in fish upon which to predicate a trespass action for their negligent destruction. Fish constitute an important natural resource providing both food and recreation for our citizens. The Pennsylvania Fish Commission operates a number of hatcheries and regularly stocks the waters of the Commonwealth, including the stream here involved. I am concurring in the result on the ground, primarily relied upon by the court below, that The Fish Law of 1959 contains an express statement by the legislature that it is intended "to prescribe an exclusive system for . . . their propagation, management and protection."

Notes and Questions

1. Why do you think that the state brought this action rather than relying on the statute?

2. What are the policy implications of this decision so far as game conservation and water pollution are concerned?

3. Why do you think that Judge Wright wrote his concurring opinion if he agreed with the result of the majority? Would he and the majority agree on the validity of the following amendment to the Pennsylvania Fish Law which was adopted in 1980?

§ 2506. Commonwealth actions for damage to fish

(a) Declaration of policy.—The Commonwealth has sufficient interest in fish living in a free state to give it standing, through its authorized agencies, to recover damages in a civil action against any person who kills any fish or who injures any streams or stream beds by pollution or littering. The proprietary ownership, jurisdiction and control of fish, living free in nature, are vested in this Commonwealth by virtue of the continued expenditure of its funds and its efforts to protect, perpetuate, propagate and maintain the fish population as a renewable natural resource of this Commonwealth.

(b) General rule.—The [fish] commission, as an agency of the Commonwealth authorized to regulate, control, manage and perpetuate fish may, in [p*33] addition to criminal penalties provided in this title, bring civil suits in trespass on behalf of the Commonwealth for the value of any fish killed or any stream or stream bed destroyed or injured in violation of this chapter. In determining the value of fish killed, the commission may consider all factors that give value to such fish. These factors may include, but need not be limited to, the commercial resale value, the replacement costs or the recreational value of angling for the fish killed. In addition, the commission is entitled to recover the costs of gathering the evidence, including expert testimony, in any civil suit brought under this section where the defendant is found otherwise liable for damages.

PA. STAT. ANN. tit. 30, § 2506 (Purdon 2012).

In addition, the Pennsylvania Clean Streams Act of 1937 was amended in 1970 to provide that anyone violating an order of the Health Department to cease polluting a stream could be subject to a $10,000 per day civil penalty for each day of violation. PA. STAT. ANN. tit. 35, § 691.605

(Purdon 2012). And in 1971 the Pennsylvania Constitution was amended to add the following section:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art. 1, § 27 (2012). As a lawyer in the Pennsylvania Attorney General's Office, how would you now proceed if a case like *Agway* arose? *See generally*, Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment* (pts. 1–2), 103 DICK. L. REV. 699 (1999), 104 DICK. L. REV. 97 (1999).

4. Could a group of commercial fishermen who customarily fished in the polluted stream recover damages or obtain an injunction against future discharges? *See* Columbia River Fishermen's Protective Union v. City of St. Helens, 160 Or. 654, 87 P.2d 195 (1939) (allowing injunction but not damages). Could the owner of a private pond polluted by the stream recover for the fish killed as a consequence? For a case which reviews the history of fishing from the Creation through Noah and Isaak Walton and holds that a lower riparian may not sue an upper riparian whose pollution has destroyed the fish in the river, see Hampton v. North Carolina Pulp Co., 49 F.Supp. 625 (E.D.N.C.1943), *rev'd per curiam*, 139 F.2d 840 (4th Cir.1944). For the state court decision that prompted its reversal, see Hampton v. North Carolina Pulp Co., 223 N.C. 535, 27 S.E.2d 538 (1943).

5. If the pollution had reached a state-run fish hatchery where fish were raised in small ponds, could the state have recovered in trespass?

6. The principal case is noted in 72 DICK. L. REV. 200 (1967) and discussed in M. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 35–37 (U.S. Council on Environmental Quality, 1977). See State v. Dickinson Cheese Co., 200 N.W.2d 59 (N.D. 1972) (accepting *Agway*); Maryland v. Amerada Hess Corp., 350 F. Supp. 1060 (D. Md. 1972) (allowing suit by state for an oil spill on the ground of the public trust); State v. Jersey Central Power & Light Co., 69 N.J. 102, 351 A.2d 337 (1976) (allowing suit but denying liability for death of fish caused by change in temperature of water discharged from a nuclear power plant).

7. Today we have a major federal statute on the topic of water pollution, but it is not clear that the statute would extend to this river. It depends on whether the river is "navigable." Water Quality Improvement Act of 1970, *as amended*, 33 U.S.C. §§ 1251–1376 (2012). Pennsylvania has a Clean Streams Act, as indicated in Note 3, which may well apply to this river. As of 2012, no one has suggested unconstitutionality of the Pennsylvania fish statute under *Hughes v. Oklahoma*, *infra*, p. S38, but the only reported case involving direct private enforcement by the state is *Agway*. The principal effect of the Pennsylvania constitutional provision seems to have been to give members of the public standing to sue.

If you were representing the Commonwealth of Pennsylvania today, and the same fact-situation arose as in *Agway*, how would you proceed?

Note on Game Laws

The King's Prerogative and the Ratione Soli. The court in *Pierson v. Post*, you will recall, commented on general lack of English authority on the naked question of how possession in wild animals is acquired. The authorities cited [p*34] involved questions of private franchise, statute

or title *ratione soli*.[1] All these questions may be viewed as being dependent upon the notion of the king's prerogative: "Whereby a right may accrue to the crown itself, or to such as claim under the title of the crown, as by the king's grant, or by prescription, which supposes an ancient grant." 2 W. BLACKSTONE, COMMENTARIES *408. One species of prerogative property is "the property of such animals *feræ naturæ*, as are known by the denomination of game, with the right of pursuing, taking, and destroying them: which is vested in the king alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren, or free fishery." 2 W. BLACKSTONE, COMMENTARIES *410–11. (The fact that the owner of a chase or warren had the privilege of pursuing onto anyone's property animals started within the warren may be the source of the curious statements about the common law in *Liesner v. Wanie*, *supra*, p. S31. *See* 7 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 491–95 (2d ed. 1937).)

Thus, private franchises to take game are seen as grants of a portion of the king's prerogative rights. By the same token the king (and later the king in his parliament) can make regulations in the form of game laws for the hunting of his animals since he must give permission to hunt them in the first place. It is not so clear that title *ratione soli* is based upon the king's prerogative. Blackstone seems to think that it is, basing his views on the notion that royal grant is the source of all land titles. Other authors have criticized Blackstone's exclusive reliance on the prerogative as the source of English wild animal law, preferring to see title *ratione soli* as a form of "natural right" by the land owner. See 2 W. BLACKSTONE, COMMENTARIES *419, at 878–79 & nn. 23–28 (W. Lewis ed. 1898); 1 W. HOLDSWORTH, *supra*, at 101 n. 7 (7th ed. 1956). See also *id.* 101–02; 7 *id.* 490–95 (2d ed. 1937).

The matter was not completely settled in England until after the passage of the Game Laws (various dates from the fourteenth to the eighteenth centuries), a series of criminal statutes which had the effect of transferring much of the king's ancient prerogatives in game to the large landowners. See 1 W. HOLDSWORTH, *supra*, at 107–08. The first unequivocal statement of title *ratione soli* does not come until Blades v. Higgs, 11 H.L. Cas. 621, 11 Eng. Rep. 1474 (1865). For a modern account of the whole story with a strong point of view, see 7 W. HOLDSWORTH, *supra*, at 488–95 (2d ed.1937) and authorities cited therein. *See also* P. MUNSCHE, GENTLEMEN AND POACHERS (1981). The queen's prerogative in wild animals (except swans and royal fish) and all franchises of forest, free chase, park and free warren were abolished in England by the Wild Creatures and Forest Laws Act, 1971, c. 47. [p*35]]

State "Ownership" of Wild Animals and the Constitution. In the United States no king's prerogative exists. We do, however, have game laws, the doctrine of title *ratione soli* and even private franchises. What justification is there is this country for these things? The legislatures of the various states have assumed property rights in the state as justification for making laws

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[1] Although we have encountered the concept of title to wild animals *ratione soli* before, a definition at this point might be helpful. Here is how the RESTATEMENT OF PROPERTY § 450 comment *g*, at 2906 (1944) puts it:

> Subject to such paramount authority as may be asserted by the state, [the owner of land] not only has [the] power to prevent appropriation by others, but an attempt at appropriation by others may be rendered ineffective by his right to claim the benefit of the attempt. Thus, if B, a trespasser, shoots wild game upon land possessed by A, A may claim the game or recover damages for its conversion.

This restates what many courts in fact hold, but the following case may be more consistent with the underlying rationale of the wild animal cases which we have developed above: *B*'s marsh buggies exploring for oil and gas inadvertently trespassed upon *A*'s marsh causing the death of several hundred muskrats. *A*, who was in the business of trapping muskrats, sued to recover the value of those killed. The court held that *A* could not recover for the muskrats killed since they were not his property, but that he was entitled to recover damages for the loss to future harvests. Harrison v. Petroleum Surveys, 80 So. 2d 153 (La. App. 1955).

regarding wild animals. The New York legislature, for example, first mentioned this principle explicitly in the Act of April 15, 1912, ch. 318, 175, 1912 N.Y. LAWS 585. The statute remains essentially the same today: "The state of New York owns all fish, game, wildlife, shellfish, crustacea and protected insects in the state, except those legally acquired and held in private ownership. Any person who kills, takes or possesses such fish, game, wildlife, shellfish, crustacea or protected insects thereby consents that title thereto shall remain in the state for the purpose of regulating and controlling their use and disposition." N.Y. ENVIRONMENTAL CONSERV. LAW § 11–0105 (McKinney 2012).

In Geer v. Connecticut, 161 U.S. 519 (1895), cited in the principal case, the Supreme Court was confronted with a challenge to a Connecticut law which, in effect, forbade taking out of the state game killed in the state. The law, it was argued, was beyond the state's competence to pass since it constituted an interference with interstate commerce. The majority opinion sustains the state's right to regulate on the basis both of the king's prerogative and of the civil law concept that res nullius belonged in common to all the citizens of the state. The Court continued, "Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good." 161 U.S. at 529. *See generally* Sax, *The Public Trust Doctrine in Natural Resource Law*: *Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). Justice Field dissented principally on the ground that the statute interfered with the property rights of individuals; Justice Harlan on the interstate commerce ground. All three opinions are well worth reading as a study in varying judicial philosophies.

Some of the ramifications of the ownership theory can be seen in the following: (1) In a state with a statute like the New York statute quoted above can the owner of a large tract of uncultivated land sue a trespasser for the mussels which he has taken from the bed of a stream which runs through the tract? *See* Gratz v. McKee, 258 F. 335 (8th Cir.1919), *rev'd on rehearing*, 270 F. 713 (1920), *aff'd as to judgment*, 260 U.S. 127 (1922). (2) Suppose that *A* seizes game in violation of the game laws of his state. Does he own the game? Does it make any difference if he is claiming against (a) a game warden found to have taken the game in performance of his duty (Jones v. Metcalf, 96 Vt. 327, 119 A. 430 (1923)); (b) a fellow hunter (Dapson v. Daly, 257 Mass. 195, 153 N.E. 454 (1926) (alternative holding)); (c) a trespasser on *A*'s land (James v. Wood, 82 Me. 173, 19 A. 160 (1889)). If *A* moves the animal or its skin to another state, does he violate 18 U.S.C. § 2314 (1976) which prohibits interstate shipment of goods "stolen, converted or taken by fraud"? See United States v. Plott, 345 F. Supp. 1229 (S.D.N.Y. 1972). Don't make up your mind completely on these cases until you have read the next section of the book. (3) Suppose that *A*, still in violation of the game laws, takes fish from a pond located on private land with the permission of the owner or shoots game on an enclosed "private" preserve. Has he stolen the state's animals? *Compare* Koop v. United States, 296 F.2d 53 (8th Cir.1961), *with* Washburn v. State, 90 Okl.Crim. 306, 213 P.2d 870 (1950) (fishing without a license on a completely landlocked lake). *See also* Annot., 15 A.L.R.2d [p*36] 754 (1951). (4) Suppose the State of New York forbids the sale of alligator shoes because the alligator is an endangered species. Alligators are not native to New York. Is the statute constitutional? *See* A.E. Nettleton Co. v. Diamond, 27 N.Y.2d 182, 315 N.Y.S.2d 625, 264 N.E.2d 118 (1970). *Cf.* Andrus v. Allard, 444 U.S. 51 (1979) (upholding the ban on sale of eagle feathers in the Federal Eagle Protection Act). (5) Suppose substantial amounts of plaintiff's crops are harvested by geese drawn to a neighboring state wildlife refuge. Can he recover from the state on the theory that they own the animals? *See* Sickman v. United States, 184 F.2d 616 (7th Cir.1950), *cert. denied*, 341 U.S. 939 (1951). On some other theory? *Cf.* Andrews v. Andrews, 242 N.C. 382, 88 S.E.2d 88 (1955).

As indicated in the principal case, Supreme Court cases after *Geer* expressed some doubt that state ownership of game justifies state game laws and preferred to justify such laws on the basis of the "police power," the general power of the state to regulate in the interests of the health, safety and welfare of its people. In Hughes v. Oklahoma, 441 U.S. 322 (1979), *noted in* 60 Or. L. Rev. 413 (1981), the Court expressly overruled *Geer* and held that Oklahoma could not consistent with the commerce clause forbid the export out of the state of minnows raised in the wild in state waters. While the Court noted that "[t]he overruling of *Geer* does not leave the States powerless to protect and conserve wild animal life within their borders" (*id*. at 338), it did not deal with the question of the source of that power nor with the implications of the overruling of *Geer* for the public trust doctrine so powerfully put in that case. The Court also left intact its holding in Baldwin v. Montana Fish & Game Com'n, 436 U.S. 371 (1978), which had rejected equal protection and privileges and immunities clause challenges to Montana's hunting license fees which blatantly discriminate between in-state and out-of-state residents. Could *Hughes* be used to argue for the unconstitutionality of PA. STAT. tit. 30, § 2506, *supra*, p. S34? Arguing the case for Pennsylvania how would you reply?

Game Law Administration. If the constitutional and theoretical bases of game laws remain to be worked out, so too, on a more mundane level, does their administration. Consider New York as a paradigm:

The basic colonial statute on the topic was the "Act for the more Effectual preservation of Deer and other Game and ye Destruction of Wolves Wild Catts and other Vermin" of Sept. 18, 1708, ch. 172, reprinted in 1 THE COLONIAL LAW OF NEW YORK 618–20 (1894). It established seasons for the hunting of deer and certain game birds and authorized the payment of bounties for the taking of wolves, wildcats and "other vermin," including foxes. (Why did Justice Livingston not cite this statute in support of his opinion in *Pierson v. Post*?) The statute only applied to counties on Long Island. Throughout the colonial period statutes were passed regulating the taking of game, particularly deer, and the 1708 act was amended as late as 1772. See ch. 1558, in 5 *id.* 399–400. But the colonial laws were scattered, and their enforcement sporadic. See T. LUND, AMERICAN WILDLIFE LAW 29–31 (1980); see also *id.* 24–34. It seems fair to say that until the middle of the 19th century New York left matters pretty much to individual initiative and the common law.

In 1844 the New York legislature reversed *Pierson v. Post* so far as deer hunting in Suffolk and Queens counties was concerned and vested property rights in any person who started the animal "with dogs or otherwise" and was in fresh pursuit of it. The statute also established a hunting season and made other hunting regulations. Act of April 1, 1844, ch. 109, 1844 N.Y. Laws 94. [p*37] Five years later the New York legislature repealed this law and all other game laws in favor of a statute which gave authority to county boards of supervisors to make laws for the protection of game. Act of April 3, 1849, ch. 194, § 4, para. 13, 1849 N.Y. Laws 295. The pursuit law was never re-enacted, but in 1859 the legislature again passed a statute for the protection of wild animals which contained provisions creating a hunting season, regulating the sale of deer skin and venison, and regulating fishing for certain species of fish. Although it was not a very comprehensive law, it nevertheless indicated that the legislature was again interested in taking upon itself the task of regulating wildlife. Act of April 19, 1859, ch. 511, 1859 N.Y. Laws 1185. Then in the Act of June 7, 1895, ch. 974, § 302, 1895 N.Y. Laws 935, the power of the local bodies to regulate was completely repealed.

The precursor to the modern Fish and Wildlife Law was passed in 1900. By this time the game laws were most comprehensive and had become so complex in scope and application that a Forest, Fish, and Game Commission was created. The Commission had the power to control fish stocking and to enforce fish, game, and forest laws. The Conservation Department was created by the Act of July 12, 1911, ch. 647, 1911 N.Y. Laws 1496, and included, among others, a Division

of Fish and Game. This division was given authority to make rules and regulations giving protection beyond the statute upon petition. Act of March 5, 1928, ch. 242, 1928 N.Y. Laws 485. All the divisions of the Department were given power to make rules and regulations to secure enforcement of the provisions of the Conservation laws. Today although the Conservation Department has been abolished and its duties transferred to the Department of Environmental Conservation, that department continues to exercise administrative power and other powers such as granting additional protection to certain animals, issuing and revoking hunting and fishing licenses, establishing restricted areas where hunting and fishing is prohibited, etc. N.Y. ENVIRONMENTAL CONSERV. LAW §§ 11–0305, 11–0311, 11–0321 (McKinney 2012).

The New York development from common law to statutory law to administrative law is typical of many areas of American law. For an excellent discussion of this same process in the context of industrial accidents with a full treatment of its legal process ramifications, see C. AUERBACH, L. GARRISON, W. HURST & S. MERMIN, THE LEGAL PROCESS (1961).

There has been some tendency in recent years for the locus of regulation of wildlife to shift from the states to the federal government. While the shift is not nearly so complete as it is in many other areas of law, federal law and federal administration now play a significant role when the wildlife in question is on federal land (the federal government still owns vast tracts of land, particularly in the West), or outside the United States, or when it is affected by a federal project, such as building a dam. Some of this legislation is preservationist in nature, e.g., Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1543 (1988), which was at issue in the famous "snail darter case," TVA v. Hill, 437 U.S. 153 (1978), or the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1407 (1988), which was an outgrowth of the "Save the Whale" campaign. Some of this legislation is more developmental in nature, conservation for the purpose of ensuring commercial exploitation, *e.g*., Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801–1882 (1988). The conflict in policy remains to be worked out. *See* Child & Haley, *The Marine Mammal Protection Act and the Fishery Conservation and Management Act: The Need for Balance*, 56 WASH. L. REV. 397 (1981). *See also* Tilleman, *It's a Crime: Public Interest Laws (Fish and Game Statutes) Ignore Mens Rea Offenses—Towards a New Classification* [p*38] *Scheme*, 16 AM. J. CRIM. LAW 279 (1989); Amestoy, *Wildlife Habitat Protection Through State-Wide Land Use Regulation*, 14 HARV. ENV. L. REV. 45 (1990); Coggins & Ward, *The Law of Wildlife Management on Federal Public Lands*, 60 OR. L. REV. 59 (1981).

The increasing interest in problems of wildlife conservation has produced a considerable literature. Bibliographies may be found in Coggins & Smith, *The Emerging Law of Wildlife*: *A Narrative Bibliography*, 6 Environmental L. 583 (1975) and in M. BEAN, *supra*, p. S35, at 470–78. More recent still are [U.S.] COUNCIL ON ENVIRONMENTAL QUALITY, WILDLIFE AND AMERICA (H. Brokaw ed. 1978) (an excellent collection of essays) and T. LUND, *supra*.

C. CLASSICAL THEORIES OF PROPERTY

1.The "Occupation Theory" of Property.

We have already seen one statement of the "occupation theory" of property in the extracts from Pufendorf and a criticism of it by Barbeyrac who relied on the "labor theory" of John Locke, *supra*, p. S18. The following is perhaps the most famous statement of the occupation theory by an English writer, though it shows some influence from the labor theory. It is followed by an equally famous criticism of it by Sir Henry Maine, one of the first "social scientists" who applied himself to law. [p*25]

2 W. BLACKSTONE, COMMENTARIES

*2–5, *14–15 (W. Lewis ed. 1898)[1]

In the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man "dominion over all the earth, and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been stated by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required. . . .

. . . Not that this communion of goods seems ever to have been applicable, even in the earliest stages, to aught but the substance of the thing; nor could it be extended to the use of it. For, by the law of nature and reason, he, who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer: or, to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted. Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force: but the instant that he quitted the use or occupation of it, another might seize it, without injustice. . . .

But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominions; and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world be continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious, and agreeable; as, habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession; if, as soon as he walked out of his tent, or pulled off his garments, the next stranger who came by would have a right to inhabit the one, and to wear the other. In the case of habitations in particular, it was natural to observe, that even the brute creation, to whom every thing else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds of the air had nests, and the beasts of the field had caverns, the invasion of which they esteemed a very flagrant injustice, and would sacrifice their lives to preserve them. Hence a property was soon established in every man's house and home-stall: which seem to have been originally mere temporary huts or movable cabins, suited to the design of Providence for more speedily peopling the earth, and suited to the wandering life of their owners, before any [p*26] extensive property in the soil or ground was established. And there can be no doubt, but that movables of every kind became sooner appropriated than the permanent substantial soil: partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could be fit for use, till improved and ameliorated by the bodily labor of the occupant, which bodily labor, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein. . . .

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[1] First edition 1765–1769.

But, after all, there are some few things, which notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water; which a man may occupy by means of his windows, his gardens, his mills, and other conveniences: such also are the generality of those animals which are said to be *ferœ naturœ*, or of a wild and untamable disposition; which any man may seize upon and keep for his own use and pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards.

Again: there are other things in which a permanent property may subsist, not only as to the temporary use, but also the solid substance; and which yet would be frequently found without a proprietor, had not the wisdom of the law provided a remedy to obviate this inconvenience. Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands; such also are wrecks, estrays, and that species of wild animals which the arbitrary constitutions of positive law have distinguished from the rest by the well-known appellation of game. With regard to these and some others, as disturbances and quarrels would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of dissension, by vesting the things themselves in the sovereign of the state: or else in his representatives appointed and authorized by him, being usually the lords of manors. And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly maxim, of assigning to every thing capable of ownership a legal and determinate owner.

H. MAINE, ANCIENT LAW

237–39, 242–54, 275–79, 280–83 (5th ed. 1888)[1]

The Roman Institutional Treatises, after giving their definition of the various forms and modifications of ownership, proceed to discuss the Natural Modes of Acquiring Property. Those who are unfamiliar with the history of jurisprudence are not likely to look upon these "natural modes" of acquisition as possessing, at first sight, either much speculative or much practical interest. The wild animal which is snared or killed by the hunter, the soil which is added to our field by the imperceptible deposits of a river, the tree [p*27] which strikes its roots into our ground, are each said by the Roman lawyers to be acquired by us naturally. . . .

It will be necessary for us to attend to one only among these "natural modes of acquisition," Occupatio or Occupancy. Occupancy is the advisedly taking possession of that which at the moment is the property of no man, with the view (adds the technical definition) of acquiring property in it for yourself. The objects which the Roman lawyers called *res nullius*—things which have not or have never had an owner—can only be ascertained by enumerating them. Among things which never had an owner are wild animals, fishes, wild fowl, jewels disinterred for the first time, and land newly discovered or never before cultivated. Among things which have not an owner are moveables which have been abandoned, lands which have been deserted, and (an anomalous but most formidable item) the property of an enemy. In all these objects the full rights of dominion were acquired by the Occupant, who first took possession of them with the intention of keeping them as his own—an intention which, in certain cases, had to be manifested by specific acts. . . . The Roman principle of Occupancy, and the rules into which the jurisconsults

[1] First edition 1861.

expanded it, are the source of all modern International Law on the Subject of Capture in War and of the acquisition of sovereign rights in newly discovered countries. They have also supplied a theory of the Origin of Property, which is at once the popular theory, and the theory which, in one form or another, is acquiesced in by the great majority of speculative jurists. . . .

To all who pursue the inquiries which are the subject of this volume, Occupancy is preeminently interesting on the score of the service it has been made to perform for speculative jurisprudence, in furnishing a supposed explanation of the origin of private property. It was once universally believed that the proceeding implied in Occupancy was identical with the process by which the earth and its fruits, which were at first in common, became the allowed property of individuals. The course of thought which led to this assumption is not difficult to understand, if we seize the shade of difference which separates the ancient from the modern conception of Natural Law. The Roman lawyers had laid down that Occupancy was one of the Natural modes of acquiring property, and they undoubtedly believed that, were mankind living under the institutions of Nature, Occupancy would be one of their practices. How far they persuaded themselves that such a condition of the race had ever existed, is a point, as I have already stated, which their language leaves in much uncertainty; but they certainly do seem to have made the conjecture, which has at all times possessed much plausibility, that the institution of property was not so old as the existence of mankind. Modern jurisprudence, accepting all their dogmas without reservation, went far beyond them in the eager curiosity with which it dwelt on the supposed state of Nature. Since then it had received the position that the earth and its fruits were once *res nullius*, and since its peculiar view of Nature led it to assume without hesitation that the human race had actually practised the Occupancy of *res nullius* long before the organisation of civil societies, the inference immediately suggested itself that Occupancy was the process by which the "no man's goods" of the primitive world became the private property of individuals in the world of history. It would be wearisome to enumerate the jurists who have subscribed to this theory in one shape or another, and it is the less necessary to attempt it because Blackstone, who is always a faithful index of the average opinions of his day, has summed them up in his 2d book and 1st chapter.

[p*28][Maine then quotes extensively from the Blackstone excerpt reproduced *supra*, p. S40.] . . .

Some ambiguities of expression in this passage lead to the suspicion that Blackstone did not quite understand the meaning of the proposition which he found in his authorities, that property in the earth's surface was first acquired, under the law of Nature, by the Occupant; but the limitation which designedly or through misapprehension he has imposed on the theory brings it into a form which it has not infrequently assumed. Many writers more famous than Blackstone for precision of language have laid down that, in the beginning of things, Occupancy first gave a right against the world to an exclusive but temporary enjoyment, and that afterwards this right, while it remained exclusive, became perpetual. Their object in so stating their theory was to reconcile the doctrine that in the state of Nature *res nullius* became property through Occupancy, with the inference which they drew from the Scriptural history that the Patriarchs did not at first permanently appropriate the soil which had been grazed over by their flocks and herds.

The only criticism which could be directly applied to the theory of Blackstone would consist in inquiring whether the circumstances which make up his picture of a primitive society are more or less probable than other incidents which could be imagined with equal readiness. Pursuing this method of examination, we might fairly ask whether the man who had occupied (Blackstone evidently uses this word with its ordinary English meaning) a particular spot of ground for rest or shade would be permitted to retain it without disturbance. The chances surely are that his right to possession would be exactly coextensive with his power to keep it, and that he would be constantly liable to disturbance by the first comer who coveted the spot and thought himself

strong enough to drive away the possessor. But the truth is that all such cavil at these positions is perfectly idle from the very baselessness of the positions themselves. What mankind did in the primitive state may not be a hopeless subject of inquiry, but of their motives for doing it it is impossible to know anything. These sketches of the plight of human beings in the first ages of the world are effected by first supposing mankind to be divested of a great part of the circumstances by which they are now surrounded, and by then assuming that, in the condition thus imagined, they would preserve the same sentiments and prejudices by which they are now actuated,—although, in fact, these sentiments may have been created and engendered by those very circumstances of which, by the hypothesis, they are to be stripped. . . .

Even were there no other objection to the descriptions of mankind in their natural state which we have been discussing, there is one particular in which they are fatally at variance with the authentic evidence possessed by us. It will be observed, that the acts and motives which these theories suppose are the acts and motives of Individuals. It is each Individual who for himself subscribes the Social Compact. It is some shifting sandbank in which the grains are Individual men, that according to the theory of Hobbes is hardened into the social rock by the wholesome discipline of force. It is an Individual who, in the picture drawn by Blackstone, "is in the occupation of a determined spot of ground for rest, for shade, or the like." The vice is one which necessarily afflicts all the theories descended from the Natural Law of the Romans, which differed principally from their Civil Law in the account which it took of Individuals, and which has rendered precisely its greatest service to civilisation in enfranchising the individual from the authority of archaic society. But Ancient Law, it must again be repeated, knows next to nothing of Individuals. It is concerned not with Individuals, [p*29] but with Families, not with single human beings, but groups. Even when the law of the State has succeeded in permeating the small circles of kindred into which it had originally no means of penetrating, the view it takes of Individuals is curiously different from that taken by jurisprudence in its maturest stage. The life of each citizen is not regarded as limited by birth and death; it is but a continuation of the existence of his forefathers, and it will be prolonged in the existence of his descendants.

The Roman distinction between the Law of Persons and the Law of Things, which though extremely convenient is entirely artificial, has evidently done much to divert inquiry on the subject before us from the true direction. The lessons learned in discussing the Jus Personarum have been forgotten where the Jus Rerum is reached, and Property, Contract, and Delict, have been considered as if no hints concerning their original nature were to be gained from the facts ascertained respecting the original condition of Persons. The futility of this method would be manifest if a system of pure archaic law could be brought before us, and if the experiment could be tried of applying to it the Roman classifications. It would soon be seen that the separation of the Law of Persons from that of Things has no meaning in the infancy of law, that the rules belonging to the two departments are inextricably mingled together, and that the distinctions of the later jurists are appropriate only to the later jurisprudence. From what has been said in the earlier portions of this treatise, it will be gathered that there is a strong a priori improbability of our obtaining any clue to the early history of property, if we confine our notice to the proprietary rights of individuals. It is more than likely that joint-ownership, and not separate ownership, is the really archaic institution, and that the forms of property which will afford us instruction will be those which are associated with the rights of families and of groups of kindred. . . .

The mature Roman law, and modern jurisprudence following in its wake, look upon co-ownership as an exceptional and momentary condition of the rights of property. This view is clearly indicated in the maxim which obtains universally in Western Europe, *Nemo in communione potest invitus detineri* ("No one can be kept in co-proprietorship against his will"). But in India this order of ideas is reversed, and it may be said that separate proprietorship is always on its way to become proprietorship in common. The process has been adverted to already. As soon as a son is born, he acquires a vested interest in his father's substance, and on

attaining years of discretion he is even, in certain contingencies, permitted by the letter of the law to call for a partition of the family estate. As a fact, however, a division rarely takes place even at the death of the father, and the property constantly remains undivided for several generations, though every member of every generation has a legal right to an undivided share in it. The domain thus held in common is sometimes administered by an elected manager, but more generally, and in some provinces always, it is managed by the eldest agnate, by the eldest representative of the eldest line of the stock. Such an assemblage of joint proprietors, a body of kindred holding a domain in common, is the simplest form of an Indian Village Community, but the Community is more than a brotherhood of relatives and more than an association of partners. It is an organized society, and besides providing for the management of the common fund, it seldom fails to provide, by a complete staff of functionaries, for internal government, for police, for the administration of justice, and for the apportionment of taxes and public duties. . . . [p*30]

Note and Questions

Try to get some feel for the nature of Blackstone's argument. To what extent is it simply a descriptive statement of what happened at some remote time? To what extent is it a "justification" of private property? How does Blackstone move from the descriptive part of his theory to the normative, from the "is" to the "ought"?

Today, few would defend the occupation theory, at least in the form in which we find it in Blackstone. For one thing it turns out that as a matter both of history and of anthropology Maine's views on the origin of property are probably a lot closer to the truth than Blackstone's. *See, e.g,* M. GLUCKMAN, THE IDEAS IN BAROTSE JURISPRUDENCE 75–169 (1965). Secondly, in complex societies like our own few resources are acquired merely by finding or seizing. Thus, however true the theory may be as an historical matter, it can hardly account for much today. Thirdly, the occupation theory cannot begin to explain the complex of powers of transfer which have grown up around property. *See* M. COHEN, LAW AND THE SOCIAL ORDER 49–51 (1933).

Nonetheless it would be mistaken to suppose that the occupation theory is totally without use. It forms a part of the moral basis for the law's willingness to protect possession, and around it swirl some of the considerable moral dilemmas which pervade the field of international law, as we will see when we examine *Johnson v. M'Intosh* and *United States v. Percheman*, *infra*, at S48.

Consider this contemporary exposition of the occupation theory:

> Possession as the basis of property ownership . . . seems to amount to something like yelling loudly enough to all who may be interested. The first to say, "This is mine," in a way that the public understands, gets the prize, and the law will help him keep it against someone else who says, "No, it is mine." But if the original communicator dallies too long and allows the public to believe the interloper [—adverse possession—], he will find that the interloper has stepped into his shoes and become the owner. . . .
>
> Why, then, is it so important that property owners make and keep their communications clear? Economists have an answer: clear titles facilitate trade and minimize resource-wasting conflict. If I am careless about who comes on to a corner of my property, I invite others to make mistakes and waste their improvements to what I have allowed them to think is theirs.

Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 81 (1985).

The entire article is well worth reading. The opinions of both majority and dissent in *Pierson v. Post*, *supra*, p. S5, figure prominently in it. Professor Rose suggests that what may have divided the court in *Pierson* is the question of relevant audience—with the "dissenting judge [thinking] fox hunters were the only relevant audience for a claim to the fox." *Id.* at 82.

When possession or occupancy is viewed as communication there are not only issues of audience, but timing, clashing cultures, and more:

> It is not always easy to establish a symbolic structure in which the text of first possession can be "published" at such a time as to be useful to anyone. Once again, *Pierson v. Post* illustrates the problem that occurs when a clear sign (killing the fox) comes only relatively late in the game, after the relevant parties may have already expended overlapping efforts and embroiled themselves in a dispute. . . . [Dealing with] the whaling industry in the nineteenth century . . . courts expended a considerable amount of mental energy in finding signs of "possession" that were comprehensible to whalers from their own customs and that at the same time came early enough in the chase to allow the parties to avoid wasted efforts and the ensuing mutual recriminations.

Id. at 83.

2. The "Labo(u)r Theory" of Property

The justification of property that follows the occupation theory both historically and logically is the theory that everyone is entitled to the full product of his labor. The principal exponent of this theory (though not the first, see D. MERINO, NATURAL JUSTICE AND PRIVATE PROPERTY 27–31 (1922)) was John Locke. The excerpt below from Locke's *Second Treatise of Government* explains the theory well and demonstrates its basis in natural law. [p*121]

J. LOCKE, TWO TREATISES ON CIVIL GOVERNMENT
Book II, 25, 27–28, 30–41, 45–51 (G. Routledge 2d ed. 1887)[1]

I shall endeavour to show how men might come to have a property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners. . . .

27. Though the earth and all inferior creatures be common to all men, yet every man has a "property" in his own "person." This nobody has any right to but himself. The "labour" of his body and the "work" of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this "labour" being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.

28. He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself. Nobody can deny but the nourishment is his. I ask, then, when did they begin to be his? when he digested? or when he ate? or when he boiled? or when he brought them home? or when he picked them up? And it is plain, if the first gathering made them not his, nothing else could. That labour put a distinction between them and common. That added something to them more than Nature, the common mother of all, had done, and so they became his private right. And will any one say he had no right to those acorns or apples he thus appropriated because he had not the consent of all mankind to make them his? Was it a robbery thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him. We see in commons, which remain so by compact, that it is the taking any part of what is common, and removing it out of the state Nature leaves it in, which begins the property, without which the common is of no use. And the taking of this or that part does not depend on the express consent of all the commoners. Thus, the grass my horse has bit, the turfs my servant has cut, and

[1] First edition 1690. For a good modern edition of the second treatise, see THE SECOND TREATISE OF GOVERNMENT (J. Gough ed. 1966).

the ore I have digged in any place, where I have a right to them in common with others, become my property without the assignation or consent of anybody. The labour that was mine, removing them out of that common state they were in, hath fixed my property in them. . . .

30. Thus this law of reason makes the deer that Indian's who hath killed it; it is allowed to be his goods who hath bestowed his labour upon it, though, before, it was the common right of every one. . . . And even amongst us, the hare that any one is hunting is thought his who pursues her during the chase. For being a beast that is still looked upon as common, and no man's private possession, whoever has employed so much labour about any of that kind as to find and pursue her has thereby removed her from the state of Nature wherein she was common, and hath begun a property.

31. It will, perhaps, be objected to this, that if gathering the acorns or other fruits of the earth, &c., makes a right to them, then any one may [p*122] engross as much as he will. To which I answer, Not so. The same law of Nature that does by this means give us property, does also bound that property too. "God has given us all things richly" (1 Tim. vi. 12). Is the voice of reason confirmed by inspiration? But how far has He given it us "to enjoy?" As much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in. Whatever is beyond this is more than his share, and belongs to others. Nothing was made by God for man to spoil or destroy. And thus considering the plenty of natural provisions there was a long time in the world, and the few spenders, and to how small a part of that provision the industry of one man could extend itself and engross it to the prejudice of others, especially keeping within the bounds set by reason of what might serve for his use, there could be then little room for quarrels or contentions about property so established.

32. But the chief matter of property being now not the fruits of the earth and the beasts that subsist on it, but the earth itself, as that which takes in and carries with it all the rest; I think it is plain that property in that too is acquired as the former. As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common. . . .

33. Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough and as good left, and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his enclosure for himself. . . .

45. Thus labour, in the beginning, gave a right of property, wherever any one was pleased to employ it, upon what was common, which remained a long while, the far greater part, and is yet more than mankind makes use of. Men at first, for the most part, contented themselves with what unassisted Nature offered to their necessities; and though afterwards, in some parts of the world, where the increase of people and stock, with the use of money, had made land scarce, and so of some value, the several communities settled the bounds of their distinct territories, and, by laws, within themselves, regulated the properties of the private men of their society, and so, by compact and agreement, settled the property which labour and industry began. . . .

46. The greatest part of things really useful to the life of man, and such as the necessity of subsisting made the first commoners of the world look after—as it doth the Americans now—are generally things of short duration, such as—if they are not consumed by use—will decay and perish of themselves. Gold, silver, and diamonds are things that fancy or agreement hath put the value on, more than real use and the necessary support of life. Now of those good things which Nature hath provided in common, every one hath a right (as hath been said) to as much as he could use, and had a property in all he could effect with his labour; all that his industry could extend to, to alter from the state Nature had put it in, was his. He that gathered a hundred bushels of acorns or apples had thereby a property in them; they were his goods as soon as gathered. He

was only to look that he used them before they spoiled, else he took more than his share, and robbed others. And, indeed, it was a foolish thing, as well as dishonest, to hoard up more than he could make use of. If he gave away a part to anybody else, so that it perished not uselessly in his possession, these he also made use of. And if he also bartered away plums that would have rotted in a week, for nuts that would last good for his eating a whole year, he did no injury; he wasted not the common stock; destroyed no part of the portion of goods that belonged to others, so long as nothing perished uselessly in his hands. [p*123] Again, if he would give his nuts for a piece of metal, pleased with its colour, or exchange his sheep for shells, or wool for a sparkling pebble or a diamond, and keep those by him all his life, he invaded not the right of others; he might heap up as much of these durable things as he pleased; the exceeding of the bounds of his just property not lying in the largeness of his possession, but the perishing of anything uselessly in it.

47. And thus came in the use of money; some lasting thing that men might keep without spoiling, and that, by mutual consent, men would take in exchange for the truly useful but perishable supports of life.

48. And as different degrees of industry were apt to give men possessions in different proportions, so this invention of money gave them the opportunity to continue and enlarge them. . . .

50. But since gold and silver, being little useful to the life of man, in proportion to food, raiment, and carriage, has its value only from the consent of men—whereof labour yet makes in great part the measure—it is plain that the consent of men have agreed to a disproportionate and unequal possession of the earth—I mean out of the bounds of society and compact; for in governments the laws regulate it; they having, by consent, found out and agreed in a way how a man may, rightfully and without injury, possess more than he himself can make use of by receiving gold and silver, which may continue long in a man's possession without decaying for the overplus, and agreeing those metals should have a value.

Note

In the seventeenth century a period of struggle between a conception of society based on the naturalness of absolute monarchy and the nascent idea of a capitalistic society marked by individual rights, Locke's theory supported the middle class revolutionaries in their quest for private property as a source of production and power. It became the classical liberal theory of property. It is not surprising that the theory found great support among the rugged individualists of frontier America.

But the labor theory was not always a support for "popular" thought. It is not difficult to see how the theory could be used to justify a capitalistic system in which the majority of the people did not have access to property. The bourgeois who have the capital to develop and work property are owners, and the poor are only wage laborers and servants of the owners. Furthermore, the theory could be used to support an argument that the owner has no other obligations than to work his property and, therefore, no social obligations can be imposed by the government. *See* C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM 214–15 (1962). As you might imagine, this idea created many problems for American reformers in the early twentieth century. *See, e.g.*, Hamilton, *Property—According to Locke*, 41 YALE L.J. 864 (1932); Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938).

Today, many would quarrel with Locke's theory. First, it is at least arguable that Locke himself would not apply the theory in a modern industrial society, because he was arguing in terms of man in a state of nature, the savage individualist, rather than the wage laborer. *But see* C. MACPHERSON, *supra*, for the proposition that Locke was indeed speaking of the wage laborer. Second, to the extent that Locke's theory depends on the broader notion of social compact, it presupposes a unity of self-interest among individual workers in society (so that a stable

sovereign body may be established) and a self-perception of equality among all those in society (so that each accepts his societal obligations). Only if [p*124] these conditions are met can the labor theory promise a stable well-governed society. Many would argue that these conditions are not met today. *See* C. MACPHERSON, *supra*, at 271–77. Furthermore, no one today can claim full responsibility for the production of economic goods. What part of the good, then, is to be labeled as the property of any one individual? Likewise, no one can claim that his property, his estate and fortune, have been attained solely through his own labor. Society has aided every individual in his labor, and society, so the argument runs, may properly demand certain tributes from the individual. *See* M. COHEN, THE LAW AND SOCIAL ORDER 51 (1933).

D. OCCUPANCY AND SOVEREIGNTY

JOHNSON v. M'INTOSH

Supreme Court of the United States
21 U.S. (8 Wheat.) 543 (1823)

ERROR to the District Court of Illinois. This was an action of ejectment for lands in the State and District of Illinois, claimed by the plaintiffs under a purchase and conveyance from the Piankeshaw Indians, and by the defendant, under a grant from the United States. It came up on a case stated, upon which there was a judgment below for the defendant. The case stated set out the following facts: . . .

[The statement of the case outlines the boundaries in the royal charter establishing the Virginia Company in 1609, which included the land north of the Ohio River forming today the southern parts of Illinois and Indiana. In 1773 the plaintiffs' predecessors in title purchased a huge tract of land in southern Illinois from the Illinois Indians for the then-enormous sum of $24,000; in 1775 another group of plaintiffs' predecessors in title purchased a similarly large tract of land in southern Indiana from the Piankeshaw Indians for $31,000. Both deeds granted the land to the plaintiffs' predecessors in title "or to George the Third, then King of Great Britain and Ireland, his heirs and successors, for the use . . . of the grantees . . . by whichever of those tenures they might most legally hold." After the Revolution, Virginia ceded its claim to lands beyond the Appalachians to the United States, and in 1818 the United States conveyed by patent title to William M'Intosh to the 11,560 acres specifically at issue in this case. Neither the plaintiffs nor any of their predecessors in title ever obtained possession of the land,] but were prevented by the war of the American revolution, which soon after commenced, and by the disputes and troubles which preceded it, from obtaining such possession. . . . [S]ince the termination of the war, and before it, they have repeatedly, and at various times, from the year 1781, till the year 1816, petitioned the Congress of the United States to acknowledge and confirm their title to those lands, under the purchases and deeds in question, but without success.

Judgment being given for the defendant on the case stated, the plaintiffs brought this writ of error.

The cause was argued by Mr. *Harper* and Mr. [*Daniel*] *Webster* for the plaintiffs, and by Mr. *Winder* and Mr. *Murray* for the defendants. . . .

On the part of the plaintiffs, it was contended, 1. That upon the facts stated in the case, the Piankeshaw Indians were the owners of the lands in dispute, at the time of executing the deed of October 10th, 1775, and had power to sell. But as the United States had purchased the same lands of the same Indians, both parties claim from the same source. It would seem, therefore, to be unnecessary, and merely speculative, to discuss the question respecting the sort of title or ownership, which may be thought to belong to savage tribes, in the lands on which they live. Probably, however, their title by occupancy is to be respected, as much as that of an individual, obtained by the same right, in a civilized state. The circumstances, that the members of the