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### Re-Integrating Spaces: The Possibilities of Common Law Property

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# SAVANNAH LAW REVIEW

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## [RE]INTEGRATING SPACES: THE POSSIBILITIES OF COMMON LAW PROPERTY

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*Alfred L. Brophy\**

When the Savannah Law School renovated the Old Candler Hospital in Savannah, Georgia, as their new building, they recreated a place of extraordinary beauty and history. This choice links the law school to a nearly two-hundred-year tradition at the center of this most beautiful City. I want to use this building's rededication to talk about the changes in property law since 1819, when this building was first constructed, and also to use this as a chance to assess some of the possibilities of the common law of property for the reintegration of spaces.

### I. Building Dedications in Pre-Civil War America

The dedications of buildings—and public spaces—are perfect moments to think about our values and how those buildings can *inspire* us.<sup>1</sup> The Candler

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\* Judge John J. Parker Distinguished Professor, University of North Carolina—Chapel Hill. I would like to thank Stephen Clowney, Christina Forth, Stacey Gahagan, Leslie Harris, Kali Murray, Marc Poirier, Gregg Polsky, Dana Remus, and Marc Roark, as well as Carol Guilliams and Linda Raulston at the Oklahoma State Archives, for assistance on researching the litigation on racially restrictive covenants there, and especially the editors of the *Savannah Law Review* for their kind invitation to keynote their colloquium, *[Re]Integrating Spaces*, which was inspired by the re-dedication of their building.

<sup>1</sup> See, e.g., Oliver P. Baldwin, Esq., Address, *in* Address Delivered at the Dedication of the Holly-Wood Cemetery on Monday, the 25th of June, 1849 (Richmond, Macfarlane & Fergusson 1849); R.M.T. Hunter, U.S. Senator, Virginia, Address at the Inauguration of the Equestrian Statue of Washington (Feb. 22, 1858), *in* MR. HUNTER'S ORATION: OPENING ODE AND ORATION 7, 7-24 (1858); Gov. Henry M. Wise, Address at the Virginia Military Institute (July 3, 1856), *in* REPORT OF THE BOARD OF VISITORS OF THE VIRGINIA MILITARY INSTITUTE, July 1856, at 63, 63-80 (dedicating a statue of George Washington on the campus of Virginia Military Institute).

Hospital, which before that was known as the Savannah Poor House and Hospital,<sup>2</sup> was a place of repair and refuge. Now it is being repurposed to another form of reconstruction, the promotion of legal education. When Henry Jackson dedicated Laurel Grove Cemetery in 1852 in Savannah, he spoke of Savannah's commercial growth.<sup>3</sup> Those were optimistic and exciting times, and they called for another sign of the advance of civilization, a place to honor the dead. The opening of a law school is another part of the City's and State's progress and a key part of the State's educational mission.

To take another example of the reflection that the dedication of a building evoked around the time of the opening of Candler Hospital, we could turn to the 1828 speech laying the cornerstone of Randolph Hall at the College of Charleston.<sup>4</sup> Landscape artist Charles Fraser spoke of the role of education in the promoting the Constitutional Republic. There was, Fraser said, a "great invisible agent in the uniform, peaceful, and harmonious operations of society."<sup>5</sup> That agent was the Constitution, which exists "in the hearts and the minds of its citizens."<sup>6</sup> And the Constitution was not just a dry document; "its energies are derived from public opinion [and] . . . a rational respect for the laws and institutions of our country imparts to them that vital principle which pervades and regulates every part of the great republican system."<sup>7</sup> These sort of public constitutional values that silently influence and govern people were often spoken about in the early Republic as a central and vital part of our country.<sup>8</sup> For law was not seen as something that could adequately function unless it had the support of the people. Education played a critical role in the constitutional

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<sup>2</sup> *History of the Largest Health System in Southeast Georgia*, ST. JOSEPH'S / CANDLER, <http://www.sjchs.org/about-us/st-josephs-candler-history> (last visited Mar. 18, 2015); WALTER J. FRASER, SAVANNAH IN THE OLD SOUTH 280-81 (2005); JACQUELINE JONES, SAVING SAVANNAH: THE CITY AND THE CIVIL WAR (2009).

<sup>3</sup> Hon. Henry R. Jackson, Address at the Laurel Grove Cemetery Dedication (Nov. 10, 1852), in LAUREL GROVE CEMETERY! AN ACCOUNT OF ITS DEDICATION 12, 12-20 (1853) (emphasizing the importance of a final resting place for the physical body so the spiritual body may find peace).

<sup>4</sup> Charles Fraser, Address at the Laying of the Corner Stone of A New College Edifice (Jan. 12, 1828), in AN ADDRESS DELIVERED BEFORE THE CITIZENS OF CHARLESTON, AND THE GRAND LODGE OF SOUTH CAROLINA 1, 5-24 (Charleston, J.S. Burges, 1828).

<sup>5</sup> *Id.* at 12.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See, e.g., JOHANN N. NEEM, CREATING A NATION OF JOINERS: DEMOCRACY AND CIVIL SOCIETY IN EARLY NATIONAL MASSACHUSETTS 81-84 (2008); Jason Mazzone, *The Creation of a Constitutional Culture*, 40 TULSA L.J. 671, 685 (2005); see generally ROBERT FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE (1984) (discussing an often overlooked fact that lawyers, rather than clergy, were the dominant intellectual force shaping both governmental and creative literature in the early Republic). But see Stephen Clowney, *Rule of Flesh and Bone: The Dark Side of Informal Property Rights*, 2015 ILL. L. REV. 59, 60-65 (suggesting that private ordering is not so peaceful).

system.<sup>9</sup> Lawyers could guide and shape those values, but not provide them when they were completely lacking. That was why there could not be adequate reform of society through law in the minds of many early Americans. It was part of the separation of law from morals that appeared in so many cases in pre-Civil War America.<sup>10</sup>

In addition to ideas about the role of education in public constitutionalism, we also hear about the value of property and order in dedication addresses. When Reverend James Henley Thornwell delivered the dedication for a church building built by Second Presbyterian Church of Charleston for African American parishioners, he emphasized the role of religion in conditioning people to accept the hierarchy that he saw inherent in human society.<sup>11</sup> It was, in essence, an argument that the distribution of property and freedom should not be challenged.<sup>12</sup> Thus, dedications are frequently and at heart about celebrating

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<sup>9</sup> Alfred L. Brophy, *The Republics of Law and Letters*, 89 N.C. L. REV. 1879, 1926-37 (2011) (discussing ideas about education in Whig and Democrat ideology and their relationship to constitutionalism); Alfred L. Brophy, *The Road to the Gettysburg Address*, 42 FLA. ST. U. L. REV. (forthcoming 2015) (discussing the ways that cemeteries contributed to the development of a constitutional culture before the Civil War).

<sup>10</sup> See, e.g., *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572 (1823) (separating “principles of abstract justice” from law in the question of how to treat Native American land claims); *id.* at 588 (“[The United States] maintain[s], as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.”); *The Antelope*, 23 U.S. (10 Wheat.) 66, 121-22 (1825) (“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.”). See also *State v. Foreman*, 16 Tenn. (1 Yer.) 256, 277, 333 (1835) (acknowledging conflict between religious morals and necessity to support acquisition of natives’ lands through conquest). Thanks to Christopher Castro-Rappl for pointing out to me that Chief Justice John Catron distinguished law from morals in this case, which involved similar issues of Native sovereignty to those in *Johnson v. M'Intosh*.

<sup>11</sup> Rev. James Henley Thornwell, *The Rights and the Duties of Masters*, Sermon Preached at the Dedication of a Church Erected in Charleston, S.C., for the Benefit and Instruction of the Coloured Population (May 26, 1850), in *THE RIGHTS AND THE DUTIES OF MASTERS, SERMON PREACHED AT THE DEDICATION OF A CHURCH ERRECTED IN CHARLESTON, S.C., FOR THE BENEFIT AND INSTRUCTION OF THE COLOURED POPULATION* 5-51 (Charleston: Steam-Power Press of Walker & James 1850).

<sup>12</sup> See also Rev. T.V. Moore, *Address Before the Philo and Franklin Societies of Jefferson College* (Aug. 1853), in *THE CONSERVATIVE ELEMENTS OF AMERICAN CIVILIZATION: AN ADDRESS BEFORE THE PHILO AND FRANKLIN SOCIETIES OF JEFFERSON COLLEGE* 3-28 (Pittsburg: J.T. Shryock 1853) (stating that materialistic tendency of civilization should be counteracted by two “conservative elements” due to “their magnitude and importance,” namely, education and religion).

the dominant values of the time. Slavery and the property rights it rested on were central to that dedication and to so much else at the time.

## II. The World of Property at the Building's Construction

The legal literature people were reading told them that property law supported exclusion of others and control over property and over people as well. Just about every property course begins with a quotation from William Blackstone's *Commentaries on the Laws of England* that "[t]here is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in the total exclusion of the right of any other individual in the universe."<sup>13</sup> Overlaying Blackstone's elegant paean, however, was James Kent's warning in his *Commentaries on American Law* that the "law concerning real property forms a technical and very artificial system; and though it has felt the influence of the free and commercial spirit of modern ages, it is still very much under the control of principles derived from the feudal policy."<sup>14</sup> Thus, property law was both central and confusing at the same time. That theme was an important in the legal literature of the eighteenth and nineteenth centuries. For the literature frequently celebrated the role of property rights in purchasing freedom. For instance, in lectures to his students in the 1830s and 1840s, William and Mary professor Thomas R. Dew told them that England's respect for property rights were what had allowed the middle class to purchase rights from the crown. Dew, building on historian Henry Hallam's writing on the Middle Ages, depicted property rights as what led to all other freedoms.<sup>15</sup>

In 1818, the year before Savannah's Old Candler Hospital opened, the Georgia legislature passed a statute that prohibited free people of African descent from owning real property or slaves.<sup>16</sup> A few decades later, an extraordinary free woman, Aspasia Mirault, gave money to a white man to purchase property over in the Pulaski Ward and hold it in trust for her.<sup>17</sup> That is

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<sup>13</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND \*2; see also Carol Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601 (1999) (discussing ubiquity of that quotation from Blackstone).

<sup>14</sup> 3 JAMES KENT, COMMENTARIES ON AMERICAN LAW \*378 (New York, O. Halstead 1828).

<sup>15</sup> THOMAS R. DEW, A DIGEST OF THE LAWS, CUSTOMS, MANNERS, AND INSTITUTIONS OF THE ANCIENT AND MODERN NATIONS 469, 478-79 (New York: Appleton & Company 1853); see also 2 HENRY HALLAM, HISTORY OF EUROPE DURING THE MIDDLE AGES (1899 ed.) (discussing the importance of ability to acquire and hold property).

<sup>16</sup> See Law of 1845, Free Persons of Color, ch. 33, art. 2, § 1 Ga. Laws, in A CODIFICATION OF THE STATUTE LAW OF GEORGIA 830 (Savannah, John M. Cooper 1845) (repealed); see also THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860 30 (1996) (discussing Georgia statute).

<sup>17</sup> JANICE L. SUMLER-EDMOND, THE SECRET TRUST OF ASPASIA CRUVELLIER MIRAUT: THE LIFE AND TRIALS OF A FREE WOMAN OF COLOR IN ANTEBELLUM GEORGIA 21-34 (2008); see also SLAVERY AND

the intellectual world and the world of law and property rights that existed at the construction of the Savannah Law School's building.

When this building was built, the expulsion of natives from Georgia was still more than a decade away and slavery had not yet reached its peak in this State. John Marshall had not yet written the decision in *Johnson v. M'Intosh*, which justified taking land away from Native Americans in part because they were hunter-gatherers, whereas European settlers engaged in planting.<sup>18</sup> Also, in the future was the parallel case by Marshall in *The Antelope* that justified slavery based on its widespread use in history and the rights of property recognized throughout the Western world.<sup>19</sup>

As the Southern states were robustly protecting property rights in humans—and tightening control over free people and slaves alike—they turned to public property to reaffirm those values. In the 1820s, the Virginia legislature chartered a charitable corporation to raise money for a grand monument to President Washington. It took decades, but by the early 1850s, the corporation held a competition for the design and then set about constructing the Washington Equine Statue. The corporation, of course, purchased humans to help with this task—and saved the contracts so that it could sue on warranties if necessary.<sup>20</sup> And when it dedicated the statue in 1857, a host of speakers depicted President Washington as supporting their vision, most notably as pro-Southern and pro-slavery, though one recalled Washington's adherence to the Union.<sup>21</sup>

This use of public property—and public spaces—to convey values and to stamp out alternative narratives of history and law continued well after the Civil War in the Confederate monuments that populate the county seats throughout the South. Sometimes those monuments appear in greater numbers elsewhere,

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FREEDOM IN SAVANNAH 138 (Leslie M. Harris & Daina Ramey Berry eds., 2014) (recounting Aspasia Miarult's 1842 secret trust agreement with a white man, George Cally, in order to circumvent the statute proscribing land purchases by free blacks).

<sup>18</sup> 21 U.S. (8 Wheat.) 543, 588 (1823) (“We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. 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.”).

<sup>19</sup> *The Antelope*, 23 U.S. (10 Wheat.) 66, 115, 121 (1825); see also Marc L. Roark, *Slavery, Property, and Marshall in the Positivist Legal Tradition*, 2 SAVANNAH L. REV. 191 (2015).

<sup>20</sup> See *A Guide to the Auditor of Public Accounts, Capitol Square Data, Washington Equestrian Statue Records, 1817-1868*, LIBR. OF VA., <http://ead.lib.virginia.edu/vivaead/published/lva/vivadoc.pl?file=vi00870.xml> (last visited Mar. 18, 2015) (listing records of transactions involving the construction of the Washington Equine Statue).

<sup>21</sup> See e.g., Hunter, *supra* note 1; see also ROBERT BONNER, *MASTERING AMERICA: SOUTHERN SLAVEHOLDERS AND THE CRISIS OF AMERICAN NATIONHOOD* 153-54 (2009); Thomas Brumbaugh, *The Evolution of Crawford's Washington*, 70 VA. MAG. HIST. & BIOGRAPHY 2, 3-29 (1962).

like Monument Avenue in Richmond, Virginia.<sup>22</sup> We could look at the messages these monuments convey in all sorts of ways. Take the Sussex County, Virginia, monument, for instance, which says “The Principles for Which They Fought Live Eternally.”<sup>23</sup> This statue is in front of the courthouse built in 1828, where a dozen male slaves were tried in the wake of the Nat Turner rebellion. Many of those men were subsequently executed, even though Turner’s forces never set foot in Sussex County.<sup>24</sup> Then again, William Faulkner’s *Requiem for a Nun* recalls the functions that monuments serve—and how they are often forgotten and left to fade and rust as the world moves on.<sup>25</sup>

These episodes of violence and exclusion of black people from their own property—as well as from other property—continued into the era of Jim Crow and sometimes even after World War II. The Tulsa riot of 1921 was only one of the most extreme of these episodes of violence that enforced and created segregation.<sup>26</sup> Even after episodes of “negro drives” to cleanse southern towns and counties ended,<sup>27</sup> the exclusion of African Americans from places of public accommodations continued. Many states upheld racially restrictive covenants from the 1920s through the late 1940s. In Oklahoma City, to take one example, there was a constellation of lawsuits challenging those covenants from the late 1920s to the Supreme Court’s decision in *Shelley v. Kraemer*<sup>28</sup> in 1948.<sup>29</sup> At least

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<sup>22</sup> Autumn Barrett, *Honoring the Ancestors: Historical Reclamation and Self-Determined Identities in Richmond and Rio de Janeiro* (Nov. 25, 2013) (unpublished Ph.D. dissertation, College of William and Mary) (on file with author) (discussing Monument Avenue within the context of memorializing and remembering U.S. slavery and the Confederacy, the author presents the significance of such sites for contested constructions of individual, local, regional, and national identities).

<sup>23</sup> TIMOTHY S. SEDORE, *AN ILLUSTRATED GUIDE TO VIRGINIA’S CONFEDERATE MONUMENTS* 5 (2011).

<sup>24</sup> Alfred L. Brophy, *The Nat Turner Trials*, 91 N.C. L. REV. 1817, 1849-50 (2013); SCOT FRENCH, *THE REBELLIOUS SLAVE: NAT TURNER IN AMERICAN MEMORY* 1-3 (2004).

<sup>25</sup> WILLIAM FAULKNER, *REQUIEM FOR A NUN* 244, 246 (1950) (employing the image of a faded World War I anti-tank howitzer alongside a Confederate monument in a town where at last the Lost Cause was fading, too).

<sup>26</sup> ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RACE RIOT OF 1921: RACE, REPARATIONS, RECONCILIATION* xvii (2002).

<sup>27</sup> See generally JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* (2005) (discussing the creation of all-white communities through regulations prohibiting African Americans and other minorities from being in that locality after a specified time of day).

<sup>28</sup> 334 U.S. 1 (1948).

<sup>29</sup> See, e.g., *Christie v. Lyons*, 47 P.2d 128, 129-30 (1935) (denying enforcement of racially restrictive covenant because there was inadequate agreement); *Veal v. Hopps*, 80 P.2d 275, 278 (1938) (ruling racially restrictive covenant invalid because necessary number of signatures acquired ten years after it was originally executed and recorded); *Caudle v. Olive*, 95 P.2d 615, 616-17 (1939) (invalidating racially restrictive covenant because of insufficient number of subsequent signatures); *Lyons v. Wallen*, 133 P.2d 555, 557-58 (1942) (upholding restrictive covenant that includes an apartment building); *Linder v. Stapp*, 178 P.2d 617, 618 (1947) (upholding restrictive covenant); see also RICHARD R.W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD:*

as early as the mid-1920s, white residents organized to get their neighbors to sign restrictive covenants. One suit still went on seeking damages for integration; that, too, finally ended in 1951.<sup>30</sup> Even after racially restrictive covenants were no longer enforced, restrictions on trespassing on businesses were upheld. The Fourth Circuit, for instance, upheld Howard Johnson's exclusion of a federal government employee from its Arlington, Virginia, restaurant in 1959.<sup>31</sup> And through the 1950s, as Alberto Lopez's Essay for this Colloquium issue discusses, African Americans needed to turn to tour guides to figure out where they could stay.<sup>32</sup> Such a narrative of the power of property to exclude is one very important side of the story of property rights in American history. The dispossessed are often left dispossessed as property law robustly protects vested rights and the right of exclusion.

### III. Property Rights and Protection of Rights of Racial Minorities

Yet, sometimes the robust protection of property rights benefits racial minorities who are property owners. The Supreme Court's 1917 decision in *Buchanan v. Warley*, which struck down a Memphis racial zoning ordinance,<sup>33</sup> is one often-cited example of how property rights protect racial minorities. It can certainly be read as a case where the protection of property rights also protected African Americans.<sup>34</sup> It might also be read as an example of equal protection protecting the rights of African Americans. Perhaps because property was so clearly unique, it allowed the Supreme Court to understand the exclusion of people from some property was inherently unequal.<sup>35</sup> The *Buchanan* court struck down a facially discriminatory zoning ordinance, which was even worse than the discriminatory statute upheld in *Plessy v. Ferguson*.<sup>36</sup>

The rule of law may just ensure everyone's rights are respected, so that can in some ways discipline the wealthy and powerful. (Though that also means rights are more often enforced against this in need.) The National Association for the Advancement of Colored People (NAACP), under W.E.B. DuBois's leadership, was instrumental in bringing suit in *Buchanan v. Warley* to strike

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RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS (2013) (attributing concerted influence of legal and social norms to the rise and fall of racially restrictive covenants).

<sup>30</sup> *Correll v. Earley*, 237 P.2d 1017 (1951).

<sup>31</sup> *See Williams v. Howard Johnson's Rest.*, 268 F.2d 845, 847-48 (4th Cir. 1959).

<sup>32</sup> *See Alberto Lopez, The Road to, and Through, Heart of Atlanta Motel*, 2

SAVANNAH L. REV. 113 (2015).

<sup>33</sup> 245 U.S. 60 (1917).

<sup>34</sup> David Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 844 (1998).

<sup>35</sup> MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 80-81 (2004) (discussing NAACP's involvement in *Buchanan*).

<sup>36</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896); Brent M. Rubin, *Buchanan v. Warley and the Limits of Substantive Due Process as Antidiscrimination Law*, 92 TEXAS L. REV. 477, 488 (2013).



down racially restrictive zoning ordinances.<sup>37</sup> The Supreme Court emphasized the ordinance's impact on white property owners who could not sell their property to whomever they chose. For *Buchanan* drew upon a Georgia decision, *Carey v. City of Atlanta*,<sup>38</sup> that also emphasized property rights.<sup>39</sup> And though the Court did not say this, perhaps the sense was that property is unique and the deprivation of the right to purchase, sell, and occupy property cannot be equal.<sup>40</sup> That is, the deprivation of the right of sale is a deprivation of the right of property and reduces the number of potential purchasers. This attitude may just be another version of the "excuse rationale" advanced so often in American legal history, where a rationale that is of some benefit to white people is offered for a decision that is really about racial justice.<sup>41</sup> Perhaps another example of such an "excuse rationale" appeared in the decision of Oklahoma City Judge Warren K. Snyder, who struck down racially restrictive covenants because an insufficient number of residents had signed the covenants.<sup>42</sup> Judge Snyder professed his disdain for social equality, but recognized that there were some constitutional rights that had to be obeyed:

[B]ecause of birth, raising and environment, . . . I don't believe now and I don't think I ever will believe in racial equality, or in racial intercourse. I can't imagine the success of having a negro sit down at my table and break bread and things of that kind, . . . but the court feels that the colored man or negro has some rights to property which he is entitled to; just as much under his constitutional rights as though he were white.<sup>43</sup>

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<sup>37</sup> DAVID LEVERING LEWIS, W. E. B. DU BOIS: BIOGRAPHY OF A RACE: 1868-1919, at 438 (1994); *see also* ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., THE JUDICIARY AND RESPONSIBLE GOVERNMENT: 1910-1921, at 795-98 (Cambridge University Press 2007) (1984) (discussing NAACP's involvement in *Buchanan*).

<sup>38</sup> 84 S.E. 456 (Ga. 1916).

<sup>39</sup> *Buchanan*, 245 U.S. 60, 79-80 (1917) (quoting *Carey*, 84 S.E. at 459).

<sup>40</sup> This was also one of the arguments made by NAACP's counsel. *Id.* at 62 (arguing that no white person would buy seller's land; thus, the ordinance "destroys, without due process of law, fundamental rights attached by law to ownership of property . . .").

<sup>41</sup> BICKEL & SCHMIDT, *supra* note 37, at 810-14 (discussing historians' conflicting interpretations of the basis and effect of the *Buchanan* decision and noting that it was interpreted by the public as a victory for civil rights at the time, even if it may have been grounded in property rights of white owners).

<sup>42</sup> Brief of Plaintiffs in Error at 14-16, *Christie v. Lyons*, 47 P.2d 128 (1935) (No. 24527) (reprinting trial court decision by Hon. Warren K. Snyder).

<sup>43</sup> *See id.* at 16; *see also* Brief of Defendants in Error at 15-16, *Christie v. Lyons*, 47 P.2d 128 (1935) (No. 24527):

The writer of this brief is himself a son of a confederate veteran, but believes notwithstanding in the sanctity of our constitution, as an able writer has said inspired almost by The Almighty on High. The Constitutional rights of this Negro . . . cannot be criticized, and the attempts of plaintiffs in error to inject the red shirt of prejudice into this case, as arrayed against the constitutional rights of the Negro owner is unbecoming of our noble profession, the lover of absolute freedom of

This sentiment may be yet another example of a judge who feels compelled for reasons of politics and morality to provide an explanation for a decision that appears at odds with what his community would expect or tolerate. In the years before the Civil War, such explanations were more often about how judges were compelled to issue pro-slavery decisions.<sup>44</sup> In the years of Jim Crow, at least sometimes the judges seem to have felt compelled to explain they were not in favor of racial equality, even as they were making decisions that tended toward equality. And yet, despite *Buchanan's* clear precedent, some municipalities continued to pass such racially restrictive zoning ordinances for even more than a decade.<sup>45</sup>

Writers on Native American law also propose that one solution to the problems of dispossession of Natives is granting them additional property rights, particularly in cultural property.<sup>46</sup> And, to take an example close to the hearts of those at Savannah Law School, the easement on the ancient Candler Oak in their front yard illustrates that the robust protection of property rights can be part of preserving nature. There is a strong case, that is, for more protection for property rights as the solution to dispossession. Such property rights activists point to the potential to protect the limited property that some people have from deprivation. They do not try to address antecedent questions of distribution or who acquired property or how.<sup>47</sup>

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the law, the constitutional right to acquire, own, and enjoy life, liberty, and protection in our property rights without discrimination on account of race, color, or previous condition of servitude.

*Id.*

<sup>44</sup> See ROBERT M. COVER, *JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS* 119-30 (1975) (explaining the “judicial can’t”); cf. Eric Muller, *Judging Thomas Ruffin and the Hindsight Defense*, 87 N.C. L. REV. 757, 758-59 (2009) (pointing out that Justice Ruffin appeared to have fewer moral qualms about slavery than his decision in *State v. Mann* would lead one to believe).

<sup>45</sup> See, e.g., *Allen v. Oklahoma City*, 52 P.2d 1054 (Okla. 1935) (striking down Oklahoma City’s racial zoning ordinance); *Ex parte Lee*, 52 P.2d 1059 (Okla. 1935) (dismissing criminal prosecution in light of *Allen*); *Ex parte Hawkins*, 52 P.2d 1059 (Okla. 1935) (exonerating bond and discharging prisoner per the *Allen* ruling); see also REPORT OF THE CITY PLANNING COMMISSION, OKLAHOMA CITY, OKLAHOMA, 1930 at 24 (1931) (“The segregation of the races by zoning has been declared unconstitutional. Similar or better results can no doubt be secured by fair cooperation and mutual agreement between the races.”).

<sup>46</sup> See generally Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 Yale L.J. 1022 (2009) (“[R]e-invisioning cultural property law in terms of peoplehood and stewardship . . .”).

<sup>47</sup> Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CAL. L. REV. 107 (2013) (making a similar point about progressive property scholarship by arguing for more attention to key questions about distribution of property, particularly as they relate to race); Timothy M. Mulvaney, *Progressive Property Moving Forward*, 5 CALIF. L. REV. CIR. 349, 349-73 (2014) (responding to Rosser and maintaining that property law contains some materials for redistribution). Recently Rosser has turned to the question whether the problem is that there is too much protection for property. See Ezra Rosser, *Destabilizing Property*, CONN. L. REV. (forthcoming 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2581710](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2581710).

## IV. The Dispossessed and the Limitation of Owners' Rights

There were other visions, though, of property balanced against community interests. Those visions seek to limit the respect for the right of exclusion. For instance, there is Ralph Ellison's vignette in *Invisible Man* of an elderly couple being evicted from their homes: they didn't have anything, and had never had anything; all they had was Jesus.<sup>48</sup> The eviction vignette was a call for rethinking property rights. And it was part of the question from Ellison's posthumous novel *Juneteenth*: "HOW THE HELL DO YOU GET LOVE INTO POLITICS OR COMPASSION INTO HISTORY?"<sup>49</sup> Such ideas have gained a lot of currency in the last twenty years among progressive property scholars such as Gregory Alexander,<sup>50</sup> Carol Rose,<sup>51</sup> Joseph William Singer,<sup>52</sup> Eduardo Peñalver,<sup>53</sup> and Laura Underkuffler.<sup>54</sup> For progressive property scholars talk of how property rights should serve human rights. They trace this lineage to *State v. Shack*, a New Jersey Supreme Court case from the early 1970s on rights of migrant tenants to receive medical and legal aid at their home, despite the opposition of their landlord, who was also their employer.<sup>55</sup> This literature is philosophically oriented. There is a lot of talk of political theory and to a lesser extent economics.

Much of what they focus on is the ways that property law ought to promote human flourishing. And these scholars write about the ways that humans are connected to property and how property promotes the lives and the expectations of the humble—about how property draws from and contributes to the full realization of personhood.<sup>56</sup> That great novel of dispossession, *The Grapes of Wrath*, was set in motion when the Joads, like tens of thousands of other farmers displaced by the dust bowl, had to leave their land. They left the land only upon protest that they were connected to it and that their ancestors had fought other humans and nature, too—and that the current generation might also fight for the land against the bank, which held the mortgage.

The tenants cried, Grampa killed Indians, Pa killed snakes for the land.

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<sup>48</sup> RALPH ELLISON, *INVISIBLE MAN* 267-72 (1952). Ellison's book also references "fifteen minutes of Jesus." *Id.* at 279. This reference is reminiscent of the late nineteenth-century hymn that called for one to "Take All the World, but Leave Me Jesus." See CLEMENT WOOD, *N-----R: A NOVEL* 118-19 (1922) (discussing the hymn in a chapter called "The White Man's Law").

<sup>49</sup> RALPH ELLISON, *JUNETEENTH* 264 (1999) (emphasis in original).

<sup>50</sup> See, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 747 (2009).

<sup>51</sup> See, e.g., Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897, 1902-03 (2007).

<sup>52</sup> See, e.g., Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1010 (2009).

<sup>53</sup> Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 822-23 (2009).

<sup>54</sup> LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* (2003).

<sup>55</sup> 277 A.2d 369 (1971); Ronald Sullivan, *2 Poverty Aides Seized at Jersey Migrants' Camp*, N.Y. TIMES, Aug. 8, 1970, at 19.

<sup>56</sup> Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

*The Possibilities of Common Law Property*

Maybe we can kill banks—they're worse than Indians and snakes.  
Maybe we got to fight to keep our land, like Pa and Grampa did.  
And now the owner men grew angry. You'll have to go.  
But it's ours, the tenant men cried. We—  
No. The bank, the monster owns it. You'll have to go.  
We'll get our guns, like Grampa when the Indians came. What then?  
Well—first the sheriff, and then the troops. You'll be stealing if you try  
to stay, you'll be murderers if you kill to stay. The monster isn't men,  
but it can make men do what it wants.<sup>57</sup>

The plea of the tenants that they take action, as had their ancestors, to preserve the land recalled the violence of their ancestors. It is a strange juxtaposition of violence against Native Americans with the tenant farmers' own claim to the land based on human dignity. Daniel Sharfstein's critique of property as personhood has picked up on this tension, between violence and claims to land, to remind us that property is often acquired through violence—that violence is often a way of confirming title to property.<sup>58</sup> The deprivation of land from Natives is based on violence, and a memory of such violence is sometimes a part of the articulation of the rights of subsequent generations to property that has descended to them. Sharfstein uses similarly jarring imagery from Mississippi in the era of the Civil Rights Movement, when a man who was part of a mob attacking two journalists said, "We killed two-months old Indian babies to take this country and now they want us to give it away to N-----rs."<sup>59</sup> And those ideas of confirming title to land in blood stretched back generations. Chief Justice John Marshall recognized the power of violence to confirm title to property in *Johnson v. M'Intosh* when he stated that the courts of the conqueror cannot deny the claims of the conqueror.<sup>60</sup> The same is true of his decision in *The Antelope*, which focused on the origins of property in humans in war.<sup>61</sup> Bernard Bailyn has termed the violence directed against Native Americans in the seventeenth century part of the "barbarous years."<sup>62</sup> Generations later, recollections of the

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<sup>57</sup> JOHN STEINBECK, *THE GRAPES OF WRATH* 39 (1939).

<sup>58</sup> Daniel J. Sharfstein, *Atrocity, Entitlement, and Personhood in Property*, 98 VA. L. REV. 635 (2012).

<sup>59</sup> *Id.* at 637 (quoting Claude Sitton, *Police Break up Negroes' Rally*, N.Y. TIMES, Mar. 28, 1963 at 4). The parallel is so striking that one is tempted to think this imagery and Steinbeck's drew from a common core of cultural ideas.

<sup>60</sup> 21 U.S. (8 Wheat.) 543, 588 (1823); see also Jedediah Purdy, *Property and Empire: The Law of Imperialism in Johnson v. M'Intosh*, 75 GEO. WASH. L. REV. 329, 348 (2007).

<sup>61</sup> *The Antelope*, 23 U.S. (10 Wheat.) 66, 120-21 (1825) ("But from the earliest times war has existed, and war confers rights in which all have acquiesced. Among the most enlightened nations of antiquity, one of these was, that the victor might enslave the vanquished . . . That which has received the assent of all, must be the law of all.")

<sup>62</sup> BERNARD BAILYN, *THE BARBAROUS YEARS: THE PEOPLING OF BRITISH NORTH AMERICA—THE CONFLICT OF CIVILIZATIONS, 1600-1675* (2013).

violence associated with taking land from Native Americans—and then from those European settlers who had taken it from Native Americans—set in motion the haunted landscape of Nathaniel Hawthorne’s *The House of the Seven Gables*.<sup>63</sup>

#### V. The Critique of Property Rights in American History

There is an important question raised by Steinbeck’s vignette in *The Grapes of Wrath* and more recently by Daniel Sharfstein, about how the personhood theory of property, which seeks to protect individuals’ connections to land, promotes violence. Yet, the critique of robust property rights of which personhood theory is a part has a stronger grounding in American history than we sometimes acknowledge. What is less apparent is that these ideas are deeply rooted in the American dream, and they gained strength throughout the twentieth century. That is, while progressive property scholars have been advancing a philosophical justification of property that promotes human flourishing, we have paid somewhat less attention to its foundation in American legal history. One strand of the history of property rights in the United States provides limitations on the power of owners of property over others, particularly others who come in contact with that property as neighbors, renters, or users of that property.

Sometimes alternative visions of property have asked why there is such a robust protection of vested rights. Such questions about vested rights were particularly prevalent during the era of Andrew Jackson. In 1845, the *United States Magazine and Democratic Review* presented an article that critiqued the distribution of property, which it took as its title the exclamation of a laborer who, standing atop a mountain and surveying the surrounding cultivated land, exclaimed, “How much land and property, and I have none! What is the reason?”<sup>64</sup> Though the standard interpretation of society was that it was instituted to protect property, this author thought society had failed in the purpose of protecting individuals. Society “does not protect property in any just sense—in any but a purely arbitrary and conventional sense. It is not a protector of property, but a robber and protector of the robbers of property.”<sup>65</sup> About fifteen years earlier, Thomas Skidmore’s extensive treatise presented a broad-based attack on property, especially inherited property.<sup>66</sup> And in the courts, Democrat-appointed judges were cutting back on the charter rights of

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<sup>63</sup> NATHANIEL HAWTHORNE, *THE HOUSE OF THE SEVEN GABLES* (Boston, Ticknor & Fields 1851). I leave to Anthony Baker a discussion of the ways that stories of haunted land reveal the acknowledgement of the injustices that took place on that land and against enslaved and Native people. See Anthony Baker’s paper on haunted landscapes in this volume. Anthony V. Baker, *[Re]Integrating Psychic Space: Law, Ontology, and the Ghosts of Old Savannah*, 2 SAVANNAH L. REV. 1 (2015).

<sup>64</sup> *What Is the Reason? How Much Land and Property, and I Have None!*, 16 U.S. MAG. & DEMO. REV., no. 79, Jan. 1845, at 17.

<sup>65</sup> *Id.* at 18-19.

<sup>66</sup> THOMAS SKIDMORE, *THE RIGHTS OF MAN TO PROPERTY! : BEING A PROPOSITION TO MAKE IT EQUAL AMONG ADULTS OF THE PRESENT GENERATION* (New York, Alexander Ming 1829).

corporations, drawing the ire of Whigs like Joseph Story and James Kent.<sup>67</sup> Similarly, the fictional literature of the era dealt with the complaints of many that their claims to use property as their ancestors had used it—maybe even as they had used it—for hunting were undermined by the extension of property rights.<sup>68</sup> In short, there was an important clash of visions between those who argued for the importance and strength of vested rights and those who challenged such ideas. These were questions, as Ralph Waldo Emerson said, “*of property & no property.*”<sup>69</sup> For Emerson had found that “this vast network, which you call property, extended over the whole planet. I cannot occupy the bleakest crag of the White Hills or the Allegheny Range, but some man or corporation steps up to me to show me that it is his.”<sup>70</sup> Such conflicting claims came to a violent conflict in disputes in the Hudson River Valley in the late 1830s in what was known as the anti-rent war.<sup>71</sup>

A. The Anti-Rent Movement and Anti-Feudalism in American Property Law

The anti-rent movement was the largest tenant movement before the Civil War. There were somewhere in the neighborhood of 240,000 tenants in the anti-rent counties of New York; perhaps as many as 60,000 tenants actively supported it. The movement was grounded in the odd land-ownership relationships of New York’s Hudson Valley. At the time of purchase, buyers received the property “in perpetuity” with covenants and conditions that reserved rights in the grantors.<sup>72</sup> Thus, we have the anomalous situation of buyers taking land in fee simple, with what appear to be feudal provisions attached to them. This led to what was called the “lease in fee.” Yet, for two centuries those on the land were called tenants and the tenants called the sellers—the beneficiaries of the feudal provisions—landlords.<sup>73</sup> The deeds typically required that the owners of the land provide a few days labor, a dozen-

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<sup>67</sup> See James Kent, *Supreme Court of the United States*, 2 N.Y. REV. 372, 385-95 (1838) (criticizing Chief Justice Roger Taney’s decision to limit charter rights in *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837)); see also Alfred L. Brophy, *The Rule Of Law in Antebellum College Literary Addresses: The Case of William Greene*, 31 CUMB. L. REV. 231, 238-45 (2001) (contrasting Democrat and Whig responses to *Charles River Bridge*).

<sup>68</sup> See JAMES FENIMORE COOPER, *THE PIONEERS* (New York, D. Appleton & Co. 1880) (1823) (exploring distinctions between natural right to hunt and the law of trespass); see also Alfred L. Brophy, *Property and Progress: Antebellum Landscape Art and Property Law*, 40 MCGEORGE L. REV. 603, 652-53 (2009) (discussing the nineteenth century dispute over trespass and natural law).

<sup>69</sup> RALPH WALDO EMERSON, *EMERSON IN HIS JOURNALS* 358 (Joel Porte ed. 1982).

<sup>70</sup> RALPH WALDO EMERSON, *The Conservative*, in *NATURE; ADDRESSES, AND LECTURES* 284, 298 (Boston and Cambridge, James Munroe and Co. 1849).

<sup>71</sup> See generally CHARLES W. MCCURDY, *THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS, 1839-1865* (2001); *Amasa J. Parker*, 38 U.S. MAG. & DEM. REV., no. 3, Oct. 1856, at 214.

<sup>72</sup> *Id.* at 11.

<sup>73</sup> *Id.* at 22.

and-a-half bushels of wheat and a few farm animals each year to the “patroon.”<sup>74</sup> Some also had provisions, known as “quarter rents,” that on sale of the land, the patroon would receive a quarter (or sometimes ten percent) of the sale price.<sup>75</sup> New purchasers then took their deeds subject to the same terms. Anti-renters portrayed their movement as an effort to break free from feudal incidents. Democrats spoke of the evils of feudalism and the effects it imposed on English society.<sup>76</sup> Conservative Democrat Senator Daniel S. Dickinson characterized the leases as “relics of barbarism, incompatible with the institutions of a free people [that] are the spirit of the age.”<sup>77</sup>

Conservative Whigs like Daniel Barnard and James Fenimore Cooper depicted the movement as a breakdown of law. The movement was led by demagogues, who catered to the interests of the propertyless (or relatively small property holder), which sought to shake the foundations of property, for relatively little gain. Barnard wrote perhaps the leading defense of the tenures, which was published in the *Whig Review* in 1845.<sup>78</sup> He saw the movement at base as an appeal to “public licentiousness,” akin to other popular movements that tended to destroy respect for law.<sup>79</sup> Barnard considered the anti-rent movement treasonous and appealed to the Constitution as well as a return to principles of respect for property and principles in place of those of both Whigs and Democrats who “look to the end, and . . . easily quiet themselves about the means.”<sup>80</sup>

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<sup>74</sup> *Id.* at 22-23 (citing N.Y. LEGIS. ASSEMB., REPORT OF THE [C]OMMITTEE ON SO MUCH OF THE GOVERNOR’S MESSAGE AS RELATES TO THE DIFFICULTIES BETWEEN THE LANDLORD AND TENANTS OF THE MANOR OF RENSSELAERWYCK, 271, 63rd sess. at 23-27 (1840) (reprinting typical deed with feudal incidents)), available at <https://books.google.com/books?id=XVEbAQAIAAJ&printsec=frontcover#v=onepage&q&f=false>.

<sup>75</sup> The quarter rents were joined with a right of first refusal in the landlord. So that landlords could either purchase the property at a stated price *or* receive a significant portion of the sale price. Those two clauses insured that property has sold at its fair market value. See Jackson *ex dem.* Lewis v. Schutz, 18 Johns. 174, 174-75 (N.Y. Sup. Ct. 1820); Jackson *ex dem.* Schuyler v. Corliss, 7 Johns. 531 (N.Y. Sup. Ct. 1811). Sometimes the “leases” lasted only for a lifetime—or three lifetimes. Upon the tenant’s death, the property reverted to the grantor to be resold.

<sup>76</sup> Junius Smith, *Reasons Why the Aspect of Society in England the United States Must Be Radically and Permanently Different*, 19 U.S. MAG. & DEMO. REV. 97, 1846, at 25.

<sup>77</sup> McCurdy, *supra* note 71, at 37-38. (quoting Daniel S. Dickinson, “a self-proclaimed conservative Democrat”).

<sup>78</sup> Daniel Barnard, *The “Anti-Rent” Movement and Outbreak in New York*, 2 WHIG REV. 577 (1845).

<sup>79</sup> See, e.g., *id.* at 577.

In a country of very large liberty, it is not wonderful that some should occasionally trespass on the extreme limits of the law of order and safety, or that some others should habitually struggle for the very largest liberty—for absolute freedom from all restraint—for unbridled indulgence. Said Plato, long ago: “Law is the god of wise men—licentiousness is the god of fools.”

*Id.*

<sup>80</sup> *Id.* at 578.

Yet, the New York courts viewed with some sympathy the claims of the anti-renters. The 1850 decision in *Overbagh v. Patrie* invalidated the quarter-sale right.<sup>81</sup> The key to Judge Amasa Parker’s decision for a three-judge panel of the New York Supreme Court in *Overbagh* is his discussion of public policy regarding enforcement of the quarter-rent provisions. He concluded that feudalism was “utterly unsuited, every vestige of it, to the institutions under which we live, and to the personal independence and equality of political rights enjoyed by our citizens.”<sup>82</sup> Parker saw the feudal incidents as inconsistent with the political ideas of the time:

The progress of man in intelligence, in knowledge, in the arts of peace and in political advancement, now calls for tenures in accordance with perfect political equality, and entire personal freedom; and if there be vestiges of feudal tenure still remaining here, they should be eradicated as speedily as is consistent with a strict regard to the rights of property of those concerned.<sup>83</sup>

He also saw the quarter-rent provisions as interfering with alienation and discouraging development of the land, as well as excessive. “After twelve alienations, [the landlord] will have received twice the improved value of the farm, in addition to the price paid on the original purchase. Yet their claim will be in no respect lessened—the demand will be insatiable—its existence interminable.”<sup>84</sup> The legal basis running parallel to his public policy discussion was Judge Parker’s equation of the quarter-rents with “fines for alienation”<sup>85</sup>—feudal incidents that required the payment of money upon alienation of the property. A 1787 Act of the New York State legislature had, moreover, abolished such tenures. Parker reasoned that in the case of the quarter-rents, there was no reversion, and hence the grantors had no estate upon which they might condition the payment of the quarter-rent.<sup>86</sup> The New York Court of Appeals 1852 decision in *De Peyster v. Michael*<sup>87</sup> confirmed the holding of the lower court’s decision in *Overbagh*.<sup>88</sup> *De Peyster* interpreted a grant from 1785—before the New York State legislature prohibited feudal tenures. Hence, Chief Justice Charles H. Ruggles had to apply the 1787 Act retroactively to find that there could be no reversion from leases in fee. Ruggles concluded the opinion with somewhat ambiguous rationale:

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<sup>81</sup> *Overbagh v. Patrie*, 8 Barb. 28 (N.Y. Gen. Term 1850).

<sup>82</sup> *Overbagh*, 8 Barb. at 43.

<sup>83</sup> *Id.* at 42. Parker cites to such secondary works as Henry Hallam’s *History of Europe During the Middle Ages*. HALLAM, *supra* note 15.

<sup>84</sup> *Overbagh*, 8 Barb. at 44.

<sup>85</sup> *Id.* at 43 (“Quarter sales, sixth sales, and tenth sales, and all fines for alienation, or sums required to be paid in the nature of fines upon alienation, have long been regarded as prejudicial to the public interest.”).

<sup>86</sup> *Id.* at 44-45.

<sup>87</sup> *De Peyster v. Michael*, 6 N.Y. 467, 505 (1852).

<sup>88</sup> *Overbagh*, 8 Barb. 28.



[A]fter a careful examination of the grounds on which these restraints on alienation in fee were originally sustained in England; of the change in the law there by statute nearly 600 years ago; of the ode in which that change was wrought; and finding that the same change has taken place here by our own statutes, we cannot entertain a doubt that the condition to pay sale money on leases in fee, is repugnant to the estate granted, and therefore void in law.<sup>89</sup>

If landlords had no reversion, they could not restrain alienation, which was necessary to effectively enforce the quarter-rents. In these ways, the New York courts gave life to a doctrine of anti-feudalism, which I believe explains well (at least at a metaphorical level) a number of subsequent accommodations between the rights of owners and others they contract with.

Some decades later—during the roaring twenties—F. Scott Fitzgerald revisited American’s opposition to feudalism, even amidst the great wealth of the era, in *The Great Gatsby*.<sup>90</sup> The man who built Gatsby’s house was rumored to have offered to pay the taxes of the surrounding houses for five years if they would thatch their roofs. That would have made their property look like peasant cottages and his house, by comparison, like a manor house. The neighbors did not take him up on the offer, for “Americans, while occasionally willing to be serfs, have always been obstinate about being peasantry.”<sup>91</sup>

In the Progressive Era, there was a robust critique of vested rights, which partially manifested itself in legal theory as a focus on economics and the effects of legal rules, rather than a backward-looking precedent.<sup>92</sup> The legal theory ran alongside popular critiques of property. President Theodore Roosevelt spoke of the sometimes conflicts between human rights and property rights. “Ordinarily, and in the great majority of cases,” Roosevelt said, “human rights and property rights are fundamentally and in the long run identical; but when it clearly appears that there is a real conflict between them, human rights must have the upper hand, for property belongs to man and not man to property.”<sup>93</sup>

Such protection of human rights at the expense of property rights—or maybe it is more appropriately phrased as the use of property rights to promote human rights—appeared in court cases as well. For instance, as a lawyer in *Muller v. Oregon*, Louis Brandeis supported the robust regulation of business and

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<sup>89</sup> *De Peyster*, 6 N.Y. at 505.

<sup>90</sup> F. SCOTT FITZGERALD, *THE GREAT GATSBY* (1925).

<sup>91</sup> *Id.* at 88.

<sup>92</sup> MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 187-90 (1992) (focusing on legal realism’s critique of classical legal thought and depicting it as out of touch with modern economics and social justice); *see also* Alfred L. Brophy, *Did Formalism Never Exist?*, 92 TEX. L. REV. 383, 407 (2013) (discussing Roscoe Pound’s ideas that economics was replacing backward-looking focus on history in law).

<sup>93</sup> HAROLD HOWLAND, *THEODORE ROOSEVELT AND HIS TIMES* 114 (1921).

the limitation of freedom of contract, a principle ally of property rights.<sup>94</sup> Years later, his *Louis K. Liggett Co. v. Lee* dissent would have upheld a statute that imposed a differential taxation on chain stores.<sup>95</sup> “We learned long ago that liberty,” Brandeis wrote, “could be preserved only by limiting in some way the freedom of action of individuals; that otherwise liberty would necessarily yield to absolutism; and in the same way we have learned that unless there be regulation of competition, its excesses will lead to the destruction of competition, and monopoly will take its place.”<sup>96</sup>

Probably the leading academic statement about the way property should serve human rights came from Morris Cohen, whose article titled *Property and Sovereignty*, which was published in the *Cornell Law Quarterly* in 1927, still sounds as fresh as if it were written recently.<sup>97</sup> Its focus on property’s control over sovereignty and its suggested solution—a focus on the ways that property should promote human rights and personhood—presage the important recent work of progressive property scholars.<sup>98</sup> For Cohen predicted that a “government which limits the right of large land-holders limits the rights of property and yet may promote real freedom.”<sup>99</sup> He focused on the ways property exists in a web of human relations and ought to promote those relations. “Property owners, like other individuals, are members of a community and must subordinate their ambition to the larger whole of which they are a part. They may find their compensation in spiritually identifying their good with that of the larger life.”<sup>100</sup>

## VI. Contemporary Property and Anti-Feudalism

The dreams of Progressive Era thinkers to limit property through regulation culminated in the New Deal, which through tax and administrative law curtailed the limits of private property. And in a series of Supreme Court decisions in the 1940s, it literally turned private property into public property for state action purposes.<sup>101</sup> The Civil Rights Act of 1964 represented another important sign

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<sup>94</sup> *Muller v. Oregon*, 208 U.S. 412 (1908); see also HORWITZ, *supra* note 92, at 188-89 (discussing Brandeis’s advocacy in *Muller* and how he argued law as “out of touch” with reality).

<sup>95</sup> 288 U.S. 517, 541 (1922) (Brandeis, J., dissenting).

<sup>96</sup> Louis Brandeis, *The Regulation of Competition Versus the Regulation of Monopoly: An Address to the Economic Club of New York on November 1, 1912*, available at <http://www.law.louisville.edu/library/collections/brandeis/node/260> (last visited Feb. 22, 2015).

<sup>97</sup> Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8, 19 (1927).

<sup>98</sup> For a recent exploration of the relationship between property and sovereignty that takes inspiration from Cohen, see PROPERTY AND SOVEREIGNTY: LEGAL AND CULTURAL PERSPECTIVES (James Charles Smith ed. 2013).

<sup>99</sup> Cohen, *supra* note 97, at 19.

<sup>100</sup> *Id.* at 8; see also GREGORY ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970, at 340-42 (1998) (locating Cohen as a progressive and noting his interest in regulation of property).

<sup>101</sup> See *Marsh v. Alabama*, 326 U.S. 501 (1946); also see *Shelley v. Kraemer*, 334 U.S. 1 (1948) (turning the enforcement of private covenants into state action). While *Shelley*

that there is a right for people to access private property on an equal footing without regard to race.<sup>102</sup> The Act made clear the important limitations of the right to exclude and added legitimacy to the rebalancing of rights between owners and non-owners, in the direction of non-owners.

In the wake of the Act, there was growing evidence that courts and legislatures increasingly protected the rights of non-owners against owners, or amplified rights that already existed. Among the areas that one might point to is landlord-tenant law. There is the famous New Jersey case of *State v. Shack* that protected the right of migrant workers to have health and legal assistance at their homes on a migrant farm camp, even though their landlord (and employer) objected.<sup>103</sup> The decision echoed the claims of human rights over property rights<sup>104</sup> that had been heard since at least the early twentieth century—and revived during debate over the Civil Rights Act of 1964. For those looking for contemporary evidence of the anti-feudal strain in American property law, *State v. Shack* is a great starting point. For it is an express recognition of the limitations of a landlord's dominion over the lives of his tenants.

Another and more pervasive sign of the limitations of landlords over their tenants is the implied warranty of habitability, which is imposed by statute in many jurisdictions now.<sup>105</sup> There are other, still expanding doctrines protecting tenants, such as the duty to inspect premises for lead paint.<sup>106</sup>

If one is thinking about the right of access to private property, one might think of easements that in recent years have been found by prescription for Native Americans to access a holy site in *United States v. Platt*,<sup>107</sup> or the

continues to be criticized for its expansion of the Fourteenth Amendment to private action, see, e.g., Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided: Some New Answers*, 95 CAL. L. REV. 451 (2007) (interpreting *Shelley* as involving the Thirteenth rather than the Fourteenth Amendment), one picture that emerges from the NAACP's argument in *Shelley* is that a larger percentage of the desirable housing stock in many of our Nation's most populous cities in the immediate aftermath of World War II had restrictive covenants on them. Thus, instead of seeing *Shelley* as a dispute over occupancy of a single house in St. Louis, Missouri, if we think of *Shelley* as representing a statement about housing nationwide, it is perhaps easier to see the erasure of the distinction between public and private action. See Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 WASH. U. L.Q. 737 (1989); see also Wendy Plotkin, "Hemmed In": *The Struggle Against Racial Restrictive Covenants and Deed Restrictions in Post-WWII Chicago*, 94 J. ILL. ST. HIST. SOC'Y 39 (2001) (discussing the wide swaths of desirable housing in Chicago that were unavailable to African Americans).

<sup>102</sup> See, e.g., Alfred L. Brophy, *The Civil Rights Act of 1964 and the Fulcrum of Property Rights*, ALA. C.R. & C. L. L. REV. (forthcoming 2015).

<sup>103</sup> 277 A.2d 369 (1972); Sullivan, *supra* note 55, at 19.

<sup>104</sup> *Shack*, 277 A.2d at 372; see also *id.* at 373 (citing, inter alia, 5 THOMAS R. POWELL, REAL PROPERTY, § 745 (Patrick J. Rohan ed. 1970), to explain limitations on property rights).

<sup>105</sup> See, e.g., Zachary Bray, *The New Progressive Property and the Low-Income Housing Conflict*, 2012 BYU L. REV. 1109 (2012); see also *Hilder v. St. Peter*, 478 A.2d 202 (Vt. 1984).

<sup>106</sup> See *Chapman v. Silber*, 760 N.E.2d 329 (N.Y. 2001).

<sup>107</sup> *United States ex rel. Zuni Tribe of N.M. v. Platt*, 730 F. Supp. 318 (D. Ariz. 1990).

easements by implication to visit the graves of relatives buried on private property that are imposed by statute or judicial decision in many jurisdictions,<sup>108</sup> or the right to trespass and hunt on unmarked, private land.<sup>109</sup> Perhaps the tragedy that is division of land and ultimately loss of land through heirs' property<sup>110</sup> can be mitigated by an expanded adverse possession doctrine that allows family members who are on property for extended periods of time to the exclusion of co-owners who are out of possession to claim exclusive title to the property. Similarly, some people who are descended from those who have been exercising gathering rights from land for generations have had those rights respected.<sup>111</sup>

Sometimes legislatures go so far as to be explicit about the balancing of the rights of the dispossessed. In Hawaii, a statute allows courts to “contemplate and reside with the life force and give consideration to the ‘Aloha Spirit.’”<sup>112</sup> Yet even when there is a question about the personhood theory—with the idea that property should enhance human flourishing—the common law supports a balancing approach. Sometimes common law itself is set up for fairness. William Blackstone, for instance, thought the common law was opposed to slavery.<sup>113</sup> To take examples from contemporary law, injunctive relief doctrine balances the rights of neighbors and takes the hard edge off of property, to allow someone who will suffer undue hardship to avoid an injunction if the benefit to the person seeking an injunction will be comparatively slight.<sup>114</sup> And there are other common law doctrines that hold out the promise of disciplining the irrational prejudices of property owners. *Shelley v. Kraemer* might, for instance, have been

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<sup>108</sup> See, e.g., Right Of Access To Cemetery On Privately Owned Or Leased Property, ALA. CODE § 35-1-4 (1975); see generally Alfred L. Brophy, *Grave Matters: The Ancient Rights of the Graveyard*, 2006 BYU L. REV. 1469 (2006) (exploring the origin and scope of legal theories used to gain property rights in the visitation of graves).

<sup>109</sup> See generally Trespass for purposes of hunting, etc., without written consent, N.C. GEN. STAT. § 14-159.6 (2011) (providing that land must be marked in order to hold trespasser liable); see generally ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND 29-60 (2007) (discussing “[t]he lost right to roam”).

<sup>110</sup> See generally Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1 (2014) (discussing problems with heirs' property).

<sup>111</sup> See *Lobato v. Taylor*, 70 P. 3d 1152 (Colo. 2003) (en banc). *Labato* recognized limited rights for a limited set of people whose rights had not been extinguished in litigation stretching back to the 1960s. But see *Sanchez v. Taylor*, 377 F.2d 733, 739 (10th Cir.1967) (holding certified title in fee simple trumps community's claims to continued historic use of land “for which the disputed land is best adapted”).

<sup>112</sup> HAW. REV. STAT. § 5-7.5(b) (1993); see also Alfred L. Brophy, *Aloha Jurisprudence: Equity Rules in Property*, 85 OR. L. REV. 771 (2006).

<sup>113</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*411. (“[P]ure and proper slavery does not, nay cannot, subsist in England; such I mean, whereby an absolute and unlimited power is given to the master over the life and fortune of the slave. And indeed it is repugnant to reason, and the principles of natural law, that such a state should subsist any where.”).

<sup>114</sup> See, e.g., *Brown v. Voss*, 715 P.2d 514 (Wash. 1986).

premised on the common law doctrine that restricts undue restraints on alienation.<sup>115</sup>

Or, to take a more recent example, a restrictive covenant limiting property use to single family residential use may reasonably be interpreted as allowing group homes.<sup>116</sup> The Fair Housing Act, moreover, provides statutory protection for group homes for people with mental and physical disabilities.<sup>117</sup> But sometimes, maybe even often, core common law principles protect the rights of the humble, unexpected as that might be.<sup>118</sup>

To return now to the equity that enforces rights—come back to Aspasia Mirault’s case before the Georgia Supreme Court in 1878.<sup>119</sup> She passed away before the Civil War, but her trustee had maintained ownership of the property for her heirs. Then in the 1870s, those heirs tried to claim title outright from the trustee’s heirs. Despite a trial court decision in their favor, Mirault’s heirs ended up losing because of the pre-Civil War statute that prevented free people of African descent from owning the property. Unpaid taxes interfered as well—and so Mirault’s heirs were unable to claim the property. This result testifies to the perhaps more prevalent cases in American history where property doctrine works harsh and facially unfair results. But it is also, perhaps, a reminder of the need for a serious look at reparations for past injustices.<sup>120</sup> Meanwhile, at other times—and increasingly it seems—calls for injecting more fairness into property doctrine are heard and followed.

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<sup>115</sup> *Direct Restraints Upon Alienation of Fee Simple Estates: Covenant Against Occupancy by Negroes*: Meade v. Dennistone et al., 2 MD. L. REV. 363 (1938) (asking whether racially restrictive covenants are prohibited restraints on alienation); *see also* Title Guarantee & Trust Co. v. Garrott, 183 P. 470 (Cal. Dist. Ct. App. 1919) (striking down a restraint against alienation to people of African, Chinese, or Japanese ancestry). The doctrine of undue restraint on alienation had been tried and rejected, to be sure, in some state cases. *See, e.g.*, Lyons v. Wallen, 133 P.2d 555, 558 (Okla. 1942) (noting that such covenants are upheld, and citing, inter alia: Corrigan v. Buckley, 271 U. S. 323 (1926); Torrey v. Wolfes, 6 Fd.2d 702 (D.C. Cir. 1925); Russell v. Wallace, 30 Fd.2d 981 (D.C. Cir. 1929); and Koehler v. Rowland, 205 S.W. 217 (Mo. 1918)). Nevertheless, such cases also rejected constitutional arguments against the servitudes. *Lyons*, 133 P.2d. at 558.

<sup>116</sup> Hill v. Cmty of Damien of Molokai, 911 P.2d 861, 865-71 (N.M. 1996).

<sup>117</sup> *See Cmty of Damien of Molokai*, 911 P.2d at 871-76.

<sup>118</sup> *See generally* Brophy, *supra* note 112 (suggesting ways that property law, especially in Hawaii, uses “equity rules”—principles regarding equitable relief—to balance rights of owners and non-owners).

<sup>119</sup> Swoll v. Oliver, 61 Ga. 248 (1878).

<sup>120</sup> *See generally* BERNADETTE ATUAHENE, WE WANT WHAT’S OURS: LEARNING FROM SOUTH AFRICA’S LAND RESTITUTION PROGRAM (2014) (discussing South Africa’s unique land restitution program that attempted to provide both reparations as well as restoration of dignity to those dispossessed of land during colonization and apartheid).