STARTING PROPERTY*

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> Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law.[1]
>
> Justice Stanley Reed
> Tee-Hit-Ton Indians v. United States (1955)

> The juxtaposition of the rule of first (or prior) possession, and the rule of conquest builds a deep tension—I am tempted to call it a contradiction— into the fabric of private law.[2]
>
> Richard A. Epstein

How should the property law course begin? The traditional way to start the course is to consider the origins of property rights. Where do they come from? How do unowned objects come to be owned? What is the original source of title? This way of proceeding seems to make sense. After all, we usually begin at the beginning. This suggests that we should ask how people come to be owners before asking what rights go along with ownership, what limits the law places on their rights and the procedures for transferring their rights.

This way of beginning has drawbacks, however. It is sometimes *not* good to begin at the beginning. Sometimes the beginning is incomprehensible without background information that would help us make sense of what it is that is being begun. Beginning with the origins of property rights may be exactly the wrong way to begin a property course. I do not mean to argue that it is inherently wrong to begin property at the beginning. Rather, I want to point out dangers with proceeding in this way and suggest alternative ways to start Property.

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1. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 285 (1955).

2. Richard A. Epstein, *Property Rights Claims of Indigenous Populations: The View From the Common Law*, 31 U. TOL. L. REV. 1, 4 (1999).

I will begin by reviewing how current property law casebooks begin and commenting on the messages these beginnings are likely to convey to students. While it is true that most professors do not teach materials in books in the exact order in which they appear in those books, it is nonetheless true that the organization of a casebook conveys an implicit message about where to start. I will argue that most property casebooks present a partial and arguably inaccurate picture of the origins of property rights or at least an inaccurate picture of how people acquire property today. I will then suggest reasons why one might choose not to start with original acquisition of property. I will look to contract law and consider the reasons that the legal realists (beginning with Lon Fuller's casebook in 1947) began contracts books at the end by considering remedies for breach rather than at the beginning with rules of contract formation. I want to suggest the relevance this procedure might have for property law.

I. BEGINNING AT THE BEGINNING

Most casebooks begin at the beginning by considering the original acquisition of property. Almost all books suggest that *possession* is the root of title. Many do this by beginning with the law of wild animals. A favorite place to start is the old case of *Pierson v. Post.*[3] Although one can derive many lessons from this case, it inevitably stands for the proposition that one can acquire ownership of a wild (unowned) animal by capturing it.[4] Other casebooks illustrate the law of first possession by beginning with the law of finders.[5] Although the traditional rules are complex, they generally teach that a finder of an unowned object may keep it while a finder of an object that had a prior owner generally must return it either to the owner of the object or the owner of the land on which it was found if they seek its return.

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3. Pierson v. Post, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

4. The following casebooks start either with Pierson v. Post or a similar case illustrating the law of capture of wild animals: ROGER BERNHARDT, PROPERTY: CASES AND STATUTES (1999); BARLOW BURKE, ANN M. BURKHART & R.H. HELMHOLZ, FUNDAMENTALS OF PROPERTY LAW (1999); CHARLES DONAHUE, JR., THOMAS E. KAUPER & PETER W. MARTIN, CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION (3d ed. 1993); JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE (1998); J. GORDON HYLTON, DAVID L. CALLIES, DANIEL R. MANDELKER & PAULA A. FRANZESE, PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS (1998); SHELDON F. KURTZ & HERBERT HOVENKAMP, CASES AND MATERIALS ON AMERICAN PROPERTY LAW (3d ed. 1990); GRANT S. NELSON, WILLIAM B. STOEBUCK & DALE A. WHITMAN, CONTEMPORARY PROPERTY (1996).

5. The following casebooks start with the law of finders: JAMES L. WINOKUR, AMERICAN PROPERTY LAW: CASES, HISTORY, POLICY AND PRACTICE (1982); SANDRA H. JOHNSON, PETER W. SALSICH, JR., THOMAS L. SHAFFER & MICHAEL BRAUNSTEIN, PROPERTY LAW: CASES, MATERIALS AND PROBLEMS (2d ed. 1998).

Other casebooks illustrate the rule of first possession by using *Johnson v. M'Intosh*,[6] a case that asks us to consider who, exactly, were the first possessors of land in the United States. Whatever interpretation one adopts, the case stands for the proposition that first possession is the root of title. Under one interpretation, the first possessors of American land were the American Indian nations. According to Chief Justice Marshall's opinion in *Johnson*, their original title was transferred to the United States (or prior colonial powers). The U.S. government then transferred title to particular lots to individual title holders. This story vindicates the law of first possession, although it also injects a dissonant note into the story; after all, the original title of the tribes was taken in a problematic procedure known as conquest—a procedure that failed adequately to protect the rights of first possessors by taking property from them against their will. Nonetheless, conquest had the effect of lawfully (although unjustly) transferring property rights from first possessors to a subsequent set of possessors.[7]

Under an alternative interpretation, *Johnson* may be used to present the argument, accepted by John Locke[8] but not by Chief Justice John Marshall,[9] that the Indians were actually *not* the first possessors of land in the United States. The tribes arguably did not "possess" the land because they did not enclose it, improve it occupy it, or otherwise treat it as something they owned and which therefore was reduced to private property.[10] Under this view, when the Europeans came, the land was unpossessed; thus the Europeans were the first possessors. This story justifies rather than problematizes conquest; it suggests that the colonial powers "captured" or possessed lands that had previously been, if not vacant, unclaimed. Like the first interpretation, it

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6. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

7. The following casebooks start with *Johnson v. M'Intosh*: RICHARD H. CHUSED, CASES, MATERIALS AND PROBLEMS IN PROPERTY (2d ed. 1999); JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY (4th ed. 1998); JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES (3d ed. 2002).

8. *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 29 (Thomas P. Peardon ed., 1952) (1690) ("Thus in the beginning all the world was America."). *See* Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1, 3 n.4 (1983), *quoted in* DUKEMINIER & KRIER, *supra* note 7, at 16-17.

> [Locke] reasoned that the Indians' occupancy of their aboriginal lands did not involve an adequate amount of 'labor' to perfect a 'property' interest in the soil. His argument helped frame and direct later debates in colonial America on the natural rights of European agriculturalists to dispossess tribal societies of their land base.

Id.

9. *Johnson*, 21 U.S. at 588 ("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 limit.").

10. For a Supreme Court opinion that accepts this implausible and discriminatory view, see Tee-Hit-Ton Indians v. United States 348 U.S. 272, 272 (1955).

vindicates the idea of first possession. This theme is buttressed by the fact that most books that begin with *Johnson* quickly turn to *Pierson* or its equivalent to emphasize the idea that possession is what matters in establishing original title.

The possession theme is further strengthened in most casebooks by placing the law of adverse possession near the front of the book. Although this topic does not concern original possession, it suggests that if an owner effectively abandons her own property by not using it or by allowing occupation of that land by another, the law will vest ownership in the one who "possesses" the property, even if (or perhaps precisely because) the possession was wrongful. Teaching adverse possession near (or after) *Johnson* may similarly convey the message that, wrong as conquest may have been, the subsequent, long standing possession of Indian lands by the United States has in fact vested legitimate property rights in the U.S. and the non-Indians to whom it granted tribal lands.

Alternatives to possession as a source of initial acquisition are often presented in property casebooks. Those in greatest use are *labor* and *investment*. *Pierson* itself is often used to illustrate the proposition that those who work to capture an animal get to keep the animal as their own. This principle rewards work and investment while distinguishing between those whose labor successfully results in production of property (those who capture and subdue the fox) and those whose labor was not fruitful (those who chased in vain). Some books include *International News Service v. Associated Press*[11] or similar cases in the introductory materials to illustrate the way in which the law of unfair competition protects property rights by preventing the theft of intellectual property.[12]

Beginning the property course with the origins of ownership and answering the question of ownership by reference to possession and/or labor may suggest that individuals deserve the property they have acquired. The only thing left to discuss is the scope of the rights they have as owners and the means by which they may transfer those rights. This message may be justified by a Lockean theory of rights that justifies property as deserved when it is based on "mixing one's labor"[13] with unowned objects or by a Benthamite utilitarian theory that recognizes the social benefits of assigning individuals control of property in some manner.[14] Conquest provides a troubling aspect to the actual historical record in the United States,[15] but it is generally presented

11. Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918).

12. *See, e.g.*, DUKEMINIER & KRIER, *supra* note 7, at 62.

13. LOCKE, *supra* note 8, at 17.

14. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., 1996) (1789). *See also* JOHN STUART MILL, UTILITARIANISM (Roger Crisp ed., 1998) (1863).

15. DUKEMINIER & KRIER, *supra* note 7 (observing that "the ongoing history of relations between Native Americans and the U.S. government has not been a very happy one").

as something unfortunate that happened in the past and does not have "much immediate relevance today."[16]

It is possible, of course, to teach the same material in very different ways. One may start a property law course with issues of possession, labor or conquest and ask critical questions about them. One might emphasize, for example, that the possessory rights of Indian nations were not uniformly respected.[17] Conquest as a source of property rights suggests that property has an unjust origin in American history. Similarly, one might note that most African Americans did not own the product of their own labor and were themselves owned by others. Even when freed, they were never compensated for hundreds of years of uncompensated labor.[18] In a similar vein, one might call attention to the fact that much of the work performed by women has been inside the home and has been done "for free" such that their labor did not generate property rights for themselves.[19]

It is also possible to teach that old favorite, *Pierson v. Post,* in a manner that de-emphasizes the idea of possession as the root of title. For example, the case raises the issue of interference by one person with the other's pursuit of the fox. Was the original pursuer entitled to be left alone in his pursuit once the second hunter noticed him closing in on the fox? The second hunter was arguably engaged in a form of unfair competition. This message might be strengthened by following *Pierson* with *International News Service.* This approach emphasizes the relational aspects of the cases. From this perspective, the question is not about the relationship between the hunter and the prey (the laborer or possessor and the object) but between the two hunters (or two news gatherers). What constitutes fair competition and what distinguishes it from unfair competition? Unfair competition can be understood as a form of theft that deprives the victim of property rights that rightly should belong to her. Viewed in this light, *Pierson* is not about the means of original acquisition but rather concerns social relationships. What are the basic ground rules of social

16. *Id.* at 12. Alternatively, Dukeminier and Krier note the argument made by Locke, as well as others, that the Indians did not sufficiently work the land or possess it so as to establish legitimate property rights. *Id.* at 16-17. In that sense, the land may have been viewed as unowned and open for first possession by the European conquerors.

17. ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: DISCOURSES OF CONQUEST (1990). *See also* Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481 (1994) [hereinafter Singer, *Well Settled*].

18. RANDALL N. ROBINSON, THE DEBT: WHAT AMERICA OWES BLACKS (2000).

19. Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994). *See also* Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55 (1979); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000); JOAN R. WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000).

interaction and interpersonal respect that will govern our pursuit of our objects?[20]

Adopting either a critical or a relational approach to the subject is helpful because it draws students' attention to issues that are problematic to the basic assumptions underlying possession and labor as true and legitimate original sources of property. I want to suggest that it is important for teachers of property law to help students learn to question the assumption that most property rights originate in an act of possession of previously unowned property or in an act of labor that creates value for the first time. Both the labor and possession theories portray property as unproblematic and presumptively legitimate. The possession of an owned object and the mixing of one's labor with such an object appear to be acts that not only harm no one else but benefit others by creating things of value.[21] Recognizing property rights in such legitimately created objects thus seems both fair and efficient; it rewards effort and grants incentives to create value. A relational or critical approach brings to light defects in this way of thinking. It brings to light the fact that possessory acts are not self-regarding; they involve claims that others should defer to the possessor's power over the thing even if those others need what the possessor grabbed.[22] Property involves relations among people, not relations between people and things.

Why is it important to question the notion of possession as the root of title? The first, and most significant problem with presenting possession as the source of title is that it is almost certainly not true today that most property rights have their origin either in possession of unowned objects or in the act of mixing one's labor with such objects. There is no land left in the United States that is not owned by someone. Additionally, there are few items of personal property lying around ready to be seized by those who are vigilant or resourceful enough to "hunt" and capture them. The very irrelevance of the law of wild animals to the day-to-day life of most Americans suggests that we must look far afield to find examples of unowned objects that come to be owned by individual capture. Indeed, even the ruling of *Pierson* is suspect when one recognizes that the case rested on the proposition that the hunt was taking place on supposedly unowned land. Today if the hunt were to take place on land owned by someone else, one would not be rewarded with ownership of the fox if one were trespassing. Moreover, if one were on the land with permission of the landowner, then ownership of the fox would be

20. The approach in this paragraph is based on a conversation with David Barron.

21. For an argument that the establishment of individual property rights by individual action without the consent of others does impose costs on others, see JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988).

22. *See* Laura Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033 (1996); WALDRON, *supra* note 21.

determined by the scope of permission granted by the landowner to the hunter. If the owner allowed the hunter to hunt on the owner's land and keep whatever he could capture or kill, then ownership would go to the hunter. However, if the arrangement did not allow hunting or did not include permission to take animals found on the land, then ownership would not go to the hunter who shot an animal on the land.

The problem is not only that possession is not the most important source of original title today, but also that possession has historically *never* been the only source of title. This is not to say that possession is not and never was important. It is to say that possession is only one of a number of major sources of original title. While the importance of labor and investment has already been noted, it is important to note that labor and investment take place in the context of previously assigned property rights in the objects being manipulated by that labor or investment. Prior to such manipulation, a social decision is necessary to determine who owns the materials being made into a valuable object, just as a decision must be made as to who owns the land on which the work is to be performed. The source of title may have been the original possession of land by American Indian nations. However, the process of conquest in the United States generally took the form of transfers of land from Indian nations to the United States for which some, perhaps inadequate, compensation was given. Once title was in the hands of the United States, it issued patents to individuals. The original source of almost all land titles in the United States is therefore the government of the United States itself. While we may entertain romantic notions of settlers going into the wilderness, staking claims on land, possessing it, and opening up the wilderness, their property rights were only lawful when the United States actually gave them title.

People who work have to work somewhere. They either work on their own land or they work for an employer that owns or leases land. Therefore, the contexts of work and labor take place against the backdrop of land ownership that originates in a government grant. Moreover, no one works completely alone. Even self-employed persons need to obtain materials with which to work, requiring food and shelter to sustain them in the meantime. Work, therefore, takes place against a backdrop of contract. In addition, the majority who are not self-employed either work for someone else or hire others to work for them. Work also takes place in the context of relationships with others. These relationships have legal consequences that are determined by the law of contract and employment regulation. This picture places the contract system at the center of the work and investment saga.

The contracts system includes law, incorporating rules that determine when and how contracts will be enforced. Sometimes the law provides remedies for breach of contract to protect the reliance interests of those to whom promises were made, creating property rights in expectations. At other times, the law provides few or no remedies for breach of contract, effectively

protecting the autonomy interests of those who change their minds after making a promise. Contract law balances the security interests of promisees in relying on promises against the freedom of action interests of promisors in having the ability to change their minds and escape obligations that have become onerous.

Thus, work does not create property by itself. It creates property in conjunction with contractual agreements. Those agreements, in turn, are regulated and given (or not given) effect by legal rules that determine the balance of power between the parties to consensual relationships. The state, in conjunction with the individual parties, determines the contours of those relationships. This means that, in addition to possession and labor, we must add both governmental grants and contracts as major sources of original title to property.

Another major source of original title to property is the family. Property rights originate, for many people, in parental support, inheritance and marriage or equivalent relationships. One might argue that such relationships do not involve "original" title. After all, they do involve transfers of property from husbands to wives (and vice versa) and from parents to children. Such arrangements, however, do create original title in the sense that it is not a forgone conclusion that owners of property have the right to pass the property along to their descendants. It was the parents who either "possessed" the land, "captured" the fox or performed the "work" or "investment" that created the wealth that gets transmitted to the children. From the children's standpoint, the source of their property is their parents. The children have not engaged in their own acts of possession or labor such that they would deserve original ownership of the property. Some legal scholars, including John Chipman Gray, have argued that the transmission of inherited wealth is sometimes harmful to children because it saps them of their own initiative.[23]

In any event, the family relationship creates a context for the creation and transmission of property rights that is far more important today in determining the distribution of wealth in the United States than is the ability to capture a wild animal on unoccupied land. Moreover, inheritance is a far more problematic source of wealth than either possession or labor. If inheritance is a major source of wealth, and if the children of wealthy families are more likely to be "well off" than are the children of poor families, then property is distributed on the basis of inherited family status rather than individual merit—a problematic conclusion given American values.

If possession is not the main way people acquire property, we might begin the property course by conveying the idea that property comes from multiple

23. *See* Gregory S. Alexander, *The Transformation of Trusts as a Legal Category, 1800-1914*, 5 LAW & HIST. REV. 303 (1987). For a recent argument against unlimited inheritance, see Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69 (1990).

sources. While these sources include possession and labor, they also include conquest, government grant, family (including parental support, inheritance, marriage and nonmarital partnerships), gift and contract. A number of property casebooks do this quite well. Richard Chused's casebook,[24] for example, which begins by discussing *Johnson* and adverse possession law, proceeds immediately to a discussion of family property (with an introduction to ownership forms available to unmarried partners), and then proceeds to address inheritance, wills, gifts and business property. Beginning a discussion of property law in this way gives a contemporary context as well as a more accurate picture about the ways in which property is acquired today. I have similarly attempted to do this in my own casebook by presenting the concepts of conquest, government grant, family, gift, possession and transfer as alternative sources of ownership rights.[25]

II. BEGINNING AT THE END

Presenting a variety of sources of title of property responds to the factual and normative inadequacies of the current possession model. However, the model fails to respond to another major problem. Beginning with the original acquisition of title assumes that students have some sense of what property is and what it means to have title to it. This assumes that we can sensibly adjudicate a dispute between competing claimants to title without first understanding what it would mean for one of them to win. If one party gets title, what rights exactly will they be getting?

This discussion presents a problem because granting title to one of the parties will not necessarily end the case. The fact that one is a titleholder does not necessarily mean one will win a dispute with a non-titleholder. If this were true, the property law casebooks would be rather short. We would have rules about initial acquisition, such as inheritance laws, information about the recording system and the procedures for transfer, but not much else. In fact, the property law casebooks are chock full of rules that limit the rights of owners in order to protect the legitimate interests of both non-owners and the community. In many property law casebooks, the majority of the cases describe situations in which the titleholders *lose*. They lose because title is not everything. Moreover, there are good reasons to limit the rights of titleholders. For example, ownership rights must be limited to protect the rights of other owners, of non-owners and of the public as a whole.[26]

The problem is that students are likely to have the intuitive conception that property rights are absolute.[27] They are also likely to think that ownership is

24. CHUSED, *supra* note 7.

25. SINGER, *supra* note 7.

26. JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000).

27. *See* Underkuffler-Freund, *supra* note 22.

defined by title. If a case involves a choice of competing owners, their views about its appropriate resolution are likely to be heavily influenced by the fact that they assume that whoever wins will have absolute control over the property. If, on the other hand, they understood that property rights are often limited to protect the legitimate interests of others, including the interests of non-owners, they would recognize that they could protect the legitimate interests of a particular party even if that party is not assigned title.

An alternative way to start the property course is to skip the question of initial acquisition altogether. Instead, we could start in the thick of things by addressing problems involved with property that is indisputedly owned by someone but whose use or transfer causes a conflict with the legitimate interests of others. We could begin, in other words, with conflicts between owners or between owners and non-owners.[28] A number of casebooks begin with cases that illustrate the fact that property rights are limited by the rights of other owners and by the legal rights of non-owners. The *Fundamentals of Modern Property Law* by Edward H. Rabin, Roberta Rosenthal Kwall and Jeffrey L. Kwall,[29] for example, begins by discussing the law of trespass, considering the limits of the right to exclude. It then proceeds to examine leaseholds and the estates system. The new edition of the Casner and Leach casebook by Susan Fletcher French, Gerald Korngold and Lea VanderVelde similarly begins with the right to exclude and limits to that right before proceeding to the law of wild animals and finders.[30]

Some casebooks take an alternative route. They include material on initial acquisition near the beginning of the book but introduce those legal issues by an extensive survey of alternative philosophical approaches to thinking about the meaning of property as both an individual right and a social institution. Examples include *Property: Land Ownership and Use* by Curtis Berger and Joan Williams[31] and *Property Law and Policy: A Comparative Institutional Perspective* by John Dwyer and Peter Menell.[32]

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28. The following books start with conflicts over property rights rather than issues of initial acquisition: JON W. BRUCE & JAMES W. ELY, JR., CASES AND MATERIALS ON MODERN PROPERTY LAW (4th ed. 1999) (beginning discussion of book with leaseholds); JOHN E. CRIBBET, CORWIN W. JOHNSON, ROGER W. FINDLEY & ERNEST E. SMITH, PROPERTY (7th ed. 1996) (discussing first the right to exclude); EDWARD H. RABIN, ROBERTA ROSENTHAL KWALL & JEFFREY L. KWALL, FUNDAMENTALS OF MODERN PROPERTY LAW (4th ed. 2000) (discussing first the right to exclude).

29. RABIN ET AL., *supra* note 28.

30. A. JAMES CASNER & W. BARTON LEACH, CASES AND TEXT ON PROPERTY (4th ed. 2000).

31. CURTIS J. BERGER & JOAN C. WILLIAMS, PROPERTY: LAND OWNERSHIP AND USE (4th ed. 1997).

32. DWYER & MENELL, *supra* note 4.

In 1947, Lon Fuller revolutionized contracts casebooks by beginning at the end.[33] Instead of asking how contracts are formed, he began *Basic Contract Law* by addressing remedies.[34] This procedure seems backwards. It would seem more natural to ask how contracts get formed (rules of offer and acceptance, consideration, promissory estoppel), then to address questions of interpretation and regulation of contract terms and then, finally, look to the remedies for breach. Yet, Fuller reversed this seemingly natural, chronological order, beginning with disputes over breach and asking how courts should respond to those breaches. Why did he do this?

There are several reasons. First, Fuller was a legal realist and he wanted students to understand the *consequences* of finding something to be an enforceable contract before they considered whether a particular set of actions created such an agreement. Fuller wanted to avoid asking an abstract question of whether a "contract" was formed. He thought we should think pragmatically about this question. Like Felix Cohen, he viewed the question of whether a "contract" had been made as a form of transcendental nonsense.[35] A pragmatist would ask: *Why* do we want to know whether there was a "contract"? The answer is that we want to know the answer to this question to determine whether a court will or should respond to a breach of a promise by imposing a remedy, either ordering someone to do what she promised to do or ordering her to pay damages in lieu of performance. The question is not a metaphysical one about whether something called a "contract" actually "exists." There is no Platonic form of a contract out there in the world that we are trying to match. People make all kinds of agreements and only some of them are enforced by courts. We are interested in knowing which commitments, under which circumstances, will or should result in a court using its power to coerce individuals either to perform or pay damages for nonperformance.

This legal realist outlook suggests that we see rights and remedies as linked.[36] More precisely, this outlook sees remedies as occurring prior to rights, since rights are defined by the scope of the remedies the law will grant to right-holders. A right without a remedy is not a right. Consider that contract law generally does not impose a remedy of specific performance. Courts usually do not require individuals to do what they promised to do. This is because, although we value the right to rely on promises made by others, we

33. LON FULLER, BASIC CONTRACT LAW (1947) (beginning with discussion of general scope of legal protection accorded contracts).

34. For a history of contracts casebooks and their relation to legal realism, see Karl Klare, *Contracts Jurisprudence and the First-Year Casebook*, 54 N.Y.U. L. REV. 876 (1979).

35. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

36. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, 184 (1992).

also value the right to change one's mind. We may create a property right in expectations and force promisors to keep their promises. However, this property right would often unduly interfere with the autonomy of the promisor, turning her into an indentured servant. Because we value autonomy, as well as property, the courts often refuse to grant specific performance. Instead, the usual remedy for breach of contract is damages. Moreover, those damages are often low. The courts impose an obligation on promisees to "cover" or otherwise mitigate damages. They do this for a variety of reasons. One reason, again, is that individuals who can costlessly cover have not been actually harmed by the breach and therefore have lost no property interests. If the promisee can costlessly cover and the promisor has strong financial or autonomy interests in changing her mind, then both fairness and efficiency may be promoted by allowing the promisor to breach.

If the law will not impose a remedy when one breaches a contract, it does no good to say that you have a "right" to have the contract enforced. The fact of the matter, according to a legal realist, is that you are legally free to breach the contract without penalty. If there is no remedy, then you have no right. If there is no penalty for breach, you are free to breach. It is misleading to talk about the "right to contract" without understanding that this right entails a choice between those situations in which the courts will protect the expectations of the promisee by enforcing the contract in some way and those situations in which the courts will not do so, effectively granting individuals the freedom both to make, *and to break,* contracts.

A second reason Fuller began with remedies is that students were likely to believe that a regime of contract entails enforcement of promises. They might even think that such enforcement would naturally take the form of forcing you to do what you promised to do. They might be reluctant to conclude, however, that someone should be forced to do what they promised to do. For example, suppose I accept an offer of admission to Boston University School of Law and am subsequently admitted to Boston College Law School where I would prefer to go. I decide to forfeit my deposit at BU and accept the offer at BC. BU then sues me, seeking an injunction ordering me to attend BU on the ground that, by accepting the offer of admission, I promised to attend. It violates norms of autonomy—not to mention the Thirteenth Amendment—to think of courts forcing people to take jobs they do not want to take. If I believe that contract enforcement entails making people do what they promised to do, and if I believe this sometimes interferes with legitimate interests in freedom of action, I might be inclined to conclude that there was no enforceable contract between BU and myself. If, on the other hand, I recognize that contract enforcement might take the form of damages and that such damages might be limited to the amount of a reasonable deposit that would allow me still to attend BC while protecting the financial interests of BU, I would not be so averse to finding an enforceable agreement to attend BU.

Knowing the *consequences* of finding an agreement to have been made may therefore influence one's willingness to find that such an agreement was actually made. Learning about remedies before learning about offer and acceptance may therefore affect students' views about whether to conclude that a contract was or was not made. Of course, it is possible to start a contracts course with contract formation and be sensitive to these issues. No doctrinal area will be fully comprehensible in isolation of others in the same (and even other) fields. There may even be other reasons for starting with contract formation, such as the fact that students have long been confused by contracts courses that start with remedies and may prefer to start with contract formation. Nonetheless, the point is that students' misconceptions about remedies may cause them to misperceive the choice actually presented in a case that raises the question of whether an enforceable commitment was made. The legal realist approach suggests that, from the very beginning, students should be confronted with the fact that choices must be made among alternative possible rules of contract and property law and that those choices implicate multiple and conflicting values.

III. BEGINNING IN THE MIDDLE

Just as students' misconceptions about remedies may cause them to misunderstand the actual issues in contract formation cases, students' misconceptions about the absoluteness of property rights may cause them to misperceive the issues at stake in cases of property acquisition. My casebook begins with the question of original acquisition because many professors seem to want to start there. I have adopted the approach of multiplying the sources of property rights. However, when I teach the course I begin my class with chapter 2 of my casebook. Like the Rabin, Kwall and Kwall casebook[37] and the Casner, Leach, French, Korngold and VanderVelde casebook,[38] I begin my course with the law of trespass and limits on the right to exclude designed to promote rights of access. I do this because I know students misperceive property rights as absolute and this misconception is likely to distort their understanding of the issues presented by property law disputes.

I begin my course neither at the beginning nor the end but in the middle. I begin not with original acquisition and not with remedies, but with disputes among owners and between owners and non-owners. My procedure is to introduce the students to the major rights, powers, privileges and immunities that may go along with ownership and to do so in the context of conflicts that arise in each of those areas. I begin with the right to exclude (trespass) and limits to that right (public accommodations law). I then move to the privilege to use property and limits to that right (nuisance). Then I cover immunity

37. *See* RABIN ET AL., *supra* note 29.

38. *See* CASNER & BARTON, *supra* note 30.

rights (the right not to have property taken from you without your consent) and limits to that right (adverse possession). Finally, I move to the power to transfer property and the substantial limits the legal system places on that right, including the regulation the law imposes on transfers of property rights through the law of servitudes, future interests, concurrent ownership rights, real estate transactions, leaseholds, fair housing law and real estate finance.

In each area, the goal is to introduce the students to conflicts that arise among owners, between owners and non-owners and between owners and the community. These conflicts ordinarily present legitimate interests on both sides and demonstrate the policies applicable to determining how to draw the line between competing interests and conflicting legal rights. Once the students understand the conflicts that arise, the fact situations in which they are likely to appear and the policies relevant to choosing alternative resolutions, they are likely to have a much more complex picture of what it means to have a private property system and the legitimate scope of rights that accompany ownership. They are more likely to understand the concepts of property and property law as embodying choices, value conflicts, and tensions. Such a sophisticated understanding will allow better understanding of what is at stake in the construction of the rules of property law.

In my own courses, because of limited time, I never get back to the issue of original acquisition. I address tribal property rights as contemporary questions, teaching the forms of title available to tribes and how they differ from the estates available in the non-Indian context. I also compare the application of the takings clause in the Indian and non-Indian context. Issues of possession are covered in the materials on adverse possession and, if I have enough time to cover it, I present a unit on personal property that would include the law of gifts and finders. Issues of work and investment are covered throughout the course or in a separate unit on intellectual property.

In effect, I begin and end in the middle. This way of organizing the course makes takings law quite problematic. If the takings clause prohibits the state from taking "property" without just compensation, and if "property" entails choices between competing interests and competing rights, then it becomes hard to say what is or should be an unconstitutional taking of property. This is as it should be. To find something to be a taking, one must conclude that the law, as applied to an owner, works a fundamental injustice rather than a choice between equally legitimate constructions of property. Given the number of choices that must be made to define property, the takings clause should have few applications. It should also be a difficult doctrine to apply because property rights are difficult rights to define.

IV. ENDING AT THE BEGINNING

In an article on beginnings, I should probably say something about endings. In recent years, I have ended my property course by introducing the

subject of American Indian tribal property, generally focusing on takings issues. I do this because this makes the contrast between Indian and non-Indian law especially stark. After learning numerous ways in which the law protects property rights, it comes as something of a shock for students to learn how United States law has treated Indian Nations. Protections routinely granted to non-Indian owners have, at times, been denied to Indian nations.[39] The origins of property in the United States appear not so benign when one considers the reality of conquest after all the hoary rhetoric deployed to protect the interests of non-Indian owners.

Nor is the problem merely an historical observation about the past. Recent Supreme Court cases have, in my opinion, often failed to provide equal protection to Indian nations by denying them protection for property rights that would have been recognized and protected in the non-Indian context.[40] In addition, treaties with Indian Nations have been given short shrift or ignored entirely in recent Supreme Court decisions.[41]

I end, rather than begin, with these cases because students are likely to assume that conquest was a terrible thing but that it happened a long time ago and has no contemporary relevance. Tribes own a substantial amount of land in the United States and continue to litigate issues regarding both sovereignty and property. Treating these issues at the end of the course allows students to consider how the contemporary cases involving Indian land claims would be resolved under the law applicable to non-Indians. They may then consider whether such principles are also applied in the Indian context. Sometimes the special rules of Indian law are deployed to give the benefit of the doubt to Indian nations. Often, however, the opposite has been the case.

Property in the United States originates in various acts of conquest. This is an uncomfortable truth. We might like to treat this fact as an unfortunate aspect of an era that is past; we might like to believe that we have gotten beyond all that. It turns out, however, that the past is never past. We deal

39. *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (holding that original Indian title is not "property" within the meaning of the Fifth Amendment).

40. *Compare* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) (finding a property claim in a tribe whose land was unlawfully taken by New York in the 1790s) *with* Blatchford v. Native Vill. & Circle Vill., 501 U.S. 775 (1991); *and* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997) (holding that tribes may not sue states in federal court to quiet title to tribal land wrongfully taken by the state) *and* Cayuga Indian Nation v. Cuomo, No. 80-CV-930, 80-CV-960, 1999 U.S. Dist. LEXIS 10579 (N.D.N.Y. July 1, 1999) (denying the remedy of ejectment for the wrongful taking of Cayuga lands by New York) *and* State v. Elliott, 616 A.2d 210 (Vt. 1992) (holding, contrary to federal Indian law, that Abenaki lands were lost through the "increasing weight of history"). *But see* Idaho v. United States, 533 U.S. 262 (2001) (holding in a 5-4 vote that Idaho had wrongfully occupied tribal lands in a case brought by the United States rather than by a tribe). *See also* Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991); Singer, *Well Settled*, *supra* note 17.

41. *See, e.g.*, Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001).

today with the consequences of that history. Such concerns are relevant, for example, to recent claims for reparations for African Americans who look to litigation granting back pay to slave laborers in the Nazi era in Germany and who ask why such compensation is not forthcoming to them. Understanding the justice and injustice of origins of property is crucial to understanding whether we do, or do not, have an answer to this question.