

POSSESSION AS THE ROOT OF TITLE

*Richard A. Epstein**

I. THE PROBLEM STATED

A beautiful sea shell is washed ashore after a storm. A man picks it up and puts it in his pocket. A second man comes along and takes it away from him by force. The first man sues to recover the shell, and he is met with the argument that he never owned it at all. How does the legal system respond to this claim? How should it respond?

The same man finds the same shell, only now the state, through its public processes, comes along and insists that the shell belongs to the common fund. It offers the man nothing for it, claiming that the shell was found by luck and coincidence and not by planned and systematic labor. How does the legal system respond to this claim? How should it respond?

The questions just put can recur in a thousand different forms in any organized legal system. The system itself presupposes that there are rights over given things that are vested in certain individuals within that system. And the system knows full well that these property rights in things are defined not against the thing, but over the thing and against the rest of the world; that property rights normally entail (roughly) exclusive possession and use of one thing in question and the right to transfer it voluntarily to another.¹ The exact contours of these rights, however important to basic theory, are not central to the main concern here. The more insistent question is: What principles decide *which* individuals have ownership rights (whatever they precisely entail) over *what* things.

The question must be distinguished from the related issue which simply asks what are the social or public functions of the institution of ownership. It could be decided that ownership is necessary to create effective incentives for the development and improvement of property or to reduce or eliminate conflicts between private persons. Yet even if these points are true, such broad justifications for ownership do not solve the more particular question of how given bits of property are matched with given individuals. It is to this question

* Professor of Law, The University of Chicago School of Law. A.B., Columbia College, 1964; B.A., Oxford University, 1966; LL.B., Yale University, 1968.

¹ The point is well known in the literature. Indeed its repetition begins the RESTATEMENT OF PROPERTY § 1 (1936).

that the common and civil law (both of which accept the desirability of private ownership) have responded with the proposition that the taking possession of unowned things is the only possible way to acquire ownership of them. As stated, the proposition assumes a central role in the development of any legal system, because it supplies the link between assertions of act and those of right. Yet the importance of the rule making original possession the source of ownership is matched by the absence of any systematic analysis of it. In this Article I hope to explore the strengths and weaknesses of the basic proposition and to give it — in at least more specific institutional contexts — a qualified endorsement. The path of the inquiry will be straightforward enough. I shall begin with an examination of common law cases and common law doctrine, and shade off into a more philosophical and institutional account of the same issues. I have no real hope that his, or any article, can offer a decisive resolution of such a fundamental and troublesome question, but I do hope to show that, however great the embarrassments of the simple common law rule, those of the most plausible alternatives are often greater.

II. THE INSTITUTIONAL FRAMEWORK

In dealing with the rule of first possession, it is vital to keep to the fore several institutional features that bind all common law (here used in the loose sense of case law, comprising both common law and equity) judges. The first of these points is that common law judges have — and traditionally have had — at their disposal only limited remedies to apply to redress a violation of a substantive right. The common law courts could award damages or demand the return of land or of a specific chattel; the courts of equity could enter decrees for specific performance (as in land sale contracts) or injunctions (as in nuisances). In both cases the judges have nothing like the vast administrative powers available to the officials in the modern bureaucratic state.

Now the question of remedy seems at first blush posterior to the more basic matter of right, and as a logical matter it is. As a historical and institutional matter, however, the two questions are very much intertwined. A court with modest remedial powers is not apt to choose, or even stumble upon, property doctrines whose enforcement requires elaborate administrative machinery. The definition of rights is therefore apt to be made along certain “natural lines”; there will be broad general propositions that can apply to all against

all, and there will be no reference to the numbers or formulas (you may build only thirty feet from the street, and you must leave ten percent of your land vacant on either side of your lot) that can be generated by direct administrative controls, such as zoning. The rule that possession lies at the root of title is one that a court can understand and apply; absent a better alternative it becomes therefore an attractive starting point for resolving particular disputes over the ownership of particular things.

Second, the common law court cannot order the docket of cases that come before it. It grows and develops with the society in which it emerges. The question, how does any person obtain rights against the world in any thing, may be first in the philosophical theory of property rights; yet there is no guarantee that this question will be first on the judicial agenda. Should the first case before the court concern the transfer of land by deed, then that is the question that must first be addressed, even if there is no explanation of why *A* has property rights in the land that he wishes to transfer to *B*. The intellectual process takes its toll upon the substantive results. A court will first make rules about the transfer, descent, and protection of property interests even for cases where the original claim of title rests upon first possession. How then can it escape the consequence of its decisions when called upon to adjudicate the force of the original title? The intellectual process forces common law courts to commit themselves on a succession of little points, which in turn denies them the freedom to switch ground when the large issues are formally presented for adjudication.

The judicial concern with its own docket influences the common law treatment of property rights in yet a third fashion. Although property rights are defined as against the entire world, they are fashioned in legal disputes between two (or at least very few) parties. The dispute may be between the plaintiff who found the shell and the defendant who took it from him. Third persons may as a matter of abstract theory have entitlements in the property in question; yet the very form of adjudication tends to postpone their claims until they themselves assert them.² The point is of especial

² The problem is, moreover, one of practical importance. Thus in order to complete a sale of land, the vendor may have to persuade his purchaser that title is clear. Such may be done by actions against known claimants against the land, but it is much more difficult to do so against unknown claimants. To meet this situation the courts have devised so-called actions to "quiet" title, which for the most part allow publication and notice to substitute for the individualized summons and complaint that initiates the usual civil action. It is generally

importance for possible ownership claims by the state, as actions between two private parties will never throw matters of public ownership into high relief. Although it is possible, and indeed correct, to argue that no adjudication between private parties can preclude the claims of the state, the steady stream of private litigation can set up the type of expectations that makes it very difficult for the state to assert its own ownership claims at some later date. The subject of original acquisition thus retains a strong private law character, one that tends to survive even when the question of the state interest is squarely raised in the eminent domain context.

III. FIRST POSSESSION: THE RULE STATED

Law then is not philosophy, and the treatment of its fundamental premises may lack the quest for universals that is the hallmark of much philosophical inquiry. *Pierson v. Post*,³ perhaps the leading case on the subject, is illustrative of the legal reluctance to examine first principles afresh. The case arose out of the following facts: The plaintiff below, Post, was pursuing a fox across an unowned stretch of beach with his hounds when Pierson, almost from nowhere, rode up to capture the fox, which he kept even after Post demanded it be handed over. Post then sued Pierson claiming that Pierson had "indirectly" injured Post by taking the fox into his possession. For the purposes of the argument, it was assumed, but not demonstrated, that the fox was unowned before the incident took place. The question was whether Post could get back "his" fox (or its value) from Pierson.

Such a case seems to present the ideal format for arguing out the essential legal issues. Yet what was done was as follows: Both the court and the dissent assumed that the only proper mode of acquiring ownership of unowned things was taking possession of them. What then followed was a dispute about the outer limits of the basic proposition. The plaintiff argued that the necessary possession was acquired when the plaintiff was in hot pursuit of an animal that, apart from the defendant's interference, he could have captured. The defendant argued that possession required complete capture by

recognized, however, that quiet title actions are inadequate in practice in most, if not all, jurisdictions. See C. DONAHUE, T. KAUPER & P. MARTIN, *CASES AND MATERIALS ON PROPERTY*, 291-92 (1974).

³ 3 Caines 175 (1805), 2 Am. Dec. 264 (N.Y. 1886).

the plaintiff: even the wounding of the animal when in hot pursuit did not amount to possession because of the many events that could have occurred between the original wounding and the eventual capture.⁴ The court in deciding for the defendant Pierson took the middle position, holding that "the mortal wounding of such beast, by one not abandoning his pursuit may, with the utmost propriety, be deemed possession of him."⁵ The dissent, looking more to the customs of sportsmen than the opinions of jurists, adopted the hot pursuit rule. Both the court and the dissent recognized that any common law rule could be superseded by any valid statute or public regulation that established ownership in some other fashion. The little question — what counts as taking first possession — received exhaustive attention. The large question — why is first possession sufficient to support a claim for ownership — received no consideration at all.

IV. THE LABOR THEORY: A RULE DEFENDED?

The treatment of the little question in *Pierson v. Post* does, however, provide some clue as to a possible approach to the larger question. Thus the dissent argued that the hot pursuit rule was necessary in order to protect the pursuer in his labor. The point of the argument is that, as an initial assumption, each person is entitled to ownership and control over his own labor. Where the pursuer by his efforts has worn down the fox, the late capture by the rival in effect amounts to an inadmissible appropriation of labor which the law should prevent. The justification for the hot pursuit rule does now, however, explain all the recurrent features of the law. Some labor goes unrequited when two pursue and one loses. Again, if *A* has given up the chase when confronted with sudden perils, *B* may capture with impunity even though his task was made immeasurably easier by *A*'s prior labors. Conversely, there are some things acquired not through labor but only by chance or good fortune and one who so acquires takes full and indefeasible title even though there was, except in a metaphorical sense, no expenditure of labor in either acquisition or cultivation.

The labor theory is, moreover, subject to difficulties even with respect to those things that are found or improved by extensive

⁴ "It is admitted that a fox is an animal *ferae naturae*, and that property in such animals is acquired by occupancy only. These admissions narrow the discussion to the simple question of what acts amount to occupancy, applied to acquiring right to wild animals." *Id.* at 177, 2 Am. Dec. at 266.

⁵ *Id.*

individual labor. Consider the following case, often debated in legal circles. *A* owns a piece of valuable marble; *B*, thinking the marble to be his own, works it in a way that enhances its value by fifty percent. He then learns that ownership was in *A*. *A* now sues to recover the possession of his (improved) marble, and the question is whether *B* is entitled to some setoff for the value that his labor has added to the marble in question.⁶ In this situation, the general tendency is to protect *B* in his labor. In the case just given, he can probably hold the marble as security for the payment of the value added, however measured; in cases in which the work is finished, and the value of the marble increased tenfold, he can probably substitute marble of like quality in its unworked state to discharge his obligation to *A*. In effect the rules seek by approximate means to sort out the joint contributions of *A* and *B*, of capital and labor, to a common enterprise. *A* cannot recover his property without any payment whatsoever, as the law in effect sets itself against the conversion of *B*'s labor by *A*.⁷ These simple examples show that it is possible for individual labor to become the source of entitlement even in the absence of a specific contract. Yet the nature of the relief afforded shows that the labor in question need not give complete ownership to the thing in question. Where the ownership claims of others are apparent, the individual labor may give rise only to a lien for services rendered and not an unchallenged claim to ownership of the thing itself.

The implications of this example, moreover, carry over to the question of original entitlements. Let it be assumed that there were some rule whereby the state (or Mr. *X*) owned all things within the society without taking first possession. *Y*'s labor would avail him not to obtain absolute title of the thing. Even John Locke himself assumes that all things that are not taken by one are still held in

⁶ On this subject, there is for example the early Roman law of *accessio* and *specificatio*, on which see W.W. BUCKLAND, A TEXTBOOK OF ROMAN LAW, 208-18 (3d ed. P. Stein 1963); B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW, 133-38 (1962). The same issue can arise in modern contexts. Thus where one of several owners in common develops common property by his own labor, the courts make an effort to give adequate recognition of both labor and property in any dispute that arises between the parties. See, e.g., *White v. Smyth*, 147 Tex. 272, 214 S.W.2d 967 (1948). The case is annotated, with updates, in 5 A.L.R.2d 1348 (1949).

⁷ It is easily understandable why *B* does not receive any legal protection in the event that he makes the improvement with full knowledge of the ownership rights of *A*, for with such knowledge his conduct is little more than an effort to exact payment from *A* for work performed without his consent. Such efforts can only undercut *A*'s claim to be the sole owner of the property in question, and must therefore be rejected.

common by the group. If he is right, then the group stands in the position of *A* in the case of the marble. Any individual who takes from that group acquires at most not the absolute ownership interest but the lien for services rendered. Indeed even this lien is in jeopardy, for if the rule of ownership is clear and determined, then *A*, if he acted with knowledge of the rule, could find himself in the position of the bad faith improver of the marble, unless the rule contained some further condition of uncertain origin and intelligibility which allowed *A* unilaterally to convert the property to his own use.

This last objection leads to another point: Why does labor itself create any rights in a thing? The labor theory rests at least upon the belief that each person owns himself.⁸ Yet that claim, unless it be accepted as bedrock and unquestioningly, must be justified in some way (leaving aside the question of to whom the justification must be made). The obvious line for justification is that each person is in possession of himself, if not by choice or conscious act, then by a kind of natural necessity. Yet if that possession is good enough to establish ownership of self, then why is not possession of external things, unclaimed by others, sufficient as well? The irony of the point should be manifest. The labor theory is called upon to aid the theory that possession is the root of title; yet it depends for its own success upon the proposition that the possession of self is the root of title to self.

The difficulties do not end here. Suppose the proposition that each person is indeed the owner of himself has been demonstrated satisfactorily. How does this ownership allow him, as against all other persons in the world, to appropriate things to himself by the expenditure of labor? The point here is perfectly general and applies whether the theory asserts that labor gives absolute ownership or a lien for improvement as against the (collective) owner. In both cases the point is quite simply that in order for the individual claim for preference to be given effect, there must be established some prior *right* (good against the entire world) to perform the labors upon which the claim for subsequent entitlement rests. Deny that right, and the labor so praised and extolled by some becomes simply a thrusting of one's self upon another without invitation or consent.

⁸ J. LOCKE, TWO TREATISES ON CIVIL GOVERNMENT, Book II, § 27 (3d ed. 1966) [hereinafter cited without cross reference as J. LOCKE, SECOND TREATISE]. "[E]very man has a property in his own person; this nobody has any right to but himself. The labour of his body and the work of his hands we may say are properly his."

Surely any individual owner can resist such gratuitous encroachments. Why then not the original owners, if any, of the common property?

The objection therefore to the labor theory turns out in the end to be precisely that which is raised against the possession theory. The essence of any property right is a claim to bind the rest of the world; such cannot be obtained, contra Locke, by an unilateral conduct on the part of one person without the consent of the rest of the world whose rights are thereby violated or reduced. First possession runs afoul of this principle; so does the labor theory. Indeed the point is a matter of principle perfectly general, and it applies moreover to *any* and *every* theory that uses individual actions as the source of entitlements against the collectivity at large. Property may look to be an individualistic institution, but the very nature and definition of the right seems to require some collective social institution to lie at its base.⁹ No "natural" act can legitimate a social claim to property.

The uneasy place of social limitations upon the individual theory of acquisition can be well seen by the collective limitations that Locke himself was prepared to place upon his own labor theory of entitlement. Thus in his articulation of the famous Lockean proviso, he insists that individual appropriation does not constitute a violation of the rights of others, at least where there is "enough and as good left in common for others."¹⁰ Yet to make this condition is to undercut utterly the strong individualistic element in the rule of first possession, as the provision if logically applied makes it impossible for anyone *ever* to acquire ownership of anything so long as there are conditions of scarcity. Thus even if the first possessor leaves enough for others to take, it will necessarily be the case that the second, third, or some remote possessor will not be able to take because by doing so he will deprive others of as much again and as good. Since therefore it was only the prior appropriation by the first taker that limited the rights of any given subsequent taker, it follows that the first taker cannot act at all because of the way in which his conduct impinges upon the rights of acquisition of others.¹¹

⁹ See, for recognition of this point, Kelsen, *The Pure Theory of Law*, 50 LAW. Q. REV. 474, 494 (1934).

¹⁰ J. LOCKE, BOOK II, § 27 (3d ed. 1966).

¹¹ See, for the original and forceful statement of the point, R. NOZICK, ANARCHY, STATE AND UTOPIA 174-78 (1974). Nozick later states that an adequate theory of justice in acquisition

A second limitation in Locke's theory reinforces the persistent nature of the residual social control. In the traditional legal accounts of the first possession rule it is always assumed that the thing in question was unowned before some possession was taken of it.¹² Yet in Locke the assumption is quite different, as it is assumed that before possession is taken all things are *held* in common (although he shrinks from saying that they are *owned* in common.) The differences between the two positions — no ownership and ownership in common — are not purely verbal. With the traditional legal view there are no normative constraints about the amount or nature of the things that anyone could reduce to individual ownership by taking first possession. The want of ownership in anyone prevented all persons from complaining about the loss in question; and the opportunity to acquire ownership through first possession made it unnecessary for anyone to complain.

Once things are held originally in common, the claims of nonpossessors are more insistent. In particular they allow, at least in Locke's view, others to complain about acquisition that is made for wasteful or other improper purposes. Such of course is inconsistent with the usual claim of absolute ownership that allows one to destroy (in the acid case) anything he owns if it pleases him, so long as he does not destroy as well the person or property of another.¹³ As a matter of legal history, injunctions against waste by owners have had very little success, precisely because the common law did not encumber any individual claim of ownership with the residual

requires adoption of some version of the Lockean proviso, *id.* at 178, although it is not clear how he would reformulate it. In any event I think that the common law cases had a much better sense of the problem when they avoided any reference whatsoever to such a limitation.

¹² GAIUS, *THE INSTITUTES OF GAIUS, SECOND COMMENTARY*, translated in 1 *THE CIVIL LAW* § 66 (S.P. Scott ed. 1932):

Property which becomes ours by delivery can be acquired by us not by natural law but also by occupancy, and hence we become the owners of the same because it previously belonged to no one else; and in this class are included all animals which are taken in land or in water or in the air.

¹³ Here the limitation of "person or property" is crucial to the case for only it will prevent the complete collapse of the traditional liberty oriented system. Without the requirement that the harm be to person or property, the general presumption in favor of the liberty of action will be engulfed by an exception, as virtually all conduct makes some individual feel worse off than he did before. The traditional injunction therefore against causing harm to another must be transformed into a prohibition against the use of force and fraud against the person or property of another, lest the liberty of action be preserved only in those cases where no one sees fit to object to individual conduct. *See*, for a further exploration of this theme, Epstein, *Intentional Harms*, 4 *J. LEGAL STUD.* 391, 423-41 (1975).

claims of a collectivity that once held a thing in common.¹⁴ Yet even if we disregard the Lockean proviso and the injunction against waste, the essential difficulty is that stated above. There is no way that any individual act can account for a claim of right against the rest of the world.

V. A CONTRACTUAL ESCAPE?

There is then a real sense of inadequacy not only with the first possession rules but with the labor theory of property as well. In an effort to escape this inadequacy, it is instructive to look to various contractual theories of entitlement that might solve the problem of how to bind the world. Dealing with property rights, of course, this theory is always stretched since it is difficult to imagine any explicit, formal arrangements that bind all individuals, including those underage and yet to be born, to a certain view of the legal universe. Yet despite this objection, many judges and commentators have placed constant reliance upon that distant cousin of contract, custom and common practice, as the source of property rights that bind the world.

In *Swift v. Gifford*,¹⁵ a dispute occurred between two fishing crews over the ownership of a whale. The crew of the ship *Rainbow* threw a harpoon that, with its line still attached, remained fast in the side of the whale even though the whale itself escaped. The crew of the ship *Hercules* captured the whale while the *Rainbow* was still in pursuit; the *Rainbow*'s master claimed the whale as his own, and in fact the master of the *Hercules* surrendered possession of it. Swift, as owner of the *Hercules*, then sued to recover the value of the whale. If actual possession is required to establish ownership, then the whale belonged to the *Hercules*, and the action was well founded. Yet a universal maritime custom held the opposite and assigned the whale to the *Rainbow* because its harpoon first stuck

¹⁴ See, e.g., *Hague v. Wheeler*, 157 Pa. 324, 27 A. 715 (1893), where the Pennsylvania Supreme Court refused to allow two landowners over a common pool of oil an injunction against waste to shut down the operations of the defendant who was letting the oil escape into the open air. In essence the court's opinion rested upon the proposition that in the absence of malice or negligence the defendant had the same right to exploit the common pool as did the plaintiff, and that this right was not lost by their inability to find a purchaser. *Id.* at 339, 27 A. at 719. The difficulty with waste in oil and gas cases comes from the inability of the common law to specify an absolute owner of oil located under land owned by separate individuals. It is the same incomplete specification of ownership rights that is of course at issue with the first possession principle as well.

¹⁵ 23 F. Cas. 558 (D.C.D. Mass. 1872) (No. 13,696).

in the whale, even though the Hercules first captured it.

The question, then, was whether the positive rule of property law took precedence over the custom of the sea in order to determine the ownership rights. *Swift v. Gifford* opted for the custom. In doing so, it went against the great Justice Story who had long set his face against the "almost indiscriminate habit of late years of setting up particular usages or customs in almost all kinds of business and trade, to control, vary, or annul the general liabilities of parties under the common law as well as the commercial law" and for whom there was "no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misinterpretations."¹⁶ It is indeed true that there are some problems about identifying the custom, and there are surely problems about using it to bind third parties. Yet within a close-knit community, such as that bound by maritime law, these risks seem to be pretty much at a minimum, and such was the case on the testimony here. The great attractiveness of common custom is that it purports to place the law of property on a firmer footing by referring it back to something other than the assertions of the judges. And there could be, I suppose, some justification for reversing the decision in *Pierson v. Post* on the strength of an analogous custom, since it appeared from the record that all hunters in the region regarded hot pursuit as giving rights to take an unimpeded first possession.

Yet in one real sense the customary theory without more will not solve the problem. Suppose, for example, that the challenge to possession in *Gifford* or in *Pierson* came not from the disappointed rival, but from a naturalist who argued that the wild life was, to use the current phrase, the "common heritage of mankind," that could not be rightfully captured by *either* of the two rivals to the chase. For this claim, the custom of the rival hunters is of no particular concern for surely it cannot bind the outsider who in no way shares in or approves of it. The demand for universality of property rights thus prevents the conversion of custom and common usage, however secure, into a source of general entitlement. The only way in which the objection could be met is to show that the custom is so universal and so ingrained in all mankind that there are in effect no strangers to the social contract. Efforts of just this sort have been made at common law, but with mixed success.

¹⁶ The Reeside, 20 F. Cas. 458, 459 (C.C.D. Mass. 1837) (No. 11,657).

In this regard the water law cases are very instructive. In the old English case of *Acton v. Blundell*,¹⁷ the plaintiff had for a period of nearly twenty years obtained water for the operation of his cotton mills from an underground well. From time to time the plaintiff had extended the well deeper in order better to obtain his needed supply of water. The defendant then began his mining operations some three-fourths of a mile or more from the plaintiff's well. He diverted the water from the plaintiff who was then forced at some expense to obtain water elsewhere to run his mill. As the period of use by the plaintiff was less than twenty years, there was no way in which the plaintiff could have established a right to the water by prescription (which of course presumes that the original use of the water was wrongful as against this defendant). The case therefore turned upon the appropriate view of the way in which ownership rights are first established in water. The two contending positions were located securely within the tradition of first possession. The difference between them was that the plaintiff argued that his use of particular quantities of underground water entitled him to similar quantities in future time periods. The defendant argued that each quantity of water was subject to a separate application of the rule of first capture: if the defendant could not complain about the prior appropriations of the plaintiff, so too the plaintiff could not complain about the current appropriations of the defendant. The plaintiff only lost that over which he had no rights. If the premise was indeed correct, then the loss was as the court described it, *damnum absque injuria*.

The defendant prevailed in *Acton v. Blundell*. Yet to do so it was necessary for him to overcome one line of argument that cut powerfully in the other direction. The question of rights in flowing water was not novel when presented to the court in *Acton v. Blundell*. A long tradition of English riparianism had established the proposition that ownership in waters flowing in defined surface channels could not be established by first possession of the water. Instead each owner of the riverbank by virtue of that ownership alone, had usufructuary rights in the flow, which prevented its total appropriation by another. The question therefore was why this tradition did not carry over to underground water which flowed in distinct channels. Here the answer of the court was instructive:

¹⁷ 152 Eng. Rep. 1223 (Ex. 1843).

The ground and origin of the law which governs streams running in their natural course would seem to be this, that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been, public and notorious: that the enjoyment has been long continued — in ordinary cases, indeed, time out of mind — and uninterrupted; each man knowing what he receives and what has always been received from the higher lands, and what he transmits and what has always been transmitted to the lower. The rule, therefore, either assumes for its foundation the implied assent and agreement of the proprietors of the different lands from all ages, or perhaps it may be considered as a rule of positive law, (which would seem to be the opinion of Fleta and of Blackstone), the origin of which is lost by the progress of time; or it may not be unfitly treated, as laid down by Mr. Justice Story, in his judgment in the case of *Tyler v. Wilkinson*, in the courts of the United States (4 Mason's (American) Reports, 401), as "an incident to the land; and that whoever seeks to found an exclusive use must establish a rightful appropriation in some manner known and admitted by the law." But in the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighbouring soil does not flow openly in the sight of the neighbouring proprietor, but through the hidden veins of the earth beneath its surface; no man can tell what changes these underground sources have undergone in the progress of time: it may well be, that it is only yesterday's date, that they first took the course and direction which enabled them to supply the well; again, no proprietor knows what portion of water is taken from beneath his own soil: how much he gives originally, or how much he transmits only, or how much he receives: on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all. In the case, therefore, of the well, there can be no ground for implying any mutual consent or agreement, for ages past, between the owners of the several lands beneath which the underground springs may exist, which is one of the foundations on which the law as to running streams is supposed to be built; nor, for the same reason, can any trace of a positive law be inferred from long-continued acquiescence and submission, whilst the very existence of the

underground springs or of the well may be unknown to the proprietors of the soil.¹⁸

The decision in *Acton v. Blundell* shows that the legal rules with respect to surface water represent an uneasy amalgam between the older first possession principle of *Pierson v. Post* and the alternative scheme of customary rights. The rules of first possession survive in modified form in that they preclude arguments of common ownership of the water by all the individuals within the state. Indeed the riparian system is best understood as a modification of the simple rules of first possession applicable in cases of wild animals or land, to the more complex subject matter of flowing water. The riparian's ownership claims rest securely upon the ownership of lands at the edge of the river, which in turn can be originally acquired only by first possession. The rules of first possession are therefore extended by a kind of imputation rule (such as that applicable for the minerals under the earth) which says whoever takes first possession of the shore has an undivided interest in the water flowing in the watercourse. The principle is then modified to take into account the further point that many persons are riparians, such that a full specification of rights requires that limitations on use be created in order to respect the correlative rights of others. The importance of custom in this system is that it establishes some of the ground rules for those correlative rights by preventing one party from making all the water his own by taking it into his possession.

Yet here it must be recognized that the power of custom is in itself subject to two limitations. First, even within the original English context, the general customs can do little to determine all the fine details of the system. The strong consensus which says that no one can appropriate all the water in a river by damming it up at its source does not carry over to the host of questions about what can be done with the water in question. The custom does not determine the extent of water that can be removed, the purposes for which it can be put, the transfer and abandonment of water rights, and the terms and conditions under which damages and injunctions may be available. Whereas custom may lend some strength to the legitimacy of the system as a whole, in the end it must be supplemented by a whole set of detailed positive rules — rules that must bind the world, even though they are by no means contractual.

¹⁸ *Id.* at 1233-34.

There is yet a second comment to be made about the use of custom as a source of justification for property rights. The first possession rule purports to be uniform over all times and all circumstances. No custom possesses such uniformity, as very divergent practices have grown up in connection with fishing, hunting, and mining.¹⁹ The point, moreover, is of especial force with respect to water rights, as the climatic conditions which made the system of natural flow riparianism attractive to English courts were not always found in the United States. In the various states of this country the English rules have indeed been rejected or modified, often by an appeal to local custom and usage which is at variance with the English. Thus the "reasonable use" doctrine adopted in many eastern states allows any given riparian to divert some significant flow of water (more than allowable under the English rule) for his own use, even if it works a substantial detriment to some other riparian.²⁰ The doctrine, moreover, contained within its very formulation some (proper) consideration of utilitarian concerns. Thus the system created a rough hierarchy of uses (domestic, agricultural, manufacturing) and explicitly permitted individuals to justify harm (measured in terms, say, of diminished water flow) inflicted upon others by the benefits that they themselves received. The precise contours of the system are, moreover, quite indefinite since no one can integrate the system's dual requirements of "reasonable use" and "fair participation" into an unambiguous legal command. What can be said is that the entire system, with all its internal complications, is not easily regarded as a natural and intuitive system of property rights. Yet it survives in a large portion of the United States, complete with all its infirmities, until this present day. Even with its customary origins, it looks in the end as much like Story's rules of positive law as *Acton v. Blundell*'s implicit social contract.

The interplay between custom and first possession is more dramatically illustrated by the shifts of water law doctrines in the western states where conditions are arid and the need for irrigation water extensive. Here the system that emerged over time was one of first appropriation, which in its crudest form allowed water *flow* to keep it as against the world, including any and all riparian owners who claimed solely by virtue of their possession of the river banks.²¹

¹⁹ On the variation of legal custom in whaling, see O.W. HOLMES, *THE COMMON LAW* 212 (1881), where several rules are set out, some of which require a division of the spoils between the parties.

²⁰ See, e.g., *Dumont v. Kellog*, 29 Mich. 420 (1874), 18 Am. Rep. 102 (1876).

²¹ See, e.g., *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882).

The collision between riparians and appropriators cannot be resolved with any kind of elegance. If the riparians took possession of river-front land before the appropriation of water, then their claims should be secure under either the natural flow or reasonable user doctrines of water law. If they took possession thereafter, they still have a case if they can establish that diversion of water is not recognized within the jurisdiction as a means to acquire rights in the waterflow itself. Nonetheless in most western states the riparians received little comfort when they passed their claims, as the courts, much impressed with the need to place the water to its most beneficial use held that first appropriation was the only principle whereby rights in water flows could be acquired.²² This rule is of course in the broad first possession tradition because it assumes that rights in running water are not held in joint ownership by all the citizens of the state (in which case individual appropriation would, far from being the source of rights, be the subject matter of a tort) but are capable of appropriation by individual actors. The system therefore represents a repudiation of *Pierson v. Post* only insofar as it recognizes that possession creates rights not only in the given thing, but in future flows as well. In addition, it differs from the other system of water rights only in the nature of the individual acts that are necessary to claim ownership over the flow in question. Although the system rests to some extent upon the custom of the West, it, like its alternatives, is in the end a command of positive law that, in the manner of all property rules, binds the entire world. Like contract, custom cannot serve as a satisfactory source of property rights.

VI. A COMMON POOL

The previous arguments and examples demonstrate that we cannot, even with the aid of custom, generate a rigorous analytical theory that demands that the rule of first possession, or any of its analogies, determine the original acquisition of property rights. From this it might be assumed that we must therefore accept some alternative theory that stipulates that in the original position all property rights are held in common whether by individuals themselves or by the state as trustees. The theory as stated can apply not only to the right to external things, but also to natural talents and aptitudes as well, which could, if desired, be treated as "a

²² *Id.* at 451-52, where the appropriators won out on a very tenuous construction of the applicable statute.

collective asset" to be devoted to some conception of the common good.²³ As stated, the theory is designed to circumvent the objections that can be raised against the common law rule of first possession, but it is itself subject to a number of objections.

The first of the arguments against a theory of joint ownership is that it in no way specifies the way in which any property which is owned by the collectivity may become vested exclusively in a single member thereof. It may be said that first possession will achieve this result, but if so, then the theory of joint ownership achieves nothing over its rejected rival.²⁴ It may be said that the state should set up an elaborate system to place the common property out for sale. But such does nothing to protect the individual rights of persons who dissent from the rules so created. Furthermore, there is the real practical problem that common ownership will result in the triumph of negativism. Absent the unanimous agreement of all members of society about how resources are to be deployed, they could well remain unused, for even an agreement over the best course of development does not speak to a distribution of the proceeds therefrom. Lest this be thought a fanciful proposal, one need only consider the valuable resources that now lie untapped upon the ocean floor. Under a regime of first possession, individuals could appropriate some of these things for their own use. Yet as matters sit, such property is said to be the "common heritage of mankind," which means that no one can use it without the consent of all, itself unattainable given the political and technical differences amongst nations.²⁵ The alternative rule of first possession is not of course without its complications. It takes an extensive technology to investigate the ocean floor and to determine the conditions under which exploration is possible. Where property rights attach only to given resources on the ocean floor, there is a clear invitation for some firms to hold back in their own efforts for exploration in order to capitalize

²³ See J. RAWLS, *A THEORY OF JUSTICE* 179 (1971). "[It is possible] to regard the distribution of natural abilities as a collective asset so that the more fortunate are to benefit only in ways that help those who have lost out." The pooling of natural talents need not take place only under a regime that respects Rawls' difference principle.

²⁴ Indeed it is the great weakness of Locke's position that he does not specify a way to handle the transition from things held in common to things owned by individuals. See J. LOCKE, *SECOND TREATISE*, at ch. 5.

²⁵ See Sweeney, Tollison & Willett, *Market Failure, The Common-Pool Problem, and Ocean Resource Exploitation*, 17 J. L. & ECON. 179 (1974). See also Eckert, *Exploitation of Deep Ocean Minerals: Regulatory Mechanisms and United States Policy*, 17 J. L. & ECON. 143 (1974).

upon the information acquired by others. A collective system which created and enforced franchises for development and exploration might be for all concerned superior to the first possession rule that it supplants. Yet there is no real certainty that such can emerge from the intense politics that tends to characterize such collect endeavors, especially at the international level.

The second objection to the joint ownership theory is perhaps more powerful. What gives any group of individuals, even those in control of the state, the right to bind others to its conception of property rights? With respect to the rules of first possession, it could at least be said that the individual owner did something to distinguish himself from the common mass, took some action, beyond mere words, to appropriate some particular thing. But what of common ownership? The point is the precise parallel to that raised against the theory of first possession. Property rights bind the world. Assume that people do have the competence to decide the rules that govern the creation of entitlements (a necessity for any theory of property rights); there is nothing which says that those who prefer common ownership should prevail over those who do not. Equality of rights could be achieved by treating each individual as having the equal entitlement to convert unowned things to his ownership, or by treating all as equal co-owners of resources in the common pool. Neither is easily justified, and the latter has no obvious superiority over the former.

VII. FIRST POSSESSION: THE QUALIFIED DEFENSE

At the outset I noted that it was my intention to give a qualified defense of the rule that possession is the root of title. The evidence of the qualifications are everywhere. The structure of the defense is as follows: We begin with the given that some system of property rights is necessary, if only to organize the world in ways that all individuals know the boundaries of their own conduct. The possible systems that might be used seem to number two. There are first those first possession systems (including the analogous rules for water, oil and gas, etc.); and there are systems that create original common ownership in all the citizens of the jurisdiction. Given the original necessity for some system, the real question is *not* how can any system of property rights be justified in the abstract, but *which* of these two systems has, when all is said and done, the better claim for allegiance. On balance the case tilts strongly for the first possession theories, whatever their infirmities.

There is first the question of the kind of state that is required by each of these theories. The rules of first possession, even their complicated water rights variants, require in effect a minimal sort of state which parcels out the rights between the various contenders in accordance with set rules, indifferent as to their personal characteristics, histories, or wealth. True, there will be some question of who took possession first, but the types of issues should not by any stretch of the imagination strain the institutional capacities of the judicial system. The theory of common ownership requires much more extensive public control, for someone must decide how the rights in question are to be packaged and divided amongst individuals. The exact magnitude of the control is of course somewhat hard to determine. The state could, to facilitate market transactions, simply package the resources in question — *e.g.*, do we sell land in big lots or little ones — and then put the packages out to bid, while remaining indifferent as to the way in which they are used in private hands.²⁶ Or the state could assume a much more aggressive role, one which requires it to condition sale, or even lease, upon complicated conditions, or which contemplates the state operation of the system as a whole. Indeed in the current political climate, it is quite possible that state ownership would lead to extensive and continuous state control. And as I tend to fear such control, I am very cautious about a system of original property rights that tends to invite its operation and expansion. Better to begin with a system that places wealth in private hands.

There is of course a related fear. The discussion has thus far been directed to the ways in which individuals acquire rights in external things. Yet there is nothing in principle which says that the theory could not be extended as well to govern the way in which individuals acquire rights in themselves. Here the theory of common ownership clearly seems to lend itself to totalitarian uses and abuses. Each individual person's talents and gifts can be treated as unearned items, much like the shell found by chance along the beach. The state therefore in its plenary capacity can allow to each individual

²⁶ The packaging of rights for sale, which almost by definition is a non-market function, is not always easily done. For a discussion of the packaging of the electromagnetic spectrum, see DeVany, Eckert, Meyers, O'Hara & Scott, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 STAN. L. REV. 1499 (1969); Minasian, *Property Rights in Radiation: An Alternative Approach to Radio Frequency Allocation*, 18 J. L. & ECON. 221 (1975). The same problems exist, in more complicated fashion, with respect to water law.

blessed with such talents the right to use them only on terms that it sees fit. Systems of high taxation of individual income or, in more extreme circumstances, forced labor, need not be seen as impermissible exactions from the individuals for the public at large. They can be viewed as the terms on which individual talents are leased back to their natural holders, who by assumption have no original rights in them. One might argue that this extension of basic theory is not fully warranted. There is, for example, no danger of overconsumption of natural talents as there is of natural things. And the argument could be strengthened by the observation that collective ownership of external things is needed in order to prevent one person from cornering the market, while such problems do not arise with individual labor. But surely this contrast is overdrawn. On the one side, certain individuals have unique talents and on the other, it is most unlikely that any individual could claim possession of all unowned things while all others, indifferent to their welfare, sit idly by. The difference between ownership of person and ownership of things is at best a matter of degree. The system that speaks of collective ownership over things provides a less solid bulwark against public control over individual talents than a system which rests upon the first possession rules.

There is a third point which in the end comes closest to being the "ultimate point." The fundamental objection against both theories of first possession and theories of original common ownership is that neither is powerful enough to bind non-consenting individuals. The objection to both theories is analogous therefore to the objection that Hume raised a long time ago to *all* ethical propositions: it is simply not possible to move from a non-ethical premise to an ethical conclusion without there being a logical gap in the argument. Put in the context of the first possession rule, Hume's insight points to an unbridgeable logical gap between the *fact* of possession and the *right* to possession. Yet the power of Hume's general proposition is the source of its very undoing. The proposition is so strong that it undercuts any and all substantive ethical positions because it does not permit the selection of ethical theories on grounds of relative virtue. That same point applies with respect to theories of original ownership. The standard objection is *too* powerful because it destroys all possible theories when one is by necessity required; what is needed is an argument that works less like a club and more like a scalpel, one which permits a ranking amongst theories, while recognizing the imperfection of all rival contenders. Whatever the philosophy of the matter, we need some system of property rights

that does bind the world, even for those who do not share in its substantive premises.

There must be some way to break a philosophical impasse, and it is in this connection that we should return again to both the institutional constraints and past practices that characterize the common law mode of adjudication. It is not that our philosophical inquiry has taken place in an intellectual vacuum. It is that the inquiry has taken place on the assumption that we can begin structuring entitlements as if we wrote upon a blank slate, indifferent to all events and practices that have developed over time. The common law courts, which always began in *medias res* and which always announced principles that governed particular disputes, never had the luxury of philosophical purity in some original position. If we accept these constraints upon the judiciary as unfortunate features of the legal system alone, then perhaps there is no great reason to attach any weight to them. Yet if we regard them as fair reflections of some larger social requirements, as indeed they are, then they can offer some limited criterion of relative virtue that allows us to choose between the two alternative systems of original property entitlements. The point is simply that some weight should be attached to the rules under which a society in the past has organized its property institutions. Where those rules are respected there is no need, at great expense, to reshuffle entitlements amongst different individuals, even in the absence of any clear principle that dictates how that reshuffling should take place. There is no need, moreover, to attack the interests of those who have expended their labor and taken their risks on the expectation, reasonable to all concerned, that the rules under which they entered the game will be the rules under which that game will be played until its conclusion. These rules and these alone have the status of legal rules at all.

Within this viewpoint it is possible to show the unique place of first possession. It enjoyed in all past times the status of a legal rule, not only for the stock examples of wild animals and sea shells, but also for unoccupied land. In essence the first possession rule has been the organizing principle of most social institutions, and the heavy burden of persuasion lies upon those who wish to displace it.

The size of the burden is, moreover, very considerable. A repudiation of the first possession rule as a matter of philosophical principle calls into question all titles. It calls into question those which exist in the hands of the original possessors; it calls into question those of their heirs; it calls into question the rights of those who have

purchased the titles in question for good consideration, and those who have made improvements upon land acquired on the faith of the public representation that they could keep it for their own. It may be an unresolved intellectual mystery of how a mere assertion of right can, if often repeated and acknowledged, be sufficient to generate the right in question. As an institutional matter, however, it is difficult in the extreme to conceive of any other system. As between two systems, both of which are philosophically exposed to the same objection, the choice must go to that which has the sanction of past practices. The first possession rule represents the most general principle of this sort. The particular customs and practices in certain locales represent yet another expression of the same basic point.

The institutional justification shows the limits of the basic position in connection with those things have yet to be exploited by any individuals or nations. With respect to these things the first possession rule has much weaker claims because it cannot draw upon the full strength of this reliance interest. The exploitation of the ocean bed or the Antarctic regions need not rest upon the first possession rules because these have not yet embedded themselves into the institutional fiber of the social system. In these cases we have both the luxury and necessity of beginning at the beginning. First possession rules might in the end be adopted, but it is now quite possible to entertain alternative systems of property rights that depart significantly from the first possession principle.²⁷ It is at this level that we can consider the question of whether all individuals are entitled to, if not the thing, then at least the wealth derived from it, and the question of what institutions and what packages of rights will tend to promote the effective use of the thing in question. For such cases, the arguments will be more congruent with the modern concerns about economic efficiency and distributional equity, and arguments about the nature and desirability of political intervention, always relevant, can assume greater force. Yet with respect to property

²⁷ Here the point with regard to land requires some explanation. Individual claims to land are often based upon direct grants from the state, or in some circumstances upon homesteading, which is in essence a first possession rule within certain ground rules set up by the state for land which it owns. Yet even the use of grants, however important for the security of individual titles, does not undermine the first possession rule; it only pushes the question of individual entitlement back to the state and not of any given individual. Indeed the sway of the first possession rule in international affairs is, if anything, more pronounced than it is in private law contexts.

rights that are already assigned, the first principles of thought are constrained from without, as the past has a power to bind the future. Vested rights have acquired, as it were, a life of their own.