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## WHO OWNS AMERICA?

KELLY M. PLUMMER\*

### I. THE INITIAL QUESTION

I must admit my disappointment to find Property on the class schedule for my first semester of law school. My first thoughts were that I should dig out my Dad's old law books because I was certain that the cases we would discuss in property would all be so old that my Dad would have studied them twenty-five years ago when he attended law school. When I began reading my Property textbook the week prior to my first day in law school, my fears were confirmed as the initial reading assignment included *Johnson and Graham's Lessee v. McIntosh*,<sup>1</sup> a case decided almost 200 years ago involving rudimentary concepts of property written in legal jargon unfamiliar to my legally untrained mind.

When I scanned my class syllabus in hopes that future readings would not resemble *Johnson*, I noticed that my professor posted, along with the first reading assignment, a question for contemplation: "Who owns America? Why?"<sup>2</sup> At first glance, the answer to the question seemed simple: People own the items they pay for or they receive as gifts; the people who own the most items own America. I soon discovered that the answer to this question encompassed a broader perspective than I imagined. Indeed, this question loomed over my Property class throughout our first semester of law school, guiding our quest for the "big picture" of property law.

### II. WHAT IS AMERICA?

My professor elaborated that the breadth of the question, "Who owns America? Why?", cannot be answered without a consideration of the timeframe in history which is implicated and the precise items involved in the analysis. The first step in our quest to discover who owns America was

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1. 21 U.S. (8 Wheat.) 543 (1823).

2. Professor Daniel Hulsebosch, Property Law Syllabus, Fall 2000, Saint Louis University School of Law (on file with author).

determining exactly what concepts our court system recognizes as property. Many students, including myself, were astounded at the breadth and legal complexity of the legal definition of property.<sup>3</sup> We were further intrigued when my professor explained that concepts of property often vary among various cultures and change over time. For instance, my professor explained that whaling norms dictating when a whale fisherman actually owns the whale vary among cultures based on the environmental conditions and social customs in the area.<sup>4</sup>

Our discussion of “Who owns America? Why?” began a semester-long process of not only developing the “big picture” perspective on property law, but also exploring the inclusive link between the past, present and future that coincides with the “big picture.” As our class soon discovered, the ownership of America depended upon not merely a person’s access to financial resources to purchase items or real property, but additionally on that individual’s own characteristics, the time in history and the surrounding community. The first case we discussed, *Johnson*, considered whether Indians had the power to give title to others, which can be sustained in a court in the United States.<sup>5</sup>

My class soon learned that the period in American history correlates with the items a person is permitted to own. Early questions in property law focused on the ownership of land.<sup>6</sup> My professor forced us to question the issues implicated when considering whether the protection and rights afforded to traditional notions of property should, pursuant to constitutional requirements and public policy rationales, be extended to encompass one’s body, thoughts, images, and creations. The professor contrasted *Moore v. Regents of the University of California*,<sup>7</sup> denying a person’s property interest in

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3. The concept of property extends beyond traditional notions of property such as real estate, household items and automobiles. See *Pierson v. Post*, 3 Cai. R. 175 (N.Y. 1805) (holding wild animals may be owned by a person who occupies them); *Haslem v. Lockwood*, 37 Conn. 500 (1871) (holding manure may be owned by a person who sweeps it up and leaves it on the side of the road to pick up the next day); *Teson v. Vasquez*, 561 S.W.2d 119 (Mo. Ct. App. 1977) (holding property may be owned by a person who exercises dominion over the property through adverse possession, despite the fact that another person holds title to the property); *Midler v. Ford Motor Co.* 849 F.2d 460 (9th Cir. 1988) (holding imitations of famous singers’ voices may be owned by the singers).

4. See HERMAN MELVILLE, *MOBY DICK* 292-95 (Encyclopedia Britannica ed., 1955) (1851) (providing some account of the laws and regulations of the whale fishery in a chapter called “Fast-Fish and Loose-Fish”); ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 191-204 (Cambridge Harvard Univ. Press eds., 1991) (discussing the manner in which whaling norms developed spontaneously over time).

5. *Johnson*, 21 U.S. (8 Wheat.) 543.

6. These questions focused on the right to own property that once belonged to Native Americans and the determination of property ownership.

7. 793 P.2d 479, 488 (Cal. 1990) (holding that a patient did not have a property interest in his unique cells entitling him to compensation when medical researchers, unbeknownst to him, took his cells to develop a cell line).

one's own cells, with *Midler v. Ford Motor Co.*,<sup>8</sup> protecting the sound of one's voice.

The traditional analysis of these issues often fails to provide a base for future expansion of property concepts.<sup>9</sup> In addition to examining the rationales articulated by the courts, our professor asked us to consider underlying concerns given the historical, political and social context of the decisions. By asking us these questions without providing us with clear-cut answers,<sup>10</sup> he challenged us to consider the ramifications of each court decision and potential paths courts could articulate given the power of precedent.

### III. CAN AMERICA BE OWNED?

After our professor navigated the class through the initial hurdles involved in determining whether something is, in fact, capable of being owned, the class explored the limits that may be placed on property ownership. The professor introduced the class to the limits federal and state governments place on property owners' rights when those rights impede on the well-being or constitutional rights of others.<sup>11</sup> For instance, in *State ex rel. Stoyanoff v. Berkley*, the court upheld the Ladue, Missouri, zoning board's denial of the construction of a triangle house.<sup>12</sup> The house violated community aesthetic standards, standards that promote general welfare and encourage the appropriate use of land.<sup>13</sup> As the class moved on to other property law issues, such as the law of servitudes, concurrent ownership and landlord/tenant situations, the students in my property class became doubtful that any person truly owns a piece of property. Even if a person holds the entire "bundle of sticks,"<sup>14</sup> our professor taught us that the "owner" does not necessarily have the right to paint the stick any color he prefers or to indefinitely control the sticks.

### IV. QUESTIONS LEFT UNANSWERED

After the first couple of weeks of law school, my initial fears that Property would entail a semester-long investigation of cases resembling *Johnson* were dispelled. While I remain unenchanted by history, I have come to appreciate

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8. 849 F.2d 460, 463 (9th Cir. 1988).

9. See, e.g., *Texas Am. Energy Corp. v. Citizens Fidelity Bank & Trust Co.*, 736 S.W.2d 25, 26 (Ky. 1987) (analogizing natural gas injected back into the earth to a fox in the wild).

10. In many of these areas, clear cut answers do not exist because these issues have been resolved differently by various jurisdictions.

11. Some limits placed on property ownership include Constitutional guarantees against takings and the promotion of community health, welfare and well-being.

12. 458 S.W.2d 305, 310-11 (Mo. 1970).

13. *Id.*

14. The "bundle of sticks" analogy is commonly used in property law to refer to the rights to exclude, use, transfer and possess property.

its value in conducting legal analysis. The historical cases we studied in Property have important implications in relation to many current topics ranging from the biological sciences to popular culture. For example, concerns for the future include the potential to commodify parts of the human body, thoughts, feelings and children.

In conjunction with learning basic legal concepts, my Property class helped me understand the continual metamorphosis of the law. Our professor's use of questions about the rationale behind past court decisions and their influence on future decisions, while often left unanswered, spurred me to explore my own view of the law and public policy implications of legal issues.<sup>15</sup> By utilizing this method of teaching, students learn the black-letter law in the area, but continue to develop their own independent analysis.

Our professor's initial question, "Who owns America? Why?" guided a semester-long journey into the breadth of property law. While I am unsure that this question can be completely answered, I am certain that the journey to reach the answer was more important than the answer itself. This journey helped me develop the "big picture" perspective of the continually developing legal system.

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15. In this aspect, Property was distinctive from my other first semester courses. In Contracts, Professor Vincent Immel gave the class the opportunity to discuss the cases at hand, but the answers were clearer; perhaps this is because the historical path of contracts law took fewer windy turns, thus leaving less room for discussion. Similarly, the set federal rules in Civil Procedure and the elements of the various torts stunted my ability to see the "big picture" or explore my own views of the subjects, despite my professors' encouragement to think creatively.