

## Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity<sup>†</sup>

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“I have been thinking,” said Arthur, “about Might and Right. I don’t think things ought to be done because you are *able* to do them. I think they should be done because you *ought* to do them. After all, a penny is a penny in any case, however much Might is exerted on either side, to prove that it is or is not. Is that plain?”

~ T.H. White<sup>1</sup>

Where do property rights come from? If you believe the property casebooks, we acquire original title to property by conquering other nations, hunting animals, catching baseballs, encroaching on our neighbors’ lands, drilling for oil, and finding lost jewels.<sup>2</sup> You’ve heard the expression “possession is nine-tenths of the law.” It turns out it’s actually true. If you can take it, you can keep it—not exactly the most morally attractive justification for the rights of owners. Imagine teaching your children that the way to get things is to grab whatever they can. But maybe there is something to the possession theory. What would we have to believe to make possession a just original source of title to property?

Possession is plausible as a source of title only if you are not taking something that already belongs to someone else. If you are the first possessor of an unowned object, like a wild animal or a deserted island, possession is like magic; it allows you to create something out of nothing. Who could reasonably object to your claim? No one has been displaced by your act of occupation and everyone else is perfectly free to go out and hunt their own foxes and discover their own uncharted shores.

Two problems disturb this rosy scenario. First, the magic disappears if you take all the cookies on the plate and leave none for your little sister. As John Locke recognized long ago, possession raises no moral issues only as long as it does not deprive others of similar paths to ownership. Locke argued that property rights in land were justified only if “there is enough, and as good left in common for

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1. T.H. WHITE, *THE ONCE AND FUTURE KING* 253 (Ace 1996) (1939) (emphasis in original).

2. I have previously criticized this litany. Joseph William Singer, *Starting Property*, 46 ST. LOUIS U. L.J. 565 (2002). For qualified defenses of the idea of first possession as the origin of property, see Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979); James E. Krier, *Evolutionary Theory and the Origin of Property Rights*, 95 CORNELL L. REV. 139 (2009); Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985).

others.”<sup>3</sup> This little caveat is affectionately called the “Lockean proviso.” If I occupy land and others do not have equal opportunities to do the same thing, then my act of first possession cannot be considered to be what John Stuart Mill called a self-regarding act; rather, my actions impose externalities on others.<sup>4</sup> And those externalities are not minor in nature; because human beings need things to survive, monopolizing things needed for human life can only be justified if others have equal opportunity to get what they need.<sup>5</sup> This makes the relationship between possession and equal opportunity a central problem.

The second wrinkle with the original possession idea is the unfortunate fact that most things already do have owners, and if you grab something originally possessed by someone else, then you are not a first possessor. When you dispossess another possessor, you have done something wrong. We have words for someone like you and they are not pretty words; if you take someone else’s car we call you a thief and if you take someone else’s country we use words like imperialist and conqueror. When you steal a car, your title is no good no matter how long you possess it. In U.S. law, thieves do not acquire good title to property, no matter how long they keep their booty. But conquest is another matter; here is a case where theft does confer legal rights. International law may condemn conquest, but it also rewards the conquerors with sovereignty. As Thucydides reports in *The Peloponnesian War*, the Athenians justified their conquest of Melos by arguing “you know as well as we do that right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.”<sup>6</sup>

For us in the United States, this is not merely a theoretical problem. When Europeans first came here, America was not an empty land. The colonial powers acquired the land from the native inhabitants by conquest. Sometimes they simply occupied native lands; sometimes they entered treaties to force Indian nations to sell their land; and sometimes they engaged in conquest by legislation, simply passing a statute transferring Indian title to the colonial power. Conquest denies the rights of first possessors. If first possession is the legitimate origin of title, then we non-Indians cannot trace our titles to a just origin.

To make clear that these issues are not merely theoretical, consider the case of *Cobell v. Salazar*.<sup>7</sup> In 1996, a class action suit was brought against the United

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3. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 288 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

4. On the slippery distinction between self-regarding and other-regarding acts, see Joseph William Singer, *How Property Norms Construct the Externalities of Ownership*, in PROPERTY AND COMMUNITY (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010). See also Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 749–50 (2009) (explaining the social obligations inherent in legitimate ownership claims); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 848–49 (2009) (explaining the social consequences of recognizing property rights).

5. Cf. LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 125–27 (2003).

6. THUCYDIDES, THE PELOPONNESIAN WAR 331 (Crawley trans., Modern Library 1951) (431 B.C.E.).

7. 573 F.3d 808 (D.C. Cir. 2009).

States alleging that the Departments of the Interior and the Treasury and the Bureau of Indian Affairs mismanaged the property of individual Indians. The U.S. government manages many lands owned by individual tribal members and often leases those lands to oil and gas interests. The Indian land owners are entitled to receive royalties on whatever is found on those lands. Unfortunately, the government did a horrendously bad job of managing the accounts, often not making the payments to the Indian owners and eventually losing records. The payments were either not made to the government at all or they were made and the government kept the money and failed to turn it over to the Indian owners. Because the records were lost, it is hard to say how much money is owed to the Indian owners, but the amount may be as high as fifty billion dollars. After more than thirteen years of litigation, the parties reached a settlement of \$3.4 billion of which \$1.4 billion would go to the Indian owners.<sup>8</sup> Three and one-half billion dollars is a lot of money but everyone agrees it is far less than what is actually owed. Congress approved the settlement and President Obama signed the legislation on December 8, 2010.<sup>9</sup> Indians disagree among themselves on whether the settlement is a good or a bad thing.<sup>10</sup> Some argue that the plaintiffs should not settle for an amount that is so far less than what they are probably owed while others argue that this is the best they can expect and that proving the amount owed is not possible given the lost records. Let's be clear that these are not welfare payments that are contemplated; these Indians are landowners and the government effectively stole their property by not paying them these royalties. At the same time, the difficulty and expense of figuring out how much each person is owed could take years, and the government has failed to do this despite numerous court orders and a federal statute ordering it to do so. How Congress responds will tell us whether or not the United States does respect the rights of first possessors.

Land titles in the United States suffer from two, rather fundamental, defects: the problem of conquest and the problem of the Lockean proviso. How worried should we be about this? How much do these complications undermine our current titles to land? And if, as I will argue, they are both serious issues, what are we to do about it?

#### I. FROM CONQUEST TO DEMOCRACY

Let's start with the issue of conquest. Both our philosophical traditions and our property law casebooks suggest that first possession is the origin of property. But

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8. News Release, U.S. Dep't of Interior, Secretary Salazar, Attorney General Holder Announce Settlement of Cobell Lawsuit on Indian Trust Management (Dec. 8, 2009), available at [http://www.doi.gov/ost/cobell/FINAL\\_12-08-09\\_Cobell\\_release\\_as\\_revised\\_12-7PM\\_FINAL.pdf](http://www.doi.gov/ost/cobell/FINAL_12-08-09_Cobell_release_as_revised_12-7PM_FINAL.pdf).

9. *President Obama Signs Cobell Settlement, Closes Chapter on Historic Injustices*, NAT'L CONGRESS OF AM. INDIANS (Dec. 8, 2010), [http://www.ncai.org/News-View.19.0.html?&no\\_cache=1&tx\\_ttnews%5Btt\\_news%5D=765&tx\\_ttnews%5BbackPid%5D=9&cHash=99a7451c81](http://www.ncai.org/News-View.19.0.html?&no_cache=1&tx_ttnews%5Btt_news%5D=765&tx_ttnews%5BbackPid%5D=9&cHash=99a7451c81).

10. Rob Capriccioso, *Congress Hears Cobell Critiques; Collusion Charged*, INDIAN COUNTRY TODAY (Oneida, N.Y.), Mar. 17, 2010, at 1, available at <http://www.indiancountrytoday.com/national/87464532.html> (last updated June 7, 2010).

title to land in the United States rests on the forced taking of land from first possessors—the very opposite of respect for first possession. Conquest is a mode of original acquisition that we cannot sweep under the rug by pretending that it accords with any recognizable principle of justice. And conquest, unfortunately, is where American history starts—as does the title to almost every parcel of land in the United States. This is a highly inconvenient (not to say stunningly demoralizing) fact, not least of all to the Indian nations that continue to inhabit the North American continent.

First possession, it turns out, is only a theory. Our actual property system rests on the opposite view. William the Conqueror invaded England in 1066 and started the feudal system that was the source of all current titles to land there, as well as the estates system that is the centerpiece of traditional American property law. The European colonizers invaded America and seized the land of Indian nations. Contrary to what the property law casebooks suggest, Great Britain and the United States *rejected* the doctrine of first possession; by adopting the doctrine of discovery, they refused to honor the rights of first possessors. Rather, they based property titles on their claims of racial superiority, and they backed those claims by force.<sup>11</sup> They had many arguments to justify conquest as legitimate, just, honorable, and compatible with the wishes of God, but those arguments no longer strike us as convincing.<sup>12</sup>

From a moral point of view, conquest puts all current land titles in doubt.<sup>13</sup> Robert Nozick's libertarian theory of the minimal state suggests that property rights are legitimate if they have their source in a just system of acquisition and then are freely transferred.<sup>14</sup> If their origin is tainted, the whole system fails.<sup>15</sup> How do we, as a nation, deal with the issue of conquest? We adopt two competing strategies. Half of the time we engage in the time-honored practice of repression; we deny this part of our history. We ignore it or we acknowledge it only to marginalize it. The other half of the time we face the issue of conquest head on but we try to legitimate the events by which we acquired title from Indian nations.

Let's start with the strategy of denial. Many of us protect ourselves from having to think too deeply about conquest by distancing ourselves from it. Amazingly,

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11. See ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 33–36, 47–58 (2005).

12. See ROBERT J. MILLER, *NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY* (2006); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990).

13. See Epstein, *supra* note 2, at 1241 (“A repudiation of the first possession rule as a matter of philosophical principle calls into question all titles.”).

14. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 149–82 (1974).

15. Nozick provides for a right of rectification of wrongful initial taking of property—a right often ignored by most libertarians of a more practical bent. *Id.* at 150–53; cf. Bernadette Atuahene, *Things Fall Apart: The Illegitimacy of Property Rights in the Context of Past Property Theft*, 51 ARIZ. L. REV. 829 (2009) (elaborating the circumstances when rectification of past property theft is needed to respond to highly unequal property distributions that are generally thought by the population to be illegitimate because of their unjust origins).

some property casebooks fail to mention Indians at all.<sup>16</sup> Most property casebooks treat conquest as unfortunate but past. The casebooks that deal with conquest immediately follow the topic with cases affirming first possession as the root of title, as if to show that we have moved beyond barbarism to civilization.<sup>17</sup> If we can relegate conquest to the distant past, we can concentrate instead on the fact that the United States was founded on respect for property rights. We do not acquire property by conquest today.

This comforting story is misleading at best and false at worst. We cannot comfort ourselves with the idea that conquest became a thing of the past with the American Revolution, independence from Great Britain, and the adoption of the U.S. Constitution. Like prior colonial powers, the United States claimed to share title to Indian lands with the Indian nations who possessed and ruled those lands. In 1823, the U.S. Supreme Court ruled in *Johnson v. M'Intosh* that Indian lands were held under a unique estate in land called "Indian title"—a title split between the "ultimate title" held by the United States and a "title of occupancy" held by the relevant Indian nation.<sup>18</sup> This split title remains to this day; the majority of lands owned by Indian nations today is held in what is called "trust status" and is co-owned by the tribes and the United States. This assertion of co-ownership is an act of conquest that continues to this day.

More devastatingly, the conquest of Indian lands is not something that predates the United States. Nor did it happen only in our early history. The United States took most of the lands of Indian nations over the course of the nineteenth century, often for inadequate compensation and against the will of the Indian nation whose lands were greatly diminished. And during the *Lochner* era from the 1890s to the 1930s, when the U.S. Supreme Court was at its activist height in striking down progressive legislation in the name of protecting freedom of contract and private property, the United States forcibly took two-thirds of the remaining lands of the Indian nations. The United States took some of those lands from the tribes by eminent domain and resold them to non-Indians, but most of those seizures were taken from the tribes without any compensation at all; they were transferred in "allotments" to individual tribal members. The Supreme Court ruled that this tribal property could be taken without compensation because changing from communal to individual ownership constituted a "mere change in the form of investment"<sup>19</sup>—a conclusion that would never be accepted in the non-Indian context.<sup>20</sup>

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16. One book that gives little attention to the Indian origins of property rights in the United States is GRANT S. NELSON, WILLIAM B. STOEBOCK & DALE A. WHITMAN, *CONTEMPORARY PROPERTY* (3d ed. 2008).

17. See, e.g., JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER & MICHAEL H. SCHILL, *PROPERTY*, at ch. 1 (7th ed. 2010).

18. 21 U.S. 543, 587–92 (1823).

19. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903).

20. Imagine the city of Cambridge taking the property of Harvard University and transferring it to Harvard alumni or donors; given the fact that corporations are "persons" protected by the Fourteenth Amendment, there is no question that this would be a taking of Harvard's property without just compensation. See Joseph William Singer, *Lone Wolf, or How to Take Property by Calling It a "Mere Change in the Form of Investment,"* 38 *TULSA L. REV.* 37, 44 (2002).

Nor did these deprivations of property rights cease as the twentieth century continued. In the 1950s, for example, the United States took timber from a band of the Tlingits who occupied southeastern Alaska. The Supreme Court held in 1955 that the Tee-Hit-Ton Band possessed merely a license to live on the land—revocable permission by the whites to occupy Alaskan territory. The consequence of this was that Alaska Natives had the right to live on the land and to exclude others, but they possessed no “property” rights protected by the Fifth Amendment.<sup>21</sup> Thus their land could be taken without compensation. This decision came one year after *Brown v. Board of Education*, and the *Tee-Hit-Ton* decision proclaimed that the Constitution protects the property rights of all Americans except the natives who originally possessed the land—in other words, the first possessors. This is not ancient history; I was born the year before this decision was rendered. This case has never been overruled, and the Supreme Court continues to cite it as good law.<sup>22</sup>

To be clear that these acts of injustice are not necessarily past, consider the case of *United States v. Navajo Nation*, decided April 6, 2009—just one year ago.<sup>23</sup> That case involved Navajo coal resources held under that peculiar joint title with the United States—a joint title that the United States exercises to oversee tribal leases of land to private corporations. The Navajo Nation argued that the United States mismanaged Navajo property, knowingly approving a lease for less than fair market value based on information the corporation had provided the United States that it failed to share with the tribe. The Supreme Court held that the tribe has no claim against the United States for mismanagement of tribal lands, even if the United States has exerted complete control over the property, unless Congress has passed a statute implicitly granting the tribe a right of action to sue for damages for mismanagement. If the United States shares management with the tribe and engages in acts that harm tribal property rights, the tribe has no remedy unless Congress affirmatively chooses to provide one.<sup>24</sup> So much for protection of tribal property.<sup>25</sup>

Repression is a time-honored method for dealing with painful events. But if we face facts, we cannot be comforted with the idea that conquest is something that predates the United States. Nor is it a thing of the past to grant Indian nations less protection for their property rights than is granted to non-Indians. Conquest is part and parcel of the American story and it is not something we can treat as finished or completely repudiated.

If the denial strategy cannot work to give us moral comfort, perhaps conquest can be justified in some other way. What legitimating strategies are open to us? First, perhaps our titles are legitimate simply because the law declared them to be

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21. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 284–85 (1955).

22. *E.g.*, *Idaho v. United States*, 533 U.S. 262, 277 (2001).

23. 129 S. Ct. 1547 (2009).

24. *See id.* at 1554–58.

25. For another recent example, see *United States v. Newmont USA Ltd.*, 504 F. Supp. 2d 1050, 1061–62 (E.D. Wash. 2007) (holding that the United States acquired “ownership” of polluted property previously owned by the Spokane Tribe through “discovery” and “conquest” even though no treaty or statute formally transferred such title to the United States).

legitimate. Theorists have long debated whether property comes from natural rights or government fiat. Conquest is an act of state power—usually by someone purporting to exercise that power for legitimate reasons and in justifiable ways. Positivists identify laws as coming from commands of the sovereign or rules created by government officials empowered to make them. If property originates in an exercise of power by a recognized sovereign, then property comes from positive law. This is the position taken by Thomas Hobbes and Jeremy Bentham.<sup>26</sup> They argued that property rights are created by law to achieve various social purposes, especially promoting investment and attaining a secure life.

The positivist tradition might solve our problem. That theory says that property rights come from the state; they neither preexist the state in a temporal sense nor have any moral validity independent of positive law. If we take this view, perhaps we can set aside those little moral questions of conquest and dispossession. Conquest was bad, yes, but it happened and we cannot undo it. Property must begin somewhere and in our system it begins with the seizure of Indian lands. Since we cannot rectify this in anything more than an imperfect way, we have no choice but to trace original title to property back to the governmental act of seizing Indian territory and transferring it to the first non-Indian owners. As Chief Justice John Marshall wrote in confronting this painful history, “Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.”<sup>27</sup>

There is something to this. We live, after all, in the real world. But moral claims are based, not on what is, but what should be. The law may declare me to be the owner of my house but that does not give us a reason to think the law is just.

A second legitimating strategy is utilitarianism. Perhaps we can get beyond all this by remembering that positivists like Jeremy Bentham generally seek support in the moral theory of cost-benefit analysis.<sup>28</sup> Let’s be pragmatic about all this. We are where we are because we got here the way we got here. In science fiction, you can redo things, but in the real world, the past is past. The only rational thing to do is to start with the status quo—now, where we are—and see if any proposed changes in law or policy would make us collectively better off. Thus, both Hobbes and Bentham suggested a utilitarian calculus—Hobbes, by suggesting that we are all better off vesting full authority in the state to allocate and define property rights, and Bentham, by suggesting a more modern conception of cost-benefit analysis designed to test current laws by their contribution to the general welfare.<sup>29</sup> This line of thought suggests not inquiring too deeply into the origins of property rights. The costs of rectifying those unjust origins surely outweigh the benefits; after all, are all the inhabitants of the American continent other than Native Americans supposed to return to Europe or Africa or Asia? Who would they displace if they went back to the land of their ancestors? No: on this view, the injustice of origins is something

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26. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Dover Publ’ns 2007) (1780); THOMAS HOBBS, LEVIATHAN (Richard Tuck ed., Cambridge Univ. Press rev. student ed. 2008) (1651).

27. *Johnson v. M’Intosh*, 21 U.S. 543, 588 (1823).

28. BENTHAM, *supra* note 26, at 1–42.

29. See *id.*; HOBBS, *supra* note 26, at 121–29.

we best relegate to history courses; it may be important to tell the story, but it should not impact current law or policy regarding ownership of land. The utilitarian solution suggests that we start from current distributions of land, whatever their origins, and ask whether a redistribution of title creates benefits that outweigh the costs.

This solution may be attractive but its attractions are illusory. For one thing, it is not clear why we should view the status quo as a neutral and morally defensible starting place. If a thief has possession of a car, we do not presume the thief has the right to keep the car; we do not compare the costs to the thief of returning the car to the benefits to the owner in retrieving her car. The status quo baseline presumes that Indian nations should be content with what they have, but if we stole their land from them, it is not clear why this should be the case.

Even if we could view the status quo distribution of land between Indian nations and the United States as a neutral starting place, it is not clear how we should value the costs and benefits of changing from one property distribution to another. Perhaps we should simply recognize that Indians are a small percentage of the U.S. population and that granting such a small group title to all the land in the United States cannot possibly increase social welfare. The needs of the many outweigh the needs of the few. But if we think about social utility in this way, we then can justify doing anything to a minority group as long as the majority group wins. Modern utilitarian theory refuses to accept the idea that costs and benefits should be measured in that way. The moral impulse behind utilitarian theory is to count each person as one and no more than one. It is premised, in other words, on the sanctity and equality of all individuals. To sacrifice one for the benefit of others is to violate the principle of equal concern and respect for each individual that is the underlying normative premise on which utilitarianism is based. For this reason, sophisticated moral theorists who adopt utilitarianism as an approach argue for a morally-constrained version of the theory.<sup>30</sup> Those moral constraints ensure that costs and benefits are not valued and compared in a manner that allows the many to ignore completely the interests of the few.

Government fiat, without more, is unacceptable as a just source of original title to property, but a utilitarian cost-benefit calculus cannot help us unless we figure out what moral constraints to use in valuing costs and benefits. How do we define those moral constraints? Perhaps the natural rights tradition stands us on firmer ground.

A third legitimating strategy justifies current land titles by the idea that we can trace our titles to the first possessors of the land. We actually acquired most of the land in the United States by transactions with Indian nations. Most treaties with Indian Nations involved transfers of land from those nations to the United States for substantial amounts of money. In short, we bought America from the Indians.<sup>31</sup> Some property law casebooks adopt this strategy, acknowledging that federal law

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30. WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 26–32, 37–45 (2d ed. 2002); MARK TIMMONS, *MORAL THEORY* 144–47 (2002).

31. Felix S. Cohen, *Original Indian Title*, 32 *MINN. L. REV.* 28, 35 (1947) (“[T]he historic fact is that practically all of the real estate acquired by the United States since 1776 was purchased not from Napoleon or any other emperor or czar but from its original Indian owners.”).



prevented the tribes from selling to anyone but the United States.<sup>32</sup> If first possession is the origin of title, then we can rest easy that we have good property rights because we acquired our title by buying the land from the first possessors. We actually do have a legitimate chain of title and a legitimate origin after all.

There is one major problem with this legitimating story. Those transfers were less than voluntary.<sup>33</sup> Consider a story I recall being told by my college economics professor, Randall Bartlett. You are in a deep pit filled with poisonous snakes, and I come along and offer to sell you the use of a ladder. In exchange I ask only that you give me half your future earnings and custody of your firstborn child. You agree to buy and I agree to sell. The deal is Pareto efficient; we are both better off afterwards than we were beforehand. Why not enforce the contract? I had no legal duty to help you and I did not hold a gun to your head; I simply offered you a pleasant alternative to an impending painful death and you eagerly accepted.

Pleasant as the alternative may be, it is still a coerced deal. We did not have equal bargaining power; indeed, you had no bargaining power at all. I could have gotten you to agree to be my slave and you might well have accepted. What I offered was only a little better than that. Besides, there are some demands we are not allowed to make in a free and democratic society that treats each person with equal concern and respect. T.H. White wrote in *The Once and Future King* that King Arthur explained: “What I meant by civilization when I invented it, was simply that people ought not to take advantage of weakness . . . .”<sup>34</sup> The treaties entered into with Indian nations did commendably reflect the United States’s view that Indian nations did have some property rights in their lands, but those treaties cannot be defended on the ground that they constituted voluntary transactions. Nor can we comfort ourselves with the observation that the Indians were compensated for their land. Such compensation is not adequate to rectify the injustices of conquest.

Recall that this was the argument made by advocates for Suzette Kelo, who sought an injunction stopping the city of New London, Connecticut, from taking her house.<sup>35</sup> She asked, not for heightened compensation, but for the power to refuse to allow the transfer of title to happen at all; she wanted a right to keep her home and argued that compensation of any amount was not a fair substitute for her power to decide when, if ever, to sell her home. If she was right, then compensation is not an adequate remedy for an unjust seizure of land.

The Supreme Court in *Kelo v. City of New London* allowed the city to take her house so the property could be redeveloped along with other property in the neighborhood to revitalize the local economy.<sup>36</sup> That Supreme Court opinion

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32. See JOHN G. SPRANKLING & RAYMOND R. COLETTA, *PROPERTY: A CONTEMPORARY APPROACH* 27–35 (2009).

33. Stuart Banner notes that the treaties did benefit both the Indians and the United States and that the agreements were voluntary in some sense. See generally STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (2005). However, as the parable of the deep pit in this paragraph demonstrates, that does not necessarily make the agreements sufficiently uncoerced as to furnish a just source of title.

34. WHITE, *supra* note 1, at 381.

35. See *Kelo v. City of New London*, 545 U.S. 469, 475–76 (2005).

36. *Id.* at 489–90.

unleashed a storm of criticism. Some critics suggested that never before in U.S. history did the government take property from some to transfer it to others simply because the government thought those others could use the property better than the original owners.<sup>37</sup> It would be good to remember that this is exactly what happened when tribal lands were taken for transfer to non-Indians. And those lands taken from Indian nations amount to ninety-eight percent of the land in the United States. Americans may be outraged by the *Kelo* decision but almost all of them are living on land taken from one owner and given to their predecessors in interest. The uncomfortable truth is that the history of the entire country is founded on this precise injustice.

A fourth legitimating strategy—and perhaps the most important—is time. Too much time has passed to rectify the wrongs of conquest. This recognition of political reality is one we cannot ignore. It may be the best argument to affirm current non-Indian titles to land.<sup>38</sup> Yet, it does not give us a just source of title. Again to quote T.H. White: “Unfortunately we have tried to establish Right by Might, and you can’t do that.”<sup>39</sup>

Where does that leave us? *The answer is that it leaves us in an uncomfortable place.* Both the great philosophers and our property law casebooks argue that the origins of property rights are crucial to determining their legitimacy, but if our land titles have no legitimate root of title, then the whole system is placed in doubt.

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37. Justice O’Connor’s dissenting opinion in *Kelo* suggested that the decision was unprecedented. Before *Kelo*, she argued, government could only take property that “inflicted affirmative harm on society,” *id.* at 500 (O’Connor, J., dissenting), but after *Kelo*, “[a]ny property may now be taken for the benefit of another private party . . . . The Founders cannot have intended this perverse result,” *id.* at 505.

Professor Richard Epstein agreed: “The *Kelo* decision wasn’t compelled by legal precedents . . . . It wasn’t a case of eliminating blight or breaking up an oligopoly. There was no precedent for kicking people out of their private homes just to warehouse the land for future development.” John Tierney, *Supreme Home Makeover*, N.Y. TIMES, Mar. 14, 2006, at A27 (quoting Richard Epstein) (internal quotation marks omitted).

Similarly, a prepared statement by Sharon B. Eckstein to a Pennsylvania legislative committee criticized the *Kelo* decision: “Never before had the U.S. Supreme Court said that a municipality could take private property and transfer it to a private entity strictly for economic development.” *Supreme Court’s Kelo Decision and Potential Cong. Responses: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 65 (2005) (statement of Sharon B. Eckstein, President, Save Ardmore Coalition, to Pa. H.R. Legis. Comm.), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_house\\_hearings&docid=f:23573.wais.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:23573.wais.pdf).

Statements like these ignore the forced takings of tribal land to be kept for future distribution to non-Indians that are the basis of most current land titles in the United States.

38. See Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 15–20 (1992) (arguing that time makes a big difference in determining the appropriate current moral response to past property deprivations).

39. WHITE, *supra* note 1, at 455 (internal quotation marks omitted); see also A. John Simmons, *Historical Rights and Fair Shares*, 14 LAW & PHIL. 149 (1995) (arguing that wrongly dispossessed owners like Indian nations may have rights to contemporary recognition of some portion of their ancestral lands).

What is the answer to our dilemma? To begin with, we must reject the path of denial and repression. We must tell our history and tell it accurately—the good and the bad. As someone once said, the truth will set us free, but first it will make us miserable. There is bad news here, but there is good news as well.

First the bad news. We cannot trace our land titles to a just origin, and we should stop pretending we can. Our titles come from a combination of military conquest of sovereign nations and forced relocations of free peoples. Not a pretty picture and we should stop denying it.

Now the good news. The United States is a democracy. It is not perfect, but it tries to live by the principle that governments derive their power from the consent of the governed while limiting the power of elected representatives through legal protection of fundamental constitutional rights. We did not simply kill all the native inhabitants, as happened in some countries, and, for the most part, we did not declare the land to be vacant *terra nullius* open for occupation. Rather, from the time of the adoption of the U.S. Constitution, the United States partially recognized the preexisting property rights of Indian nations, and it arranged for transfers of title from those nations to the United States.

In three crucial opinions decided by the Supreme Court in the 1820s and 1830s, Chief Justice John Marshall sought to slow down the march of conquest by announcing that Indian lands could not be taken without the full and voluntary consent of the Indian owners.<sup>40</sup> Those opinions were not completely admirable; they contained offensive racist language and justified the discovery doctrine by claiming that Indians were savage and uncivilized. But they also tried to enact U.S. ideals. They did so by admitting the injustice of conquest and adopting legal rules designed to limit its injustices in the future.

The United States ignored the rule that tribal property could not be taken forcibly and against the will of the Indian tribes. Again and again the United States took tribal property involuntarily. But the transfers did affirm that the tribes had legitimate initial partial title to their lands, and much of the time those transfers were accompanied by substantial compensation. In addition, Congress passed a statute in 1946 called the Indian Claims Commission Act that allowed Indian nations to bring lawsuits against the United States for compensation if they could show that they had not been fairly compensated for their lands to begin with.<sup>41</sup> That law was far from perfect but it reflected American values and attempted to extend them to the first possessors of our lands.

We need to rewrite our history books so that our children understand the actual process by which we acquired title to lands in the United States. Most of our children learn that our lands were acquired from other colonial powers but they do not learn as much about the history of Indian land cessions. And most of our children are not taught that Indian nations still own two percent of the land in the United States or that the federal government recognizes more than 565 Indian

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40. *Worcester v. Georgia*, 31 U.S. 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Johnson v. M'Intosh*, 21 U.S. 543 (1823); see Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 489–95 (1994) (explaining the significance of these cases).

41. Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 (codified as amended at 25 U.S.C. §§ 70–70w (1976)).

nations that enjoy government-to-government relations with the United States. And our law students are taught the relations between the federal and state governments, but many are not taught about the hundreds of other sovereigns that continue, against all odds, to live among us non-Indians.

The answer to our problem of origins of property rights is the *practice of democracy*. Democracy entails the idea of collective governance over the conditions of our lives while also recognizing respect for human rights. Laws adopted by elected representatives have some claim to legitimacy even if they concern property rights, and constitutions have some claim to legitimacy if they are adopted by the people themselves. As has been pointed out by Milner Ball and Philip Frickey, the Indian nations did not sign the Constitution.<sup>42</sup> How then did they become incorporated legally into the United States? The answer is that, if they did become incorporated legitimately and legally, it happened through the treaty process. Treaties with Indian nations, Frickey argues, are quasi-constitutional documents.<sup>43</sup> And Robert Williams explains that most Indian nations regard treaties as relationships of mutual respect and ongoing engagement.<sup>44</sup> The treaties with Indian nations were not one-time contracts that involved transfers of title but entailed mutual recognition of continuing government-to-government relationships between Indian nations and the United States—a policy that has been formally expressed by every President, Republican and Democrat, since Richard Nixon.<sup>45</sup>

If conquest is not a legitimate source of title, then land in the United States was not obtained legitimately from Indian nations. That means that we non-Indians are living on Indian land. We have no choice but to live with the burdens of history. The democratic way to deal with this is to reduce the injustices associated with conquest. The absolute minimum that we could do today to accomplish this is to *stop engaging in acts of conquest now*. That means respecting retained tribal property rights and respecting the existing sovereignty of Indian nations. I am sometimes asked why we should recognize tribal sovereignty. This question betrays ignorance both about American history and current U.S. law. Tribal sovereignty exists now. It has always existed, and it is recognized by U.S. law. It *preexisted* the United States and represents sovereignty that the United States never extinguished. To limit the sovereign powers of Indian nations over their reserved lands without their consent is to engage in an act of conquest. That should stop.

Our land titles do not have a just origin, but we have attempted to rectify this by providing partial compensation to Indian nations for their lost lands and by

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42. Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1; Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

43. Frickey, *supra* note 42, at 406–17.

44. See ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800*, at 98–137 (1997).

45. See, e.g., Michael D. Shear, *Has President Obama Kept His Promise to American Indians?*, THE CAUCUS: THE POLITICS AND GOVERNMENT BLOG OF THE TIMES (Dec. 16, 2010 8:32 AM), <http://thecaucus.blogs.nytimes.com/2010/12/16/has-president-obama-kept-his-promises-to-native-americans> (quoting White House spokesman Shin Inouye as saying, “[President Obama] deeply values and appreciates the nation to nation relationship between the federal government and Indian country”).

adopting a policy of self-determination, recognizing tribal sovereignty and reserved property rights. This means respecting tribal off-reservation hunting and fishing and water rights, and on-reservation powers to govern tribal territories free of state law. Tribes who seek such protections are not asking for special rights denied to others. They are asking that we not continue the practice of conquest.

## II. FROM POSSESSION TO EQUAL OPPORTUNITY

Now we must turn our attention to the Lockean proviso. Locke argued that first possession is a legitimate source of title only if “there is enough, and as good left in common for others.”<sup>46</sup> Locke went on to argue that private property was justified even though all the land is taken because the adoption of a money economy left everyone better off than before we adopted the social institution of private property.<sup>47</sup> On that theory, we have nothing to worry about from the Lockean proviso. Surely a system of private property and market relations is better than not having such a system at all. Homeless families may suffer from the lack of a place to sleep at night, but we would all be worse off if we did not recognize the right of owners to exclude nonowners from their homes.

Given the current recession and the harsh struggles of many Americans to find work, we should not dismiss the Lockean proviso so easily. Nor should we ignore the fact that family background is the best predictor of future economic status. According to Locke, private property is justified only if each person has an equal chance to become an owner. It is a question of debate what that principle requires, but it is a major error for property law casebooks to justify original acquisition of property by reference to the principle of first possession without acknowledging the Lockean proviso or in some way addressing the distributive issues involved in a private property system. We would be untrue to the normative reasons that make first possession legitimate if we did not teach that first possession is legitimate only if others have equal opportunities to acquire property themselves. What are the consequences of this principle?

The conservative view is that existing distributions of property must be respected. Both redistribution and taxation of property designed to take the property of some to be transferred to others are per se illegitimate. Property rights are either respected or they are not respected; to take someone’s property to give it to someone else is never justified.<sup>48</sup> And limitations on the rights of owners are simply another means of taking some sticks in the bundle of rights that goes along with ownership and transferring them to others. The natural rights tradition suggests that property rights have a strong normative basis that justifies legal protection regardless of the consequences of protecting those rights; on this view, one cannot be both for property and for redistributive efforts that transfer property from the rich to the poor.

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46. LOCKE, *supra* note 3, at 288.

47. *Id.* at 293–302; see also Carol M. Rose, “Enough, and as Good” of What?, 81 NW. U. L. REV. 417, 430–33 (1987) (explaining the argument that everyone benefits from living in a private property system).

48. See Epstein, *supra* note 2, at 1228 (arguing that recognition of a Lockean proviso would undercut the individualistic basis of the first possession theory).

Progressives, on the other hand, advocate redistribution of property to promote equality. Doesn't this represent an attack on property rights? The answer is no.<sup>49</sup> Recall why the first possession story is so prevalent both in our property casebooks and in our national myths. People need homes where they can rest, play, and enjoy human relationships. Property is necessary for liberty. That is why we should allow people to possess land. Because we live in a democracy that seeks to treat each person with equal concern and respect, the right to acquire property cannot be limited to those lucky few who came first. If property is necessary for liberty, and if each person has an equal right to be free, then it follows that property rights are not justified unless each person has an equal opportunity to acquire the property necessary for a full human life. When Texas economist Robert Montgomery was questioned about whether he favored private property, he replied, "I do—so strongly that I want everyone in Texas to have some."<sup>50</sup>

If this is so, we must reject the idea that property rights are absolute and that taxation and regulation designed to promote equal opportunity violate property rights. Libertarians like Robert Nozick have it exactly backwards. Nozick argued that if thousands of people pay money to see a great basketball player like Wilt Chamberlin, why doesn't he have a right to keep the money?<sup>51</sup> The answer is that property rights, if they become very unequally distributed over time, give the wealthy more and more power over economic and social life. Equal opportunity is not something that happens once and then we are indifferent to the distribution of abilities to acquire property in the future. If one is born to a poor family and attends a poor public school and has less access to the social and economic means to get ahead, the resulting distribution of property cannot be characterized as just even if our goal is maximizing liberty. As Jeremy Waldron and Frank Michelman have argued, if property is needed for liberty, then each person must have a realistic opportunity to acquire the material bases for exercising those liberties.<sup>52</sup>

Nozick argued that we should adopt a historical approach to property.<sup>53</sup> He meant that we establish just means of original acquisition, allow free transfers, and then respect the property rights that emerge regardless of their distribution. But this is an odd approach to history. A true historical approach would start with what really happened rather than a fictitious state of nature. As I have noted, our property history begins in 1066 when William conquered England and began the feudal system. He gave the whole country to dozens of his family and friends and established a hierarchical society. Over time, both Great Britain and the United States moved from feudalism to democracy. Eventually we abolished slavery; we

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49. See Leif Wenar, *Original Acquisition of Private Property*, 107 MIND 799 (1998) (arguing that ownership rights are justified only if external effects on others are taken into account in defining the distribution and definition of property rights).

50. THE LITTLE, BROWN BOOK OF ANECDOTES 395 (Clifton Fadiman ed., 1985).

51. NOZICK, *supra* note 14, at 160–64. *But see id.* at 180 (conceding that ownership rights must be limited or shared when circumstances change so as to deprive others of access to things needed for human life).

52. JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 408–15 (1988); Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1327–34 (1987).

53. NOZICK, *supra* note 14, at 153–55.

have abolished racial segregation; we have abolished the rights of husbands to control their wives' property. Our democratic system of property starts, not with the state of nature, but with the constitutional prohibition on titles of nobility and with laws that prohibit social relationships that give some people unwarranted power over others. Democracies do not allow people to create any and all forms of ownership; many types of property relationships are banned. They are off the menu. Laws and policies designed to promote equal opportunities for all are not infringements on property rights. They are the only thing that justifies property rights in a democracy.<sup>54</sup>

We do not acquire property today by staking claims in the wilderness. Original acquisition of property today comes, not from conquest or first possession, but from family, work, and investment. Most people acquire property initially from their parents who care for them, provide them a home, and help them find their way in the world. If family is a major source of original acquisition of property today, then children whose parents are poor, and cannot provide for them, are at a severe disadvantage.<sup>55</sup> Equal opportunity will exist only if both law and government policy actively seek to create it.

Outside the family, most property is acquired through work, investment, and exchange. These methods of acquisition involve collaborative ventures with others. These social and economic relationships are mediated and regulated by law. Americans often say they distrust government, but they demand laws that impose minimum standards for contractual relationships. Our most libertarian states regulate the workplace to ensure that we have safe places to work and that we do not face unjust discrimination on the job. They regulate insurance companies and banks so that our money is there when we need it. They regulate consumer products like cars to ensure that they are safe and perform as advertised. They regulate land use so that our homes and businesses can expect a secure, unpolluted, and pleasant environment. They regulate professions like building contractors, lawyers, and doctors to ensure that we do not entrust our money and our lives to quacks. These regulations are not designed to take away our liberty; these laws are what makes us free.<sup>56</sup>

The estates system may be arcane and confusing but the principle behind it is crucial: some packages of property rights are unlawful in a free and democratic society. We outlaw particular packages of rights because they are incompatible with our way of life; democracies do not countenance titles of nobility, feudal relations of unequal status, apartheid, or plantation slavery. Sometimes we outlaw particular packages because they interfere with the welfare-promoting functions of a free market; they inhibit alienability or they impede competition or they cause other harmful externalities. The current recession, caused by the subprime mortgage foreclosure crisis, means that never again will it be difficult for property

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54. See JEDEDIAH PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION* (2010) (explaining the need to shape property rights and limit them to make them compatible with a democratic conception of liberty).

55. See BRIAN BARRY, *WHY SOCIAL JUSTICE MATTERS* 46–69 (2005).

56. Joseph W. Singer, *Things That We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society*, 2 *HARV. L. & POL'Y REV.* 139 (2008).

law professors to explain that it should be illegal to create certain packages of property rights. Securitized subprime mortgages granted without adequate record keeping or safeguards have resulted in toxic assets that have wrecked the world economy. There are reasons not to allow such packages to be created in the first place.

Libertarians argue that property rights cannot be limited or redistributed to promote equality because this violates the rights of owners. But property rights are not, and cannot be, absolute. The only way to have absolute property rights is to follow Thomas Hobbes and give all the property to a king or queen and let them have full power over it. But that kind of society is a monarchy or a tyranny. If you want to live in a democracy, then property rights must be limited by law. If you want every person to have the chance to become an owner and if you want their property rights to enjoy basic protections, then you must regulate the packages of rights that can be created. Property exists only if we have property law, and law exists only if we have government to issue regulations. One cannot be for property and against government.

This means that the rights of current owners must be limited to ensure that everyone can become an owner. Nor does this violate the normative basis of our story of origins—quite the contrary. Property rights have just origins today only if each person has the equal opportunity to acquire them. The legitimate origin of property is not first possession but equal opportunity. This means that the progressives were right all along. We cannot be indifferent to the unjust origins of property, but it is equally true that we cannot be indifferent to the social, economic, and legal barriers that continue to prevent access to the property system today. Our most important philosophical traditions are premised on the twin concepts of democracy and equal opportunity. And if that is true, then using democratic means to limit or reallocate property rights to ensure equal opportunity and to promote social relations compatible with a free and democratic society not only is not a violation of property rights but also is compelled by the very reasons we created property rights in the first place.

Our more enduring normative basis for the original acquisition of property is not the concept of first possession—and certainly not conquest. It is, instead, the democratic ideal of equal opportunity.<sup>57</sup> If that is so, then the extent to which such equal opportunity does or does not exist becomes a question of fundamental importance.

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57. See Bas van der Vossen, *What Counts as Original Appropriation?*, 8 POL. PHIL. & ECON. 355, 360–66 (2009) (arguing that original acquisition theories are legitimate only if they are qualified by legal rules that ensure that acts of appropriation do not deny others similar opportunities).