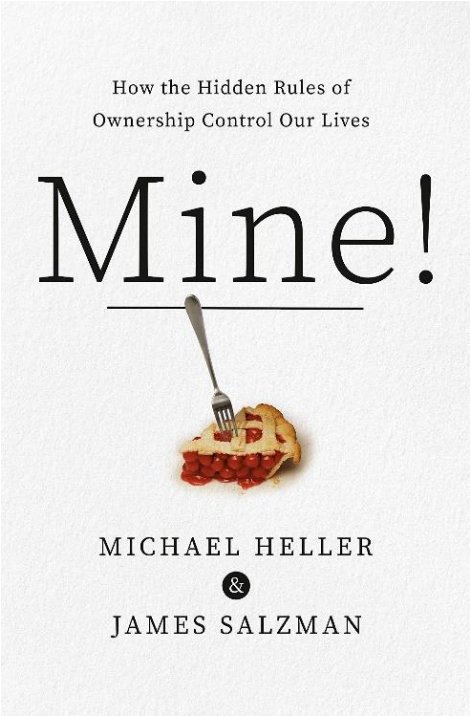
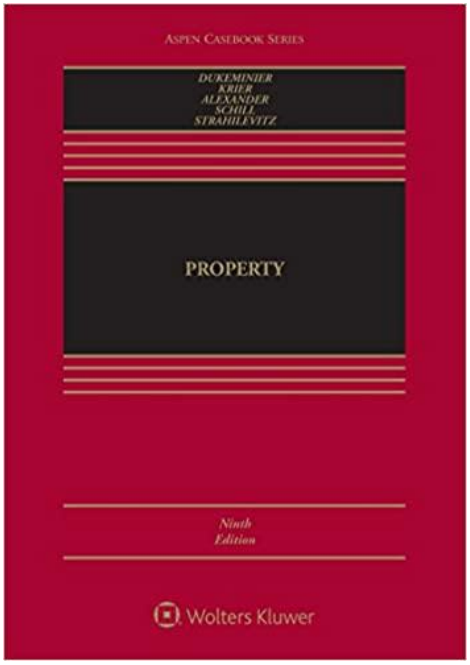
TEACHER'S MANUAL for *MINE!*



For use with PROPERTY (Dukeminier et al., 9th ed.)



Why adopt *Mine!* as a supplemental text?

Taught together with Dukeminier et al., *Mine!* brings property law to life. Alongside discussions of casebook classics such as *Pierson v. Post* and *Moore v. Regents of the University of California*, *Mine!* engages students with surprising and contemporary debates such as:

- Who controls the space behind an airplane seat, you reclining or the passenger behind you trying to work on her laptop?

- Should someone be prohibited from operating a food truck in the metered parking space in front of a restaurant?

- Should you have the right to shoot down a pizza delivery drone peering into your house?

- Why does a chair in the street hold your parking place after a snowstorm in Chicago but not in New York? And conversely, why does a napkin on your drink hold your seat at a New York bar, but not in a Chicago dive?

The inspiration for *Mine!* came from a Property Law professor colleague who remarked offhand, "It's surprising that there is no *Freakonomics* for Property Law." He had a point. *Freakonomics* teaches simple microeconomics through clever and engaging stories—why do sumo wrestlers cheat, and why do drug dealers live with their mothers?

Mine! follows the same approach—it is the most readable, popular, widely reviewed, story-based book to bring together the basics of modern property law. We uncover the often-hidden rules for who gets what and why in an entertaining and provocative fashion. Roman Mars, the podcast host of *99% Invisible*, described it as an "academic barfight book. Completely joyful to read but it's a thing to start and settle fights because everyone thinks they're right."

Between us, Michael Heller and James Salzman have taught thousands of property law students using the classic Dukeminier et al. casebook. We honed the stories in *Mine!* in the classroom to engage student interest, teach the core of modern property theory, and make visible the centrality of ownership rules to our everyday lives. Indeed, *Mine!* was conceived from the ground up to be used as a supplement to property law casebooks.

Written in a user-friendly fashion without legal jargon, our goal is to make students feel smarter after reading the stories and engaging with the explanations. This works all the better in a classroom setting coupled with the Dukeminier et al. casebook, where the teacher and students can explore how property rules evolved, and which rules make sense and which don't, whether for reclining airline seats, our genomes, or marital property.

How to use this teacher's manual?

There are three strategies for using *Mine!* with the first year Property class.

(1) **Assign the book** before class has begun (either as required or recommended reading). This will provide a solid understanding of the field from Day One.

(2) **Assign chapters**. The book is written for a lay audience and is a quick read, so reading a 20-30 page chapter is not a major time commitment. The benefit to this approach is that the students gain a full understanding of each claim for ownership (possession, labor, etc.).

(3) **Add specific excerpts** into your existing syllabus. We have written the Teacher's Manual with this last approach in mind. The goal is to ensure minimal extra work for the teacher and a broader context for class discussion.

This manual tracks the table of contents of the Dukeminier et al. casebook. Under each section, the teaching notes for relevant excerpts from *Mine!* and page numbers are set out. If you are teaching material from Chapter 1, for example, directly under the chapter title we set out three separate excerpts you could assign as background for the chapter's classes. If you are teaching a specific case in Chapter 1, such as *Ghen v. Rich*, we place the relevant excerpt from *Mine!* and teaching notes just below the case name. This will make it easy to adopt into an existing syllabus.

What about cost?

We are mindful of the high cost of casebooks; no teacher wants to add to students' costs. The good news is that *Mine!* is available on the web for $15. The paperback edition is coming out in February 2022. If students resell their copy after the course, or buy a used copy, the text will cost $5-10.

How to get a desk copy of *Mine!* for review?

You can obtain an e-galley of the book (Doubleday, ISBN: 978-0-385-54472-6) by clicking on the complimentary eBook access link. If you want a hard copy, please email Jim Salzman (salzman@law.ucla.edu) with your address and he will arrange for a copy to be mailed to you.

Where to find multimedia resources?

Our website, www.minethebook.com, contains a fun interactive quiz from *Worth* magazine and a series of short videos explaining ownership stories and concepts. These provide a nice complement to the readings noted in the Teacher's Manual.

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CHAPTER 1
Acquisition of Property by First Possession: Discovery and Capture

For the first or second class of the course, we recommend assigning all or part of Chapter 1 (*Who Gets What and Why*). This 20-page chapter provides an engaging introduction to why ownership matters and how to think about it. If you wish to assign fewer pages, we encourage you to start with the Six Stories excerpt. This provides a framework you can refer to throughout the entire course. Teaching notes for the very first classes of the course are set out below.

Six Stories (pp. 12-16)
Click here for the video (How the Hidden Rules of Ownership Control Our Lives)

The single most important teaching tool from *Mine!* is that there are just six stories that people use to claim original ownership. This has always been the case and will always be so. The stories and popular sayings are set out below:

First-in-time	*First come, first served*
Possession	*Possession is nine-tenths of the law*
Labor	*You reap what you sow*
Attachment[1]	*My home is my castle*
Self-ownership	*Our bodies, our selves*
Family	*The meek shall inherit the earth*

This is a *simple conceptual framework* that students can use throughout the course to identify competing justifications for ownership. Once students become comfortable with this approach, they can more easily understand that ownership is a socially-determined and constantly-contested allocation of resources rather than a fixed, natural, or discoverable fact. And, as well, that much more ownership is determined by social conventions than by law.

You can prompt a class discussion by describing a typical playground scene where one toddler is playing with a plastic shovel and puts it down for a moment. Another toddler wanders over and picks it up. When the first toddler turns around to play with the shovel again, the conflict begins. Grown-ups only hear each toddler shouting, "Mine!" If you ask the students the claim each toddler is making, though, the importance of story-telling becomes evident. One is claiming first-in-time, the other possession. Each feels equally in the right.

[1] We use "attachment" rather than accession because the term is more easily understood, and intended more broadly than the narrow accession doctrine. We chose "family" instead of "group" also for ease of understanding.

Conflicting stories are at play with reclining airline seats (possession versus attachment), who owns your genetic data (labor versus self-ownership); indeed any conflict over ownership involves competing stories. Sometimes the conflicts are over the strength of the story (should attachment prevent drones from flying over your house? how high should your air rights attach above the surface of the land?) or competing versions of the same story (which attachment claim should be stronger when growing redwoods shade a neighbor's solar panels?).

The key teaching point is that you can use the Six Stories framework throughout the course to dissect ownership conflicts. Much as Neo is able to break down The Matrix into a stream of 1's and 0's, students who master the Six Stories framework will be able to make sense of conflicting ownership claims and distill the basic stories at play.

The implication of the Six Stories framework is equally important. If all original ownership claims come down to competing stories, then *ownership is really a matter of story-telling*. There is no empirical, natural rule for ownership. We find that dispelling this pre-conception is one of the most important tasks of the first year Property course. Students come to Property expecting to memorize a bunch of boring rules. That is certainly part of the course, but these rules are under constant pressure, and in many areas, are not fixed. Who should own our clickstreams or genetic data? There is little law directly addressing this issue yet and ownership is up for grabs.

The goal in highlighting the six underlying stories is to start changing how students look at the world around them, asking not simply "who owns this?" but, instead, "what are the competing ownership stories that justify ownership for one party over another?" We find this a more accessible approach than looking at the world through the bundle of sticks metaphor. In particular, with this approach the role of lawyer as story-teller becomes paramount.

If property claims come down to competing stories, if ownership is fundamentally a "story-telling battle," what should be the *roles of lawyers, judges, and legislators* be in deciding which story wins? In our view, this is where advocacy becomes paramount. The ability to identify which stories are in play on the sides of a debate allows advocates to identify and respond to the core claims. It also becomes critical to identifying the unspoken values underpinning each story.

In terms of class exercises, ask the students to apply the stories to the cases in Chapter 1 and identify the stories in play for each party. Note that many of these involve conflicting stories over what counts as first-in-time, possession, and labor (does hunting or throwing the harpoon count?).

Johnson	(first, possession)
M'Intosh	(first, possession, labor)

Ghen	(labor, first)
Rich	(possession)
Hayashi	(possession)
Popov	(labor, first)
Keeble	(labor, first)
Hickeringill	
Pierson	(possession, first)
Post	(labor, first)

Another an in-class exercise is to ask students to bring in an ownership example from that day's newspaper. We are confident that every day a headline will turn on a story-telling battle from at least one of the six simple stories. The day this manual text was written, for example, there was a front page story over who will get access to Covid booster shots (first in time, or another rule?).

Students may ask whether these stories are solely Western. Do other cultures use different stories? We have spoken with anthropologists and not found any other stories. To be sure, different cultures will rely more on some stories than others. Some may rely on the family story more than labor, for example, but everyone is using the same storybook.

Do these six sayings fully cover original ownership claims or can you think of another the book left out? Students may ask why purchase or gift is not an independent claim. After all, that's how we determine ownership of most of our stuff. Transfer of property, though, does not really answer the basic ownership question. At some point back in the chain of prior sellers or donors, there must have been an original owner – someone who first claimed title based on one of the six stories. In some respects, this is the main question in Johnson v. M'Intosh. Which original claim of ownership wins over the other? Who decides what counts as "first," "possession", and "labor"?

And if your class discussion does come up with a seventh story, please let us know!

The Knee Defender (pp. 1-7)

This excerpt describes a fight over a passenger locking the front airline seat so it cannot recline.

We start with this story because everyone who has ever flown can relate to the dilemma and frustration over reclining airline seats. But as a teaching point, note that *the airplane seat is a wonderful analogy of many land conflicts* you will teach throughout the course. The boarding pass works like a land deed. Seat conflicts raise issues of nuisance and trespass, subsurface and air rights.

While people tend to think of seat recline conflicts as a matter of politeness or high-altitude manners, it's important for students to realize that, at its core, they are really a question of property rights. Who controls the wedge of space behind the seat?

You should start the discussion with a poll. Who is in the right – the knee defender or recliner? When we give talks about *Mine!,* we always ask for a show of hands or zoom poll the audience and, remarkably, the audience always splits. Much of the time it is 50/50. The most skewed results we have ever seen is 60/40 in favor of reclining. We suspect you will get a similar result in the classroom. The great part is that each side looks at the other with incredulity, thinking, "how could you possibly disagree with me?" This can be brought out by asking why students disagree. Are ownership preferences in the class based on height? Gender?

Some may say the difference is based on politeness, but that glosses over the fact that, even if you choose not to recline out of courtesy, you still believe you have the right to recline but simply don't exercise it. Why do you think you have that right?

In our view, the core driver is that we are working from different stories. As the excerpt notes, Attachment ("if I can recline into the space it's mine") is in conflict with Possession (I have claimed this space for my laptop and knees"). The first key point to highlight (ideally in conjunction with the Six Stories text at page 12) is that ownership claims are just stories. And there is no single right story. Ownership is a social construct, not a fact, and it is always up for grabs. This makes the role of the lawyer particularly important because she has the task of persuading the decisionmaker that her client's story is the right one.

The second key point is to ask why these fights are breaking out now. This allows the class to explore *the roles of technology and scarcity in shaping property rights*. Why technology? We use airplane tray tables differently from how we used to. No longer simply the support for rubber chicken, tray tables are now valued work spaces for laptops and the entertainment center for inflight movies. The growing importance of laptops on flights has made the wedge of space more valuable. Passengers now care a lot more whether they can work on and view their laptops.

The perfect storm is when this is new resource use combines with induced scarcity. As described in the text, airlines have been shrinking the distance between seats (the "pitch") such that on some

airlines it feels like you need to fold your legs before sitting down, and the back of the seat reclines directly into your abdomen. Put these together and you have space that has become newly valuable and scarcer. When more people want the same thing and there is not enough to go around, property rules matter -- and that's everywhere and always.

And this highlights another key lesson of the seat recliner story. This situation is an example of *ownership engineering*. Airlines obviously know about seat reclining fights but what do they do? They keep quiet.

They could be clear about the right to recline, or the right to defend your knees, yet they remain silent. This places the responsibility on passengers to establish a norm around seat reclining, and a broadly accepted norm has yet to emerge (which should be obvious from polling your students). We call this strategy "strategic ambiguity." Keeping property rights uncertain helps the airline. Passengers blame each other for the conflicts when they really should be angry at Delta, Frontier, or another carrier.

The coolest part of this story, though, is how it also explains the battle over who should control your clickstream. The arguments of attachment and possession are the same on the web as in the air (with an additional labor argument for the website creators) and the same level of uncertainty remains. This is just fine for the websites. The uncertain status quo works to their benefit as they gather up our clickstreams.

This issue is usually described as a privacy law matter. And privacy does matter, but that's only part of the story. It is up to us, as citizens and lawyers, to recognize that this is equally an ownership conflict. Viewed that way, we can identify the competing stories, and support whichever story we think appropriate. The main lesson is that ownership is always up for grabs, for something as trivial as a reclining seat or as consequential as control of our online lives.

Another useful point to make is how uncommon it is for property conflicts to end up in court. The vast majority, *99.99%, of struggles over ownership are settled informally*. How many cases are litigated involving someone cutting in line, taking your parking space, saving seats? Yet these ownership struggles dominate our daily lives. The law is important, to be sure, but in understanding the vast reach of ownership rules, the informal is in many respects just as important as the formal. Students need to understand the influence of both norms and laws.

The rocking chair (pp. 18-20)

This excerpt describes a conflict among siblings over who should own the beloved rocking chair of their father and how it should be owned. Click here for the video (The Rocking Chair).

Michael Heller uses this in his first class every year. It provides a great way for the students to understand that there is no single correct answer for ownership. Depending on what matters most to the judge – *fairness, efficiency, administrability, deterrence*, etc. – different rules will be more or less appealing. Assigning this will make the point clear. You can then ask the students what they would have done as judges and why. This will lead to a rich discussion over what matters most to the students.

An equally important point to make is the distinction between *ex ante and ex post* judicial reasoning. This arises in the *Popov v. Hayashi* case below, as well. Should the judge focus on "doing justice" between the siblings (ex ante) or on shaping future behavior of parties (ex post).

Or you can simply use the facts without assigning the text to set up your own in-class discussion. (Note: The rocking chair case appears without discussion in Dukeminier et al. on page 414. The Mine excerpt and discussion can be reserved to this point when you are discussing co-ownership rules).

A. Acquisition by Discovery

Johnson v. M'Intosh (Dukeminier et al, p. 4)

Sweat of the Brow (pp. 82-86)

The questions following *Johnson v. M'Intosh* introduce students to Locke and the labor story -- it's mine because I worked for it. The excerpt in *Mine!* explains the key point that labor, like every other story justifying ownership, is not self-defining. The Native Americans' labor didn't count to the courts. They were looking for labor that made New England look like Old England. As we explain, "Ownership is a social engineering choice, a conclusion we come to, not a fact we find." This can lead to one of the "ah ha!" moments for students, realizing that *property rules are instrumental*, designed to achieve particular outcomes. This recognition will help shift the students from simply looking for a rule to memorize, instead, to asking what the rule was designed to do, what value judgments are unstated.

This becomes even more evident in considering how property rights shaped the settling of the American West. Virtually all the public resources accessible following the Louisiana Purchase could be transferred to private property if they met the requirements for what was seen at the time as productive use. Vast swathes of land, water, minerals, and forests were transferred from the government to settlers as part of this deal.

It's worth asking the students if this was a smart policy, even given 19th century social mores. What goals were the government trying to achieve? Is it still a smart policy in the 21st century? Is "non-use" of resources for environmental protection a legitimate productive use? Even today, as a result of these rules established over a century ago, conservationists cannot bid on public timber, oil or grazing leases unless they commit to extractive activities. Conservation on public lands is not generally regarded as productive use.

Dynamic Tolling and Korean Taco Trucks (pp. 37-39)

This excerpt describes how first come, first served, has been adapted for access to the highway fast lane and battles over whether food trucks can park near restaurants.

Johnson v. M'Intosh is not only about labor, of course. The case can also be framed by asking which chain of title claim came first -- an application of the first come, first served story. You can cover this topic in more detail in Part B of this chapter, but you may want to steer class discussion toward more modern day versions of these conflicts. The fast lane on the highway used to be first come, first served, but highway departments have changed over time who counts as first during rush hour. It may be limited to high occupancy vehicle (HOV) carpools or perhaps electric or hybrid cars. These are all intended to reduce auto emissions. Or, if the goal is to raise money, the fast lane can be reserved for those willing to pay.

It's worth asking the students if they support congestion pricing. Those who oppose it likely do so on moral grounds that it disfavors the poor who may have the same willingness to pay but less ability. This creates an opportunity to *explore market allocation for scarce resources*. We allocate many, perhaps most, resources by price, so what's wrong doing that with fast lane access? Is there something about public resources that makes this seem wrong?

You can add to this discussion by also assigning the *Linestanding* story at pages 21-23, where you can ask the same questions about how students feel about the linestanding business. Unlike the seat reclining question, where audiences split 50/50, audiences tend to be all over the map on this question, leading to a nice discussion on why ability to pay should be a valid allocation basis for places in line (students often will distinguish, as with fast lanes, between private and public resources, between paid linestanding for a Broadway show versus a Supreme Court seat).

The food trucks story is a great way to show how ownership rules can work in favor or against newcomers, depending on who is making the rules. It also helps show students how many conflicts are really about property rights. Most people looking at the parking space debate would focus

purely on competition rather than ownership at the core of the dispute, but control over parking spaces can usefully be framed as "who counts as first?" Is it the food truck that was the first to take the open spot that morning or the restaurant that has long been in this location and therefore has a superior right to the surrounding spaces?

As we point out, it's *Johnson v. M'Intosh* all over again, but this time the newcomers lose. In *Johnson,* the Court interpreted "first" and "labor" so European immigrants won Native Americans. Today, in the food truck context, cities are interpreting "first" and "labor" so immigrants lose against existing owners. The differing outcomes poignantly illustrate how the basic ownership stories are up for grabs.

B. Acquisition by Capture

Pierson v. Post (Dukeminier et al, p. 19)

Who's on First? (pp. 24-30)

Pierson v. Post is a wonderful case for highlighting a whole range of property law insights. *Mine!* focuses on the core question of what counts as first -- hot pursuit or capture? First possession is one of the six core stories of ownership. This excerpt shows its historic uses and modern applications, as well as why it is such an intuitive and easy to apply rule. The major take-away is that "first" is a slippery, contested concept. There are no value-neutral ways to decide who should control scarce resources. As we write:

> This point represents the biggest gap between lay and legal views of property, and it is a hard lesson for new law students to grasp: ownership is a social engineering choice, a conclusion we come to, not a fact we find. First, we decide the goals we want ownership to achieve. Next, we decide what means will most likely get us there. Finally, we affix the legal term *owner* to the sum of those oft-hidden value judgments and casual empirical guesses. Ownership is the endpoint, not the start, of analysis.

Getting students to understand this early in the semester will provide a richer perspective on why Property Law looks this way it does. Click here for the video (first come, last served).

More specifically, while what counts as first may seem to be an empirical fact, that's not so evident. The issue often turns on *how* you got to be first. In *Pierson*, what counts as first may be either hot pursuit or capture. On the playground, a child may say, "I ran to be the first in line. I'm the line leader." But the teacher may well reply, "Sure, you got to the front of the line first, but you ran

and only walking is allowed so you go to the back." One of the most notorious examples of deciding what counts as first in American history was Rosa Parks, who refused to go to the back of a Birmingham bus when a seat near the front was open, making her claim of first an iconic moment of the civil rights movement.

The text also provides an opportunity to discuss *the rule/standard distinction* that students will use for the rest of their law school education. You can use driving as a class example. A rule would be 55 mph. A standard would be "drive safely." It will be interesting to see which approach the students favor and why, comparing a city or suburban street to the empty stretches of Nevada highway.

What are the advantages of rules over standards? Rules tend to be easier for courts to administer (and hence cheaper); rules may discourage future litigation by informing the parties ahead of time the likely result of any dispute; and a clear-cut rule can sometimes more effectively channel behavior by making salient which course of action a court prefers.

Standards, by contrast, leave less room for individual variation. Unanticipated fact situations governed by rules may foreclose sensible departures. Rigidity has its costs, particularly if there are lots of variables and stakes are high. Would students prefer a rule of "if you miss three classes you have your grade lowered one letter," or "excessive and unjustified class absences will result in a lower grade"?

Our discussion of "*casual empiricism*" may be helpful for teachers who want to demystify judicial opinions. The focus on the case method for first year law school pedagogy can often elevate judicial decisions to an elevated status, sometimes undeserved. It can be useful to point out to students early on that the vast majority of judges have no idea how their ruling will actually affect future behavior, and not infrequently get it wrong.

Even if a judge is concerned about the incentives created by her ruling, though, this still puts her in a tough position. She needs to reach a decision and may well be wrong in her empirical assumptions of what will follow. Does this mean that judges should be conservative (small c) in their decision making, modest in any changes since it is not certain what will follow? Or is this just the nature of the undertaking, and we must operate under uncertainty, trying to do the best we can with our hunches?

Cameron Crazies and Disney FastPasses (pp. 30-36)

This excerpt describes the "Campout" experience at Duke, and the complicated process for students to win basketball season tickets.

Jim Salzman starts his Property Law course with this story. It is something that almost all law students can relate to, even if they are not sports fans. It is particularly useful for highlighting the instrumental nature of property rights -- the owner designing allocation rules to serve its interests. You can set up the discussion with this video of Duke Law students explaining campout. https://web.law.duke.edu/video/duke-law-2011-campout/

As set out in the text and video, Duke has come up with a fantastical scheme that suddenly makes sense when viewed as a *form of ownership engineering*. It is effective at identifying not only rabid fans but strengthening a deep sense of shared community (and dedicated alumni in later years). It's useful to point out how the allocation schemes are nested. Undergrads are treated differently from grad students who are treated differently from alums. The same resource is allocated differently depending on what Duke Athletics wants from each group. After discussing this example, students will start becoming comfortable asking the questions: Why is the owner allocating property rights this way? How does this ownership story benefit the owner?

To drive this point home, you can assign the next section (pp. 33-36) to show how Disney cleverly segments allocation strategies for its popular rides. You can also ask students how airlines use the *remote control of ownership* for priority boarding (prioritize frequent flyers and those who pay full fare).

Taking advantage of recent events, you can also ask about who got priority for the Covid vaccine. The basic problem is no different from *Pierson* or Cameron Crazies. When an owner has a scarce resource and competing demands (whether over a fox, basketball tickets, or a vaccine shot), the owner needs to establish rules for allocation -- Who gets what and why? For the Covid vaccine, once one moved beyond the consensus for favoring health care workers, states were all over the map, literally. New Jersey gave priority to smokers, others to the elderly or teachers. Why should one group be first served ahead of another?

This also is a useful opportunity to introduce the metaphor of the "Ownership Remote Control." Duke is using access to basketball seats in order to get students to behave in ways they would never otherwise consider. This is even clearer with HOV lanes on highways encouraging carpooling. The connection you can draw to *Pierson* is the ex ante argument in the majority, which would reward people for investing in hunting gear.

Ghen v. Rich (Dukeminier, p. 27); Tragedy of the Commons and Anticommons (p. 30-35)

The Not-So-Deadly Catch (pp. 246-253)

Click here for the video (Saving the Planet Through Ownership Engineering).

This excerpt describes how the rule of first come, first served, for fisheries created the conditions for the reality TV series but how ownership engineering made the fishery safer and more profitable.

The *tragedy of the commons* poses a challenge for many natural resources, not just whales. It drives races to over-extract groundwater, fish, and oil, just to mention a few. The Deadliest Catch story shows how poorly designed allocation rules can create enough danger and drama for a hit reality TV show but, equally, how ownership engineering can remedy the problem and create win-win solutions (albeit more boring TV).

In teaching this material, the first step is to ask the students to explain why derby fishing (first come, first served) was inefficient and dangerous. The danger part is clear -- if the season ends when the quota is reached, then boats must go out in dangerous conditions or they risk losing out on that season's catch by staying safely in port.

The efficiency point is less obvious. Under the derby system, canneries were the big winners. Prices were very low when all the fish were being landed at the same time. Catch shares changed the balance of power. Vessels now have the freedom to fish only when the prices are higher. This political economy explains why catch shares were actually prohibited in the late 1990s. Cannery lobbyists persuaded Congress to ban this practice for a number of years.

As with all allocation strategies, there are trade-offs. Once catch shares can be traded, then more efficient and wealthier interests may buy them up. This has happened in a number of catch share programs and the number of vessels has shrunk. You can ask students whether this is a good or bad development. It makes local ship owners wealthier but it's not clear that this benefits the community since it may reduce the number of local vessels and jobs.

How might this problem be addressed? One approach has been so-called "community development quotas (CDQs)." These are owned on behalf of the vessels in the community, so that no single vessel can sell its catch shares outside the community.

If you want to teach another example of successful ownership engineering, ***The Greatest Water on Earth,*** pp. 241-246) shows how "as if" ownership design has ensured the quality of New York City's drinking water. Click here for the video (Saving the Planet, starting at 1:45).

Cap-and-Trade for Better and Worse (pp. 253-258)

This excerpt describes how ownership engineering has been used to battle acid rain and combat climate change.

The ownership engineering strategy of *creating new kinds of property* to solve problems has also become commonplace in environmental protection. This section sets out how polluters can "own" their pollution reductions and trade them. This approach has proven very successful addressing acid rain (trading sulfur dioxide allowances) and ozone depletion (trading CFCs allocations). As the text explains, this changes the business model of polluters. Before, there was no money to be made in reducing their pollution. With allowances, however, they can now make money by reducing their pollution since they can sell their excess credits to companies where reductions are more expensive.

Equally, though, ownership engineering can create new problems. The text explains the *environmental justice* problem of "hot spots," where pollution is concentrated in particular industrial areas, often around low-income communities of color. You can ask students how to avoid the hot spots problem. The simplest approach is to cap the number of allowances in particular areas, but that makes the program harder to administer and limits trading. There is therefore a trade-off between trying to maximize the trading activity (a thick market), on the one hand, and trying to protect particular interests with certain restrictions (leading to a thin market, on the other).

The HFC-23 story is particularly concerning. Billions of dollars were paid to entrepreneurs who simply created and then destroyed powerful greenhouse gases with no environmental benefit. This presents an important reminder to economists that they may be the smartest people in the room, but there are even smarter people outside.

Keeble v. Hickeringill (Dukeminier, p. 35)

Dry Wells and Sticky Staircases (pp. 131-138)

This excerpt shows how first come, first served, has depleted groundwater aquifers in California and Texas.

In teaching the groundwater material, it helps to show how the issue is similar to *Pierson v. Post.* Instead of chasing wild animals, the landowners are chasing water in the aquifer that moves. This also provides a nice example of how technological development can lead to pressure for shifts in

property rights. Prior to the sale of diesel pumps, no one paid much attention to how much groundwater neighbors pumped because it was so labor intensive to pump by hand that the aquifer was largely unaffected. Once diesel pumps could run 24 hours a day, lowering the water table became a real concern, much as Sipriano and Fain learned to their despair. If the powerful diesel pump of Ozarka Water sucked up the water that had been under neighbors' property, is it theft or did they simply "attract" the resource? How is attracting the water different from how Hickeringill attracted the ducks from Keeble's pond?

The rules vary widely for groundwater. The rule of capture in Texas encourages a tragedy of the commons. Fain and Sipriano should probably get their own pumps to ensure they at least have some water before their neighbor pumps it all away. This had been the case in California's Central Valley, described in the story of the Pitiglianos and the community of Monson. Should wealth determine ownership of fugitive resources? Those who can afford the big pumps and deep wells get whatever they can? If not, how should the water rights be allocated?

During the terrible drought from 2010-2015, the California Assembly passed the Sustainable Groundwater Management Act (SGMA), the first meaningful restriction on groundwater use ever adopted in California. In simple terms, groundwater basins must create agencies that write management plans ensuring sustainable use of groundwater by 2040, with close monitoring and sanctions. It is early days and not yet clear if this will work, but the specter of wells running dry has spurred a major change in how the resource is managed.

Clever ownership design to overcome the tragedy of the commons has also evolved in Texas oil fields through the strategy of *unitization,* described in ***Dukeminier, et al., pp. 41-46*** and discussed in the section that follows, ***Black Gold*** **(pp. 138-141).**

Popov v. Hayashi (Dukeminier et al., p. 46)

Million dollar ball (pp. *74-79)*

This is always a fun case to teach. Our excerpt provides more background to the case and explains different remedies available to the judge. It provides a helpful context for class discussion assessing the relative merits of each allocation rule. Of perhaps greater value for the rest of the course, the excerpt explains the *ex ante/ex post* choice that all judges must decide--ruling on the present case alone or considering the incentives/disincentives created by the decision for future actors.

Most students will likely start from a skeptical approach to ex ante reasoning. What is fairest for these two parties before the court? Judges, after all, are supposed to "do justice." But this ignores the power of precedent. What if future judges follow this rule, as well? In that case, perhaps students should be asked to take an explicitly instrumental approach, focusing on how the rule will influence the behavior of future fans. Since the vast majority of ownership conflicts never go to court, it may be that fans operating in the shadow of the law will tailor their behavior accordingly.

But even this assumption can be challenged. Adjusting your *behavior in the shadow of the law* for family law issues (the topic of Bob Mnookin's classic article) may make much more sense than doing so for baseballs in the stands. Family law conflicts, after all, are much more likely to go before a judge than who owns a baseball.

Put simply, the excerpt provides a good opportunity to explore the ex ante/ex post choice that all cases pose, as well as introduce the important concept of shaping behavior of non-litigants by the decision rule. But it also provides an important opportunity to challenge this common assumption. It may well be the case, particularly where it is very unlikely that an ownership conflict will escalate to calling the police or any kind of court action, that the parties either don't know what courts have ruled or don't care. Do students think that a ruling for Popov would have materially changed fan behavior in baseball stadiums? More generally, when do parties operate in the shadow of the law? Discussion of the rule's effect on baseball fans can reinforce the *casual empiricism* point raised earlier.

We believe that custom and norms are far more important in determining everyday ownership disputes than statutes, regulations, and judicial decisions. These are not formal laws, to be sure, but in practice are just as effective, if not more so. It's useful to ask students for examples of norms and customs that shape their behavior but would never be challenged in court. Are these value laden? What about the old-fashioned (outdated) custom of "Ladies First" when going through a door? We tend not to think of these as ownership rules but they determine who gets to the front of the line and implicitly express value judgments.

CHAPTER 2
Acquisition of Property by Subsequent Possession: Find, Adverse Possession, and Gift

The cases in this chapter revolve around the story of possession -- It's mine because I'm holding on to it. In addition to the casebook materials on find, adverse possession, and gift, we recommend adding excerpt material on the endowment effect and what we call "symbolic possession." This is the type of possession ownership claim that most of us encounter every day (such as saving seats or pool chairs) and it provides a nice informal example to contrast with the legal rules covered in the casebook. This is also a good place to introduce the work of Elinor Ostrom on communal property regimes, using examples of lobster gangs and surfers.

Sandboxes and Shopping Carts (pp. 46-50)

This excerpt explains the research uncovering the *endowment effect* and how it is used by retailers. Click here for the video (How Retailers Profit from Your Ownership Instinct).

This is a nice excerpt to introduce the chapter because it explores why we care about possession. It turns out it's not merely instrumental. Psychologists have shown time and again that the endowment effect in our brains makes us regard resources we possess more highly. Holding on to something, imagining it as yours, changes how you value it. When pointed out, everyone immediately gets this point. Just ask how they feel about someone taking items out of their cart at the checkout line. The fact that this also explains the layout of Apple stores, behavior of car dealers, and return policies of web retailers makes it all the more personal and interesting. Possession feels like it *should* be nine-tenths of the law!

The Parking Chair (pp. 43-46)

This excerpt explores the practice of chairs used to save parking spots that have been dug out after a snow storm and recent battles over challenges to this tradition.

Podcast interviewers have loved this story. It's also one that students can easily relate to. The basic challenge, shared with saving seats, is that you can't hold on to everything. As a result, just as bears and dogs mark their territory, we leave clear signs. The challenge is whether they will be respected. To start the parking chair discussion, ask if any students have this tradition in their hometown. If so, was it respected? Should it be?

The conflict of stories here is both labor (I put in the time to shovel the snow) and *symbolic* possession (I am claiming it with my chair/cone/ironing board) versus *physical* possession (I am in the spot now and don't respect your chair's claim). What makes this case particularly interesting is the importance of local norms. Rochester and Buffalo get a lot more snow than Philadelphia or Pittsburgh, but do not have parking chair traditions. Why do students think informal ownership regimes arise in some settings and not in others? It can't be simply the presence of heavy snowfalls. More important, why do they endure?

This brings in the story of South Boston. You can set up it up by asking why local norms broke down. The answer is three-fold: newcomers move in who don't know or respect the informal claims of property rights; the resource being claimed rises in value and therefore is more contested; and government steps in to supplant the informal regime because of increased violence, or a desire to promote economic growth. These are described in more detail at pages 72-73. You may want to combine this with the seat saving excerpt below since it raises many of the same issues.

Sorry, This Seat Is Taken (pp. 57-63)

This excerpt explores the practice of seat saving with the example of a passenger using a iPad (unsuccessfully) to save an exit row seat on a Southwest flight.

Unless your students have been living under a rock, everyone in the course will have confronted this challenge, most notably at graduations, school events, or movies. You can start off with the general question of, Do you respect the jacket? You will likely get a range of responses, from always to perhaps not if the venue is very crowded. You can vary this by asking how much of a row someone can save at a crowded graduation. A handful of seats? Half a row? The whole row? You can ask the same types of questions for the Southwest example of an early boarder saving a prized exit row seat for a late boarder.

Jim Salzman recently asked the flight attendants on a Southwest flight about their experience and they wholeheartedly endorsed our portrayal of the conflict. The company's policy of no clear rules (the strategy we call *strategic ambiguity*) placed them in a difficult situation when asked to intervene. One attendant said the most common issue arises when a passenger asks if they can save seats. Her standard reply is, "It's a crowded flight but you can try." In other words, "don't come running to me when Stu Weinshanker decides to move your iPad."

The key thing to get from class discussion is that we all have some internal rules or guides for when symbolic possession goes too far. Do the students go through the three-step questions

described in the text -- Identification, Evaluation, and Action? Is there a gender or racial bias in the responses? Are there certain values embedded in seat saving norms? Is it better to rely on norms and working it out or to have clear property rights that are announced and enforced? There is some benefit in not having all aspects of our lives regulated, perhaps like seat saving.

Surf and Turf (pp. 68-71)

This excerpt describes the lobster gangs and surfers who use threats of violence to maintain exclusive use and management of their lobster grounds and surf breaks.

You can also assign this material in Chapter 1 when discussing the tragedy of the commons. The classic responses to the perverse incentives created by open access to a depletable resource are either state intervention (regulations limiting access) or privatization (relying on private property to ensure more sustainable management). The valuable research of Elinor Ostrom, awarded the Nobel Prize in Economics, is that private actors can develop resilient and sustainable common property regimes where no government intervention or sale of the resource is necessary. The most famous examples are likely nineteenth century whaling rules and the lobster gangs described in the text, though Ostrom and her colleagues identified hundreds of others. The surfer variant provides a nice West Coast example, but the dynamic in all these cases is identical.

The key features in *successful common resource regimes* are a closed community of users (i.e., shared norms), efficient monitoring (i.e., detecting violations), and reciprocity of sanction (i.e., credible threat of enforcement). The surfer and lobster gang examples make clear the importance of excluding outsiders, often violently. An interesting question is why the government does not intervene. Perhaps they don't think the gain is worth the likely violent resistance. Perhaps the system works pretty well despite the exclusion of outsiders. Perhaps the relevant authorities are insiders, themselves. Or the cost of property rights creation and enforcement exceeds the benefits.

A. Acquisition by Find (Dukeminier, p. 53)

Hannah v. Peel (p. 57)
McAvoy v. Medina (p. 63)

Fiddleheads and Double Eagles (pp. 124-128)

This excerpt provides more background to the note on finding buried gold coins on the property of the publisher of *Rolling Stone*, in **Dukeminier et al, p. 66**. Students learn more about the

characters involved in this conflict and their salty language. Does the judge's rule promote discovery of hidden resources? Perhaps it promotes discovery and also the finders keeping silent afterwards.

We placed this story in the chapter on Attachment, exploring how much of your home really is your castle. The excerpt goes into who owns wild plants found on your property. The law of forage supported the rights of hunters in all of the original colonies. The reason was instrumental -- food was scarce so labor that identified additional food was rewarded with ownership. Only later did the norm of exclusion threaten this custom, and did the law shift to designate foragers and hunters as trespassers.

B. Acquisition by Adverse Possession (Dukeminier, et al., p. 70)

Van Valkenburgh v. Lutz (p. 76)
Mannillo v. Gorski (p. 89)

Backyard Bandits (pp. 50-54)

This excerpt describes an adverse possession battle in Boulder, Colorado, pitting the former mayor and his wife against a retired couple.

Adverse possession pits the claims of first in time against current possessors. It is a property topic that inevitably discomforts many students. Indeed, some leave the class iPhone in hand, calling their parents to check if the path across their backyard that neighbors have used for years as a shortcut was by permission or not.

This section builds on the casebook judicial opinions in providing a colorful contemporary story of an adverse possession battle in the idyllic community of Boulder, Colorado. The characters involved, the former mayor and a couple who counted on the land for their retirement nest egg, are engaging, as is the community's response. Getting a bullet in the mail does focus the mind. If counseling the Mayor and his wife, would the students have recommended filing a quiet title action? What are the downsides to enforcing property rights, even when the law is on your side? These questions give students the opportunity to explore how community norms and informal sanctions can work against formal property rules. The mayor and wife became pariahs in their community even though their adverse possession claims were solid.

Do students think that state legislatures should make adverse possession claims harder to win? The Colorado legislature did exactly that after this case.

How should owners of property that are commonly used as public spaces protect themselves against prescription claims? The excerpt also describes a modern defense against adverse possession that urban students may recognize in the sidewalk bronze plaques proclaiming private property. Many college campuses employ a similar strategy of sealing off a popular walkway or street every year to defeat any claims of adverse possession. It may be interesting to ask your university's general counsel if this is the practice at your school.

Howard v. Kunto (p. 95)
O'Keeffe v. Snyder (p. 103)

Trails of Tears (pp. 54-57)

This excerpt explores the history of conquest and dispossession, as well as the difficult policy choices of whether or how to make parties whole many years after the initial actions.

This material could also be assigned after *Johnson v. M'Intosh.* We prefer it here because the concept of adverse possession explains well, we believe, the dynamic of conquest through history. At what point does a resource taken by force become owned by the conquering party? Often there is no relevant law on the books to follow. This question raises uncomfortable parts of American history, notably the dispossession of Cherokee and Seminole from the southeast to Oklahoma, along with many other dispossessions by the U.S. government of Native Americans. We have had fascinating class discussions about the appropriate roles of *adverse possession and reparations* in these contexts and others described below.

The text describes Michael Heller's experience with the World Bank in newly freed Communist countries. How would students have resolved competing claims over homes and apartments after the fall of the Berlin Wall, when Communist countries reintroduced market economies? Should the idea of adverse possession rule -- it has been too long since you possession of your apartment or factory and the claim must be put to rest? Or does justice require reparation?

Do students feel differently about art taken by the Nazis from the parents or grandparents of living relatives? What about similar claims of looted artwork by Napoleon or by Alexander the Great? At what point should subsequent possession be recognized?

A useful class exercise to flesh out these issues is to ask students to break into groups in order to identify general principles that museums should use when deciding whether to repatriate art to governments claiming their return, centuries after the art was taken (or purchased). There is a

fascinating website created by the UNESCO group with the unwieldy name of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation.
<http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/>

Their model code is on the web at
http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/UNESCO-UNIDROIT_Model_Provisions_en.pdf

There is no simple answer to these questions but it is instructive for students to confront them, recognizing that these present central issues of ownership and property rights. They are difficult to resolve in part because the current possessors are not obviously culpable. Too much time has passed. But does that forgive the original seizure? We have no determinate answer beyond the blunt equation, Possession + Time = Ownership.

CHAPTER 3
The Limits and Possibilities of Real Property, Personal Property, and Intellectual Property

This chapter raises many of the issues in the *Mine!* ***Chapter 3, "I Reap What You Sow."*** It may be worth assigning the entire chapter because many of the stories build off one another. If you prefer to assign excerpts, below are two that provide useful introductions. In addition, we crystalize the intellectual property theory perspective in this chapter in a highly accessible article in Harvard Business Review: https://hbr.org/2021/03/elon-musk-doesnt-care-about-patents-should-you. This brief article can be freely accessed on the HBR site.

"A Guy in New Jersey" (pp. 7-11)

This excerpt explains why HBO not only knows about but actually encourages people to share their passwords, even though this is illegal. Click here for the video (Why HBO and Disney Tolerate Theft).

The HBO story is a fun way to start class. It's easier to ask if students know someone who shares a password than asking them to volunteer their illegal activity, but the point is clear. Almost everyone shares passwords and feels OK about it. What's surprising is that HBO knows and even has encouraged this. The counter-intuitive business strategy relies on a form of ownership engineering that we call "*Tolerating Theft*."

In HBO's case, their goal is to grow their viewership and future subscribers. Interestingly, Netflix has been exploring shutting down password sharing with, in a recent trial, the gentle reminder, ""If you don't live with the owner of this account, you need your own account to keep watching." Whether they require two-factor authentication remains to be seen. You can ask the students why Netflix might be reluctant to crack down on password sharing. Would this be seen as taking a stick from the subscribers' bundle of sticks (the stick to share) even if they legally did not have that stick in the first place?

As the excerpt explains, it's not just HBO that tolerates theft of its intellectual property. Knowing its software would be pirated, Microsoft followed the same strategy to build its presence in China. "As long as they're going to steal it, we want them to steal ours," said Bill Gates, back in 1998. Echoing Plepler, he added. "They get sort of addicted, and then we'll somehow figure out how to collect sometime in the next decade." And indeed, China now accounts for up to 10% of Microsoft's annual revenue of $125 billion.

Even Disney strategically tolerates theft. For decades, the company was known for aggressively defending its copyrights and trademarks. But now Disney often looks away, tolerating super-fan pirates who create innovative products. For example, when online vendor "Bibbidi Bobbidi Brooke" came out with a hugely popular line of rose-gold sequined Mickey ears in 2016, Disney did not shut her down, as was its legal right. Instead, it simply copied her design. After Disney's official version hit the stores, the new Mickey ears sold out immediately. Brooke was gracious, posting "always excited to see new merch offerings." Everyone wins: Brooke stays in business and Disney benefits from low-cost product development.

The big question for class discussion of this material is whether America may have created *too much protection* of property rights. Are there any features that make weak IP protection for HBO, Disney and Microsoft a good business strategy but not other industries? Why might this be a particularly bad idea for pharmaceutical companies?

Can students think of examples where creators do not seek legal protection for their creations or are not even allowed to? Why do sports coaches and stand-up comics continue to innovate even though they can't get legal protection for their newest plays or comedy routines? What are the costs of too much ownership protection?

I Have a Dream, Pay Me Now (pp. 80-82)

This excerpt describes the strict licensing that King, Inc., has used to restrict any use of Dr. Martin Luther King's Jr.'s writings or images without payment.

This is an eye-opening, tragic story that we use to open the chapter on labor. The fact that the King Memorial had to pay Dr. King's estate to include his words on a national monument honoring his legacy strikes a lot of people the wrong way. The key question, posed in different settings in many parts of this chapter, is whether the law grants too much protection for intellectual property. Many companies posit that the more IP protection the more incentive to create things that benefit society, but that's surely not always the case. Is a creator, such as Dr. King or Walt Disney, really motivated by the fact that their heirs can own and sell their creations long after they have died? Would we have no "I have a dream speech" or Mickey Mouse without this added bonus? Many students will likely think not.

The key point to get across with this excerpt is that IP protections, indeed property rights more generally, are entirely creations of the state. Students should constantly be asking whether the benefits created by property rights create more social good than harm. And how would we measure

this or know? The contours of IP ownership are up for grabs, and the counter-argument that more protection is necessarily good warrants strong consideration.

A. Acquisition by Creation (Dukeminier et al., p. 132)

International News Service v. Associated Press (p. 133)
Feist Publications, Inc. v. Rural Telephone Service Co. (p. 141)
Authors Guild v. Google, Inc. (p. 148)
Diamond v. Chakrabarty (p. 162)

> **Eyes Off the Price (pp. 97-99)**
> **Drug Development Gridlock (pp. 99-104)**

These excerpts show how the *tragedy of the anticommons* has obstructed the creation of documentaries, rap music, and medications.

This is a great explanation of the concept Michael Heller has written widely about, the tragedy of the anticommons. This is briefly mentioned in Chapter 1 of the casebook but it is easier to grasp in the context of IP. We recommend assigning both excerpts together. The first explains how too many separate copyrights have essentially blocked the production of historical documentaries and hip hop's wall of sound. The second excerpt shows how too many patent rights have effectively blocked drug development.

A key point to highlight in the *Eyes Off the Prize* excerpt is why fair use is insufficient. If the film makers and musicians likely have the legal right to use the short bits of speech and sound (as many IP lawyers think they do), why don't they just go ahead since they are likely legally in the right? The answer is potential litigation costs. Even if the artists have strong legal claims, it costs money to defend those claims and the cases can drag on and on, keeping the work off the market. What producer is going to provide money for the film or album if they think there is a good chance they'll have to pay legal fees to defend the final work, even if they are likely to win? Can the students come up with a way to avoid this problem? One possibility is the rights clearance model that radio stations use (discussed in our **Moore case study, p. 184-187**).

The drug development gridlock poses similar challenges. Buying out all the potential overlapping patents gets expensive quickly, and there is always the danger of holdouts. The excerpt describes a series of ownership engineering solutions to this problem such as patent pools and standard setting organizations. A key lesson of this excerpt is for students to realize that the nature of IP protections has very real impacts on our lives in ways we likely never imagined.

Given all the problems posed by the tragedy of the anticommons, why is there not stronger pressure on Congress to *weaken* IP protections? This question provides an opportunity to explore the political economy of IP and, in particular *public choice theory*. Concentrated interests that benefit from particular legal protections will lobby and donate vigorously to protect and even expand them. The public interest may be harmed far more than the private interests are benefits, but the harm is diffuse and therefore difficult to motivate into serious political opposition. This is even clearer in the Disney story, below.

Moore v. Regents of the University of California (Dukeminier et al., p. 167)

Golden Eggs (pp. 168-170)
The Dimmer Switch of Ownership (pp. 171-177)
Golden Eggs, Revisited (pp. 177-179)

These excerpts explain the market for eggs used for in vitro fertilization, the history of rules governing the sale of body parts, and how the metaphor of a dimmer switch helps clarify possible allocation rules.

We recommend that you assign all three of these brief excerpts together since they build on each other. The ownership story underlying this excerpt is self-ownership. You surely own your body, but what property rights do you hold? Can you sell, gift, destroy, modify? The answer depends not only on the body part but where you live. Eggs and surrogacy provide nice examples to explore these questions because technology has played such an important role in the evolution of ownership rules. Prior to advances in in-vitro fertilization, there was no real market for eggs and little need for ownership rules. With the advent of the technology and fertility clinics, however, the demand for "designer kids" has led to the growing market for eggs. Women surely own their eggs, but should there be any restrictions on their sale? And why are state rules all over the map (literally) on these issues?

If you pose this question to the class, you will likely get a range of responses. It's likely they will fall into three categories that push in different directions: few restrictions because of respect for *autonomy and liberty*, strong restrictions because of concerns for *coercion of vulnerable groups*, and a range of restrictions depending on whether one feels that commodification threatens the *sanctity of the person*.

This provides a segue into discussion of the *Dimmer Switch metaphor*. This is an important concept to share with students. Most Property Law courses do not focus on this aspect of ownership. Our

tendency is to think of ownership as binary, as on or off. This certainly is how most judges decide ownership disputes. The Coase Theorem presents a nuanced approach, but this excerpt explains another nuanced way to think about the issue. By clever ownership design, we can find ways to address the separate concerns of autonomy, coercion and sanctity. Just as the bundle of sticks metaphor is valuable in explaining the many different ways we can own a resource, the dimmer switch metaphor can explain how we engineer ownership to address competing values.

Moore and Less (pp. 180-187)
Womb for Rent (187-194)

We provide accessible background to the *Moore* case in this excerpt. The main reason to assign this material, however, is its application of the dimmer metaphor in a practical application and *introduction to the rights/remedies distinction*. The court decided the case like a light switch. UCLA wins. Moore loses. This is a deeply dissatisfying result because it shows no consideration for Moore's claim of *self-ownership* -- It's mine because it's part of my body. Because the court goes all in for UCLA's *labor* story -- It's ours because we did the research to make it valuable (and if we can't own it you won't get any more life-saving research) -- there is no opportunity to vindicate at least part of Moore's story of ownership.

The text lays out for the students a much broader range of remedies, from nominal payment and fair market value to mandatory licensing. In class, you can write these on the board and ask students to identify the pros and cons of each approach. The mandatory licensing strategy shows how the law can borrow across applications. While are substantial differences between radio songs and cell lines used for research, from a *property design perspective* they share a lot in common.

The last sentence at the end of the excerpt poses a question that may arise frequently when discussing property rights -- *whose hand is on the dimmer*? This question plays out in all the self-ownership topics, whether surrogacy, egg sales, or cell line development. This is clearest in the *Womb for Rent* section that follows (187-194). One of the difficult puzzles in writing the self-ownership chapter was why the rules vary so much from state to state. The reason, we argue is that the dimmer switch ends up at very different points depending on the how the competing pressures for autonomy, coercion, and sanctity play out. And these can be very different state to state. It's worth asking the students why rules for self-ownership do not track Red/Blue, North/South, East/West, or Urban/Rural divides. For many years, New York and New Jersey had different rules for surrogacy.

Many students don't appreciate that *property law is primarily state law*. When should federal law step in? When do they think the state "laboratory of democracy" approach is inappropriate? Is

there something about self-ownership that makes it more suited to national uniform rules? Or should the opposite be true, given community norms and morals? What about state/local rules? What do they think of a local community dominated by a particular religious group that votes to ban surrogacy or egg sale? Should the laboratory of democracy operate at the local level, as well?

The Wild West of Genetic Data (pp. 110-119)

This excerpt explores who owns genetic data provided by customers of genetic tracing firms such as 23andMe and Ancestry.com.

This section is self-contained and provides a case study of a current issue that the students will have heard about. A number may well have sent in a cheek swab to 23andMe or Ancestry.com to learn about their heritage. They will be shocked to learn they are more product than client, that these companies' profits come less from individuals' payments for genetic analysis than from databases they assemble from our data and then license.

The case raises a lot of good class discussion topics. It is also helpful to start by noting that the genetic data debate is normally framed as purely a privacy issue. What does framing it as ownership add? This opens up different potential solutions.

From a conceptual perspective, if viewed purely as an ownership issue it poses self-ownership versus labor stories. I should own my genetic data because it's part of me versus 23andMe should own it because of their work in decoding my genome. Both seem valid claims. The first part of the excerpt sets out a range of options that arise from the ownership vantage. In class, you can write these on the board and ask students to identify the pros and cons of each approach. Would these be available if it were purely seen as a privacy issue? Should students, and others who sent in their samples, have an ownership share in the resulting database (and the profits it generates)? If students should have an ownership stake, how would that stake be defined to databases companies can continue to innovate?

What's particularly interesting is that the genetic data companies are fine with *unclear ownership* (what we call *strategic ambiguity*) because they can then rely on contract to safeguard their rights. This provides a nice opportunity to point out how different legal regimes can intersect in business strategy. It doesn't matter if we own our genome so long as the companies are given permission to use it for research. An allied question is whether we should be paid for it. This discussion dovetails with the *Moore* case. It would not be that hard to set up a scheme where we were compensated every time our genome (or cell line) were used by researchers. Technological

developments have lowered transaction costs that earlier persuaded courts against granting ownership rights to patients.

A final fascinating topic for discussion concerns *ownership baselines*. This is also useful story for introducing the idea of *opt-ins versus opt-outs* -- an important tool of property rights design. Would the genetic testing industry still thrive if the baseline were self-ownership for DNA? What about internet apps if we owned our clickstreams? If the technology of micro-payments is feasible, the answer is likely yes. Or companies would shift the baseline by requiring contractual assent in order to use their services. But should this be allowed, if it becomes a universal practice and effectively allows no choice at all?

B. The Public Domain (Dukeminier, et al, p. 178)

Matthews v. Bay Head Improvement Association (Dukeminier, et al, p. 179)

Beach Nourishment and Concrete Islands (pp. 141-144)

This excerpt focuses on the doctrine of accession -- which we call attachment -- and can fit nicely here because of the beach access issue (or it can be taught along with the judicial takings case in **Chapter 13, Stop the Beach Renourishment case, p. 1115**). The excerpt provides a nice chance to bring discussion of climate change into the classroom and the property issues this will pose in the coming years.

You can start by explaining the rules for *accretion and avulsion*, asking why there is a difference. Students will likely focus on the importance of investment-backed expectations. You can plan around gradual changes but drawing property boundaries based on sudden changes seems unfair. Is beach nourishment better considered as avulsion or accretion, or should it not be considered under either doctrine? If the government is funding the beach nourishment, why should there be any private property claim to it?

The practice of beach nourishment has become hugely controversial. Critics see it as public funds subsidizing wealthy property owners. Local chambers of commerce see it as essential to maintaining their tourist trade. What's interesting is that rising sea level from warming oceans will continue for decades to come, which brings front and center the strategy of "retreat." Many land use planners have argued that instead of building expensive sea walls and beach renourishment, the better public policy is to retreat farther inland. Over the longer term, you can't hold back the water. Beach renourishment advocates are fighting hard against this strategy, particularly in South

Florida, likely in large part because there are so many sunk costs in real estate. No one is going to want to walk away from a major investment and try to start again in a new location.

You can have a fascinating class discussion around the issues raised by retreat. Retreat to where? Should it be publicly funded (as has happened with native American groups in Alaska)? How can the sense of community be maintained? Should property rights in the old location simply transfer to the new location? You can ask the students to do an internet search on climate change retreat for Charleston, South Carolina, or Lake Charles, Louisiana. This is a good article if you want to explore the issues further in class.
https://news.climate.columbia.edu/2021/07/01/what-is-needed-for-fair-and-equitable-managed-retreat/

While not covered in our book or the Dukeminier text, for teachers particularly interested in climate change, you could discuss efforts to extend the public trust doctrine to the atmosphere. This was a core argument in the *Juliana* case. This article provides a useful background. http://progressivereform.org/cpr-blog/will-the-atmosphere-make-it-as-the-public-trust-doctrine-s-next-frontier/

Eldred v. Ashcroft (p. 187)

Very Important Babies Daycare (pp. 87-93)

This excerpt tells the story of Disney's aggressive policing of copyright infringements at baby case centers and its lobbying campaign to extend the term of copyright protection.

This is a useful excerpt to discuss the *political economy of ownership*. Students are often shocked when learning about how efforts to protect the Disney copyrights have effectively shut down the public's access to decades of American writing, music and film. The key point to highlight in discussing the material is who decides. Because Congress sets the copyright term limit, lobbying a few key members has paid huge dividends to companies and rights holders (the owners of the Great American Songbook rights were also active lobbyists).

A good way to tee up the discussion is to ask the students to play the role of lobbyist and persuade the class why the copyright term should be extended yet again. Disney and its allies have been effective with the argument that more protection means more creativity. Surely, though, this is not absolute or copyright protections would be permanent. How much is too much? This leads into the argument that you cannot have creative activity without free access to earlier creations. Nothing is

ever totally new. So, as the text puts it, what is *the least amount of protection* that can be granted to creators while still protecting the public domain? Disney, obviously, does not frame it this way.

What do the students think of the proper role for courts? *Eldred* seems to say that they will not get involved, making lobbying investments all the more valuable. Why do students think the Copyright Extension Act passed with such overwhelming support? This is another opportunity to explain *public choice theory*. Concentrated interests that benefit from particular legal protections will lobby and donate vigorously to protect and even expand them. The public interest may be harmed far more than the private interests are benefited, but the harm is diffuse and therefore difficult to motivate into serious political opposition. It's not worth it for individual citizens to organize since the cost to each is so small, even though it may be massive in total.

C. What Ownership Entails: The Rights to Exclude, Alienate, Abandon, and Destroy (Dukeminier, et al, p. 205)

I Stole It Fair and Square (pp. 104-110)

This excerpt describes examples of successful businesses such as fashion design and space companies that rely on no IP protections and why this strategy works.

Central to certain theories of ownership is the right to exclude. Some say it is the basis of intellectual property rights, erecting a fence around your idea so that others cannot use it without your consent. But there's always the space for "fair use" in copyright. And what if the centrality of the exclusion assumption is wrong much of the time? The HBO story in the Introduction raises this topic and this excerpt goes into more detail. The key point is to emphasize that the assumption of the central importance of the right to exclude is just that, an assumption. And there is plenty of real world evidence undercutting that assumption in certain fields.

Ownership seems straightforward in business: Get a patent or copyright when you create something. Charge for its use. Avoid ambiguity about who owns what. But much of this wisdom is wrong. The world's savviest businesses already know this. HBO tolerates theft of its core product. SpaceX forgoes patents. Airbnb opened for business before cities decided whether short-term rentals were legal.

These successful companies are skilled at *ownership engineering* – a term we define to mean creating value by managing how products and services are owned. Businesses spend a fortune on traditional engineering, tweaking every button and knob. But they ignore ownership engineering, assuming it is fixed and unchangeable.

The examples in this excerpt all show successful businesses either with no effective right to exclude or who choose not to exclude. Kal Raustiala and Chris Sprigman's book is full of examples of this "piracy paradox." Why is piracy so commonplace? In part because, as students need to be reminded, very few ownership conflicts ever go to court. Those are the deviant cases. In dynamic fields, where the knowledge base or fashion is constantly on the move, *first movers* don't need legal protections to be motivated. If they rely on last year's designs, jokes, or plays, the competition will pass them by.

Another key insight is the importance of *sanctions outside the legal system.* This is most apparent in stand-up comedy, where public shaming keeps joke theft in check. And when creators do turn to the legal system to exclude others' use, as happened in the recording industry, the result likely was not worth the effort. HBO watched and learned. Even Disney has been changing its tune. To end the discussion, you can ask when the right to exclude is critically important. Put another way, what do the piracy paradox examples have in common?

Three Blasts of Number 8 Birdshot (pp. 120-124)

This excerpt tells the story of a home owner blasting a drone out of the sky and the battle over who controls the "droneways" above our backyards.

Students love this story. It's so visceral and confrontational, yet with major implications for 21st century commerce. There is a very helpful article laying out the regulatory issues (and with a picture of the T-shirts Merideth sold) at https://dronelife.com/2016/01/21/why-the-drone-slayer-matters/

The key question to highlight is why this is an ownership conflict. The basic issue is how high the attachment story extends. Early cases about air travel made clear your ownership of Blackacre did not extend to the heavens. But how high does it go? The FAA has regulated how high drones can fly but not how low before it becomes trespass.

The article referenced above goes through the detailed legal arguments. The first is whether an unmanned aircraft is legally an aircraft. If so, federal law makes it a felony for anyone who "sets fire to, damages, destroys, disables, or wrecks any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce." A further question is whether the FAA can regulate all airspace.

A key teaching point is to show how technology changes the shape of property rights. Prior to the widespread use of drones, no one really cared about who owned the air column above most property because it was not a scarce or valued resource. With the possible future of drone deliveries, now a lot of people care about this question and ownership has become contested. Should judges determine this question, asking what constitutes trespass, or the Federal Aviation Administration? Or maybe leave it up to each state or community to decide?

CHAPTER 5
Future Interests

D. The Trust (Dukeminier, et al, p. 337)

Broadway National Bank v. Adams (p. 339)

E. Rules Furthering Marketability by Destroying Contingent Future Interests (Dukeminier, et al, p. 341)

The Symphony Space, Inc. v. Pergola Properties, Inc. (360)
Dukeminier & Krier excerpt on rise of perpetual trust (379)

> **No Titles of Nobility (pp. 216-220)**
> **"A Real Boutique Place" (pp. 220-228)**
> Click here for the video The Ownership Secret of the Super Rich)

These excerpts provide more historical background and current politics on how trusts and estates law has been reshaped to the point that, quite literally, there is now a separate legal system for the ultra-wealthy that has put in place the mechanism for a new aristocratic class in America. The *Titles of Nobility* section explains how aristocratic interests used property doctrines such as primogeniture and entailment concentrated family wealth over generations. The rule against perpetuities was designed, in large part, to combat this.

The *Real Boutique Place* excerpt takes up the story and shows how concerned America's leaders were with aristocratic wealth. This explains the popular argument in favor of the estate tax. It's fascinating how what just a generation ago was taken for granted -- it's appropriate and beneficial to tax inherited wealth -- to the minority view today. The excerpt then sets out in detail how South Dakota intentionally undermined estate law protections in order to entice money (and hoped-for jobs) to the state. It provides a classic example of the *race to the bottom*, where states compete with one another by reducing regulation to entice investment.

We find the South Dakota story shocking, and it provides a stark reminder of how small, hidden changes to state property laws can have enormous social and economic implications. When we ask our South Dakotan students if they are aware of this practice, they have all expressed surprise. This is an example of how a small group of insiders can dominate a state's property regime, with consequences for all of us. This story also reinforces the idea that in America, *property law is primarily state law*.

We all suffer high and hidden costs from this — paying more in taxes and getting less in government services. And by hyper-concentrating wealth, South Dakota locks away resources that could spark entrepreneurial innovation.

All this is possible because, in the United States, states mostly define family ownership, not the federal government. Effectively, South Dakota is setting national policy. But Congress can override these choices and plug holes in our leaky estate tax system. One step would be to tax trusts at the passage of each generation and limit generation-skipping tax-exempt trusts. A bigger step would be to ensure that appreciated stocks — a big driver of wealth inequality — are taxed at least once. As a candidate, Joe Biden made that a centerpiece of his tax plan.

Or one could start anew. Ditch the existing estate tax and replace it with an inheritance tax on those who receive the wealth. Answer the bogus "death tax" claims with a "silver spoon tax" that reins in windfalls to kids of super-wealthy family dynasties. Heirs of inherited income should pay at least a fraction of the taxes the rest of us pay on income from work. Our Washington Post op-ed crystalizes this argument:
https://www.washingtonpost.com/opinions/2021/03/19/we-need-rein-billionaires-start-with-south-dakota/

Surprisingly, there has not been a groundswell of political opposition to this special treatment for the super-rich. Today, for example, the estate tax applies to just two of every thousand people who dies. Yet repeal continues to enjoy popular support—up to seventy percent. Why do students think this remains such a popular measure? Why aren't there more politicians calling for reform? Is it more a case of influential lobbying or that there is little political benefit gained from this issue?

A Brief Exhortation (pp. 228-229)

This excerpt describes basic estate planning steps that all adults should take.

Michael Heller always spends part of a class at the end of Chapter 5 explaining the *basic estate planning steps* that all law students should take. He is often thanked by former students for sharing this counsel.

CHAPTER 6
Co-ownership and Marital Interests

A. Common Law Concurrent Interests (Dukeminier, et al, p. 387)

Delfino v. Vealencis (p. 406)
Heir property section (p. 414)

John Brown's Farm (pp. 202-208)
Click here for the video (How African-American Farmers Lost Their Land)

This excerpt provides greater background to the Black farmers and heir property note, explaining not only the practice of how land loss happened but the larger economic implications. As an expert we quote says, heir property is "the worst problem you never heard of." In the era of Black Lives Matter with heightened interest in wealth disparity and social justice, students will be interested to understand the role that intestacy and partition have played in destroying black wealth over generations. As another quoted expert describes, "if you want to understand wealth and inequality in this country, you have to understand black land loss."

In much of *Mine!*, we argue that the law is overrated. Norms and customs play a much larger role in our everyday lives than legal doctrines and courtrooms. That said, the law remains hugely important for family and real property, as this story shows. For class discussion, apart from ensuring the students understand how intestacy and partition combined to make black farmers so vulnerable, it's useful to focus on proposed reforms. How would the right of first refusal work? Why would incorporation of the land be effective? The story provides a stark reminder of how property law can be designed to favor the wealthy and dispossess the poor.

"A Meaningless System of Minute Partition" (pp. 208-212)

Native American land loss is not discussed in the casebook so this excerpt is particularly important to show how estate law has also harmed Native Americans. The law is more complicated than in the case of black farmers because of federal requirements ostensibly intended to safeguard Indian interests. This made combining fractionated interests even more difficult. It's a tragic story, and it's important to show students how well-intentioned but poorly designed ownership engineering (requiring land to be split among heirs and trusts that restricted transfer) made a bad situation much worse. As with black farmers, this practice prevented land wealth from growing across generations, contributing to the terrible poverty on many Indian reservations today.

The second part of this excerpt explains the argument of Dagan and Heller's *Liberal Commons* idea. It provides a useful introduction to the *exclusion versus governance* debate that is at the heart of much modern property theory. The excerpt gives students the tools to assess how ownership can be designed for cooperative group management. Students can be asked to assess the different trade-offs of the liberal commons -- individual choice versus group authority, majority decisions versus minority dissent, and protecting group values versus individual freedom to exit -- in concrete situations. The text describes how this worked for partition and black land loss. How does this work in marriage, or a corporate partnership, or a garage band?

B. Marital Interests (Dukeminier, et al, p. 427)

In re Marriage of Graham (p. 438)

From Shared Sacrifice to Self-Sacrifice (pp. 229-234)

This excerpt provides background on the *Graham* case and contrasts it with the New York divorce of famed opera singer, Federica von Stade (**noted on p. 444**). It then sets out a range of rights allocations for the assets. For class discussion, a starting point is whether future earning potential is even a form of property. This can be examined from both a formal analysis (does it look like other kinds of property or meet the standard definition of property) and a functional analysis (this does not feel like a piece of land or gold, but it surely has value and can be used exclusively). Students should be asked which option is fairest. What rule would a Rawlsian "veil of ignorance" approach come up with – the lawmaker not knowing whether the ruler will be the male or female, the dependent or income-earning spouse? Presumably, the rule would favor the more vulnerable party. Given that, how does the class explain that now every state has determined that future earnings is not marital property? One might argue that there are other ways to get at this (perhaps through alimony), but a work-around is not really an answer to whether it should be regarded as property or not.

The broader point about marital interests is that states are often making implicit value judgments about what a married relationship should look like. Should it be more a business relationship or shared commitment?

Migrating Couples (p. 453)

Marriage Menus (pp. 235-239)

This excerpt offers a surprising story of how much marital property law differs from one state to another, and how this can work to the detriment of a spouse (building on the **Hanau case, noted on p. 454**). The fact that newlyweds spend more time discussing the color theme of their wedding than how they will own their assets is telling (and a bit shocking). If nothing else, this section can be a wake-up call to students contemplating marriage that they should give careful thought to how they want to share or not share their assets going forward. What's mine is yours, or maybe not.

Obergefell v. Hodges (p. 456)

Head and Master (pp. 164-168)

This is an important excerpt because it lays out the strategy to target vulnerable groups by restricting their property rights. Beyond the case of slavery, there are examples throughout history that many students will not know about, from the Nazi's gradual restrictions of Jewish property rights, to California's old restrictions on Asian ownership rights, to Louisiana's "head and master laws" limiting ownership authority of wives.

When groups do not have full control over assets, their autonomy is greatly limited. They cannot amass enough assets to start a business or buy a house. Spouses in unhappy or abusive marriages cannot leave without the risk of penury. When students read about the disposition of marital assets between same sex couples, they should realize the long road of other groups to get even close to equal rights over property. It's unlikely that many students will know that one of the most important targets of the women's rights movement, raised in the America's very first convention at Seneca Falls, New York, was for stronger property rights for women.

CHAPTER 10
Judicial Land Use Controls: The Law of Nuisance

A. An Introduction to the Substantive Law
B. Remedies (and More on the Substantive Law)

Spur Industries, Inc. v. Del E. Webb Development Co (p. 749).

Earth, Sun, and Wind (p. 153-160)

This excerpt describes a conflict between homeowners in a Sunnyvale, California, cul de sac over whether redwood trees shading a neighbor's solar panels constitute a nuisance.

This is a great excerpt for teaching the Coase Theorem, building on the discussion of the "four rules" in note 3. The text goes through the different options of property and liability remedies and the importance of realizing reciprocity of harm, all in user-friendly, non-technical language. It's particularly engaging for students because there is no bad actor here.

You can start by asking who should win, Vargas or Bissett. There will be a split of opinion. Neither growing redwoods nor installing solar panels is a bad thing to do, but applying the traditional on/off switch of ownership means that one side must lose and the other will win.

Students should be asked to diagram the remedies based on the classic 2x2 matrix from Calabresi and Melamed.

Entitlement with:	Injunction/Property rule	Liability rule
Tree owner	Tree owner wins	Solar owner pays tree owner for loss of from topped trees
Solar panel owner	Solar panel owner wins	Tree owner pays solar owner for loss of electricity ("reverse damages")

Based on the remedies, should the winner's property right be protected by an injunction or by damages? What are the pros and cons of each rights/remedy combination? The Calabresi and Melamed analysis opens up the possibility of remedies where each party's interest is at least partially vindicated, and they are forced to ask how much exercising their right is really worth to them.

As new renewable energy technologies emerge and become widespread, there will be more and more examples of these "green versus green" conflicts. Wind power siting is just the most recent of these.

CHAPTER 11
Private Land Use Controls: The Law of Servitudes

C. Covenants Running with the Land

Nahrstedt v. Lakeside Village Condominium Association, Inc. (p. 875)

Boo Boo, Dockers, and Tulip (pp. 147-152)

This excerpt provides greater background and texture to the *Nahrstedt* case. It describes the origin of the common-interest community legal arrangement and its extraordinary rise, to the point where most new residential units are governed by CIC restrictions.

CHAPTER 13
Implicit Takings

Penn Central Transport Co. v. City of New York (p. 1050)

Toddlers Rules of Ownership (pp. 275-278)

Students often find implicit takings rules a mess. We end the discussion of the open-ended tests in *Penn Central* by circling back to the early questions that animate the course: what is property? If it turns on expectations, where do those come from and which ones count? Turns out, toddler's intuitions about property are pretty on target. They expect to be able to play with truck, but reasonable limits are okay, like not hitting their sibling, which is a nuisance, and not part of their ownership, etc.