

We abandon *Pierson v. Post* here for a moment to take a preliminary view of the modern philosophy of property. The readings for these two classes are not particularly long, but they are quite dense. We need more time to explore them than just one class. We will truncate the three classes that follow in the syllabus. I will make suggestions as to what in the Fernandez book can be skipped. Today, we are going to have a guest in the second hour, Bharath Palle, who has written a dissertation chapter on Hohfeld's ideas about property. Next week, we will have a guest in the middle of class Prof. Henry Smith, to discuss his recent piece on Hohfeld.

Today we consider Hohfeld and Breakey, pp. 63–66, and 87–107.

1. Hohfeld (the answers to the questions that follow may be found at http://www.law.harvard.edu/faculty/cdonahue/courses/prop/lec/outcl07_19F_selftest.html

:

Jural Opposites	right	privilege	power	immunity
	no-right	duty	disability	liability

Jural Correlatives	right	privilege	power	immunity
	duty	no-right	liability	disability

Hohfeld's fundamental insights were two:

- a. The language of the law is, or ought to be, language about relationships between legal persons. Neither a piece of land nor a cow can bring or defend a law suit, though there are those who have argued that animals should be able to bring law suits.
- b. The key to understanding the differences among different types of legal relationships is to look to the correlative. A landowner might say "I have a right to possess my land; I have a right to use my land; I have a right to convey my land. I have a right not to have my land taken from me by the government, unless it pays for it." But each of those phrases means something different if we look to the correlative. What is the correlative of each of these statements of right? Once you've figured that out, back up and supply the correct Hohfeldian term for the 'right':

right to possess

right to use

right to convey

right not to have it taken

2. What happens if we apply Hohfeldian terminology to *Keeble v. Hickeringill*?
3. How might we apply Hohfeldian terminology to the position of an adverse possessor who has not yet run out the statute of limitations? Consider first the position of the adverse possessor (AP) vis-à-vis the person against whom s/he is running out the statute of limitations (TO, i.e., 'true owner').
 - a. Rights?
 - b. Privileges?
 - c. Powers? – there are at least two
 - d. Immunities?

4. Breakey – two fundamental problems:
 - a. Application of the concept of property to intangibles
 - b. Bundle Theory vs. Full Liberal Ownership
5. Breakey – Preliminaries:
 - a. Property as a thing vs. property as a relationship
 - b. Property: private, collective, common
 - c. Property in both law and custom is complex
6. Breakey – Bundle Theory supported by three reasons:
 - a. Conceptual: Hohfeld was not necessarily a Bundle Theorist, but he made Bundle Theory possible
 - b. Descriptive: Bundle Theory became particularly relevant when wealth came increasingly to be held in not in physical things
 - c. Normative: Bundle Theory made possible changes in property entitlements for moral reasons or for reasons of public policy.
7. Breakey – Full Liberal Ownership Blackstone, or, more precisely Honoré:
 - a. The right to possess: to have exclusive physical control of a thing;
 - b. The right to use: to have an exclusive and open-ended capacity personally to use the thing;
 - c. The right to manage: to be able to decide who is allowed to use the thing and how they may do so;
 - d. The right to the income: to the fruits, rents and profits arising from one's possession, use and management of the thing;
 - e. The right to the capital: to consume, waste or destroy the thing, or parts of it;
 - f. The right to security: to have immunity from others being able to take ownership of (expropriating) the thing;
 - g. The incident of transmissibility: to transfer the entitlements of ownership to another person (that is, to alienate or sell the thing);
 - h. The incident of absence of term: to be entitled to the endurance of the entitlement over time;
 - i. The prohibition on harmful use: requiring that the thing may not be used in ways that cause harm to others;
 - j. Liability to execution: allowing that the ownership of the thing may be dissolved or transferred in case of debt or insolvency; and,
 - k. Residuary character: ensuring that after everyone else's entitlements to the thing finish (when a lease runs out, for example), the ownership returns to vest in the owner.

These items have been generally accepted by the proponents of Full Liberal Ownership except for item (i), which is not regarded as a feature of property *per se*, but rather a general duty that we all owe each other.

 - a. These are not necessary and sufficient but central characteristics of the term 'property'.

- b. They actually describe the situation in a wide variety of societies as to many, if not all, chattels.
- 8. Breakey – Integrated theory: Argues that the right to exclude, the privilege of use, and the power to manage and/or convey go together very frequently, sufficiently frequently that they create a whole that is greater than the sum of its parts. That then leads to the question which of the three is the dominant one?
 - a. Trespass-based theories. Encounter great difficulty with intangible property.
 - b. Harm-based theories. Seem particularly appropriate in cases of access to common resources.
 - c. Power-based theories: the focus on alienation.
 - d. Immunity-based theories. Take that not very far down the road and it is hard to distinguish property from other fundamental rights, like free speech.
 - e. Remedy-based theories: Calabresi and Melamed.
- 9. Breakey – Cross-Cutting Theories
 - a. Radin: Property and Personality.
 - b. Katz: Ownership and Agenda-setting
- 10. Breakey – Socialist and Egalitarian Theories w/ a side note on joint-ownership