Property*

David Schmidtz

I. The Right To Exclude

Working within a Lockean tradition, William Blackstone (1765) characterized property as the 'sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.' In practice, though, property rights in the Anglo-American tradition have always been hedged with restrictions. The dominion to which Blackstone refers is limited by easements, covenants, nuisance laws, zoning laws, regulatory statutes, and more generally by the public interest.

Wesley Hohfeld (1913) distinguished between rights and liberties. I am at liberty to use P just in case my using P is not prohibited. I have a right to P just in case my using P is not prohibited, plus I have the additional liberty of being able to prohibit others from using P. That is to say, the difference between a mere liberty and a full-blooded property right is that with the latter, there is an owner who holds a right to exclude other would-be users.

Today, the term 'property rights' generally is understood to refer to a bundle of rights that could include rights to sell, lend, bequeath, use as collateral, or even destroy. (John Lewis generally is regarded as the first person to use the 'bundle of sticks' metaphor, in 1888.) The fact remains, though, that at the heart of any property right is a right to say no: a right to exclude non-owners. In other words, a right to exclude is not just one stick in a bundle. Rather, property is a tree. Other sticks are branches; the right to exclude is the trunk.

This is not merely a stipulation, because unless an owner has a right to say no, the other sticks are reduced to mere liberties rather than genuine rights. Thus, I could be the owner of a bicycle in some meaningful sense even if for some reason I have no right to lend it to my friend. By contrast, if I have no right to forbid you to lend it to your friend, then I am not the bicycle's owner in any normal sense. The tree would be missing its trunk, not just one of its branches.

This does not settle what, if anything, can *justify* our claiming a right to exclude, but it does clarify the topic. When we ask asking about *owning* a bicycle as distinct from merely being at liberty to use it, we are asking first and foremost about a right to exclude.

II. The Point of Property

When are we justified in claiming a right to exclude? There are legal questions, of course, but there also are moral questions about what the law *ought* to be. Claims about natural rights and natural law concern what legal rights ought to be, not what legal rights happen to be.

Dutch thinker Hugo Grotius (1625) secularized the idea of natural law. In his hands, natural law theory became a naturalistic inquiry into the question of what social arrangements were most conducive to the betterment of humankind, given fundamental facts about human nature. Grotius argued that there would be laws of nature, dictated by requirements of human nature, even if (perish the thought) there were no deity. Human societies almost invariably create property as a legal category, so property rights are indeed artifacts in that sense, yet the very fact that humans create (and generally respect) property is part of our natures. Moreover, as Carol Rose puts it, 'property is designed to *do* something, and what it is supposed to do is to tap individual energies in order to make us all more prosperous' (Rose, 1994, 2). People create property rights for a purpose, and in a given time and place there always will be a fact of the matter about whether they work.

John Locke (1690), following Grotius, argued that God gave the world to humankind in common for the betterment of humankind, and therefore intended that people have the right to do what they need to do to put the earth to work. Individual persons own their own selves. To be sure, persons are God's property, but as against other humans, no one but the individual alone holds the right to say yes or no regarding how his or her body is to be put to work. The premise of self-ownership is controversial, but no alternative is less controversial. (It may be controversial to say a person has a right to say no to a proposal to use her body in a certain way, but it is more controversial to say she doesn't.)

This right to choose how to put our bodies to work would be useless in that original state, and God would be leaving us to starve, unless we were at liberty to make a living by laboring upon otherwise unowned objects in the world. We normally are not at liberty to seize what already belongs to someone else—seizing what belongs to someone else normally does not contribute to the betterment of humankind—but when a resource is unowned, we can come to own it by mixing our labor with it in such a way as to make it more useful. Thus, we acquire a crop by virtue of being the ones who planted and harvested it, and we acquire the land underneath the crop by virtue of being the ones who made that land ten, a hundred, or a thousand times more productive than it had been in its unappropriated wild condition.

Locke was not envisioning a world where little or no wild land remained for latecomers, but implicitly he argued that latecomers could *afford* to respect the claims of those who arrived first. Indeed, what Locke would have seen today is how much *better* it is to arrive late, after all the appropriating is done. We latecomers benefit from generations of people already having done the hard work of making the land and the overall economy hundreds of times more productive than it was during the age of first appropriation, more than doubling life expectancy in the process. (Schmidtz, 2008.)

John Locke thus extended the idea of self-ownership to include the external resources that people could make part of themselves, in effect, by mixing their labor with them. The extension is controversial, but the subtle essence of it is not. The subtle idea is that there is a question about who has the least obstructed claim to a resource. So, if we look at a piece of land that Bob alone worked on and improved (cleared, planted, etc.), then here is a fact that matters to anyone who cares about persons: only Bob can reap the fruits of the land that Bob improved without having to seize the fruits of another person's labor.

The point is not that Bob has some metaphysically extraordinary connection to that piece of land. The idea is that Bob has a *bit* of a connection, and no one else can establish a comparable connection without at the same time disregarding Bob's prior claim. The first labor-mixing thus raises the bar on what it takes to justify subsequent acts of taking possession. (Inevitably, there will be a subsequent owner, but legitimizing transfer and subsequent ownership usually involves getting consent from the previous owner. The sort of labor-mixing that would help to justify *first* appropriation would be beside the point.)

Traffic Management

To Carol Rose (1994), a fence is a *statement*—announcing to the world that you will defend what is inside, and asking people to curb themselves so you won't need to, thereby saving everyone a lot of trouble.

The whole point of a fence is to *get in the way*, which sounds hard to justify. But here is another way to conceive of property: property rights are like traffic lights. Traffic rights move traffic not so much by turning green as by turning red. Without traffic lights, we all in effect have a green light, and the result is gridlock. By contrast, a system where we in turn face red and green lights is a system that keeps us moving. It forces us to stop from time to time, but we all gain in terms of our ability to get where we want to go, because we develop mutual expectations that enable us to get where we want to go, uneventfully. Red lights can frustrate, but the game they create for us is positive-sum. We all get where we are going more quickly, more safely, and more predictably, in virtue of knowing what to expect from each other. (As Locke might have argued, even 'pedestrians' are better off in an effective system of *commercial* traffic, because the trucking and bartering that constitutes commercial traffic is what enables twenty-year-old have-nots eventually to become forty-year-old haves.)

We don't want *lots* of rights for the same reason that we wouldn't want to face red lights every fifty feet. Getting our traffic management system right is a matter of getting the most compact set of lights that does the job of enabling motorists to know what to expect from each other, and thereby get from point A to point B with minimal delay.

Traffic lights hardly do anything. They sit there, blinking (as Jason Brennan puts it in Schmidtz and Brennan, 2009). Yet, without them, we are not as good at knowing what to expect, and consequently not as good at getting where we need to go while staying out of each other's way. The same could be said of property conventions.

III. How to Respect the Right to Exclude

Calabresi and Melamed (1972) distinguish three ways respecting property. In normal cases, property is protected by a *property rule*, meaning no one may use it without the owner's permission. In other circumstances, P is protected by a *liability rule*, meaning no one may use it without compensating the owner. In a third case, P is protected by an *inalienability rule*, meaning no one may use P even with the owner's permission.

The fundamental rationale for liability rules is that sometimes it costs too much, or is impossible, to get consent, and sometimes the contemplated use is compellingly important. Further, every time we pull out of a driveway, there is some risk that our plans will go awry and we will end up accidentally damaging someone's property. Where a property rule would require us to get advance permission from every property owner against whom we run the risk of accidental trespass, a liability rule requires instead that we compensate owners after the fact if we should accidentally damage their property.

The analogous rationale for an inalienability rule is that there are forms of property so fundamental that we would cease fully to be persons if we were to, for example, sell them. We may, say, regard my kidney or my vote as my property, and yet deny that this gives me any right to sell such things. In this respect, we would then be treating my right as inalienable.

The takings clause of the fifth amendment of the U.S. Constitution specifies that public property may not be taken for public use unless just compensation is paid. The clause does not explicitly affirm the public's right to seize private property for public use, although that is the implication. We can see the takings clause, then, as affirming that even when a compelling public interest precludes treating a private property right as protected by a property rule, the public must still respect the right to the extent of treating it as protected by a liability rule.

As a rule, the protection that liability rules afford is not good enough. Here is the problem. Suppose someone steals your car, then brings it back undamaged with the gas tank full. Lack of damages notwithstanding, the fact remains that your rights were violated in a serious way. For property rights to do what they are supposed to do, the right to exclude needs to have 'teeth', which is to say it needs to be protected by property rules, not liability rules, and the penalty for *intentional* trespass must be real, not nominal. Thus, in 1997, Judge Bablitch of the Supreme Court of Wisconsin, in the case of *Jacque vs. Steenberg Homes Inc*., reaffirmed the centrality of property rule protection to a properly functioning system of property. In that case, Steenberg intentionally crossed Jacque's property to deliver a motor home to Jacque's neighbor, despite Jacque having denied Steenberg's request for permission. A lower court had awarded Jacque one dollar in compensatory damages (because there had not been any significant damage) and denied any punitive damages on the ground that merely nominal damages could not sustain substantial punitive damages. Judge Bablitch rules that this would have been the correct ruling in a case of *accidental* trespass, but in a case of *intentional* trespass, punitive damages themselves must be substantial enough to deter.

Common Law

Philosophy is part of what drives the evolution of Anglo-American conceptions of property, but the history of property is not only a history of ideas. Philosopher David Hume (in his *History of England*) wrote that so long as the property system was as precarious as it was in the Middle Ages, there could be little industry. To Hume, the so-called Dark Ages were as dark as they were because people were not free. In particular, they were not free to choose how to make a living. Moreover, they lacked secure title to the products of their labor.

What changed? Hume treats as of singular importance the rediscovery of Justinian's Pandects in Amalfi, Italy, in 1130 (Hume, 1983, Book II, 520). The Pandects were a digest of state of the art Roman civil law, commissioned by emperor Justinian, and produced by the day's leading legal scholars (circa 530). Within ten years, lectures on this newly discovered civil law were being given at Oxford. As law and legal thinking evolved, there emerged a class of independent jurists whose job was to apply known and settled laws. This is *common* law, that is, evolving judge-made law. English King Henry II in the late 1100s extended this evolving body of judicial precedent, making its scope national rather than local. Much of the history of property law's evolution in the Anglo-American world is thus a history of judge-made legal precedent. *Jacque vs. Steenberg Homes* is an example.

The remainder of this essay discusses several other legal cases illustrating the sorts of principles that drive the evolution of the common law of property.

IV. Externalities

Any given transaction has costs and benefits. I sell you a widget for $1.50. The benefit of the transaction to me is $1.50, minus what it cost me to bring that widget to market. Presumably we're both better off, because we traded by consent. I manufactured the widget for, let's say, 79 cents, so I'm better off. You use your new widget to manufacture a gizmo that you can sell for a profit of $3.14, so you too are better off.

What can go wrong? Suppose you use your new widget at 4AM in a way that makes an ear-splitting noise, and your neighbors lose sleep. Thus, a transaction can have costs or benefits to parties other than the buyer and seller. An *external* cost is a cost imposed on bystanders. An external benefit is a benefit that falls on bystanders. When you make that horrible noise with the widget I sold you, neighbors are worse off. You and I are better off, but bystanders are worse off, which makes it unclear whether society as a whole is gaining or losing.

But now consider a different case. Suppose you don't make any noise with the widget, but you do make lots of gizmos, and offer them for sale at $1.99 rather than what had been their going rate of $3.14. As a result, people who had been selling gizmos for $3.14 are worse off. Both cases are cases in which innocent bystanders are made worse off, but the second case is legitimate somehow. Being awoken in the middle of the night by an ear-splitting widget noise is arguably a form of trespass, but in the second case, my customers are not my property, and your 'stealing' a customer from me is not stealing so much as simply outperforming me and thus taking business from me that never was mine by right. From a social perspective, when a transaction affects the supply and demand for gizmos, and the price of gizmos changes in response, this is a good thing for the neighborhood, not a bad thing. Falling gizmo prices reflect the fact that supply increased relative to demand, and therefore from the community's perspective there is less reason for any particular manufacturer to be making gizmos. So, falling price induces the appropriate response. Externalities that affect people's welfare only by affecting prices are called *pecuniary* externalities, and from a social perspective they are beneficial because changing prices induce buyers and sellers to adjust their behavior in ways that benefit customers.

In 1707, the case of *Keeble v. Hickeringill* came before the Queen's Bench of England. Keeble was a farmer who had set up a system of decoys to lure waterfowl into traps. He would then sell the captured birds. His neighbor, Hickeringill, began to fire guns into the air so as to frighten the birds away and interfere with Keeble's business. Keeble filed suit. Judge Holt ruled in favor of Keeble. Holt reasoned that Keeble was minding his own legitimate business and Hickeringill had no right to interfere. Holt refers to another case where a defendant interfered with a neighbor's school *by starting a better school*. The defendant won in that case because the students were not the plaintiff's property. The plaintiff had no right to be protected against the defendant 'stealing' the students by offering the students a better alternative. Holt next considered a hypothetical where a defendant interferes with a neighbor's school by firing guns into the air and frightening the students away. That would be an intentional trespass, because the defendant would be aiming to sabotage the plaintiff's product, not to enhance the defendant's product. Judge Holt drew a distinction between genuine and merely pecuniary externalities (centuries before the technical terms were coined), refining the property system so as to limit genuine externalities while leaving intact the liberty to compete in the marketplace, thereby making it easier for neighbors to live, and make a living, together.

Sometimes externalities are not worth eliminating. When people live miles apart, we don't bother to develop laws regulating shooting of guns into air. As population density rises, a cost becomes worth internalizing at some point. Likewise, there is an external cost to driving, but we don't want people to stop driving. We just want to limit the cost to reasonable levels. *Eliminating* external costs is not the aim. It will always be part of the idea of being a good neighbor that it is worth living among neighbors despite minor irritations, and good neighbors take reasonable steps to tread lightly on their neighbors' normal sensibilities. There is no perfect substitute for being considerate. No system of law will enable us to be good neighbors just by obeying the law.

V. POSSESSION

In the case of *Armory v. Delamirie* (1722), a chimney sweep discovers a ring, pockets it, then takes it to an appraiser. The appraiser pockets the jewel that had been in the ring. The chimney sweep sues the appraiser for the return of the ring. The court rules that the question is not who is the true rightful owner, but whether there has been a wrongful transfer from the plaintiff to the defendant. The court determines that there has indeed been a wrongful transfer and rules that it must be undone. This was among the first cases to establish possession as marking presumptive ownership. The chimney sweep was not the ring's rightful owner, but his simply possessing the ring conferred a right to maintain possession against those who would take it without consent.

A person has to feel safe in going to the market and engaging the services of others in mutually beneficial commerce. If a jeweler has a right to take your stuff, then you won't feel comfortable taking your stuff to a jeweler. One of the main purposes of law in general and property law in particular is to make people feel safe in going to market to truck and barter. If property rights are sufficiently secure, then one need not conceal one's valuables; on the contrary, one can *flaunt* their value, openly advertising what one has for sale, thereby making it easier for the whole community to do business.

VI. Positive Sum Games

In 1880, in the case of *Ghen v. Rich*, the court learns that Ghen fired a bomb lance into a fin-back whale. The dead whale sank, then washed up on the coast of Massachusetts, where it was found by Ellis. Ellis sold the carcass to Rich, who extracted oil from the blubber. Hearing of this, Ghen filed a claim for the value of the oil extracted. Ghen's case rested on the custom in the whaling community of treating the person who first harpooned a whale as establishing possession and thus ownership. In 1881, Judge Nelson of the Massachusetts District Court ruled in favor of Ghen, crediting whalers for developing norms that facilitate the whaling trade. Whaling ports were concentrated, close-knit communities. Norms were propagated there: simple, transparent norms that invested property rights in whalers who were good at producing what the larger community needed whalers to produce.

Judge Nelson acknowledged that whether an act counts as establishing possession and thus presumptive ownership is a matter of convention. In some whaling communities, the 'iron holds the whale', meaning that fatally harpooning a whale is enough to establish possession. In whaling communities where the most commercially valuable whales are too dangerous or too difficult to attach to one's boat, this is all that reasonably can be asked. (This was the rule applying to the fin-back, which is why the first possessor was Ghen, not Ellis.) In other whaling communities, though, where the prized whales are slow and docile, the mark of first possession is more stringent. In those communities, the rule is 'fast fish, loose fish', meaning one has not established possession until the whale is fastened to the boat. (See Ellickson 1991.)

Carol Rose identifies two overarching principles for defining rules of possession. First, establishing possession should involve doing something unambiguous, something that notifies the world of what one is claiming. Second, establishing possession by the rules should involve useful labor, something that adds to the value of what one is claiming.

VII. Transaction Costs

In *Hinman vs. Pacific Air Transport* (1936), a landowner sues an airline for trespass, asserting a right to stop airlines from crossing over his property. The court's predicament: on one hand, a right to say no is the backbone of a system of property that in turn is the backbone of cooperation among self-owners. On the other hand, much of property's point is to facilitate commercial traffic. Ruling that landowners in effect can veto the air traffic industry is the kind of red light that would gridlock traffic, not facilitate it. The Hinman verdict is explainable in terms of *transaction costs* (costs incurred in concluding a transaction—commissions, time and money spent on transportation to and from the market, equipment and space rentals, time waiting in line, and so on). The cost of airlines transacting with every land owner for permission to pass over the owner's land would render air traffic out of the question. The ruling was that the right to say no does not extend to the heavens but only so high as a landowner's actual use. Navigation easements subsequently were recognized as allowing federal governments to allocate airspace above five hundred feet for transportation purposes.

Justice

Common law judges need to formulate simple rules, in the spirit of equality before the law, that enable litigants to get on with their lives, knowing how to avoid or minimize future conflict. In *Hinman*, a property system had come to be inadequately specified relative to newly emerging forms of commercial traffic. In a targeted, not overly clever way, Judge Haney made the system a better solution to the particular problem confronting his court. Judge Haney's verdict left us with a system of rights that we could *afford* to take seriously.

The right to say no is an institutional structure that facilitates community by facilitating commerce in the broadest sense. The right to say no safeguards a right to come to the market and contribute to the community, thereby promoting trade, and thereby promoting progress. When people have a right to say no, and to withdraw, then they can afford *not to withdraw*.

They can afford to trust each other. That is, they can afford to live in close proximity and to produce, trade, and prosper, without fear.

By the same token, the right to say no is not a weapon of mass destruction. It is a device whose purpose is to facilitate commerce, not prevent commerce, so it must not put people in a position to gridlock the system. The right to say no is meant to be a right to decline to be involved in a transaction, not a right to forbid people in general to transact. In *Hinman*, the plaintiff's interpretation of his right to say no implied a right to gridlock airlines, so the edges of the right to say no had to be clarified.

That is to say, property's purpose as a means of production (how the law has to evolve in order to continue to serve its purpose) has to condition the contours of justice, not the other way around. Therefore, taking justice seriously has to involve treating justice as something that comes second, not first, because taking justice seriously has to involve treating justice as something a society can afford to take seriously. In the *Hinman* case, for example, whether justice recognized a right to say no that extends to heaven had everything to do with whether such extension was a viable way of managing the commercial traffic of a peaceful and productive community of sovereign, individual equals. (See Schmidtz, 2010).

Zoning

The case for zoning begins with a problem of internalizing externalities, combined with a conjecture that a given externality problem cannot be solved because the cost of transacting is too high. Neighborhood associations create covenants forbidding industrial development. Sometimes, though, there are holdouts whose interests lie in a different direction, and who want to retain the option of selling their land to industrial concerns. Thus, neighborhoods often seek to reserve to themselves a right—as neighborhoods—to say no to such sales. *Euclid vs. Ambler Realty* (1926) is the basis of all subsequent zoning in the United States. In 1922, the village of Euclid, a suburb of Cleveland, adopted a comprehensive zoning plan. In the middle of this village, though, was a large tract of land owned by Ambler Realty. Ambler sued Euclid, alleging that the zoning plan robbed Ambler of the greatest value of its land because the parcel was in the immediate vicinity of a railroad that made it better suited for industrial than residential use.

A district judge found the zoning ordinance unconstitutional. The 14^{th} Amendment says, in part, that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws'. The U.S. Supreme Court overturned this ruling. There was a concern that zoning had been used to create neighborhoods barring minorities, immigrants, and people with criminal records. Everyone knew that one of zoning's uses was to protect residents from renters and low-income groups by creating single-family residential zones, minimum acreage lot requirements, and so on. Still, the court saw no such concerns in play in *Euclid*. So, the court decided (with three dissenting votes) that their job was to rule on the merits of the case rather than on the general principle, acknowledging that zoning *could* be used as a tool of oppression but holding that it was not being abused in the case at hand. If and when neighborhoods abused the option of zoning, they could and would be sued, and future courts would then define and refine zoning's legitimate limits.

VIII. Equality Before the Law

In 1911, thirty of the thirty-nine property owners in a St. Louis neighborhood signed a covenant barring the sale of their parcels to non-whites. In 1945, the owner of one such parcel sold to Shelley, an African-American family. Neighbors sued to prevent Shelley from taking possession. Dodging the moral issue, the trial court dismissed the suit on technical grounds, ruling that the covenant was valid only on condition that all the neighborhood owners sign, and not all had. The Supreme Court of Missouri reversed this decision, arguing that the people who signed the agreement had a right to do so, and their exercising such right violated no provision of the Constitution. Shelley, by now occupying the property, counter-sued, saying the covenant did indeed violate the U.S. Constitution's 14th amendment, which guarantees to each citizen 'equal protection of the laws'. The case went to the U.S. Supreme Court, which ruled that private racist covenants are constitutional, but *public enforcement* of such covenants is not. Private covenants do not involve or implicate the state, but public enforcement of private covenants does.

Shelley terminated half a century of effort to segregate via covenant. The idea of covenants is neutral in the abstract, but in practice overwhelmingly was used to exclude African Americans. *Shelley* signaled that courts would scrutinize actual patterns of discrimination, not merely formalities. The lawyer arguing Shelley's case was Thurgood Marshall, an African American and future justice of the U.S. Supreme Court, who would go on to argue, in *Brown v. Board of Education* (1954) that 'separate but equal' is unconstitutional because there was precious little equality in segregation's results as put into practice since *Plessy v. Ferguson* (1896).

What we are left with today is a right to enter covenants, exchange easements, and so on, so long as those changes aim at making the community a better place. One can enter into private agreements, but one cannot bind future generations by creating racist covenants that *run with the land*. Being a racist is one thing; binding future owners to participate in a racist covenant is another. Once a covenant is designed to run with land, the covenant isn't just a contract issue anymore. It has become a property issue. In property law, there are *limiting doctrines* that prevent idiosyncratic wishes of previous owners from running with the land. Idiosyncratic contractors can agree to whatever idiosyncratic deal they want, but their agreement does not bind future buyers of their property. Restrictions on property that run with land have to be justified, when challenged, by argument that such restrictions are reasonably expected to be of value to subsequent owners. Which raises a question: could racially restrictive covenants reasonably be expected to be of value to subsequent white owners? Perhaps, but here is the crux. For a court to acknowledge that whites have a legitimate interest in excluding blacks would be for the State to acknowledge racism as legitimate. And *that* is what the 14th amendment's 'equal protection' clause forbids.

REFERENCES

• Blackstone, William. (1979) *Commentaries on the Laws of England* [1765] (Chicago: University of Chicago Press).

• Calabresi, Guido and Melamed, A. Douglas. (1972), 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral', *Harvard Law Review* 85: 1089-1128.

• Demsetz, Harold. (1967), 'Toward a Theory of Property Rights', *American Economic Review* (Papers & Proceedings) 57: 347-59.

• Ellickson, Robert C. (1991), *Order Without Law : How Neighbors Settle Disputes* (Cambridge : Harvard University Press).

• Ellickson. Robert C. (1993), 'Property in Land', *Yale Law Journal* 102: 1315-400.

• Grotius, Hugo. 2005. *Rights of War and Peace* [1625], (London: Elibron).

• Hardin, Garrett. (1968), 'The Tragedy of the Commons', *Science* 162: 1243-48 .

• Hohfeld, W. (1964), *Fundamental Legal Conceptions* [1913 and 1917] (New Haven: Yale University Press).

• Hume, David. (1983) *History of England* [1778] Indianapolis: Liberty Fund Press.

• Lewis, John. (1888), *Law of Eminent Domain* (Chicago: Callaghan and Co.).

• Locke, John. (1960), *Second Treatise of Government* [1690] P. Laslett (ed.), (Cambridge: Cambridge University Press).

• Rose, Carol. (1985), 'Possession as the Origin of Property', *University of Chicago Law Review* 52: 73-88.

• Rose, Carol. (1986), 'The Comedy of the Commons: Custom, Commerce, and Inherently Public Property', *University of Chicago Law Review* 53: 711-87.

• Rose, Carol. (1994), *Property and Persuasion* (Boulder: Westview).

• Schmidtz, David. (2008), *Person, Polis, Planet: Essays In Applied Philosophy* (New York: Oxford University Press).

• Schmidtz, David. (2010), "Property and Justice," *Social Philosophy and Policy* 27: 79-100.

• Schmidtz, David, and Brennan, Jason. (2010), *A Brief History of Liberty* (Oxford: Blackwell).

David Schmidtz

Kendrick Professor of Philosophy and joint Professor of Economics

Director, Arizona Center for Philosophy of Freedom

University of Arizona

---

* I thank Christopher Freiman, Daniel Silvermint, and Cathleen Johnson for helpful comments. I also thank Dean Don Weidner and all the wonderful faculty at Florida State College of Law for hiring me as a visiting professor for the fall semester of 2007, where I taught property and did much of the research for this article. I could not have written this essay without their excellent advice and warm encouragement.