

# THE NEW PROPERTY OF THE NINETEENTH CENTURY: THE DEVELOPMENT OF THE MODERN CONCEPT OF PROPERTY

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## INTRODUCTION

“There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property . . . .” wrote William Blackstone in 1765.<sup>1</sup> Two centuries after Blackstone wrote, Charles Reich’s highly influential article “The New Property,”<sup>2</sup> argued that property is the indispensable foundation of the free individual in the modern welfare state.<sup>3</sup> While the concept of property has been central to the development of both public<sup>4</sup> and private law during the history of the United States, the meaning of the term “property” has changed radically. This essay will trace the main transformations of the concept of property from the Revolutionary period to the modern period. The introduction will present both the methodology and the thesis of the essay. Following the introduction, the essay will examine the development of the concept of property in three stages. First, the Blackstonian conception of property, prevalent at the founding of the nation, will be described by focusing on two elements of Blackstone’s theory: the physicalist<sup>5</sup> conceptions and the absolutist<sup>6</sup> conceptions. Next, the general transformation of each of these elements during the nineteenth century will be described and

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1. 2 W. BLACKSTONE, COMMENTARIES (1765).

2. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

3. The article was cited as authority by the U.S. Supreme Court in the landmark case of *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). It also has become a staple part of the teaching of property law in the United States. See, e.g., C. HAAR & L. LIEBMAN, PROPERTY AND LAW 1027-1126 (1977).

4. For a general discussion of the importance of property to eighteenth century revolutionary thought, see Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 712-14 (1938).

5. See text accompanying notes 19-25 *infra*.

6. See text accompanying notes 26-32 *infra*.

illustrated through an analysis of the law of business goodwill, accession, trademarks, oil and gas, and trade secrets. Finally, the changes in the physicalist and absolutist conceptions of property will be shown to form the basis of the modern concept of property as defined by Wesley Newcomb Hohfeld.

### A. Methodology

American legal historiography, as it has evolved in this century, has been concerned primarily with the problem of explaining which among various historical forces "caused" a particular judicial decision.<sup>7</sup> The method used in this essay stands entirely outside this conventional approach to American legal history. Rather than attempting to explain the cause of particular decisions, it attempts to describe the structure of legal thought.<sup>8</sup> The difference lies both in using a purely descriptive rather than explanatory approach, and in examining the structure of an entire conceptual scheme rather than the outcomes of particular decisions. The effort is not to explain why a particular side won on a given day, but to describe the conceptual apparatus by which the court justified its decision.

Central to the discussion among legal historians interested in causation has been the debate over the extent to which the law is autonomous,<sup>9</sup> a debate which is epitomized by the opposing views of the formalists and the instrumentalists.<sup>10</sup> At one end of the spectrum, the formalist explains all legal decisions as logical deductions from previous decisions,<sup>11</sup> and therefore legal thought explains everything. At the other end of the spectrum, the instru-

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7. See, e.g., Feinman, Book Review, 78 MICH. L. REV. 722 (1980).

8. The method employed herein owes a great deal to the work of Duncan Kennedy, especially as exemplified in his article *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209 (1979). I am also heavily indebted to his magnificent essay, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

9. See, e.g., Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman's "A History of American Law,"* 1977 WIS. L. REV. 81 (1977) for an argument in support of the law's "relative autonomy." See L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973) for an argument against the autonomy of law.

10. See, e.g., Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 LAW & SOC'Y REV. 571 (1977); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1977).

11. The tenets of formalism are described in Kennedy, *Legal Formality*, 2 J. OF LEGAL STUD. 351 (1973). See also R. UNGER, *LAW IN MODERN SOCIETY* (1976).

mentalist sees legal thought as but a diversion, a sideshow produced merely to justify decisions made entirely for political reasons.<sup>12</sup> But regardless of whether one sees legal thought as a dependent or an independent variable in the study of legal history, legal thought clearly is of crucial importance to that study; within it lies the secret of how the deception was made convincing. Until that is understood, attempts at unmasking the law are necessarily incomplete. This essay, then, begins with the conviction that legal historians, whatever their beliefs about causation in history, need to understand the nature of legal thought and therefore an initial effort at description is justified.

Legal thought is, in essence, the process of categorization. The lawyer is taught to place phenomena into categories such as fact or law, substance or process, public or private, contract or tort, and foreseeable or unforeseeable, to name but a few. Categorizing phenomena determines how they will be treated by the legal system. Whether, as with the formalist, the process of placement is seen as mechanical, or, as with the instrumentalist, the process is seen as politically motivated, the process is the core of legal thought.<sup>13</sup>

The task of the legal historian who examines American legal thought is to explore the origins and structure of the categories. This essay explores the origins and structure of the category of property. Although the language of causation is used occasionally, the question of what caused the shift from a Blackstonian conception of property to a Hohfeldian conception is largely ignored. Instead, the attempt is to describe the two conceptions of property and the process by which one conception was abandoned and the other adopted.

The selection of the concept of property as the subject of this initial exploration was deliberate.<sup>14</sup> American legal thought since the Revolutionary period has been dominated by the idea of liberalism, broadly defined.<sup>15</sup> One characteristic of liberalism has been

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12. A good example of instrumentalism in its extreme form is L. FRIEDMAN, *supra* note 9, at 10.

13. See generally Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 BUFFALO L. REV. 383 (1979); Kennedy, *supra* note 8.

14. Similar investigations of legal concepts include Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1959 (1980) and *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract and Tort*, 93 HARV. L. REV. 1511 (1980).

15. The theory of liberalism, its relationship to politics and psychology, and its dilem-

the dualism of the state and the individual. All of the important problems in a liberal legal system can be stated as a choice between state power and individual freedom. The choice is bewildering because state power is seen both as the indispensable condition to the existence of freedom and as the chief threat to that freedom.<sup>16</sup> The categories of legal thought mark the boundaries between state power and individual freedom. The process of categorization, in effect, is the process of choosing between the state and the individual in particular cases. Property has played a critical role in the scheme of legal categories. Property and its counterpart, sovereignty, have been understood as generic terms for, respectively, the collection of freedoms held by the individual and the collection of powers held by the state. In very real terms, the concept of property has marked the boundaries of individual freedom and the limits of state power.

Thus, the choice between state power and individual freedom in particular cases repeatedly has been stated in legal terms as the decision whether property exists. The study of the development of the concept of property should reveal something about the process by which this fundamental choice has been made during the course of American history. A glimmer of insight into this process of categorization—the process which constitutes American legal thought—is the goal of this essay.

## B. *Thesis*

In broad outline, the thesis is this: at the beginning of the nineteenth century, property was ideally defined as absolute dominion over things. Exceptions to this definition suffused property law: instances in which the law declared property to exist even though no “thing” was involved or the owner’s dominion over the thing was not absolute. Each of these exceptions, however, was explained away. Where no “thing” existed, one was fictionalized. Where dominion was not absolute, limitations could be camouflaged by resorting to fictions, or rationalized as inherent in the nature of the thing or the owner. The result was a perception that

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mas are described in R. UNGER, *KNOWLEDGE AND POLITICS* (1975) and R. UNGER, *supra* note 11.

16. For this view of liberalism and the following discussion of the relationship between liberalism and the structure of legal thought, I am greatly indebted to the work of Kennedy, *supra* note 8, and Unger, *supra* note 15.

the concept of property rested inevitably in the nature of things and that recognition of some thing as the object of property rights offered a premise from which the owner's control over that thing could be deduced with certainty. The perceived inevitability of this definition of property legitimated the concept. At the same time, the serviceability of property as a premise from which legal relations could be deduced permitted courts to use the concept to fix the boundaries of dominion between private individuals and between the individual and the state. Property law thus appeared to settle controversies while simultaneously legitimating, and even necessitating, the result.

As the nineteenth century progressed, increased exceptions to both the physicalist and the absolutist elements of Blackstone's conception of property were incorporated into the law. Acting at times on a theory of natural law and at other times on the instrumentalist public policy of a positive state, courts increasingly sought to protect valuable interests as property even though no thing was involved. The protection of value rather than things—the dephysicalization of property—greatly broadened the purview of property law. Any valuable interest potentially could be declared the object of property rights. This dephysicalization was a development that threatened to place the entire corpus of American law in the category of property. Such conceptual imperialism created severe problems for the courts. First, if every valuable interest constituted property, then practically any act would result in either a trespass on, or a taking of, someone's property, especially if property still was regarded as absolute. Second, once property had swallowed the rest of American law, its meaningfulness as a separate category would disappear. On the other hand, if certain valuable interests were not to be considered property, finding and justifying the criteria for separating property from nonproperty would be difficult. The sense of inevitability in the definition of property had disintegrated and with it the legitimacy of the concept of property.

The absolutist conception of property also came under assault. Throughout the nineteenth century, courts discovered that interests which deserved protection, whether based on natural law or positive instrumentalism, could not be protected absolutely without unduly restricting the activity of others. Courts created less protected forms of property, but once they admitted that all prop-

erty was not equally protected, the designation of an interest as property no longer provided a premise from which legal rights could be automatically deduced. The designation of an interest as property no longer settled any controversy; it merely restated the dispute. Courts, therefore, were faced with the dilemma of finding and justifying criteria for deciding upon the protection to which a particular species of property was entitled.

By the beginning of the twentieth century, the Blackstonian conception of property was no longer credible. A new conception emerged and was stated in its definitive form by Wesley Newcomb Hohfeld. This new property was defined as a set of legal relations among persons. Property was no longer defined as dominion over things. Moreover, property was no longer absolute, but limited, with the meaning of the term varying from case to case.

The new conception of property failed to solve the problems left by the destruction of the Blackstonian conception. Courts still had to decide whether a particular interest was property, and if it was, how much protection it merited. Nevertheless, the Hohfeld conception provided a vocabulary for discussion that was consistent with the new dephysicalized and limited property.

This century long evolution resulted in an inability of property concepts to settle controversies and to legitimate the results. Courts overcame their paralysis by deciding individual cases with overt recourse to political goals. But, in so doing, they abandoned the myth of judicial neutrality and with it their own legitimacy. This evolution illustrates the general transformation of legal reasoning. It is the story of a radical reconceptualization in a crucial area of American law that brought with it the destruction of the legitimacy of law that the Realist movement bequeathed to American legal thought.<sup>17</sup>

## I. OLD PROPERTY: THE BLACKSTONIAN CONCEPTION

The common law conception of property at the end of the eighteenth century was embodied in Sir William Blackstone's *Commentaries on the Laws of England*, published in 1765.<sup>18</sup> That

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17. See Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 *BUFFALO L. REV.* 459 (1979).

18. The "chorus of approbation" that greeted Blackstone's publication of the *Commentaries* and the subsequent influence of that work, are described in Odgers, *SIR WILLIAM BLACKSTONE*, 27 *YALE L.J.* 599 (1918); 28 *YALE L.J.* 542 (1919).

conception saw property as absolute dominion over things. In Blackstone's words, property was "that 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."<sup>19</sup> Blackstone's definition contained essentially two elements: (1) the physicalist conception of property that required some "external thing" to serve as the object of property rights, and (2) the absolutist conception which gave the owner "sole and despotic dominion" over the thing.

#### A. *The Physicalist Conception of Property*

Blackstone divided all legal rights into two categories: rights over persons and rights over things. The law of property concerned only the latter.<sup>20</sup> Under the physicalist concept the law of property was based on a taxonomy of things, with the nature of each thing determining its treatment at law. The basic distinction made was between real property and personal property and was based on a fundamental difference in the things which served as the basis of property rights. Real things were fixed and immovable, such as land and tenements, while personal things were movable, such as goods and money.

These two categories were subdivided. Things real were divided into corporeal hereditaments—things which could be detected by the senses, and incorporeal hereditaments<sup>21</sup>—things which existed only "in contemplation."<sup>22</sup> A corporeal hereditament was simply land. An incorporeal hereditament was "a right issuing out of a thing corporate"<sup>23</sup> and fell into one of the following categories: advowsons, tithes, commons, ways, offices, dignities, franchises, corodies, annuities, and rents.<sup>24</sup> Incorporeal hereditaments presented a conceptual problem for Blackstone since the holder of such property held no thing, only a right, albeit a right issuing from a thing. Blackstone solved the problem by reifying these rights; they became "things" even if only "in

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19. 2 W. BLACKSTONE, COMMENTARIES 2.

20. *Id.* at 15.

21. A hereditament is "whatsoever may be *inherited*." *Id.* at 17.

22. *Id.*

23. *Id.* at 19.

24. *Id.* at 21.

contemplation."<sup>25</sup>

Personal property, also was divided into two categories: in possession and in action. Chattels personal in possession consisted of actual possession of some thing while chattels personal in action, or *choses in action*, consisted only of the right to hold the thing in possession at some future time.<sup>26</sup> As Blackstone put it, a *chose in action* was a "thing rather in *potentia* than in *esse*."<sup>27</sup>

Like the corporeal/incorporeal hereditaments distinction, the distinction between things in possession and choses in action illustrates Blackstone's insistence upon property as things. Just as Blackstone reified incorporeal hereditaments, he reified choses in action. A chose in action was a thing in *potentia*, but a thing nonetheless.

Blackstone's conception of property as dominion over things was maintained only at the expense of intellectual integrity. Calling a right a thing did not make it one. Furthermore, if rights were things, then all legal rights could be considered property and Blackstone's fundamental distinction between rights over persons and rights over things was destined to evaporate.

### B. *The Absolutist Conception of Property*

Blackstone considered property to be one of three "absolute right[s], inherent in every Englishman."<sup>28</sup> So absolute were the rights or property, according to Blackstone, that the law would not permit the smallest infringement of them, even for the good of the entire community.<sup>29</sup>

Blackstone's absolutist conception of property, like his physicalist conception, could be maintained only through a set of fictions. The common law recognized numerous instances of limited property. Blackstone used two separate strategies for reconciling the exceptions: one for tangible things and one for reified

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25. Pollock and Maitland, describing incorporeal hereditaments, observed: "They are thinglike rights and their thinglikeness is of their very essence." 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 123 (1898).

26. 2 W. BLACKSTONE, *COMMENTARIES* 389.

27. *Id.* at 397.

28. 1 W. BLACKSTONE, *COMMENTARIES*, 134. The other absolute rights were life and liberty.

29. *Id.* at 135.



rights.<sup>30</sup>

Where some tangible thing was involved, Blackstone considered any limitations in the owner's dominion to be inherent in the nature of the thing or the owner. For example, animals *ferae naturae*<sup>31</sup> presented an example of qualified property because their nature did not permit absolute dominion over them.<sup>32</sup>

Where no tangible thing was involved, as in the case of incorporeal hereditaments and choses in action, Blackstone used his reified rights fiction to preserve the absolutist conception of property. Blackstone considered the incorporeal hereditament and the chose in action to be the thing which was the object of the property rights. Thus, one who had a chose in action or an incorporeal hereditament had absolute dominion over a thing. The limited property right had been reified, and the resulting thing was owned absolutely.

## II. THE CREATION OF NEW PROPERTY

### A. *The Dephysicalization of Property*

The courts of Blackstone's era claimed to be protecting the possession of things. If no physical thing was possessed, as with an incorporeal hereditament or a chose in action, one was fictionalized. Courts in the nineteenth century continually encountered situations in which the protection of some intangible form of wealth was far more important to the litigants than the protection of any tangible thing in the case. Whatever their motive or justification in finding property, courts frequently found that protecting the possession of a tangible thing rather than intangible wealth was pointless if not counterproductive.<sup>33</sup> Too often there simply was no thing to be protected. Courts thus began to define property as the right to value rather than to some thing.

This tendency to create nonphysical forms of property was encouraged by changes in the structures of two bodies of legal doctrine: the adoption of the fourteenth amendment and changes in

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30. 2 W. BLACKSTONE, COMMENTARIES 389.

31. Translated to mean "animals of a wild nature."

32. 2 W. BLACKSTONE, COMMENTARIES 389. In this category of qualified property, Blackstone also placed air, light, fire and water. Property which was qualified because of the peculiar circumstances of the owner included bailments, goods pawned upon a condition, and goods distrained for rent. *Id.* at 395-96.

33. See text accompanying notes 38-67 *infra*.

equity jurisprudence. First the due process clause of the fourteenth amendment protected citizens against deprivation of life, liberty, or property by the State. New as well as old forms of wealth could thus be protected against state infringement if courts could be persuaded to treat them as property. This encouraged the rapid creation of nonphysical forms of property.<sup>34</sup> Second was the rule in equity that had been established, originally as dictum in the 1818 case of *Gee v. Pritchard*,<sup>35</sup> that equity would act to protect only property rights, not personal rights. Thus, the only way that equity could protect valuable interests was to designate them as property. One late nineteenth century commentator noted the court's changing attitude toward equity's protection of property:

The principle, followed so long by courts of equity, that Chancery interferes only to protect rights of property, has recently lost much of its vigor because the courts, though often professing allegiance to the rule, have stretched the term "property" almost beyond recognition in the effort to do justice in the constantly arising situations where personal and political rights demand adequate protection. Accordingly, the injunctive method of abating nuisances, originally designed to prevent injuries to property, has been used where what was actually protected was the individual's personal comfort, health, or safety.<sup>36</sup>

This commentator listed rights in dead bodies, unpublished private letters, and privacy as examples of newly created property rights.<sup>37</sup>

The collective effect of these developments was the creation of numerous species of nonphysical property such as business goodwill and accession. Courts gradually recognized that the value of business goodwill was not necessarily linked to the premises, or to any tangible incidents of the business. This recognition led to a decision by the courts that property in goodwill could exist and be alienated even though unattached to a thing. The law of accession presents a slightly different situation. In all the accession cases, the disputants agreed that a thing was the object of the controversy. However, one side would claim that the property rights were in the original possessor of the thing while the other side would claim that the property rights were in the one who had contributed the

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34. For a seminal discussion of the creation of nonphysical forms of property under the due process clause, see J. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* (1924).

35. 2 Swanst. 402, 36 Eng. Rep. 670 (1818).

36. 7 COLUM. L. REV. 533 (1907) (citations omitted).

37. *Id.* at 533-34. See also 19 COLUM. L. REV. 413 (1919).

most value to the thing. By the end of the nineteenth century the courts no longer conceived of property rights as relative to the thing; they concluded that, as in business goodwill, legal property rights of property protected the value rather than the thing. Other forms of nonphysical property were created to develop new property rights where no tangible thing was involved in order to protect the value of an investment, such as trademarks and trade secrets. These four examples of dephysicalization of property suggest the diverse approaches used by nineteenth century courts. In the case of business goodwill, there was a gradual abandonment of the need for the tangible things which had supported that property right. In the law of accession, a thing remained the object of the dispute, but the nature of the thing ceased to affect the resolution of the dispute. Finally, in trademarks and trade secrets, courts created property where no tangible thing existed. All these paths led to the same destination: the dephysicalization of property. Property was no longer solely rights over things, but rights to any valuable interest.

1. *Business Goodwill* The tendency of early nineteenth century courts to conceive of property as rights in some thing was reflected in the classic definition of goodwill furnished by Lord Eldon in *Cruttwell v. Lye*:<sup>38</sup> "nothing more than the probability, that the old customers will resort to the old place."<sup>39</sup> This early definition of goodwill considered it an incident of real property.<sup>40</sup> Courts gradually began to realize, however, that in many cases the value of the goodwill was unrelated to the location of the business. In *Metropolitan Bank v. St. Louis Dispatch Co.*,<sup>41</sup> for example, after the St. Louis Evening Post Company merged with the St. Louis Dispatch Company to form the Post-Dispatch the court held that the Post-Dispatch did not own the goodwill of the St. Louis Dispatch, even though it owned the place where the St. Louis Dispatch had been published. The court explained: "As applied to a newspaper, the goodwill usually attaches to its name rather than to the place of publication. The probability of the title continuing to

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38. 17 Ves. Jun. 335, 34 Eng. Rep. 129 (1810).

39. *Id.* at 346, 34 Eng. Rep. at 133.

40. See, e.g., *Rawson v. Pratt*, 91 Ind. 9 (1883) (goodwill is an incident of a place of business). See also *Elliot's Appeal*, 60 Pa. 161 (1869) (goodwill of an inn does not exist apart from the building).

41. 149 U.S. 436 (1893).

attract customers in the way of circulation and advertising patronage, gives a value which may be protected and disposed of, and constitutes property."<sup>42</sup> The *Metropolitan Bank* court viewed goodwill as being attached to value rather than things. The growing rejection of a physicalist conception of property in goodwill was also reflected in *Washburn v. National Wallpaper Co.*,<sup>43</sup> where the court observed that goodwill is not "indissolubly connected" with a particular location or a specific set of objects and that a firm could retain its goodwill even though it moved to a new location and bought new equipment.<sup>44</sup> Goodwill did not attach to any tangible part of the business, but rather to the business as a going concern.

By the turn of the century, the courts were ready to take the final step: goodwill need not be appurtenant to any thing. For example, in *Brett v. Ebel*,<sup>45</sup> a man transferred the goodwill of his freighting business by agreeing not to solicit his old customers. The court held that this was a valid transfer of goodwill, even though no physical objects had changed hands.<sup>46</sup> The goodwill transferred in *Brett* differed from the goodwill in *St. Louis Dispatch* and *Washburn* in that the former involved a covenant not to compete while the latter involved only the sale of a business. The doctrinal breakthrough of *Brett*, however, that property can exist in goodwill without reference to any physical thing, cannot be attributed solely to the fact that a covenant not to compete need not involve the transfer of tangible objects. In fact, prior to *Brett*, a covenant not to compete was invalid unless it was supported by consideration in the form of some tangible thing, because goodwill alone, not being property, would not be adequate consideration.<sup>47</sup> The new *Brett* rule was applied and justified in *Rowe v. Toon* where the court explained that a covenant not to compete often created a "valuable

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42. *Id.* at 446.

43. 81 F. 17 (2d Cir. 1897).

44. *Id.* at 20.

45. 29 A.D. 256, 51 N.Y.S. 573 (1st Dep't 1898).

46. *Id.* at 258, 51 N.Y.S. at 574; accord, *Rowe v. Toon*, 185 Iowa 848, 169 N.W. 38 (1918).

47. See, e.g., *Pickett v. Green*, 120 Ind. 584, 22 N.E. 737 (1889) where the covenant not to compete by a retiring physician was appurtenant to the sale of "1 table, 1 office chair, with book rest, 1 reclining chair, with cane bottom and back, 6 common chairs, 1 prescription case, 1 book-case, 1 stove, with pipe, 1 side-lamp, 1 oil can, 1 slate . . ." 120 Ind. at 585, 22 N.E. at 738. See also *Rowe v. Toon*, 185 Iowa 848, 169 N.W. 38 (1818), citing the once general rule that a covenant not to compete is valid only if made in connection with the transfer of property.

opportunity.”<sup>48</sup> This value could be the object of property rights in goodwill, and nothing more than this value was needed as consideration for the contract.

The movement toward a rule that goodwill could constitute property without the existence of a tangible thing was facilitated by attempts to abstract a general theory of goodwill from the cases. One effect of this process of abstraction was to divert attention from the physical thing involved in a particular goodwill case and to focus discussion on the general nature of the legal relationships created through a transfer of goodwill. This seemed to give goodwill a separate existence apart from things. Another effect of abstracting the concept of goodwill was a realization that, in many respects, goodwill resembled traditional forms of property and should, therefore, be treated as property.

In 1875, A.S. Biddle published one of the first comprehensive treatments of the concept of goodwill in American legal literature.<sup>49</sup> He criticized Lord Eldon’s definition of goodwill for being too narrow and adopted Joseph Story’s more comprehensive definition.<sup>50</sup> Biddle reviewed the case law, and perceiving it to be suffused with conflicting and confused decisions,<sup>51</sup> attempted to formulate a set of general principles to govern the law of goodwill. He focused on the alienability of goodwill and its protection in equity, and concluded that goodwill was “a species of incorporeal personality . . . subject with but few exceptions to the general laws which regulate that kind of property.”<sup>52</sup>

Eight years later, Adelbert Hamilton also set out to collect the authorities and state the “general principles” of goodwill.<sup>53</sup> Emphasizing the alienability of goodwill,<sup>54</sup> Hamilton also adopted

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48. 185 Iowa at 855, 169 N.W. at 41.

49. Biddle, *Goodwill*, 14 AM. L. REG. 1 (1875).

50. Story defined goodwill as:

the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position, or common celebrity, or reputation for skill or affluence or punctuality, or from other accidental circumstances or necessity or even from ancient partialities or prejudices.

J. STORY, LAW OF PARTNERSHIP § 99 (1841).

51. *Id.*

52. Biddle, *supra* note 49, at 8.

53. Hamilton, *Good-Will*, 15 Fed. 315 (1883).

54. *Id.* at 316.

Story's definition of goodwill as the best available and concurred in Biddle's characterization of goodwill as incorporeal personalty. In an attempt to capture the essence of goodwill, Hamilton stated that "[g]oodwill denotes a relation existing between a man or firm and the public with reference to a particular business."<sup>55</sup> He began to conceive of goodwill as creating relations between people, not between people and things.

By the beginning of the twentieth century, the commentators had lost interest in classifying goodwill as a particular species of property, such as incorporeal personalty.<sup>56</sup> One writer, for example, concluded that goodwill was of pecuniary value and was assignable, and, having these two "essential attributes of property," should be considered property.<sup>57</sup> Four years later, another student author stated as a premise the proposition that his predecessor had reached as conclusion: "Goodwill is generally recognized to be a form of property."<sup>58</sup> The transition had become clear; goodwill though entirely nonphysical had become property. Later discussions of goodwill in legal literature made no attempt to place it in any category of property.<sup>59</sup> Perhaps it made little sense to the commentators to attempt to fit a dephysicalized form of property into a scheme which was based on a taxonomy of things.

2. *Accession* The common law rule of accession from the time of Blackstone until the 1870's was that if one altered goods owned by another, causing their physical identity to be lost, yet in good faith was ignorant that the things belonged to another, then the ownership of the goods would pass from the original owner to the person who performed the alteration. The original owner would simply be entitled to compensation. If the alteration did not change the physical identity of the goods, then the original owner would retain his title and the interloper would have no interest in the goods.<sup>60</sup> This rule was readily accepted by American courts throughout the first three-quarters of the nineteenth century.<sup>61</sup>

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55. *Id.*

56. This was the same time as courts like the *Brett* court were upholding the transfer of goodwill unsupported by the transfer of any physical objects.

57. 16 HARV. L. REV. 135, 136 (1902).

58. 19 HARV. L. REV. 538 (1906).

59. *See, e.g.*, 3 COLUM. L. REV. 210 (1903); 29 HARV. L. REV. 457 (1915); 19 COLUM. L. REV. 413 (1919); 31 YALE L.J. 209 (1921); 34 YALE L.J. 101 (1924).

60. 2 W. BLACKSTONE, COMMENTARIES 404.

61. *See, e.g.*, *Lampton's Exec. v. Preston's Exec.*, 24 Ky. (1 J.J. Marsh) 454 (1828);

As a result of this rule, once the error of the taking was discovered, the appropriator of the goods that retained their physical identity would lose any investment made in improving the goods. A desire to protect the value of the interloper's investment led to the creation of a new rule. In *Wetherbee v. Green*,<sup>62</sup> decided in 1871, the defendant had taken timber which he erroneously believed he owned, and converted it into barrel hoops worth twenty-eight times more than the timber. In passing upon the timber owner's action for replevin of the wood, Judge Cooley reviewed the extensive authority for the physical identity rule, and concluded that a determination based solely on whether the new product was identifiable from the original thing taken was contrary to the goal of protecting the value of investment.<sup>63</sup> He held that title should be determined by the relative amount each claimant had contributed to the final product.<sup>64</sup> Since the appropriator's contribution to the final value of the hoops was twenty-eight times greater than that of the original owner, the latter's action for replevin was denied leaving him with an action for damages in the amount of the value of the original timber.

The comparative value rule established by *Wetherbee* quickly began to supplant the physical identity rule in other jurisdictions.<sup>65</sup> Some courts went so far as to hold that when the appropriator's contribution to the value of the goods exceeded that of the original owner, the original owner would be limited to damages for the goods taken even where the appropriator acted wilfully and

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Baldwin v. Porter, 12 Conn. 473, 484 (1838); Silsbury & Calkins v. McCoon & Sherman, 6 Hill 425 (Sup. Ct. 1844), *rehearing denied* 4 Denio 332 (Sup. Ct. 1847), *rev'd on other grounds* 3 N.Y. 379 (1850); Riddle v. Driver, 12 Ala. 590 (1847); Reader v. Moody, 48 N.C. (3 Jones) 11 (1856); Potter v. Marde, 74 N.C. 36 (1876).

62. 22 Mich. 311 (1871).

63. *Id.* at 320.

64. *Id.*

65. See, e.g., Lewis v. Courtright, 77 Iowa 190, 41 N.W. 615 (1889) (defendant who, in good faith, cut neighbor's grass worth 8 - 10 cents per acre and converted it to hay worth \$2.00 - 4.50 per acre, was granted title to the hay); Eaton v. Langley, 65 Ark. 448, 47 S.W. 123 (1898) (adopted the rule of *Wetherbee v. Green*, 22 Mich. 311 (1871) and held that where appropriator increases sixfold the value of lumber converted to railroad ties, the increase was not enough to pass the title). In cases where the plaintiff sued not for recovery of the goods, but for damages, the issue was whether the plaintiff was entitled to the full value of the goods after their improvement, or merely the value of the goods when taken. Cases holding that the plaintiff was entitled only to the value of the goods when taken include: Herdic v. Young, 55 Pa. 176 (1867); Heard v. James, 49 Miss. 236 (1873); Texas & N.O. Ry. Co., 34 Tex. Civ. App. 94, 77 S.W. 955 (1903).

knowingly.<sup>66</sup> The rule inaugurated by *Wetherbee* was a stark rejection of the physicalist conception of property embodied in Blackstone's Commentaries and in the cases decided prior to 1870. After *Wetherbee*, property rights were annexed not to an identifiable external thing, but to value.<sup>67</sup>

### B. *Limiting of Property Rights*

Courts in the nineteenth century began to extend property protection to interests which previously had been protected only in a very limited fashion or not at all. This section will examine two such interests, trademarks and trade secrets. In 1800, trademarks were protected only against fraud while trade secrets were not protected at all. Yet by the end of the nineteenth century, both were considered property. Courts decided, however, that extending absolute protection to these valuable interests was undesirable. With trademarks, courts recognized that absolute protection of one man's use of a trademark prevented even harmless use of the same mark by others notwithstanding that others had invested substantially in the use of the trademark. Faced with competing claims of absolute property rights, the courts limited property protection by limiting the categories of people against whom an infringement action could be brought. In trade secret cases, courts realized that absolute protection of trade secrets would vitiate the legislature's patent policy of limiting the duration of an idea's protection. In contrast with trademarks, which were originally protected *in rem*, trade secrets received only limited protection from the moment of their designation as property. The owner of the trade secret was limited to bringing an action for violation of the secret only against persons in breach of trust.

Limitations on absolute dominion were required also where the property rights protected were not some newfangled "valuable interest" such as a trade secret, but were a more traditional object of property rights: a tangible thing. This section will examine one such example, the law of oil and gas. These minerals had not been of any legal interest in Blackstone's time and were not mentioned

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66. See, e.g., *Single v. Schneider*, 24 Wis. 299 (1869); *Carpenter v. Longenfelter*, 42 Neb. 728, 60 N.W. 1022 (1894).

67. For a similar and contemporaneous shift in the law of trusts, see Williston, *The Right to Follow Trust Property When Confused With Other Property*, 2 HARV. L. REV. 28 (1888).



in his *Commentaries*. Nevertheless, minerals are things and it is likely that Blackstone would have considered oil and gas to be objects of property, as he had other minerals.<sup>68</sup> Indeed, the earliest oil and gas cases were argued by analogy to Blackstone. Courts recognized that granting absolute rights in oil and gas interfered with the absolute rights of others who had access to the same mineral pool. The result was again to limit property. This time, however, the limitation was both a shift from protection *in rem* to protection against those who owned no land superadjacent to the mineral pool, and a restriction of the owner's right of usufruct.

The examples of trademarks, trade secrets and oil and gas illustrate the variety of situations in which limited property rights were created. The object of the property to be limited might be a tangible thing, such as oil, or an intangible thing, such as a secret. The limitations sometimes occurred gradually, after an early period of absolute protection, as with trademarks, or may have been created simultaneously with the property rights, as with trade secrets. The nature of the limitation varied and included limitations on the number of persons against whom protection was available, as in trademark law, and on the uses to which the owner might put the object of the property rights, as in oil and gas law. The common element is that by the end of the nineteenth century these various chapters in the law, multiplied a hundred times throughout the *corpus juris*, made it impossible to believe Blackstone's thesis that property rights were absolute.

1. *Trademarks* The first suggestion of affording protection for a trademark came in *Singleton v. Boulton*,<sup>69</sup> decided in 1783. Lord Mansfield stated that if the defendant had sold medicine under the plaintiff's name, an action for fraud would lie. The plaintiff and defendant, however, both had sold the medicine under the name of the inventor, who was not a party to the suit. Since there was no evidence that the defendant had defrauded the plaintiff, the court denied relief. Lord Mansfield considered protecting the trademark as property, but declined to do so because the medicine had not been patented. Fraud provided only limited protection for trademarks because no action would lie unless the second user of the trademark intended to deceive the public.

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68. 2 W. BLACKSTONE, COMMENTARIES 18.

69. 3 Doug. 293, 99 Eng. Rep. 661 (1783).

Mansfield stopped short of designating a trademark as absolute property. To do so would have permitted recovery for any unauthorized use, regardless of the appropriator's state of mind. A half century after *Singleton*, the courts were ready to view a trademark as property and to afford it absolute protection. In the landmark case of *Millington v. Fox*,<sup>70</sup> a perpetual injunction was granted to prevent one tradesman from using the trademark of another. For the first time, a trademark was deemed to be property and was protected against all infringement, even unintentional.

The conceptual change reflected in *Millington* did not win immediate or universal acceptance. Four years later, in *Perry v. Truefitt*,<sup>71</sup> Lord Langdale questioned *Millington's* protection of trademarks where there was no intent to deceive and noted that he was unaware of any previous case that protected trademarks so extensively. He concluded that he did not think it possible to own property in a name or mark, even if that name or mark was protectable against fraudulent use.<sup>72</sup> Langdale's implicit assumption was that property in a true Blackstonian sense meant absolute protection, and a mere right of protection against fraud did not mean that a trademark was property and was entitled to this absolute protection.

The American courts quickly followed the lead of their English counterparts. Prior to *Millington*, the decisions rested on fraud. For example, in *Thomson v. Winchester*,<sup>73</sup> decided in 1837, an action in fraud was allowed in order to protect a trademark. A shift in concept, similar to the one occurring in England, also can be seen in *Bell v. Locks*,<sup>74</sup> decided in 1840. There the court stated that a newspaper's name would be protected from fraudulent appropriation, even though the court found no fraud in the case. By 1844 the influence of *Millington* was felt in American courts. *Taylor v. Carpenter*<sup>75</sup> cited *Millington* for the principle that a perpetual injunction would be issued to protect trademarks even in the absence of fraudulent intent. Since the defendant in *Taylor* had

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70. 3 My. & Cr. 338, 40 Eng. Rep. 956 (1838).

71. 6 Beav. 66, 49 Eng. Rep. 749 (1842).

72. *Id.* at 73, 49 Eng. Rep. at 752. See also *Croft v. Day*, 7 Beav. 84, 49 Eng. Rep. 994 (1843).

73. 36 Mass. (19 Pick.) 214 (1837).

74. 8 Paige Ch. 75 (N.Y. 1840).

75. 11 Paige Ch. 292 (N.Y. 1844).

admitted fraudulent intent, the reference to *Millington* was only dictum. However, the following year, in *Coats v. Nelson Holbrook & Co.*,<sup>76</sup> the same New York court perpetually enjoined the infringement of a trademark. Citing *Millington*, the court held that the fraudulent intent of the defendant was relevant only to the determination of costs. Two years later, the New York chancery court decided a trademark case without even mentioning the intent of the defendant.<sup>77</sup> Rather, the court proceeded on the ground that the defendant had a "valuable interest" in the mark which entitled it to protection.

By the middle of the nineteenth century, the idea of protecting trademarks as property had gained broad acceptance. Trademarks were afforded the absolute protection associated with property:

[T]he trademark is property, and the owner's right of property in it is as complete as that which he possesses in the goods to which he attaches it, and the law protects him in the enjoyment of the one as fully as of the other . . . . The right is not limited in its enjoyment by territorial bounds, but subject only to such statutory regulations as may be properly made concerning the use and enjoyment of other property, . . . the proprietor may assert and maintain his property right wherever the common law affords remedies for wrongs.<sup>78</sup>

The absolute right of property in trademarks was affirmed by the United States Supreme Court in the *Trade-Mark Cases*<sup>79</sup> of 1879. The Court announced both that the proprietor of a trademark had a right to exclusive use of the mark and denominated that right a property right. Recognizing the absolute nature of trademark property, the Supreme Court observed in *Kidd v. Johnson*<sup>80</sup> that the right to use a trademark was not limited to any place, but extended "everywhere."<sup>81</sup>

The move to create absolute property in trademarks was not without its skeptics. Francis Upton, in his 1860 treatise on trademarks, commented that an exclusive right to anything was a monopoly and thus a restraint on the individual's freedom of trade.<sup>82</sup>

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76. 2 Sand. Ch. 586 (N.Y. 1845).

77. *Partridge v. Menck*, 2 Barb. Ch. 101, 103 (N.Y. 1847).

78. *Derringer v. Plate*, 29 Cal. 292, 295 (1865).

79. 100 U.S. 82 (1879).

80. 100 U.S. 617 (1879).

81. *Id.* at 619.

82. F. UPTON, A TREATISE ON THE LAW OF TRADEMARKS 88-89 (Albany 1860).

Upton observed that the aversion to creating monopolies had rightly given way to the important public policy of commercial development, but he warned that the doctrine of exclusive property in trademarks should be applied "with the extremest caution."<sup>83</sup> The solution adopted for this problem was not to limit property, but to restrict the types of symbols that could become the objects of absolute property rights. Therefore, by 1872, the courts had almost uniformly reduced the restrictions on commerce inherent in making trademarks property by adopting a set of restrictions regarding the kinds of marks which could be protected as property. The trademark had to be distinctive, *i.e.*, readily identified with the maker of the goods to which it was attached. Additionally, the trademark could not be a geographic name, generic name, or a name which merely described the article, its ingredients or qualities.<sup>84</sup> These restrictions were calculated to extend absolute protection only to those marks which were least likely to interfere with the activities of others.

This paradigmatic trademark scheme which defined two classes—marks with absolute protection and marks with no protection—began to crumble as the turn of the century approached. The leading case which eroded the boundaries of the two discrete categories was *American Waltham Watch Co. v. U.S. Watch Co.*<sup>85</sup> For many years, the plaintiff had manufactured watches in Waltham, Mass., identified by the word "Waltham," and had acquired a great reputation for them. The defendant, with the apparent intention of diverting some portion of the plaintiff's trade, began to sell watches also bearing the name "Waltham." When the plaintiff brought an action for trademark infringement, the defendant replied that the plaintiff's choice to identify his product by a city name was his folly since he could not be given a monopoly on a geographic name. The court held that the word "Waltham," though originally used in its geographic sense, had over time acquired a secondary meaning which the court would protect. This secondary meaning doctrine could have expanded trademark protection to every symbol or word in which anyone had invested value. Instead, the courts created a new category of partial protec-

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83. *Id.* at 96.

84. *See Delaware & Hudson Canal Co. v. Clark*, 13 U.S. (Wall) 311, 323-24 (1871).

85. 173 Mass. 85, 53 N.E. 141 (1899).

tion initially known as "cases analogous to trademarks" and later called "trade names" or referred to under the general rubric of "unfair competition." The difference between the two protected categories was this: trademarks were property and, as such, were protected *in rem*. Trade names, on the other hand, were not property, and were protected only against particular individuals to prevent fraud in particular cases.<sup>86</sup>

With the decision in *American Waltham Watch*, history had come nearly full circle. The courts had gone from allowing injunctions only in the case of fraud, to providing absolute property protection for trademarks, and to providing limited protection for trade names in *Sartor v. Schader*.<sup>87</sup> After repeating the traditional distinction between trademarks and trade names,<sup>88</sup> the court shattered the absolutist conception of property in trademarks. It stated: "In this secondary meaning there may be a property right."<sup>89</sup> Two years later a Massachusetts case, *Cohen v. Nagle*,<sup>90</sup> also recognized trade names as a limited form of property. The plaintiff had adopted the trade name "Keystone," which he readily agreed was a geographic name and of such common use that it could not be a trademark. Nevertheless, the court held that the infusion of value by the plaintiff into the word "Keystone" made it a form of property. The rights attached to this property, however, gave the owner no exclusive right to the use of the property. The courts had changed the meaning of property in closing the circle.

By creating limited property, the courts essentially robbed the term "property" of its meaning. Designating a symbol as property now could mean either that it would be protected absolutely or that it would be protected only against fraud. Since protection against fraud had been available before the creation of property in trademarks or trade names, designating a symbol as property as in *Sartor* and *Cohen* did not say anything new about it or the protection that might or might not be afforded it. Judicial recognition that the meaning of "property" had been destroyed, was clearly

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86. See Cushing, *On Certain Cases Analogous to Trade-Marks*, 4 HARV. L. REV. 321 (1891); Jones, *Historical Development of the Law of Business Competition*, 36 YALE L.J. 351, 374 (1927); Lane, *Development of Secondary Rights in Trade-Mark Cases*, 18 YALE L.J. 571 (1909); 6 COLUM. L. REV. 349 (1906).

87. 125 Iowa 696, 101 N.W. 511 (1904).

88. *Id.* at 700, 101 N.W. at 513.

89. *Id.*

90. 190 Mass. 4, 76 N.E. 276 (1906).

evidenced in Judge Loring's concurring opinion in *Cohen*:

. . . whether it is or is not correct to say that such a plaintiff has property in such a word is not of consequence. If he has a right of property in such a word, this right of property results from his right to prevent others from using it. His right to prevent others from using it does not result from his right of property.<sup>91</sup>

Designating a trademark or trade name property no longer stated a premise from which the rights of the parties could be automatically deduced. Recognition of limited property meant that the concept of property had lost its power to decide cases, and the rights of the parties would have to be determined some other way.

With the adoption of the concept of limited property rights in trade names, courts began to discover good reasons for limiting the absolute protection afforded to trademarks. The need to limit trademark protection typically arose in a case where two parties, in complete ignorance of each other's existence, adopted the same trademark for the same product. As long as they operated in separate markets, there was no practical problem even though the second user technically was infringing upon the first user's absolute right of property in the trademark. A dispute arose, however, when the two products met in the same market. The United States Supreme Court was faced with the dilemma of either modifying the first user's absolute right of property in the trademark or destroying the second user's innocent investment in the symbol in *Hanover Star Milling Co. v. Metcalf*.<sup>92</sup> The result was protection of the second user's investment. The Court announced that the first user now would be protected against only infringement in those markets where his trademark already had become known. The second user was permitted to introduce the mark into any other market. The Court reconciled this holding with the earlier *Derringer* and *Kidd* cases, that had explicitly established trademark protection as extending "everywhere," by stating that in those cases, the infringement occurred in a market where the first user's mark already was known. Then, having demonstrated to its own satisfaction that trademark protection had never really reached everywhere, the Court added an interesting twist to property theory. They noted that trademark property protection did not ex-

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91. *Id.* at 18, 76 N.E. at 282 (citations omitted).

92. 240 U.S. 403 (1916). *See* *United Drug Co. v. Theodore Rectanus*, 248 U.S. 90 (1918).

tend to markets where the first user had not made his mark known because he was regarded as having abandoned his right of property and was, therefore, estopped from asserting that right. Courts continued to claim that property was absolute, even if they would not always permit the proprietor to assert his unlimited rights.<sup>93</sup>

Limiting the once absolute property in trademarks threatened to destroy the distinction between trademarks and trade names. Once both were recognized as limited property, even though those limitations were not identical, courts began to regard the distinctions between trademarks and trade names as only technical.<sup>94</sup>

Because trademarks and trade names had begun to shade into each other, courts again had to decide how much protection a symbol should receive whatever it was technically called. *Hanover* had established the rule for the geographic extent of protection against usage of the mark for the same product, but had left unresolved the extent of protection against other products using the same symbol in the same market. The criteria which had separated classic late nineteenth century trademarks from other symbols had required trademarks to be distinctive names associated with particular products and excluded geographic, descriptive or generic names. Courts in the early twentieth century adopted the same criteria for deciding how much protection a mark or name would receive. The more a symbol resembled a classic trademark, the more protection it would be given.<sup>95</sup> The difference between 1875 and 1925 then was that discrete categories had yielded to a continuum. For example, in *Pease v. Scott County Milling Co.*,<sup>96</sup> the district court noted that distinctive names, such as "Kodak," "Budweiser," "Ford," and "Aunt Jemima," would be protected in all cases where damage would be caused by unauthorized use, while names such as "Blue Ribbon," or "Star" would be protected only against use on similar products. Following similar reasoning, the Second Circuit Court held in *France Milling Co., Inc. v. Washburn-Crosby Co.*,

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93. 269 U.S. 372 (1926).

94. See *Regis v. J.A. Jaynes & Co.*, 185 Mass. 458, 70 N.E. 480 (1904). The U.S. Supreme Court, for example, observed in *American Steel Foundries v. Robertson*, 269 U.S. 372 (1926), that the precise difference between trademarks and trade names was not often material since the law would protect either against appropriation of essentially the same principles.

95. See Schechter, *The Rational Basis of Trade-Mark Protection*, 40 HARV. L. REV. 813 (1927).

96. 5 F.2d 524 (E.D. Mo. 1925).

*Inc.*,<sup>97</sup> that the use of the nondistinctive name "Gold Medal" would be given narrow protection against second users of the name. This meant that marketing wheat flour under the name Gold Medal was forbidden, but marketing pancake flour under that name was allowed. The terms "trademark" and "trade name" were tied to the concept of property and like the concept of property they lost their power to determine results. Cases would be decided, not by deducing legal rights from concepts, but by the policy of protecting investors from injury.

2. *Trade Secrets* Limited property did not necessarily evolve from absolute property as in the case of trademarks. Trade secret cases present the situation in which property rights are limited from their inception. The earliest petitions for judicial protection of trade secrets were denied. Lord Eldon in *Newberry v. Janes*<sup>98</sup> denied a request for an injunction to restrain an apprentice from revealing a secret formula for medicine on the ground of impossibility, since the only way the court could protect a secret would be to learn it, and then there would be no secret. If there were no secret, then the supposed ground for judicial intervention would be absent. Precedent, however, would have supported a decision to protect the trade secrets. In *Smith v. Dickenson*,<sup>99</sup> an English case decided thirteen years earlier, the plaintiff had invented an apparatus to girth saddles, which he intended to patent. He sold his secret to the defendant in return for a promise not to divulge it. The defendant promptly patented the invention, and the plaintiff successfully brought an action for breach of the agreement. Lord Eldon could have extended *Smith* to provide protection even where the secret was not to be patented, but he declined to do so. As he explained in *Williams v. Williams*,<sup>100</sup> a case factually similar to *Newberry*, the circumstances were different because the future patentee in *Smith* would eventually disclose his secret, while in *Newberry* and *Williams* no patent and therefore no disclosure was impending.<sup>101</sup> Only where disclosure was a condition of the grant of protection would the court protect the secret.

Ironically, it was Lord Eldon who established the protection of

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97. 7 F.2d 304 (2d Cir. 1925).

98. 2 Mer. 445, 35 Eng. Rep. 1011 (1817).

99. 3 Bos. & Pul. 630, 127 Eng. Rep. 339 (1804).

100. 3 Mer. 157, 36 Eng. Rep. 61 (1817).

101. 3 Mer. at 160, 36 Eng. Rep. at 62.



nonpatentable trade secrets three years after *Newberry* and *Williams*. It is not clear whether the new protection resulted from a change of heart or a change of facts. In *Yovatt v. Winyard*,<sup>102</sup> the inventor of a secret hired an employee to whom he refused to divulge the secret. The employee nevertheless learned the secret surreptitiously. The plaintiff sought an injunction against the use of the secret by the employee, and distinguished *Newberry* and *Williams* by noting that the inventor in those cases had disclosed the secret to the employee voluntarily, whereas in *Yovatt* the employee had learned the secret against the wishes of the employer. Although the distinction did not resolve the dilemma of protecting a secret without learning it, Lord Eldon granted the injunction. He based his decision on a breach of trust, which would have been equally applicable to the earlier cases in which the employees had promised not to divulge the secret.

While *Yovatt* turned the tide in favor of protecting trade secrets, it did not base the protection on any kind of property theory. Two years later, in *Bryson v. Whitehead*,<sup>103</sup> the defendant had sold his business as a dyer to the plaintiff, complete with his valuable trade secrets, and agreed not to practice the trade for twenty years within fifty miles. The plaintiff sued for specific performance of the agreement and the court granted the injunction holding that a trader could sell a secret and then be bound by that agreement not to use it.<sup>104</sup> The next year, the same court faced another trade secret case and again protected the secret without referring to property rights. In *Green v. Folgham*,<sup>105</sup> the defendant conceded that he had been given a secret formula for an ointment to be held in trust for others, but had instead breached the trust. The court ordered him to account for his profits from the sale of the ointment. However, in its opinion, the court simply ignored the precedent of *Newberry*, *Williams*, *Yovatt*, and *Bryson* and instead relied entirely on the admitted breach of trust. The protection under these decisions, like the early protection of trademarks from fraud, was based more on preventing bad conduct by the defendant than on affording the plaintiff absolute protection of his investment. It was a limited protection and no court in the process of developing

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102. 1 Jac. & W. 393, 37 Eng. Rep. 425 (1820).

103. 1 Sim. & St. 74, 57 Eng. Rep. 29 (1822).

104. *Id.* at 31.

105. 1 Sim & St. 398, 57 Eng. Rep. 159 (1823).

this protection had declared such secrets to be the object of property rights.

This common law protection of trade secrets created a resemblance between trade secrets and patents. Patent protection was first enacted in 1793<sup>106</sup> for the purpose of creating property rights in an invention. In return for protection *in rem*, the inventor was required to divulge the secret and to surrender all protection after a certain number of years. Statutory patent law, however, influenced ambivalently the development of the law of trade secrets. The similarity between patented inventions and trade secrets suggested that secrets could and should be protected as property. Yet, the carefully legislated restrictions on patent rights under patent law also suggested that trade secrets should not be considered absolute property.

The differences and similarities between patents and trade secrets in the years following the first trade secret cases were explained briefly by Williard Phillips in his 1837 treatise on patent law: [T]he patent was property while the trade secret was not. However, an inventor could assert a nonproperty interest in a trade secret which, under certain circumstances, would be protected by law.<sup>107</sup> Phillips' authority for the legal protection of trade secrets was *Smith v. Dickenson*, which protected trade secrets intended to be patented. It is not clear why he ignored *Yovatt* and other cases establishing protection for trade secrets in the absence of an intent to patent the secret.

Another commentator, Joseph Story, also noted the protection afforded trade secrets in his 1836 treatise on equity jurisprudence, acknowledging that equity would restrain a party from disclosing secrets communicated to him in the course of a confidential employment.<sup>108</sup> Story's authority was *Yovatt v. Winyard*, in which Lord Eldon created protection for trade secrets not to be patented, and two other English cases, *Cholmondeley v. Clinton*<sup>109</sup> and *Evitt v. Price*.<sup>110</sup> *Cholmondeley* held that a lawyer could not change sides in a case, because that would prejudice the first client's

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106. T. FESSENDEN, *LAW OF PATENTS* 35 (1810).

107. W. PHILLIPS, *LAW OF PATENTS* 333, 340 (1837).

108. J. STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE* § 952 (1836).

109. 19 Ves. 261, 34 Eng. Rep. 515 (1815).

110. 1 Jac. & W. 394, 57 Eng. Rep. 659 (1827).

secrets,<sup>111</sup> while *Evitt* held that a lawyer's accountant was obligated, like the lawyer, to protect the client's secrets. Story thus found the basis of trade secret protection to be the prevention of breach of trust. Whether looking toward Story's breach of trust reasoning or Phillips' narrower ground of protecting future patents, the significance is that neither writer asserted the existence of property in trade secrets. Indeed Phillips even denied that such property existed.

The same year that Phillips published his treatise on patents, the Massachusetts Supreme Judicial Court decided one of the first American trade secrets cases. This case, *Vickery v. Welch*,<sup>112</sup> highlighted both the consensus that trade secrets should be protected and the lack of consensus on the precise grounds and conditions of that protection. In *Vickery* the defendant sold his business, complete with goodwill and secrets, to the plaintiff, but continued to divulge secrets after the sale. The plaintiff sued for an injunction. In granting the injunction, the court, stated: "[n]ow we cannot perceive the least reason which, after such sale, would enable the defendant lawfully to retain any right in the property or rights sold, nor any right to convey to strangers, any part of what was to be transferred to the plaintiff."<sup>113</sup> Whether the court meant to call the trade secret property or whether the court was merely protecting the trade secret in the same way it was protecting the property sold is unclear. The latter seems more likely because the court's authority for protecting the secret was *Smith v. Dickenson* and Phillips' treatise, both of which denied that trade secrets were objects of property. The citation of these authorities in *Vickery* was inapposite however because both authorities based protection on the future patentability of an invention, while in *Vickery* there was no indication that the secrets sold were about to be patented.

The lack of consensus on precise grounds and protections of trade secrets was finally acknowledged by the English court in *Morison v. Moat*,<sup>114</sup> decided in 1851. That case involved essentially the same facts as *Yovatt*. The plaintiffs alleged that the defendant employee had learned their trade secret surreptitiously and they

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111. This was the plaintiff's argument; Lord Eldon did not specify it as the ground for his holding.

112. 36 Mass. (19 Pick.) 523 (1837).

113. *Id.* at 526.

114. 9 Hare 241, 68 Eng. Rep. 492 (1851).

sought an injunction to prevent his further use of the secret. The court, citing the various grounds used in previous cases to justify the protection of trade secrets, including property, contract, and breach of trust, relied on *Yovatt* and granted the injunction.<sup>115</sup> *Morison* is significant because it recognized, albeit in dictum, that trade secret protection could be based on property. Despite its undocumented reference to other cases, *Morison* appears to have been the first case on either side of the Atlantic unambiguously to find property in trade secrets.

The first American decision to recognize property in trade secrets was the 1866 Massachusetts Supreme Judicial Court case of *Peabody v. Norfolk*.<sup>116</sup> The plaintiff, who had given certain trade secrets to his employee, the defendant, under a promise not to divulge those secrets to others, sought specific performance of that promise. After reviewing the protection provided for trade secrets in the English cases discussed above, with particular attention to *Morison v. Moat*, the court held that "a secret art is a legal subject of property."<sup>117</sup> The court granted an injunction and established the rule for the protection of trade secrets which remained essentially unchanged into the twentieth century: the inventor of a secret, whether the secret is patentable or not, does not have an exclusive right to the secret against the world, but he does have "a property" in the secret which protects him against any disclosure constituting a breach of confidence.<sup>118</sup> The last two decades of the nineteenth century witnessed a sudden increase in the number of trade secrets cases, and all closely followed this rule.<sup>119</sup>

Trade secrets thus became the object of property rights, although no court ever suggested that such secrets might be absolutely protected. Since limited property had been recognized by Blackstone, the creation of such property in trade secrets was hardly a radical decision. Yet, it is still surprising that absolute protection for trade secrets was never considered, particularly because the first trade secrets cases were decided contemporaneously

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115. 9 Hare at 255, 68 Eng. Rep. at 498.

116. 98 Mass. 452 (1868).

117. *Id.* at 459-60.

118. *Id.* at 458.

119. See, e.g., *Salomon v. Hertz*, 40 N.J. Eq. 400, 2 A. 379 (1886); *Chadwick v. Covell*, 151 Mass. 190, 23 N.E. 1068 (1890); *Simmons Hardware Co. v. Waibel*, 1 S.D. 488, 47 N.W. 814 (1891); *Stewart v. Hook*, 118 Ga. 445, 45 S.E. 369 (1903); *Pomeroy Ink Co. v. Pomeroy*, 77 N.J. Eq. 293, 78 A. 698 (1910).

with the first trademark cases. In some cases, the defendant appropriated both the trademark and the trade secret from the plaintiff, requiring a single court to decide the nature of both interests simultaneously.<sup>120</sup> Theoretically, a court which gave the inventor of a distinctive symbol the right to exclusive use of the symbol also could have given the inventor of a valuable process an exclusive right of use. Courts may have resisted the idea of absolute property in trade secrets because of the prior existence of statutory patent law. The patent provided protection *in rem*, but for a limited time and conditioned upon disclosure of the secret. As the court observed in *Morison v. Moat*, providing absolute protection for trade secrets would give the proprietor of the trade secret more rights than the holder of a patent.<sup>121</sup> If the patent was to remain a valuable grant that could entice inventors to disclose their secrets, it would have to offer the inventors greater protection than was available at common law.

Given the limitations on the property rights recognized, the designation of trade secrets as objects of property rights did not provide more protection to trade secrets than was available under the earlier cases. The important question for a court deciding a trade secret case was whether the defendant had acted wrongly, not whether the trade secret was property. Finding property in the trade secret added nothing to the decision. The U.S. Supreme Court recognized this disintegration of the meaning of property in trade secrets in *E.I. DuPont DeNemours Powder Co. v. Masland*.<sup>122</sup> There, the court was asked to restrain the defendant from using or disclosing secrets he had learned as an employee of the plaintiff. The defendant claimed there was no secret, and that if the injunction was granted, the merits would be prejudged as to the existence of a secret. Justice Holmes, writing for the court, replied:

The case has been considered as presenting a conflict between a right of property and a right to make a full defense . . . We approach the question somewhat differently. The word property as applied to trade-marks and trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good

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120. See, e.g., *Canham v. Jones*, 35 Eng. Rep. 302 (1813); *Watkins v. Landon*, 52 Minn. 389, 54 N.W. 193 (1893); *Chadwick v. Covell*, 151 Mass. 190, 23 N.E. 1068 (1890).

121. 9 Hare at 258, 68 Eng. Rep. at 500.

122. 244 U.S. 100 (1917).

faith. Whether plaintiffs have any valuable secret or not the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied but the confidence cannot be. Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs, or one of them.<sup>123</sup>

The case was decided in accordance with the policy of protecting confidential relations, without regard to whether the trade secret was property.

3. *Oil and Gas* The emergence of an oil and gas industry in the early nineteenth century thrust upon the courts the need to develop a theory of property in oil and gas law with little or no precedent to guide them. The earliest cases had little trouble finding property in oil and gas, perhaps because of the tangible nature of these minerals. The courts also applied the absolutist conception of property to these minerals. For example, in *Hail v. Reed*,<sup>124</sup> the defendant took three barrels of oil from a well on the plaintiff's land and was sued for recovery of the oil. The plaintiff argued that the owner of land on which a well is situated "should be considered as having the exclusive property in all that well contains."<sup>125</sup> The defendant replied that oil "is ever moving"<sup>126</sup> and therefore should be analogized to animals *ferae naturae*, which become the property of the first person to reduce them to possession.<sup>127</sup> Alternatively, the defendant argued that oil is analogous to a surface stream and claimed that no right to the oil existed until the oil had been appropriated.<sup>128</sup> The court seized upon yet another analogy—that of a spring which arises on one's land—and held that the owner of the freehold on which the well was located was the exclusive owner of the oil.<sup>129</sup>

The nature of oil, however, strained the concept of absolute rights in property because several landowners who had access to the same oil could raise competing claims. The Pennsylvania court in *Funk v. Haldeman*<sup>130</sup> considered such competing claims and

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123. *Id.* at 102.

124. 54 Ky. (15 B. Mon. 479) 383 (1854).

125. 54 Ky. (15 B. Mon. at 480) at 384.

126. 54 Ky. (15 B. Mon. at 482-83) at 386.

127. *Id.*

128. 54 Ky. (15 B. Mon. at 485) at 388.

129. 54 Ky. (15 B. Mon. at 490) at 392-93.

130. 53 Pa. 229 (1866).

struggled to preserve the absolutist conception of property in oil. The plaintiff paid the defendants, owners of a farm, \$200 for the right to prospect for oil on a portion of the farm and for the exclusive use of one acre of land around each well; he also agreed to give the defendants one-third of all the oil he extracted from the land. After the plaintiff struck oil, the defendants sank their own wells and the plaintiff sued to enjoin the defendants' drilling. The plaintiff argued that the oil pool was indivisible and that the drilling of other wells diminished his exclusive right.<sup>131</sup> As in *Hail*, the defendants proposed an analogy to streams, claiming that the plaintiff had a right only to such oil as he possessed.<sup>132</sup> The court held that the plaintiff had the exclusive right to drill for oil on the portion of the farm on which he had the right to prospect. It observed that the plaintiff already had invested \$800,000 in the development of the well, and then noted that although there was no express stipulation in the agreement that the plaintiff would have the exclusive right to drill for oil, that was the only fair inference. A contrary holding would have placed all the risks of exploration on the plaintiff, and then, when he struck oil, would have allowed the defendants to sink their own wells, rendering the plaintiff's investment essentially worthless.<sup>133</sup> The court concluded that the defendants' right to drill for oil was restricted to the land on which the plaintiff had no right to prospect. The plaintiff's right to the oil was thus limited, but only because he had purchased drilling rights for merely a portion of the farm.

The total inapplicability of the absolutist conception of property to oil and gas soon became apparent to the courts. The *Funk* court had permitted the defendants to drill on portions of the farm where the plaintiff had no drilling rights, even though such drilling could ruin the plaintiff's investment as easily as the prohibited drilling. Similarly, the *Hail* court had never suggested that the plaintiff could prevent drilling into the same pool by others on adjoining land, despite the court's references to exclusive ownership.

The exclusive ownership issue was finally confronted directly in a series of cases involving landowners who had tapped into the same mineral reservoir. If the value of the investment of both par-

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131. *Id.* at 235.

132. *Id.* at 236.

133. *Id.* at 248.

ties was to be protected, some form of limited property rights was essential. The solution was to retreat to the analogy, rejected in *Hail*, of animals *ferae naturae*. A new rule was established in *Westmoreland & Cambria Natural Gas Co. v. Dewitt*,<sup>134</sup> that oil and gas were held to be minerals *ferae naturae* because they were not fixed to a particular piece of land. Like animals *ferae naturae*, oil and gas would be considered the property of the owner of the superadjacent land as long as they were in his possession. If another landowner acquired possession of the minerals, however, title would pass to him. Thus, every landowner was entitled to tap any oil or gas pool he had access to, regardless of whether others had already tapped it.

The new rule of minerals *ferae naturae* quickly became the majority rule in the United States.<sup>135</sup> The theoretically absolute right to exclude others from tapping a pool had been limited to exclude only those whose land was not superadjacent to the mineral reservoir. The right to use the minerals, however, was still absolute. Any superadjacent landowner was legally entitled to take as much oil or gas as he could get by any available means. And what could the other landowners do to protect their interests in the minerals? As one court put it: "Nothing, only go and do likewise."<sup>136</sup> Indeed, an Indiana court held that one could explode nitroglycerine in one's gas well in order to increase the gas flow, even though that might result in a more rapid depletion of the pool and diminish the quantity of gas a neighbor could draw before the well was exhausted.<sup>137</sup>

The absolute right of usufruct was the next portion of the owner's property in oil and gas to come under attack. The minerals *ferae naturae* rule gave many people access to the same pool, but failed to limit the methods of extracting the minerals. Thus, it encouraged landowners to exhaust a pool as quickly as possible, before others did, even if such rapid exhaustion entailed enormous waste. By the turn of the century, the courts had begun to address the problem of waste. In *Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co.*,<sup>138</sup> the plaintiff, who owned land over a pool

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134. 130 Pa. 235, 18 A. 724 (1889).

135. Summers, *Property in Oil and Gas*, 29 YALE L.J. 175, 176 (1919).

136. *Barnard v. Monongahela Nat. Gas Co.*, 216 Pa. 362, 365, 65 A. 801, 802 (1907).

137. *People's Gas Co. v. Tyner*, 131 Ind. 277, 31 N.E. 59 (1891).

138. 155 Ind. 461, 57 N.E. 912 (1900).



of gas, sought to enjoin a superadjacent landowner from using pumps to force gas out of the ground at such a pressure that it sucked saltwater into the pool, destroying the value of the remaining gas. In granting the injunction, the court reasoned that, although a superadjacent landowner had a property right entitling him to mine the gas, he had no right to induce an unnatural flow into his own well or to take any action which might damage the common reservoir. In other words, the taking of gas from the pool had to be reasonable.<sup>139</sup> A similar rule of reason imposed by statute had been approved by the U.S. Supreme Court<sup>140</sup> the year before and other jurisdictions quickly adopted the rule, either by statute or by judicial decision.<sup>141</sup> The adoption of a rule of reason was, however, an abandonment of the superadjacent landowner's absolute right of usufruct in oil and gas. The rule also precluded the application of any fixed or determinant set of rights in the owner of property in oil and gas. The rule stated that whether the owner of such property was entitled to mine the minerals in a particular way depended on what was reasonable under the circumstances, a matter for the court to decide based on the policy of preventing waste or other considerations. Once again, as with trademarks and trade secrets, the designation of oil and gas as objects of property did not permit the court to deduce logically the rights of the parties involved. Only considerations of public policy would decide cases.

### III. THE CONCEPTUALIZATION OF NEW PROPERTY

By the end of the nineteenth century, Blackstone's conception of property as absolute dominion over things had become fatally anachronistic, and was supplanted by a new form of property. This new property had been dephysicalized and thus consisted not of rights over things, but of any valuable right. The new property had also been limited. It consisted not of an absolute or fixed constellation of rights, but of a set of rights which were limited according to the situation.

Legal commentators were acutely aware of the development of

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139. *Id.* at 469-70, 57 N.E. at 915.

140. *Ohio Oil Co. v. Indiana*, 177 U.S. 190 (1899).

141. *See, e.g., Louisville Gas Co. v. Kentucky Heating Co.*, 117 Ky. 71, 77 S.W. 368 (1903); *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188, 86 N.E. 219 (1908). *See also* cases cited in W. SUMMERS, *CASES AND MATERIALS ON OIL AND GAS* § 63 (1954).

the new property. Francis J. Swayze, addressing the 1915 graduating class of the Yale Law School, described the "new kinds of property of great value."<sup>142</sup> These included business goodwill, trademarks, trade secrets, common law copyright, going value of businesses, franchises and equitable easements.<sup>143</sup> Similarly, Dean G. Acheson observed in 1914 that "the all-absorbing legal conception of the [nineteenth] century [was] that of the property right. Everything was thought of in terms of property—reputation, privacy, domestic relations—and as new interests required protection, their viability depended upon their ability to take on the protective coloring of property."<sup>144</sup>

Lawyers were interested in the new property because of its personal and commercial importance.<sup>145</sup> But more than that, the new property struck the legal imagination because, as Acheson observed, the concept of nonphysical and limited property seemed capable of embracing every valuable interest known to the law. Among the interests that the courts held to constitute property were, in addition to those listed by Swayze, the right to use the mail system,<sup>146</sup> the right of an employer to a free flow of labor,<sup>147</sup> the right of an employee to free access to employment,<sup>148</sup> the right of a stockholder to vote for all the directors of a corporation,<sup>149</sup> the right to a tax exemption,<sup>150</sup> the right to prohibit others from selling

142. Swayze, *The Growing Law*, 25 YALE L.J. 1, 10 (1915).

143. *Id.* at 10-11.

144. Acheson, *Book Review*, 33 HARV. L. REV. 329, 330 (1919).

145. The legal community was acutely aware of the commercial importance of the new property. For example, the reporter of *Coats v. Holbrook*, 2 Sand. Ch. (N.Y.) 586 (1845), one of the earliest American cases finding property in trademarks, added a footnote to the case, observing that:

The great interest felt in these questions by the manufacturing and commercial world, is illustrated by the fact, that the judgment . . . in *Coats v. Holbrook*, was noticed at some length in the *London Times* soon after it was pronounced, and was stated at large in the Liverpool newspapers.

*Id.* at 587.

146. *Hoover v. McChesney*, 81 F. 472 (1897). See 11 HARV. L. REV. 265 (1897).

147. See Comment, *A New Approach to Labor Problems*, 37 YALE L.J. 249, 252 (1927) and cases cited therein.

148. *Id.*

149. *Lord v. Equitable Life Assurance Soc'y*, 47 Misc. 187, 94 N.Y.S. 65 (1905). See 19 HARV. L. REV. 62 (1905).

150. *Choate v. Trapp*, 224 U.S. 665 (1912). See also Goodnow, *Exemptions from Taxation as Property Under the 5th and 14th Amendments*, 12 COLUM. L. REV. 724 (1912); Goodnow, *The Nature of Tax Exemptions*, 13 COLUM. L. REV. 104 (1913).

news one has gathered,<sup>151</sup> the right of a building owner to use an elevator,<sup>152</sup> the right to membership in a stock exchange,<sup>153</sup> the right to use of a church pew,<sup>154</sup> and the right to control the disposition of a dead body.<sup>155</sup> The increasing awareness of legal commentators that a vast body of property rights was being created which did not fit Blackstone's physicalist or absolutist conceptions rendered Blackstone increasingly obsolete. The exceptions had engulfed the rule.

In a pair of articles published in 1913 and 1917, Wesley Newcomb Hohfeld presented a conceptual scheme for analyzing the new property.<sup>156</sup> Hohfeld identified eight fundamental legal relations which formed the constituent elements of property.<sup>157</sup> Each of these fundamental legal relations was defined relative to its opposite and correlative. The juxtaposition of these relations produced the following scheme:

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

Hohfeld believed that these eight legal relations were "the lowest

151. *International News Serv. v. Associated Press*, 248 U.S. 215 (1918); *Nat. Tel. News Co. v. Western Union Tel. Co.*, 35 Chicago Legal News 89 (1902). See also Note, 18 COLUM. L. REV. 257 (1918); 32 HARV. L. REV. 566 (1919); Comment, 12 YALE L.J. 97 (1902); Comment, *The Associated Press Case*, 28 YALE L.J. 387 (1919).

152. *People v. Sheridan*, 186 A.D. 211, 174 N.Y.S. 327 (2d Dept. 1919). See also 28 YALE L.J. 605 (1919).

153. See *Nashua Sav. Bank v. Abbott*, 63 N.E. 1058 (Mass. 1902) and 16 HARV. L. REV. 70 (1902).

154. See *Gay v. Baker*, 17 Mass. 435 (1821); *Church v. Wells's Ex'rs*, 24 Pa. 249 (1855); Zollmann, *Pew Rights in the American Law*, 25 YALE L.J. 467 (1916).

155. Dead bodies are variously described by the cases as both property and quasi-property. See 20 YALE L.J. 663 (1911); 17 YALE L.J. 295 (1908); 13 HARV. L. REV. 63 (1899); 10 HARV. L. REV. 51 (1896).

156. Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

157. Hohfeld's attempt to describe law by analyzing terms was part of a tradition of analytical jurisprudence dating back to John Austin in the early nineteenth century. The emphasis on terminology increased around the beginning of the twentieth century, when the

common denominators of the law,"<sup>158</sup> and that any legal relationship could be expressed as the sum of some combination of these eight denominators. To say that one owned property was to say that the owner had some set of rights, privileges, powers, and immunities. Moreover, one who did not own property had a set of no rights, duties, disabilities, and liabilities relative to the owner.

Hohfeld's conception of property differed from Blackstone's in two crucial respects. To begin with, Hohfeld banished the need for things from property law. The obsession of old property with things had been manifested in three ways. First, at various times, Blackstone had equated property with things. Corporeal hereditaments (land), for example, were things while incorporeal hereditaments (rights) were reified so that they too were considered things. Hohfeld criticized the equation of property with things: "Since all legal interests are 'incorporeal'—consisting, as they do, of more or less limited aggregates of abstract legal relations—such a supposed contrast as that sought to be drawn by Blackstone can but serve to mislead . . ."<sup>159</sup> Property according to Hohfeld consisted of legal relations, not things. Where Blackstone's insistence on things had caused him to reify incorporeal hereditaments, Hohfeld's reaction made him insist that only rights could be property. Blackstone, at other times, equated property not with things, but with rights over things. This was the second manifestation of the old property's obsession with things. Hohfeld also disputed this definition of property by arguing that legal relations were between people, not between people and things.<sup>160</sup> Hohfeld, by denying that property was things or rights over things, had rejected both of the plausible interpretations of Blackstone's definition of property. Whether property was the thing or the right over the thing, Blackstone had made clear that property could exist only in relation to some thing. Hohfeld rejected even this minimal association with tangible objects, arguing that property could exist whether or not there was any tangible thing to serve as the object of the rights.<sup>161</sup> Hohfeld's

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meaningfulness of legal terms, such as property, was disintegrating. See, e.g., Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163 (1919); Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226 (1921); Harno, *Tort-Relations*, 30 YALE L.J. 145 (1920).

158. 23 YALE L.J. 16, 58.

159. *Id.* at 24.

160. 26 YALE L.J. at 721.

161. *Id.* at 738-39.

conception of property was completely dephysicalized.

The second crucial difference between Hohfeld's and Blackstone's conceptions of property was that the dominion of the owner of Hohfeldian property was not absolute or fixed. Property consisted of a set of legal relations, but not necessarily any particular set. Hohfeld denounced the tendency to lump together under blanket terms the multiplicity of legal relations that might exist between the property owner and others.<sup>162</sup> This was exemplified by the owner of land in fee simple,<sup>163</sup> whose property actually consisted of a complex aggregate of rights, privileges, powers, and immunities against other persons. Hohfeld urged that these different legal relations not be confused with one another. The owner might, for example, alienate some portion of his rights to the land without affecting the remaining aggregate of relations. By breaking property into its constituent parts, Hohfeld both demonstrated that property does not imply any absolute or fixed set of rights in the owner and provided a vocabulary for describing the limited nature of the owner's property.

Hohfeld's conception of the new property gained broad acceptance among other legal commentators.<sup>164</sup> A.L. Corbin, writing in 1922, observed that "[o]ur concept of property has shifted; incorporeal rights have become property. And finally, 'property' has ceased to describe any *res*, or object of sense at all, and has become merely a bundle of legal relations—rights, powers, privileges, immunities."<sup>165</sup> The complete acceptance of the Hohfeldian conception of property by the American legal establishment was signaled

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162. *Id.* at 746.

163. *Id.*

164. Hohfeld's scheme was not automatically accepted by all legal commentators, and it became part of the general debate over terminology. See text accompanying note 170 *infra*. The Yale Law School immediately embraced Hohfeld's analysis. See text accompanying note 170 *infra*. Two professors in particular, Walter Wheeler Cook and Arthur L. Corbin, dedicated themselves to spreading the good news of Hohfeldian analysis. See Corbin, *supra*, note 157. The YALE LAW JOURNAL published many articles applying Hohfeld's system to various legal problems involving property. Volume 28 of the JOURNAL, for example, contained the following articles: Comment, *What Constitutes an "Injury" to "Real" Property*, 28 YALE L.J. 171 (1918); Comment, *Conversion by Innocent Agents*, *id.* at 175; Comment, *Competition of Trolleys and Unlicensed Jitneys*, *id.* at 485; Comment, *The Associated Press Case*, *id.* at 387; Note, *What Constitutes "Injury to Property"*, *id.* at 605; Note, *Right to Work in One's Own Business*, *id.* at 707; Note, *Hohfeld's Contribution to the Science of Law*, *id.* at 721; Note, *Restraining Interference with Office*, *id.* at 838.

165. Comment, *Taxation of Seats on the Stock Exchange*, 31 YALE L.J. 429 (1922).

by the promulgation of the American Law Institute's *Restatement of Property* in 1936. The word "property" is not included among the terms defined by the *Restatement*. Instead, the *Restatement* defines the four constituent elements of property: rights, privileges, powers, and immunities, with their correlatives: duties, no rights, liabilities, and disabilities.<sup>166</sup>

Once property was reconceived to include potentially any valuable interest, there was no logical stopping point. Property could include all legal relations. Indeed Hohfeld had insisted that his eight fundamental legal relations were "the lowest common demoninators" of all legal relationships. As one court put it: "The word [property], as here used, is intended to embrace every species of valuable right and interest, and whatever tends in any degree, no matter how small, to deprive one of that right, or interest, deprives him of property."<sup>167</sup>

Such an explosion of the concept of property threatened to render the term absolutely meaningless in two ways. First, if property included all legal relations, then it could no longer serve to distinguish one set of legal relations from another. It would lose its meaning as a category of law. Second, the greater the variety of interests that were protected as property, the more difficult it would be to assert that all property should be protected to the same degree. The pressure to create new species of property protected in different ways would be intense, so that the designation of some interest as property would no longer indicate any fixed protection. Consequently, property would cease to distinguish one kind of legal relation from another and fail to distinguish with any clarity legally protected interests from other interests. The inability of property to distinguish one kind of legal relation from another was illustrated by the law of trade secrets. The creation of property in trade secrets did not change the nature of the legal protection. The inability of property to distinguish legally protected interests from other interests was illustrated by the law of trademarks during the first quarter of the twentieth century. At that time, the protection available to trademarks was arranged on a continuum, from essentially no legal protection, to absolute protection. Knowing that a symbol was a trademark and therefore

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166. American Law Institute, *Restatement of Property* §§ 1-4 (1936).

167. *People v. Warden*, 145 A.D. 861, 863, 130 N.Y.S. 698, 700 (1st Dep't 1911).

property did not determine the symbol's position on that continuum.

The destruction of meaning in the concept of property destroyed the concept's apparent power to decide cases. As one commentator observed: "Does not property mean anything of value to the individual? If so, any legal relation is in effect property. This but emphasizes the point that the term is too inclusive to be of assistance in solving most disputed points."<sup>168</sup> Walter Wheeler Cook noted this problem in relation to general expressions such as "property in news" or "quasiproperty" which he argued were too vague to be of assistance in deciding legal disputes. To Cook, the more useful questions were what rights, privileges, powers, and immunities did the newsgatherer have regarding the news, and against whom did he have them?<sup>169</sup>

Pressure thus mounted to find some way of containing the expansion of property. The strategy adopted was to concede that while any valuable interest could be property, it would not necessarily be considered property merely because it was valuable. A court would consider such an interest to be property only if public policy so demanded. Justice Brandeis, dissenting in *International News Service v. Associated Press*,<sup>170</sup> summarized the new approach:

But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to insure to it this legal attribute of property. The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain cases where public policy has seemed to demand it.<sup>171</sup>

Justice Holmes, dissenting in the same case, restated the argument more consisely: "Property, a creation of law, does not arise from value, although exchangeable—a matter of fact. Many exchangeable values may be destroyed intentionally without compensation. Property depends upon exclusion by law from interference

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168. Comment, *Adverse Possession of One's Own Debt*, 29 YALE L.J. 91, 94 n. 16 (1919).

169. Comment, *The Associated Press Case*, *supra* note 164 at 388-89 (1919).

170. 248 U.S. 215 (1918). The issue was whether one could have property rights in news.

171. *Id.* at 250.

. . . .<sup>172</sup>

Holmes and Brandeis were saying that property was what the law said it was. But positivism was nothing new; Blackstone had a positivist streak. The real significance of the Holmes-Brandeis position was that they were also denying that law had produced a self-limiting definition of property. Some valuable interests were property and some were not. The basis for distinguishing the two categories was not anything in the definition of property, but public policy. Holmes and Brandeis had stopped the seemingly limitless expansion of property, but at the price of admitting that there was no inevitability in the definition of property. In effect, the determination of whether an interest was property was not one of logic, but of politics. As one writer noted, ". . . the difficulty that causes such a volume of disagreement is the chameleon character of the term 'property right' or 'vested right': the fact that it is not an absolute standard, but a variant which each man, layman, legislator, and judge, determines individually out of his own background."<sup>173</sup>

Deciding whether an interest was property was only half the problem. Courts still had to decide what kind of property it was. In other words, what kind of jural relations with other persons did the owner of the property have? The answer could not be deduced from the word property, since property had come to embrace so many different forms of limited rights, or from the nature of the thing involved, since often no thing was involved. The discussion of the law of trademarks, oil and gas, and trade secrets indicates how, in each case, the creation of property in these interests failed to provide a premise from which the result of a dispute could be logically deduced. The question of what rights resided in the owner could be answered only in the same way as the question of whether property existed at all could be answered—through public policy.

The general approach of the legal community in the first quarter of the twentieth century to the problem of defining the nature of property rights in a particular case is captured by two case comments published in 1919. The first comment discussed the case of *Rorabank v. Motion Picture Operators' Union of Minneapolis*.<sup>174</sup>

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172. *Id.* at 246.

173. Note, *The Variable Quality of a Vested Right*, 34 *YALE L.J.* 303, 309 (1925).

174. 140 *Minn.* 481, 168 *N.W.* 766 (1918).



The court had held that a union may not force a theatre owner who works in his own theatre to replace himself with union members. The writer observed:

The majority opinion argues that the [owner's] rights against the [union] arise from the Bill of Rights and the Fourteenth Amendment. These certainly confer an *immunity* upon all citizens, from certain interferences by state *governmental* agencies. But such immunity does not carry with it, as a logical necessity, *rights* in one citizen against *other individuals*. It may well be that public policy at times requires the co-existence of such rights with the immunities in question, but the fact should be borne in mind that the requirement is not one of logic, but one of policy, to be determined in each case.<sup>175</sup>

That the right to work was property, which included protection against government interference, did not mean that it also included protection against individual interference. Whether property in one's own labor included the latter protection was a question of public policy.

The second case comment discussed *Puget Sound Traction, Light & Power Co. v. Grassmeyer*.<sup>176</sup> The court had held that a trolley company with a franchise to operate could seek an injunction against the operator of unlicensed jitneys because illegal operation of the jitneys infringed upon the trolley company's property in its franchise. The writer commented:

Granted that, as the court said, "the franchise is property and any unlawful interference therewith is actionable," we still need to know just what this so-called property is and how it can be "interfered with," lawfully or unlawfully . . . . Upon analysis the "franchise" of the plaintiff to lay tracks, operate trolley cars, etc., upon the public highways is seen to be a complex aggregate of jural relations, consisting, *inter alia*, of: (1) privileges against people generally to do these things; (2) rights against people generally that they shall not interfere with the doing of these things . . . . The real question, therefore, is, whether such a "franchise" ought to be held to include rights against unlicensed persons that they refrain from competing with the plaintiff. Ultimately, this question must be decided on grounds of policy which the use of vague language can only serve to conceal.<sup>177</sup>

By the end of the first quarter of the twentieth century, the legal community knew there was no inevitability in the definition of property, or in the legal consequences of something's being des-

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175. Note, *Right to Work in One's Own Business*, *supra* note 164 at 708 (citations omitted).

176. 102 Wash. 482, 173 P. 504 (1918).

177. Note, *Competition of Trolleys and Unlicensed Jitneys*, *supra* note 165 at 487.

ignated as property. Both determinations were matters not of logical deduction, but of political choice.

### CONCLUSION

The creation of the new property can be understood from two perspectives. From the perspective of the treatise writer, who seeks to assimilate and rationalize case holdings, the rise of the new property was merely an expansion and a transformation of the concept of property. Property was, first of all, dephysicalized so that it could protect any valuable interest, not just things. Moreover, property rights were seen not as rights over things, but rights between people. Second, property was limited, so that the owner of some valuable interest no longer exercised absolute control over other people with respect to that interest. Indeed, the term "property" did not imply any particular set of rights over others. Rather, the particular combination of rights that comprised property in a given case would be decided according to the circumstances. Thus, the treatise writer could conclude that the result of this process of expansion and transformation was that property protected many more and different interests in 1925 than in 1765 and that the protection was of a variable rather than a fixed nature.

The rise of the new property, however, can also be understood from the perspective of the jurist, who seeks to identify the sources and justifications of the legal order. From that perspective, the process of expansion and transformation of the concept of property accomplished two things. First, it demonstrated that there was nothing inevitable about the definition of property. That is, property law could not be logically deduced from the nature of things. Second, the broad and variable nature of the new property destroyed the fixed meaning of the concept, so the results of cases could no longer be deduced from the nature of the property rights. Thus, by 1925, it was abundantly clear that the definition and application of the concept of property could not be done through logical deduction. The courts avoided paralysis by deciding cases according to public policy. Property was completely positivized. The concept was defined and applied in whatever manner the courts thought expedient of public policy. But this solution to the problem of dispute resolution came at the price of the courts' legitimacy. For if judges were not bound by precedent, then nothing was to prevent them from injecting their own political opinions into

decisions. The “government of laws, and not of men”<sup>178</sup> which had seemed so clearly to exist in 1803 had been exposed as, in truth, a government of “nine old men.” The creation of the new property was, in microcosm, the destruction of the rule of law.

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178. Chief Justice Marshall used this phrase to describe the government of the United States in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

