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Establishing Ownership: First Possession versus Accession

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## Establishing Ownership: First Possession and Accession

Thomas W. Merrill

### I. Introduction

One of the most intriguing issues in property law is how persons come to have property rights in previously unowned things. The dominant understanding, certainly in the Anglo-American tradition, is that original ownership is established by first possession.<sup>1</sup> Resources are imagined as originally existing in some kind of open-access commons or the “public domain.” Individuals acquire property rights in a portion of this common pool by being the first to reduce particular things to individual control or possession. John Locke’s famous account of the origins of property looms large here.<sup>2</sup> Locke posited that “in the beginning all the World was America,”<sup>3</sup> by which he meant a world rich in natural resources and thinly populated by people who survived by hunting, fishing, or gathering acorns in the forest.

In this paper I challenge first possession’s claim to preeminence as a mode of establishing original ownership. There is a second, analytically distinct mode, which I call the principle of accession. The principle of accession holds that ownership of new or

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<sup>1</sup> See, e.g., Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 *J. L. & Econ.* 393, 393 (1995) (“First possession rules are the dominant method of initially establishing property rights.”); Richard A. Epstein, *Possession as the Root of Title*, 13 *Ga. L. Rev.* 1221, 1222 (1979) (asserting that in both common and civil law “the taking possession of unowned things is the only possible way to acquire ownership of them.”).

<sup>2</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, Bk II, Ch. V ((Everyman ed. 1970) 1<sup>st</sup> ed. 1689).

<sup>3</sup> *Id.* at 140.

unclaimed resources is established by assigning such resources to the previously-established owner of property most prominently associated with the new resource. Examples include the understanding that minerals newly discovered under the ground belong to the owner of the surface estate, that interest paid on a fund of money belongs to the owner of the source of the funds, and more pervasively, that any change in the value of property caused by an Act of God or market forces belongs to the owner of the asset so affected.

Accession often competes with first possession as a mode of establishing original ownership, and I will argue that it tends to dominate first possession as property rights become thicker and economic values associated with resources grow larger. There are a number of possible explanations for accession, including ad hoc pragmatic justifications, human psychology, and the need for conventions to reduce social conflict. But the best explanation is that accession is much more efficient than first possession on a number of dimensions, making it critical to the successful operation of any system of private property. Indeed, I will argue that accession largely accounts for what economists have come to call “residual claimancy.” A person is a residual claimant to the extent he or she is the owner of assets which establish the right to ownership of other assets or increments in value by operation of accession.

Why then is accession so invisible in the normative debate over the justifications for private property? One reason may be that accession is awkward for both the leading factions in that debate. Lockeans ignore accession because it suggests it is impossible to devise a system of private property based solely on volitional acts of individuals, such as first possession, individual labor, and exchange of entitlements. Insofar as every system

of property must also rely on the principle of accession, property includes a built-in tendency for the rich to get richer, without regard to how hard they work or how cleverly they negotiate exchanges of rights. Egalitarian redistributionists may ignore accession because it suggests the futility of tinkering with core property doctrine to achieve greater equality without doing irreparable damage to property itself. Sensing the futility of reforming the institution, redistributionists are reduced to demanding programs that insure that everyone has some property. But as long as the engine of private property is left running with accession in place, giving everyone some property – especially if it is fungible wealth – may do little to stem the relentless trend toward inequality. The principle of accession, in other words, suggests that property may be both more morally ambiguous and yet also less plastic than has commonly been imagined.

## **II. The Principle of Accession**

The principle of accession was well known to the Romans and is discussed by early English writers including Bracton, Hume and Blackstone.<sup>4</sup> For reasons that are not entirely clear, discussion of the principle of accession has almost entirely disappeared from the English language literature on property rights. One possible explanation for this eclipse is a kind of pedagogical path dependency. Sometime in the early twentieth century the word “accession” became associated with a narrower legal doctrine dealing with mistaken improvers of tangible personal property.<sup>5</sup> This tended to mask the general

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<sup>4</sup> Even these earlier commentators did not devote much attention to the principle. Hume has one paragraph on accession in his *Treatise*, coupled with a long (and richly suggestive) footnote. Blackstone also devotes but one paragraph to accession. He notes that it is a principle borrowed from Roman law and blandly describes it as being “grounded on the right of occupancy.” 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 404 (Facsimile Edition; first edition 1766)

<sup>5</sup> An article published in the *Columbia Law Review* in 1922 adopts this narrower locution. See Earl C. Arnold, *The Law of Accession of Personal Property*, 22 *Colum. L. Rev.* 103 (1922). See also Alvin E. Evans, *Some Applications of Title by Accession*, 16 *U. Cin. L. Rev.* 267 (1942) (including a variety of

principle, which had wider implications. As the narrower doctrine, for its part, came to be seen increasingly as marginal to the study of property (for reasons that are also not clear), it has been gradually excised from the casebooks.<sup>6</sup> With the marginalization of the narrow doctrine, which in turn had come to mask the general principle, the general principle of accession faded from view.

Whatever the cause of its obscurity, the principle of accession is sufficiently unfamiliar that it is appropriate to begin by trying to pin down more precisely what it means, and how it differs from the more familiar concept of first possession.

First possession is grounded in a conception of original ownership based on being the first to perform certain acts, that is, engaging in a required performance earlier in time than any other person. Valuable resources are regarded as being in an open access commons.<sup>7</sup> No one has acquired possession or ownership over these things. Ownership is awarded to the first person who performs those acts deemed to demonstrate the degree of control over the thing required to qualify as “possession.”<sup>8</sup> The acts that demonstrate the required degree of control vary according to context.

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doctrines under the rubric of accession but assuming that it refers primarily to mistaken improvers of personal property).

<sup>6</sup> Dukeminer and Krier, the leading casebook, has pruned discussion of the doctrine of accession from three paragraphs in the first edition to one in the most recent edition. Many casebooks do not mention it at all. E.g., Hovenkamp & Kurtz. A forthcoming casebook that Henry Smith have authored, Merrill & Smith, *Property: Principles and Policies* (Foundation Press forthcoming March 2007), seeks to rectify this by including extensive materials on accession, including examples of five doctrines applying the principle.

<sup>7</sup> “Commons” is misleading here, since most physical spaces that have been called “the commons” or “a common” are in fact restricted to members of particular communities and are governed by social norms if not legal rules and regulations. See Thrainn Eggertsson, *Open Access versus Common Property*, in Terry L. Anderson & Fred S. McChesney, *Property Rights: Cooperation, Conflict, and Law* 74 (2003). The rule of first possession presumes that in its relevant dimensions the resource is up for grabs by an indefinite number of competitors and that it will be awarded to the one who is first to assert the required degree of control over the resource.

<sup>8</sup> For discussion of the communicative aspect of possession-acts, see Carol M. Rose, *Possession as the Origin of Property*, 52 *U. Chi. L. Rev.* 73 (1985).

Accession is grounded in a conception of original ownership as agglomeration with existing claims of ownership. Valuable things are regarded as existing in a background condition occupied by preexisting property rights. As new things are discovered or changes in relative values cause previously ignored questions of ownership to become salient, the newly discovered or newly salient resource is awarded to the existing owner of some other resource that is most prominently associated with the newly discovered or salient thing. The factors that establish “prominence,” in a fashion analogous to those that establish first possession, vary according to context.

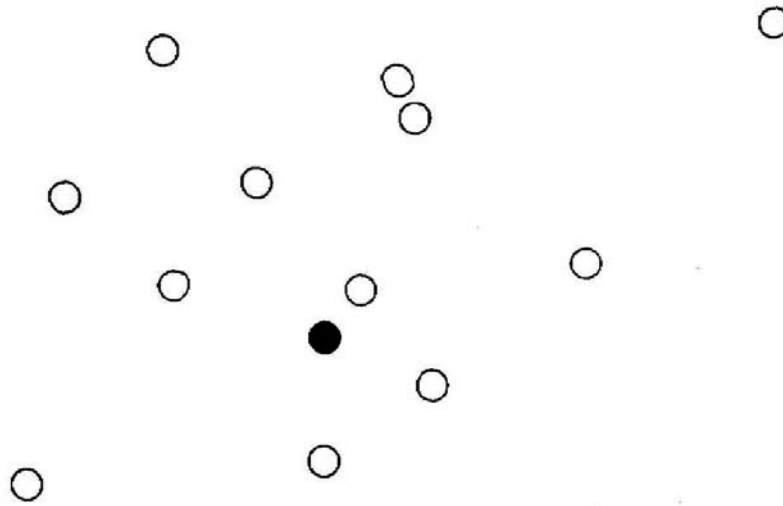
One way to capture the difference between the two principles is to say that first possession arranges various potential claimants for ownership along a temporal axis. The claimants can be viewed as competitors in a race. Think of the Sooners, galloping off at the sound of a gun to be the first to stake a claim to some choice spot of land in the newly opened Oklahoma territory. Accession, in contrast, arranges potential claimants for ownership on a spatial plane. Here the claimants must try to prove that they already own some property that is the “closest” in terms of prominence to the contested asset. The key is to prove that you have the most prominent relationship to the contested thing, relative to all other potential claimants.

Figure one, which illustrates a simple coordination game, captures this idea.<sup>9</sup>

### **Figure 1**

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<sup>9</sup> Robert Sugden, *The Economics of Rights, Co-operation & Welfare* 94 (1986).



Join the black circle to one of the white circles. If you choose the same circle as your partner, you win £10; otherwise, you win nothing.

Contestants who play this game nearly always select as the point of coordination the white dot just above and to the right of the black dot, which is closest in terms of physical proximity to the black dot. Other choices are logically possible, such as the dot directly below the black dot, or the dot in the upper right hand corner, which is furthest away from the black dot. But these choices have much less “prominence” than the closest dot.

Actually spatial proximity does not completely reflect the idea of accession in all circumstances. A better image might be gravity or magnetism. Think of the unclaimed object as being like a lead pellet dropped on a table covered by various magnets; the pellet moves toward and becomes affixed to the magnet that exerts the strongest magnetic force on it, as determined by the size and power of the magnets as well as their physical proximity to the pellet. The relationship of “prominence” for purposes of accession is thus a function not merely of physical proximity but also other forces (mass for example)

that also enter into our perception of what it means to say that something has a prominent relationship to something else.

First possession and accession also differ in their implicit assumption about the background conditions in which the assignment of rights takes place. First possession assumes that the background condition is one largely free of preexisting property rights. The hunter stalks wild game through an open forest; the fisher casts her line in the ocean; the inventor seeks a patentable discovery in a world in which ideas are in the public domain, and so forth.

Accession, by contrast, tends to assume a background condition that is richly populated by existing property rights. The “commons” disappears from view and is replaced by conception of the relevant background as one in which all things of value have been assigned to some owner. When new resources are discovered or new increments in value emerge, we look around to see which preexisting property owner is the most logical one (the most “prominent” one) to whom to assign the new resource or value. Think of the wireless telephone company searching tax maps for the owner of the land which happens to be the ideal spot for a new transmission tower.

Notwithstanding these important differences, first possession and accession also share important attributes. Both can be seen as particular conceptions of a more generic concept of possession. The concept of possession relates to the idea of being in control of some thing.<sup>10</sup> First possession can be said to select out circumstances where some person has come sufficiently close to being in control of some thing previously not under

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<sup>10</sup> “Possession ...Law: Act, fact, or condition of a person’s having such control over [a thing] that he may legally enjoy it to the exclusion of all others having no better right than himself.” Webster’s New International Dictionary (Unabridged) (2d Ed. 1954).



the control of anyone to be said to be “in possession” of the thing. Accession can be said to select out the circumstances that allow us to assign some thing to the property owner who has the best claim to be able to control the thing, and hence the strongest claim to be said to be “in possession” of the thing. In both contexts, declaring someone to be “in possession” is more like saying they have an exclusive right to control some thing, as opposed to saying that are in fact in control of the thing.

In addition, both first possession and accession assign ownership uniquely, in a winner-take-all fashion. Under first possession, the race for each resource is assumed to have a single winner. Either Pierson or Post gets the fox; they are not awarded title as tenants in common. Similarly, accession assigns rights to contested resources to the singular preexisting owner with the most prominent claim to it. The newborn lamb is assigned to the owner of the ewe, not to the owners of the ewe and the ram in joint custody.

This may be the appropriate place to address a possible objection, to the effect that accession is not really a principle about original acquisition of property rights so much as a principle about the scope of property rights already acquired. I think this is not correct, insofar as accession often applies to resources that unquestionably have no previously-established owner and appear quite literally out of the blue. Consider in this regard meteorites that fall to the earth. No one could claim that a meteorite – which can be highly valuable to collectors and museums – has any prior owner. Yet courts have generally awarded ownership of meteorites to the owners of the land on which they fall, by the principle of accession. Similar points can be made about newborn animals, land created by accretion, or the discovery of oil under the North Sea.

It is true that accession only works when some other property rights are already in existence. Accession therefore cannot explain how the very first property rights came into being. But first possession has a version of this problem too, insofar it presupposes (in Locke's version) that individuals own their own bodies and hence their own labor, without explaining where this ownership comes from,<sup>11</sup> or more generally, that acts asserting dominion and control over some thing are uniquely attributable to (are "owned by") the person performing these acts. In any event, there is no logical flaw in positing a principle for establishing original ownership in things that presupposes ownership of other things. This is perfectly intelligible as long as we recognize that at least one other basis for establishing ownership exists, whether it be first possession, conquest, or state fiat.

### **III. The Scope of Accession**

If accession is conceptually distinct from first possession as a basis for establishing original ownership of property, how widespread is this principle in actual property systems? I will argue that accession is extremely widespread, indeed ubiquitous. Its operation is easiest to see in relatively elemental contexts, stripped of explicit contracts and complex organizational forms. But once we get a sense of the range of legal doctrines that reflect the principle of accession in these simple settings, and we see how often accession trumps first possession when the two principles come into conflict, we will be in a better position to perceive that it also operates out of view and without controversy in more complex settings, and in fact is endemic to any system of property rights.

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<sup>11</sup> Epstein, *supra* note 1 at 1227.

## A. Traditional Examples

Let us begin with some folksy examples that govern agrarian activities, namely animal husbandry and horticulture. Under the doctrine of *increase*, “[t]he general rule, in the absence of an agreement to the contrary, is that the offspring or increase of tame or domestic animals belongs to the owner of the dam or mother.”<sup>12</sup> Here we have a striking example of a new resource that enters the world – a newborn animal. Conceivably, ownership of this new resource could be assigned to its “first possessor.” But we do not see this. Instead, ownership of newborn animals is assigned to the person who owns another resource that bears a prominent relationship to the new resource – the mother of newborn. Felix Cohen once reported that the rule of increase is followed by all known legal systems.<sup>13</sup> Note that “prominence” in this instance is biological rather than spatial, although presumably in most cases biological proximity will also translate into spatial proximity.

When we turn from animals to plants, a similar rule applies. So-called *fructus naturales* – trees, bushes and other perennials and their fruits – are always regarded as belonging to whoever owns the soil. Thus, provided the land is privately owned, even the Lockean exercise of gathering acorns from the forest is actually governed by the principle of accession rather than first possession. The rules that apply to *fructus industriales* – annual crops obtained by planting and cultivation – are slightly different. Here, under the doctrine of *emblements*, the crops belong to whomever is in possession of the soil under a claim of right at the time the crops are planted. This wrinkle is added to protect

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<sup>12</sup> Carruth v. Easterling, 150 So.2d 852 (Miss. 1963) (quoting Am. Jur. 2d, Animals, Sec. 10, p. 257).

<sup>13</sup> Felix Cohen, Dialogue on Private Property, 9 Rutgers L. Rev. 357, 366 (1954).

tenants at will, adverse possessors, and other good faith cultivators from being denied the fruits of their labors. But note that the wrinkle does not change the fact that the rule is grounded in the principle of accession; it merely resolves a potential dispute about the identity of the owner of the accession-creating resource caused by changed circumstances during the period of cultivation.<sup>14</sup>

Another application of the principle of accession, also somewhat esoteric, is the doctrine of *accretion*. This provides that a riparian landowner whose land is gradually augmented by alluvial formations owns the newly-formed land.<sup>15</sup> In theory, we could declare that the new soil belongs to the first possessor or to the state to distribute as it sees fit. But no known legal system, going back to Roman times, follows such an approach. Instead, the new soil always goes to the preexisting riparian owner on whose banks the new land is attached.<sup>16</sup>

The principle of accession is also reflected in the law that governs improvers of tangible personal property, which unfortunately has come to be called the doctrine of *accession*, thereby masking the more general principle.<sup>17</sup> Suppose someone mistakenly takes up grapes that belong to another and turns them into wine, or mistakenly cuts down

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<sup>14</sup> Both “fructus” rules, like the doctrine of increase, are defaults. That is, the individual who is designated the “owner” under the accession rule can by contract designate some other person as owner. But this feature is true of most property rules, which assume alienability of the right.

<sup>15</sup> See, e.g., *Nebraska v. Iowa*, 143 U.S. 359 (1892).

<sup>16</sup> In contrast, when a river or other body of water suddenly changes its course, under the principle of avulsion the boundaries remain as before. This seems to run counter to the usual principle of accession. A possible explanation might be that with avulsion, as opposed to accretion, there is a clear loser as well as a winner. The intuition may be that it would be too destabilizing to the system of property rights to declare that a freak event of nature can divest property from A and transfer it to B.

<sup>17</sup> See *supra* note 5.

timber belonging to another and turns it into barrel hoops.<sup>18</sup> If the original object is significantly transformed by the improver, and if the improver has provided a greater portion of the value of the final product than the owner of the original material, then the improver will be awarded the “thing” and the original owner is given a claim for restitution of the value of the original material. Most applications of the doctrine involve a situation in which A supplies some raw material and B supplies labor that transforms it. But it can also apply where A and B both supply some physical input, as where A supplies flour which is then mistakenly packaged into sacks owned by B.<sup>19</sup> In all cases, the doctrine can fairly be said to reflect the principle of accession, provided we are willing to follow Locke in characterizing labor as something owned by the laborer. The question in each case is in effect which supplier of inputs has the more prominent relationship to the final object.

The doctrine of accession has several features that distinguish it from the other examples of the principle of accession we have considered so far. The improving party will gain title only if he or she acted in good faith, that is, without knowledge of a superior title in another to the raw material; the original inputs must be significantly transformed from their original state by the improving party;<sup>20</sup> and the inputs must not be readily severable, for example, I cannot gain title to an old print by putting it in a nice frame. Perhaps most intriguingly, the doctrine introduces a sharing of values through the use of a liability rule. Other applications of the principle of accession are all-or-nothing.

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<sup>18</sup> *Wetherbee v. Green*, 22 Mich. 311 (1871).

<sup>19</sup> *Atchison Ry. Co. v. Schriver*, 84 P. 119 (Kan. 1906).

<sup>20</sup> The Romans in particular insisted on this, calling it *specificatio*.

The doctrine of accession awards title to one party, and a claim of monetary damages for the value of inputs to the other.<sup>21</sup> We should be reluctant to draw too many inferences from this quirk, however. Even with the injection of the liability rule, the doctrine of accession maintains the principle of singular ownership over the res, the thing itself.

If these examples are thought to be overly- quaint, other applications of the principle of accession are of greater on-going relevance in determining the allocation of resources. Consider the *ad coelum* doctrine,<sup>22</sup> which declares that the owner of the surface owns from the depths to the heavens. Although Justice Douglas once declared that this doctrine “has no place in the modern world,”<sup>23</sup> it is clear that it is fundamental to property rights in land. Deeds to land nearly always are stated in terms of some measurement of the surface area. Because of the *ad coelum* rule, the owner of the surface is also entitled to dig below the surface (for example to construct a basement for a building) and to build above the surface (to build the building itself). As applied in American law, the *ad coelum* rule also means that, absent a severance, the owner of the surface owns any minerals discovered below the surface, any caves discovered beneath the surface, and has the right to extract groundwater and oil and gas from beneath the surface.

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<sup>21</sup> This can be seen as an application of principles of restitution. We see something similar in the law that applies to good faith improvers of real property. Courts tend to award the improved property either to the original owner of the land or the improver, and then apply principles of restitution by ordering an offsetting award of damages to the other. In the doctrine of accession, the restitution is one-way only. If the improver of the tangible does not sufficiently transform the object, or is not responsible for a sufficiently high percentage of final value, then the original owner gets the object back and keeps the value of the improvements without any claim for quantum meruit by the improver.

<sup>22</sup> Short for *cjus est solum, ejus est usque ad coelum et ad inferos*. This has been translated as “To whomever the soil belongs, he owns also to the sky and the depths.” Black’s Law Dictionary (6th ed. 1990).

<sup>23</sup> *United States v. Causby*, 328 U.S. 256, 261 (1942).

It is relatively easy to see that the *ad coelum* rule is yet another application of the principle of accession. We start with ownership of the surface. Then, as new increments in value are discovered beneath the surface (minerals, caves, groundwater) or above the surface (capacities to exploit air rights) these increments in value are automatically assigned to the owner of the surface – the most prominent pre-assigned property right. Not surprisingly, the rule can be found in Roman sources, and is apparently followed in all civil and common law jurisdictions.<sup>24</sup>

Another application of considerable continuing significance is the doctrine of fixtures. A fixture is “a thing which, although originally a movable chattel, is by reason of its annexation to, or association in use with land, regarded as part of the land.”<sup>25</sup> The case law is voluminous and a variety of notions play a role in determining whether a chattel is a fixture – the intentions of the owner of the chattel, social expectations, and the degree of physical attachment to the realty are all relevant. But the basic inquiry is similar to what we see under the principle of accession more generally, asking whether the movable thing bears a relationship to the land that is so physically close or otherwise prominent that the movable thing should be regarded as being owned by the preexisting owner of the land.

We can also find examples of the principle of accession at work with respect to intangible property. Consider the question of who owns the interest earned on a fund of money that has been placed in an interest bearing account. Ordinarily of course, the matter will be governed by contract; the owner of the fund will enter into a contract with

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<sup>24</sup> See Andrea B. Carroll, Examining a Comparative Law Myth: Two Hundred Years of Riparian Misconception, 80 Tul. L. Rev. 901 (2006).

<sup>25</sup> Ray Andrews Brown, The Law of Personal Property 698 (1955).

the depository institution that specifies what happens to the interest. But under some circumstances involving escrow funds, security deposits, or prepayments for services, there may be no contract or the government may mandate that interest be paid as a matter of law. As discussed by the Supreme Court in three recent decisions, the common law rule here is that interest follows principal.<sup>26</sup> In other words, the interest does not belong to the first to grab it nor is it something that state authorities can allocate as they see fit. It is instead understood to belong to the already-existing owner of another resource prominently associated with the interest – the source of money on which the interest was earned. This rule is so firmly entrenched that the Court has given it a constitutional dimension which appears to be impervious to contractual or legislative modification.<sup>27</sup>

The principle of accession also plays a large role in intellectual property regimes. Copyright provides a particularly striking illustration. The Copyright Act confers on the holder of a copyright not only the exclusive right to copy the work, but also the exclusive right to prepare derivative works based on the work, known as the right of adaptation.<sup>28</sup> For example, the author of a copyrighted book has the exclusive right to prepare a script for a play based on the book, or a screenplay for a movie based on the book. Here we see a clear instance of the holder of the more prominent property – the original copyright – being also given the right to control lesser variations on this right (lesser in terms of the degree of originality).

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<sup>26</sup> *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003); *Philips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980).

<sup>27</sup> In *Philips*, *supra*, the Court held 5-4 that interest is the “private property” of the owner of the source of funds, even if state law provides to the contrary at the time the money was deposited.

<sup>28</sup> 17 U.S.C. § 106(2).



Trademark law has also come to reflect the principle of accession, through the protection against dilution of famous marks. Originally, trademark protection attached only to particular distinctive marks used in connection with particular goods and services. The system operated on the basis of first possession, as the first firm to “capture” consumer recognition of its mark in a particular market was awarded an exclusive right to use the mark in that market. As brand management became an increasingly important marketing tool, however, firms sought and obtained from Congress a broader form of protection against dilution of famous marks.<sup>29</sup> This new protection has the effect of extending the scope of trademark protection from commercial uses actually captured to uses not captured but which have a close enough connection to a famous mark to do it potential harm.<sup>30</sup> In other words, famous marks are now recognized as having an accession-like power over any use of the mark having a close enough connection to the mark to affect its value as a mark.

A third example from intellectual property is provided by the right of publicity. Indeed, this right may be nothing more than a bundle of accession rights. The right applies to celebrities who have a persona which has commercial value. The celebrity herself is obviously in control of (is in “possession” of) her persona. The right of publicity permits the celebrity (or in some states, her estate) to determine which if any commercial markets she wishes to enter in order to reap a commercial gain from her persona. Thus, Bette Midler can decide whether the sound of her voice will be used to help sell Fords on television, Arnold Schwarzenegger can decide whether his image can

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<sup>29</sup> See 15 U.S.C. § 1125(c).

<sup>30</sup> See Clarisa Long, Dilution, 106 Colum. L. Rev. 1029, 1034 (2006) (describing the dilution right as moving trademark law from a system of use rights toward a system of exclusion rights.)

be used in a line of bobble-head dolls, and so forth. In each case, we can say that the secondary right – to use the image of the celebrity in a particular commercial market – is assigned by accession to the owner of the primary right – the right of the celebrity to control the persona itself.<sup>31</sup>

## **B. Contested Issues**

Now that we have seen a variety of examples of the principle of accession at work, it may be illuminating to consider some situations in which the law is uncertain about whether ownership of contested resources should be assigned by first possession or accession. Most of these situations involve fairly low-valued resources or issues that arise too infrequently to generate any firm conclusions. Nevertheless, we see an unmistakable pull toward accession, particularly as the background condition becomes thicker with established property rights or as economic values become greater.

Ownership of wild animals is one ground of contestation. Although American students are taught that first possession prevails here, there is fact a competing principle, sometimes called *ratione soli* (by reason of the soil), that awards rights to wild animals to the owner of the land on which they are killed or captured. England, with its large landed estates and anti-poaching laws, was traditionally more receptive to this competing

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<sup>31</sup> Patent law contains no doctrine that explicitly incorporates the idea of accession, other than perhaps the doctrine of equivalents, which extends protection beyond the literal claims of the patent to include in addition anything that differs in modest ways from the claims. *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, 520 U.S. 17 (1997). In actual operation, however, the patent system is very accession-like in its treatment of improvements. As Kitch explains, patents typically claim an invention that “works” but is not necessarily one that is commercially valuable. See Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 *J. L. & Econ.* 265, 275-80 (1977). Once the patent is granted, the patentee is then given the exclusive right to tinker and refine the invention, to see if it can be made into something commercially valuable. These further improvements, which incorporate the patent but are not themselves sufficiently original to warrant patent protection, are understood also to belong to the patentee, by accession as it were. See also Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 *Tex. L. Rev.* 989, 1070 (1997) (noting that “[t]he treatment of improvements is a function of the value and significance of the improvement in relation to the original invention.”).

principle than America. In the U.S, a privilege of hunting on any unenclosed land was early recognized in many States.<sup>32</sup> This has given way to posting laws, which permit landowners to exclude hunters by posting no trespassing signs. As rural areas have become more settled, posting has increasingly tended to dominate over open access, with the result that the domain of first possession for acquiring wild animals has steadily diminished.

Moreover, even in America rights to certain wild animals have always been assigned to landowners rather than first possessors. Bees, in particular, have been regarded as being subject to control by the owner of the soil on which the hive is found, with first possessors given short shrift.<sup>33</sup> Other wild animals that build elaborate homes in fixed locations, such as beavers, may also be more likely to fall under the principle of accession.<sup>34</sup>

Lost property provides another area of contestation. When a lost item is found on private property, does a qualified property right arise in the finder or the owner of the locus in quo? This is another straightforward contest between first possession and accession. Courts have had little trouble ruling for the owner of the locus in quo when the finder is trespassing or the item is attached to or buried beneath the soil.<sup>35</sup> The latter line of cases is reminiscent of the doctrine of fixtures, and reveals again how the claim of

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<sup>32</sup> See Dale D. Goble & Eric T. Freyfogle, *Wildlife Law* 133-140 (2002).

<sup>33</sup> *Fisher v. Stewart* (NH 1804); *State v. Repp*, 73 N.W. 829 (Ia. 1898).

<sup>34</sup> See Harold Demsetz, *Toward a Theory of Property Rights*, 57 *am Econ. Rev.* 347 (1967) (Papers and Proceedings) (reviewing evidence that the Labradorean Indians of Quebec shifted from a rule of first possession to a rule of accession for determining rights to hunt beavers as the value of beaver belts rose).

<sup>35</sup> See, e.g., *Favorite v. Miller*, 407 A.2d 974 (Conn. 1978) (awarding fragment of revolutionary-era statute of George III discovered in soil by trespassing finder to landowner).

the landowner takes on greater gravitational force as connectedness with the soil becomes more pronounced. The famous English case of *Hannah v. Peel* is instructive here.<sup>36</sup> Corporal Hannah found a brooch in an old country house where he was stationed during World War II. The court seemed impressed by the fact that Major Peel, the owner of the house, had never entered into occupancy of it. (It was purchased by the Peel family for the value of the fields and woods; they lived elsewhere.) The fact that Major Peel had never been in possession of the house seemed to deflate his claim to be “in possession” of the brooch. If Peel had more connection with the house, the court hinted that it might have awarded the brooch to him.

American courts have pushed further in the direction of ruling for landowners in finders cases by inventing the doctrine of mislaid property. Items are mislaid when you put them down someplace intentionally and then forget where you put them. Mislaid property always goes to the owner of the locus in quo. Since a significant portion of lost property can be characterized as mislaid, this doctrine moves a large number of cases from the first possession category over into the accession column.

Cases involving falling meteorites can also entail a competition between the first possessor who digs up the meteorite and the owner of the land on which it falls. As a rule, the landowner wins, especially when the meteorite is buried in the soil.<sup>37</sup> In 1954, in Sylacauga, Alabama, a meteorite crashed through the roof of a house, bounced off a radio, and struck the tenant, Mrs. Ann E. Hodges, bruising her arm and hip. Litigation ensued between the landlord and the tenant over who had the better claim to the

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<sup>36</sup> [1945] K.B. 509.

<sup>37</sup> *Goddard v. Winchell*, 52 N.W. 1124 (Ia. 1892).

meteorite. Although precedent seemed to favor the landlord, the tenant was in actual possession of the house, the meteorite never embedded in the soil, and the tenant claimed a special equity based on the fact that the meteorite struck her. In these circumstances, the landlord settled on terms that permitted Mrs. Hodges to retain possession. Although this could be construed as a preference for the first possessor (if being struck qualifies as possession), it can also be viewed as a dispute over which of two persons with an interest in the locus in quo had a better claim to accession.

A final, and particularly instructive, example concerns the assignment of domain names on the internet. With regard to the internet, in the beginning all the World was indeed America. That is, the background condition was widely regarded as one vast cyberspace or “telecosm,” in which rights to things like domain names would be assigned by first possession. At first the allocation followed the first possession script, as the initial contractor responsible for issuing domain names, Network Solution, Inc., (NSI) simply issued names on a first-come, first-served basis. This soon changed when various wily characters began acquiring domain names that corresponded to trademarks or trade names of established entities which had been slow to recognize the value of the internet. Some of these characters offered to sell the laggard entities the rights to use their own trade name on the internet, a practice known as “cybersquatting.”

A number of these entities elected to sue, claiming that the practice of cybersquatting constitutes either trademark infringement or dilution. The courts generally agreed.<sup>38</sup> In effect, they held that owners of property rights established in traditional commercial channels – trademarks – could extend those rights to the new

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<sup>38</sup> See, e.g., *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359 (4th Cir. 2001); *TCPIP Holding Co., Inc. v. Haar Communications, Inc.*, 244 F.3d 88 (2d Cir. 2001).

environment of the internet, notwithstanding the formal adoption of a rule of first possession as the mode of assignment of names for that new environment. Congress quickly ratified this conclusion by enacting the Anti-Cybersquatting Consumer Protection Act.<sup>39</sup> It is now well established that principles of trademark law trump the first-come, first-serve registration rules of the internet. This is a very dramatic example of the principle of accession superseding first possession. It suggests that when the economic stakes are sufficiently high, accession can replace first possession in fairly short order.

### **C. The Generality of Accession**

The various instantiations of the principle of accession just canvassed have been almost entirely ignored by property scholars, apparently on the ground that they are too quirky or insignificant to warrant our attention. And there has been no discussion of the possibility that they might reflect a more general principle of property law. Yet once we state the principle at a sufficient level of generality, we can begin to see applications of it popping up throughout the law. This in turn suggests that the specific instantiations I have reviewed are simply the tip of the iceberg of a much more general phenomenon about property rights – one so pervasive and general that it escapes our everyday notice.

Consider one more manifestation of the principle of accession, or something very much like it, outside the traditional domain of property law: the corporate opportunity doctrine. This venerable rule says that when corporate directors or officers become aware of certain business opportunities they must disclose them to the corporation and give the corporation a right of first refusal before seeking to exploit these opportunities themselves. What kinds of opportunities fall within the scope of the rule? A leading

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<sup>39</sup> 15 U.S.C. § 1125(d).

Delaware decision says they are opportunities in the corporation's "line of business" which the corporation is financially able to undertake.<sup>40</sup> And how do we know what is in the corporation's line of business? According to Eric Talley, this turns on "the court's perception of the relative proximity between the project's requirements on the one hand, and the corporation's expertise on the other."<sup>41</sup> One could easily say that the new opportunity is a kind of trade secret will be awarded either to the director on the basis of first possession, or to the corporation by accession, depending on whether the opportunity has a sufficiently prominent relationship to the corporation's existing business.

In fact, the principle of accession works all the time to allocate new resources and increments in value to particular owners of property. Suppose A owns a large tank of oil, and world oil prices skyrocket. No one questions that A also "owns" the windfall reflected in the enhanced value of the oil in the tank. The relationship is so closely prominent that accession is applied without thinking about it. Now suppose A owns a ranch in Texas, and oil is discovered in the ground under the ranch. Here we may pause before concluding that A also owns the newly discovered oil. There is enough physical distance between the ranch's surface rights and the oil in the ground, and the resources are sufficiently different, that we can see the possibility of ownership of the oil being allocated different ways. But, at least in the U.S., we will ultimately apply the *ad coelum* rule and award the oil to the owner of the ranch. Here too we are applying accession, but in a more self-conscious fashion.

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<sup>40</sup> Guth v. Loft, 5 A.2d 503 (Del. 1939).

<sup>41</sup> Eric Talley, Turning Servile Opportunities into Gold: A Strategic Analysis of the Corporate Opportunities Doctrine, 108 Yale L. J. 277, 289 (1998).

The basic point is that the institution of property includes as a central design feature the routine capture by the owner of an asset all increments in value that are prominently associated with that asset. With respect to most increments in value, most of the time, this design feature operates silently and uncontroversally. Only when a new increment in value has a somewhat attenuated connection with the asset, or when the new increment in value takes a form that allows us to think of it as a separate asset, do we turn to one of the family of doctrines that comprise the principle of accession to establish whether the owner of the primary asset also owns and control the derivative asset. In this asset, the principle of accession is visible primarily in unusual cases, but consideration of the operation and function of the principle allows us to see that it is really quite ordinary – and fundamental.

### **III. Explaining Accession**

Given that legal scholars have mostly ignored the principle of accession, it will not come as no surprise that there are few explanations for this principle in the existing literature. To the extent one finds any explanation at all in the American legal literature, it consists of ad hoc pragmatic reasons that might support particular doctrines that embody the principle. If we are interested in more general explanations for the principle, we have to turn to English philosophers and economists.

#### **A. Ad Hoc Explanations.**

American legal literature contains scattered explanations for particular doctrines that embody the principle of accession. These take the form of off-the-cuff observations for why accession makes sense in specific contexts. Such explanations are relatively easy to devise for anyone versed in first-generation law-and-economics accounts of why



common law rules might be efficient, or indeed for anyone schooled in offering up “policy analyses” of legal rules. At a minimum, they suggest that each manifestation of the principle can be said to have some plausible utilitarian rationale. A few illustrations:

- The doctrine of increase “contributes to the economy by attaching a reward to planned production; is simple, certain, and economical to administer; [and] fits in with existing human and animal habits and forces.”<sup>42</sup>

- The law of fixtures focuses on the degree of affixation rather than relying exclusively on party intent because removal of an affixed chattel can either destroy or damage the chattel, or do injury to the premises.<sup>43</sup>

- The doctrine of accretion avoids a situation in which narrow strips of land would be isolated between a body of water and an existing landowner. These strips would often be landlocked and would be too small to devote to significant productive use.

- Wild animals are more likely to be governed by *ratione soli* to the extent they have a fixed location to which they return. Some degree of cultivation may be required to reap optimal use of wild animals with fixed locations, such as bees. For example, it may be important to harvest the honey at the right time of year, and it may be important to keep flowering trees and shrubs nearby.

- The law of finders often awards qualified title to the owner of the locus in quo rather than the first finder because this is more likely to lead to recovery of the lost item

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<sup>42</sup> Cohen, *supra* note 13 at 368.

<sup>43</sup> See William B. Stoebuck & Dale A. Whitman, *The Law of Property* 353-54 (3d ed. 2000).

by the true owner. When the true owner discovers his loss, “he will check back in the places he has been that day, and the search will quickly lead him” to the lost item.<sup>44</sup>

I could go on in this vein, but you get the picture. The interesting question is whether there is anything more to say. In other words, do we have a series of ad hoc doctrines, each of which has a plausible utilitarian justification, and nothing more? Is the appearance of some deeper connection or thematic unity among these doctrines just an illusion?

It is of course impossible to say for sure. A number of factors lead me to suspect that something more is going on than ad hoc pragmatism. For one thing, many of these doctrines have very strong rule-like qualities that admit of no exceptions, defenses, balancing tests, or qualifications. This is true of *increase*, the crop rules, accretion, *ad coelum*, and interest-follows-principal. If the doctrines were merely pragmatic generalizations, it is hard to imagine they would have this character. For another thing, quite a few of these doctrines appear to be either universal or at the very least to be very widespread among the legal systems that have drawn from Roman law sources. This too seems unlikely if the rules are merely grounded in pragmatic utilitarianism.<sup>45</sup> Finally, the decisions that apply these doctrines do not explicate them in terms of underlying policy justifications. Instead, they have a this-is-just-the-way-it-is quality. One would expect more policy arguments in the decisions if they were merely generalizations of policy-based rules of thumb.

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<sup>44</sup> Richard A. Posner, Savigny, Holmes, and the Law and Economics of Possession, 86 Va. L. Rev. 535 555-56 (2000).

<sup>45</sup> Cf. Saul Levmore, Variety and Uniformity in the Treatment of the Good-Faith Purchaser, 16 J. Legal Stud. 43 (1987) (noting that the proper treatment of good faith purchasers involves difficult pragmatic judgments and that legal systems have accordingly adopted a wide variety of responses to the problem).

## B. General Explanations

The first attempt of which I am aware to explain the principle of accession is David Hume's.<sup>46</sup> Hume regarded accession as one of four great principles by which ownership is established. The four principles were occupation (first possession), prescription (adverse possession), accession, and succession. He presented them as unfolding in a kind of temporal sequence. The first claims of ownership are established by occupancy; as time passes this is replaced or superseded by prescription; these rights over time are augmented by accession; finally, all such rights are passed from generation to generation by succession. In Hume's account, therefore, accession plays a key role in establishing ownership, in sharp contrast to Locke's account, where it is not mentioned.

Hume held that "[w]e acquire the property of objects by *accession*, when they are connected in an intimate manner with objects that are already our property, and at the same time are inferior to them." He cited as examples "the fruits of our garden, the offspring of our cattle, and the work of our slaves." Each of these derivative assets, he noted, is deemed to be the property of the owner of the primary asset, and has this status even before it is reduced to possession.

Hume offered what is basically a psychological explanation for what he saw as the universal force of the principle of accession. He noted, first, that "the mind has a natural propensity to join relations, especially resembling ones, and finds a kind of fitness and uniformity in such an union." Thus, "from an object, that is related to us, we acquire a relation to every other object which is related to it, and so on, till the thought loses the chain by too long a progress." Hume was especially fascinated by the observation that

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<sup>46</sup> DAVID HUME, A TREATISE OF HUMAN NATURE 509-13 (L.A. Shelby-Bigge, ed. 1888; First edition 1739).

fitness of relation – and hence ownership by accession – seemed always to run from great to little objects rather than the other way around. For example, he wrote, “[t]he empire of *Great Britain* seems to draw along with it the dominion of the *Orkneys*, the *Hebrides*, the isle of *Man*, and the isle of *Wright*; but the authority over those lesser islands does not naturally imply any title to *Great Britain*.” As to the factors that determine which of two objects is great and which is little, Hume saw many candidates with possible appeal to the human imagination. “One part of a compound object may become more considerable than another, either because it is more constant and durable; because it is of greater value; because it is more obvious and remarkable; because it is of greater extent; or because its existence is more separate and independent.”<sup>47</sup> These potential defining factors, he conceded, can be “conjoin’d and oppos’d in all the different ways, and according to all the different degrees, which can be imagined.” Consequently, in close cases the answer as to which is the greater and which the lesser can only be resolved by “municipal laws, to fix what the principles of human nature have left undetermin’d.”

Hume’s psychological theory is notable because it is not just the first but the only general theory of the principle of accession that I have been able to discover. There is almost certainly something to it. One only has to read judicial decisions declaring that mirrors attached to the wall with screws are fixtures whereas mirrors hanging from the

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<sup>47</sup> *Id.* at 512 n.2. Hume here is describing the factors that can be used to resolve ownership in a case of confusion or mixture, where two owned objects are conjoined together. But in context, it is clear that he regarded the same principles as applying to accession, where ownership of an unowned object is assigned to the owner of a related object.

wall by hooks are not,<sup>48</sup> to begin thinking that there must be strong psychological forces that equate connectedness with ownership.

But Hume's theory also leaves many questions unanswered. Humans have many psychological propensities, some good, some not so good – especially if not held in check. How do we know that the propensity to associate small or insignificant objects with large or prominent ones is a propensity that should be nurtured and embodied in social institutions, as opposed to a tendency to be held in check? Hume provides no answer to this question. Moreover, if original ownership can be acquired in a variety of ways, including both first possession and accession, how do we know which one to prefer, particularly if both are available in a particular set of circumstances? No psychological theory, including Hume's can answer this kind of question.

Recently, the English game theorist Robert Sugden has offered a neo-Humian explanation for the acquisition of original ownership.<sup>49</sup> Sugden's explanation is embedded in a more general account of how potential social conflicts are resolved by developing stable conventions that produce positive sum outcomes. One reason that such conventions emerge, he suggests, is that certain solutions have a natural "prominence" that makes them focal points for coordination. One of the prominent coordination devices he discusses is being in "possession" of some thing. Sugden proceeds to consider a number of examples of "possession," including first possession, adverse possession, and the principle of accession.

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<sup>48</sup> See *Strain v. Green*, 172 P.2d 216 (Wash. 1946). The party who installed the mirrors had the same intent regarding ownership and presumably the social expectations about mirrors was either the same or favored the mirror hanging by hooks being a fixture (it was in the bathroom).

<sup>49</sup> Sugden, *supra* note 9.

The most interesting example of accession discussed by Sugden concerns the allocation of drilling rights to oil under the bed of the North Sea.<sup>50</sup> Before oil was discovered, no one knew that this asset existed. Established international law treaties seemed to suggest that the oil would belong to country that claimed the continental shelf on which the particular oil rig was placed. But in fact, the countries bordering on the North Sea adopted a different convention, always awarding the oil to the country whose coastline was closest to the rig, without regard to whether it was on a continental shelf. Sugden notes that this solution was readily agreed upon by the countries affected, and was not challenged by other countries even if they were more powerful (e.g., the Soviet Union) or more in need of the resources (e.g., African nations). He also observes that the solution was easy to apply and enforce, especially as compared to any kind of rule requiring equalization of revenues among affected nations.<sup>51</sup>

Sugden's account is a clear advance over Hume's as a general explanation for the principle of accession (although it is not offered as such). Unlike Hume, who grounds accession in psychological propensities, Sugden situates it in a theory of the evolution of social conventions. This includes as one of its elements functionality – the generation of a stable positive sum solutions – which can account for why accession becomes reflected in law and why it has staying power. His account is also useful in stressing that uniqueness is an important element of prominence.<sup>52</sup> Recall that one of the features of the principle of accession is that it generates unique answers to the question: Who is

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<sup>50</sup> Id. at 87-88.

<sup>51</sup> Id. at 98-99.

<sup>52</sup> Sugden offers the following example, taken from Schelling. Suppose two people are separately shown a map and asked to picking a meeting point. If the map has multiple crossroads and one house, they will pick the house. If it shows multiple houses and one crossroad, they will pick the crossroad. Id. at 99.

entitled to x? Finally, Sugden also suggests that the evolutionary process that produces stable conventions will favor what he calls “cheat-proof” rules.<sup>53</sup> This he says counts “against conventions – however much we might approve of them from a moral point of view – that are subtle or subjective, or that require fine judgments.”<sup>54</sup> This too seems an apt characterization of most of the rules that reflect the principle of accession.

Nevertheless, Sugden’s account is still unsatisfactory as an explanation for the widespread adoption of accession as a basis for establishing original ownership. Most glaringly, Sugden treats accession and first possession interchangeably, and so his account gives us no reason to prefer one over the other as a basis for establishing claims to resources. What is missing from Sugden, as from Hume and the American legal academics, is any argument about how accession stacks up against first possession, and why the legal system might have some reason systematically to prefer accession when it is an available option for establishing ownership. It is to the task of developing such an account that I now turn.

#### **IV. First Possession Versus Accession: Efficiency Considerations**

In this Part I will outline the reasons why accession is superior to first possession on efficiency grounds. I will begin by taking up the traditional economic critique of first possession, and asking whether accession fares better on the dimensions on which first possession falls down. I will then turn to a consideration of the role that accession plays in sweeping together the gains and losses associated with the management of resources, and how it relates to the idea of residual claimancy.

##### **A. The Economic Critique of First Possession**

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<sup>53</sup> Id. at 101.

<sup>54</sup> Id. at 100.

First possession has not been treated kindly by economists who have considered it as a means of establishing original ownership of property.<sup>55</sup> The economic critique can be pieced together from two types of commentary. One focuses on the race aspect of first possession; the other on the background condition of open access. Together, these sources suggest that first possession suffers from four shortcomings: (1) wasteful consumption of resources through competition for the prize of ownership; (2) premature or over consumption of resources (the “tragedy of the commons”); (3) inadequate incentives to cultivate or improve resources; and (4) unfavorable conditions for securing agreements for collective governance of resources. I will argue that on each of these dimensions, the principle of accession unequivocally performs better.

### **1. Wasteful Races**

Any system that establishes a race open to all can end up wasting valuable resources. No contestant will have an incentive to spend more on the race than the value of the prize. But each contestant may have an incentive to outspend the other contestants, provided the additional expenditures can make the difference between winning and losing. In the limit, each contestant may spend up to the value of the prize in an effort to out-compete the others. If there are multiple contestants, the expenditures incurred by the losers will produce no positive social benefit. Under the right conditions, the race may end up consuming more resources than it produces, making it a losing proposition from

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<sup>55</sup> See, e.g., David D. Haddock, *First Possession Versus Optimal Timing: Limiting the Dissipation of Economic Value*, 64 Wash. U. L. Q. 775, 791 (1986) (concluding that “a prospective rule of first possession has little to recommend it”).



the perspective of social efficiency. This analysis has been applied to land races, patent races, and the quest for prizes and economic rents more generally.<sup>56</sup>

Switching from first possession to accession promises to eliminate the waste inherent in racing to secure ownership of resources. Under accession, the prize in the form of some novel or unanticipated resource is awarded to the most prominent preexisting owner. Ordinarily, only one claimant will satisfy this condition, and the identity of this claimant will be clear cut. If the air rights above a particular plot of land suddenly become very valuable as the site for a wireless telephone tower, there will ordinarily be no dispute as to who is entitled to reap the windfall created by this new resource use: It will be the owner of the surface rights to the plot of land in question. To be sure, there may be cases where disputes will arise over the identity of the most prominent preexisting property or over who the owner of that property happens to be. Resources may be expended in resolving such disputes. But on the whole, the potential for rent-dissipating competition among rival claimants should be greatly reduced under accession relative to first possession.

Dean Lueck's work on the economics of first possession effectively confirms this point.<sup>57</sup> One of Lueck's principal findings is that the degree of waste associated with first possession is a function of the extent to which competitors are homogeneous or heterogeneous in terms of their ability to secure the prize. The more heterogeneous the competitors, the more likely it becomes that one will win the race quickly and limit the

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<sup>56</sup> See, e.g., Terry Anderson & Peter J. Hill, *The Race for Property Rights*, 33 *J. L. & Econ.* 177 (1990); Mark F. Grady & Jay I. Alexander, *Patent Law and Rent Dissipation*, 78 *Va. L. Rev.* 305 (1992); Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 *Western Econ. J.* 224 (1967).

<sup>57</sup> Lueck, *supra* note 1.

degree of wasteful racing engaged in by the others. He writes: “In the extreme case, where just one person has costs less than the net present value of the asset’s flows, the first-best outcome is achieved. In this case, only one person finds it worthwhile to enter the race, so there is no dissipation.”<sup>58</sup> This essentially describes the situation achieved by switching from a rule of first possession to accession. Under accession, only one person is uniquely entitled to “race” for the new asset. This is not because this person has a unique cost advantage relative to other competitors (although this may also be true), but rather because the legal rule grants him an exclusive right to acquire the asset. The result is the same: the wasteful dissipation associated with first possession is eliminated.

## **2. Commons Tragedies**

Any system of first possession presupposes a background condition in which resources are held in an open access commons. Depending on the nature of the resource, this gives rise to a danger of premature or over consumption which goes by the familiar moniker “the tragedy of the commons.”<sup>59</sup> The tragedy can occur because the open access status creates a pervasive problem of cost externalization. Suppose there are 100 fishing boats plying a bay. If boat A succeeds in catching a fish, the benefits of the catch are fully internalized to boat A. But the costs of the catch, in terms of foregone opportunities to catch fish, are spread over all 100 boats in the bay. So boat A only incurs 1/100 of the costs of the capture, and the other 99/100 of the costs are externalized to the other boats. From the perspective of each of the boats, the calculus is the same: benefits fully internalized, costs mostly externalized. This sets up a dynamic in which each boat has an

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<sup>58</sup> Id. at 400.

<sup>59</sup> See Garrett Hardin, *The Tragedy of the Commons*, 162 *Science* 1243 (1968).

incentive to grab as many fish as quickly as possible and overall consumption can spiral out of control. If the resource is finite and especially if it is sensitive to destruction if taken before maturity or beyond sustainable levels, the result can be complete extinction of the resource. Thus, the tragedy of the commons is primarily applicable to natural resources like fisheries. There is, by the way, ample empirical evidence that the problem is a very serious one, at least with respect to fisheries.<sup>60</sup>

Switching from first possession to accession promises largely to eliminate the dangers associated with the tragedy of the commons. Under accession, both the benefits and costs associated with consumption of the contested resource are internalized by the owner of the accession-creating resource.<sup>61</sup> To continue with the fishing example, suppose we assign exclusive rights to a portion of the bay to each owner of riparian land around the perimeter of the bay as a right appurtenant to the land.<sup>62</sup> These exclusive aquatic territories are enclosed with permeable containment barriers, which then provide the basis for aquaculture operations (fish farming). Now, each time the riparian owner removes a fish from the aquaculture containment, she realizes 100 percent of the benefits and 100 percent of the costs from this action. As a result, we would expect

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<sup>60</sup> Jonathan H. Adler, *Legal Obstacles to Private Ordering in Marine Fisheries*, 8 *Roger Williams U. L. Rev.* 9 (2002) (reporting that almost one-half of global fish stocks are fully exploited); Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 *N.Y.U. L. Rev.* 117 (2005) (documenting the collapse or severe stress of many fisheries within the U.S. exclusive economic zone).

<sup>61</sup> See Robert Cooter & Thomas Ulen, *Law and Economics* 131 (1988) (“The advantage of tying ownership of fugitive property to ownership of settled property is that this rule does not induce inefficient investment in speculative pre-emption so long as the ownership claims in the resource to which the fugitive property is tied are already established.”) (emphasis omitted).

<sup>62</sup> This is not as far-fetched as it might seem. Under English common law, riparian landowners owned the bed of non-tidal waters to the mid-point of the stream or lake. The rule is still followed in many states for nonnavigable rivers and lakes.

owners to avoid taking fish before they are fully grown and to limit their consumption of the resource to rates that insure a sustainable yield.

### **3. Incentives for Cultivation**

Because first possession requires that we conceive of the background condition as open access, any regime of first possession will also provide inadequate incentives for participants to cultivate, improve, or otherwise invest in the underlying pool from which resources are drawn.<sup>63</sup> Analytically speaking, this point is the same as the last one, except that the emphasis is now on disincentives to provide external benefits rather than incentives to impose external costs. Potential competitors for resources drawn from an open access commons have little incentive to stock the commons or otherwise cultivate or replenish it, because the benefits of these efforts will be externalized to all other competitors for the assets in the pool. For example, no individual fisher has much incentive to build a fish hatchery to replenish the stock of fish in an open access fishery, because the new supply of fish will be captured by all other fishers operating in the area.

Accession solves this problem by assuring that all benefits created by investment in an asset will be captured by the owner of the asset, so long as those benefits share the quality of prominent association required for accession to operate. We see this quite literally in a number of accession doctrines, including increase, the crop rules, the doctrine of accession, the rule that interest follows principal, the adaptation right in copyright, and so forth. In each case, the rule assures that the owner of the primary asset will be able to “reap where he has sown” by also claiming ownership over the derivative asset.

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<sup>63</sup> See Demsetz, *supra* note 34.

The point can be further illustrated by Kitch's famous prospect theory of patents.<sup>64</sup> Patents have long been conceived of as prizes awarded to the first person to capture a particular useful and original idea. Kitch asked in effect, Why is the prize awarded in the form of an exclusive property right to the invention, rather than a cash reward or an honorific title? His answer was that the property right gives the inventor the incentive to invest further in development of the invention – to make further improvements in it, to negotiate with other patent holders for complementary rights, to establish a system of distribution, and to bring the invention to the attention of the public. In other words, by giving the patent holder an exclusive right to the invention, the law allows the inventor to make additional investments that will enhance the value of the invention, knowing that he will be able to internalize any and all benefits that flow from these additional investments. This is the logic of accession.<sup>65</sup>

#### **4. Governance Costs**

A final criticism leveled against first possession is that it increases the costs of contracting among the respective claimants to achieve any type of mutually advantageous forbearance or other collective action. This criticism again flows from the open access nature of the background condition that first possession takes as a given. Bob Ellickson has made the point by describing the advantages of parcelization of land for regulating “small events,” “medium events,” and “large events.”<sup>66</sup> In an open access regime, even a

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<sup>64</sup> Kitch, *supra* note 31.

<sup>65</sup> Mark Lemley derides this rationale for intellectual property as “ex post” thinking, which he says is “anti-market.” Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 *U. Chi. L. Rev.* 129 (2004). But this critique would seem to apply equally to private ownership of agricultural land, insofar as it is justified by the incentive structure it creates to cultivate, harvest and market crops.

<sup>66</sup> Robert C. Ellickson, *Property in Land*, 102 *Yale L. J.* 1315, 1322-35 (1993).

small event like growing a tomato plant is difficult to regulate, since it is necessary to secure the agreement of all other participants to forbear from taking or trampling the plant. Similarly, a medium event like building a small dam will be nearly impossible to accomplish, given the need to secure unanimous consent not to interfere with the dam or appropriate its value. Both types of action can be achieved much more easily if the commons is parcelized and each participant is given exclusive rights over a single parcel. In the case of the small event, no contractual agreement is required at all. A single owner can decide to grow and tend the plant without needing the cooperation of anyone else. With respect to the medium event, contracting is now more feasible, since only a small number of individual owners are affected by the project. If their consent can be secured, the project can go forward. Only when we turn to large events, like widespread air pollution, do we find little ground for preferring parcelization to open access, as both seem to present difficult problems for collective governance.

Here again, we can see that accession, in a fashion analogous to parcelization, reduces transaction costs and hence makes collective decision making easier to achieve. The reason parcelization reduces transaction costs is that it assigns particular resources to specific gatekeeper-managers, and it provides a method of defining the resource that is inexpensive and unambiguous (boundary markings). Collective governance of resources for small and medium events is thereby handled either by delegation to the singular gatekeeper-manager, or can be resolved by simple bilateral negotiations. Accession has similar qualities. It assign particular resources (lesser or derivative ones) to the owner of other resources (the greater or primary one) on the basis of prominence. This too has the effect of assigning particular resources to specific gatekeeper-managers and is also

inexpensive and (usually) unambiguous. Here too then, governance can be handled for most issues – Ellickson’s small and medium events – by delegation or contract.

### 5. Offsetting Factors

Surely, you say, there must be something affirmative to be said on efficiency grounds for first possession in comparison with accession. There is, but it is roughly the same basis we have for saying canned vegetables are better than fresh vegetables: they are cheaper.

Sometimes it is said that first possession creates a sharper set of incentives to exploit resources for productive ends, whereas accession allows poor resource management to persist if the owner of the primary asset is a poor manager.<sup>67</sup> For example, first possession creates incentives actually to kill the fox, rather than dawdling all day swilling port with the fox hunting party under the rule of *ratione soli*. But this assumes we want the fox dead, and we want it dead quickly. Maybe we really don’t want the fox dead, or maybe it would be better to let the fox grow up and kill it next year, or maybe the whole purpose of the exercise is in fact to dawdle and enjoy the spectacle of the fox hunt.<sup>68</sup>

The general point is that by giving the owner of a primary asset the exclusive right to exploit the derivative asset, the owner of the primary asset internalizes all the costs and benefits associated with the exploitation, cultivation, preservation – or whatever – of the derivative asset. If the owner of the primary asset falls down on the job, the

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<sup>67</sup> This is one of Lemley’s criticisms of “ex post” justifications for intellectual property. See Lemley, *supra* note 65.

<sup>68</sup> See Andrea McDowell, *Pierson v. Post* and the Realities of Fox Hunting (forthcoming Michigan Law Review) (presenting evidence that the purpose of fox hunting was recreation and that farmers were often paid to raise foxes to add to the pleasure of the hunt).

value of the package of assets will decline, providing an inducement for others to make offers to take over the package, in order to extract more value from the derivative asset. There is no reason to believe that these market incentives, translated through accession, will systematically result in inefficient exploitation of resources. In contrast, there *is* reason to fear that first possession will create systematic incentives for over-exploitation or under-investment in the resource.

Why then do we continue to see first possession used as a mode of original acquisition rather than universal reliance on accession? One explanation that has been given is that some resources are inexhaustible (or at least “plenteous”<sup>69</sup>), making it unnecessary to worry about the many inefficiencies associated with first possession. The high seas and the air we breathe used to be regarded this way. But not any longer: The inefficiencies of first possession in these contexts are evident for all to see. (Accession is not only efficient, it is also good for the environment.) Ideas and expression have also been regarded this way. But as we have seen, improving, distributing, and packaging ideas matter too. So there is plenty of room for accession to operate in the intellectual property realm as well as the realm of natural resources.

A better explanation, which goes back to Demsetz’s classic article,<sup>70</sup> is that the costs of setting up a system of accession – the costs of enclosing the open access commons, establishing primary rights, and defining and enforcing the associated derivative rights – may be greater than the benefits accession would produce. The

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<sup>69</sup> See Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 *U. Chi. L. Rev.* 711, 717 (1986).

<sup>70</sup> See Demsetz, *supra* note 34. For a formal but non-mathematical restatement, along with many instructive examples, see Terry L. Anderson & Peter J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 *J. L. & Econ.* 163 (1975)



resource in question may have low value on an expected-value basis, like lost property; or the state may have collapsed or be too weak to enforce accession rights, as happened in the California Gold Rush; or the resource may be of a fugitive nature like wild animals, water, oil and gas, or ideas, which makes definition and enforcement particularly costly. One would predict, following Demsetz, that as resource values rise, or the system of enforcing property rights becomes more secure, or new technologies emerge that lower the costs of definition and enforcement of derivative rights, we will see shifts from first possession to accession in these situations.<sup>71</sup>

This then is the sole virtue of first possession relative to accession from an efficiency perspective: it is cheap. We use first possession when we cannot afford the more expensive, but far more attractive, principle of accession. Otherwise, first possession has almost no redeeming features from an efficiency perspective. It is a second-best solution we put up with until the conditions are in place to move to accession.

### **B. Accession and Residual Claimancy**

We are now in a position to see how accession is in fact a very general principle, integral to the basic logic of using property as a strategy for the management of resources. The property strategy appoints a singular gatekeeper for each resource, a mini-sovereign who determines who gets included and excluded, what use will be made of the resource, when it will be sold, and so forth.<sup>72</sup> The strategy works in large part because the gatekeeper internalizes the benefits and costs associated with this delegated

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<sup>71</sup> Anderson & Hill, *supra* note 70.

<sup>72</sup> See Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating property Rights*, 31 *J. Legal Stud.* 453 (2002).

managerial function. Decisions that expand social output, as judged by the market, inure to the benefit of the gatekeeper-manager. Decisions that reduce social output, again as judged by the market, inure to the detriment of the gatekeeper-manager.

Critically, in order to assure that routine internalization of these gains and losses occurs, we need some principle that automatically assigns all increments in value that arise over time to particular assets and their associated gatekeeper-managers. The principle that accomplishes this routine sweeping function is the principle of accession. The principle of accession provides that all newly discovered resources and increments in value are allocated to the property most “prominently associated” with these new values. The principle assures that the owner of the primary asset automatically internalizes every thing that affects the value of the asset, net of contractual obligations.

This broad internalization of values is closely related to what economists have come to call “residual claimancy.”<sup>73</sup> Although this term is used most often in describing relatively complex organizational forms like business firms, partnerships, and trusts, it has also been used to analyze basic property rights.<sup>74</sup> Economists have offered a variety of explanations for why some values are reduced to fixed contractual obligations, and others exist as residual claims. One explanation is that the party who is best able to manage risk is made the residual claimant. Another is that the party who is in the best

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<sup>73</sup> The term appears to have originated with Alchian and Demsetz. See Armen A. Alchian & Harold Demsetz, Production, Information Costs, and Economic Organization, 62 Am. Econ. Rev. 777 (1972). It gained impetus through Jensen and Meckling’s famous article on the nature of the business firm, which stressed the importance of agency costs and conceived of the firm as a nexus of contracts. Michael C. Jensen and William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. Fin. Econ. 305 (1976). They defined the firm as “one form of legal fiction which serves as a nexus for contracting relationships and which is also characterized by the existence of *divisible residual claims on the assets and cash flows of the organization which can generally be sold without permission of the other contracting individuals.*” Id. at 311 (emphases altered from original).

<sup>74</sup> See Yoram Barzel, *Economic Analysis of Property Rights* (1997).

position to affect the mean value of the asset is made the residual claimant. Most of these accounts have a strong contractarian flavor, the suggestion being that the affected parties decide case-by-case how to allocate fixed and residual claims in order to produce optimal incentives for value maximization.

A simple example of this kind of analysis is provided by leases.<sup>75</sup> Sometimes the lease provides for the payment of fixed cash rent for a period of time, in which case the landlord is a contractual claimant and the tenant the residual claimant. In a lease of agricultural land, for example, the landlord would get a steady stream of rental payments and the tenant's income would fluctuate depending on the price of inputs, the price of crops, and the skill and effort expended by the tenant in farming. Alternatively, the lease could provide for a rent computed as a percentage of gross revenues, in which case the landlord and tenant would share in the residual claims. This is characteristic of share cropping arrangements and percentage leases for shopping center space. Yet a further variation would be one in which the tenant has no fixed obligation and landlord is allowed to adjust the rent on a daily basis, in response to changes in supply and demand. Here the tenant's obligation is fixed by a (spot) contract, and the landlord becomes the residual claimant. This is what we find in the operation of hotels and automobile rental agencies.

Obviously, plausible economic arguments can be advanced as to why these different patterns of residual claimancy are established in different contexts. And it is equally obvious that contractual provisions play a critical role in shifting the identity of the residual claimant from one context to the next. But is it contracts all the way down?

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<sup>75</sup> See Barzel, *supra* note 74 at 33-54.

The economists, who tend to view property rights in contractarian terms,<sup>76</sup> often seem to think so. For example, in one article residual claims are defined as a “*contract* for the rights to net cash flows.”<sup>77</sup> The problem with this is that we rarely if ever see such a contract. Contracts are used to define relatively specified claims, whereas the residual rights are left unspecified. Oliver Hart has broken with this tradition, offering the view that residual claims are “closely connected” with the concept of ownership.<sup>78</sup> But this is vague. Individuals and entities own assets, not residual claims.

Perhaps some clarity can be brought to this inquiry by introducing the principle of accession. The principle of accession, broadly conceived, means that the owner of an asset will also be deemed the owner of any new assets or increments in value prominently associated with that asset. This explains the basic concept of residual claimancy in the simple property rights contexts. The owner of an asset will be the residual claimant of all derivative assets and increments in value attributable to that asset, after specified contractual obligations are satisfied. This understanding also supplies the baseline against which modifications in the allocation of residual rights by contract are interpreted. In lease law, for example, the baseline understanding is that the tenant, as the party in possession, is the person entitled to capture all gains and losses associated with the asset during the tenant’s period of possession.<sup>79</sup> Modifications of this understanding,

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<sup>76</sup> See Thomas W. Merrill and Henry E. Smith, What Happened to Property in Law and Economics?, 111 Yale L. J. 357 (2001).

<sup>77</sup> Eugene F. Fama & Michael C. Jensen, Agency Problems and Residual Claims, 26 J. L. & Econ. 327, 328 (1983).

<sup>78</sup> Oliver D. Hart, Incomplete Contracts and the Theory of the Firm, 4 J. L. & Econ. Org. 119, 124 (1988) .

<sup>79</sup> *Paradine v. Jane*, [1647] K.B., 82 Eng. Rep. 897.

as by adopting of a sharing of these gains and losses between landlord and tenant, require a specific lease provision to the contrary.

As applied to entity law, recognition of the principle of accession yields the insight that the analysis of “residual claimancy” entails a two-step analysis. First, title to the assets of the firm, the partnership, or the trust is held in the name of the entity itself. Thus, by operation of the principle of accession, any new resources, or gains and losses in value, prominently associated with ownership of these assets belong to the entity as entity and not to anyone else. Second, the division of these accessionary gains and losses among the various actors who have a stake in the entity will be determined by entity law, including permissible contracts. Thus, for example, in determining how the cash flows of a corporation will be distributed among stockholders, bondholders, officers, directors, and the officer’s favorite charities, we look to business corporation law and any relevant charter provisions or contractual undertakings of the firm.

This perspective may help resolve the debate over the boundaries of the firm.<sup>80</sup> If we think of the firm as simply a nexus of contracts, then the firm dissolves into web of contracts, with no clear line of demarcation between inside and outside.<sup>81</sup> The property rights perspective suggests that the boundary of the firm is established by the assets to which the firm holds title in the name of the firm. The firm qua firm enters into a nexus of contracts with persons outside the firm to manage these assets, buy and sell these assets, and so forth, and the firm internalizes the benefits from its custodial and

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<sup>80</sup> See Edward M. Iacobucci & George G. Triantis, *Economic and Legal Boundaries of Firms* (forthcoming Virginia Law Review 2007).

<sup>81</sup> See Melvin A. Eisenberg, *The Conception That the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 *J. Corp. L.* 819 (1999).

transactional activities regarding these assets via the principle of accession. The firm qua firm can be said to be the residual claimant of these activities. The cash flows generated by these activities are then distributed among various stakeholders of the firm according to a different nexus of contracts that governs relations between shareholders, directors, officers, and employees within the firm. The concept of residual claimancy may also be relevant within this internal nexus of contracts; for example we can say that the shareholders are in many respects the residual claimants within the internal nexus of contracts. But mixing up the two types of residual claimancy is likely to produce confusion. And it goes without saying that we will need boundary maintenance doctrines to allocate certain assets between the firm qua firm and the agents of the firm, such as is reflected in the corporate opportunity doctrine considered earlier.

#### **V. First Possession Versus Accession: Ethical Implications**

I will now switch gears, rather violently I am afraid, and consider the principle of accession from a very different perspective: that of morality and in particular the literature on ethical justifications for the institution of private property. While from an efficiency perspective the principle of accession should elicit nothing but cheers, the story is rather different when we turn to the moral and ethical perspective. Here the implications of accession seem rather grim, enough so that we perhaps have a better clue as to why there has been so much reluctance to talk more explicitly about accession in the discourse on property rights.

Let us begin with John Locke, still today the point of departure for most philosophical discussions of property.<sup>82</sup> Locke unabashedly grounds original ownership

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<sup>82</sup> See Jeremy Waldron, *The Right to Private Property* \_\_\_\_ (1988).

of property in first possession,<sup>83</sup> as do his intellectual successors, such as Robert Nozick<sup>84</sup> and Richard Epstein. Locke suggested that first possession is justified because it involves labor and/or because it is responsible for only a trivial portion of the value of modern property. Nozick argued that so long as acts of first possession do not leave any person worse off – and ordinarily he thought they do not since they involve the taking of things that no one previously claimed – they are unobjectionable. Epstein has concluded that first possession is justified because it is the method of original acquisition most likely to avoid “extensive and continuous state control.”<sup>85</sup>

For Lockeans in general, the most important fact about first possession is that it entails a volitional act. A person must intentionally do something for which he is presumptively responsible before acquiring something by first possession. I also suspect that first possession is attractive for Lockeans because it appears to be fair and just, in that it establishes a simple competition for resources open to all. Although luck as well as labor may play a role in determining who initially gets the most valuable resources, all persons at least have an equal opportunity in the race for the most valuable.

The school of thought that can be called Lockean couples this emphasis on first possession with an associated type of argument about how we get from acts of original

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<sup>83</sup> Locke, *supra* note 2. Consider this passage:

[W]hat fish any one catches in the ocean, that great and still remaining common of mankind...is by the labour that removes it out of that common state nature left it in, made his property, who takes that pains about it. And even amongst us, the hare that any one is hunting, is thought his who pursues her during the chase: for being a beast that is still looked upon as common, and no man's private possession; whoever has employed so much labour about any of that kind, as to find and pursue her, has thereby removed her from the state of nature, wherein she was common, and hath begun a property.

<sup>84</sup> Robert Nozick, *Anarchy, State, and Utopia* 149-82 (1974).

<sup>85</sup> Epstein, *supra* note 1 at 1239.

acquisition to the much wealthier and more complex world we live in today. This associated argument also emphasizes certain volitional acts that individuals take with respect to the objects over which ownership has been established by first possession.

Locke himself stressed the importance of human labor in transforming objects acquired through original possession. In an interesting exercise in armchair empiricism, Locke estimated that “ninety-nine hundredths” of the value of all resources in contemporary society is due to labor, as opposed to acts of original possession.<sup>86</sup> Thus, nearly all the value we attribute to property today is due to assiduous husbandry and cultivation; original acquisition is but a tiny detail. The invention of money, according to Locke, played an important role here, by permitting large accumulations of wealth attributable to sustained labor without creating problems of spoilage or waste.

More recent accounts, including Nozick’s influential restatement of Locke, have emphasized the role of voluntary exchange of rights in moving from first possession to the complex reality of today. Nozick suggests the contemporary distribution of property is just insofar as it is the product of acts of original possession of unclaimed things followed by voluntary exchanges of the rights so acquired (including exchanges of labor for things). Thus, as long as two conditions are satisfied – justice in acquisition (first possession) and justice in transfer (voluntary exchange) – the current distribution of property is just.<sup>87</sup>

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<sup>86</sup> Locke, *supra* note 2 at 136.

<sup>87</sup> Nozick summarizes his position as follows:

If the world were wholly just, the following inductive definition would exhaustively cover the subject of justice in holdings.

1. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.



In short, the Lockean conception posits that a just system of property is one built up out of discrete volitional acts of individuals, each of which is morally justified. Rights acquired by individual labor are the easiest to justify. Who is more deserving of these increments in value than the one who brought them into being by the sweat of her brow (supplemented by the occasional spark of creativity)? Rights acquired by voluntary exchange also seem morally unproblematic, provided we are confident the exchanges are free of force or fraud. Original acquisition by first possession seems the most difficult to justify. But at least first possession is also grounded in volitional acts of individuals, and it may be further justified by the fact that possession entails labor or by the equal opportunity version of equality that first possession seems to embody.

The Lockean view of property has been criticized on many grounds, but I am here interested only in the implications of the principle of accession for this view. The principle of accession poses a significant challenge to the Lockean exercise in justification. Accession sweeps into the control of owners of assets all increments in value prominently associated with the asset, including those created by assiduous labor and stewardship, but also those that come about because of Acts of God, market forces, and other events beyond the contemplation or control of any individual. This means the system of private property includes a substantial element of value that cannot be attributed to any volitional act on the part of the owner or her predecessors in title. The role of luck, which plays only a minor role under first possession – mostly with regard to acts which are now only a distant memory – plays a pervasive and ongoing role under

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2. A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding.

3. No one is entitled to a holding except by (repeated) applications of 1 and 2.

Nozick, *supra* note 84 .at 151.

accession. It is much more difficult to justify a system based in significant part on luck than one grounded solely in volitional acts like first possession, labor, and voluntary exchange.<sup>88</sup>

To make matters worse, the principle of accession means that private property has built into its very operation a set of doctrines that mean the rich get richer. Insofar as new resources are discovered or increments in value become newly salient and we assign these new resources or values to established owners of property, then those who already have significant property continually get more – by operation of law. And those who have less property, or who have no property at all, will fall further and further behind. This means that private property has inherently regressive distributional tendencies. These tendencies are not merely the byproduct of some people working harder than others or being better negotiators than others. Because of the principle of accession, regressive distribution is hard wired into the very operation of a system of private property.

Thus, it is disappointing but not surprising that Lockeans have ignored the principle of accession in their various accounts of why private property is justified. Accession may be powerfully efficient, but it is deeply problematic on grounds of both corrective and distributive justice. How awkward.

The other dominant school of normative scholarship about property I will call the egalitarian redistributionists.<sup>89</sup> This view, following Bentham, posits that property is the

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<sup>88</sup> A recent movement in moral philosophy called “luck egalitarianism” argues that persons should have no claim on resources that are the product of luck as opposed to volitional choices. The project falls down in the face of practical difficulties in distinguishing between choices and circumstances. See, e.g., Samuel Scheffler, *What is Egalitarianism?*, 31 *Phil. & Pub. Affairs* 5 (2003). It is nevertheless revealing in that it suggests that a moral justification for a social institution in which luck plays a large role will be difficult.

<sup>89</sup> See, e.g., Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (2004).

product of state action, not a sequence of individual volitional acts starting in some kind of state of nature. Because property is the product of deliberate collective action, the touchstone for the design of any property system should be the public welfare, broadly defined to include both incentives for increased social output and a distribution of that output that assures the widest benefit to society. The modern version of this perspective does not call for the abolition of private property, but rather for the institution of government programs that would ensure that everyone has enough property to lead a decent life. These programs would be funded by higher taxes, imposed (interestingly) on incomes not property.

The egalitarian redistributionists have also overlooked the implications of accession. It is abundantly clear that these scholars are driven primarily by a concern for distributive justice. And it is also clear that they lack enthusiasm for the institution of property. Thus, it is more than a little strange that they have not attacked the principle of accession, as a factor powerfully contributing to the unequal distributive outcomes which is what they find most distasteful about property. Instead these scholars tend to focus almost exclusively on distributional shares of wealth, conceived in the abstract as the power to draw on society's resources for personal consumption. Property is simply a black box whose outcomes for patterns of consumption they do not like. A simple explanation for this might be that these scholars are just not very interested in how the system of property works – as opposed to its implications. But it is possible that there are deeper causes for the failure to engage with the principle of accession as well.

As we saw in Part IV, the principle of accession has very strong efficiency properties. It is the principal mechanism we have for assuring the proper management

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and control of resources, by internalizing to the gatekeeper-managers of resources the costs and benefits of their decisions about how to deploy these resources. The principle of accession, as a mechanism for internalizing the costs and benefits of managerial decisions taken by the gatekeeper-manger, is obviously overbroad. It sweeps within its compass not only increments in value (or loss) due to the gatekeeper's stewardship and negotiating skills, but also those due to Acts of God, market forces, and pure dumb luck. Unfortunately, however, no mechanism has yet been devised for limiting the rewards and punishments of the owner of assets to those attributable to the owner's volitional acts. No perfect Georgian tax<sup>90</sup> has been devised that neatly subtracts windfall gains and losses, while leaving in place only those changes in value attributable to individual effort and skill. Until a more precise filtering mechanism of gains and losses is devised, the property strategy must rely on the principle of accession.

The very strong efficiency properties associated with accession make it difficult to mount a direct assault on this characteristic of property, in an effort to achieve a more egalitarian distribution of outcomes. In particular, consider the implications of any attack on the idea that assets generally have a unique and singular gatekeeper-manager, inspired perhaps by a desire to promote more widespread sharing of the control and benefits of property. This would directly undermine the principle of accession, which internalizes the benefits and costs of management decision on a singular owner in order to promote efficient stewardship of assets. Tinkering with the core principles of property in this fashion would threaten to kill the capitalist goose that lays the proverbial golden egg.

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<sup>90</sup> Henry George was a nineteenth century economist who argued that all taxes should be based on changes in the value of land, which he regarded as the product of forces unaffected by the exercise of individual choices and effort and hence as imposing no distortions in terms of individual incentives. See Henry George, *Progress and Poverty* (1879).

So the egalitarian redistributionists, at least now that the Marxists have largely left the stage, confine themselves to arguing around the edges of property. They expose historic injustices in the acquisition of property and offer proposals for guaranteed minimal entitlements. They applaud features of the existing system of private property that they regard as endorsing greater communitarian controls over property, such as the regulation of spillovers, limits on dead hand control, public accommodations duties, anti-discrimination laws, and expanded powers of eminent domain.<sup>91</sup> But they offer few proposals for the modification of existing property doctrines,<sup>92</sup> and no proposals that would touch the principle of accession.

The interesting question is whether the egalitarian ideals of the redistributionists can ever be realized as long as the core of private property remains intact, including the principle of accession. Accession makes property a powerfully efficient tool for managing resources, but it also creates a built in multiplier effect that means owners of property continually and automatically get more property. The multiplier effect works most strongly with respect to the ownership of things – discrete assets that can be identified as being prominently related to other discrete assets and values. Insofar as programs of redistribution entail conferring property on the needy in the form of money or other claims on fungible wealth, and insofar as these entitlements remain modest, it is not clear that redistribution can ever keep up with accession. How awkward.

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<sup>91</sup> For examples of this perspective, see, e.g., Gregory Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought* (1997); William Joseph Singer, *Entitlement: The Paradoxes of Property* (2000).

<sup>92</sup> For a rare exception, see Hanoch Dagan & Michel A. Heller, *The Liberal Commons*, 110 *Yale L. J.* 549 (2001) (suggesting that automatic right of partition be qualified in order to promote greater efforts in collaborative ownership of property).

In short, the principle of accession is a deeply problematic feature of property from an ethical perspective. It is centrally responsible for the efficiency of property, but makes it much more difficult to justify property using commonly shared moral viewpoints. Since it appears we cannot live without the principle of accession, the attempts to justify the existing system of private property, or to describe an alternative vision of an ideal system of property, will remain stunted and incomplete as long as this principle is ignored.