PROPERTY AND STEWARDSHIP—
PRIVATE PROPERTY PLUS PUBLIC INTEREST EQUALS SOCIAL PROPERTY

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This article presents an in depth analysis of the historical and jurisprudential underpinnings of property and the rights associated with ownership. The question of whether the nominal title to property confers a right to unrestricted possession and unrestrained use of the property or merely the right to use it for what may be deemed purposes socially acceptable at the time of such use, is examined from a historial and philosophical perspective. The author discusses private property rights, the concepts of property and sovereignty, and then analyzes the law of property from ancient times to the present. The law of private property is then shown to be a system of rights that has evolved throughout history according to a common thread: societal limitations on the use of private property.

INTRODUCTION

One of the basic concerns of American jurisprudence today is how to regulate land use, control the exploitation of the finite supply of non-renewable resources and respect the naturally imposed limits to growth, all the while protecting the public interest in those fundamental capital assets of civilization—land, landscape and natural resources—and at the same time assuring the continued existence of the American Free Enterprise System.

The fundamental question facing all the "owners" of natural resources or real property and those who would develop real property and exploit natural resources during the remainder of this century is whether the nominal title to property confers upon its holder a right to unrestricted possession and unrestrained use of the property or merely the right to use it for what may be deemed purposes socially acceptable at the time of such use.

Objections have been raised to any formal legal recognition of the interest that society has in land, landscape and non-renewable

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natural resources.[1] Many purveyors of gloom and doom[2] predict the demise of the free enterprise economic system, claiming it is rooted in the concept that private property rights, even in land and other non-renewable natural resources, are absolute and inviolable whatever the needs of society might be. This view overlooks the fact that the concept of social property has been with civilization from its earliest days,[3] and still can be found in some form in most cultures today.[4]

1. *See, e.g.*, McClaughry, *Farmers, Freedom and Feudalism: How to Avoid the Coming Serfdom*, 21 S.D. L. REV. 486 (1976), in which the author, President of the Institute for Liberty and Community at Concord, Vermont, asserts that feudalism and the concept of social property are somehow historically linked, and that the concept of freehold title to real property is an essential element of the American way of life and the free enterprise system.

2. *See particularly*, the extensive debates in the Committees and on the floor of the Congress during the consideration of the bills seeking to establish a national land use policy or planning act during the last year of the Nixon Administration.

3. *See* H.S. MAINE, ANCIENT LAW, ITS CONNECTION WITH THE EARLY HISTORY of SOCIETY AND ITS RELATION TO MODERN IDEAS ch. VIII (1861).

4. Social property in America includes the common lands of New England Towns, which have been jealously overseen by the town proprietors since the seventeenth century. *See, e.g.*, S.C. POWELL, PURITAN VILLAGE: THE FORMATION OF A NEW ENGLAND TOWN (1963); K. LOCKRIDGE, A NEW ENGLAND TOWN: THE FIRST HUNDRED YEARS (1970); W. KAVENAGH, VANISHING TIDELANDS: LAND USE AND THE LAW IN SUFFOLK COUNTY, N.Y. 1650 TO THE PRESENT (1977).

The Adirondack Park in New York State is larger than the entire state of Massachusetts and represents one of the last great wilderness and semi-wilderness areas east of the Mississippi River. It is administered by an agency with almost dictatorial land use regulatory power over 6,000,000 acres, almost one-third of central New York State. Within the Park and subject to the jurisdiction of the Adirondack Park Agency pursuant to the provisions of N.Y. EXEC. L., Art. 27, §§ 801-819 (McKinney), are 12 counties, 92 townships, and 15 incorporated villages, each with its own government as local municipal subdivisions of the State of New York, and each with land use regulatory and planning authority pursuant to state enabling legislation patterned after the STANDARD ZONING ENABLING ACT (1926 version). The Adirondack Park Agency has become the target of many constitutional challenges to legislative determinations that certain property shall be deemed so vested with the public interest that it is subject to regulation on behalf of the people and treated for administrative purposes as social property. The statutory language is almost an invitation to suit by all the private property interests who dream of second home development and quick profit from the increasing interest of the affluent in clean air, clean water and the "wilderness experience."

Recently the Agency has survived a number of challenges to its land use restrictions, of which perhaps the most far reaching was the controversy over whether a permit should be granted to the Lake Placid Olympic Organizing Committee for construction of a new 90-meter and an improved 70-meter ski jump for the 1980 Winter Olympics under N.Y. EXEC. L. § 809.10e (McKinney). The permit could not be issued by the Adirondack Park Agency without an express finding that,

> [T]he project would not have an undue adverse impact on the aesthetic, ecological, wildlife, historic, recreational or open space resources of the park, or upon the ability of the public to provide supporting facilities and services made necessary by the project, taking into account the commercial, industrial, residential, recreational or other benefits that might be derived from the project.

Id. As some indication of the extent and significance of the controversy, in addition to the project proponents, the intervenors included: The Sierra Club in opposition to the application on the grounds that the proposed ski jumps would be visible from areas within the Park designated "wilderness" and "forever wild;" the Adirondack Park Local Government Review Board, a statutory body composed of local government representatives whose executive director was bitterly opposed to the Adirondack Park Agency as a supra-municipal planning board and zoning board of appeals; the Adirondack Council, a coalition of organizations whose member groups all had substantial interests in the wilderness and environmental amenities of the Park; and the New York State Department of Environmental Conservation, whose official position was at best ambivalent since it was a developer of intensive recreational facilities within the Park, such as the ski complex at Whiteface Mountain, but was also responsible

for maintaining the environmental quality of the State of New York, including the Adirondack region. The Agency had already been sued by a number of developers and the Natural Resources Defense Council, and at that time concerted efforts were being made in the New York State Legislature to repeal the enabling Act, or at least abolish the Agency and return its land use regulatory powers to the local municipal subdivisions.

While the Adirondack Park Agency itself had only to make the rather limited legal determination whether the record developed by the Hearing Officer provided substantial, credible evidence that the project as proposed "would not have an undue adverse impact, . . ." the Hearing Examiner was forced to consider a number of questions novel in environmental law before making his determination. The finding, report, and decision of the Hearing Examiner indicate the problems inherent in any attempt to regulate land use and development by statute. During the remainder of this decade, at least, it is obvious that such determinations will have to be made on a case-by-case basis following consideration of the relevance, materiality, competency, credibility and substance of the evidence by testing in what the trial bar euphemistically refers to as the "crucible of cross-examination" during adversary judicial or quasi-judicial proceedings, as this portion of the decision illustrates.

JOHN BROWN NATIONAL HISTORIC SITE

> The National Historic Site that is the burial place of John Brown on a farm that played a significant part in the history of the United States prior to and during the early days of the War Between the States will be subject to an unavoidable visual impact as the result of constructing the twin towers and associated "in-run" ramps of the 90-meter and 70-meter ski jumps for the 1980 Winter Olympic games.
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> The evidence clearly established that these two structures will have a substantial visual impact upon the historyscape in the region of the John Brown National Historic Site, and there seems to be general agreement among the expert witnesses testifying on behalf of both the project sponsors and the State of New York Department of Environmental Conservation, that such an impact will be negative or adverse.
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> The most significant contention of the Sierra Club and The Adirondack Council is that the intrusion of these towers into the view from the farm and gravesite of John Brown represents not only an adverse impact, but an "undue adverse impact" within the meaning of the Adirondack Park Agency Act. It is this contention that must be addressed eventually by the Adirondack Park Agency.
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> At this time the Agency must accept as a well-established fact that the twin towers associated with the proposed ski jump facilities at Intervale together with some undefined portion of the in-run ramp associated with each tower will represent a significant visual intrusion in the historyscape that includes the farm and gravesite of John Brown, a national historic site designated pursuant to the provisions of the appropriate Federal legislation. It can be reasonably assumed that such an intrusion will, in fact, represent an adverse impact upon the National Historic Site.
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> If there were an alternative acceptable to the Lake Placid Olympic Organizing Committee, the choice would be clear and the Agency could limit further development of the Intervale site and, if possible, encourage transfer of the entire complex to the alternate location. However, the Lake Placid Olympic Organizing Committee does not consider any location other than Intervale a viable alternative site for the Olympic ski jumps, and it is not for the Adirondack Park Agency to substitute their judgment for that of the successful bidder for the 1980 Winter Olympic Games.
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> The Adirondack Park Agency is not a designer of ski jumps for Olympic competition. Neither is the Adirondack Park Agency technically competent to determine whether or not one site or another is more appropriate as far as ski jumping is concerned. However, the Adirondack Park Agency is quite capable of determining, and indeed the Adirondack Park Agency is charged with the obligation to determine, whether the proposed 90- and 70-meter ski jump facilities at Intervale . . . represent an undue adverse impact on the resource of the Adirondack Park, one of which is the John Brown National Historic Site.

Counsel for the Adirondack Council read into the record a moving comment:

> Lost in the Adirondack hills with two companions one day in late June 1849, Richard Henry Dana, Jr., noted author of *Two Years Before the Mast* . . . sighted a one-story house on a freshly cleared farm. Its owner, as the three lost campers soon learned, was a recently arrived settler named John Brown. He "received us with kindness," wrote Dana,

Largely as a result of the rush to develop the national economy during the westward expansion following the Louisiana Purchase, the concept of social property, or public limitation on the private use of property vested with the public interest, has been rigorously repressed in favor of a theory of absolute rights associated with private ownership that would make a medieval monarch envious.

Social Property is nothing more than property which has become vested with the public interest to such an extent that the property itself can be considered dedicated to public use. Whether in fact or at law, the nominal owners of property so vested with the public interest become trustees[5] of the property for the benefit, use and enjoyment of the general public, and are bound to exercise their personal rights as nominal owners in behalf of others for the accomplishment of purposes which may not be dictated by self-interest.

The prime agricultural lands and arable soils of this nation have become so important to the welfare of the people of this generation and those generations yet unborn, that they impose the general obligation of a trustee for the public benefit upon the nominal owner. Enforcement of the public trust[6] in the fertile soils of America is one of the great objects of equitable jurisprudence.

The food and fiber demands of civilization have established that the prime agricultural lands of the United States, at least, are pro-

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inviting them to stay for supper. Seated at the long table were a black man and a black woman. Somewhat taken aback by this display of social equality, Dana was even more surprised when his host introduced the blacks by their last names with the prefixes of Mr. and Mrs. In his diary, Dana duly underscored these courtesy titles given to the black diners, Mr. Jefferson and Mrs. Waite. At John Brown's family board, as Dana quickly found out, blacks neither sat below the salt nor were addressed as unequals.

And there can be no doubt that it was this egalitarian attitude on the part of John Brown and his family, which is the memory of his tormented spirit that speaks most eloquently to the people of today.

Yet where in American history can we find the most significant break of the barrier between Black and White that Society erected as part of its reaction to the shame of slavery in America, but in competitive athletics? It was at the athletic training table that Black and White sat together and shared a meal during this century. It was competitive athletics that gave Blacks the opportunity to make a mark in what was an otherwise White society. Four years after Lake Placid hosted the 1932 Winter Olympic Games, Adolph Hitler watched Jessie Owens, an American and a Black man, win four Gold Medals at the 1936 Summer Olympic Games, the last Olympics before the Holocaust of World War II.

In re Application for a Project Permit for the Construction of Certain 90- and 70-meter ski jump facilities proposed by the Lake Placid Olympic Organizing Committee at Intervale, Town of North Elba, Essex County, New York, to be used for the 1980 Winter Olympic Games.

5. The word "trust" or "trustee" appears to have come into use during the early years of the reign of Henry V (*circa* 1402). *See*, Dodde v. Browning, 1 Cal. xiii, a suit which alleged a feoffment of land and chattels in trust during plaintiff's absence and charged that defendant Feoffees had farmed the land without plaintiff's assent and refused to re-deliver the chattels. D. KERLY, A HISTORICAL SKETCH OF THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 84 (1890).

6. For a general discussion of the public trust, *see*, V. YANNACONE, B. COHEN, S. DAVISON, ENVIRONMENTAL RIGHTS & REMEDIES ch. 2 (1972).

See also, Yannacone, *Agricultural Lands, Fertile Soils, Popular Sovereignty, The Trust Doctrine, Environmental Impact Assessment and The Natural Law*, 51 N.D.L. REV. 615, 621-630 (1975).

perty vested with sufficient public interest to claim equitable protection by and on behalf of the people of the United States. Preserving the productivity of the prime agricultural land in the United States for the benefit of all the people of this and succeeding generations is certainly one of the unenumerated rights retained by the sovereign people[7] of the United States through the ninth amendment[8] and

7. In feudal times, the king was but the suzerain of suzerains, each of whom possessed his own rights and power. It is from the time of Jean Bodin (1530-1596) that the concept of truly absolute sovereignty imposed itself upon the jurists of the Baroque Age. The divine right of kings, a theory which reached its peak at the time of Louis XIV, states that absolute power is directly conferred on the King by God, and not indirectly through a transfer from the people of the absolute power of the commonwealth. The "divine right" theory was based on the idea that the King as a person was possessed of a natural and inalienable right to rule his subjects from above. Once the people had agreed, whether by positive affirmative act or mere acquiescence in the existing state of affairs, upon the means and method of government for the kingdom, no matter how long ago, they were forever deprived of any right to govern themselves. The natural right to govern the body politic resided thereafter only in the person of the King, or other individual ruler, as his personal and private property.

Since this natural and inalienable right to supreme power resided only in the person of the King, and was independent of the body politic, the power of the King was supreme, not only as the highest power existing in the body politic, but as a monadic and supernal power existing above the body politic and separately from it. The King reigned over all his subjects, and took care of their common good from above as the political image of God, a royal privilege which was to become rather disparaging of God as time went on. Any restriction on the supernal independence and power of the King could only come from a free and gracious concession granted by the King, most often in actual fact under pressure from the people. This was the connotation of "sovereignty" that surrounded the entry of the word into the vocabulary of political theory from the low Latin *superanus. Cf.* J. MARITAIN, MAN AND THE STATE (Phoenix ed., 1966). "*Ex Optimatum ordine, princeps*" was employed long ago in the common language to mean any official endowed with superior authority. Du Cange quotes an edict of the French King Charles V, made in 1367, which reads: "*Voulons et ordonons que se . . . le Bailli ou autre leur souverain.*"

In Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), Mr. Justice Wilson sets forth the characteristics of a despotic government in this language:

> Even in almost every nation which has been denominated free, the state has assumed a supercilious pre-eminence above the people who have formed it: hence the haughty notions of state independence, state sovereignty, and state supremacy. In despotic governments, the government has usurped, in a similar manner, both upon the state and the people: hence, all arbitrary doctrines and pretentions concerning the supreme, absolute, and incontrollable power of government. In each man is degraded from the prime rank, which he ought to hold in human affairs: in the latter,the state as well as the man is degraded. . . .

Id. at 461. After reviewing the situation in France during the reign of Louis XIV, he turns to England where the sovereignty has been described as being with the "King in Parliament" and demonstrates that this is the very model of a despotic government:

> Another instance, equally strong, but still more astonishing, is drawn from the British government, as described by Sir William Blackstone and his followers. As described by him and them, the British is a despotic government. . . . In that government, as so described, the sovereignty is possessed by the parliament: in the parliament, therefore, the supreme and absolute authority is vested (citing 1 BLACKSTONE'S COMMENTARIES 46-52, 147, 160-62); in the parliament resides that uncontrollable and despotic power, which, in all governments must reside somewhere. The constitutent parts of the parliament are the King's majesty, the Lord's spiritual, the Lord's temporal, and the Commons. The King and these three estates together form the great corporation or body politic of the kingdom. . . . The parliament form the great body politic of England! What, then, or where, are the people? Nothing! Nowhere! They are not so much as even the 'baseless fabric of a vision!' From legal contemplation, they totally disappear! Am I not warranted in saying that, if this is a just description, a government, so and justly described, is a despotic government.

Id. at 462.

8. U.S. CONST., amend. IX: "The enumeration in the Constitution of cer-

entitled to protection under the *due process* clause of the Fifth Amendment,[9] and similarly by operation of the *rights, privileges and immunities, due process*, and *equal protection* clauses of the Fourteenth Amendment.[10]

In the case of a unique, non-renewable, natural resource treasure such as the limited supply of prime agricultural land in the United States, a Court of Equity can act to protect the public interest in the arable soil even if it means limiting the rights of the nominal "owner" of the property. Equity can be called upon to protect the rights of the sovereign people of the United States in and to the full benefit, use and enjoyment of property vested with the public interest long after it has come into nominally private ownership.[11]

The concept that all who are free are free to take freely from that which nature has provided for all has always carried the implicit ethical and later equitable injunction, "so long as no damage is done to the rights of others similarly free."[12] Unfortunately, the Industrial Revolution and the accompanying rise of modern economic theory based on the philosophy of materialism have led the corporate oligarchy of the industrial world to ignore the equitable maxim, "so use your own property as not to injure the property of others, particularly that which is the property of all human beings—the air we breathe,

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tain rights shall not be construed to deny or disparge others retained by the people." For a more extensive discussion of the ninth amendment, *see*, V. YANNACONE, B. COHEN, AND S. DAVISON, ENVIRONMENTAL RIGHTS & REMEDIES ch. 3 (1972).

9. U.S. CONST., amend. V: "No person shall be . . . deprived of life, liberty or property, without due process of law . . . ."

10. U.S. CONST., amend. XIV, § 1: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

11. F. MAITLAND, EQUITY chs. 5, 7 (1909); 3 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1060 (2d ed. 1899); 2 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 958 (2d ed. 1899).

Judicial declaration of the rights and interest of the people in and to the benefit, use and enjoyment of certain property was not unknown at common law. Courts often declared the public right to privately held lands. *See*, Irwin v. Dixon, 50 U.S. (9 How.) 9 (1850); New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836); Cincinnati v. White, 31 U.S. (6 Pet.) 431 (1832). *See also*, Longley v. City of Worcester, 304 Mass. 580, —, 24 N.E.2d 533, 537 (1939); Dickinson v. Ruble, 211 Minn. 373, 375-76, 1 N.W.2d 373, 374-75 (1941).

12. It is interesting to note the relationship between farming the land and harvesting the sea:

> [F]rom the time primitive men first applied husbandry to the animal and plant products of the land the labor of the fisherman has stood in sharp contrast to that of the rudest farmer. A Yarmouth sea chantey illustrates this difference:
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> The farmer has his rent to pay.
> Haul, you joskins, haul.
> And seed to buy, I've heard him say.
> Haul, you joskins, haul.
> But we who plough the North Sea deep
> Though never sowing, always reap,
> The harvest which to all is free,
> And Gorleston light is home for me.
> Haul, you joskins, haul.
>
> In Norfolk terms, joskins are part-time fishermen who farm in the summer and join the herring fleet during the winter.

J. BARDACH, HARVEST OF THE SEA, at 106 (1968).

the water we drink, and the land and other non-renewable natural resources which are the source of our food, clothing, and shelter."

Of course fertile soils, no less than air and water, may be appropriated by individuals and business entities for private pecuniary profit. The extent of the appropriation and the uses permitted must accord, however, with the needs of Society at each period in human history. In spite of institutions such as title insurance companies, and even the "taking clauses" of the fifth[13] and fourteenth[14] amendments to the United States Constitution, those who hold nominal title to the unique and non-renewable national natural resource treasure represented by the fertile soils of our country, hold that title, even though it may be denominated fee simple absolute, as trustees for the benefit, use and enjoyment of all the people of this and succeeding generations.

Equity provides a degree of elasticity not to the meaning, but the application of constitutional principles, and it is this ability to accommodate the public interest that has been the boast and the excellence of the common law.[15] To concede this capacity for growth and change in the common law while at the same time saying that the

13. U.S. CONST., amend. V: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

14. U.S. CONST., amend. XIV: § 1: "[N]or shall any State deprive any person of life, liberty, or property without due process of law. . . ."

15. The common law in America is characterized by the supreme value it places on individual liberty and respect for individual property. It is concerned more with individual rights than with social righteousness. Its respect for the individual makes its procedures inherently contentious and preserves the theory that litigation is essentially a contest between parties represented by champions who fight fairly according to the rules of chivalry. It relies more on individual initiative rather than government action to vindicate rights. It tries questions of far-reaching social significance in the context of private controversies between nominal litigants.

Nevertheless, the common law in America tends to impose duties and establish liabilities independently of the will of those bound, looking to relations rather than to legal transactions as the basis for assessing legal consequences.

Among the historical factors that have determined much of the early course of the evolution of an American common law have been feudal law with its roots in Germanic legal institutions; Puritanism as it was brought to America by the New England colonists; the confrontations between the courts and the Crown in seventeenth century England; eighteenth century political philosophy; the "State of Nature" in the New World prior to the War Between the States; and the concepts of justice, law, and sovereignty that prevailed among American political leaders and intellectuals during the period the English common law was being made over in the American courts.

If the causes of the reactionary response of the law to consideration of social problems are to be found in the traditional elements of our legal system, so too the introduction of moral considerations through the law of equity was not an achievement of legislation but rather the work of the courts. American common law can meet the exigencies of justice and from the results of individual efforts establish a scientific system of equity jurisprudence.

Many fundamental changes in the American legal system have already taken place case-by-case along the way toward social justice. It was the courts that provided restraints on anti-social exercise of the incidents of property ownership. The American courts have gradually limited what the French call "abusive exercise of rights;" passing through the law of equity from preventing unconscionable exercise of legal rights against individuals to limitations on the anti-social exercise of those legal rights. The law of equity has been moving toward a doctrine that the law should secure satisfaction of the reasonable wants of a property owner with respect to the use of property, but only to the extent that such use is consistent with the interests of society.

courts are forever bound to perpetuate rules, which by reasonable test may be subsequently found to be neither wise nor just, simply because they have once been declared suitable to the situations and institutions of some past time and condition of humanity, is to deny the common law and equitable jurisprudence that flexibility and capacity for growth required to meet the exigencies of each historical epoch.[16] At the heart of most controversies over the regulation of land

16. More than a century ago, Chancellor Kent stated that upwards of a thousand cases in the English and American reports could then be pointed out "which had been overruled, doubted, or limited in their applicaton." The great Chancellor continued by declaring that decisions which seem contrary to reason "ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty of harmony of the system destroyed by the perpetuity of error." Rumsey v. N.Y. & N.E.R. Co., 133 N.Y. 79, 85-86, 30 N.E. 654, 655 (1892).

Every extension of the rights of the "People" as against the unfettered exercise of private or corporate property rights has been resisted in the courts and even in the halls of the legislature on the grounds that there is no "precedent." Of course, if that were a valid objection, the common law today would be the same now as it was during the time of the Plantagenets. Even the British Courts realized that: "When those ghosts of the past stand in the path of justice clanking their medieval chains, the proper course of the judge is to pass through them undeterred." United Australia Ltd. v. Barclay's Bank, Ltd., 1 A.C. 29 (1941).

Of course the modern American statement of that position is found in Woods v. Lancet, in which the New York Court of Appeals said that: "The common law does not go on the theory that a case of first impression presents a problem of legislative as opposed to judicial power." 303 N.Y. 349, 354-56, 102 N.E.2d 691, 695 (1951). The ultimate statement of the fundamental maxim that equity suffers no wrong without remedy has been put forth as follows: "If it were necessary to go much further than it is, in opposition to some sanctioned opinions, in order to open the doors of this court to those who could not obtain [justice] elsewhere, I should not shirk from the responsibility of doing so." Wallworth v Holt, 4 Myl. & C. 619.

While legislative bodies certainly have the power to change old rules of law, nevertheless, when they fail to act, it is the duty of the court to bring the law into accord with present day standards of wisdom and justice. Funk v. United States, 290 U.S. 371, 382 (1933). If the rule were otherwise, we would still be burdened with many of the morally outrageous rules of law that were laid down during the nineteenth century, such as:

> [I]n the eye of the law, so far certainly as civil rights and relations are concerned, the slave is not a person, but a thing. The investiture of a chattel with civil rights or legal capacity is indeed a legal solecism and absurdity. The attribution of legal personality to a chattel slave, legal conscience, legal intellect, legal freedom, or liberty and power of free choice and action, and corresponding legal obligations growing out of such qualities, faculties and action implies a palpable contradiction in terms.

Bailey v. Poindexter's Ex'or., 56 Va. (14 Gratt.) 132, 142-43 (1858). The Virginia Court simply followed the rulings of the Supreme Court of the United States in Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856), in which Chief Justice Taney stated that the Constitution was made by and for White men who were the People who had ordained it in order to secure the Blessings of Liberty for themselves and their posterity, and then proceeded to deny to Negroes ". . . as a subordinate and inferior class of beings, who had been subjugated by the dominant race," the rights of national citizenship.

Only two years before *Dred Scott*, the California Supreme Court extended the impact of a statute which provided that: "[N]o Black or Mulatto person, or Indian shall be allowed to give evidence in favor of, or against a [W]hite man," to include the Chinese because they were "a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point . . . between whom and ourselves nature has placed an impassable difference." People v. Hall, 4 Cal. 399, 405 (1854).

In 1875, when a woman sought to practice law in the State of Wisconsin, the court proclaimed that:

> The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world, . . . [A]ll life-long callings of women, inconsis-

use and the exploitation of natural resources, we find the basic legal question: "What are the constitutional limitations on the public control of private property?" We also find the even more fundamental philosophical question: "What is contained in the *ius abutendi*,[17] the 'bundle of rights' associated with nominal title to real property?"

tent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it. . . . The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife. Nature has tempered women as little for the juridical conflicts of the courtroom as for the physical conflict of the battlefield. . . ."

In re Goodell, 39 Wis. 232, 245 (1875). The court carried its position even further in chastising the male attorney who had the temerity to represent the young lady:

> And when counsel was arguing for this lady that the word person . . . [in the statute describing those qualified to practice law] necessarily includes females, her presence [in the courtroom] made it impossible to suggest to him as *reductio ad absurdum* of his position, that the same construction of the same word . . . would subject woman to prosecution for the paternity of a bastard, and . . . prosecution for rape.

Id. at 246.

17. *Ius Abutendi (jus abutendi)* literally means the right to abuse. By this phrase is understood the right to abuse property, or the state of having full dominion over property; the right to destroy or consume, the right to freely dispose of property. MOREY, ROMAN LAW 383.

Ius Utendi (jus utendi), on the other hand, referred to the right to use property without destroying its substance; a concept similar to the later idea of "use without waste." It was employed in contradistinction to the "*ius abutendi*." The phrase *ius utendi tantum*, referred to the use of property for the purpose for which it is fitted, without destroying it, and which use can, therefore, be repeated.