

2014

Why Restate the Bundle?: The Disintegration of the Restatement of Property

Thomas W. Merrill

Henry E. Smith

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle?: The Disintegration of the Restatement of Property*, 79 Brook. L. Rev. (2014).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol79/iss2/12>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

Why Restate the Bundle?

THE DISINTEGRATION OF THE RESTATEMENT OF PROPERTY

Thomas W. Merrill[†] & *Henry E. Smith*^{††}

INTRODUCTION

The American Law Institute (ALI) has devoted a great deal of time and energy to restating the law of property. To date, the ALI has produced 17 volumes that bear the name *First*, *Second*, or *Third Restatement of Property*. There is unquestionably much that is valuable in these materials. On the whole, however, the effort has been a disappointment. Some volumes seek faithfully to restate the consensus view of the law; others are transparently devoted to law reform. The ratio of reform to restatement has increased over time, to the point where significant portions of the *Third Restatement* consist of repudiating what was done in the *First* and *Second Restatements*,¹ which can hardly inspire confidence. Most damning of all, the effort to restate the law of property remains seriously incomplete. Even after 17 volumes produced over 75 years, the *Restatement of Property* offers no treatment of adverse possession, ignores most of the law of personal property, says nothing about real estate transfers, recording acts, groundwater and mineral rights, or eminent domain, and does not touch intellectual property. The incompleteness reduces the utility of these Restatements as a research tool, and diminishes the incentive of lawyers to draw upon them.

Recent data on the usage of different Restatements confirm the relative weakness of the *Restatement of Property*.²

[†] Charles Evans Hughes Professor of Law, Columbia Law School.

^{††} Fessenden Professor of Law, Harvard Law School.

¹ The THIRD RESTATEMENT repudiates the SECOND's version of the Rule Against Perpetuities, which in turn repudiated the version in the FIRST RESTATEMENT, *see infra* notes 48-66 and accompanying text; and the THIRD RESTATEMENT repudiates the FIRST RESTATEMENT's version of servitudes, *see infra* notes 62-63 and accompanying text.

² We are grateful to Lance Liebman, Executive Director of the ALI, for providing us with this information.

The ALI receives royalty payments for downloads of its Restatements by users of Westlaw. The *Restatement of Property* generates only one-quarter the royalties generated by the *Restatement of Contracts*, and merely 15% of the royalties of the *Restatement of Torts*. Of course, it is possible that the law of property is contested less frequently than contracts or torts. But the *Restatement of Property* is downloaded even less than the *Restatement of Trusts*, which could be regarded as a subfield of property. The data on usage tend to confirm, in our opinion, that lawyers and scholars find the *Restatement of Property* unhelpful compared to many of the other restatement efforts undertaken by the ALI.³

The failure of the *Restatement of Property*, at least relative to *Contracts*, *Torts*, *Trusts*, and a number of other subjects, raises important questions for the ALI and property scholars alike. In this essay we explore the possible causes of that failure. To a certain extent, it can be explained by accidents of history. As we describe in Part I, the *Restatement of Property* was conceived in extremely broad terms, so broad that it was probably unrealistic to expect that it could be completed. The property project has also been dominated by Reporters whose interests have been focused narrowly on particular subsets of the law of property, at the expense of the general law of property. Perhaps most critically, the *Second* and *Third Restatements of Property* have been given over to campaigns for legal reform, often entailing the repudiation of earlier volumes of the Restatement, which has very likely undermined the utility and the credibility of the ALI's effort.

We nevertheless argue that the roots of the failure of the *Restatement of Property* run deeper. As detailed in Part II, the *Restatement of Property* was launched as a deliberate effort to inject greater rigor and clarity into legal analysis by adopting the "scientific" terminology of Wesley Newcomb Hohfeld. Chapter 1 of the *First Restatement of Property* could be described as a Restatement of Hohfeld. This effort failed, as other Reporters were either hostile or indifferent to the program of adopting the Hohfeldian vocabulary.

This does not mean, however, that the Hohfeldian legacy is irrelevant. As we argue in Part III, Hohfeld's analysis

³ Another comparison, which we have not attempted to quantify, is to the relative frequency with which Restatements are referenced in leading casebooks. It is our impression that the RESTATEMENT OF CONTRACTS and the RESTATEMENT OF TORTS appear much more frequently in contracts and torts casebooks than does the RESTATEMENT OF PROPERTY in property casebooks.

of legal concepts was associated with a substantive theory of property as a formless and infinitely malleable collection of rules to be shaped in accordance with ad hoc perceptions of public policy. This substantive theory has come to be associated with the metaphor of the “bundle of rights” or “bundle of sticks.” The theory of property as a plastic concatenation of rules has animated the restatement project from its beginnings to the present day. Yet if this substantive theory is correct, it is unclear why it makes any sense to devote significant intellectual energy to trying to restate the law of property. Existing rules are likely to be the product of policy imperatives of the distant past, perpetuated by path dependency, which are largely irrelevant to today’s world. It would be far better to devote one’s energies to reforming the law, in order to make it coincide with today’s policy preferences. This, we think, describes the fate of the *Restatement of Property*. Its failure lies in significant part in the theory of property that launched it and that has been adhered to ever since.

I. A SHORT HISTORY OF THE *RESTATEMENT OF PROPERTY*

We begin with a brief review of the history of the *Restatement of Property*. That history reveals at least some of the sources of the relative weakness of the *Restatement of Property*. Contrary to Hegel, history is more than the unfolding of the implications of an Idea. Interests, personalities, and simple accidents also matter.

Planning for the *Restatement of Property* began in 1926, when the ALI Executive Committee asked Harry A. Bigelow of the University of Chicago to prepare a report dealing with “the Scope and Classification of the Subject of Property.”⁴ Bigelow responded with a 70-page memo setting forth a blueprint for the anticipated project.⁵ The memo began with a discussion of the meaning of property, which Bigelow defined in extremely broad terms. Property, he stipulated, refers to the rights of persons with respect to “things,” both tangible and intangible, which other persons have a duty to respect.⁶ As defined, “property” included not just rights to land and chattels, but also security interests, choses in action, personal contracts,

⁴ HARRY A. BIGELOW, PRELIMINARY REPORT TO THE COUNCIL ON SCOPE AND CLASSIFICATION OF THE SUBJECT “PROPERTY” 2 (A.L.I. 1926) (hereinafter Bigelow Memo) (reproducing resolution).

⁵ *Id.* at 3-4.

⁶ *Id.* at 5-6.

intellectual goods, enforceable promises, and even reputations.⁷ The potential domain of property, he concluded, is very broad.

Bigelow then proceeded to exclude from this broad universe various topics that by convention were regarded as discrete fields of study. Thus, although the definition was so broad that it included contracts, Bigelow acknowledged that contracts should be excluded because they would be subject to a separate projected *Restatement of Contracts*.⁸ Similarly, although his definition included intangible rights like reputation, Bigelow acknowledged that this should be covered in the *Restatement of Torts*.⁹ Although Bigelow regarded trusts as being more comfortably nested within the field of property, he also recommended that trusts be the subject of a separate Restatement, given that trusts were studied by scholars who specialized in that subject and were not generalists in the field of property.¹⁰ (George Bogart, a trusts specialist and one of Bigelow's colleagues at Chicago, assisted Bigelow in preparing the memo.¹¹) Equity presented a particular puzzle, and Bigelow devoted considerable space to considering whether topics like specific performance of land sale contracts should be included in a *Restatement of Property* or in a *Restatement of Equity*, a task complicated by uncertainty over whether there was to be a *Restatement of Equity*.¹² (No such restatement was ever produced, although the ALI did sponsor a path-breaking *Restatement of Restitution*.¹³)

Viewed from a distance, Bigelow's memo was a classic power grab: claim authority over everything and then concede away discrete subjects where others have staked out turf and would resist encroachment. It worked, in the sense that the Council tacitly endorsed Bigelow's effort and appointed him Reporter for the *Restatement of Property*. The strategy was also to have decisive effects on the future shape of the restatement project. It explains, for example, why wills and estates are included under the umbrella of the *Restatement of Property*, whereas trusts are subject to a separate Restatement, even

⁷ *Id.* at 7-9.

⁸ *Id.* at 8-9.

⁹ *Id.* at 9-10.

¹⁰ *Id.* at 31-32.

¹¹ *Id.* at 2 (noting Bogart's participation). Bogart later served on the Advisory Committee for the First RESTATEMENT OF TRUSTS, see RESTATEMENT (FIRST) OF TRUSTS iii (1935), and, of course, has his name on a prominent treatise devoted to trusts.

¹² Bigelow Memo, *supra* note 4, at 28-42.

¹³ RESTATEMENT (FIRST) OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS (1937). Warren A. Seavey and Austin W. Scott served as reporters.

though, from the perspective of modern legal practice and law school curricula, it would make more sense to cover both topics in a single Restatement, e.g., “Trusts and Estates.” Both wills and trusts fell within Bigelow’s broad definition of “property,” but trusts were specifically hived off, whereas wills and estates were not.

Bigelow’s memo was equally fateful in his discussion of the order in which topics within the field of property should be taken up by the projected Restatement. He argued that the first thing to tackle was estates in land and future interests.¹⁴ Only later would the restaters turn to the legal incidents of ownership, servitudes, personal property, and intellectual property.¹⁵ This ordering of priorities goes a long way toward explaining the incompleteness of the *Restatement of Property*, and especially the heavy emphasis on land at the expense of personal and intangible rights. Estates in land came first, and the ALI never got around to restating much of what Bigelow slated for coverage at a later time.

One suspects that Bigelow’s priorities were strongly influenced by the law school curriculum of the 1920s, which made the estate system derived from English feudalism the centerpiece of the study of property.¹⁶ Interestingly, however,

¹⁴ Bigelow Memo, *supra* note 4, at 63-64.

¹⁵ *Id.* at 61-64

¹⁶ These proclivities can be illustrated in instructional materials prepared by Bigelow and Powell, separately and jointly. In his 1919 casebook on real property, Bigelow’s table of contents consisted of: Chapter I “The Feudal System,” Chapter II “Estates,” Chapter III “Nonpossessory Interests in Land,” Chapter IV “Joint Ownership,” Chapter V “Disseisin and the Remedies Therefor.” 2 HARRY A. BIGELOW, INTRODUCTION TO THE LAW OF REAL PROPERTY (1919); *see also* 2 HARRY A. BIGELOW & JOSEPH WARREN MADDEN, INTRODUCTION TO THE LAW OF REAL PROPERTY (2d ed. 1934). Later, Bigelow and Powell, together with Ralph Aigler, published a famous casebook, RALPH A. AIGLER, HARRY A. BIGELOW & RICHARD R. POWELL, CASES AND MATERIALS ON THE LAW OF PROPERTY (Warren A. Seavey ed., 1942), whose Parts are: 1 “Personal Property,” 2 “Types of Estates in Land,” 3 “Relations Involving Two or More Owners of Property,” 4 “Adverse Possession and Prescription,” 5 “Problems in Conveyancing.” Part 1, apparently by Bigelow (who had previously published a casebook on personal property), engages in a Hohfeldian analysis of the legal protection of an owner’s interests in a car, with citations to Hohfeld, Corbin, and Kocourek. *Id.* at 2-3. (Later in Chapter 1, a position is staked out that “all legal relations can exist only between persons, the legal relations that constitute the law of property concern things . . . but a thing cannot have a legal relation.” *Id.* at 3-4. In contrast to some of Bigelow’s statements during the ALI process, the book goes on to develop a general account of property as entailing rights good against the world, stating that

[t]he second characteristic [of property] is that the four relations discussed in the preceding paragraphs are all relations between A and an indefinitely large number of persons, or as it is sometimes put, “against the world at large,” or to use a common but, for the reasons just discussed, misleading Latin phrase, “in rem.”

Bigelow sought to justify his ordering of topics in a very modern way, by generating an empirical study of the relative frequency with which different topics in property law appear in reported judicial decisions. The empirical study, he suggested, supported his recommendation to tackle real property and the estate system first.¹⁷ Yet an examination of his data, reproduced in an appendix to the memo, casts doubt on this.¹⁸ Even in the 1920s, mortgages and liens generated more litigation than estates; for that matter, so did personal property disputes (even after excluding cases involving sales) and landlord-tenant law.¹⁹ Today, of course, the topic Bigelow put at the forefront has declined greatly in significance, and the ones he put off to the future have emerged as having even greater importance than they had in his day. Rigorous adherence to empiricism would have produced a sequencing of topics for the projected Restatement much more consistent with future trends.

Perhaps most significantly, Bigelow's ambitious agenda sowed the seeds of failure. The projected scope of the project was so broad that it would take a herculean effort to bring it to conclusion. Perhaps Bigelow was Hercules, but we will never know, for he resigned his position as Reporter after only two years, upon being appointed Dean of the University of Chicago Law School.²⁰ His replacement was Richard R. Powell, of Columbia Law School, who had also advised on the planning memo and was a member of the original Advisory Committee on Property.²¹

Powell was a natural choice to take over as Reporter. He was deeply learned and widely respected in his field. Nevertheless, he did not have the temperament needed to execute Bigelow's ambitious program. Powell's scholarship was

Id. at 4. (contrasting this "marked characteristic of property" with the situation in contract); *see also id.* at 5 (generalizing the analysis to real property). Part 2, apparently by Powell, includes not only Chapter 7 "Historical Background" but also Chapter 14 "Equitable Estates—Uses Prior to 1536"! *Id.* at 561. To cite another example, in the late 1920s and early 1930s, the West Publishing Company published five volumes on Property Law by Columbia Law School professors for use in the first year curriculum. *See* RICHARD R. POWELL, CASES AND MATERIALS ON THE LAW OF POSSESSORY ESTATES (West, Pub. Co. 1933). They were an introductory volume on "Possessory Estates," two volumes on "Trusts and Estates," a volume on "Vendor and Purchaser," and a volume on "Landlord and Tenant." *Id.* at v-vii. All five volumes dealt almost exclusively with real property. *Id.*

¹⁷ Bigelow Memo, *supra* note 4, at 14.

¹⁸ *Id.* App. at 74-75. The survey was comprised of all reported cases digested in the American Digest, Volume 22-A, covering the first four months in 1925.

¹⁹ *Id.*

²⁰ RESTATEMENT (FIRST) OF PROPERTY, vol I, introduction x (1936).

²¹ *Id.* at xi.

characterized by an insistence on “meticulous accuracy.”²² He was also fascinated by details rooted in English history. Biographical sketches of his years at Columbia feature his mastery of the Socratic teaching method, including an exchange in which he asked a student to explain “[w]hat effect did the Statute of Quia Emptores have upon the creation of tenancies in frankalmoign?”²³ Powell’s announced intention, upon taking over as Reporter, was to avoid misleading generalities and “particularize extensively,” although he admitted that this “has the disadvantage of restricting the immediate aid rendered by the Institute to quite narrow fields in the Law of Property.”²⁴ Powell was neither a theorist nor a reformer by temperament. He recognized that the law evolved, but it did so slowly, and in order to understand the law one had to start with history. Although it would be inaccurate to characterize Powell as a legal formalist of the sort associated with Christopher Columbus Langdell, he unquestionably regarded the restatement enterprise as one in which the committee’s task was to uncover the superior “rule” implicit in existing legal sources.

This rule-based and historically-grounded orientation is highly visible in the first four volumes of the Restatement produced under Powell’s supervision. Perhaps the most telling example is Chapter 5, for which Powell was solely responsible, which spends 127 pages explicating “Fees Tail and Related Estates.”²⁵ The fee tail had been abolished in virtually every state for over one hundred years when the Restatement was prepared. The chapter is therefore devoted to explicating the estates into which the fee tail was converted under different statutes in different states, and the case law interpreting these statutes. The result was definitive. But given the obscurity of the topic, its fundamental irrelevance, and the impossibility of stating a single rule for all jurisdictions, this was surely a misplaced commitment of resources for a Restatement, especially given all the other items waiting on Bigelow’s agenda.

Whether it was due to the change in leadership, or to Powell’s insistence on a meticulous elaboration of the old estate

²² John Ritchie, III, Book Review, 63 HARV. L. REV. 732, 734 (1950) (reviewing RICHARD R. POWELL, *THE LAW OF REAL PROPERTY* (1st ed. 1949)).

²³ JULIUS GOEBEL, JR., *A HISTORY OF THE SCHOOL OF LAW COLUMBIA UNIVERSITY* 268 (1955); see also *Text of the Resolution of the Columbia University Faculty of Law in Honor of Richard Roy Belden Power on the Occasion of his Retirement*, 60 COLUM. L. REV. 105 (1960).

²⁴ Richard R. Powell, *Restatement of the Law of Property*, 16 A.B.A. J. 197, 198 (1930).

²⁵ RESTATEMENT (FIRST) OF PROPERTY §§ 59-106 (1936).

system, the *Restatement of Property* soon lagged badly behind other restatement efforts. The first two volumes did not appear in print until 1936, well after Agency, Contracts, Torts, and other efforts had made their initial debut.²⁶ At some point in the mid-1930s, William Draper Lewis, the Executive Director of the ALI, became alarmed. In 1935, the decision was made to transfer a group of property specialists working on the legal incidents of ownership, under the leadership of Everett Fraser of the University of Minnesota Law School, from the *Restatement of Property* to the *Restatement of Torts*.²⁷ This explains why a collection of topics denominated “natural rights in land”—including nuisance, lateral and subjacent support, and riparian water rights—appears in Volume IV of the *Restatement of Torts*, rather than in the *Restatement of Property*.

By the time Powell delivered the first two volumes of the *Restatement of Property* in 1936, a further decision was made to subdivide the property working group. Powell would continue to lead “Group 1,” explicating the constructional principles that govern estates in land and future interests and the Rule Against Perpetuities. A new “Group 2,” under the leadership of Oliver Rundell of the University of Wisconsin Law School, would tackle servitudes.²⁸ Powell delivered his third volume, on constructional principles, in 1940, and a fourth and final volume, on the Rule Against Perpetuities and related restrictions on the creation of property interests, in 1944. Rundell also completed the work on servitudes in 1944.²⁹ After that, World War II ended the original restatement project. Although Torts and Contracts were relatively complete efforts, the *Restatement of Property* covered only estates in land and servitudes. If one looked into the *Restatement of Torts*, one could find significant additional material relevant to property, including a fairly complete treatment of the right to exclude and privileges overriding the right to exclude³⁰ and the incidents of

²⁶ Volumes 1 and 2 of the RESTATEMENT (FIRST) OF CONTRACTS appeared in 1932; volumes 1 and 2 of the RESTATEMENT (FIRST) OF AGENCY appeared in 1933; volumes 1 and 2 of the RESTATEMENT (FIRST) OF TORTS appeared in 1934; the RESTATEMENT (FIRST) OF CONFLICTS OF LAW appeared in 1934; and volumes 1 and 2 of the RESTATEMENT (FIRST) OF TRUSTS appeared in 1935.

²⁷ RESTATEMENT (FIRST) OF TORTS vii, intro. (1939)

²⁸ RESTATEMENT (FIRST) OF PROPERTY, vol 1, introduction xiii (1936).

²⁹ RESTATEMENT (FIRST) OF PROPERTY: FUTURE INTERESTS CONTINUED AND CONCLUDED (1940); RESTATEMENT (FIRST) OF PROPERTY: SOCIAL RESTRICTIONS IMPOSED ON THE CREATION OF PROPERTY INTERESTS (1944); RESTATEMENT (FIRST) OF PROPERTY: SERVITUDES (1944).

³⁰ Volume I of the RESTATEMENT (FIRST) OF TORTS includes very extensive coverage of basic rights in property and exceptions thereto. Chapter 7, covering 40

ownership covered by Fraser's ad hoc group transferred from Property to Torts. But the balance of Bigelow's ambitious agenda, including landlord-tenant, mortgages and liens, all of personal property, and intellectual property went untouched.

When the ALI decided to revive the *Restatement of Property* project in 1970, Powell was again appointed to the advisory committee, but the position of Reporter went to A. James Casner of Harvard Law School.³¹ Casner was a protégée of Powell's, having obtained a J.S.D. degree from Columbia under Powell's supervision while a young scholar on leave from Maryland Law School. Powell was sufficiently impressed by his student that he had Casner appointed to the Advisory Committee for the *Restatement of Property*, where he worked on Chapter 7, which dealt with class gifts (the topic of his dissertation), and prepared the index for volumes I and II.³² Casner made important contacts as the junior member of the advisory committee, especially in developing a close friendship with Barton Leach of Harvard Law School. Leach later secured Casner a visiting professorship at Harvard, which turned into an offer of tenure.³³ After serving as an intelligence officer in World War II, Casner returned to Harvard. He and Powell briefly discussed collaborating on a property treatise, but Powell decided to develop a treatise on his own, which still bears his name.³⁴ Casner then put together a team of authors to produce the *American Law of Property*, which was effectively a competing treatise to Powell's.³⁵ Casner and Leach also collaborated on a popular property casebook.³⁶ Casner maintained close ties with

pages, covers "Invasions of the Interest in the Exclusive Possession of Land and its Physical Condition (Trespass on Land)"; Chapter 8, covering 149 pages, deals with "Privileged Entries on Land"; Chapter 9, covering 88 pages, treats "Intentional Invasions of Interests in the Present and Future Possession of Chattels"; and Chapter 10, covering 46 pages, addresses "Privileges Intentionally to Invade Interests in Present and Future Possession of Chattels." This material is covered in only the most cursory fashion in torts casebooks today and the material is more likely to be encountered in basic property law courses.

³¹ The information on Casner and his tenure as Reporter of the RESTATEMENT (SECOND) OF PROPERTY has been gleaned from an historical video interview with Casner produced by the ALI in 1990. *ALI Audiovisual History—A. James Casner*, (A.L.I. 1990), available at http://www.youtube.com/watch?v=QTH1q5B_1nk&list=PL1C004D53890D3AA1.

³² *Id.* at 02:03-06:25; 24:20-24:28.

³³ *Id.* at 09:30-14:47.

³⁴ RICHARD R. POWELL, *POWELL ON REAL PROPERTY* (1st ed. 1949). The current edition, a loose-leaf treatise published in 17 volumes, is *Powell on Real Property* (Michael Allen Wolf, general ed., 2013).

³⁵ *AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES* (A. James Casner ed., 1952).

³⁶ A. JAMES CASNER & W. BARTON LEACH, *CASES AND TEXT ON PROPERTY* (1st ed. 1950).

the ALI during this period, serving as Reporter for a *Restatement of Estate and Gift Taxation* before also being appointed the new Reporter for Property.³⁷

Casner lacked Bigelow's theoretical bent, and did not share Powell's scholarly fascination with historically-derived rules. He was, by temperament, a reformer. Casner had stirred up the tax bar with his proposal for a one-time generation-skipping tax based on life expectancies as part of his work on estate and gift taxes.³⁸ When asked for his advice about how to proceed with a new restatement of property, Casner argued that the first task should be landlord-tenant law.³⁹ He reasoned, sensibly enough, that the *First Restatement* had said virtually nothing about this area of property law. But he was also motivated by the awareness that landlord-tenant law was a hot topic at the time among those agitating for legal reform to assist the poor, and he saw the Restatement as a means for lending weight to these efforts.⁴⁰

Casner's effort to use the Restatement as a vehicle for landlord-tenant reform proved to be highly controversial. The advisory committee included a number of practicing lawyers who specialized in negotiating commercial leases;⁴¹ they were skeptical about the need for implied warranties of habitability and rules mandating that landlords mitigate damages when tenants abandon leaseholds.⁴² Casner also had to contend with Charles J. Meyers, of Stanford Law School, who argued, following the tenets of the nascent law and economics movement, that mandatory tenant rights would diminish the supply of rental units and increase prices.⁴³

After seven years of wrangling, two volumes on landlord-tenant law emerged in 1977. The final product reflected a compromise between Casner and the reformers on the one hand and the skeptics on the other. For example, the Restatement endorsed the implied warranty of habitability, but said it could be waived by landlords in return for consideration

³⁷ *ALI Audiovisual History*, *supra* note 31, at 44:11-44:30.

³⁸ *Id.* at 44:32-45:50; 47:13-47:55.

³⁹ *Id.* at 49:15-51:01.

⁴⁰ *Id.* at 50:25-52:02.

⁴¹ In contrast to the FIRST RESTATEMENT, which was dominated by academics, Casner was the only academic on the landlord-tenant volumes. RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT ix, intro. (1977). The other committee members were either practitioners or judges. *Id.*

⁴² See *ALI Audiovisual History*, *supra* note 31, at 52:16-53:09.

⁴³ Charles J. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879, 893 (1975).

provided such a waiver was not “unconscionable or significantly against public policy.”⁴⁴ As a result, the Restatement’s landlord-tenant volumes did not satisfy either the reformers or the skeptics. Overall, these volumes have had comparatively little impact on the law.

After the landlord-tenant project was done, Casner convinced the ALI to undertake a series of volumes on “Donative Transfers”—essentially wills and estates.⁴⁵ Again, there was logic to this, since Bigelow’s original blueprint had hived off trusts but implicitly left wills and estates within the domain of property. It was no coincidence, however, that estate planning had become the central concern of Casner’s own scholarly efforts, while his interest in basic property law had waned. Casner never revised the *American Law of Property* after it was published in 1952-54, and no supplement was produced after 1977.⁴⁶ Instead, he devoted his scholarly energies largely to a multi-volume treatise on estate planning.⁴⁷ Once again, Casner’s reforming impulse dictated the agenda. This time, his initial target was the venerable Rule Against Perpetuities.

The First Restatement had considered the Rule Against Perpetuities in Volume IV, where Powell had produced a typically thorough restatement of the conventional understanding of the Rule, derived from John Chipman Gray’s treatise on the subject.⁴⁸ The traditional rule, as explicated by Powell and before him Gray, was complex and a potential trap for those not advised by the best lawyers. But it had the virtue of allowing the validity of future interests to be determined as soon as a conveyance took effect, because the Rule was applied by considering all possible future contingencies (“what might happen”). Casner, prodded by his colleague Barton Leach, was a proponent of changing the Rule by considering what actually did happen (“wait and see”).⁴⁹ This reform had the virtue of eliminating some very low-probability scenarios easily overlooked by lawyers (fertile octogenarians, unborn widows, and the like), but at the price of

⁴⁴ RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 5.6 (1977).

⁴⁵ See *ALI Audiovisual History*, *supra* note 31, at 57:25-59:13.

⁴⁶ *Id.*, at 1:07:16-1:08:37.

⁴⁷ A. JAMES CASNER, *ESTATE PLANNING: CASES, STATUTES, TEXT, AND OTHER MATERIALS* (1st ed. 1953).

⁴⁸ JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* (1st ed. Boston, Little, Brown, & Co. 1886).

⁴⁹ *ALI Audiovisual History*, *supra* note 31, at 59:19-59:55, 1:01:51-1:02:56. Leach had long been a critic of the traditional rule, largely on the ground that it generated unfair surprises. See, e.g., Barton Leach, *Perpetuities in Perspective: Ending the Rule’s Reign of Terror*, 65 HARV. L. REV. 721, 730 (1952).

creating long periods of uncertainty, which could impair the alienability of property.

Casner's advocacy of "wait and see" triggered an emphatic rebuke by his former mentor Powell, in a dramatic confrontation at the ALI annual meeting.⁵⁰ The gist of the Powell critique was that wait and see "leaves the location of who owns what unascertainable for the entire period of the rule."⁵¹ Others pointed out that wait and see had been adopted by only a small number of jurisdictions, and that no intervening change in circumstances had occurred since 1944 that would justify eliminating the traditional rule.⁵² Casner nevertheless prevailed a year later, and "wait and see" was officially endorsed by the ALI with the publication of the *Restatement (Second) of Property: Donative Transfers* in 1983.⁵³ The reform was eventually adopted by a significant number of states, although more through adoption by state legislatures of the Uniform Statutory Rule Against Perpetuities, rather than through judicial revision relying on the Restatement.⁵⁴ In fact, some state courts have rejected "wait and see" on the ground that such a reform was the province of the legislature, not the courts.⁵⁵

Casner soldiered on as Reporter for another decade, producing successive volumes on estate planning, namely powers of appointment (1986), class gifts (Casner's dissertation topic) (1988), and gifts (1992).⁵⁶ He made no move to fill the other gaps in property that remained under Bigelow's original plan.

The Casner era marked a decisive turn away from the conception of the Restatement as a distillation of the law as it is, to a view of the Restatement as a vehicle for laying down the law as it should be. Something similar happened in other Restatements in the second series, for example Prosser's *Restatement (Second) of Torts*, with its advocacy of strict products liability.⁵⁷ In an interview conducted near the end of his life,

⁵⁰ A.L.I., 55TH ANNUAL MEETING: PROCEEDINGS 1978 at 250-56, 285-86 (1979).

⁵¹ *Id.* at 251.

⁵² *E.g.*, *id.* at 258 (comments of Louis Lusk); *id.* at 267 (comments of Laurence H. Eldredge).

⁵³ RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 1.4 (1983); *see id.* at viii.

⁵⁴ HELENE SHAPO ET AL., THE LAW OF TRUSTS AND TRUSTEES § 214, at n.28 (2011).

⁵⁵ *E.g.*, *Symphony Space, Inc. v. Pergola Props., Inc.*, 669 N.E.2d 799, 808 (N.Y. 1996).

⁵⁶ RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS, div. II, pt. V (1986) (Powers of Appointment); RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS, div. II, pt. VI (1988) (Class Gifts); RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS, div. III (1992) (Requirements for Effectuating a Donative Transfer).

⁵⁷ RESTATEMENT (SECOND) OF TORTS § 402A (1965).

Casner forthrightly defended the conception of the Restatement as an instrument of legal reform.⁵⁸ He acknowledged that it was difficult to draw the line between restatement-style reform, which implicitly invites the judiciary to change the law, and reform produced by promulgating uniform laws, which target the legislature as the appropriate instrument of legal change.⁵⁹ But Casner betrayed no doubt about the propriety of asking committees of lawyers, headed by law professors, to agitate for legal reform under the guise of “restating” the law. Epistemological modesty was not part of his makeup.

When the ALI decided to launch a third series of property restatements, it abandoned the practice of appointing a single reporter to oversee the effort. Instead, the ALI decided that henceforth it would appoint different reporters to head up different topics within the field of property. This approach recognized the reality that a single reporter was unlikely to have the time and energy, not to mention the expertise, to oversee a vast area like property (especially as staked out by Bigelow). Both Powell and Casner, in their different ways, had settled on discrete areas within the field of property that reflected their own research interests, without venturing into more unfamiliar territory. Nevertheless, the appointment of specialists to oversee particular topics probably accentuated the trend toward using the Restatements as platforms for pushing reform. Specialists are likely to have strong views about the right and wrong ways to approach a topic, and to see their position of leadership as an occasion to advance the right and the good.

The *Third Restatement of Property* would devote its attention to three different topics. The first—mortgages—filled a glaring gap left by the *First* and *Second Restatements*, and was ably executed by Reporters Grant Nelson and Dale Whitman.⁶⁰ The other two topics were overtly reformist. Ironically, both sought to replot ground that had already been covered in the *First* and *Second Restatements of Property*. In effect, the ALI, in its zeal to advance particular conceptions of desirable legal reform, began to cannibalize its own prior efforts at reform.

The first of the new reformist efforts was the *Restatement (Third) of Property: Servitudes*, published in two volumes in 2000. The ALI had already restated servitudes, in Volume V of the *First*

⁵⁸ *ALI Audiovisual History*, *supra* note 31, at 1:08:38-1:11:20.

⁵⁹ *Id.* at 1:13:13-1:13:54.

⁶⁰ RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES (1997).

Restatement, under Reporter Oliver Rundell.⁶¹ This was a quintessential effort to restate the law as it is, with all its quirks and curlicues. The reporter for the new servitudes project, Susan French, and her colleagues were eager to streamline and rationalize the law. Since most servitudes—whether they are easements, covenants, licenses, or profits—originate in some contractual undertaking, the new Restatement advocated the adoption of a very contract-like conception of servitudes, centered on the intent of the original contracting parties and subject to standard contractual defenses like restraint of trade, unconscionability, and violation of public policy.⁶² Old requirements, like privity of estate and touch and concern, designed to limit the promises that could be imposed on non-consenting future owners, were unceremoniously tossed aside.⁶³ Whatever the merits of this reconceptualization as a proposal for legislative reform, it was apparently too radical for the courts. To date, the courts have largely ignored the reforms urged by the *Restatement (Third) of Servitudes* and have instead continued to apply the “outmoded” common law in determining when servitudes run with the land.⁶⁴

The other reformist effort appeared under the title *Restatement (Third) of Property: Wills and Other Donative Transfers*, which appeared in volumes released between 1999 and 2011 under the leadership of Reporter Lawrence Waggoner and Associate Reporter John Langbein.⁶⁵ The reader will recall that Casner produced four volumes under a similar title as part of the *Second Restatement of Property*, the last volume of which was released in 1992. The best explanation for the new series of volumes is simply that the new Reporters disagreed with the previous Reporter on a number of fronts and were eager to advance their own preferred positions. Perhaps most strikingly, the *Third Restatement* repudiated Casner’s “wait and see” reform of the Rule Against Perpetuities, offering up yet another version

⁶¹ RESTATEMENT (FIRST) OF PROPERTY: SERVITUDES (1944).

⁶² RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 2.2, 3.1, 3.6, 3.7 (2000).

⁶³ *Id.* at ch. V, introductory note; § 3.2. As the Executive Director observed when the volumes were released, “[t]he large ideas in this Restatement are very different from those that governed its predecessor.” *Id.* at ix.

⁶⁴ THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 1041-42 (2d ed. 2012); Note, *Touch and Concern, the Restatement (Third) of Property: Servitudes, and a Proposal*, 122 HARV. L. REV. 938, 944-45 (2009).

⁶⁵ 1 RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS (1999); 2 RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS (2003); 3 RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS (2011).

of the Rule Against Perpetuities.⁶⁶ Under the Waggoner-Langbein proposed reform, the Rule would prohibit any conditional gift for the benefit of persons born more than two generations after the transferor.⁶⁷ Ironically, by the time the *Third Restatement* repudiated “wait and see,” it had become the majority rule. No state, however, had ever adopted the Waggoner-Langbein two-generation proposal. It was offered up as a pure reform, with no pretense of restating the law at all.⁶⁸

We agree with Waggoner and Langbein that some form of the Rule Against Perpetuities is desirable, and we agree with their rejection of Casner’s version of the “wait and see” reform. But the ALI is now on record as endorsing three different versions of the Rule Against Perpetuities. This has occurred during a period when the Rule has been abolished or severely curtailed in many states in an effort to attract trust business.⁶⁹ The idea that yet another reform of the Rule endorsed by the ALI will staunch its evisceration by special interest legislation is fanciful. By the time the ALI has restated itself three times, any credibility it can claim based on expert knowledge of existing legal authority has evaporated. Its pronouncements will be regarded as having no more authority than proposals for reform appearing in a law review.

This brief overview suggests that much of the failure of the *Restatement of Property* can be laid to accidents of history. Bigelow’s scoping of the project in extremely broad terms, his resignation as Reporter before significant progress had been made, Powell’s slow and meticulous leadership animated by his fascination with historical obscurities, Casner’s dogged pursuit of particular reforms at the expense of all else, the fragmentation of

⁶⁶ RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS, ch. 27, introductory note (2010). Reporter Waggoner had previously been supportive of the wait and see approach, but had urged the adoption of a fixed number of years as the waiting period rather than the traditional lives in being plus 21 years. See Lawrence W. Waggoner, *Perpetuities: A Perspective on Wait-and-See*, 85 COLUM. L. REV. 1714, 1714 (1985).

⁶⁷ RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 27.1

⁶⁸ Reporter Waggoner has acknowledged that the new position on perpetuities “is aspirational.” Lawrence W. Waggoner, *What’s in the Third and Final Volume of the New Restatement of Property that Estate Planners Should Know About*, 38 ACTEC L.J. 23, 42 (2012). He justifies this on the ground that perpetuities law is “now statutory,” so “[i]f the Restatement is to be successful in shaping the law, it will have to be through legislation.” *Id.* at 42-43. This ignores that perpetuities law, even if embodied in legislation, draws on common law concepts, which in turn require judicial interpretation. In any event, it is an acknowledgment that the Restatement has taken on a role indistinguishable from an editorial supporting law reform.

⁶⁹ Robert Sitkoff & Max Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005).

authority among multiple Reporters for the third round, and the overtly reformist rather than “restatist” aspirations of the volumes produced in the third round—all of these factors contributed to the production of 17 volumes that receive relatively little attention from lawyers and scholars, and have had little influence with the courts.⁷⁰

II. THE HOHFELDIAN FOUNDATION OF THE *RESTATEMENT OF PROPERTY*

We have yet to consider the most interesting aspect of the history of the *Restatement of Property*, namely, that it was originally conceived as an implementation of the typology of legal concepts introduced by a Yale Law Professor named Wesley Newcomb Hohfeld. Although Hohfeld wrote less than voluminously and died at the age of 39 in 1918, his ideas had a pronounced influence on legal scholars, especially in the inter-War period. Hohfeld engaged in what today would be called conceptual analysis. His most famous contribution was to break apart the concept of “right” into four distinct ideas—right, privilege, power, and immunity—each having its own “correlate” and “opposite.”⁷¹ He also criticized the distinction between *in personam* and *in rem* rights, arguing that all rights pertain to relations among persons, rather than relations of persons to things.⁷²

Hohfeld himself can claim some credit for the formation of the American Law Institute. He gave a speech to the ABA annual meeting in 1914 urging the formation of an institution devoted to clarifying and harmonizing the law.⁷³ Although he

⁷⁰ We make no attempt here to test the positive theory of “private legislatures” put forward by Alan Schwartz and Bob Scott, which emphasizes the informational advantages of reformers and special interest groups relative to the general membership of such lawmaking bodies. Alan Schwarz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 597 (1995). Broadly speaking, however, it is our impression that in the field of property the “reformers,” i.e. law professors, have played a more significant role than have interest groups. The landlord-tenant volumes may be a partial exception.

⁷¹ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28-59 (1913).

⁷² Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 718-33 (1917).

⁷³ N. E. H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 L. & HIST. REV. 55, 58-59 (1990). The address, entitled “A Vital School of Jurisprudence and Law: Have American Universities Awakened to the Enlarged Opportunities and Responsibilities of the Present Day?,” is reproduced in WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 332-84 (Walter Wheeler Cook, ed., 1923).

died before this vision was realized, some of the founders of the ALI, most importantly William Draper Lewis, the first Executive Director, were enamored of the notion that Hohfeld's "scientific" terminology might help bring greater clarity to the law.⁷⁴ Bigelow was of the same mind, having engaged in Hohfeldian analysis in some of his previous scholarship.⁷⁵ Immediately upon being appointed Reporter for the *Restatement of Property*, Bigelow set about drafting a proposed Chapter 1 devoted to setting forth precise definitions of "general terms" to be used in restating the law of property.⁷⁶ That chapter tracks Hohfeld's conceptual analysis of fundamental legal terms so closely it could almost be described as a Restatement of Hohfeld.⁷⁷

The Hohfeldian roots of Chapter 1 were confirmed at a meeting of the ALI Council in 1929. When a council member remarked on the close resemblance between the definitions in Chapter 1 and Hohfeld's fundamental legal concepts, Bigelow acknowledged that "[w]ith modifications we very definitely took Mr. Hohfeld's ideas as the basis upon which we framed these

⁷⁴ G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 L. & HIST. REV. 1, 30 (1997). White argues that Hull exaggerates Hohfeld's reformist agenda, *id.* at 28 n.80 (contrasting N.E.H. Hull, *Vital Schools of Jurisprudence: Roscoe Pound, Wesley Newcomb Hohfeld, and the Promotion of an Academic Jurisprudential Agenda, 1910-1919*, 45 J. LEGAL EDUC. 235, 270 (1995)), and that there is little to no evidence that the early restaters understood the Hohfeldian system or its subversive implications. *Id.* at 29. *But see also* Hull, *supra* note 73.

⁷⁵ See Harry A. Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639, 640 (1913) (citing Hohfeld); Harry A. Bigelow & J.W. Madden, *Exception and Reservation of Easements*, 38 HARV. L. REV. 180, 185-88 (1924). In his famous article on covenants, Bigelow also cites two of Hohfeld's antecedents in analyzing rights and privileges, Terry and Salmond. Bigelow, *The Content of Covenants in Leases*, *supra* at 640 n.5, 641 nn.13-14. He did the same in an early speech on easements, Harry A. Bigelow, *Natural Easements*, 9 U. ILL. L. REV. 541, 543 n.7, 544 n.8, 10 (1915). Bigelow's discussion in this speech suggests a familiarity with Hohfeld's unique contributions:

First [the owner] has what are ordinarily called privileges or permissive rights with respect to the land, i.e., he may use it as he sees fit; he may dig in it; erect buildings on it, cultivate it, or he may let it lie idle and do nothing with it: in fact the privileges of user of an owner of land are so varied that it is useless to attempt to enumerate them. It will be noticed that there are no duties on the part of other members of society correlative to these privileges [sic], the relation of any such other member is purely negative. All that can be said is that no right of his is violated by the landowner's exercising any of these privileges.

Id. at 543. Interestingly, in this passage, Bigelow recognizes that the open-ended set of privileges is not (effectively cannot be) delineated directly. *Id.* He also discusses how "[i]n addition to these privileges of user any given landowner has certain rights in the narrow sense, i.e. legal relations that imply correlative duties on the part of other members of society." *Id.* This was before Hohfeld published his analysis of in rem rights.

⁷⁶ RESTATEMENT (FIRST) OF PROPERTY ch. 1 (1936).

⁷⁷ *Id.*

definitions.”⁷⁸ Immediately after Bigelow acknowledged the debt to Hohfeld, Lewis chimed in:

[T]he importance to the Institute of these first five Sections is very wide. We started the Restatement of the law of Property very largely to be sure that in the use of these terms describing fundamental concepts of the law we were correct, and we asked the Property group to work them out. They have done so and their conclusions are quite a compelling force with the other Reporters.⁷⁹

Lewis later added that the first chapter of Property had been circulated to all reporters of other subjects and with the exhortation to use the words “as Mr. Bigelow has used them in this Tentative Draft.”⁸⁰

Bigelow proceeded to offer a spirited defense of the Restatement’s adoption of Hohfeld’s four different definitions of “right.” He explained that “[w]hat we are trying to do is to make as scientific an exposition as we can of the law of real property” and that the first step in doing so was “to free ourselves from the ambiguities and the inexactness of expression that would exist if we did not differentiate these various meanings of the word right.”⁸¹ A particularly telling exchange occurred when one of the council members, a Mr. Beers, challenged the accuracy of the definitions on the ground that there was no mention of the idea that property “is a right against all persons, against all the world.”⁸² One of Hohfeld’s views, contrary to conventional understanding, was that rights in rem or “against the world” could be cashed out in terms of clusters of in personam rights.⁸³ Channeling Hohfeld, Bigelow replied that “I do not believe that there is any such thing as a right against the world at large, against everybody.”⁸⁴ He acknowledged that one could have identical rights against different individuals. But it is also possible that the rights “may vary according to the man.”⁸⁵ He was adamant that, “accurately speaking,” there was “no such

⁷⁸ Harry A. Bigelow & Richard R. Powell, *Discussion of Property Tentative Draft No. 1*, 7 A.L.I. PROC. 199, 207 (1929). The only “modification” appears to be the substitution of the phrase “absence of right” for Hohfeld’s “no-right.” *Id.* at 210-11.

⁷⁹ *Id.* at 207.

⁸⁰ *Id.* at 209.

⁸¹ *Id.* at 213-14.

⁸² *Id.* at 211.

⁸³ Specifically, he argued that “in rem” rights were better seen as “multital,” which means a cluster of many “unital” or one-on-one right-duty pairs, whereas “paucital” rights were clusters of few unital rights. Hohfeld, *supra* note 72, at 718-33. For discussion, see Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 780-89 (2001).

⁸⁴ Bigelow & Powell, *supra* note 78, at 215.

⁸⁵ *Id.*

thing as a right against the world at large, or as the older authorities said, in rem.”⁸⁶ In the last analysis, he said, there is

nothing but a series of rights against various specified individuals and ordinarily while it is accurate to say you have got a right against everybody, against the world at large, yet when you come to the Restatement where it becomes essential to analyze your right more carefully, I do not want to find ourselves committed to the proposition that there is such a thing as a right against the world at large or against an indeterminably large number of people.⁸⁷

Bigelow was arguably not entirely successful in extirpating any reference to rights “in rem” from the first draft of Chapter 1. The persistent Mr. Beers noted that “interests in land” was defined as rights “against the members of society in general not to be interfered with in respect of the land.”⁸⁸ He pointedly asked whether the latter notion was not the same as a right “against the world at large.”⁸⁹ Bigelow responded that the phrase “against members of society in general” was intended “to cover the meaning of the old phrase ‘in rem’ which I have discarded.”⁹⁰ He insisted, however, that “rights against members of society in general” did not mean the same thing as rights “universally applicable.”⁹¹ Later, the reference to ownership of land including rights against “members of society in general” was changed into a definition of “possessory interests in land,” avoiding any suggestion that rights of “ownership” might entail universal duties.⁹²

The Hohfeldian ideas in Chapter 1 survived the skeptical questioning by the Council. After he took over as Reporter in 1929, Powell showed no inclination to tinker with Bigelow’s handiwork. As published in 1936, much of Chapter 1 reads as if it were drafted by Hohfeld himself. Consider the four opening sections:

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 218.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 217-18. The new definition of “Possessory Interests in Land” was modified to read: “a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land.” RESTATEMENT (FIRST) OF PROPERTY: POSSESSORY INTERESTS IN LAND § 7 (1936). Given that ownership of land generally entails possession, or at least the right to determine who has possession, the concession that possession entails rights against the world would seem to imply that ownership does too.

§ 1. Right.

A right, as the word is used in this Restatement, is a legally enforceable claim of one person against another, that the other shall do a given act or shall not do a given act.

Comment:

*Correlative duty. * * **

§ 2. Privilege.

A privilege, as the word is used in this Restatement, is a legal freedom on the part of one person as against another to do a given act or a legal freedom not to do a given act.

Comment:

a. *Correlative absence of right. * * **

§ 3. Power.

A power, as the word is used in this Restatement, is an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act.

Comment:

a. *Correlative liability. * * **

§ 4. Immunity.

An immunity, as the word is used in this Restatement, is a freedom on the part of one person against having a given legal relation altered by a given act or omission to act on the part of another person.

Comment:

a. *Correlative disability. * * *⁹³*

How far the adoption of Hohfeldian terminology in chapter 1 affected the balance of the content of the original *Restatement of Property* is open to question. The first two volumes of the *Restatement of Property*, produced by Powell with Bigelow looking over his shoulder, display a conscientious effort to deploy the Hohfeldian definitions set forth in Chapter 1.⁹⁴ But after

⁹³ RESTATEMENT (FIRST) OF PROPERTY §§ 1-4 (1936).

⁹⁴ One can cite any number of instances in the first volume of the Restatement in which the Hohfeldian vocabulary is utilized. Some examples:

Chapter 1, the First Restatement quickly plunged into explicating the various estates in land and future interests, more or less following conventional understandings. In these provisions it is difficult to discern any substantive impact associated with the use of Hohfeldian terminology, whether it achieved any clarifying effect or not.

Whatever its impact on the First *Restatement of Property*, the hopes of Executive Director Lewis that Chapter 1 of the *Restatement of Property* would serve as a template for the adoption of a consistent “scientific” terminology throughout all Restatements were not realized. In 1933, George Farnum, himself an enthusiastic proponent of Hohfeldian terminology, undertook an analysis of the emerging work product of the ALI with a view to determining whether Hohfeldian language was being adopted consistently.⁹⁵ Farnum gave high marks to the *Restatement of Property* and to the *Restatement of Business Associations*, where Lewis himself was serving as Reporter.⁹⁶

§ 24. Condition Subsequent.

The term “condition subsequent” denotes that part of the language of a conveyance, by virtue of which upon the occurrence of a stated event the conveyor, or his successor in interest, has the power to terminate the interest which has been created subject to the condition subsequent, but which will continue until this power is exercised.

....

§ 49. Privilege to Use the Affected Land.

The privilege of the owner of a possessory estate in fee simple defeasible to use the land is identical with that of an owner of a possessory estate in fee simple absolute, except that the privilege is limited by a duty not to commit waste.

....

§ 53. Liability to Condemnation.

The liability of an owner of an estate in fee simple defeasible to have his interest taken under eminent domain proceedings is identical with that of an owner of a estate in fee simple absolute.

....

§ 147. Liability to Creditors

Except as modified by the rules of law of trusts, a creditor of a person who has an estate for life has the power to subject such estate to the payment of his claim. The owner of an estate for life has a liability corresponding to this power.

RESTATEMENT (FIRST) OF PROPERTY §§ 24, 49, 53, 147 (1936).

⁹⁵ George R. Farnum, *Terminology and the American Law Institute*, 13 B.U. L. REV. 203, 208-09 (1933).

⁹⁶ *Id.* at 211.

With respect to the *Restatement of Contracts*, Farnum identified inconsistencies, especially with respect to the use of the term “liability.”⁹⁷ He attributed this to the fact that *Contracts* was a collaboration between Reporter Samuel Williston, a Hohfeldian skeptic, and Special Advisor Arthur Corbin, an enthusiast.⁹⁸ *The Restatement of Trusts*, under the leadership of Austin Scott, was disappointing. “It is difficult to detect any pronounced trace of Hohfeld’s influence.”⁹⁹ The *Restatement of Agency* was a project in which Farnum thought “the Hohfeldian terminology could be utilized to particular advantage.”¹⁰⁰ Nevertheless, the original Reporter, Floyd Mechem, was indifferent to Hohfeld, and his replacement, Warren Seavey, had made only modest efforts to redress this deficiency.¹⁰¹ The Reporter for the *Restatement of Torts*, Francis Bohlen, was openly critical of Hohfeld, and insisted on using terms “quite at odds with their Hohfeldian definition.”¹⁰² As for the *Restatement of Conflict of Laws*, under the direction of Reporter Joseph Beale, the influence of Hohfeld “is nowhere apparent.”¹⁰³ All this was deeply disappointing to Farnum, who identified the work of the ALI as the “arena in which the decisive battle over the practical value of the Hohfeldian terminology seems to be in progress.”¹⁰⁴

Farnum’s analysis shows that the attempt to impose Hohfeldian language on the restatement project as a whole never got off the ground. There were too many strong-willed reporters who had their own ideas, and Lewis had insufficient leverage to insist they rewrite their work product to incorporate an uncongenial vocabulary. As Lewis was forced to concede in a Council discussion on the initial draft of the *Restatement of Conflicts of Laws*, “there was no insistence on a uniform legal terminology throughout all the Restatements.”¹⁰⁵

Not surprisingly, Hohfeldian terminology did not even survive within the *Restatement of Property*. Powell felt an obligation to adhere to Bigelow’s effort to prescribe Hohfeldian

⁹⁷ *Id.* at 213.

⁹⁸ *Id.* at 212-13. For Corbin’s enthusiasm, see Arthur L. Corbin, Forward, in HOHFELD, *supra* note 73.

⁹⁹ Farnum, *supra* note 95, at 214.

¹⁰⁰ *Id.* at 215.

¹⁰¹ *Id.* at 215-16.

¹⁰² *Id.* at 216.

¹⁰³ *Id.* at 217.

¹⁰⁴ *Id.* at 208.

¹⁰⁵ *Id.* at 209 (citing Formal statement of Director, Proposed Final Draft No. 1, RESTATEMENT (FIRST) OF CONFLICT OF LAWS 26 (1934)).

definitions in the *First Restatement*. But Casner had no interest in Hohfeld, nor did any of his successors as Reporters for the *Third Restatement*. Consider, for example, the following from the *Restatement (Second) of Property: Donative Transfers* (1983):

§ 5.1 Basis for Determining Validity of Restraints on
Personal Conduct.

Unless contrary to public policy or violative of some rule of law, a provision in a donative transfer which is designed to prevent the acquisition or retention of an interest in property in the event of any failure on the part of the transferee to comply with a restraint on personal conduct is valid.¹⁰⁶

If a Hohfeldian had written this section, it would speak in terms of powers and liabilities, but these terms do not appear. By the time we get to the *Third Restatement*, the deviations are even more striking. This is taken from *Restatement (Third) of Property: Servitudes*:

§ 2.18 Acquisition of Servitudes by Governmental
Bodies and the Public . . .

(2) Unless application of the rules set forth in 4.1 through 4.2 leads to a different conclusion as to the intention of the parties creating a servitude, the right to control a servitude for the benefit of the public is located in the state and the right to use the servitude benefit extends to the public at large.¹⁰⁷

Note that “right” is used the first time in the sense of a Hohfeldian “power,” and is used the second time in the sense of a Hohfeldian “privilege.” In others words, the Restatement was guilty of the core ambiguity in the use of terms that Hohfeld sought to extirpate. Hohfeld would be turning over in his grave.

In short, the campaign launched by Lewis and Bigelow to have the entire restatement project conform to Hohfeldian terminology survived into the *First Restatement of Property* and the *Restatement of Business Associations*. But otherwise, it quickly fell apart. It was too much to expect lawyers to begin speaking in a different language.¹⁰⁸

¹⁰⁶ RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 5.1 (1983).

¹⁰⁷ RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.18 (2000).

¹⁰⁸ This was recognized at the time. See William R. Vance, *The Restatement of the Law of Property*, 86 U. PA. L. REV. 173, 175 (1937) (“The use of the Hohfeld terminology is greatly helpful in stating specific problems that require nice analysis, but it is not suited to descriptive or expository writing addressed to even such a specialized portion of the public as the members of the bar and the bench. Lawyers and

III. THE RESTATEMENT AND THE BUNDLE OF RIGHTS

The fact that Hohfeld's peculiar terminology failed to catch on across the entire ALI project, and that it soon died even within the confines of the *Restatement of Property*, does not mean that Hohfeld's influence, or the climate of opinion that allowed so many to embrace his prescriptions with such enthusiasm, did not have a profound impact on the *Restatement of Property*. Although Hohfeld never used the expression "bundle of rights" to describe property, his writings on property clearly presupposed a conception of property that came to be summarized by the bundle metaphor. Property in a Hohfeldian world consists of various packages of rights, privileges, powers, and immunities, with their correlates and opposites. Precision is important in delineating the elements in each package. But, by implication, there is no limit on the way in which the elements can be combined—or recombined if recombination is thought to be appropriate. Similarly, Hohfeld thought there was no such thing as a right good against the world. All packages of property could be reduced to combinations of elements good as between individual persons.¹⁰⁹ So viewed, there is no inherent structure or architecture to property.¹¹⁰ Each set of circumstances is governed by a unique combination of elements, which can be modified as perceptions of public policy evolve. Hohfeld's view of property was effectively what a later generation would call the "bundle of rights" or "bundle of sticks."

The first Reporter of Property, Harry Bigelow, fully assimilated and embraced this view of property. In his 1926 memo, for example, Bigelow illustrated the concept of property by instancing A's ownership of a farm:

Legally this means the following: A has with regard to that particular piece of soil an indefinitely large number of interests: that his neighbors shall not look at it, flood it by turning water on it, or walk across it; to cultivate it in certain ways; to raise money by giving another person legal rights in it; to dispose of all legal rights in it. His first interest the law does not protect, the second it protects with qualifications, the third it protects almost completely, and so on

judges do not in fact understand the Hohfeld system, and one suspects that even the restaters have their difficulties with it . . ." (footnote omitted) (documenting mistakes in the use of Hohfeld's terminology in the RESTATEMENT OF PROPERTY)).

¹⁰⁹ See Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, *supra* note 83, at 786 ("Hohfeld conceived of in rem rights as a kind of cluster bomb of actual and potential in personam rights.").

¹¹⁰ Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1692 (2012).

with others, by giving him various kinds of rights, in the broad sense. These rights, in the broad sense, may be grouped under various headings such as right as correlative to duty, powers, privileges, etc. The aggregate of these rights with respect to the soil constitute A's property with regard thereto. That is, property is a collective word denoting the totality of A's rights with regard to his land Each individual right that A has in the land may be properly spoken of as a property right. When a person has the totality of rights with regard to soil that the law creates we have the norm of property, or complete ownership.¹¹¹

Although Bigelow in this passage does not expressly adopt the metaphor of the “bundle of rights,” one could not ask for a clearer expression of the “bundle” view of property, complete with references to Hohfeldian terminology (“right as correlative to duty, powers, privileges, etc.”).¹¹² Ownership of a farm can be cashed out in terms of “an indefinitely large number of interests.”¹¹³ Some of these the law protects; some it does not. The totality of the interests protected by law constitutes the “norm of property.”¹¹⁴ Bigelow clearly embraced the extreme nominalism about the concept of property associated with the bundle metaphor.

The same conception of property was formally adopted in Chapter 1 of the Restatement, albeit in a somewhat cryptic fashion. Recall that sections 1-4 of Chapter 1 set forth the definitions of “right,” “privilege,” “power,” and “immunity,” more or less taken straight from Hohfeld. Section 5 then provides:

§ 5. Interest.

The word “interest” is used in this Restatement both generically to include varying aggregates of rights, privileges, powers and immunities and distributively to mean any one of them. * * * ¹¹⁵

This generic concept of “interest” is then picked up again in Section 10, which defines “owner”:

§ 10. Owner.

The word “owner,” as it is used in this Restatement, means the person who has one or more interests.¹¹⁶

¹¹¹ Bigelow Memo, *supra* note 4, at 6.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ RESTATEMENT (FIRST) OF PROPERTY § 5 (1936).

¹¹⁶ *Id.* at § 10.

“Ownership,” in other words, refers to nothing other than the collective bundle of “interests”—that is, rights, privileges, powers, and immunities—which attach to a particular person. In fact, the Restatement is even more nominalist about property than Bigelow had been in his 1926 memo. There, you will recall, property was defined as interests of a person with respect to a thing. In the text of the Restatement, the “thing” disappears. Ownership refers to a collective of interests of a person. Taken literally, there is no difference between “property” and other legal relations. “Property” is just an empty vessel, into which any collection of “interests” of persons can be poured.

We do not mean to overstate the causal connection between the bundle of rights conception of property and the various failings of the *Restatement of Property*. Just as the various Hohfeldian definitions in Chapter 1 were quickly forgotten, so was the definition of ownership as a collection of interests.

Nevertheless, the underlying conception of property as a bundle of rights was given a decisive boost by the ALI’s endorsement, and quickly became a kind of American orthodoxy.¹¹⁷ The bundle was congenial to a variety of actors. It was consistent with the perspective of legal formalists like Powell, who thought law could be described as a system of rules, because it implied that there could be a different rule for each situation. It appealed to progressive/sociological reformers like Lewis and Bigelow who wanted to rationalize the law to make it conform more closely to what they perceived to be the public interest. It was embraced by the Legal Realists, of whom Casner was perhaps an unconscious disciple, who wanted to expand public regulation of property without any concern for constitutional protections of property. And it was adopted by law and economics scholars, who preferred to analyze property disputes in terms of contractual models (transaction costs) or tort models (cost internalization).¹¹⁸ To all these proponents, the bundle model was appealing because it purported to be scientifically sophisticated

¹¹⁷ See, e.g., BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 26-29 (1977); Thomas C. Grey, *The Disintegration of Property*, in NOMOS XXII: PROPERTY 69 (J. Roland Pennock & John W. Chapman eds., 1980). More recently the bundle picture has been challenged from feminist, Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239, 241 (1994), philosophical, J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 737 (1996), and economic, Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001), perspectives. For a debate on the bundle picture, see *Symposium: Property: A Bundle of Rights?*, 8 ECON. J. WATCH 193 (2011), available at <http://econjwatch.org/issues/volume-8-issue-3-september-2011>.

¹¹⁸ See Merrill & Smith, *supra* note 117, at 375.

and oriented to real world detail, but otherwise imposed no constraints on their aspirations.

Although there is no direct causal link between the bundle of rights metaphor and the failure of the *Restatement of Property*, we think the embrace of the bundle idea by the founding generation of the restatement enterprise, and its unquestioning acceptance by succeeding generations of reporters, made that failure more likely. If property is just a bundle of rights, with no inherent structure, then one can start anywhere one wants in a Restatement. One can start with what is familiar from the classroom (the estate system), or one can start with the issue du jour (landlord-tenant law). In effect, the bundle allows one to avoid choices on what to cover.

The bundle also disavows any connecting threads among different issues in property. This too facilitates piecemeal restating. By implying that property is an ever-mutating institution, the bundle also reduces the incentive to provide a complete restatement of property. To the contrary, it makes it more likely that the enterprise will gravitate toward the pet projects of whoever happens to be in control of the process at any point in time.

Finally and most critically, a *Restatement of Property* built on the sands of the bundle concept is unlikely to have a great deal to say of sustaining interest or value. It is little wonder that a Restatement built on this foundation has seen relatively little use, and has had relatively limited influence.

CONCLUSION

Despite the many volumes appearing under the title “Restatement of Property,” property has never really been restated. In a grand irony, the project that through its adoption of Hohfeldian terminology was supposed to provide the undergirding for the rest of the Restatements was never finished. We have argued that the choice of Hohfeldian framework, interpreted as the bundle of rights—with its atomized legal relations and its reductionist approach to in rem rights—contributed to the shortcomings of the *Restatement of Property*. The bundle picture was fully compatible with progressive aspirations, the postponement of major areas and difficult issues, and the piecemeal treatment of whichever topics suit the fancy of reporters and reformers. Indeed, it was compatible with anything. Because the main lesson of the bundle of rights picture of property is that property is a collection of interests and property law is a collection of individual policy-driven rules, a comprehensive restatement that

reflected the architecture of property was not felt as a compelling need—the bundle denied the very existence of any such architecture. There is little reason to restate the bundle, and, if property is a bundle, little reason to restate the law of property.

Would it be possible at this late date to return to Bigelow's original plan, appoint a new cadre of reporters, instruct them to stick to restating the law without advocating sweeping reforms, and produce, at long last, a complete *Restatement of Property*? We doubt it. Such a Restatement would be truly valuable only if animated by a shared conception of an imminent architecture in the law of property. We happen to believe there is such an architecture, grounded in a basic commitment to owners' exclusion rights, modified by select governance regimes that respond to problems generated in part by transaction costs. But there is no universal agreement about this. The cadre of reporters selected to implement the plan would likely go off in all directions, pursuing different hobbyhorses, just as their predecessors did. Moreover, many of the areas in Bigelow's plan that have remained untouched, including security interests and their many offshoots in the form of derivatives, not to mention intellectual property rights, have become immensely complex and contested, which would further compromise any attempt at comprehensive treatment. Finally, we think the animating vision of the original Restatement project—which emphasized the improvements that could be brought about by rationalizing, simplifying, and eliminating conflict in the common law—has largely vanished from the ranks of the American professoriate. The vision of the law as political struggle, with competing ideologies and interests seeking dominance in any available forum, is widespread enough that a new group of restaters would likely not rest content with restating the law, but would seek to remake it in accordance with their own views. If so, there is little reason to think that a new Restatement would avoid the failings of the old.