Judge Posner's Reconstruction of Property Theory

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INTRODUCTION

The many other terrific contributions to this Symposium analyze clearly and thoughtfully the impact Judge Posner's judicial opinions have had on a wide range of legal fields. This contribution, by contrast, begins by committing a cardinal sin: it rejects the premise of the Symposium. To be clear, I argue that Judge Posner has fundamentally reshaped the law of property as it is understood by American lawyers today. But that influence has occurred largely through his scholarship rather than through his judicial opinions.

Part I of this Essay considers the substantial impact Judge Posner's scholarship and philosophy have had on the field of property law today. The overall impact on modern property law of Judge Posner's scholarly writings and of the law-and-economics movement more generally has been significant. Part II goes on to investigate why Judge Posner's judicial opinions have made a relatively small contribution to the field of property law when compared with the impact of his scholarship and the much more significant impact of his judicial opinions on other fields of law, such as antitrust, contracts, or torts. Although no single explanation is wholly satisfying, together a set of structural considerations about property law teaching and doctrine may gesture at an answer. This Essay, in Part III, goes on to consider what the juxtaposition between Judge Posner's scholarship and case law might tell us about modern property law as a whole. Finally, Part IV closes by nominating recent property law opinions from Judge Posner that may merit inclusion in a new, reconstructed property law course.

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I. INFLUENCING LAW THROUGH THE DEVELOPMENT OF THEORY

Judge Posner's scholarship and his contributions to the law-and-economics movement more broadly have strongly influenced American property law. Judge Posner's most important piece of scholarship in this area is likely his seminal treatise, *Economic Analysis of Law*.[1] In this treatise, Judge Posner applies economic analyses to many different areas of classical real property law to both justify existing doctrine and propose revisions to existing law.

Consider his analysis of the traditional distinctions between lost, mislaid, and abandoned property as one such example.[2] The common law distinction between lost and mislaid property denominates the finder of lost property as the lawful possessor but the owner of the location where property is mislaid to be the lawful possessor. Judge Posner rejects this distinction on the grounds that allowing the finder to keep lost property either provides a reward greatly exceeding the finder's cost or can induce people to concentrate excessive resources into activities that will generate rewards.[3] By contrast, he supports the doctrine around abandoned property.

> From an economic standpoint, . . . when the owner deliberately "throws away" the property, . . . [it] signifies that the property has no value to him, and so by deeming the property abandoned and therefore available for reappropriation by someone else the law encourages the reallocation of the property to a higher-valued use without burdening the system with negotiation costs.[4]

The *Economic Analysis of Law* treatise has also helped explain the ways in which early American courts sometimes sought to distance themselves from the doctrines established through English common law. For instance, the treatise's explanation of the law of waste—as a tool to "mediate[ ] between the competing interests of life tenants and remaindermen" trapped in a bilateral monopoly with each other[5]—helps explain the revisions made to

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1 Richard A. Posner, *Economic Analysis of Law* (Wolters Kluwer 9th ed 2014).

2 Id § 3.12 at 86–89.

3 Id § 3.12 at 86–87.

4 Id § 3.12 at 87.

5 Posner, *Economic Analysis of Law* § 3.10 at 74 (cited in note 1).

the English rules by early American courts.[6] Similarly, in the context of water law, the water law systems developed in the eastern and western regions of the United States differed in large part because water was plentiful in the east, where water rights were communalized, and scarce in the west, where exclusive rights were granted by appropriation.[7]

In Judge Posner's time on the bench, his *Economic Analysis of Law* treatise was cited in ten US Supreme Court opinions, nearly fifty federal appellate opinions from every circuit except the Federal Circuit, and dozens of opinions from the high courts of roughly half of the states.[8] Although many of these opinions do not involve property law, the treatise has been cited in cases involving a range of property law topics, including the law of waste,[9] eminent domain,[10] cotenants' rights to partition property,[11] valuation of real property,[12] condominium developer liability,[13] and more. For instance, in *Devins v Borough of Bogota*,[14] the New Jersey Supreme Court considered whether adverse possession could be applied to "municipally-owned property not dedicated to or used for a public purpose."[15] Although the lower courts had applied the traditional rule that government-owned property could not be acquired by private parties through adverse possession, the state supreme court held that private parties may acquire property in such circumstances.[16] In reaching its holding, the court cited *Economic Analysis of Law*'s support for adverse possession from an economic perspective, as it "promotes active and efficient use of land."[17] As another example, in *Board of County*

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6 See Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 Cornell L Rev 653, 679 (2006) (explaining how, in replacing the reversioner's veto in English law with a tenant's ability to make improvements and collect the resulting income, American law avoided the bilateral monopoly problem).

7 See Posner, *Economic Analysis of Law* § 3.2 at 44 (cited in note 1).

8 These are results from a Westlaw search conducted in July 2018.

9 See *Travelers Insurance Co v 633 Third Associates*, 14 F3d 114, 119–20 (2d Cir 1994).

10 See *District Intown Properties Limited Partnership v District of Columbia*, 198 F3d 874, 884 (DC Cir 1999) (Williams concurring in the judgment).

11 See *Carter v Carter*, 516 A2d 917, 919 (DC 1986).

12 See *Board of County Commissioners of Johnson County v Jordan*, 370 P3d 1170, 1193 (Kan 2016).

13 See *Moloney v Boston Five Cents Savings Bank FSB*, 663 NE2d 811, 814 n 7 (Mass 1996).

14 592 A2d 199 (NJ 1991).

15 Id at 200.

16 Id at 204.

17 Id at 202.

Commissioners of the County of Arapahoe v United States,[18] a dissenting member of the Supreme Court of Colorado cited Judge Posner's economic analysis of property rights centered on scarcity in deciding two conditional water rights decrees.[19]

Yet the statistic that is perhaps most reflective of the treatise's persuasive power is the number of times it was cited even prior to Judge Posner's ascension to the bench in 1981. Before his nomination, the treatise was cited in a Supreme Court dissent by Justice Harry Blackmun,[20] in nine appellate opinions from five different federal circuit courts,[21] and in decisions from five separate state high courts.[22] Although none of these federal cases involved property law questions, three of the five state high court opinions involved property law topics: mortgage agreements,[23] condominium payments,[24] and eminent domain.[25] Then-Professor Posner was impacting the development of property law before he even took the bench.

Although the treatise has likely been Judge Posner's most influential scholarly contribution to the field of property law, its essential approach has been echoed in many other scholarly works written over many decades. In a 1975 Texas Law Review piece, Judge Posner considered both the development of the law-and-economics field generally as well as its application to law school

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18 891 P2d 952 (Colo 1995).

19 Id at 980 (Scott dissenting).

20 *Commonwealth Edison Co v Montana*, 453 US 609, 650 (1981) (Blackmun dissenting).

21 See *Martin v Vector Co*, 498 F2d 16, 23 (1st Cir 1974); *Gutor International AG v Raymond Packer Co*, 493 F2d 938, 947 (1st Cir 1974); *Rich v United States Lines, Inc*, 596 F2d 541, 559 n 6 (3d Cir 1979); *Melville v American Home Assurance Co*, 584 F2d 1306, 1314 n 11 (3d Cir 1978); *Associated Radio Service Co v Page Airways, Inc*, 624 F2d 1342, 1351 (5th Cir 1980); *Northwest Power Product, Inc v Omark Industries, Inc*, 576 F2d 83, 89 (5th Cir 1978); *Freeport Sulphur Co v S/S Hermosa*, 526 F2d 300, 309 n 5, 310 (5th Cir 1976) (Wisdom specially concurring); *Boggs v Blue Diamond Coal Co*, 590 F2d 655, 661 (6th Cir 1979); *Larionoff v United States*, 533 F2d 1167, 1178 n 30 (DC Cir 1976), affd, 431 US 864 (1977).

22 See *Holiday Acres No 3 v Midwest Federal Savings and Loan Association of Minneapolis*, 308 NW2d 471, 481 (Minn 1981); *Golden v McCurry*, 392 S2d 815, 819–20 (Ala 1980) (Faulkner concurring in part and dissenting in part); *Vines v Orchard Hills, Inc*, 435 A2d 1022, 1026 (Conn 1980); *Suter v San Angelo Foundry & Machine Co*, 406 A2d 140, 146 (NJ 1979); *Malone v Commonwealth*, 389 NE2d 975, 980 n 14 (Mass 1979).

23 *Holiday Acres*, 308 NW2d at 481.

24 *Vines*, 435 A2d at 1024–25. *Vines* involved issues of contract law as well. Id at 1025–59.

25 *Malone*, 389 NE2d at 980.

curricula,[26] arguing that in fields such as antitrust law, "it is already widely acknowledged that the student's understanding will be seriously incomplete if it does not embrace the relevant economic concepts."[27] Presciently, he predicted that "[t]he list of areas of acknowledged relevance" to law and economics was growing, and he specifically argued that "it very soon will include . . . major parts of the substantive law of property."[28] Similarly, his 2000 essay *Savigny, Holmes, and the Law and Economics of Possession*[29] articulates how economic analysis provides a superior understanding of the concept of possession (or property rights) than do the arguments put forth by legal theory legends such as Friedrich Carl von Savigny and Oliver Wendell Holmes.[30] In 2011, he engaged with Professor Thomas Merrill's critique of his treatise's approach to the law of waste,[31] arguing for the superiority of the economic approach over Merrill's proposed "material alteration" approach to the doctrine.[32]

II. EXPLAINING THE SCOPE OF JUDGE POSNER'S CASE LAW IMPACT

Unlike the contribution made by Judge Posner's scholarly writings, his judicial opinions have made a relatively small contribution to the field of property law when compared with the impact of his judicial opinions on other fields of law. Scholars have looked to the frequency with which judges' opinions have been included in casebooks as one measure of doctrinal influence. If cases are selected for inclusion, not only to teach students what the substantive law is but also to expose them to the most influential analytical methods, the number of opinions a judge has written that are selected for inclusion in a casebook may be a fair proxy for his or her influence over that field of law.[33]

[26] Richard A. Posner, *The Economic Approach to Law*, 53 Tex L Rev 757, 758– 61, 763–68, 779–82 (1975).

[27] Id at 779.

[28] Id.

[29] Richard A. Posner, *Savigny, Holmes, and the Law and Economics of Possession*, 86 Va L Rev 535 (2000).

[30] Id at 551.

[31] Thomas W. Merrill, Melms v. Pabst Brewing Co. *and the Doctrine of Waste in American Property Law*, 94 Marq L Rev 1055, 1087–90 (2011).

[32] Richard A. Posner, *Comment on Merrill on the Law of Waste*, 94 Marq L Rev 1095, 1098–1100 (2011).

[33] See Mitu Gulati and Veronica Sanchez, *Giants in a World of Pygmies? Testing the Superstar Hypothesis with Judicial Opinions in Casebooks*, 87 Iowa L Rev 1141, 1145–46 (2002).

Employing this method, Professor Mitu Gulati and Veronica Sanchez found that Judge Posner has far more doctrinal influence than any other member of the federal bench, with 118 opinions selected for inclusion in leading casebooks at the time they performed their study.[34] As they put it, "The differential in terms of total influence on the casebooks between Posner and almost all the other judges is staggering."[35] Gulati and Sanchez confirmed this result by considering how often a judge is explicitly invoked by other judges in their opinions,[36] with Judge Posner leading this count as well, having 178 invocations during their period of study.[37] Importantly, just fourteen of these invocations occurred in parentheticals of dissenting or concurring opinions,[38] suggesting that the vast majority of these invocations occurred in a more detailed way in the text of an opinion or in a parenthetical in a majority opinion.[39]

However, disaggregating these numbers by doctrinal area tells a different story. As Gulati and Sanchez noted, most of Judge Posner's casebook opinion inclusions come in either first-year courses like contracts and torts (twenty-six and twelve opinions, respectively) or upper-level business courses like tax (six opinions) and antitrust (ten opinions).[40] Each of these areas of law is the subject of a separate commentary in this issue.[41] In property law, by contrast, just two of Judge Posner's cases are included in the casebooks.[42]

Perhaps the better-known of these opinions is *Chicago Board of Realtors, Inc v City of Chicago*,[43] a case involving a comprehensive landlord-tenant ordinance that, in addition to

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34 Id at 1155. Seventh Circuit Judge Frank Easterbrook comes in second, with fifty-six opinions. Id.

35 Id.

36 Id at 1193–95.

37 Gulati and Sanchez, 87 Iowa L Rev at 1200 (cited in note 33). Again, Judge Easterbrook comes in second, with ninety-eight invocations. Id.

38 Id at 1198.

39 See id at 1200.

40 Id at 1177–78.

41 See generally Douglas G. Baird, *Unlikely Resurrection: Richard Posner, Promissory Estoppel, and* The Death of Contract, 86 U Chi L Rev 1037 (2019); Saul Levmore, *Richard Posner, the Decline of the Common Law, and the Negligence Principle*, 86 U Chi L Rev 1137 (2019); C. Scott Hemphill, *Posner on Vertical Restraints*, 86 U Chi L Rev 1057 (2019); Yair Listokin, *Posner on Tax: The Independent Investor Test*, 86 U Chi L Rev 1157 (2019).

42 Gulati and Sanchez, 87 Iowa L Rev at 1177–78 (cited in note 33).

43 819 F2d 732 (7th Cir 1987).

other provisions, essentially codified the implied warranty of habitability.[44] Judge Richard Cudahy's opinion for the court upheld the ordinance against a constitutional challenge from a group of property owners, but it is not Judge Cudahy's opinion that is memorialized in the casebooks.[45] Rather, that honor goes to Judge Posner's separate opinion.[46] Judge Posner wrote to emphasize the potential unintended consequences of the ordinance. He expressed the view that landlords would offset the ordinance's new burdens by raising the rent, squeezing out the low-income tenants the law was supposed to benefit. In support of this conclusion, Judge Posner marshaled both empirical literature and a political economy argument about the backers of the bill.[47] The substance of the *Chicago Board of Realtors* decision has been criticized by leading scholars, who have also minimized its impact on contemporary courts.[48] The case did not go on to be cited widely by other judges.[49] But the opinion's endurance in leading casebooks and in the 1L property curriculum means that a generation or more of law students have been exposed to this opinion and its way of thinking about law.

Why might it be that Judge Posner's judicial opinions in the field of property law have not had the impact that his opinions in other fields have had? The nature of property law and property disputes provides some potential answers, although they are perhaps not fully persuasive. Many property law issues are creatures of state law, and consequently cases based on these doctrines do not present federal questions to be decided by federal courts.[50] And unlike other common law fields (such as contracts or torts), the site-specific nature of real property law may result in fewer property lawsuits being brought in federal court through diversity

44 See id at 734. See also id at 742 (Posner concurring).

45 See, for example, Jesse Dukeminier, et al, *Property* 531–33 (Wolters Kluwer 8th ed 2014).

46 As he notes, because his opinion is joined by Judge Easterbrook, "it is also a majority opinion." *Chicago Board of Realtors*, 819 F2d at 741 (Posner concurring).

47 See id at 741–42 (Posner concurring).

48 See, for example, Lior J. Strahilevitz, *"Don't Try This at Home": Posner as Political Economist*, 74 U Chi L Rev 1873, 1883–84 (2007) (referring to the impact of this case on contemporary jurists as "negligible").

49 The case has primarily been cited by courts within the Seventh Circuit. The only other federal appellate citation to the opinion comes in a Ninth Circuit case that was reversed by the en banc court. *Guggenheim v City of Goleta*, 582 F3d 996, 1021 (9th Cir 2009), vacd on rehearing en banc, 638 F3d 1111 (9th Cir 2010).

50 See 28 USC § 1331 (providing for federal court jurisdiction over questions of federal law).

jurisdiction.[51] As a result, it may be that fewer opportunities are available for federal judges to decide issues of real property law.

This is undoubtedly not true of all areas within real property law. We should expect to see federal court cases involving federal constitutional rights, including but not limited to racial discrimination and eminent domain, and federal statutes, such as the Fair Housing Act[52] (FHA). And there are many influential US Supreme Court opinions in these areas of property law. But even these cases are often decided on appeal from state courts rather than federal courts.[53] Further, takings cases that are brought against the federal government are channeled through the Court of Claims and into the Federal Circuit,[54] meaning that the regional circuits do have fewer opportunities to confront these questions. Although there are FHA cases arising within each circuit,[55] it does not appear that Judge Posner's opinions in this area have made a significant impact on the doctrine.[56]

Another explanation might stem from property law's history. Property law is a field whose teaching often appears to be marked by unusually old cases. The very first case in the leading property textbook dates from 1823.[57] *Pierson v Post*,[58] arguably the most

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51 See 28 USC § 1332(a) (providing for federal court jurisdiction in actions between citizens of different states in which the amount in controversy exceeds $75,000).

52 Pub L No 90-284, 82 Stat 81 (1968), codified as amended at 42 USC § 3601 et seq.

53 See, for example, *Murr v Wisconsin*, 137 S Ct 1933, 1941–42 (2017) (reviewing a Wisconsin Court of Appeals eminent domain case); *Kelo v City of New London*, 545 US 469, 476–77 (2005) (reviewing a Connecticut Supreme Court eminent domain case); *Penn Central Transportation Co v New York City*, 438 US 104, 120–22 (1978) (reviewing a New York Court of Appeals eminent domain case); *Barrows v Jackson*, 346 US 249, 252 (1953) (reviewing a case from the District Court of Appeal of California for the Second Appellate District on racial discrimination in real estate transactions); *Shelley v Kraemer*, 334 US 1, 6–7 (1948) (reviewing a case from the Missouri Supreme Court on racial discrimination in real estate transactions).

54 See Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 Georgetown L J 1437, 1492 (2012).

55 See, for example, *Texas Department of Housing and Community Affairs v Inclusive Communities Project, Inc*, 135 S Ct 2507, 2515 (2015).

56 Leading casebooks in the field often use the FHA as a tool to teach statutory interpretation skills and so give the text of the statute primacy over cases interpreting its provisions. Unlike in other areas of property law, the casebooks have not settled on particular federal court opinions as canonical interpretations of the FHA. See, for example, Thomas W. Merrill and Henry E. Smith, *Property: Principles and Policies* 467–71 (Foundation 1st ed 2007); Jesse Dukeminier, et al, *Property* 471–77 (Wolters Kluwer 9th ed 2018); Joseph William Singer, *Property* 581–96 (Aspen 3d ed 2010).

57 *Johnson and Graham's Lessee v M'Intosh*, 21 US (8 Wheat) 543 (1823), in Dukeminier, et al, *Property* (9th ed) at 4–10 (cited in note 56).

58 3 Cai R 175 (NY 1805).

famous case in the property law curriculum,[59] was decided in 1805. The historical, common law perspective that echoes through much of property law doctrine even today encourages both lawyers and judges to assign outsized importance to cases following traditional common law methods and adopting traditional common law views. Cases or legal scholarship expressing new methods or views might be met with resistance against this historical framing.

Yet this story is not perfectly explanatory, either. It is not obvious that property law is more focused on older cases than are other common law subjects, such as contracts or torts, in which Judge Posner has had far more influence. This may depend on the class and casebook in question—for instance, in contract law, the existence of the Uniform Commercial Code may mitigate some of these dynamics—but these courses also incorporate canonical older cases and traditional common law methods. In addition, if the inclusion of old cases in the casebooks is not only a teaching tool but also a signal that the core questions involved in many of these doctrines have been settled for some time, that would be in tension with the argument that Judge Posner's scholarly writing has had a significant impact on the field. If these issues were settled, his ability to influence them would be more limited.

A third and final possible explanation is the problem of drawing lines between the doctrines. Judge Posner has authored a number of famous cases that sound in property law but that have been incorporated into casebooks in other, adjacent fields. Consider his opinion in *Desnick v American Broadcasting Companies, Inc*.[60] One of the key issues in *Desnick* is trespass, and Judge Posner's discussion of the issue incorporates property law elements, such as discussions of implied consent to entry.[61] Yet trespass is also a tort, and when combined with the other issues in *Desnick* (including defamation and right of privacy), the case is understandably a highlight of torts casebooks[62] rather than property classes. Judge Posner also has a number of influential cases in the intellectual property area, and although many property textbooks do include several intellectual property cases, they are

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[59] See Bethany R. Berger, *It's Not about the Fox: The Untold History of* Pierson v. Post, 55 Duke L J 1089, 1095–96 (2006).

[60] 44 F3d 1345 (7th Cir 1995).

[61] Id at 1351–52.

[62] See, for example, Ward Farnsworth and Mark F. Grady, *Torts: Cases and Questions* 29–32 (Aspen 2d ed 2009) (including *Desnick* to illustrate trespass in the intentional torts section).

generally viewed as being different in kind from the standard real property cases. Indeed, his patent law opinions are the subject of another essay in this Symposium.[63] Judge Posner himself may view these fields of law as separate, as *Economic Analysis of Law* considers traditional real and personal property issues early on in a chapter within the section on the common law,[64] while it considers intellectual property and privacy much later in a chapter within the section on public regulation of the market.[65]

Although none of these factors alone explains the limited impact Judge Posner's opinions, rather than his scholarship, have had on property law, it may be that, in combination, they suggest an answer. In the end, it does not appear that Judge Posner had the same opportunity to reshape property law through his judicial opinions as he had in other fields of law. Instead, he spoke forcefully through his scholarly work.

III. Reflections on Modern Property Law

Judge Posner's property law opinions may have made less of a mark on the doctrine than did his opinions in other fields of law, and yet his scholarship continues to have great predictive and explanatory force. What can that juxtaposition teach us—as lawyers, as law professors, and as scholars—about property law itself? Perhaps it should cause us to think differently both about the ways in which law professors conceive of property law as a whole and also about Judge Posner and his legacy.

At present, many conceive of property law as a somewhat disjointed course, aiming to bring together different doctrines that all relate either to land or to things. As Professor James Grimmelmann has described it, "Even those who relish teaching property describe a constant struggle against intricacy, incoherence, and irrelevance."[66] Other professors have described the course in even less complimentary ways.[67] Unlike other first-year courses, including contracts or torts, property law is often taught

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63 See generally Jonathan S. Masur, *Posner's Unlikely Patent Intervention*, 86 U Chi L Rev 1171 (2019).

64 Posner, *Economic Analysis of Law* § 3 at 39 (cited in note 1).

65 Id §§ 11.1, 11.4 at 401–02, 411–12.

66 James Grimmelmann, *Real + Imaginary = Complex: Toward a Better Property Course*, 66 J Legal Educ 930, 930 (2017). See also William L. Reynolds, *Back to the Future in Law Schools*, 70 Md L Rev 451, 455 (2011).

67 See, for example, Steven Friedland, *Teaching Property Law: Some Lessons Learned*, 46 SLU L J 581, 581 (2002) (describing property as a "montage of ill-fitting subjects, jarringly connected by arcane language and obfuscatory rules").

in a way that lacks intellectual cohesion. To be clear, I do not mean this pejoratively. I teach my own property law class in a way that grapples with and at times even embraces this incoherence but that also attempts to present unifying themes throughout the course. Nevertheless, the lack of cohesion is not only intimidating for first-year law students, but it also presents difficulties for lawyers and judges attempting to draw analogies between different doctrines within property law.[68]

This view is not universal. Perhaps most notably, a popular casebook in the field by Professors Thomas Merrill and Henry Smith clearly presents a view of property law "as a single subject unified by core principles."[69] They place the right to exclude at the center of the course, spinning out to explore the doctrine's structure of rights, correlative duties, and exceptions to these rights. However, the authors' use of this framework is made possible by their heavy reliance on the analytical tools of law and economics.[70] These tools allow teachers and scholars to create cohesion within a course of seemingly disconnected doctrines. For students, the law-and-economics framework provides a through-line for an otherwise potentially confusing class.[71]

Judge Posner's scholarship has helped develop and disseminate these tools. Without Judge Posner's scholarship, our appreciation of whether and how courts should shape property law to fit goals of economic efficiency would be much diminished. In other doctrinal areas, Judge Posner's opinions have rightfully assumed a more prominent place in the classroom setting.[72] But where he has written fewer opinions, he has been able to speak more clearly through his scholarship and persuade accordingly. For instance, even though the leading property casebook contains

68 The Dukeminier textbook does not explicitly take a position on this question, but it does present a pluralistic conception of the field, seeking to teach students many different approaches to the field. Dukeminier, et al, *Property* (8th ed) at xxxi (cited in note 45).

69 Thomas W. Merrill and Henry E. Smith, *Property: Principles and Policies* v, vii (Foundation 2d ed 2012). See also Thomas W. Merrill and Henry E. Smith, *Property: Principles and Policies* v (Foundation 3d ed 2017).

70 See Merrill and Smith, *Property: Principles and Policies* (1st ed) at 30–37 (cited in note 56).

71 Professor Gulati and Sanchez argue that many features of the Chicago School of Law and Economics thinking "predict its dominance in the casebook world." Gulati and Sanchez, 87 Iowa L Rev at 1152 (cited in note 33).

72 See id at 1177 (listing how many of Judge Posner's opinions appear in casebooks for each legal subject).

just one of his full opinions,[73] it contains many more citations to and excerpts from *Economic Analysis of Law*.[74] For lawyers and judges, the law-and-economics framework also provides a scaffolding on which they may analogize different areas of property law precedent.

Adopting the law-and-economics framing further allows for a reconsideration of the subjects that are commonly thought to be included within the traditional property law paradigm. Most lawyers may conceive of property law as a course relating to the acquisition, ownership, transfer, and use of land and things, but its real scope can and should be understood far more broadly. Perhaps most obviously, property can also include intangible goods,[75] whether they fit under the traditional category of intellectual property (patents, copyrights, trademarks, and trade secrets) or more general categories of intangible property (financial assets, typically). The law-and-economics framework applies similarly to these forms of property and, in at least some cases, may provide superior explanations for the relevant legal doctrines. To the extent that the right to exclude is given pride of place within the curriculum, students may begin to see parallels to various doctrines within privacy law or other related fields.

To be sure, there are other major themes and policy considerations that can be followed throughout property law. First-year law students and judges alike can consider the ways in which property law creates and confers power not only over land but also over people[76]—and the potential impacts of that power.[77] They can also consider problems of institutional design and examine which forms of property law and regulation serve which policy goals. But the choice made by professors and judges to use the law-and-

[73] See Dukeminier, et al, *Property* (8th ed) at 531–33 (cited in note 45) (including Judge Posner's opinion in *Chicago Board of Realtors*). However, the ninth edition of the textbook contains an excerpt from another case. See Dukeminier, et al, *Property* (9th ed) at 1017–18 (cited in note 56), quoting *Coniston Corp v Village of Hoffman Estates*, 844 F2d 461, 464 (7th Cir 1988).

[74] See Dukeminier, et al, *Property* (9th ed) at 72, 280, 470, 518, 999–1000 (cited in note 56).

[75] See Grimmelmann, 66 J Legal Educ at 939–44 (cited in note 66).

[76] See, for example, Morris R. Cohen, *Property and Sovereignty*, 13 Cornell L Q 8, 9–10 (1927) (discussing feudal law and its essential connection between land and personal power).

[77] See, for example, *Moore v City of East Cleveland*, 431 US 494, 496–97, 504–06 (1977) (holding unconstitutional a zoning ordinance that prohibited a grandmother from living with her grandchild because they did not fit the ordinance's definition of "family"); *Shelley v Kraemer*, 334 US 1, 20–21 (1948) (holding that racially restrictive housing covenants are unenforceable in court).

economics framework in property law cases, and to cite Judge Posner's scholarship instead of other options, is a testament to the impact he has had on the field and to his legacy.

IV. REINTRODUCING JUDGE POSNER'S OPINIONS TO THE 1L PROPERTY COURSE

Judge Posner's view of property law is as relevant today as when he first began to advance it decades ago. However, now that the ninth edition of the Dukeminier textbook has removed the *Chicago Board of Realtors* decision, his influence is felt in the first-year course mainly through references to the *Economic Analysis of Law* treatise. The paucity of Judge Posner's opinions in leading property textbooks is not an inevitability, however, and I would like to nominate for inclusion two of his recent property law opinions that combine his economic understanding of the doctrine with more modern concepts that professors are often seeking to impress upon our students.

First, consider *Cerajeski v Zoeller*,[78] which focused on Indiana's Unclaimed Property Act[79] and whether its practice of confiscating interest on unclaimed principal constituted a taking.[80] The Uniform Unclaimed Property Act of 1995,[81] which has been enacted in some form in all states,[82] creates a system for states to deal with unclaimed property, typically intangible property or personal property held in safety deposit accounts.[83] After a specified period of years (which differs by the type of property in question), the Act allows the state to presume that the property at issue has been abandoned and to take possession of it.[84] The state must then take affirmative steps to locate the owner of the property, but after some point, the property will escheat to the state.[85]

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78 735 F3d 577 (7th Cir 2013).

79 Ind Code § 32-34-1-1 et seq.

80 *Cerajeski*, 735 F3d at 578–79.

81 Uniform Unclaimed Property Act (Uniform Law Commission 1995).

82 See Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U Pa L Rev 355, 396 (2010).

83 See id.

84 See id. For instance, traveler's checks are presumed abandoned fifteen years after issuance, while money orders are deemed abandoned just seven years after issuance. Uniform Unclaimed Property Act § 2(a). The tangible, personal contents of a safety deposit box are presumed abandoned "more than five years after expiration of the lease or rental period" of the box. Uniform Unclaimed Property Act § 3.

85 See Uniform Unclaimed Property Act §§ 7–9. There is an extensive discussion in both the case law and scholarship about whether Unclaimed Property Acts are truly escheat statutes, but the issue is beyond the scope of this Essay. See, for example, *Cerajeski*,

Cerajeski considered a problem that arose from Indiana's system for dealing with interest accruing on unclaimed property. Specifically, owners seeking to reclaim property were entitled to receive interest that accrued *before* the property's delivery to the Indiana Attorney General.[86] However, the statute did *not* entitle them to receive interest that accrued *after* such delivery but before the unclaimed property was discovered and reclaimed by its original owner,[87] even though the time in question may have been lengthy.[88] In *Cerajeski*, Judge Posner was asked to decide whether the state's confiscation of that subsequently accrued interest without compensation violated the Takings Clause.

Judge Posner's basic conclusion was that Indiana's confiscation of this interest constitutes a taking requiring compensation. The state may be entitled to a fee for its services in maintaining and advertising the unclaimed property, but as long as the property has not yet escheated to the state's ownership, the state's confiscation of the interest violates the Takings Clause.[89] Perhaps more interesting than the doctrinal analysis, though, is the way in which the opinion allowed Judge Posner to accomplish three aims that are desirable in the 1L curriculum.

First, the opinion weaves together various doctrines of property law that the students may have already encountered: abandoned versus lost or mislaid property,[90] estates in land,[91] and eminent domain.[92] For students who have begun to view property law as the disjointed course described above, *Cerajeski* helps illustrate the ways in which these doctrines can work together or

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735 F3d at 580–81 (arguing that "acts based on the Uniform Property Act of 1995 . . . 'are not escheat statutes'"). Compare Si M. Bondurant, *To Have and to Hold: The Use and Abuse of Oil and Gas Suspense Accounts*, 31 Okla City U L Rev 1, 27 (2006) (explaining that the Unclaimed Property Acts codify the common law doctrine of escheat), with Patrick H. Martin and J. Lanier Yeates, *Louisiana and Texas Oil & Gas Law: An Overview of the Differences*, 52 La L Rev 769, 838 (1992) (claiming that Louisiana's Unclaimed Property Statute is not an escheat statute). In practice, at some point the state may succeed to ownership of the relevant property interest.

86 Ind Code § 32-34-1-30(a).

87 See *Cerajeski*, 735 F3d at 578–80; Ind Code § 32-34-1-30(b).

88 Indiana provided for a bank account to be presumed abandoned just three years after the "last indication by the owner of interest in the property," but owners could reclaim their property from the state for up to twenty-five years after it was first presumed abandoned. Ind Code §§ 32-34-1-20(c)(12), 32-34-1-36(e).

89 *Cerajeski*, 735 F3d at 580, citing *Koontz v St. Johns River Water Management District*, 133 S Ct 2586, 2601 (2013) (supporting the proposition that the confiscation of a financial obligation constitutes a taking).

90 *Cerajeski*, 735 F3d at 579.

91 Id at 580–81.

92 Id at 580.

at odds within the case law. Second, the opinion applies these doctrines to intangible, rather than real, property. A case like this is key to helping students understand that property law covers more than just land and things—that the interests it creates exist in intangible, as well as tangible, goods. Finally, *Cerajeski* illustrates the policy goals behind both Unclaimed Property Acts and Judge Posner's own reasoning. Specifically, Judge Posner explained how the basic structure of these acts—a lengthy opportunity to reclaim property, followed by public advertisement of its existence, concluding finally with state reclamation—is consistent with the economic goals of the law of finders: to reunite lost or mislaid property with its owners[93] and to put property to productive use.[94]

A second, more traditional opinion to consider incorporating is *Bitler Investment Venture II, LLC v Marathon Petroleum Co*,[95] a case presenting issues of both contract and property law. Bitler had leased a series of gas stations to Marathon, and after new environmental regulations were enacted, the parties updated the lease to include their responsibilities regarding environmental remediation.[96] Bitler subsequently brought both a breach of contract claim as well as a property law waste claim against Marathon, arguing that Marathon's failure to properly clean up the pollution in question had implications under each set of doctrines.[97]

Bitler provided Judge Posner with an opportunity to revisit "the venerable doctrine of waste."[98] Yet similar to his opinion in *Cerajeski*, Judge Posner was able to do so while accomplishing other purposes. First, *Bitler* allowed Judge Posner to explain how his economic analysis of law underlies and unites both contract and property law. His description of the law of waste as a "common law doctrine of great antiquity" for mediating the interests of life tenants and remaindermen[99] sounds directly in the language used in his treatise.[100] Here, too, he was able to explain the ways in which the bilateral monopoly aspect of such a situation

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93 See Strahilevitz, 158 U Pa L Rev at 396 (cited in note 82).

94 *Cerajeski*, 735 F3d at 579.

95 741 F3d 832 (7th Cir 2014).

96 Id at 834.

97 Id at 835.

98 Id at 834.

99 *Bitler*, 741 F3d at 836.

100 See note 4 and accompanying text.

may prevent the life tenant and the remainderman from negotiating a solution to a potential dispute.[101] In this case, however, the added presence of the lease agreement between the parties encouraged Judge Posner to confront deeper questions about what remaining functions the doctrine of waste might serve in a situation in which the parties *have* completed a negotiation.[102]

Second and relatedly, *Bitler* enabled Judge Posner to draw connections between different areas of law—here, property law and contract law. As he noted, the parties could have contracted around the doctrine of waste but chose not to, perhaps because they recognized that "the law of waste can continue to play a useful role even when the parties have a detailed contract."[103] This is true not only in the sense of parties' rights, as when an incomplete contract may fail to specify a particular act that could rise to the level of waste, but also in the sense of their remedies, as "waste can provide a remedy supplementary to the remedy for breach of contract."[104] Because the relevant state law entitled the victim of waste to double damages,[105] Bitler was able to receive damages beyond those in a standard breach of contract lawsuit alone.

CONCLUSION

As in the other areas of law considered in this Symposium issue, Judge Posner's body of work has had a transformative effect on the doctrine of property law. However, because this influence has occurred largely through his scholarly writings rather than his judicial opinions, beginning even before his ascension to the bench, his property law opinions deserve increased scholarly and pedagogical focus. Property law professors should now begin to recognize the ways in which Judge Posner's opinions in this field provide a more modern, interconnected view of property law than may have been valued previously—and as a result should consider incorporating more of Judge Posner's opinions into a new 1L curriculum.

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[101] *Bitler*, 741 F3d at 836–37.
[102] See id at 837.
[103] Id.
[104] Id.
[105] *Bitler*, 741 F3d at 837–38, citing Mich Comp Laws § 600.2919(2)(a).