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DISPOSSESSION AT THE CENTER IN PROPERTY LAW

*Kali Murray**

My mother took my sister and me to plantations for our summer vacations: Destrehan Plantation in Destrehan, Louisiana; Mount Vernon Plantation in Mount Vernon, Virginia; and Monticello Plantation in Charlottesville, Virginia. On these trips, we would receive a guided tour of the owner's house, the owner's grounds, and the owner's fields.

There, however, would always come a point in the tour when my mother would take my sister and me apart from the crowd. She would say to us, two small African-American children, the following: we built the houses, we cooked the food and cleaned the houses, and we farmed these fields. My mother, Sandra Murray Nettles, a noted educational psychologist, had her reasons. In her recent book, *Necessary Spaces: Exploring the Richness of African-American Childhood in the South*, my mother emphasized that plantations may have served as *home grounds* for the formation of African-American identity.¹ Upon her visit to the Weems Plantation in Henry County, Georgia, the site of her family's enslavement before the Civil War, my mother was reminded "how the landscape of slave quarters might have highlighted the importance of the family and commun[ity] . . . [as] the cabins tended to be a distance from the main house, assuring, for instance, that children could see parents in roles beyond their work

* Associate Professor of Law, Marquette University Law School. This Essay is dedicated, of course, to Alfred Brophy, who, as stated at the start of this Colloquium, is both smart and, more importantly, kind. My scholarship would not be the same without his guiding hand.

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¹ SAUNDRA MURRAY NETTLES, *NECESSARY SPACES: EXPLORING THE RICHNESS OF AFRICAN-AMERICAN CHILDHOOD IN THE SOUTH* (2013).

as slaves.”² Her belief in this concept of *home grounds* inspired my mother then to reclaim the plantation and its landscape for her children.

Implicit in my mother’s claim of *we built that* was a story that competed with the carefully curated tours offered to us. Her story of *we built that* helped to frame for her children a way to manage the means of explaining slavery to small children, as it explained simultaneously why we did not own the beautiful home at the top of the hill, but also reaffirmed the meaning of the lives that built that home. It was a story then that emphasized the complex relationship that African-Americans have had to the plantations, a site for their owner’s claim of *possession* and their experience of *dispossession*.

The Colloquium, *[Re]Integrating Spaces*, seeks among its purposes to interrogate how a “societal sense of place, space, and meaning” impacts property law.³ With this theme in mind, I return in this Essay to my mother’s lessons in two key ways. Initially, I examine the claim that dispossession, as a theoretical construct, should assume importance within property theory. While the centrality of possession within our property system is well understood within property theory, I claim that dispossession—often obscured—serves an equally important role in understanding how property law functions within societies. As I examine this question, I turn to one key site—the plantation—as a way to illuminate this theoretical claim. This Essay, then, engages in what noted legal geographer Nicholas Blomley has identified as the “spatialization” of property.⁴ The “spatialization” of property, argued Blomley, reveals the ways in which spaces themselves can reflect on the violence in establishing the origins, actions, and legitimations of property law.⁵ Specific spaces, like plantations, demonstrate “the effects and modalities of property’s violence in particular ways.”⁶ The plantation, in this sense, becomes shorthand to capture the ways in which violence manages the binary nature of property law: the owned and the non-owned; the possessed and the dispossessed.

Possession—the act of claiming property interests in things, lands, and even persons—is a central preoccupation of property law.⁷ Possession, claim property theorists, is a precondition to the recognition of ownership and resulting rights to exclude, use, and transfer property.⁸ Possession, stated Carol Rose, attempts to

² *Id.* at 17.

³ Program from *[Re]Integrating Spaces* Colloquium, (September 19, 2014) (on file with journal).

⁴ Nicholas Blomley, *Law, Property, and the Geography of Violence: The Frontier, the Survey and the Grid*, 93 ANNALS ASS’N AM. GEOGRAPHY 121, 135 (2005).

⁵ *Id.*

⁶ *Id.*

⁷ See, e.g., Richard Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1978) (assessing the relationship between institutional and philosophical issues raised by possessory claims).

⁸ *Id.* at 1222 (“Yet the importance of the rule making original possession the source of ownership is matched by the absence of any systematic analysis of it.”).

answer one of the most fundamental questions of ownership: what makes a thing owned?⁹

The centrality of possession as a concept in property law arises because it justifies the ultimate claim of ownership. We anoint an owner in a dispute between two possessors because, as Carol Rose further noted, we find one possessor has sent “a message that others in the culture understand and that they find persuasive as grounds for the claims asserted.”¹⁰

Possession, therefore, is a story about a liminal moment in property law. Two parties have equal claim to a property thing and in that moment, we select one party over another party. Property law, then, becomes the story of that winner as they proceed through the system. Once possession is determined, we become invested in assessing the rights of the property ownership as we move forward.

We do not linger behind with those who have lost. Perhaps, the dispossessed are not considered to be important. Property law is about property owners after all. Perhaps, more disturbingly, we might not want to investigate too closely the violent damage that might be inflicted by the dispossession of another. That is, to put it bluntly, we like to think over divestment of property interests when they involve a fox,¹¹ but not—as abolitionists emphasized—when they involve human lives.¹²

Dispossession, like its twin, possession, should be at the center of property law for three key reasons. Initially, by placing dispossession at the center, we can more carefully delineate what we value in property ownership.¹³ Concerns over dispossession, claimed Lee Anne Fennell, help us to understand why we value property ownership, since “[a]t a broader level, the entire system of real property rights is arguably motivated in large part by the value that people place on secure possession.”¹⁴ Indeed, the common law of property has long recognized recovery for acts that may dispossess a property holder by reducing their security of ownership. For example, as articulated by the Supreme Court of Georgia, the harm for conversion is not simply that any interference may harm the property rights of the owner, but a harm also occurs because the owner is dispossessed.¹⁵ The Court noted in *Maryland Casualty Insurance Co. v. Welch*¹⁶

⁹ CAROL M. ROSE, *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY AND RHETORIC OF OWNERSHIP* 11-12 (1994).

¹⁰ *Id.* at 25.

¹¹ *Pierson v. Post*, 3 Cai. R. 175 (N.Y. 1805).

¹² *Ratrie v. Sanders*, 2 H & J 327 (Md. Ct. App. 1808) (examining the doctrine of replevin within the context of a dispute of ownership over slaves).

¹³ Lee Anne Fennell, *Possession Puzzles 2* (John M. Olin Program in Law and Econ., Working Paper No. 522, 2010), available at http://chicagounbound.uchicago.edu/law_and_economics/371/.

¹⁴ *Id.*

¹⁵ *Maryland Cas. Ins. Co. v. Welch*, 356 S.E. 2d 877, 880 (Ga. 1987).

¹⁶ *Id.*

that in order to raise a conversion claim, “technically it is not necessary that the defendant assert any right of ownership over the property; it is sufficient if the defendant wrongfully assumes dominion over the property inconsistent with the owner’s right.”¹⁷ The harm in conversion suffered by the property owner in *Maryland Casualty* is one that arises from dispossession. Consequently, this focus on harm suffered by the property owner demonstrates the value associated with maintaining security in one’s ownership. Thus, dispossession serves a useful purpose by emphasizing that security in property ownership is an essential element of property ownership, along with the accompanying right to use, exclude and transfer.

Consequently, then, maintaining security of possession illuminates the high stakes that accompany the recognition of property ownership. Perhaps this concern with security of ownership suggests why individual, communal, and state violence can be central to preserving the rights of the property owner. Placing dispossession, consequently, at the center helps to focus us on how the seeming stability of property ownership may rest on violent acts towards others. This insight is consistent with Daniel Sharfstein’s claim that such violent behavior is often central to the behavior of property owners and his specific claim that “[p]roperty has a special significance in American culture in part because our ancestors killed for it, and even today, personhood can be the product of self-justifying behavior, as owners conflate unneighborly and even violent conduct with their property rights and identities as owners.”¹⁸

Revisiting the plantation as social space offers a way to consider this relationship of violence and property security. For example, in his autobiography, *My Bondage and My Freedom*, Frederick Douglass offered the plantation as a site to explore the relationship of possession and dispossession.¹⁹ In this book’s chapter entitled *A General Survey of the Slave Plantation*, Douglass utilized how the social and physical landscape of the plantation reinforced the legal dispossession of the slave.²⁰ Douglass leads the reader through the physical landscape of tidewater Maryland, emphasizing how the “secluded, dark, and out-of-the-way place, is the ‘home plantation’ of Col. Edward Lloyd, on the

¹⁷ *Id.*; see also *Levenson v. Word*, 668 S.E.2d 763, 765 (Ga. Ct. App. 2008) (“[O.C.G.A.] Section 51-10-1 provides that ‘[t]he owner of personalty is entitled to its possession. Any deprivation of such possession is a tort for which an action lies.’ This statute ‘embodies the common law action of trover and conversion.’”); *Trey Inman & Assocs., P.C. v. Bank of Am., N.A.*, 702 S.E.2d 711, 716 (Ga. Ct. App. 2010) (“In order to establish a claim for conversion, the complaining party must show (1) title to the property or the right of possession, (2) actual possession in the other party, (3) demand for return of the property, and (4) refusal by the other party to return the property.”); *Dierkes v. Crawford Orthodontic Care, P.C.*, 643 S.E.2d 364, 367 (Ga. Ct. App. 2007) (“To make out a prima face case of conversion, a plaintiff must show that she has title to the property, that the defendant wrongfully possessed it, and that she demanded possession but the defendant refused to surrender it.”).

¹⁸ Daniel Sharfstein, *Atrocity, Entitlement, and Personhood in Property*, 98 VA. L. REV. 635, 666-67 (2012).

¹⁹ FREDERICK DOUGLASS, *MY BONDAGE AND MY FREEDOM* (1857).

²⁰ *Id.* at 61-79.

Eastern Shore . . .”²¹ operated as its own nation.²² Its seclusion, for Douglass, culminated in his corresponding claim that on the plantation “[t]here are no conflicting rights of property, for all people are owned by one man; and they can themselves own no property.”²³ For Douglass, the physical landscape of the plantation served to uncover the mutual relationship between the plantation owner and the slaves—the ways in which the property owner’s secure property rights depended on the slave’s ongoing dispossession. Indeed, for Douglass, his emphasis on the mutuality of the relationship between the slave owner and the slaves on the plantation offered another way²⁴ to demonstrate the violence embedded in valuing the slave owner’s rights against that of the enslaved.

Placing dispossession at the center has a second primary purpose. Highlighting the impact of dispossession lessens what A. J. van der Walt described as the “logic of centrality” in property theory and practice.²⁵ For van der Walt, this logic of centrality occurs in property law when “lawyers, owners and users of property habitually and unreflectively accept that property institutions naturally assume a central place in society and that property—as an organizing concept—similarly assumes a central role in law and legal theory,” and such logic can “inhibit much-needed social and legal transformation in that they condemn certain persons to the margins of society and of the law, either by design or by default.”²⁶ Shifting from possession to dispossession is useful in property as it disrupts what topics receive specific theoretical and practical attention in property law.

²¹ *Id.* at 62.

²² *Id.* at 64.

²³ *Id.* at 64. For Douglass, the master’s claim of ownership reflected the political and social distortion wrought by slavery within a democracy that often used property ownership to mean citizenship. Phyllis Craig Taylor, *To Be Free: Liberty, Citizenship, Property and Race*, 14 HARV. BLACKLETTER L.J. 45, 49 (1998) (outlining the importance of republican theory to conceptualizations of race).

²⁴ Douglass’s rhetoric should be identified as such, given that some evidence exists indicating that slave systems in the South recognized minimal claims of property ownership by slaves. See DYLAN C. PENNINGROTH, *THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH* 45-78 (2003) (assessing the limited property rights for African-American slaves). This reflects in large part Douglass’s attempt to link the relationship of the master and slave to a considered political philosophy. See Ivy Wilson, *On Native Ground: Transnationalism, Frederick Douglass, and “The Heroic Slave”* 121 PMLA 453, 453-56 (Mar. 2006) (assessing Douglass’s political theory of citizenship).

²⁵ A. J. van der Walt, *Property and Marginality*, in *PROPERTY AND COMMUNITY* 81 (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010).

²⁶ *Id.* Van der Walt’s questioning of the logic of centrality is also reflected in the works of Peter Gerhart and Abraham Drassinower. PETER GERHART, *PROPERTY LAW AND SOCIAL MORALITY* 10 (2014) (“This book seeks to provide a corrective by developing a justification for the content of the property law that sees the rights of owners and non-owners to grow from a set of shared values rather than from a set of conflicting interests.”); Abraham Drassinower, *Authorship as Public Address: On the Specificity of Copyright Vis-A-Vis Patent and Trade-Mark*, 2008 MICH. ST. L. REV. 199, 218 (2008) (assessing the interpersonal relationship between user and author in copyright law).

This doctrinal shift can be as simple as focusing on a new set of actors who participate in the making of property law, as advocated in *Integrating Spaces: Property Law and Race*.²⁷ A more emphatic shift also may be contemplated within how we study and teach the constitutional property regime in the United States. Extensive scholarly literature²⁸ exists that addresses the means and the scope of the Fifth Amendment's prohibition against the taking of private property without just compensation.²⁹ Our focus on the Fifth Amendment reflects the logic of centrality in property since the Fifth Amendment seeks to compensate the property owner in the event of governmental interference. Focusing on the impact of dispossession as an organizational lens may heighten the importance of other amendments within our discussion of constitutional property law. Such a shift would heighten the importance of the Thirteenth Amendment in property theory and property law generally. Section 1 of the Thirteenth Amendment prohibits the existence of slavery and involuntary servitude in the United States,³⁰ and Section 2 permits Congress to enact legislation to enforce this prohibition.³¹

Scholarly interest in the impact of the Thirteenth Amendment has enjoyed an important recent revival.³² This revival has important consequences for property law in general and for understanding the benefits of placing dispossession at the center specifically. In a general sense, among its diverse meanings, the Thirteenth Amendment can be seen to prohibit ownership of, and control over, another human being for pecuniary gain. As George Rutherglen observed, the congressional passage of the Thirteenth Amendment "concerned rights directly opposed to one another: what the slave owners lost in property rights, the slaves gained in freedom."³³ While the term "property" might not literally appear in its text, recent scholarship has emphasized that the Thirteenth Amendment is central to property law for any number of reasons, including its recognition of custom as a primary source of law,³⁴ its incorporation of

²⁷ ALFRED BROPHY, ALBERTO LOPEZ & KALI MURRAY, *INTEGRATING SPACES: PROPERTY LAW AND RACE* xix (2011).

²⁸ The scholarly literature in this area is extensive. For a review of the literature, see Terrance O'Reilly, *A Research Guide to Regulatory Takings*, 14 *LEGAL REFERENCE SERVS. Q.* 97, 97-100 (1995).

²⁹ U.S. CONST. amend. V.

³⁰ U.S. CONST. amend. XIII, § 1.

³¹ *Id.* § 2.

³² See, e.g., Symposium, *The Thirteenth Amendment: Meaning, Enforcement, and Contemporary Implications*, 112 *COLUM. L. REV.* 1811 (2012); Symposium, *The Maryland Constitutional Law Schmooze*, 71 *MD. L. REV.* 12 (2011); ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND THE BIRTH OF AMERICAN FREEDOM* (2004).

³³ George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 *VA. L. REV.* 1367, 1382 (2008); see also *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896) (defining slavery as "the absence of a legal right to the disposal of his own person, property, and services").

³⁴ Darrell A. H. Miller, *The Thirteenth Amendment and the Regulation of Custom*, 112 *COLUM. L. REV.* 1811 (2012) (assessing the impact of the customary practices on Thirteenth Amendment practice).

antebellum property theory into the text of the United States Constitution,³⁵ and its direct connection to civil rights legislation in property and contract law.³⁶

Beyond its general implications, focusing on the Thirteenth Amendment helps us in our contemplation of our third major consequence of placing dispossession at the center of property law, namely, its reorientation of property theory towards recognizing a new story as to the *origins* of property claims. Carol Rose, in another seminal insight, argued that property law uses story-telling narratives to figure out the origins of the question of “who has what and how property gets distributed.”³⁷

The Thirteenth Amendment, thus, is the legally salient manifestation of a broader story of property origins: the *disruptive* origins of property claims. The disruptive origins of property rights help us to think through those moments in which property relationships are reordered within a society. This disruption of property consequently serves as a way that those individuals who may have been dispossessed of property rights consequently obtain property rights. The disruptive origins of property ownership seeks to tell the story of when the logic of centrality in property law is reordered—when those at the margins can become central to a new property order. This disruptive story of property origins offers us a way to talk about those pivotal moments in which reconceived political, social, and legal orders transform property distributions within a society. A particular quote contained within Kenneth Burns’s popular documentary, *The Civil War*,³⁸ has become a shorthand way to discuss the impact of its disruption on the larger American society. A freed black slave in the Union Army, so the story goes, saw his ex-owner being led away in chains as a prisoner and said to him, “Hello massa, bottom rail on top this time.”³⁹ The disruptive story of property origins captures the ways in which property rights can emerge at times of radical redistributions in property ownership.

³⁵ Rutherglen, *supra* note 33, at 1377 (“Any analysis of the scope and content of the Thirteenth Amendment must begin from its moral foundations in abolitionist thought.”).

³⁶ Darrell A.H. Miller, *White Cartels, The Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer Co.*, 77 *FORDHAM L. REV.* 999 (2008) (assessing the impact of the Civil Rights Act of 1866 on civil rights claims).

³⁷ ROSE, *supra* note 9, at 27. Of course, in many respects, I depart from Rose’s theory in that it is marked by historical narrative rather than what she terms a pseudo-historical narrative. *Id.* at 28. Her theoretical insight, however, that property stories assert narrative (rather than science and prediction) remains valid, even where historical narratives are present. As Carlo Ginzburg notes, “[a] false statement, a true statement, and an invented statement do not present any differences among themselves, from a formal point of view.” CARLO GINZBURG, *THREADS AND TRACES: TRUE FALSE FICTIVE 7* (Anne C. Tedeschi & John Tedeschi trans., 2012).

³⁸ *The Civil War* (PBS television broadcast 1990).

³⁹ *Id.*; see also *Ken Burns on PBS*, PBS, <http://www.pbs.org/civilwar/classroom/episode5.html> (last visited July 24, 2015) (describing Episode Five, The Universe of Battle, of *The Civil War*, to which this anecdote is related). This story also has been incorporated into public usage; for instance, the term “bottom rail on top” is cited in the Urban Dictionary. *Bottom Rail on Top*, URBAN DICTIONARY, <http://www.urban-dictionary.com/define.php?term=bottom+rail+on+top> (last visited July 24, 2015).

We can once again tell that disruptive story of property rights using the physical space of the plantation. For example, Charlotte Forten, a noted African-American diarist of the Civil War, used a visit to a plantation to illustrate reordering of the property relationship.⁴⁰ In this story of the disruptive origins of property rights, Forten noted in her diary that when she “[a]rrived at the Superintendent’s house we were kindly greeted by him and the ladies and shown into a lofty ceiled parlor where a cheerful wood fire glowed in a grate, and soon we began to feel quite at home in the very heart of Rebeldom”⁴¹ In essence, Forten used this moment within the plantation parlor to emphasize the profound reordering of property relations that emerged out of the Civil War.

It was a truly shocking moment: an African-American woman—an African-American lady—now sat in the parlor of a former slave plantation and could make the claim that the plantation felt quite like home.⁴² Forten’s statement was even more complex if we think about how it captures the political changes during the Civil War and the later Reconstruction Era that made this statement possible: the relationship of ascendant federal authority to the new social order (this was, after all, the Superintendent’s home), as well as the corresponding failure of the “Rebel” legal, political, and social order.

Indeed, this passage is notable for who was not there—the titular owner of the plantation house.⁴³ Charlotte Forten’s diary captures the reversal that marks the disruptive origins of property law. The dispossessed was then in legitimate, symbolic possession of the property thing itself: bottom rail on top, indeed. Forten’s story and other stories of disruptive origins of property ownership reinforce the theoretical importance of dispossession for property law.

The disruptive origins of property start with one crucial acknowledgement: the immoral acts of dispossession, whether of state or communal origin, must be addressed within the new political order. The Thirteenth Amendment, notably, was not the first instance of a government constitutionally addressing a reordering of the property relationships after the emancipation of slaves. The Haitian Constitution of 1801 and the Haitian Constitution of 1805 both contain articles that abolish slavery.⁴⁴ The Haitian Constitution of 1805 further

⁴⁰ THE JOURNAL OF CHARLOTTE L. FORTEN: A FREE NEGRO IN THE SLAVE ERA 145 (Ray Allen Billington ed., 1961). Forten maintained her diary from 1854 until 1864.

⁴¹ *Id.* at 145.

⁴² *See id.*

⁴³ *Id.*

⁴⁴ LA CONSTITUTION D’ HAÏTI, 1801, art. 3 (“There cannot exist slaves on this territory, servitude is therein forever abolished. All men are born, live and die free and French.”) (Charmant Theodore, trans.), available at: [http://thelouvertureproject.org/index.php?title=Haitian_Constitution_of_1801_\(English\)](http://thelouvertureproject.org/index.php?title=Haitian_Constitution_of_1801_(English)); LA CONSTITUTION D’ HAÏTI, 1805, art. 2 (“Slavery is forever abolished.”), available at: http://thelouvertureproject.org/index.php?title=Haitian_Constitution_of_1805. The constitutional regime of Haiti was quite complex, as there were at least four constitutions in its early history. Julie Gaffield, *Complexities of Imagining Haiti: A Study of National Constitutions, 1801-1807*, 41 J. SOC. HIST. 81, 86-90 (2007) (assessing how the Constitution of 1801 and the Constitution of 1805 used the emancipation clause to reframe national identity in Haiti).

prohibited the ownership of property by all white men.⁴⁵ The disruptive origins of property thus attempt to reconstitute a political order through the recognition of past dispossession. Indeed, the emancipation amendments are within a lineage of a constitutional property tradition that seeks to incorporate and ameliorate the effects of dispossession. This lineage is directly linked to Article 25, Section 5-8, of the Constitution of South Africa, which contains significant remedial redress for the past injustices related to land tenure and property acquisition during the apartheid era.⁴⁶ I stress the long lineage of these legal reflections of the disruptive origins in property law because, in many respects, we often treat these constitutional reorderings as anomalies within the property order. By linking these together, I hope to reclaim their centrality in property law as ways that property regimes seek to be responsive to the moral and political challenges presented by dispossession.

Second, the story of disruptive origins helps us to think about the relationship of the common law, statutory law, and constitutional property law in crafting the binary of possession and dispossession. This relationship is reinforced in two ways within the context of the complex property framework embodied in the Thirteenth Amendment. First, the Thirteenth Amendment⁴⁷ differs from the Fourteenth Amendment⁴⁸ in that the Amendment applies to private actions undertaken by individuals as well as state actions. For instance, the United States Supreme Court in *Jones v. Alfred H. Mayer Co.*⁴⁹ recognized that Congress, acting under the Fourteenth Amendment's Section 2⁵⁰ authority, appropriately regulated the ability of private parties to discriminate in the acquisition of property in the Civil Rights Act of 1866.⁵¹

⁴⁵ LA CONSTITUTION D' HAÏTI, 1805, art. 12 (“No whiteman of whatever nation he may be, shall put his foot on this territory with the title of master or proprietor, neither shall he in future acquire any property therein.”), available at http://the.louvertureproject.org/index.php?title=Haitian_Constitution_of_1805.

⁴⁶ S. AFR. CONST. 1996, art. 25, §§ 5-8, available at: <http://www.constitutional.court.org.za/site/constitution/english-web/ch2.html>.

⁴⁷ U.S. CONST. amend. XIII.

⁴⁸ U.S. CONST. amend. XIV.

⁴⁹ 392 U.S. 409, 438-39 (1968):

Thus, the fact that [§] 1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem. If Congress has power under the Thirteenth Amendment to eradicate conditions that prevent Negroes from buying and renting property because of their race or color, then no federal statute calculated to achieve that objective can be thought to exceed the constitutional power of Congress simply because it reaches beyond state action to regulate the conduct of private individuals. The constitutional question in this case, therefore, comes to this: Does the authority of Congress to enforce the Thirteenth Amendment ‘by appropriate legislation’ include the power to eliminate all racial barriers to the acquisition of real and personal property? We think the answer to that question is plainly yes.

⁵⁰ U.S. CONST. amend XIV, § 2.

⁵¹ Ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981-1986 (1982)).

Finally, as demonstrated once again by its concrete expression in Section 1 of the Civil Rights Act of 1866,⁵² the Thirteenth Amendment explicitly recognizes a binary relationship of possession and dispossession in its commitment to allow African-Americans the full rights associated with property ownership. Section 1 contemplates that freed slaves would have the ability to “inherit, purchase, lease, sell, hold, and convey real and personal property”—a full expression of the range of available property rights.⁵³ Section 1, however, also recognizes that freed African-Americans would also enjoy the “full and equal benefit of all laws and proceedings for the security of person and property”⁵⁴ Thus, the second element of Section 1 reflects the insight that comes from viewing dispossession in the center insofar as it stresses providing ex-slaves not only with what we term the basic rights of property ownership—the right to use, exclude, and transfer—the property item, but an additional claim to fully ensure the security of those rights through access to judicial proceedings related to those rights. Section 1’s expansive scope, thus, incorporates what I noted above as a central component of dispossession: its ability to reflect the security of the property owner’s claim.

Ezra Rosser, in his recent critique of the emerging progressive property scholarship, has argued that that we cannot fully understand the doctrinal formation of property law until property scholars and practitioners expand “the conversation to include acquisition and distribution in a way that destabilizes societal assumptions regarding ownership.”⁵⁵ This Essay is a tentative attempt to engage with Rosser’s challenge. I note, however, that I would offer a central caveat to Rosser’s claim: traditional property law has very often engaged with these issues through the central concept of dispossession. Indeed, the benefits I have suggested from placing dispossession at the center of property law, including its explanatory force in assessing the claims of property ownership, its disruption of the logic of centrality in property theory and practice, and its basis as a story of disruptive origins are, at best, the beginning of an attempt to reorder property theory and practice. It is, therefore, our task to recognize and reclaim dispossession at the center of property law.

⁵² *Id.* § 1.

⁵³ *Id.*

⁵⁴ Congress amended Section 1 of the Civil Rights Act of 1866 in 1878 to its current structure. 1 Rev. Stat. 348, §§ 1977-1978 (1875). This current structure moves the language related to the security of property ownership into what is now Section 1 of § 1981. A review of the legislature indicates that the change was not substantive in character.

⁵⁵ Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 170 (2013).