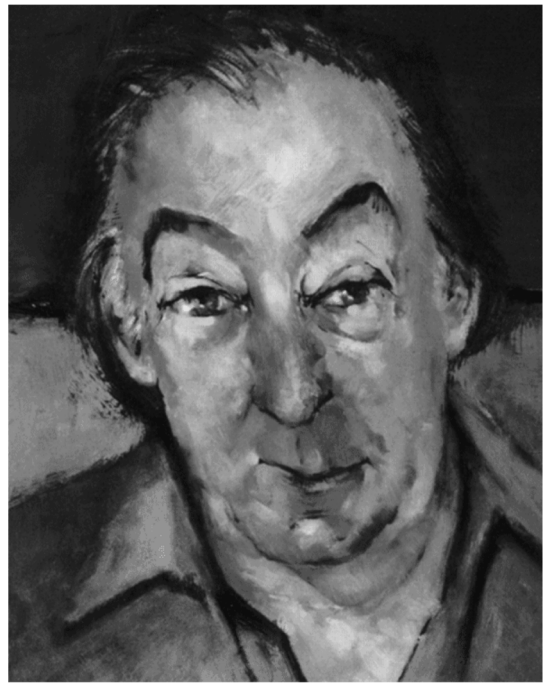

Figure 1 – A Bright Future for Property. Portrait of Lionel Murphy by Clifton Pugh as entered in the 1975 Archibald Prize (reproduced with the permission of Shane Pugh). Our title for this article and this portrait draws inspiration from David Johnston, The Renewal of the Old (Cambridge University Press, 1996) 25, and from 'This Dream of You', Together through Life (Album, Bob Dylan, Columbia Records, 2009) verse 2:

> There's a moment when all old things
> Become new again.

THE RENEWAL OF THE OLD: LIONEL MURPHY'S PROGRESSIVE-RELATIONAL CONCEPTION OF PROPERTY

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As we approach Justice Lionel Murphy's 100th birthday on 30 August 2022, this article explores and renews a significant aspect in the jurisprudence of this truly radical judge: the social relations or progressive view of property. Justice Murphy both identified and judicially expounded this view well before the American social relations or progressive schools. And rather than merely identifying it as some intellectual museum piece, the article also builds on it. The article contains five parts. Part I contextualises the jurisprudential debates surrounding property. Part II recounts Justice Murphy's judicial radicalism. Part III explores the elements of Murphy's progressive-relational view of property. Part IV applies the elements of Murphy's progressive-relational property to the High Court's recent native title decision in Northern Territory v Griffiths (Ngaliwurru and Nungali Peoples). Part V offers some concluding reflections on the bright future for property found in Murphy's conception.

I INTRODUCTION: THE RENEWAL OF THE OLD

In 1984, then Judge Antonin Scalia and theorist Richard Epstein held a debate at the Cato Institute over the role of courts in protecting 'economic liberty'.[1] The Scalia-Epstein Debate signalled a global trend – just emerging in 1984 United States – towards greater protection of economic liberty rights. At the heart of the debate stood property as a foundational concept which might serve as a bulwark for use by the courts in protecting broader economic rights and liberties. The two debaters disagreed over the role of the courts in protecting such liberties. Scalia

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1 Cato Institute (ed), *Scalia v Epstein: Two Views on Judicial Activism* (Cato Institute, 1985). Antonin Scalia was then a Judge of the United States Court of Appeals for the District of Columbia Circuit, and soon appointed to the United States Supreme Court. See also Jonathan H Adler, 'Scalia v Epstein – 35 Years Later: Revisiting Their Debate on Judicial Protection of Economic Liberty', *Volokh Conspiracy* (Blog Post, 17 March 2019) <https://reason.com/volokh/2019/03/17/scalia-v-epstein-35-years-later>.

argued that 'the courts [should] limit their constitutionalizing to those elements of economic liberty that are sensible'.[2] Epstein countered that the *United States Constitution* ('*US Constitution*') in its express terms already provided the broad protection 'at their face value' for economic liberties and property rights without the need for any expansive judicial interpretation.[3] They both agreed, though, that the *US Constitution* contained some form of strong protection for property.

The view that economic liberties have a place in the pantheon of constitutionally-protected individual rights was in its infancy in the United States of 1984. Since then, however, the protection of such 'liberties' has expanded, with property forming its core. Richard Epstein became the intellectual force behind what came to be known as the 'property rights movement',[4] crystallising in what is called 'constitutional property', the strong protection for an absolutist view of what has come to be known as the 'liberal conception of property'.[5] According to this view, liberal property establishes absolute rights that ought not to be interfered with, even by the state, and constitutions ought to provide equally strong protection for those rights. Alexander said this about constitutional property:

> Making property a matter of constitutional protection means that questions about property – how it is distributed, how it is used, and so on – are not subject to the pathologies of ordinary politics. Property becomes 'Super Property'. It is substantially (although not completely) isolated from the public sphere, thereby securing the integrity of the private sphere. Where property has been given constitutional status, the courts' only legitimate role is strictly enforcing individual property rights. Specifically, it is the job of courts to protect private property interests against legislative actions that redistribute property entitlements …[6]

While Scalia and Epstein were debating about the place of liberal property in the *US Constitution* specifically, the constitutionalising trend towards the protection of absolutist property has spread to many countries, indeed, Australia prominent among them.[7] One could therefore be forgiven for thinking that this is the only way to see property.

There is, though, another view, not only in the United States, but anywhere that has succumbed to the constitutionalisation of property, and it is a view that recognises the reality that rather than being an inherent natural right, property is in fact a creature of law, created by the state, and so subject to its regulation – as Bentham said: '[p]roperty and law are born and must die together. Before the laws,

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2 Antonin Scalia, 'Economic Affairs as Human Affairs' in Cato Institute (ed), *Scalia v Epstein: Two Views on Judicial Activism* (Cato Institute, 1985) 1, 4.

3 Richard A Epstein, 'Judicial Review: Reckoning on Two Kinds of Error' in Cato Institute (ed), *Scalia v Epstein: Two Views on Judicial Activism* (Cato Institute, 1985) 9, 16.

4 And, of course, Epstein has since become strongly identified with and is recognised as the intellectual force behind the property rights movement: for his classic statement, see Richard A Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press, 1985). And see James W Ely, 'Impact of Richard A Epstein' (2006) 15(2) *William & Mary Bill of Rights Journal* 421; Ed Carson, 'Property Frights: Why Property Rights Initiatives Are Losing at the Polls' (1996) 28(1) *Reason* 27, 28.

5 Gregory S Alexander, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (University of Chicago Press, 2006). And on the liberal conception of property, see Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1988); Stephen R Munzer, *A Theory of Property* (Cambridge University Press, 1990).

6 Alexander (n 5) 3.

7 Ibid 1–2.

there was no property: take away the laws, all property ceases'.[8] This alternative view of property understands its social reality as a construct emerging from social relations among people. While this alternative view is little-known outside of property theory circles, even Scalia recognised that property is somehow a different sort of right when compared to other fundamental freedoms:

> It leads to the conclusion that economic rights and liberties are qualitatively distinct from, and fundamentally inferior to, other noble human values called civil rights, about which we should be more generous. Unless one is a thoroughgoing materialist, there is some appeal to this. Surely the freedom to dispose of one's property as one pleases, for example, is not as high an aspiration as the freedom to think or write or worship as one's conscience dictates.[9]

The alternative view emerges around the same time as the property rights movement, and it is usually traced to Joseph William Singer's 1988 'The Reliance Interest in Property', which soon came to be identified with the 'property as social relations' school of theorising.[10] Today this view forms the core of the 'progressive property' movement, which stands in counterpoint to the property rights movement. In 2009, the leading social relations theorists authored 'A Statement of Progressive Property', encompassing and summarising the breadth and depth of the theorising which came before it.[11]

Yet, while the property rights movement continues to enjoy global judicial traction in the assessment of property, progressive property struggles to gain similar acceptance. Indeed, to a great extent, judges entirely ignore it; few, if any, ever refer to the social dimension of property and the importance of understanding property that way when examining the role of the state in limiting what property allows its holder to do with a good or resource. Instead, drawing upon strands of the economic liberty approach of Scalia and Epstein, judges fall back, again and again, on a Blackstone-informed absolutist[12] 'bundle of rights' metaphor,[13] focusing on the rights to use, exclude, and alienate property.[14] This confirms what Alexander identified: courts see their only role as one of strictly enforcing an

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8 Jeremy Bentham, 'Principles of the Civil Code' in John Bowring (ed), *The Works of Jeremy Bentham* (William Tait, 1843) vol 1, 309.

9 Scalia (n 2) 1.

10 Joseph William Singer, 'The Reliance Interest in Property' (1988) 40(3) *Stanford Law Review* 611.

11 Gregory S Alexander et al, 'A Statement of Progressive Property' (2009) 94(4) *Cornell Law Review* 743, 743–4.

12 Sir William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press, rev ed, 1979) vol 2, 2. A notable exception to the standard use of Blackstone is found in David B Schorr, 'How Blackstone Became a Blackstonian' (2009) 10(1) *Theoretical Inquiries in Law* 103.

13 For the origins of which, see Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) *Yale Law Journal* 16 ('Some Fundamental Legal Conceptions'); Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) *Yale Law Journal* 710 ('Fundamental Legal Conceptions'); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning: And Other Legal Essays* (Yale University Press, 1919) ('*Fundamental Legal Conceptions*'); AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 107, 108–34. And see JE Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43(3) *UCLA Law Review* 711 ('Bundle of Rights').

14 What Margaret Jane Radin calls the 'liberal triad': 'The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings' (1988) 88(8) *Columbia Law Review* 1667, 1668.

absolutist individualist conception of property. Michael Heller concludes that 'the bundle of rights [metaphor] waxes in judicial decision-making', with pernicious practical consequences.[15]

Why do judges seem so singularly unable to see new and significant views of property that go beyond protecting the right of the holder to the detriment of others? The answer lies in the paradoxical fact that judges fail to use progressive property in their judgments because they believe that other judges have failed to use it and, for that reason, it seems that the idea must have been judicially rejected.[16] In short, progressive property lacks a judicial champion. This is based in a legal formalist approach to jurisprudence particularly prevalent among common law judges, by which judges are reluctant to innovate with ideas from beyond the acceptable corpus of legal thinking (being, tautologically, the body of precedent itself).

Progressive property in Australian law, however, need not suffer from this paradox. It may surprise many Australian lawyers and scholars – and judges! – to know that the progressive view of property has not only a solid theoretical foundation,[17] but also, and more importantly, an Australian judicial champion, too: Justice Lionel Murphy. Indeed, Murphy had already not only identified, but also judicially expounded a progressive view of property as many as seven years before Singer's 'The Reliance Interest in Property'. This is not to suggest that Murphy was adopting the ideas of these scholars themselves, but that his judgments can be seen as participating broadly in the same theoretical school. It was not, after all, until years later that the 'progressive property' theorists were so christened. As we approach Murphy's 100th birthday on 30 August 2022, we think it important to reflect upon this important legacy of a truly radical Australian judge. We argue that Murphy can be seen as a judicial champion of values that have ordinarily been seen to be confined to the academy. In doing so, we seek not merely to identify what might now seem chronologically old so as to place it on a pedestal as some intellectual museum piece. Rather, we adopt the methodology employed in David Johnston's approach to Roman law as elaborated in his inaugural lecture as University of Cambridge Regis Professor of Civil Law: one studies Roman law

15 Michael A Heller, 'Three Faces of Private Property' (2000) 79(2) *Oregon Law Review* 417, 431, see generally 429–32.

16 See ibid.

17 The progressive property tradition in Australia is long and rich: see, eg, Alice Erh-Soon Tay and Eugene Kamenka, 'Introduction: Some Theses on Property' (1988) 11(1) *University of New South Wales Law Journal* 1; Brendan Edgeworth, 'Post-Property? A Postmodern Conception of Private Property Law' (1988) 11(1) *University of New South Wales Law Journal* 87; Paul Babie, 'Sovereignty as Governance: An Organising Theme for Australian Property Law' (2013) 36(3) *University of New South Wales Law Journal* 1075; Paul Babie, 'The Spatial: A Forgotten Dimension of Property' (2013) 50(2) *San Diego Law Review* 323 ('The Spatial'); Paul Babie, 'Private Property Suffuses Life' (2017) 39(1) *Sydney Law Review* 135; Paul Babie, 'The Future of Private Property' (2018) 40(3) *Sydney Law Review* 433; Paul Babie, 'Reflections on Private Property as Ego and War' (2017) 30(4) *International Journal for the Semiotics of Law* 563 ('Reflections on Private Property'); Peter Burdon, 'What Is Good Land Use? From Rights to Relationship' (2010) 34(3) *Melbourne University Law Review* 708 ('What Is Good Land Use?'); Peter D Burdon, *Earth Jurisprudence: Private Property and the Environment* (Routledge, 2017); Peter D Burdon, 'Private Property Revisited' in Klaus Bosselmann and Prue Taylor (eds), *Ecological Approaches to Environmental Law* (Edward Elgar Publishing, 2017) 619.

through an interest 'not with the recovery of the old but with its renewal, not with an archaeological attempt to recover ancient remains but with the attempt to build on ancient foundations. [One seeks] the nourishment which we have derived, or can today derive, from the past'.[18] We seek to identify Murphy's foundation of progressive property, and to build on it; to find the manna of social relations, and derive nourishment from it.

In reflecting upon Murphy's approach to property, we demonstrate that what might seem old in years, in fact retains its vitality and remains, indeed, a new way of understanding property in Australian law. In seeking this nourishment, 'the past is assured of a bright future'.[19] In short, we want a renewal of the old. While the cases and Murphy's decisions themselves are old, their content is progressive, new, fresh, and available to serve as foundations for a social-relations alternative to the constitutionalised bundle of rights perspective that prevails in Australia, as in so many other jurisdictions. And the vision of property found there provides nourishment for modern Australian law as it grapples with new property challenges.

In addition to this Introduction, the article contains four parts. Part II briefly recounts Justice Murphy's radicalism as a judge, setting the framework for understanding how the approach taken to law would produce exciting results in property law. In Part III we explore the elements of what we refer to as the progressive-relational view of property elaborated by Murphy during his time as a justice of the High Court. We begin, though (as did Scalia in the 1984 debate with Epstein), by setting the economic realist and historical materialist framework within which Murphy operated; this, too, is found in his jurisprudence. Having set the context, we identify six elements of the progressive view of property found in Murphy's decisions:[20] property has (i) a social basis, which means that it is (ii) more than mere wealth, but rather (iii) emerges from relationships, giving rise to structures of (iv) power, which (v) the state adopts and adapts, allowing for (vi) change over time. Taken together, these six elements reveal just how innovative Murphy's understanding of property was. Far from old, it is a quintessentially new way of understanding property in Australian law. In Part IV, we build upon Murphy's foundation, applying the elements of progressive-relational property to the High Court's recent native title decision in *Northern Territory v Griffiths (Ngaliwurru and Nungali Peoples)* ('*Griffiths*').[21] In this way, we demonstrate how Murphy's view of property might nourish modern judicial approaches to novel forms of property, demonstrating how it explains novel property claims and disputes. In *Griffiths*, the High Court struggled to work with an understanding of property not grounded in the liberal conception of rights – use, exclusivity, alienability. Murphy's approach would have helped the High Court not only to understand native title, but also to provide appropriate protection for it. *Griffiths* is but one example of a case where Murphy's progressive account would assist. Part

18 David Johnston, *The Renewal of the Old* (Cambridge University Press, 1996) 2.

19 Ibid 25.

20 These draw upon the earlier, seminal, account found in Brendan Edgeworth, 'Murphy on Property' in Jocelynne A Scutt (ed), *Lionel Murphy: A Radical Judge* (McCulloch Publishing, 1987) 170.

21 (2019) 364 ALR 208.

V offers some brief concluding reflections on the bright future for property found in Murphy's progressive-relational conception.

II A RADICAL JUDGE

Few people today question the assertion that Lionel Murphy was a radical judge. This is well established:[22]

> He clearly deserves his reputation as Australia's most radical judge. Whether he is taking an 'activist' view of the scope for *judicial* change in the law, or asserting the need for 'judicial restraint' so that *legislative* programs are not impeded by undue interference, the ultimate purposes which he wants the lawmaking process to achieve embody a genuinely radical perception of human welfare.[23]

He took a radical approach to the law and society and to the judge's role within both (which, for Murphy, are really one and the same). While committed to parliamentary democracy (spending the better part of his career in the Senate), once assuming judicial office 'he had a golden opportunity to "do his own thing"'.[24] He saw, in his time in the three branches of government, a potential for the judiciary to become a truly co-equal branch of government, in which 'the other branches of government and the public understand the real, as distinct from the apparent, role of the judiciary'.[25] Thus, while radical, '[h]e did not reject institutions. Rather he worked within them. He worked them to social advantage, as he saw it'.[26]

Murphy's brand of radicalism was of course seen most forcefully in his approach to the *Australian Constitution*. But, less well known, in relation to the common law, 'he encouraged development of the law, invention and reform because he regarded himself as an authentic voice of the Australian common people: with strengths and weaknesses which derived from his manifest

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22 Jocelynne A Scutt (ed), *Lionel Murphy: A Radical Judge* (McCulloch Publishing, 1987). The epithet 'radical' may be defended on several grounds. In form, Murphy adopted a theoretical and principled approach above a doctrinal one: see, eg, Edgeworth, 'Murphy on Property' (n 20) 184; Michael Kirby, 'Murphy: Bold Spirit of the Living Law' (Lionel Murphy Memorial Lecture, Sydney University Law School, 28 October 1987); Michael Kirby, 'Lionel Murphy – Ten Years On' (Lionel Murphy Memorial Lecture, Senate Chamber, Old Parliament House, 21 October 1996) 9–10. In substance, his opinions were often in dissent. His judgment was based foremost in a concern for equal justice: Mary Gaudron, 'Epilogue: Speech Given at Memorial Service for Lionel Murphy at Sydney Town Hall 27 October 1986' in Jocelynne A Scutt (ed), *Lionel Murphy: A Radical Judge* (McCulloch Publishing, 1987) 258, 258; Michael Kirby, 'Foreword' in Jocelynne A Scutt (ed), *Lionel Murphy: A Radical Judge* (McCulloch Publishing, 1987) 4. He professionally distinguished himself on the court from the Chief Justice, then Barwick, which established his position relative to a conservative-led court: see David Marr, *Barwick* (George Allen & Unwin, 1980) 245–7 (Barwick and the conservative bar's objections to Murphy's appointment), 281–2 (the terse exchange between Barwick and Murphy about the 1975 constitutional crisis).

23 AR Blackshield, 'Introduction' in AR Blackshield et al (eds), *The Judgments of Justice Lionel Murphy* (Primavera Press, 1986) xiii–xix, xvi (emphasis in original).

24 Kirby, 'Foreword' in Scutt (n 22) 4, 5.

25 *Gazzo v Comptroller of Stamps (Vic)* (1981) 149 CLR 227, 254 (Murphy J) ('*Gazzo*').

26 Kirby, 'Foreword' in Scutt (n 22) 4, 6.

humanness'.[27] This 'authentic voice' is revealed in his jurisprudence, of course, but it began with his approach to the judicial craft itself. How did Murphy then conceive of the judge's role in a co-equal judicial branch?

To begin, Murphy was '[s]upremely self-confident and self-assured in his mastery of legal principle. Not plagued by troublesome doubts or obfuscating precedents',[28]

> Murphy simply presented a proposition in his judgment as being self-evident without requiring further explanation or justification. This had led to the argument that whilst his judgments comprised quite advanced substantive propositions, they did not comprise an inherent logic or a distinctive system of reasoning whereby his legal methodology was manifested.[29]

This might be put another way: Murphy, more than most, began from first principle. He 'ordinarily went directly to the concept or idea which was at stake'.[30] While others start with the legislation, the case, or, indeed, even the *Constitution* itself, Murphy started from first principle, with a consequent persistence, a doggedness, and a 'deep conviction … in the rational processes of human thought'.[31] '[A]s a person, as a politician and later as a judge … he was convinced that others would come to see the truth, as he saw it. … He had an enduring faith in the logical exercise of political and judicial power and in the abiding honesty and decency of his fellow human beings'.[32]

But beginning with first principle is not shorthand for saying that Murphy lacked a principled approach to the judicial development of law. Quite the contrary. His was an approach characterised by drawing upon a breadth and depth of legal source material that often took him far beyond the law books and his own jurisdiction. Rather than depending only on the sources available in the Anglo-Australian common law, Murphy built a library that allowed for a wide-ranging approach to the law. He

> proudly displayed the United States Reports, recording the opinions of the most powerful Supreme Court of the English-speaking world. His willingness to reach into those opinions, particularly in constitutional cases, and his inclination to write his reasons in a style similar to that used in the United States Court, marked him out as unusual.[33]

Yet, the books weren't just for show: 'He was devoted to the books. He assiduously noted them up, spending what to most of us would have been tedious hours in the process'.[34] In doing so, '[Murphy] … [freed] the legal mind from the blinkers of sole allegiance to English legal authority'.[35]

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27 Ibid 7.

28 Ibid 5. See also Scott Guy and Kristy Richardson, 'Justices Murphy and Kirby: Reviving Social Democracy and the *Constitution*' (2010) 22(1) *Bond Law Review* 26.

29 Guy and Richardson (n 28) 30. See also Edgeworth, 'Murphy on Property' (n 20) 184.

30 Michael Kirby, 'Foreword' in Jenny Hocking, *Lionel Murphy: A Political Biography* (Cambridge University Press, 2000) iii, viii.

31 Kirby, 'Foreword' in Scutt (n 22) 6.

32 Ibid. See also Gaudron (n 22) 258.

33 Kirby, 'Foreword' in Hocking (n 30) viii.

34 Neville Wran, 'Murphy the Barrister' in Jocelynne A Scutt (ed), *Lionel Murphy: A Radical Judge* (McCulloch Publishing, 1987) 15, 15.

35 Kirby, 'Foreword' in Hocking (n 30) ix.

In judicial philosophy, Murphy was heterodox, heretical,[36] at odds with the approach taken by most judges before and, to be fair, since.[37] Michael Kirby, comparing Sir Garfield Barwick (the exemplar of the Australian judicial ethos) to Murphy, writes that the former

> was the supreme individualist, with a profound faith in the capacity of each Australian to reach [their] full potential if only the interference of government could be kept at a minimum. Murphy was a communitarian. His was an ideal of society in which the strong help to shoulder the burdens of the weak – in which minorities are protected and encouraged to reach their full potential.[38]

Materials drawn from throughout the English-speaking world – especially those from the United States – in support of communitarianism found expression most frequently in Murphy's judgments, thus identifying him most readily with judicial radicalism. The use of such materials often came in the sphere of public law jurisprudence: the *Constitution*,[39] family law,[40] economic regulation,[41] taxation,[42] human rights,[43] and issues relating to the media.[44] It is less well known that he was also an innovator in the private law sphere.[45]

Given his lasting legacy in public law, especially in relation to constitutional implications[46] it might seem strange or odd to associate Murphy's concern for the weak and minorities with property. Yet before a written form of constitutional foundational document was ever known to humankind, before fundamental human rights were ever protected in written documents, there was property: a right sometimes inimical to the interests of the weak, the underprivileged, the dispossessed, and therefore necessitating their protection against its excesses. It is that concern to which the social relations or progressive school of property seeks to draw attention. And it was Murphy's concern. For that reason, Murphy's approach as a communitarian is therefore most evident not in his constitutional or public law jurisprudence, but in those decisions that involve property. We turn, then, to consider Murphy's property jurisprudence.

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36 Ibid viii.

37 Edgeworth, 'Murphy on Property' (n 20) 185.

38 Kirby, 'Foreword' in Hocking (n 30) iii.

39 John Goldring, 'Murphy and the *Australian Constitution*' in Jocelynne A Scutt (ed), *Lionel Murphy: A Radical Judge* (McCulloch Publishing, 1987) 60.

40 Jocelynne A Scutt, 'Murphy and Family Law' in Jocelynne A Scutt (ed), *Lionel Murphy: A Radical Judge* (McCulloch Publishing, 1987) 86.

41 Peter Hanks, 'Murphy on Economic Regulation' in Jocelynne A Scutt (ed), *Lionel Murphy: A Radical Judge* (McCulloch Publishing, 1987) 118.

42 Richard Krever, 'Murphy on Taxation' in Jocelynne A Scutt (ed), *Lionel Murphy: A Radical Judge* (McCulloch Publishing, 1987) 128.

43 Jocelynne A Scutt, 'Murphy and Women's Rights' in Jocelynne A Scutt (ed), *Lionel Murphy: A Radical Judge* (McCulloch Publishing, 1987) 144; Marcus Einfeld, 'Murphy and Human Rights' in Jocelynne A Scutt (ed), *Lionel Murphy: A Radical Judge* (McCulloch Publishing, 1987) 187.

44 Garry Sturgess, 'Murphy and the Media' in Jocelynne A Scutt (ed), *Lionel Murphy: A Radical Judge* (McCulloch Publishing, 1987) 211.

45 See, eg, Edgeworth, 'Murphy on Property' (n 20) 170.

46 Murphy 'left a copy of the *Constitution* beside his bed at night, in case sleeplessness should strike him and he had yet another chance to look into its language to discover its implications': Kirby, 'Foreword' in Hocking (n 30) ix.

III PROGRESSIVE-RELATIONAL PROPERTY

A Economic Relations: Realism and Materialism

In his private law jurisprudence, Murphy developed 'a thoroughgoing critique of traditional liberalism on the basis of its inegalitarianism, its privileging of private property over social obligation, and its immunisation of major economic decision-making from democratic control'.[47] Murphy's is a view of property that denies 'the market unrestricted capacity to determine the processes of consumption, distribution and exchange, given its inherent disregard of the needs of the poor, underprivileged and disadvantaged'.[48] Something, then, had to be done to redress this inequality. Murphy did this through one of the foundational principles of legal interpretation found in his jurisprudence: a species of historical materialism or economic realism. The pattern of materialist interpretations of the law which we find in Murphy go a long way to explaining his approach to that most concrete form of economic power, private property, to which we move in the next section. Before we can discuss the presence of this concept in Murphy's jurisprudence, it is useful to define the relationship of historical materialism to law in general terms.

The term 'historical materialism' refers to a form of historical analysis which is based in the idea that social change is a product of material circumstances, specifically economic forces. In Marx's clearest exposition of his theory of historical materialism, found in the Preface to *A Contribution to the Critique of Political Economy* ('Preface'), Marx asserts that he pursued the study of law 'as a subordinate subject along with philosophy and history'.[49] In the Preface, Marx makes a critical distinction between social consciousness and social existence:

> The sum total of [the] relations of production constitutes the economic structure of society, the real foundation, on which rises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production … conditions the social, political and intellectual life process in general. It is not the consciousness of men that determines their being, but, on the contrary, their social being that determines their consciousness.[50]

In precisely the same way, the materialist conception of law must deny the view that the law can be safely and satisfactorily interpreted merely according to its internal logical system: '[L]egal relations as well as forms of state are to be grasped neither from themselves nor from the so-called general development of the human mind, but rather have their roots in the material conditions of life …'.[51]

Stated in the most simple and general terms, the position of law in the Marxist conception of society 'treat[s] it as one aspect of a variety of political and social arrangements concerned with the manipulation of power and the consolidation of modes of production of wealth …'.[52] That is, the law is just one part of the power

47 Edgeworth, 'Murphy on Property' (n 20) 185.
48 Ibid.
49 Karl Marx, 'Marx on the History of His Opinions: Preface to *A Contribution to the Critique of Political Economy*' in Robert C Tucker, *The Marx-Engels Reader* (WW Norton, 2nd ed, 1978) 3–6 ('Preface').
50 Ibid 4.
51 Ibid.
52 Hugh Collins, *Marxism and Law* (Oxford University Press, 1982) 13.

structure which serves to maintain the particular economic order. Nevertheless, it is trite to remark that there is no true Marxist theory of law, if that is considered to mean a consistent and sophisticated position on the proper approach to law based on the writings of Marx. Much of this is explained by the very fact that Marxists consider law to follow the economy, not the other way around. So the proper object of critique is economic forces. The legal system which backs them – being, at most, just the accepted form of violence on which the forces depend – is secondary. Therefore, in his dated, but important, introduction to Marx and law, Hugh Collins can identify but one treatise by Karl Renner, and another by Evgeny Pashukanis, as the 'only two major works devoted exclusively to the formulation of a Marxist theory of law'.[53] To this we might suggest the addition of lesser-known works by Nicos Poulantzas,[54] though here is not the place to survey the record.

It is, however, relevant to consider why Marxists and lawyers who believe in similar moral imperatives are so often uneasy companions. Why, for example, in the great range of moral and theoretical approaches among judges, do we find so few examples in which it is emphasised that law is a servant of the economic structure of society and ought to be so treated? To answer this, it is necessary to begin with the idea that the materialism of Marxism is inimical to legal formalism, or what Collins calls 'the phenomenon of legal fetishism … [being] the belief that legal systems are an *essential* component of social order and civilisation'.[55] According to the formalist view, it follows that '[l]egal systems are not simply types of a broader species of systems of power, but they possess distinctive characteristics'.[56] The materialist rejects this liberal conception of the law as a unique institution which is divisible from the dominant form of social arrangement, the economy.[57] Instead, the historical materialist view of the law emphasises – often exclusively – its economic purpose.

It is not necessary to go beyond this basic principle to enter into the various debates between competing materialist conceptions of the law.[58] Those are problems of theory which do not arise for determination in the questions which come before a judge. We do, however, find the more general idea of historical materialism in the judgments of Murphy.

This is most clearly seen in the progressive opinions which Murphy J gave in response to several industrial disputes in the High Court. Murphy J's view was consistent: that a law which governs a certain economic relationship ought to evolve to serve its purpose where the nature of those relationships have themselves

53 Ibid 9–10.

54 The reader is directed, in the first instance, to these two works: Nicos Poulantzas, *Political Power and Social Classes*, tr Timothy O'Hagan (Verso, 1978) and Nicos Poulantzas, *State, Power, Socialism*, tr Patrick Camiller (Verso, 2014).

55 Collins (n 52) 10 (emphasis added).

56 Ibid 11. See also, the introductory section on 'Bourgeois Legal Ideology' in Alan Hunt, 'Law, State and Class Struggle' (June 1976) *Marxism Today* 178, 184.

57 Collins (n 52) 11.

58 One debate among Marxist legal philosophers concerns the proper place of law within the 'base' and 'superstructure' model of society. See, eg, the polemic by GA Cohen, 'Base and Superstructure: A Reply to Hugh Collins' (1989) 9(1) *Oxford Journal of Legal Studies* 95; and the chapter on the subject by Hugh Collins himself: Collins (n 52) ch 4.

evolved in the economy.[59] In two cases which turned on the definition of 'industrial disputes' under section 51(xxxv) of the *Constitution*, Murphy J's view was that the Court should not follow a strict construction of the section that had been adopted in the early years of the High Court, given the economy had since changed.[60] In *R v Coldham*, Murphy J warned that 'the words [of the section] are not to be read artificially'.[61] The artificial reading against which Murphy J protested was that which supposed that an 'industrial dispute' could not 'arise between those who are not employers and employees'.[62] This was 'absurd' because 'significant changes ha[d] occurred in industrial relations', whereby 'work previously carried out on an employer-employee basis [was instead coming to be] done under the contract system'.[63] To exclude disputes that arose between workers and business merely because those workers were not formal *employees* would give an unfair advantage to a business and leave the workers without important protections. It was Murphy J's view that the evolution of the economy ought to be followed by an evolution of the law. His analysis of the change in economic reality justified a change in the interpretation of the law so that it might fulfil its proper purpose in the economy.[64]

In another case, *R v Gaudron; Ex parte Uniroyal Pty Ltd*,[65] the question was whether a dispute over the preference of an employer for a particular class of members in a union was an industrial dispute in the relevant statutory and constitutional meaning of that term. Murphy J viewed that it was. In his opinion, Murphy J explained that such a dispute was properly seen as part of the 'historical struggle between employers and employees over the existence, recognition and role of trade unions'.[66] Here again, we see Murphy J's judgment being informed by his consideration of the historical and economic context, a kind of economic realism.

The purpose of this section is not somehow to impose a Marxist reading on Murphy, nor to suppose that Murphy himself was guided by communist views. To do either of those things would be to misconceive the role of the judge and to overestimate the power of the courts, in both the liberal and materialist views of the legal system. However, it may quite clearly be seen that Murphy consistently stressed a realist approach to questions of law which dealt with economic relations. The proper approach, as seen in the few paradigmatic cases we have mentioned, was to conceive an interpretation of the law by consideration of its economic function.

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59 On the relational element of the Marxist conception of law, see Alan Hunt, 'Marxist Theory of Law' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell, 1996) 355, 356–7.

60 *R v Coldham; Ex parte Fitzsimons* (1976) 137 CLR 153, 174–5 ('*Coldham*'); *R v Holmes; Ex parte Public Service Association (NSW)* (1977) 140 CLR 63, 90 ('*Holmes*').

61 *Coldham* (1976) 137 CLR 153, 175.

62 Ibid.

63 Ibid 174–5. See also *Holmes* (1977) 140 CLR 63, 90.

64 See also the view of Murphy J about the definition of trade in the modern economy, guided by commercial facts: *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190, 239–40; and the view of marriage as an economic institution: *R v Ross-Jones; Ex parte Beaumont* (1979) 141 CLR 504, 519.

65 (1978) 141 CLR 204.

66 Ibid 226.

That Murphy J's economic analytical approach was a conscious pattern of thinking can be surmised from his reflections on the role of the law in building the economic powerhouse of imperial Britain:

> [A] significant part of Australian law has been made in the United Kingdom rather than in Australia and, inevitably, much of this law was evolved to meet changing conditions in the United Kingdom and to facilitate its emergence as a world power. During the nineteenth century, the dominant theme was the evolution of rules to serve the needs of British commerce and industry, particularly the factory system. … [T]he judicial modernization of the mercantile law assisted greatly in the expansion of trade throughout the Empire and in making London the commercial capital of the world.[67]

Some of Murphy's opinions on the economy are difficult to square with this grand view. For example, in a case dealing with the interpretation of section 92 of the *Constitution*, Murphy J made the questionable assertion that the protection of interstate free trade was not based in liberal economics:

> Although fashioned at the end of the nineteenth century, the *Constitution* did not entrench nineteenth century economic ideas. Yet for most of its history, s 92 has been construed as if it guaranteed that nineteenth century notions of laissez-faire would prevail.[68]

Nevertheless, the opinion of Murphy J in this case maintains the same emphasis on looking to changing economic circumstances as in the other examples. Murphy J took issue with the strict and liberal interpretation of section 92 that would disable certain interventions of the state in the economy in the name of free trade. This was '[a]n extreme instance of laissez-faire'.[69] The proper approach was to consider the changed economic circumstances, in this case of an Australian wheat economy that Murphy J viewed it was reasonable to regulate: '[r]egrettably economic and social ideas adopted by society in one era are often persisted with by judges long after they have been discarded by the rest of society'.[70]

In all the examples we have considered, Murphy's opinions on laws which govern economic relationships are guided by a primary consideration of the economic reality which the law seeks to support or regulate. It is an economic realist philosophy or, more generally, a purposive approach to laws which govern economic relations. In this section, we have considered the economy in its abstract sense and in various forms. In the next section, we move to consider a specific category of economic relations: those found in property.

B Property: Progressive and Relational

Shortly after Murphy's death in 1986, two pieces of scholarship appear, related but unknown to each other, on opposite sides of the Pacific. In the United States, as we have seen in Part I, Joseph William Singer publishes 'The Reliance Interest in Property' in the *Stanford Law Review*; in Australia, Brendan Edgeworth

67 *Viro v The Queen* (1978) 141 CLR 88, 159–60.
68 *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 309.
69 Ibid 310.
70 Ibid 309.

publishes 'Murphy on Property'.[71] While neither refers to the other, they are related in that they identify a new way of looking at property – one which views it as a matter not of a bundle of rights, but of social relationships between people in relation to things or items of social wealth. Edgeworth's chapter is of course referring to Murphy's view of property, which we call here progressive-relational.

What is important for our purposes is to emphasise that neither Edgeworth nor Singer is the first to identify this view. Rather, Murphy identified it – Edgeworth of course explicitly recognises this, while Singer, writing in the United States, would have had no way of knowing of Murphy's judicial championing of a view which is often attributed to Singer and 'The Reliance Interest in Property', but which Murphy predated by as many as 10 years. Moreover, Murphy predates the American progressive property movement by as many as 30 years. If Singer's 'The Reliance Interest in Property' in 1988 and co-authored article 'A Statement of Progressive Property' in 2009 bookend, or frame, the origins and growth of the progressive property movement, then Murphy not only preceded and judicially championed it, but had already planted that seed in a real-world, working legal system – Australia's – before Singer wrote in 1988, and long before 'A Statement of Progressive Property' in 2009.[72] The identification, then, of progressive, or social-relations property solely with American law is not only inaccurate as a matter of theory, but also as a matter of law. Murphy had already found it, and not merely as a theoretical matter, but as part of the law of Australia. And Edgeworth's chapter, while a deeply significant and important piece of scholarship, did not establish something new, but rather identified and summarised what Murphy had already planted in Australian law.

Yet the seed remains buried – perhaps forgotten – in Australian property law. Here we seek not only to focus attention again on it, but also, and much more importantly, to nurture and grow it. In this we reveal the only extant judicial championing of a progressive-relational view of property in the common law world. What we present here is, in short, what social-relations and progressive property theorists have been searching for: an example of a judicial champion of their theory of property in a real world, common law setting. Murphy's progressive-relational view of property, old in years, remains new in its inspiration. It contains six elements: property has (i) a social basis, which means that it is (ii) more than mere wealth, but rather (iii) emerges from relationships, giving rise to structures of (iv) power, which (v) the state adopts and adapts, allowing for (vi) change over time. We turn now to a detailed consideration of each element.

1 Social Basis

Consideration of Murphy's jurisprudence, be it in public or private law, begins with his radical – to some heterodox or even heretical – approach to judging. As we argued in Part II, Murphy began from a position of concern for people and their strengths and weaknesses. This informed a search for first principle, drawing upon

71 Singer 'The Reliance Interest in Property' (n 10); Edgeworth, 'Murphy on Property' (n 20) 170.

72 See above nn 11–12.

a breadth and depth of evidence, which might or might not be legal precedent, and relied upon the rational processes of human thought to reach a just outcome. This frequently led Murphy in directions that went beyond Australian shores, and the United States was one of the places to which he found himself drawn. This is deeply significant to the development of his property jurisprudence. With strong communitarian instincts, Murphy found a natural home among the American legal realist movement of the early part of the 20th century, and even with the nascent Critical Legal Studies ('CLS') movement of the late 1960s. Murphy's approach as a communitarian is most evident in those decisions that involve property.

For Murphy, the liberal conception of 'property is as much … a component of *power and inequality* as of freedom'.[73] We will see more of the way in which Murphy conceived of property, and how he sought to redress the power structure embedded in its inherent inequality. For the moment, we touch here only on his methodology:

> Murphy's interpretative methodology … relies on extra-legal factors and bypasses, in many cases, the doctrine of precedent. In that respect, it appeals directly to social, political and public considerations (much as the American legal realists and critical legal studies movement did in the immediate pre- and post-World War II years of which he was keen to take note …).[74]

And this meant '[focusing] on the substantive sociological details of the case'.[75] Murphy, then, placed himself squarely within the American legal realist position and was already a property Critical Legal Scholar, or 'crit', well before CLS had even turned its attention to property with Singer's 'The Reliance Interest in Property', which inaugurated social-relations or progressive property (which is in fact CLS property theory).

But Murphy was more than a progressive-relational or crit property theorist – he was a crit property *judge*! His methodology, then, is not merely important from the perspective of what Murphy was doing, but as a model for progressive-relational property theorists the world over as they urge the judiciary in their own jurisdictions to adopt a more progressive stance. And using this methodology, Murphy, perhaps without an explicit structure which he himself imposed, set out a progressive-relational view of property. That view emerges from the economic realist-historical materialist view held by Murphy, which we assessed above. Before turning to the elements of Murphy's progressive-relational view, it is worth first pausing to consider the difficulties which Murphy saw in reducing property merely to a question of wealth.

2 More than Wealth

Up until the 20th century, it was well-established that property was much more than simply wealth. This is perhaps most evident in the fact that, for a very long time, the doctrine of tenure and estates governed the use and control of land as property, for the important reason that land was power. The twin pillars of English feudal land law, tenure and estates, established a system of correlative social rights

73 Edgeworth, 'Murphy on Property' (n 20) 185 (emphasis in original).
74 Guy and Richardson (n 28) 31.
75 Ibid (emphasis omitted).

and duties centred on the use of land. Until the 20th century, property was very much a thing – land and chattels – and because it was tangible, it equated to wealth, to power.[76] And because property's tangibility signalled those who held power, it 'intrinsically conferred a role in political life: it was akin to a ticket to participate in the life of political society'.[77] In the 20th century, though, all of this changed, as property was reduced to abstract rights and interests, thus converting the tangible thing into an intangible value – economic, or monetary.[78] What was once tangible becomes ethereal.

Murphy J rejected this 'wealth view' of property, beginning with his judgment in *A-G (Cth) ex rel McKinlay v Commonwealth*,[79] a case involving the principle of one-person, one-vote democratic equality ideal in the *Constitution*. Murphy J, in upholding the democratic equality ideal in the right to vote, wrote that the

> [e]nforcement of constitutional political rights does not have to be justified by characterizing them as rights of property. This degrades the political right. The exaltation of property rights over civic and political rights is a reflection of the values of a bygone era.[80]

In other words, the exaltation of property is a product of post-20th century neoliberal thinking that focuses strictly on the absolutist triad of use, exclusion, and alienability.[81] For Murphy, the abstract bundle of rights in things reduces the important 'thingness' inherent in what property *ought to be* to an economic value.[82] Indeed, in the case of voting, detachment from the thing – the vote – results in the failure to recognise that the English common law once 'established that the right to vote in elections for Parliament was property and its denial a deprivation, remediable by an action for damages'.[83]

Murphy J elaborated upon this theme in the context of the right to work in *Dorman v Rodgers* ('*Dorman*'),[84] which involved whether the right to practise a profession (medicine) is compensable as property – that being required by section 35 of the *Judiciary Act 1903* (Cth) to bring an appeal from a decision of the Board to strike a member from the practising list. The majority of the Court held that there was no compensable property; the right to practise medicine having no value as property.[85] Murphy J, however, wrote that

> [p]roperty is an extremely wide concept with a long history. In non-legal usage land or a thing (tangible or intangible) is referred to as property. In legal usage property is not the land or thing, but is *in* the land or thing. Throughout the history of the

76 See Robert W Gordon, 'Paradoxical Property' in John Brewer & Susan Staves (eds), *Early Modern Conceptions of Property* (Routledge, 1995) 95, 95.
77 Edgeworth, 'Murphy on Property' (n 20) 174.
78 Ibid.
79 *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1.
80 Ibid 76.
81 See Edgeworth, 'Murphy on Property' (n 20) 174–5.
82 See Burdon, 'What Is Good Land Use?' (n 17).
83 *Dorman v Rodgers* (1982) 148 CLR 365, 372 (Murphy J) ('*Dorman*').
84 Ibid.
85 Ibid 367 (Gibbs CJ), 371 (Stephen J, Mason J agreeing at 371 and Brennan J agreeing at 382), 378 (Aickin J), 380–1 (Wilson J).

> common law the concept of property has been used to recognise the legitimacy of claims and to secure them by bringing them within the scope of legal remedies.[86]

Thus, the term

> 'property' embraces every possible interest recognized by law which a person can have in anything and includes practically all valuable rights. When used in legislation it should be given its 'ordinary' or 'natural' comprehensive meaning unless the context or history of the legislation suggests otherwise. The use in s 35 of the phrase 'any property' indicates the broadest sense of the word.[87]

The majority of the Court had seized upon the fact that the right to practise medicine could not be transferred. This, of course, is a hallmark of the narrow, abstract, bundle of rights approach to property, which relies upon alienability as being a requisite characteristic of property.[88] For Murphy J, though, alienability 'is not an essential characteristic of property … The right to vote … was not transferable. Numerous other property rights are non-transferable, for example licences of various kinds'.[89] Murphy J had the opportunity to confirm that a non-transferable licence might be property in *Forbes v New South Wales Trotting Club Ltd* ('*Forbes*').[90]

In finding property in the right to vote, the right to work, and in non-transferable licences, Murphy takes direct aim at the bundle of rights metaphor, long before it had become vogue to question it.[91] It is the narrow focus on bundles and rights that equates property only with value, a fact which constrained the reasoning of the majority in *Dorman*, but not that of Murphy J – a fact which ought not to surprise those familiar with his approach to the judicial craft. Murphy J does this as part of 'an attack on those theories which attempt to employ the model of the individual entrepreneur to justify the economic arrangements of a post-liberal society which has rendered that image of incentive and efficiency largely irrelevant'.[92]

Having demonstrated that he saw property as so much more than wealth, as capable of encompassing non-transferable interests, especially the right to vote and the right to work, we can explore the elements of Murphy's progressive-relational view.

3 Relationship

In the first half of the 20th century, Wesley Newcomb Hohfeld, one of the first American legal realists – a school of thought with which Murphy had a natural affinity – recognised something quite profound about law generally, and property specifically. Writing between 1913 and 1923, Hohfeld developed a novel means of describing legal rights, identifying four basic types of legal right – rights,

86 Ibid 372 (emphasis in original).
87 Ibid 372–3 (Murphy J) (citations omitted).
88 On this debate, see JE Penner, *The Idea of Property in Law* (Clarendon Press, 1997).
89 *Dorman* (1982) 148 CLR 365, 374.
90 (1979) 143 CLR 242.
91 See Penner, 'Bundle of Rights' (n 13).
92 Edgeworth, 'Murphy on Property' (n 20) 176.

privileges, powers, and immunities.[93] These 'jural relations' offered a useful way of understanding and analysing private property. Yet, because it was not specifically a theory of private property, Hohfeld's theory of rights left unresolved the identification of the specific rights that constitute the liberal conception. That task was taken up by Anthony Honoré, who provided the foundations of what has today become the bundle of rights metaphor.[94]

But before Honoré took Hohfeld in a different direction, another American legal realist, Felix Cohen, built upon Hohfeld by writing that

> [p]rivate property is a *relationship among human beings* such that the so-called owner can exclude others from certain activities or permit others to engage in those activities and in either case secure the assistance of the law in carrying out [that] decision.[95]

According the to the inheritors of the realist tradition of Hohfeld and Felix Cohen – the progressive and social relations school of property theory[96] – the source, origin, and constitution of private property is said to lie in *relationships* between people.[97] Private property is, in other words, a dynamic social construct, 'a cultural creation and a legal conclusion'.[98] Rather than being a-contextual, it flows from and has meaning according to social context,[99] depending for its content

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93 Hohfeld 'Some Fundamental Legal Conceptions' (n 13); Hohfeld, 'Fundamental Legal Conceptions' (n 13); Hohfeld, *Fundamental Legal Conceptions* (n 13); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning: And Other Legal Essays* (Yale University Press, 1923).

94 Honoré (n 13) 108–34.

95 Felix S Cohen, 'Dialogue on Private Property' (1954) 9(2) *Rutgers Law Review* 357, 373 (emphasis added).

96 Hohfeld's thinking was subsequently taken up by Robert L Hale, 'Coercion and Distribution in a Supposedly Non-coercive State' (1923) 38(3) *Political Science Quarterly* 470; Morris R Cohen, 'Property and Sovereignty' (1927) 13(1) *Cornell Law Review* 8; Robert L Hale, 'Bargaining, Duress, and Economic Liberty' (1943) 43(5) *Columbia Law Review* 603; ibid. Contemporary scholars, especially those of the CLS movement, who became known as the property as social relations school, have extensively developed and expanded the early realist work on property: see CB Macpherson, 'Capitalism and the Changing Concept of Property' in Eugene Kamenka and, RS Neale (eds) *Feudalism, Capitalism and Beyond* (Australian National University Press, 1975) 104; Jennifer Nedelsky, 'Reconceiving Rights as Relationship' (1993) 1(1) *Review of Constitutional Studies/Revue d'Études Constitutionelles* 1; Duncan Kennedy, 'The Stakes of Law, or Hale and Foucault!' (1991) 15(4) *Legal Studies Forum* 327; Joseph William Singer, 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld' [1982] 6 *Wisconsin Law Review* 975; Singer 'The Reliance Interest in Property' (n 10); Joseph William Singer and Jack M Beermann, 'The Social Origins of Property' (1993) 6(2) *Canadian Journal of Law & Jurisprudence* 217; Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale University Press, 2000) ('*Entitlement*'); Carol M Rose, *Property & Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Westview Press, 1994); C Edwin Baker, 'Property and Its Relation to Constitutionally Protected Liberty' (1986) 134(4) *University of Pennsylvania Law Review* 741; Laura S Underkuffler, 'On Property: An Essay' (1990) 100(1) *Yale Law Journal* 127.

97 Joseph William Singer offers this summary: 'Property concerns legal relations among people regarding control and disposition of valued resources. Note well: Property concerns relations *among people*, not relations between people and things': Joseph William Singer, *Property* (Wolters Kluwer, 5th ed, 2017) 2 (emphasis in original) (citations omitted).

98 Baker (n 96) 744.

99 Laura S Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford University Press, 2003) ch 4; JW Harris, *Property and Justice* (Oxford University Press, 1996) 317–20. See also Stephen R Munzer, *A Theory of Property* (Cambridge University Press, 1990); Margaret Jane Radin, *Reinterpreting Property* (University of Chicago Press, 1993); JE Penner, *The Idea of Property in Law* (Oxford University Press, 1997); Waldron, *The Right to Private Property* (n 5). For more recent acceptance of the relevance of

on the cultural, political and ideological beliefs of a particular society.[100] In 2009, Gregory Alexander, Eduardo Peñalver, Joseph William Singer, and Laura Underkuffler authored 'A Statement of Progressive Property', encompassing and summarising the breadth and depth of social relations theorising.[101]

Murphy J identified two types of relationship which may form the social context, the cultural, political, and ideological beliefs that form the core of what property is. While the recognition of native title would not occur until six years after his death, in two cases – *R v Kearney; Ex parte Jurlama* ('*Kearney*')[102] and *Coe v Commonwealth* ('*Coe*')[103] – Murphy J alluded to the 'spiritual relationship' which has only recently been found to support the rejection of the doctrine of terra nullius,[104] and the recognition of native title interests of Aboriginal and Torres Strait Islander peoples.[105] In *Kearney*, Murphy J, considered that the nature of Aboriginal land ownership pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) was not limited to 'the sites giving it that character being actually part of the land claimed', but rather, could be 'merely linked to it by dreaming tracks'.[106] And in *Coe*, in which the High Court struck out a badly drafted statement of claim for native title, Murphy J wrote that

> [t]he plaintiff claims that … Australia was at (or during) the time of its acquisition inhabited by the aboriginal people who had a complex social, religious, cultural and legal system and that their lands were acquired by the British Crown by conquest. There is a wealth of historical material to support the claim that the aboriginal people had occupied Australia for many thousands of years; that although they were nomadic, the various tribal groups were attached to defined areas of land over which they passed and stayed from time to time in an established pattern; that they had a complex social and political organisation; that their laws were settled and of great antiquity.[107]

Murphy J would have granted leave to amend the statement of claim so as to rely upon this historical material demonstrating the connection to land claimed.[108]

Murphy J also recognised social relations as forming the basis of property. While he alludes to this fact in *Forbes*,[109] Murphy J put this clearly, directly, and forcefully in *Dorman*, writing that property 'might first be formulated as social claims with no legal recognition. As they become accepted by reason of social or

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social context, see Alexandra George, 'The Difficulty of Defining "Property"' (2005) 25(4) *Oxford Journal of Legal Studies* 793.

100 Thomas W Merrill, 'Property and the Right to Exclude' (1998) 77(4) *Nebraska Law Review* 730, 737–9. This can be traced to the seminal work of Thomas C Grey, 'The Disintegration of Property' in J Roland Pennock and John W Chapman (eds), *Property* (New York University Press, 1980) 69.

101 Alexander et al (n 11) 743–4.

102 (1984) 158 CLR 426.

103 (1979) 24 ALR 118.

104 George Winterton, 'Murphy: A Maverick Reconsidered' (1997) 20(1) *University of New South Wales Law Journal* 204, 206.

105 *Griffiths* (2019) 364 ALR 208, 269 [216] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ, Gageler J agreeing at 274 [240], Edelman J agreeing at 276 [253]).

106 *Kearney* (1984) 158 CLR 426, 435.

107 *Coe* (1979) 24 ALR 118, 138 [50].

108 See also AR Blackshield et al (eds), *The Judgments of Justice Lionel Murphy* (Primavera Press, 1986) 312–3; Winterton (n 104) 206.

109 *Forbes* (1979) 143 CLR 242.

political changes they are tentatively and then more surely recognized as property. The limits of property are the interfaces between accepted and unaccepted social claims'.[110] And for Murphy J, what matters most in determining the nature of social relations is substance, not form,[111] with remedies, especially those in equity, established by the courts so as to protect the property form which emerges from social relations.[112]

Relationships, then, constitute what property is; whatever the law recognises as property often emerges from these relations, often pre-dating legal recognition and adoption.[113] In this process, the 'cultural creation and … legal conclusion'[114] of property, Murphy always prioritised the community, by which property, or at least the courts who recognise and enforce it, must '[encompass] a range of interests far wider than market values and the individual's private rights. [Murphy's] [w]as a socially oriented view of the duties of property holders and the restrictions which may be placed on their rights in view of the public interest'.[115]

For social relations and progressive property theorists, as for Murphy, the relational foundation of property means, importantly, that it is more than simply rights. Rather, the holder of property not only enjoys rights, but also owes obligations towards others in the exercise of those rights. Social relations theorists identify the importance of such moral imperatives – duties and obligations – to all systems of property; this ensures that the choices made by those who hold property do not produce outcomes which harm the interests of others who may or may not themselves hold property.[116] Indeed, Joseph William Singer argues that while private property might seem 'to abhor obligation … on reflection we can see that it requires it'.[117] Yet Murphy understood this well before the social relations and progressive property theorists did.

In *Cartwright v McLaine & Long Pty Ltd* ('*Cartwright*'), the High Court held that an occupier cannot be held liable for damages caused by nuisance (or possibly negligence) emanating from land in circumstances where the occupier did not create the nuisance unless continued with the occupier's knowledge or means of knowledge of its existence.[118] For Murphy J, however, '[a] person in occupation of premises adjoining a public road is liable for failure to exercise reasonable care and skill in the supervision of the premises so that those on or passing along the road will not be harmed. This extends to anything falling or escaping from the

110 *Dorman* (1982) 148 CLR 365, 372.
111 *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359, 375.
112 *Hewett v Court* (1983) 149 CLR 639, 651 ('*Hewett*'). See also *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326, 346–7 ('*Heid*').
113 Cf Marx, 'Preface' (n 49) 4.
114 Baker (n 96) 744.
115 Lisbeth Campbell, 'Lionel Murphy and the Jurisprudence of the High Court Ten Years On' (1996) 15(1) *University of Tasmania Law Review* 22, 31.
116 Singer, *Entitlement* (n 96) 204.
117 Ibid.
118 (1979) 143 CLR 549.

premises'.[119] Murphy J quoted with approval Starke J in *Hoyt's Pty Ltd v O'Connor*:[120]

> The duty of an occupier is … 'to keep his property from being a cause of danger to the public by reason of any defect either in structure, repair, or use and management, which reasonable care and skill can guard against'. The duty, as Sir Frederick Pollock says, is impersonal rather than personal. Again, the occupiers may be answerable for the neglect of the duty, as Hamilton LJ (now Viscount Sumner) points out in *Latham's Case*, 'even though but for the intervening act of a third person or the plaintiff himself' the 'injury would not have occurred'. 'No doubt each intervener is a *causa sine qua non*, but unless the intervention is a fresh independent cause, the person guilty of the original negligence will still be the effective cause, if he ought reasonably to have anticipated such interventions and to have foreseen that if they occurred the result would be that his negligence would lead to mischief'.[121]

The community, then, looms large in Murphy's assessment of property. The rights of the individual property holder require balancing as against the wider interest of the community. This balance, typically considered as part of the public–private divide long recognised as a fundamental division in a state's legal framework, Murphy not only considered, but fundamentally recalibrated as part of a progressive-relational view of property.

4 Power

Property, as Murphy understood, is about unequal allocations of power. Just what *sort* of power and *how* it is conferred we find revealed in the American legal realist tradition to which Murphy was drawn. Writing almost 100 years ago, and just after Murphy was born, Morris Cohen argued that property is a conferral of power in the form of a state grant of sovereignty to the individual said to hold it.[122] Cohen adverted to a traditionally public law concept to describe property, at once making clear what property is, as well as blurring the traditional boundary drawn between public and private law. Cohen argued that this 'public-private divide' constitutes a fixed division in any legal system, traceable to the ancient Roman law and its division between dominium (rule of the individual over things) and imperium (rule of the prince (or state) over all individuals).[123]

But property bridges the public–private divide – and for Cohen, the initial identification and subsequent blurring of the traditional divide provides a useful tool for the analysis of the power of the individual contained in property. In short, dominium constitutes the state's grant of power – rights – upon the individual,[124] which thereby 'helps … to exclude others from using the things which it assigns to me. If then somebody else wants to use the food, the house, the land, or the plow which the law calls mine, [they have] to get my consent. To the extent that these

119 Ibid 572.
120 (1928) 40 CLR 566, 584 (Starke J).
121 *Cartwright* (1979) 143 CLR 549, 573–4 (Murphy J), quoting *Hoyt's Pty Ltd v O'Connor* (1928) 40 CLR 566, 584 (Starke J) (citations omitted). Murphy J also cited *Rickards v Lothian* (1913) 16 CLR 402: *Cartwright* (1979) 143 CLR 549, 574.
122 Morris R Cohen (n 96).
123 Ibid 8–9.
124 Ibid 11.

things are necessary to the life of my neighbor, the law thus confers on me a power, limited but real, to make [them] do what I want'.[125]

Following realist instincts, Murphy, too, saw the line between the public and the private as more permeable than hard. This tendency emerged before Murphy was even on the High Court, in his championing as Attorney-General in the Whitlam Government of the *Trade Practices Act 1974* (Cth), the 'purported aim [of which was] to regulate "unfair" trading practices [which] necessarily rejects the idea that freedom abides in the market'.[126] Murphy was a justice by the time the constitutionality of the Act came before the High Court. *Trade Practices Commission v Tooth & Co Ltd* ('*TPC v Tooth*'),[127] a constitutional property case, involved whether the removal of the power of a corporation to engage in exclusive dealing with customers constituted a regulation of trade or a taking of property violative of section 51(xxxi) of the *Constitution*. The majority found that it was not a taking.[128] Murphy J agreed, but for reasons which make clear that section 51(xxxi) gave the state an expansive power to regulate market activity before it could be said to constitute a taking of property. Murphy J wrote:

> If s 51(xxxi) is a far reaching restriction of the legislative power … then this would put into question many laws of the Parliament which have not so far been questioned. Generally, 'property' is not confined to real estate or goods; the word embraces a multitude of legal conceptions – intellectual property, the right to vote … and so on. Many federal laws provide for alteration of property rights and obligations between citizens without any intended use of the property by the executive government or its agents. If such alterations were to be regarded as acquisitions of property within s 51(xxxi) there would be some remarkable results; for example, the validity of many long-standing sections of Acts such as the *Conciliation and Arbitration Act 1904* (Cth), as amended, would be put in doubt …[129]

What Murphy J really does here is define the nature of property. Rather than being an inviolable private right with which the state may only interfere on the basis of just terms compensation being paid to the holder, Murphy J recalibrates the traditionally understood public–private divide so as to define the state's power of regulation broadly, in such a way as to render the power held by individuals pursuant to property as allowing a narrower scope of freedom of choice. This recalibration of the public–private divide finds its fullest expression in Murphy J's decisions in *Interstate Parcel Express Co Pty Ltd v Time-Life International (Nederlands) BV* ('*Interstate*'),[130] *Forbes*, and *Clunies-Ross v Commonwealth* ('*Clunies-Ross*').[131]

In *Interstate*, the High Court considered a potential copyright infringement through the importation of books into Australia, seemingly in contravention of the *Copyright Act 1968* (Cth), and the scope for the grant of discretionary equitable remedies in aid of the party whose copyright is infringed. The majority of the Court

125 Ibid 12.
126 Edgeworth, 'Murphy on Property' (n 20) 182.
127 (1979) 142 CLR 397.
128 Ibid 405–6 (Barwick CJ), 409 (Gibbs J), 413, 416 (Stephen J), 433 (Mason J).
129 Ibid 434 [5].
130 (1977) 138 CLR 534.
131 (1984) 155 CLR 193.

found that an infringement had occurred and that equitable remedies therefore lay in aid of the party whose copyright had been infringed.[132] In dissent, Murphy J took his decision beyond the narrow scope of the relative interests of the parties, expanding the consideration to encompass a public power to prevent monopolisation of the market by a small number of private actors to the detriment of the broader public interest.[133] As in *TPC v Tooth*, Murphy J expanded the scope of the public power of the judiciary so as to protect the public interest, writing that

> [o]nce the facts of a case disclose the reasonable possibility of a serious breach of the *Trade Practices Act* or injury to the public interest by a party, the court can and should require the party to negate this before exercising discretion in its favour. This is because there are public equities as well as private equities. The concept of public equities has been associated with the old doctrine of clean hands.[134]

Forbes involved whether a landholder could exercise its right to exclude members of the public from its lands which were used as a racecourse. Members of the public could enter the lands upon receipt of a licence from the New South Wales Trotting Club. The dispute before the High Court involved the longstanding debate as to the proprietary nature and enforceability of a contractual licence. The traditional position, at least in Australia, is that such licences are subject to damages in breach, but not to equitable remedies of enforcement generally available only to proprietary interests. While the majority left this traditional position undisturbed, Murphy J found that in some circumstances, private 'rights [may be] so aggregated that their exercise affects members of the public to a significant degree, [such that] they may … be described as public rights and their exercise as that of public power'.[135] Here, '[t]he respondent is not only an owner of land … [but] exercises power which significantly affects members of the public, tens of thousands of whom go to watch the spectacles, many to bet as a hobby, and some, like the appellant, to try to make a living by betting'.[136] In short, the Trotting Club was exercising public, not private, power and as such, '[i]t may not arbitrarily exclude or remove such a person from the lands during a race meeting'.[137] This was nothing new, as Murphy J wrote: '[f]rom early times, the common law has declined to regard those who conduct public utilities, such as inns, as entitled to exclude persons arbitrarily'.[138]

Murphy J took an equally expansive view of the state's public power in *Clunies-Ross*, which involved the creation of a private fiefdom by the Clunies-Ross family by the settlement of an uninhabited island in the Cocos (Keeling) Islands in 1827. Britain and subsequently Australia acquired sovereignty over the

132 *Interstate* (1977) 138 CLR 534, 545 (Gibbs J), 554–5 (Stephen J), 557 (Jacobs J).
133 Ibid 560–562. See also Campbell (n 115) 32.
134 *Interstate* (1977) 138 CLR 534, 560, shortly thereafter citing the United States Supreme Court approach to the equitable maxim of clean hands in *Precision Instrument Manufacturing Co v Automotive Maintenance Machinery Co*, 324 US 806 (1945); *Blonder-Tongue Laboratories Inc v University of Illinois Foundation*, 402 US 313 (1971); *S & E Contractors Inc v United States*, 406 US 1 (1972): at 560–1.
135 *Forbes* (1979) 143 CLR 242, 275.
136 Ibid 274–5. See also Campbell (n 115) 31.
137 *Forbes* (1979) 143 CLR 242, 275.
138 Ibid 274.

islands and the Commonwealth sought to acquire the house and land of the Clunies-Ross family, ostensibly for the public purpose of 'extinguish[ing] the taint of feudalism and colonialism'.[139] The Clunies-Ross family challenged the statutory power pursuant to the *Lands Acquisition Act 1955* (Cth) on the basis that it constituted a violation of section 51(xxxi) of the *Constitution*. For Murphy J,

> [t]he history of eminent domain shows that a classic public purpose for acquisition of land has been to eradicate feudal incidents and relics. Whether the Court agrees with the political and social considerations which lead to such an opinion is not relevant. The merits of the opinion are for the Government, not the Court, unless it would be irrational to regard the acquisition as one for a public purpose.[140]

And a rational public purpose could be determined from political and social considerations.

Clunies-Ross allowed Murphy J to summarise the extent of the state's power as against the individual property-holder in defence of the public interest:

> It runs against generally accepted principles of interpretation to read narrowly a wide phrase such as 'for a public purpose'. Acquisition of land round an airport or a defence installation, not to use, but so that no one may use it, is for a public purpose. Acquisition of a derelict site, not to use it, but to remove an eyesore or to prevent danger, is for a public purpose. Acquisition of a wilderness area, specifically so no one should use and therefore despoil it, is for a public purpose. The spirit and enjoyment of life of the island people can be diminished not only by a derelict site or pollution but by the continued presence of the former feudal overlord, in the former feudal manor. It is open to the Government to take a view that the acquisition of the land and house to prevent that continuance is for a public purpose.[141]

It would have been easy for Murphy J to conclude that the private property rights seemingly held by Clunies-Ross ought to prevail against the power of the state to compulsorily acquire it. But for Murphy J, it was the public, in this case those still living under the taint of the feudal system established on the Cocos (Keeling) Islands, yet long since forgotten even in the place where it had once reached its zenith, that the Court must defend. And that meant a wide exercise of the state's public power to take, subject to just terms compensation pursuant to section 51(xxxi) of the *Constitution*.

The blurring of the public–private divide further reveals an important aspect of the state's public power, one which Murphy clearly understood: that in deciding cases which seemingly involve the public–private divide, 'judges in property disputes are invariably involved in a delegation of sovereignty to one party or another'.[142] In fact, Murphy is clearly demonstrating in the decisions considered in this section that the state confers sovereignty through action taken in furtherance of *all three* branches of governmental power. Thus, Murphy understood that the state confers the sovereignty of property in every aspect of its power: legislative, executive, and judicial. This occurs most often when the state adopts and adapts

139 *Clunies-Ross* (1984) 155 CLR 193, 208 (Murphy J).
140 Ibid.
141 Ibid 209.
142 Edgeworth, 'Murphy on Property' (n 20) 179.

those relationships already recognised in social interaction as new forms of property within the positive law of a state.[143]

5 State

The American legal realists made it clear that in property, quite apart from being part of any natural law, 'we have the essence of what historically has constituted political sovereignty'.[144] Moreover, it is the province of the state, in its legislative and judicial power, to create and confer the form of sovereignty, or power, found in property. Today we consider it trite to repeat Jeremy Bentham's aphorism in support.[145] Yet the fact remains, property emerges from the power of the state, a power the state continues to exercise. Charles Reich, in the seminal 'The New Property', wrote that

> [g]overnment is a gigantic syphon. It draws in revenue and power, and pours forth wealth: money, benefits, services, contracts, franchises, and licenses. Government has always had this function. But while in early times it was minor, today's distribution of largess is on a vast, imperial scale.
>
> The valuables dispensed by government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth – forms which are held as private property. Social insurance substitutes for savings; a government contract replaces a businessman's customers and goodwill. The wealth of more and more [people] depends upon a relationship to government. Increasingly, [people] live on government largess – allocated by government on its own terms, and held by recipients subject to conditions which express 'the public interest'.
>
> The growth of government largess, accompanied by a distinctive system of law, is having profound consequences. … It is helping to create a new society.[146]

This 'new property' is, in Cohen's terms, simply an expansion of the ways in which the state may exercise its imperium in order to create and confer new forms of property on individuals, which is in fact a form of sovereignty, to control things and to control others. Reich put the effects of new property, the expansion of sovereignty in the hands of the individual, this way: 'It affects the underpinnings of individualism and independence. It influences the workings of [fundamental rights]. It has an impact on the power of private interests, in their relation to each other and to government'.[147]

Property, then, involves *two* allocations and *two* exercises of power, of sovereignty: the first, that of the state in its political sovereignty to create and confer a form of power known as property on individuals – and this is ever expanding, as Reich shows – and, the second, the power itself which is conferred on the individual, a lesser form of sovereignty, but sovereignty all the same, as far as Cohen is concerned. Property is the power of the state to create and confer it *and* it is the power so conferred.

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143 See Singer 'The Reliance Interest in Property' (n 10); Singer, *Entitlement* (n 96).
144 Morris R Cohen (n 96) 13.
145 Bentham (n 8) 309.
146 Charles Reich, 'The New Property' (1964) 73(5) *Yale Law Journal* 733, 733.
147 Ibid.

If property is the power of the state counterposed against the power of the individual, then the state retains a power so as to prevent individuals exercising sovereignty in ways that may harm the greater social good or the general welfare.[148] It is in the power that the state exercises, its sovereignty, its imperium to create property, that one also finds the power of the state to control it. Through its regulation – the imposition of moral imperatives, duties, and obligations – a system of law mediates the power of private property (social relationships), thus preventing the potential for the individual to gain advantage over the community.[149]

Ultimately, the power to regulate may go so far as to allow the state to take an individual's property. This every legal system countenances for the simple reason that '[i]f property institutions are justifiable at all, then at least some of the rules whereby what a person owns may be taken from him against his will are justified. … [because] justice has inevitable costs'.[150] These 'justice costs' are those which arise as part of a community's 'obligations to discharge basic needs', and may be of two types, direct and indirect.[151] In the former, 'citizens or groups … in justice, demand … from their fellows … that they not be subjected to unprovoked violence, [which gives rise to the] … need [for] legislators, prosecutors, police, soldiers, judges, and social workers',[152] while the latter are those involving 'collective goods', such as roads, parks, museums, and so forth, and basic needs, such as those provided for in the *Universal Declaration of Human Rights*, article 25(1).[153] In other words, the taking of property, or whatever you want to call it, is inevitable in some cases if the state is to meet some minimal level of justice to all citizens.

Just as it is important, then, to constrain individual power in an effort to prevent negative consequences for others, so too is it necessary to constrain the state's power to take an individual's property in furtherance of justice needs. This latter constraint Gregory Alexander calls 'constitutional property'[154] – the constitutional guarantee of property in the hands of individuals, and the scope for the state to expropriate, take, compulsorily acquire etc, the property of individuals in order to achieve a redistribution of resources so as to meet certain societal objectives – what we might call the justice obligations of the state to its citizens.[155]

For Murphy J, the state exercises the dual power to create and confer property, and to constrain both its use in the hands of individuals and the power of the state to take it in order to meet justice needs, through legislative and judicial power. One finds an example of the former in two matrimonial property cases involving

148 Morris R Cohen (n 96) 11.

149 David Lametti, 'Property and (Perhaps) Justice: A Review Article of James W Harris, *Property and Justice* and James E Penner, *The Idea of Property in Law*' (1998) 43(3) *McGill Law Journal* 663; David Lametti, 'The Concept of Property: Relations Through Objects of Social Wealth' (2003) 53(4) *University of Toronto Law Journal* 325.

150 Harris (n 99) 38 (citations omitted).

151 Ibid 279.

152 Ibid.

153 Ibid 281.

154 Alexander (n 5) 2–3.

155 Harris (n 99) 38.

division of assets pursuant to the *Family Law Act 1975* (Cth). In *Ascot Investments Pty Ltd v Harper* ('*Ascot*'),[156] Murphy J wrote that

> [t]he Australian Parliament may make laws authorizing alienation by judicial order of property which is inalienable under State law provided there is a rational connexion between the law and a legislative power such as that with respect to marriage, divorce, bankruptcy or taxation. Equally, if property is alienable under State law only under certain conditions, Parliament may authorize alienation notwithstanding that the conditions are not fulfilled, again provided there is a rational connexion between the law and a subject matter of legislative power.[157]

And in *Gazzo v Comptroller of Stamps (Vic)* ('*Gazzo*')[158] that '[t]here is a wealth of anthropological and legal material establishing that in virtually every society, ancient or modern, primitive or civilized, law on property of the parties is an integral part of the law of marriage'[159] and that as such, the state can vary the property rights of each spouse in the marriage, namely, that over time the English common law relating to such property has attracted 'statutory [modification] … directed towards ameliorating the subordinate position of the wife'.[160] Lisbeth Campbell argues that for Murphy, cases such as *Ascot*, *Gazzo*, and *Clunies-Ross* are part of a broader commitment to the democratic ideal, in which 'Parliament is the overriding law-making authority'.[161]

Yet, although Murphy clearly places the legislature in the paramount position as concerns the creation and conferral of property and to constrain the power of the individual to make use of property in ways inimical to others, he clearly also sees a role for the judiciary, both in creating and conferring property, and in policing the exercise of individual power pursuant to it and the state's power to take it for justice needs. *Clunies-Ross*, for instance, demonstrates the role played by the courts in policing the means by which the state may exercise its power compulsorily to acquire property. And two cases involving equitable remedies – *Hewett v Court* ('*Hewett*')[162] and *Heid v Reliance Finance Corporation Pty Ltd* ('*Heid*')[163] – demonstrate the role of the courts in developing equitable remedies so as to do justice as between the parties.

Perhaps what these equity cases demonstrate above all, though, is the potential for property to change over time. For Murphy, it is here where the judiciary takes a vanguard role, being the first to encounter changes in social relations as giving rise not only to modified existing property forms, but also to entirely new types of property.

6 Change

Because it is social, property serves social functions. Within the context of relatedness from which it emerges, regulation preserves those functions, and this

156 (1981) 148 CLR 337.
157 Ibid 360.
158 (1981) 149 CLR 227.
159 Ibid 257 (Murphy J).
160 Ibid 258 (Murphy J).
161 Campbell (n 115) 34.
162 (1983) 149 CLR 639.
163 (1983) 154 CLR 326.

in turn allows for its adaptability over time to meet new social circumstances.[164] We saw this in Murphy's relational-progressive view in his matrimonial property decisions. In *Calverley v Green* ('*Calverley*'), a case involving the presumptions of resulting trust and advancement, Murphy made the point in starker terms:

> I have reconsidered the law on presumptions of resulting trusts … My conclusion is they are inappropriate to our times, and are opposed to a rational evaluation of property cases arising out of personal relationships.[165]

Murphy J was willing to think differently about proprietary interests in land which might arise as a consequence of unconscionability in equity, and so concluded that 'the old presumptions [of resulting trusts and advancement] are not sustainable by common experience and should not therefore be applied'.[166] While the suggestion that we cast aside the old presumptions might seem to be nothing less than revolutionary, it also makes a great deal of sense, for, once banished, the post-presumptions outcome results in 'the legal title reflect[ing] the interests of the parties, unless there are circumstances (not those false presumptions) which displace it in equity'.[167]

Perhaps Murphy J's approach in *Calverley* was too radical.[168] But perhaps not. It is arguable that the High Court in *Trustees of the Property of Cummins v Cummins*[169] adopted in part Murphy's approach to the presumptions.[170] In *Brown v Brown* Kirby P seemed to prefer Murphy's approach, but followed the majority,[171] while in *Prentice v Cummins*, Sackville J wrote that there is 'a great deal to be said for Murphy J's approach'.[172] What matters, though, is not whether Murphy's approach to presumptions has prevailed. Instead, what really matters is the wider point: because it is social-relational, property both emerges and changes over time in response to socio-politico-economic conditions, and it is very often the courts that will first detect these shifts, and implement them in the formal positive law of property. Perhaps nowhere is this more clearly seen than when dealing with novel forms of property. And the best example of that in recent Australian history is native title. How might Murphy's progressive-relational view of property understand this comparatively recent development in Australian history?

IV BUILDING ON THE FOUNDATIONS

What is the value or usefulness of Murphy's progressive-relational view of property? The answer to that question lies in the way it allows us to understand what property is when applied to the real world of socio-politico-economic

164 Singer and Beermann (n 96) 228.
165 (1984) 155 CLR 242, 264.
166 Ibid.
167 Ibid 265.
168 See Lisa Sarmas, 'Trusts, Third Parties and the Family Home: Six Years Since *Cummins* and Confusion Still Reigns' (2012) 36 *Melbourne University Law Review* 216, 223 n 39.
169 (2006) 227 CLR 278.
170 Sarmas (n 168) 223 n 39, 227–30.
171 (1993) 31 NSWLR 582, 595.
172 (2003) 134 FCR 449, 463 [51].

conditions. We might select any number of recent disputes dealt with by Australian courts; the most novel – indeed, the most profoundly significant of these – involve the recognition of native title in Australian law.[173] It is not our intention to re-assess the cases that have brought us to the current state of the law on native title;[174] rather, we use Murphy's view of property to explain the High Court's most recent pronouncement on native title in *Griffiths*.

Using Murphy's progressive-relational view of property, we can say something about native title as a part of Australian law before turning to the nature and content of that title as a form of property. As we have seen, for Murphy, law generally, and property specifically, changes constantly, ever adapting to new social, political, and economic conditions. And while he never sat on the Court when it had the opportunity to consider the merits of a native title claim that would allow the overturning of the notorious injustice of terra nullius, Murphy J nonetheless took the opportunity in *Coe* to indicate that for him, the law was already changing. In holding that the plaintiffs in *Coe* ought to be entitled to file an amended statement of claim,

> Murphy outlined the case as he thought the plaintiff was entitled to argue. The Privy Council decisions in *Cooper v Stuart* … – that the colony of NSW was not acquired by conquest but was 'practically unoccupied' – was either 'made in ignorance or as a convenient falsehood'; and the plaintiff should be allowed to adduce the 'wealth of historical material' to the contrary.[175]

Because 'Murphy's constitutional philosophy was grounded in a commitment to … civil rights and social justice. … [H]e … questioned the *terra nullius* doctrine finally overthrown in [*Mabo [No 2] v Queensland* ('*Mabo*')]'.[176]

As seen through Murphy's eyes, in a progressive-relational conception of property, the rejection of terra nullius and the recognition of native title in no way represented 'fractur[ing] the skeleton of principle which gives the body of our law its shape and internal consistency' as Brennan J suggested in *Mabo*,[177] but a natural, organic changing of the Australian law of real property. For Murphy, it is entirely appropriate that it should be the courts, given their role in discerning the socio-politico-economic shifts in a society, that would first recognise, and then give effect to, the rejection of terra nullius and the acceptance of native title as a part of Australian property law. Moreover, the legislative power would follow the lead of the courts to give effect to what the courts had recognised. *Mabo* and the original, pre-1998 amended version of the *Native Title Act 1993* (Cth) were nothing more and nothing less than the natural working out of the laws' adapting to changing conditions.

Rather than an acceptance of change, though, the courts generally, and the High Court specifically, continue to agonise over the nature and content of native

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173 As encapsulated in the landmark decisions in *Mabo [No 2] v Queensland* (1992) 175 CLR 1 ('*Mabo*'), *Wik Peoples v Queensland* (1996) 187 CLR 1, *Western Australia v Ward* (2002) 213 CLR 1 ('*Ward*'), and the pathbreaking *Native Title Act 1993* (Cth).

174 For that, see Richard H Bartlett, *Native Title in Australia* (LexisNexis, 3rd ed, 2015).

175 Blackshield et al (eds), *The Judgments of Justice Lionel Murphy* (Primavera Press, 1986) 312–13 (citations omitted).

176 Winterton (n 104) 206; (1992) 175 CLR 1.

177 *Mabo* (1992) 175 CLR 1, 29 (Brennan J).

title. So, too, in the appeals in *Griffiths*,[178] which involved a compensation claim against the Northern Territory in respect of native title over lands in Timber Creek claimed by the Ngaliwurru and Nungali Peoples pursuant to the *Native Title Act 1993* (Cth). The High Court dealt with questions that remained unanswered, over 25 years after its decision in *Mabo*: (i) *exclusive* native title rights to and interests in land, in general, equate to the objective economic value of an unencumbered freehold estate in that land, and *non-exclusive* native title rights and interests to 50% of the freehold value; (ii) interest is payable on the compensation for economic loss (based upon a complex system of calculation); and (iii) compensation for loss or diminution of traditional attachment to land or connection to country and for loss of rights to gain spiritual sustenance from that land is the amount which society would rightly regard as an appropriate award for the loss (the High Court expressed this as 'cultural loss').[179]

Our concern here involves the nature of native title as a form of property for which compensation is available for its extinguishment. In order to reach the compensation question, a court must first determine the native title purported to have been extinguished. This is both a question of law and of fact:[180] law as to what must be satisfied in order to find that native title exists, and fact as to what the precise native title of a claimant group might be. The High Court in *Griffiths* confirms that this analysis must begin with the *Native Title Act 1993* (Cth).[181] Section 223(1) provides that 'native title' or 'native title rights and interests' means:

> the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

It is well-established that this section establishes a statutory definition of native title that draws substantially upon the *Mabo* common law definition, confirmed in *Western Australia v Ward* ('*Ward*').[182] But drawing upon *Ward*, the Court in *Griffiths* says something interesting:

> The first and second of those characteristics – that native title is a bundle of rights and interests possessed under traditional laws and customs and that, by those laws and customs, Aboriginal peoples have a connection with the land or waters – reflect that native title rights and interests have a physical or material aspect (the right to

178 From *Northern Territory v Griffiths* (2017) 256 FCR 478 allowing in part appeals from *Griffiths v Northern Territory [No 3]* (2016) 337 ALR 362.

179 *Griffiths* (2019) 364 ALR 208, 212 [3] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ, Gageler J agreeing at 274).

180 *Ward* (2002) 213 CLR 1, 66 [18] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

181 *Griffiths* (2019) 364 ALR 208, 218 [19] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

182 *Ward* (2002) 213 CLR 1.

> do something in relation to land or waters) and a cultural or spiritual aspect (the connection with the land or waters).[183]

Edelman J, who concurred in the result, referred to exclusive native title as 'a right to control access to … land … within the so-called "bundle of rights" held by native title claimants'; it is more than 'a liberty to use the land', but something 'in the nature of a right to control access to and exclude others from it'.[184]

We want to focus on three matters which emerge from the way in which the High Court characterises native title. First, why refer to native title as a bundle of rights, including a right to control access to and exclude others from land? Indeed, Edelman J seemingly identifies two of the three rights of the liberal triad in reference to native title: use/control and exclusion. Edelman J goes further, and spends significant time discussing the 'exchange value' or 'use value' of native title, and how cultural value is a special value which is separate from exchange or use value;[185] this, of course, can be summarised using the nomenclature of the third right of the liberal triad: alienability.

Yet nowhere in section 223 is the language of bundles and rights and liberties used. By injecting it into the assessment of native title, though, the Court immediately categorises property as a bundle of rights; and it further extrapolates that if this is what property is when used in relation to non-native title interests, then native title, too, as a matter of common law recognition, must also be that. This is not surprising, given the way in which the liberal conception and bundles of rights has come to dominate judicial thinking about property, but it does mean that everything else the Court says about this novel form of property is constrained by a liberal conception. This forces novel forms of property, like native title, to conform, whatever else it might be, to the liberal understanding of private property – in land or intangibles – or state property, or common property. All must comport with an understanding of property that sees it as definable by reference to a set of 'rights' – of which the most common are the liberal triad (use, exclusivity, and alienability), or the wider standard incidents of ownership identified by Honoré – drawn together in bundles.

But need it be this way? The short answer is no – property need not be constrained by a narrow focus on rights or incidents. Rather, if it is seen as relational, it can be so much more. Indeed, taking Murphy's progressive-relational approach to property would make a significant difference to the way we understand any form of property, be it private, state, common, or native title. It would make a difference when we come to the second and third aspects of the quotation above on which we want to focus: 'by those laws and customs, Aboriginal peoples have a connection with the land or waters', and that the native title which emerges from that connection carries 'a physical or material aspect (the right to do something in relation to land or waters) and a cultural or spiritual aspect

183 *Griffiths* (2019) 364 ALR 208, 219 [23] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ, Gageler J agreeing at 274).

184 Ibid 277 [256] (citations omitted).

185 Ibid 288–9 [304].

(the connection with the land or waters)'.[186] Constrained by viewing property as only a bundle of rights, the lower courts in *Griffiths*, the Federal Court and the Full Court of the Federal Court, found it difficult to deal with the cultural or spiritual aspects of native title. The High Court concluded that

> the people, the ancestral spirits, the land and everything on it are 'organic parts of one indissoluble whole'; the effects on the sense of connection are not to be understood as referable to individual blocks of land but understood by the 'pervasiveness of Dreaming'; the effects are upon an Aboriginal person's feelings, in the sense of a person's engagement with the Dreamings; an act can have an adverse effect by physically damaging a sacred site, but it can also affect a person's perception of and engagement with the Dreamings because the Dreamings are not site specific but run through a larger area of the land; and as a person's connection with country carries with it an obligation to care for it, there is a resulting sense of failed responsibility when it is damaged or affected in a way which cuts through Dreamings.[187]

The High Court here affirms that the trial judge was correct to take account of all of these factors in determining the native title the extinguishment of which gave rise to compensation. The point here is simply this: it is the very fact that such considerations were claimed, by the Northern Territory and by the Commonwealth, to be improper, which emerges from the approach already taken to native title – that it is simply a bundle of rights, to which such 'non-economic' considerations as spiritual attachment are irrelevant. The High Court, correctly concludes that these are not irrelevant considerations; indeed, they are the very core of what native title is, as confirmed by the High Court in *Ward*:

> [T]he connection which Aboriginal peoples have with 'country' is essentially spiritual. In *Milirrpum v Nabalco Pty Ltd* … Blackburn J said that: 'the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship … There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole'. It is a relationship which sometimes is spoken of as having to care for, and being able to 'speak for', country. 'Speaking for' country is bound up with the idea that, at least in some circumstances, others should ask for permission to enter upon country or use it or enjoy its resources, but to focus only on the requirement that others seek permission for some activities would oversimplify the nature of the connection that the phrase seeks to capture. The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the [*Native Title Act*]. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them. The difficulties are not reduced by the inevitable tendency to think of rights and interests in relation to the land only in terms familiar to the common lawyer.[188]

The High Court in *Griffiths* confirms the correctness of this approach. And that seems right, it seems just.

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186 *Griffiths* (2019) 364 ALR 208, 219 [23] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ, Gageler J agreeing at 274).

187 Ibid 271 [223] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ, Gageler J agreeing at 274) (citations omitted).

188 *Ward* (2002) 213 CLR 1, 64–5 [14] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

But the fact that the High Court need say any of this about native title as though it was something exceptional as far as law is concerned is a product of the bundle of rights thinking which grips the judicial mind.[189] For Murphy, native title is a simple matter of the state's recognition, in its judicial and legislative power, of relationship (spiritual, social, and physical), with corresponding obligation, to land and to others, as part of native title. Murphy's progressive-relational view of property allows native title to stand on its own terms. Native title is more than wealth, more than an equation of its 'value' according to the value of freehold land. It is more than liberal bundles of rights, equating a spiritual-social relationship to the liberal triad of use, exclusivity, and alienability.

Equating all new forms of property to the univocal liberal conception does no justice to the parties claiming such property; and for Murphy, it was justice which mattered – that was why the courts exercised broad regulatory public power, so as to constrain inappropriate exercises of private power, so as to prioritise obligation while diminishing the reliance on 'right'. This was justice. Applying Murphy's progressive-relational view obviates the need for a court, indeed for the High Court, to be forced into the necessity to conform native title – indeed, any novel form of property – to the constraints of the liberal triad.

V CONCLUDING REFLECTIONS: THE PAST OF MURPHY HAS A BRIGHT FUTURE

Most contemporary property theory views it as a bundle of rights conferring absolute control over the use of goods and resources in the hands of individuals, to be given strong protection by the state against the encroachments of others or, especially, of the state. For Lionel Murphy, however, property is the power created and conferred by the state, and so subject to its control, regulation, and ongoing modification, placed in the hands of individuals to use goods and resources. Still, few if any Australian lawyers would think such a view of property to be part of Australian law. They are wrong.

Murphy was an innovator, not only in public law – with the notion of implied constitutional rights – but also, perhaps much more importantly so, in private law. And it is here, in only a handful of opinions, where one finds a richness of understanding of what property really is. Murphy's property opinions contain the foundation of a view of property that begins with the interests of the community balanced against those of the individual. The foundation awaits the work of new generations – indeed, our own generation – to build upon it a fully progressive-relational conception of property. The direction is already there in Murphy's jurisprudence, revealing that property is not an inherent right, but a creation of the state, power or sovereignty conferred upon individuals, but limited in their hands so as to protect the broader, public interest.

This understanding of property holds the potential for great benefit in Australian law. Murphy's view moves beyond the constraints of bundles of rights,

189 Heller (n 15) 431, and see generally 429–32.

focusing on the individual right, to the reality of relationship, between people and between the people and the state, making it easier to see where the exercise of rights might also carry with it the limitations of obligation. Looking at property relationally, we look first at consequences rather than rights. And that matters because in looking only at rights we miss the great harm that property can do – politically (in concentrations of wealth),[190] economically (in allowing those concentrations to drive outcomes such as poverty and homelessness),[191] and environmentally (in outcomes like pollution and climate change).[192] And the state, through the judiciary and the legislative-executive would play an important role in identifying and discerning when socio-politico-economic conditions change such as to necessitate a change in the nature and content of property. The foundation of this progressive-relational view of property is there in Murphy's few words.

But there is a wider import to recognising what Murphy did with property, and it lies in how one treats the liberal theory with which we began this article. It is no longer seriously doubted that judges have the power to move law in new directions. And the liberal theory of property – as bundles of rights creating absolute control of goods and resources, protected by the state, has its judicial champions in every jurisdiction. We need only look at Australian case law to see this bundle of rights view used, again and again, to deal with novel disputes involving the use and control of goods and resources. Nowhere is this more evident, and more anomalous, than in the case of native title, a form of property forced to conform itself to a liberalism to which it has never subscribed. This ought not to surprise us, for we examined earlier the fact that most judges uncritically and unthinkingly follow this bundle of rights thinking. And that is why Murphy's view of property

190 The origins for this are found, of course, in Karl Marx: see Karl Marx and Friedrich Engels, *The Communist Manifesto* (Penguin, rev ed, 2002); Karl Marx, *Capital: A Critique of Political Economy* (Penguin, 1992–93) vols 1–3 ('*Capital*'); Karl Marx, *Theories of Surplus-Value*, tr Jack Cohen and SW Ryazanskaya (Progress Publishers, rev ed, 1971) vol 4 ('*Theories of Surplus-Value*'). An application of Marxian thought to 21st century politics is found in Thomas Piketty, *Capital in the Twenty-First Century*, tr Arthur Goldhammer (Belknap Press, 2014). And specific applications to property are found in Waldron, *The Right to Private Property* (n 5) 443–4; Babie, 'The Spatial' (n 17); Babie, 'Private Property Suffuses Life' (n 17); Babie, 'The Future of Private Property' (n 17); Babie, 'Reflections on Private Property' (n 17).

191 As with politics, the origins for this are found in Marx and Engels (n 190); Marx, *Capital* (n 190); Marx, *Theories of Surplus-Value* (n 190). An application of Marxian thought to 21st century economics is found in Piketty (n 190). And specific applications to property are found in Jeremy Waldron, 'Homelessness and the Issue of Freedom' (1991) 39(2) *UCLA Law Review* 295; Nicholas Blomley, 'Homelessness, Rights, and the Delusions of Property' (2009) 30(6) *Urban Geography* 577; Babie, 'The Spatial' (n 17); Babie, 'Private Property Suffuses Life' (n 17); Babie, 'The Future of Private Property' (n 17); Babie, 'Reflections on Private Property' (n 17).

192 As with politics and economics, the origins for this are found in Marx and Engels (n 190); Marx, *Capital* (n 190); Marx, *Theories of Surplus-Value* (n 190). An application of Marxian thought to 21st century environmental concerns is found in John Bellamy Foster, *Marx's Ecology: Materialism and Nature* (Monthly Review Press, 2000); Kohei Saito, *Karl Marx's Ecosocialism: Capital, Nature, and the Unfinished Critique of Political Economy* (Monthly Review Press, 2017). And specific applications to property are found in Paul Babie, 'Climate Change and the Concept of Private Property' in Rosemary Lyster (ed), *In the Wilds of Climate Law* (Australian Academic Press, 2010) 7; Paul Babie, 'Choices that Matter: Three Propositions on the Individual, Private Property, and Anthropogenic Climate Change' (2011) 22(3) *Colorado Journal of International Environmental Law and Policy* 323; Burdon, 'What Is Good Land Use?' (n 17).

matters: it reveals, judicially, a view of property largely the province of elite theorists – the American legal realists and the CLS property-as-social-relations scholars – rather than 'real-world' lawyers. The import of Murphy for property, then, is as the judicial champion of progressive-relational property.

Murphy's progressive-relational view may be a way of looking at property seldom seen in Australian law, but by seeing it as relationship, Murphy opens up new possibilities in Australian law, possibilities to make property work not only for those said to hold it, but for all Australians. That is an important legacy, and it makes new in spirit what might seem old in chronology. It provides a foundation for both Australian law and for progressive-relational theory. Murphy has interpreted the law in society as he saw it. It remains for us, as lawyers and as theorists, to change it.