Property as Capture and Care

Keith H Hirokawa, Albany Law School
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Keith H. Hirokawa
Assistant Professor of Law

Email: khiro@albanylaw.edu
Phone No.: 518-852-2620

Length: 30,790 words (including footnotes)
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Keith H. Hirokawa
Assistant Professor of Law, Albany Law School

E-mail: khiro@albanylaw.edu
Phone: (518) 852-2620

Abstract

Capture (as a doctrine and a conceptual scheme) has long provided law with a basis for allocating rights between competing claims to property. Capture, however, has always offered only a partial picture of property. This article considers opportunities to view property law from the perspectives of care, collaboration, and community, principles offered by ecofeminists to describe the relationships that humans can (and do) have with land. This article argues that property is ultimately a negotiation between capture and care, and that by recognizing care as a property principle, property appears to provide a more comprehensive and consistent understanding of how rights can occur within a system that allocates common goods to private control.
I. Introduction

This Article explores the idea that property is essentially a process of negotiation between two often competing but ultimately complementary aims. On the one side, property confirms that an individual has, according to the rules set forth to govern the task of acquiring or legitimizing an expectation, successfully reduced another (thing, idea, place) to her control by way of creation, domination, or deprivation of the other’s liberty. This is illustrated in the rule of capture and is often thought to trigger the right to govern the property exclusively and individually.¹ Yet, whether by design or evolution, domination provides a limited explanation of how and when certain expectations become protectable as property. As a simple example, we

might note that capture does not provide a helpful or consistent explanation for the regulatory controls on land use and environmental law, circumstances which cause us to frequently (but not successfully) revisit absolutist visions of property protection.  

Or, in a more difficult example, we might question how Mr. Popov was vested with an interest in the notorious baseball, even though he was unable to demonstrate domination and control. This other side of property - the non-capture side - is often portrayed as an exercise in equity, an incorporation of the notion of reasonableness, or even an integration of an interest that is something other than an individual’s stake, and in either event arises as what will be referred to herein as the “care” side of property.

To explain this notion of care, this article borrows from ecofeminism, an approach to environmental ethics that “makes a central place for values of care, love, friendship, trust, and appropriate reciprocity – values that presuppose that our relationships with others are central to our understanding of who we are.” The point of associating with ecofeminism is, in part, to recognize ecofeminism for providing the foundations for an ethic of care in land, but also to propose that ecofeminism be taken very seriously in understanding the relationship between land, nature, and property. As Marc Poirier notes, “[c]are is productive and fruitful, like

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2 See, e.g., Bethany R. Berger, What Owners Want and What Governments Do: Evidence from the Oregon Experiment, 78 Fordham L. Rev. 1281, 1297 (2009) (noting that “there is something basic - whether its origins are instinctual or cultural - in the notion of 'mine' that attaches to physical possession and that sees the power of others over those possessions as inappropriate interference to be vigorously resisted.”).


4 Carol Gilligan offers the ethic of care as (among other things) a means of self-identification through relationships, rather than through rights. See, CAROL GILLIGAN, IN A DIFFERENT VOICE (1982) She proposes a theory of social order based on “seeing a world comprised of relationships rather than of people standing alone, a world that coheres through human connection rather than through systems of rules” Id. at 29. The “ethic of care” embodies the idea of the moral (and legal) self constituted through one’s relation to others, instead of in the exclusion of others. This ethic entails “the vision that self and other will be treated as of equal worth, that despite differences in power, things will be fair; the vision that everyone will be responded to and included, that no one will be left alone or hurt” Id. at 63. Ecofeminists apply the ethic of care to our relationships with land and nature. For discussion on the ecofeminist understanding of an “ethic of care,” see Deane Curtin, Toward an Ecological Ethic of Care, in Karen Warren, ECOLOGICAL FEMINIST PHILOSOPHIES (1996).

5 Ecofeminism, once thought to be merely the offspring of a more general critical feminist approach to theory in matters of nature and natural, has distinguished itself as a robust critique of structural domination and oppression in dialogues concerning moral agency, identity, ontology and ethics, among other things. See Elaine L. Hughes, Fishwives and Other Tails: Ecofeminism and Environmental Law, 8 CAN. J. WOMEN & L. 502, 506 (1995) (reporting in 1995 that “ecofeminism is simply a branch of feminism in which ‘nature is the central category of analysis.’”), quoting Ynestra King, Healing the Wounds: Feminism, Ecology and the Nature/Culture Dualism, in Irene Diamond and Gloria Feman Orenstein, eds., REWEAVING THE WORLD: THE EMERGENCE OF ECOFEMINISM (1990) at 117. Although ecofeminism has taken on many forms, the approach has pressed on the linkages between gender, nature and the historical human pursuit, domination, consumption, and destruction of the feminine and the natural, with a specific eye on explaining the connections between the domination of nature and things associated with “the feminine,” such as care, community, collaboration, experience, and perspective. Karen J. Warren, Ecofeminism: Introduction, in Michael E. Zimmerman, et al., Environmental Philosophy: From Animal Rights to Radical Ecology (2nd Ed. 1998), 263, at 264 (“Just as there is not one feminism, there is not one ecofeminism.”). Ecofeminism has also fostered attention to intersectional analysis, broadening the scope of both intention and consequence in examining the evidence of oppressive forces.

information, and it generates further fruitful, uncertain, and unexpected downstream positives.”7 However, it is not the purpose of this Article to provide a general defense of ecofeminism, or to incorporate into this discussion the very central roles that gender and nature play in understanding the oppression of the other.8 Rather, the intent here is to use the framework of care, and the incidents of that ethic in the allocation of property, to better understand the process of property and the character of rights in property law: “[w]hether something is inside or outside the marketplace of rights has always been a way of valuing it.”9

The methodology employed in this analysis is pragmatic: this analysis examines the legal system as it is to identify an appropriate context for an examination of the concept of care and its potential impact, possible influence, and frequent commensurability with property law.10 The

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8 Ecofeminism converges with feminism in the critical exposition on rationality, which represents an historical but “false duality in Western thought that favors the human mind and spirit over the natural world and its processes.” Nancy Levit and Robert R. M. Verchick, Feminist Legal Theory: A Primer (2006) 31. Christine Di Stefano and Mary Anne Warren, for instance, deliver their converging critiques on the manner in which the categories of legal subjectivity define nature out of legal discourse by conditioning the recognition of legal rights on the capacity for the exercise of political agency (such as autonomy). See, e.g., Christine Di Stefano, Autonomy in the Light of Difference, in REVISIONING THE POLITICAL: FEMINIST RECONSTRUCTIONS OF TRADITIONAL CONCEPTS IN WESTERN POLITICAL THEORY, Nancy Hirschmann and Christine Di Stefano, eds. (1996) 95, at 98 –99 (“The ‘malestream’ concept of autonomy captures, in an especially compelling and efficient way, the modern discovery and valuation of freedom, reason, and agency housed within a conception of the self as an independent and reflexive rational chooser.”). Ecofeminists have also illuminated the similarities between the domination of women and the domination logic that riddles the values and social practices underlying our treatment of the environment and have pointed out the striking similarities between the manner in which men enjoy favored social status at the expense of women and human treatment of nature from a position of superior status. See Nancy Levit and Robert R. M. Verchick, Feminist Legal Theory: A Primer (2006) 31 (“the analysis begins where all ecofeminism begins: with the premise that the oppression of nature and the oppression of women are closely connected.”); Karen Warren, ECOFEMINIST PHILOSOPHY: A WESTERN PERSPECTIVE ON WHAT IT IS AND WHY IT MATTERS (2000). Ecofeminism adds to feminism the notion that the eradication of both of these systemic and intersecting systems of oppression requires a jurisprudence that addresses gender and environmental issues simultaneously. Karen J. Warren, The Power and Promise of Ecological Feminism, 12 ENV. ETHICS 125, 126 (1990) (Arguing that ecological feminism “provides a distinctive framework both for reconceiving feminism and for developing an environmental ethic which takes seriously connections between the domination of women and the domination of nature.”).


10 This method may raise substantial questions about the degree of faith required to simultaneously engage in an ecofeminist and the pragmatic approach. Val Plumwood argues that we should “remove rights from the center of the moral stage and pay more attention to some other, less dualistic, moral concepts such as respect, sympathy, care, concern, compassion, gratitude, friendship, and responsibility,” moral concepts that “have been treated as peripheral and given far less importance than they deserve.” Val Plumwood, Nature, Self, and Gender: Feminism, Environmental Philosophy, and the Critique of Rationalism, in Michael E. Zimmerman, et al., Environmental Philosophy: From Animal Rights to Radical Ecology (2nd Ed. 1998) 291, 296. Plumwood argues that, first, the rationalization of rights (or, rights based on rationalization) have historically operated as an exclusionary mechanism against moral grounds that have been labeled subjective, emotional, or otherwise consigned to the private sphere. Second, she notes that “concepts such as respect, care, concern, and so on are resistant to analysis along lines of a
simple - and perhaps oversimplified - approach used to illustrate this point is to distinguish the doctrine of capture (and counterparts throughout property and environmental law) from non-capture legal doctrines. Capture, of course, would seem to epitomize what ecofeminists have identified as “the logic of domination”\(^\text{11}\) by founding property entitlements in the mere ability to possess and control, by encouraging aggressive behavior, and by rewarding the destruction of others in the world.\(^\text{12}\) Laws that are conceptually contrary to capture, which are variably (but not interchangeably) referred to as ‘non-capture’ and ‘care,’ are identified for their potential to further a dialogue on an ecofeminist presence in law. In this analysis, attention to the negotiation between capture and care in the law provides fuel for an interesting dialogue on the potential of ecofeminism in the law: non-capture doctrines have developed sometimes in reaction to, but others times without regard for an underlying framework of domination, use, consumption, and destruction. Or, at least, non-capture doctrines can be easily distinguished from such a framework. What is left to be determined is what values are expressed in non-capture doctrines, and how those values intersect with ecofeminism and its embrace of care, context, community, and collaboration.

To contextualize this approach to property analysis, the argument begins in Part II by introducing the negotiation between capture and care as essential to an understanding of the process by which law legitimizes expectations into property rights. This part attempts to identify strains in property rights that are open to the negotiation process, how property acquisition and ownership is consonant with the tenets of care, and how this interpretation of property, environmental law, land use regulation, and natural resource allocation illustrates some surprising ways in which the legal structure of property supports an ethic of care. Part III provides some remarks on the extent to which this project, or further parallel research may provide valuable insights for a jurisprudential project concerning property, nature, and the natural.

\(^{11}\) The ‘logic of domination’ refers to “a structure of argumentation which leads to a justification of subordination.” Karen J. Warren, The Power and Promise of Ecological Feminism, 12 ENV. ETHICS 125, 128 (1990).

\(^{12}\) I have elsewhere suggested that the analogy to capture has jurisprudential value beyond the critique as a doctrine of domination. Keith H. Hirokawa, Property Pieces in Compensation Statutes: Law’s Eulogy for Oregon’s Measure 37, 38 ENV. L. 1111 (2008). The doctrine includes some balancing when the world of capturable things is regulated in a way that resolves the claims of individuals with the needs of community: by removing some things of the world from capture, property law provides a process for consideration of both private and public expectations, and in that process (and subject to such rules), capture merely sets the circumstances to resolve competing expectations. The point made in this article is different, but not necessarily contrary. There, it was suggested that property rules account for, are inclusive of, and are amenable to alternative property constructs commensurable with the notion of the public welfare. Although the focus here is not distinct from the reasoning employed therein, in this Article the concept of capture serves a more conceptual role for purposes of analyzing structural coherency throughout property.
II. Seeing Capture and Care in Property

We often discuss the rule of capture as a first possession doctrine which falls from the frustrations of a fox hunter who, by luck or lack of skill, unsuccessfully chased a fox to the point of exhaustion.\(^{13}\) Whether the hunter was endowed with the skill to complete the hunt will never be told, as the hunt ended abruptly, without his consent or charge. Instead, the hunter’s efforts were intercepted by Pierson, the meddling interloper who was able to capture and kill the fox.\(^{14}\) Between these two parties, asks the court, who is entitled to the spoils of the hunt? The *Pierson* court easily concluded that a *ferae naturae* - a wild, unowned thing, the life of which is led by its own natural liberty - does not become property simply by an intention, by donning special hunting shoes or purchasing and training “hounds of imperial stature.”\(^{15}\) Rather, a thing becomes property when humans exercise dominion, reduce the thing to control, and effectively transform the thing from its state of natural liberty.\(^{16}\)

Ecofeminists converge upon the notion that an ethic that allows, encourages, or even rewards acts of domination is responsible for the manner in which both nature and women have been subjugated under rights-based legal schemes. As a result, there are some fairly obvious reasons that capture might be considered a doctrine subject to the concerns of ecofeminism and its endorsement of the ethic of care. Certainly the name itself - capture - invokes the image of a fiercely competitive and aggressive subject, one that by the rules of the game would not translate well into the principles of care, community, and collaboration that underlie ecofeminism. More importantly, the rule of capture neatly excludes these principles by targeting not the manner in which rights among neighbors are structured to provide a purportedly just result, so much as in calling the captured thing “property”: “the sole and despotic dominion which one man claims an exercise over the external things of the world, in total exclusion of the right of any other individual in the universe.”\(^{17}\) Ecofeminism’s critique of the logic of domination is particularly salient here: the notion that domination of another entity *gives rise* to a right to dispossess and exclude, rather than *results* from an entitlement, encourages domination rather than respect, and the apologetic search for justification for this logic (e.g., that a clear rule such as capture serves efficiency\(^{18}\) and has long-since been this way\(^{19}\)) fails to support its continued existence.\(^{20}\)

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\(^{13}\) *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

\(^{14}\) *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805). Id.

\(^{15}\) 3 Cai. R. at 182 (Livingston, J., dissenting).

\(^{16}\) 3 Cai. R. at 179.


\(^{19}\) Carol Rose, *Possession as the Origin of Property*, 52 U. Chi. L. Rev. 73, 81 (1985) (arguing that possession as a basis for title is a socially useful tool because “clear titles facilitate trade and minimize resource-wasting conflict.”).
addition, the Cartesian distinction of subject and object - not to mention the nature of the tension between the two in the rule of capture - could not be mistaken for easing the rule of law into a cooperative negotiation over resource allocation and use. The Lockean notion of dessert underlying capture seems to assume that uncaptured, unconsumed, and unused resources are valueless: the doctrine refuses to value non-use.\textsuperscript{22} Even the public policy concern of the dissenting judge in \textit{Pierson}, who overtly seeks a legal doctrine intended to encourage the immediate and total destruction of the species, reeks of the logic of domination.\textsuperscript{23}

There are other, equally important analyses at stake here involving the method of law’s foreclosure of voice and vocabulary. For instance, by defining the terms under which a right of first possession can vest, the rule of capture assumes that capturable property is encountered as unowned, unoccupied, or otherwise not subject to another competing claim. Yet, in general, the condition precedent for first possession is historically and ecologically unsound, as the property at issue is in all capture cases was at least occupied by some entity or community (Native Americans, wildlife, plant communities, etc).\textsuperscript{24} Because the rule does not recognize just \textit{any} claim, but only those based on the claimants’ labor (the elements of intent, communicative action and control), capture effectively and efficiently ‘frees up’ the world to be distributable as property, and in the meantime attempts to displace values that might effect a different distribution scheme.\textsuperscript{25}

In \textit{Pierson v. Post}, law appears to consider only the claims and concerns of the two in pursuit, both of whom are engaged in the grappling and grasping game of domination over the \textit{ferae naturae} “thing” (and, in an equally relevant sense, over one another as well\textsuperscript{26}). From the rule of capture, we might be wise to conclude that the notion of property is a relevant concern only among competing humans. Whether such a conclusion is true-in-fact is less important, if at all, than its meaning in law: the things of the world are reducible to property, and this is

\textsuperscript{21}As Holmes stated:

\begin{quote}
It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.
\end{quote}

Oliver Wendell Holmes, Jr., \textit{The Path of the Law}, 10 Harv. L. Rev. 457, 469 (1897).
\textsuperscript{23}\textit{Pierson v. Post}, 3 Cai. R. 175, 182 (N.Y. Sup. Ct. 1805) (Livingston, J., dissenting) (“When we reflect also that the interest of our husbandmen, the most useful of men in any community, will be advanced by the destruction of a beast so pernicious and incorrigible...”).
\textsuperscript{25}See, e.g., \textit{Tee-Hit-Ton Indians v. United States}, 348 U.S. 272, 290 - 91 (1955) (Tribal property may be occupied by the U.S. in the absence of an express act vesting title in the tribe).
\textsuperscript{26}Arguably, by valuing ownership and domination, western culture “urges us to control and dominate others (both human and nonhuman), the land, and even the self - to ‘tame the wild,’ to ‘conquer the jungle,’ to control the ‘beast within.’” Rita Turner, \textit{The Discursive Construction of Anthropocentrism}, 31 ENV. ETHICS 183, 187 (2009).
accomplished by domination over such things. No value is given, role reserved, or importance placed on the fox’s voice. No place is made in the rule of capture for nature, its needs, or how such needs might be adjudicated. From this perspective on property, capture illustrates the quintessential need for thinking about care in property law, specifically for its distrust of androcentric and “systematic structuring of institutions to reflect the viewpoint and position of those in power [which] is most often invisible.” Discovering the invisible is central to the project of ecofeminism - “to expose and dismantle the conceptual structures of domination that have kept various ‘isms of domination,’ particularly the domination of women and nature.”

It may yet be unrealistic to think that a care analysis of existing property law will bring the fox’s needs to the fore, and indeed, this article does not attempt that feat. Rather, the question that begs the introduction of a care analysis in property law is: to what extent does capture, and other property doctrines that are analogically its counterpart, dominate property law? Certainly, the influence of capture on property law is expansive: race recording statutes, adverse possession, and finders law expressly require domination over another party’s efforts (and the thing itself) to make a valid claim; less overt, but still relevant, are those property doctrines that endorse the types of behavior that might be considered favorably under the rule of capture. What is notable here, however, as posited by Kate Green, is that the logic of domination does not itself dominate law. Rather, the legal system is spilling over with an array of non-capture property doctrines that prohibit, eschew, or denigrate the role of domination in the allocation of rights to property. It is in these instances that we can consider a constructive approach to understand (and even resolve) the tension between issues of value and meaning in land, on the relationship between property and community, and on competing descriptions of the nature on which the property system is built.

Among other things, a care approach to property compels us to think of something other

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27 Not that this is particularly surprising. The question of whether non-human beings have legal rights has underlain the literature on property and environmental law since the early 1970’s. See, e.g., Christopher D. Stone, Should Trees Have Standing? Toward Legal Rights for Natural Objects, 45 S. Cal. L. Rev. 450 (1972).

28 On the other hand, Clare Palmer and Francis O’Gorman have raised serious questions about whether foxhunting is more illustrative of a domination ethic or something quite different. Taking on a Foucauldian approach to the concept of resistance, they argue that the fox in the foxhunt is not dominated merely by becoming the object of desire:

The fox, at least, has an “unruly body,” not shaped by human desires; it lives a life largely independent of human provision and interaction; and the whole idea of the fair chase means that the death of the fox is not inevitable; however much its chances of escape are limited. The fox can resist human power to the end.

Clare Palmer and Francis O’Gorman, Animals, Power, and Ethics: The Case of Foxhunting, in MORAL AND POLITICAL REASONING IN ENVIRONMENTAL PRACTICE, Andrew Light and Avner De-Shalit, eds. (2003) 281, ___


31 See, Kate Green, Being Here - What a Woman Can Say About Land Law, in FEMINIST PERSPECTIVES ON THE FOUNDATIONAL SUBJECTS OF LAW (Anne Bottomley, ed. 1996) 87, 102-103.
than domination and capture as the basis for property expectations. And, when we view the rights that accrue in property from the perspective of care, the notion of domination begins to cede from the spotlight, as the rule of capture fails to explain the basis and direction for many developments in law. As Alison Jaggar pointed out, “Because we expect humans to be aggressive, we find the idea of cooperation puzzling. If, instead of focusing on antagonistic interactions, we focused on cooperative interaction, we would find the idea of competition puzzling.” Another way of making this point might be to assert that when non-capture doctrines and developments are viewed from a capture perspective, the law appears riddled with anomaly; when viewed from a perspective of capture and care, the law can be viewed as comfortably integrating elements of both individualistic needs and the needs of relating the individual to the whole. It may be in this area of law that ecofeminism can provide both critical and constructive insights.

Of course, depending on the characterization we give, the law can appear quite messy, a consequence arguably (and likely) stemming from both the positive character of law and of our critical construction of its indeterminacies. Yet some characterizations will succeed in being more persuasive, simply because their organization of the law will insert some semblance of coherency and cohesiveness to our understanding. This might be accomplished by the ecofeminist analysis of property and its program of distinguishing domination from other relational forms of property ownership. As such, this article looks broadly (but by no means exhaustively) at property and the incidents of a right in property to consider the variety of platforms offered, the many ways that capture is undermined in property law, and the multiple and pluralistic interpretations that might be given to the application of non-capture doctrines. In some instances, the tension between capture and non-capture reasoning will be more apparent; in others, the distinction will be subtle. This is to be expected, and of course is part of the point

32 See Elaine L. Hughes, Fishwives and Other Tails: Ecofeminism and Environmental Law, 8 CAN. J. WOMEN & L. 502, 511 (1995) (“Ecofeminism offers, at a minimum, a rich source of ideas about how one might ‘re-vision’ the entire framework of environmental law.”).

33 Greta Claire Gaard, ECOFEMINISM: WOMEN, ANIMALS, NATURE (1993) at 220. See also, Alison Jagger, FEMINIST POLITICS AND HUMAN NATURE (1983)

34 Hence, when Hughes observes that “fish don’t count” in much of contemporary environmental law, she is not making a biological (and social) observation about the mathematical prowess of aquatic entities. Elaine L. Hughes, Fishwives and Other Tails: Ecofeminism and Environmental Law, 8 CAN. J. WOMEN & L. 502, 525 (1995). Rather, she notes that the legal scheme that governs our decisionmaking about fish do not take fish into consideration. Fish are treated as objects, not subjects. Fish are treated as inherently capturable, and are not even worthy of attention until they are circumstantially accessible as prey. Hughes re-envisioned law by experimenting with the role of nature: as subject and object, rather than only as commodity: as accountable and accounted for, rather than as mere circumstance; as participant and partner, rather than as a threat, challenge, or pesky critter that we need to capture. Id. at 525--29. See also albeit from a slightly different approach, see, e.g., Sandra B. Zellmer and Jessica Harder, Unbundling Property in Water, 59 Ala. L. Rev. 679, 684 (2008) (using water as an example for the idea that property is about relationships between people and relationships with the discrete thing of property).

35 Given this approach, it is clearly the case that the legal examples provided here may be subjected to competing analyses: some may disagree on whether particular doctrines are relevant to ecofeminism, or whether the doctrines
made: the indeterminacy of law is at the base of the project of nature constructivism, not as an obstruction as much as a circumstance. The other part is to see that a construction of property that includes the influence of care on the allocation of rights is both persuasive and coherent.

A. Legitimate Expectations in Transfers of Title: Capture, Relationship, and Responsibility

In the context of real and personal property, the rule of capture applies in a wide variety of ways, illustrating the rules under which a claimant can (or must) dominate, possess and convey, as well as identifying the property incidents that accompany ownership. For instance, the statute of frauds, as well as exceptions to its governance, can be explained by analogy to the rule of capture. A conveyance of real property is generally subject to the applicable state’s statute of frauds, under which a conveyance of real property must typically be evidenced by a written and signed memorandum to be enforceable by the injured party, a requirement that allows for application of the rule of capture (by illustration of intent, physical delivery, and acceptance of the document that represents a conveyance of ownership). Note also that even an oral conveyance may be enforceable by the purchaser under certain circumstances, notwithstanding the writing requirement, but only where the purchaser is able to demonstrate substantial steps toward completing the purchase. Of the three generally recognized steps that might be offered as evidence of the agreement - payment, possession and improvements - it seems that the most persuasive for the purchaser’s enforcement is the degree of physical improvement that has been caused by the purchaser on the subject land. Hence, the law provides an exception to the statute of frauds where the purchaser has demonstrated intent and physical capture by engaging her labor on the land, transforming the land, or has otherwise taken control in a ‘productive’ manner. Something short of this demonstration is, like the efforts of Post, insufficient to support a claim to “property.”

really resemble ecofeminist principles. This is also a circumstance of the varieties of ecofeminism. As Hughes noted, “[d]espite its theoretical foundations, current writings question radical feminists’ ‘call for coherence in feminism around sexuality’ and strive for an alliance amongst diverse viewpoints, rather than seeking a ‘hegemonic theory.’” Elaine L. Hughes, *Fishwives and Other Tails: Ecofeminism and Environmental Law*, 8 CAN. J. WOMEN & L. 502, 505 (1995).

39 See, e.g., *Hamilton v. Traub* 29 Del.Ch. 475, 480, 51 A.2d 581, 584 (Del.Ch.1947) (finding that performance is evidence of existence of agreement and therefore requiring sale transaction to proceed), *Eckart v. Engelking Corp.* 2006 WL 2729301 (Minn.App. 2006) at 5 (finding that payment of taxes, maintenance and purchase price was sufficient to evidence transfer of ownership, notwithstanding lack of written agreement), *Gardner v. Gardner* 454 N.W.2d 361 (Iowa 1990) (holding that oral agreement to return residual interest in property to siblings when defendant was unable to obtain a mortgage was enforceable).  
Although much of property law may be available to the capture explanation, we
frequently find doctrines and case law in which capture fails to provide a complete picture of the
law. Hence, in the case of the statute of frauds, we might recognize that the purpose served by
the writing requirement relates to the need to avoid fraudulent claims and insure that the form of
a real property conveyance confirms that a meeting of the minds underlies the exchange, goals
that arguably diverge from the interests of competitors and neutralize aggressive tactics.
Likewise, it is worth noting that the expectations carved out of the statute of frauds for oral
conveyances are founded in the more ‘muddy’ authority of the court to do equity and protect
innocent and reasonable expectations.

For the bulk of property’s doctrinal foundations, there are competing doctrines and
interpretations that challenge the notion of whether domination as exemplified in capture is so
pervasive in law as might be expected. This section considers property rules relating to the
transfer of title. An inspection of the exchange between capture and care in these areas of law
illustrates that the law of property does not (or at least, does not consistently) favor the types of
traits and behaviors that might be expected of a dominator. Rather, we find that the values
expressed and behaviors demanded from law often favor the ethic of care, including such
incidents as relationship and responsibility.

1. Adverse possession

The doctrine of adverse possession divests a title owner of her interest in real property
and vests the right of possession in a trespasser to the land. It requires a claimant-in-possession
to demonstrate continuous and actual possession of the property in an open, notorious and hostile
manner, to the exclusion of others, for a length exceeding a certain statutory time period. Technically, an adverse possession claim is premised on the running of the statute of limitations on the true owner’s cause of action for ejectment. As a practical matter, however, adverse possession appears as merely a real property application of the aggressive, competitive doctrine of capture: adverse possession is the control of another’s property in such an open manner that the acts of possession communicate a claim of attachment, and in such an individual and exclusive manner that illustrates both legalized thievery and complete domination of the land.

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41 See Timberlake v. Heflin, 379 S.E.2d 149, 153 (W.Va. 1989) (citing 2 A. Corbin, Corbin on Contracts § 498 (1950 & 1984 Supp.) (purpose of the Statute of Frauds is “to prevent the fraudulent enforcement of unmade contracts, not the legitimate enforcement of contracts that were in fact made.”)
42 See generally, Carol M. Rose, Crystals and Mud in Property Law, 40 Stan. L. Rev. 577 (1988) (discussing the effect of property’s clear and cloudy principles).
45 This interpretation is called into question when we take into account those states (and commentators) that factor good faith into the elements of adverse possession. See, eg., Halpern v. Lacy Inv. Corp., 259 Ga. 264, 265, 379 S.E.2d 519, 521 (Ga. 1989) (holding that “to enter upon the land without any honest claim of right to do so is but a trespass and can never ripen into prescriptive title.”). See also, generally, Richard H. Helmholtz, Adverse
In this description of adverse possession, we emphasize the logic of domination, and as such, the doctrine appears to fall squarely into the ecofeminist critique.

Yet, adverse possession might be interpreted differently: it might not be a doctrine that rewards acts of aggression and competitiveness (or, for that matter, a doctrine that penalizes non-use of property\(^{46}\)), but rather one that rewards relational attachments to land. Indeed, what is equally relevant to the examination of adverse possession is that a possessory claim does not arise merely by the entry of another’s real property - that, of course, is enjoinable as a trespass.\(^{47}\) Instead, among the variety of approaches, one persuasive argument seems to be that, after such a long and uninterrupted period of possession and use, it is reasonable to assume that the possessor has formed attachment relationships with the land that only come from engagement with the land, and it is this aspect of property that may be protected in adverse possession statutes.\(^{48}\) In stark contrast to the ‘legalized thievery,’ capture theory of adverse possession, the relationship approach illustrates an emphasis on law’s ability to prioritize care and protect the type of attachment to land that facilitates relationships: as Holmes argued, “A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.”\(^{49}\) In other words, adverse possession is justifiable on grounds that law can legitimize interests that arise as relationships with land. Such relationships may be acquired, developed, or emboldened through a process of context, experience, personhood, and perhaps even a little equity.

Given the foregoing, we might surmise that a care approach completes the doctrine of adverse possession. At least, the capture version of adverse possession fails to explain why land is reopened to the possibility of capture by virtue of an unpermitted entry by the adverse possessor, where the title owner has already captured the land and, presumably, has not communicated the intention to divest herself of title. In contrast, the non-capture description of adverse possession accounts for the transfer of the title interest: as between an absentee title owner, who has a personal and identity interest in the title, and an occupant whose identity is tied

\(^{46}\) Generally, property law has not compelled an involuntary transfer on the sole ground of non-user. See, e.g., Columbus-American Discovery Group v. Atlantic Mutual Ins. Co., 974 F.2d 450 (4th Cir. 1992).

\(^{47}\) See., e.g, Walker Drug Co., Inc. v. La Sal Oil Co., 972 P.2d 1238, 1243 (Utah 1998) citing John Price Associates, Inc. v. Utah State Conference, Bricklayers Locals Nos. 1,2 and 6 and Tile Setters Local No. 5 615 P.2d 1210, 1214 (Utah, 1980) (“The gist of an action in trespass in infringement on the right of possession.”); Hoery v. United States, 64 P.3d 214, 217 (Colo. 2003) citing Public Serv. Co. of Colorado v. Van Wyk, 27 P.3d 377, 389 (Colo.2001); Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913, 933 (Colo.1997) (“The elements for the tort of trespass are a physical intrusion upon the property of another without the proper permission from the person legally entitled to the possession of the property.”).

\(^{48}\) Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 477 (1897) (“It is in the nature of man’s mind.”).

\(^{49}\) Id.
closely to the land, the law favors the relationship, and is more reluctant to sever a physical and emotional attachment than a mere paper title. When viewed as a doctrine that respects relationships with the land, rather than a doctrine that encourages trespass, adverse possession presents a more coherent doctrine than when understood through the rule of capture.50

2. Termination of Co-Tenancy: Partition

A similar analysis can be given to the laws governing partition. Co-ownership of property can be discontinued in a number of ways, one of which is known as partition. Partition is a method of separating ownership interests in property in a manner that reflects (and to some extent preserves) the ownership interests of the respective parties. There are generally two types of judicial partition remedies: partition in kind and partition by forced sale. For purposes here, the differences between the two are immeasurable.

In a partition by forced sale, the property is sold, the interests are converted to economic values, and the proceeds are distributed among the parties in proportion to their interests. This method of partition intends that land be valued according to the market: partition by sale assumes that the value of the land (or perhaps the highest value) can be realized in the market. In contrast, partition in-kind reflects on the effort to prevent detachment of the parties from the land. A partition in-kind will result in a physical division of the property, and severance of the previously undivided property interests, with allocation of the parts to individuals in the co-tenancy. The courts have shown a preference for partition in-kind: a party seeking a partition by sale has the burden of demonstrating that the property cannot be conveniently partitioned in kind, that the interests of one or more parties will be promoted by sale, and that the interests of the remaining parties will not be prejudiced.51

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50 Interior Trails Preservation Coalition v. Swope, 115 P.3d 527, 530-531 (Alaska 2005) (Easements can be acquired by prescription upon a showing that (1) use of the property was continuous and uninterrupted for the same that applies to adverse possession; (2) the claimant used the property as an owner, rather than with permission; and (3) the use was reasonably open. Unlike adverse possession, prescriptive easements may be obtained by the general public.). Id at 31, citing Dillingham Commercial Co., Inc. v. City of Dillingham, 705 P.2d 410, 416-17 (Alaska 1985).

The capture analysis of rights by prescription closely follows the analysis offered above for adverse possession: although easements by prescription do involve the unpermitted entry upon land of another, and as such support a capture perspective of land acquisition, the more persuasive and coherent understanding of prescription is provided by a non-capture analysis. However, the law of public prescriptive easements offers an additional non-capture element to the ecofeminists’ tool box: a sufficient public use of private property defeats the right to exclude and vests a right to use as an expectation in the general public. Although the elements for public and private prescriptive easements are essentially the same, a public prescription claimant is required to prove continuous use by the general public, and need not demonstrate use by any specific individual. Rather, the claimant may rely upon and assert the use made by the public.

Certainly, an argument could be made that partition in-kind is contrary to the aims of care in property, as the result of segregating interests and individualizing ownership reflects poorly on an effort to negotiate community interests in land.\textsuperscript{52} However, on closer inspection, partition in-kind bears a relation to care in an important way; partition in-kind reflects on a different basis for valuing land. In \textit{Ark Land Company v. Harper},\textsuperscript{53} the court was faced with competing claims for partition in kind and partition by forced sale. The property, previously owned exclusively by the defendant’s family, had been parsed off in sales from various family members to the plaintiff, resulting in the plaintiff’s ownership of 67.5% of the property.\textsuperscript{54} The plaintiff was unable to acquire the remaining interests and sued for partition by sale.\textsuperscript{55} The \textit{Ark Land} plaintiff was able to demonstrate that the market value of the separate parcels of was substantially lower than the land as a single parcel, and as such, asserted that all of the owners’ interests would be significantly devalued if the land were divided through a partition in kind.\textsuperscript{56} Specifically, the plaintiff would incur significant additional costs by implementing its mining plan on smaller parcels.\textsuperscript{57} Accordingly, the trial court ordered the sale, finding that the economic value issues outweighed any inconvenience to the defendants.\textsuperscript{58}

On review, the West Virginia appellate court rejected the notion that monetary considerations - as a measure of the property’s value - can act as an exclusive test or trump card for depriving the defendants a fair attachment value to the property.\textsuperscript{59} Although the court expressed a keen sensitivity to the plaintiff’s claimed injuries, “[t]he additional cost ... simply does not impose the type of injurious inconvenience that would justify stripping the [defendants] of the emotional interest they have in preserving their ancestral family home.”\textsuperscript{60} The court not only integrated emotional attachment into the rationale of property, but elevated the status of the parties’ sense of place in shaping the substance of the parties’ respective property rights.\textsuperscript{61} Indeed, what is interesting is, as has been found in other contexts, that “courts recognize the fact that people do form deep attachments to some kinds of property, and that the value of some sorts of property cannot properly be compensated by substitution of another like thing.”\textsuperscript{62} In this case,

\begin{footnotesize}
\begin{enumerate}
\item[(N.D.,1984)] (finding that personal attachment to the land can and should be preserved by partition in-kind).
\item[54] Id. at 334.
\item[55] Id.
\item[56] 215 W. Va. at 335
\item[57] Id.
\item[58] 215 W. Va. at 336—37.
\item[59] 215 W. Va. at 337, fn.8.
\item[60] 215 W. Va. at 339.
\end{enumerate}
\end{footnotesize}
a strong relationship to land was held the superior right, not for the aim of excluding others, but to defeat a claim that the highest value of land is in the value of what can be taken from it.

Although the result of partition is to individualize, the process of segregating the interests of co-owners of real property nonetheless provides a powerful antidote to the idea that the ‘highest and best’ uses of land must be gleaned from market value or the value additions from extracting resources from the land. Courts can and do recognize that possession of property provides an opportunity to form relationships with the land. Moreover, where the competing interests of co-ownership concern an owner intent on domination and transformation of the land for its resources on one hand, and an owner seeking to preserve her relationship with the land itself on the other, the law favors the less transformative values and uses of land. What is most striking, however, about the preference for partition in kind is what it says about the source of property: the emotional attachment observed by the court is something more profound than the despair of being deprived of a mere possession. Rather, the court is protecting a relationship that arises out of a particular experience (this person, this land) in which the claimant does not claim the value of land to someone else (as market value analysis inevitably does), but to the claimant. The care approach illustrated by the court recognizes that “[r]elationships are not something extrinsic to who we are, not an ‘add on’ feature of human nature; they play an essential role in shaping what it is to be human.” As such, the relationship claim of care is not founded in mere domination (this is mine) of the thing, but in the shared experience: as Karen Warren states, the place where we engage in “loving perception of the land, not fused together into a single entity, but in a “complement of two entities acknowledged as separate, different, independent, yet in relationship.”

3. Conveyancing: Caveat Emptor and Informational Duties

Property law has long struggled with the problem of integrating notions of responsibility into conveyances, in large part due to law’s resolve for certainty in the transfer of rights. The doctrine of caveat emptor - ‘buyer beware’ - represents the traditional and customary reluctance to extend a vendor’s or builder’s duties beyond the confines of the transaction itself. The doctrine has roots in the notion of equal bargaining power, but primarily acts to impose efficiency in the system by allocating risks to a buyer, risks which transfer completely upon a completed exchange. As such, caveat emptor can be explained as an analogy to capture: delivery

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63 This analysis might be further supported by other alternatives to these two partition choices. For instance, under partition by allotment or owelty, a court may recognize that the best interests of the parties would be furthered by vesting a single party with title (or a more valuable portion of the property) upon payment. See, e.g., Zimmerman v. Marsh, 365 S.C. 383, 618 S.E.2d 898 (S.C. 2005) (allotment); Dewell v. Lawrence, 58 P.3d 223 (Okla. Civ. App. 2002) (owelty). Courts also recognize that co-ownership may be a collaborative and cooperative venture and enforce agreements not to partition. See, e.g., Libeau v. Fox, 892 A.2d 1068 (Del. 2006).
and acceptance of title by the buyer (control and possession) vests the rights of ownership; caveat emptor reflects on the notion that one’s capture of title likewise vests the risks and duties of property, regardless of what harsh consequences the risks may reveal. The doctrine provides incentives to buyers to make informed choices, but effectively protects vendors who sell defective products.

The doctrine of caveat emptor might leave us uneasy about the bargaining footing of purchasers, where the notion of a buyer’s expectations in the property are often left to the nature of the information disclosed by the vendor. Given the opportunity to conceal conditions in the property that could adversely affect the market value (and artificially inflate market prices in a way that undermines a buyer’s expectations), courts have developed exceptions to caveat emptor. The most prevalent of these relates to latent defects and the vendor’s duty to disclose. Stambosky v. Ackley provides some unique, but nonetheless helpful insights into the limitations of caveat emptor. In Stambosky, a seller did not disclose an historical condition of the property - that it was allegedly haunted! Complicating the matter was the seller’s past marketing of the property as a haunted house. Under the traditional doctrine of caveat emptor, relied upon by the seller, the purchasers were without a remedy: damages are not available for the seller’s mere silence about a condition of the property (as silence does not mean misrepresentation).

Reflecting on the harshness of such a result, the court found limitations in the doctrine of caveat emptor: nondisclosure can constitute a basis for rescission where the undisclosed condition materially affects the value of the home and is unlikely to be discovered by the reasonably prudent buyer. Where an inspection does not (or cannot) reveal the particular facts at hand, the court requires the seller to be forthright about the condition of the property.

The law of leases has undergone a similar shift. Historically, leases were considered conveyances of property interests, and as such, were governed by traditional common law.

67 Id. at 255—56, 572 N.Y.S.2d at 674.
68 Id. at 256, 572 N.Y.S.2d at 674
69 Id.; See, e.g., Anderson Drive-in Theatre, Inc. v. Kirkpatrick, 123, Ind.App. 388,110 N.E.2d 506 (1953) (caveat emptor applies to lease where no evidence of fraud, despite owner’s knowledge that the physical characteristics of the property would not be suitable for lessee’s purposes).
70 169 A.D.2d 254, 258—59, 572 N.Y.S.2d 672, 675—77; See, e.g., Smith v. Old Worson Development Co., 479 S.W.2d 795, 801 (Mo. 1972) (rejecting caveat emptor in purchase of residential property because the latent defect was undiscoverable at the time of purchase ).
71 169 A.D.2d 254, 256, 572 N.Y.S.2d 672, 676; The hard case, for purposes of analyzing capture influences in the law, concerns the purchaser’s expectations in properties subject to environmental regulation. In Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886 (1992) and Palazzolo v. Rhode Island, 533 U.S. 606, 121 S.Ct. 2448 (2001), the Court rejected the assertion that purchasers should take property subject to both the environmental conditions and the regulations on property use arising from those conditions. Of course, in neither case was the Court concerned with nondisclosure, and in neither was relief asserted against the seller, but in both, the Court offered some protection for the purchaser in cases where market value of land is influenced by the manner in which land use is regulated.
property rules. The subject of the conveyance was possession of the land, without regard for the structures (or, for that matter, the intended use of the structures), in which the landlord’s primary, often sole covenant concerned the delivery of possession at the commencement of the lease period. The tenant’s right of possession was underlain by the doctrine of caveat lessee, under which the tenant took possession subject to their condition, with no recourse based solely on the habitability of the premises. Arguably, at the time this rule developed, the treatment of leases as property conveyances was commensurable with the circumstances and the parties’ expectations. However, urbanization and shifts in technology, tenant’s expectations, and sophistication of the parties caused a corresponding shift in the courts. Tenants in the latter half of the twentieth century sought suitable housing, not farmable land. As the D.C Circuit Court stated: 

[T]hey seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.

As urban dwellers, uncomfortable working with tools and unfamiliar with the land, the tenants’ competencies and experiences in making repairs to the complex machinery that powered the lights and appliances grew infrequent: “In most circumstances, the modern tenant lacks the skill and ‘know-how’ to inspect and repair housing to determine if it is fit for its particular purpose.”

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72 See Note, Judicial Expansion of Tenants’ Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases, 56 Cornell L.Q. 489, 489-90 (1971); Anderson Drive-in Theatre, Inc. v. Kirkpatrick, 123 Ind.app. 388, 394110 N.E.2d 506, 508 (Ind. 1953) (landlord is under no obligation, short of allegations of fraud, to disclose facts about the condition of land that could be material to the tenant’s intended use: “The law has not yet… reached the point of imposing upon the frailties of human nature a standard so idealistic as this.”).

73 See, e.g., Service Oil Co. v. White, 218, Kan. 87, 94 542 P.2d 652, 659 (1975) (citing 2 Powell, Real Property (1974) 225(2), 230.) (“It has been said that under normal circumstances the lessee takes the full risk as to fitness of the premises for the uses to which he intends to apply them. The doctrine of caveat emptor has generally been applied where a lessee has claimed that property leased by him did not conform to the requirements for which he leased it.”).


75 See, Hilder v. St. Peter, 144 Vt. 150, 158 478 A.2d 202, 207 (1984) (citing Green v. Superior Court, 10 Cal.3d 616, 622, 517 P.2d 1168, 1172, 111 Cal.Rptr. 704, 708 (1974)) (“The tenant of the Middle Ages was a farmer, capable of making whatever repairs were necessary to his primitive dwelling.”); Tonetti v. Penati, 48 A.D.2d 25, 28, 367 N.Y.S.2d 804, 806-807 (1975) (citing 1 Tiffany, Landlord and Tenant, § 12, p 46) (“The rule there laid down was promulgated in an agrarian society when leases were so much considered Sales of the premises for the terms of the leases that the tenants’ interests were termed ‘chattels real’”); Lemle v. Breeden, 51 Haw. 426, 430, 462 P.2d 470, 472 --73 (1969) (“At common law leases were customarily lengthy documents embodying the full expectations of the parties. There was generally equal knowledge of the condition of the land by both landlord and tenant. The land itself would often yield the rents and the buildings were constructed simply, without modern conveniences like wiring or plumbing.”).


77 Breezewood Management Company v. Maltbie, 411 N.E.2d 670, 674 (Ind. Ct. App.1980)(recognizing “the modern trend abolishing caveat lessee and treating a lease as a contractual relationship…”).
As such, tenants were found to have grown into an inferior bargaining position in leasing arrangements. Under these circumstances, the courts saw little value in the doctrine of caveat lessee, favoring a conceptual approach that treats leases as contracts with implied covenants, rather than as conveyances. This shift purportedly served a greater attention to the details of the parties’ circumstances and expectations, while undermining the effect of capture by mitigating for the unequal bargaining powers of landlords and tenants.

Although the shift away from the harshness of caveat emptor certainly evidences a transition in values away from allowing aggressive sellers to capitalize on bargaining circumstances, a care approach to property also emphasizes that overcoming caveat emptor was primarily property’s response to dissatisfaction with “objectivity” in the law. Ecofeminists have long pointed out that rules may well be “objective” to the benefitting party, and that a claim to objectivity “legitimizes itself by reflecting its view of existing society, a society it made and makes by so seeing it, and calling that view, and that relation, practical rationality.”

Attentiveness to the context of understanding and circumstances of the parties contrasts the impersonal and “objective” constraints of caveat emptor. In particular, the care approach insists

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78 See, Hilder v. St. Peter, 144 Vt. 150, 478 A.2d 202, 207 (1984) (citing Green v. Superior Court, 10 Cal.3d at 624, 517 P.2d at 1173, 111 Cal.Rptr. at 707-08 (1974)). (“[T]oday’s residential tenant, most commonly a city dweller, is not experienced in performing maintenance work on urban, complex living units. The landlord is more familiar with the dwelling unit and mechanical equipment attached to that unit, and is more financially able to “discover and cure” any faults and break-downs.”)

79 Sargent v. Ross, 113 N.H. 388, 397, 308 A.2d 528, 534 (1973) (citing Scott v. Simons, 54 N.H. 426 (1874)) (“we today discard the rule of ‘caveat lessee’ and the doctrine of landlord nonliability in tort to which it gave birth. We thus bring up to date the other half of landlord-tenant law. Henceforth, landlords as other persons must exercise reasonable care not to subject others to an unreasonable risk of harm.”); Boston Housing Authority v. Hemingway, 363 Mass. 184, 198, 293 N.E.2d 831, 842 (1973) (“The modern view favors a new approach which recognizes that a lease is essentially a contract between the landlord and the tenant wherein the landlord promises to deliver and maintain the demised premises in habitable condition and the tenant promises to pay rent for such habitable premises. These promises constitute interdependent and mutual considerations. Thus, the tenant’s obligation to pay rent is predicated on the landlord’s obligation to deliver and maintain the premises in habitable condition.”).

80 Hilder v. St. Peter, 144 Vt. 150, 158, 478 A.2d 202, 207 (1984) (“In light of these changes in the relationship between tenants and landlords, it would be wrong for the law to continue to impose the doctrine of caveat lessee on residential leases.”); Sargent v. Ross, 113 N.H. 388, 398, 308 A.2d 528, 534 (1973) (quoting Dowd v. Portsmouth Hosp., 193 A.2d 788, 792 (1963) (on rehearing)) (“We think this basic principle of responsibility for landlords as for others ‘best expresses the principles of justice and reasonableness upon which our law of torts is founded.’”); Tonetti v. Penati, 48 A.D.2d 25, 29, 367 N.Y.S.2d 804, 807 (1975) (“It is evident that the rationale behind the common-law rule, which likened a lease to the sale of a chattel and therefore applied the ancient doctrine of caveat emptor, has no rational basis in a modern, urban society. Realistically viewed, and fiction discarded, a lease of residential premises establishes a contractual relationship with mutual obligations and is not intended to be treated as a conveyance of an interest in realty. The main concern of today’s tenant is that he acquire premises which he can enjoy for living purposes: he is more mobile and generally less skilled at maintenance than the agrarian tenant; repairs are more costly and dwellings, with modern plumbing and electrical facilities, are more complex.”); Presson v. Mountain States Properties, Inc., 18 Ariz.App. 176, 179, 501 P.2d 17, 20 (1972) (recognizing the “current trend in the law is one of disfavor of caveat emptor (caveat lessee)” (ruling on other grounds)).

that law not foreclose consideration of the imbalances in a particular transaction - perhaps due to access to information or opportunity, or availability of resources, but in any event due to clear and definite differences in negotiating power.  

B. Interests in the Property of Others: Capture, Context, and Community

Up to this point, the discussion suggests that in the process of legitimizing interests as property rights, a rule of capture approach might be premised on an abstract idea of individualism, the value of one's labor, and the importance of individual property ownership in a political society. Such an approach produces the types of results we might expect from a capture doctrine - aggressive confrontations among competitive parties that shape their behaviors to meet the degree of domination required of a prevailing party. It is unsurprising that parties who are comfortable competing on such terms are favored under capture schemes. Yet, capture fails to hold an exclusive position in the legal system, and even this brief review evidences existing and growing legal trends in title and conveyance doctrines that benefit collective and systemic needs, value in cooperation and collaboration, and the importance of physical and emotional attachment to land.

Of course, doctrinal questions involving the transfer of title will understandably be open to an analysis under the doctrine of capture. Capture, after all, is intended to govern the acquisition of a property interest. Yet the applicability of the capture analogy also extends into the content of property ownership. This section considers conflicts over property boundaries arising both from the physical circumstances of real property (owners have neighbors) and conceptual needs in private property. In both, the property analysis contends with the right to exclude others.

As we turn to property doctrines which locate property interests in the property of others, we find more of the same exchange between capture and care: although property rights are for some purposes delineated by property boundaries, the analysis of capture and care in property illustrates that such boundaries are something less than sacred. Capture rules encourage aggressive behavior, such as property uses that impose injuries upon others, whether intentional, malicious, or even innocent. In these examples, we focus on the manner in which capture laws propose “neutral” and “objective” measures for valuing the attributes of land, water, air, and other objects, with the aim of excluding the value of care by defining value as a contingency resolved in the market place, instead of in relationships and attachments. A care approach in these doctrines recognizes that property decisions affect interests beyond the boundaries of

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82 Diana Majury, Women Are Themselves to Blame: Choice as Justification for Unequal Treatment, in Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., Making Equality Rights Real: Securing Substantive Equality Under the Charter 209, 216 (2006) (“The availability of any choice must be examined in its context which would include factors pertaining to race, class, gender, (dis)ability, age, or sexual orientation that may limit or coerce ‘choice’ or render a choice in effect unchoosable.”).
individual private property, and that property interests in another’s property are best understood by identifying how capture and care complement one another in the resolution of property controversy.

1. Nuisance Law

Under private nuisance, the use rights of property owners are limited by the extent to which particular uses unreasonably interfere with the use and enjoyment of another’s property. Under public nuisance, the acting owner’s rights are limited by the interests embodied in the public welfare: “A common or public nuisance is the doing of or the failure to do something that injuriously affects the safety, health or morals of the public, or works some substantial annoyance, inconvenience or injury to the public.” Although the two differ at least on the scope of the injury at issue, with private nuisance focused on interference with private rights and public nuisance looking to the public welfare, they nonetheless converge on the effect of a nuisance finding on the right to use property: the doctrine of nuisance identifies the limits of a property owner’s right to use property. The court’s role in nuisance cases is to determine which of competing interests and needs in property will be legitimized by limiting the other’s claim:

The ground of this jurisdiction... is the ability of courts of equity to give a more speedy, effectual, and permanent remedy than can be had at law. They cannot only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future. . . . This is a salutary jurisdiction, especially, where a nuisance affects the health, morals, or safety of the community.

The nuisance doctrine recognizes the presumption that property ownership entails a right to make reasonable use of the property. Hence, as the New York court stated in Bove v. Donner-Hanna Coke Corp., “As a general rule, an owner is at liberty to use his property as he sees fit, without objection or interference from his neighbor, provided such use does not violate an ordinance or statute.” Courts, however, have long recognized a rule “made necessary by the intricate, complex and changing life of to-day.” Under the “old and familiar maxim that one must so use his property as not to injure that of another (sic utere tuo ut alienum non lædas), . . . an owner will not be permitted to make an unreasonable use of his premises to the material...

85 See People ex rel. Gallo v. Acuna, 14 Cal.4th 1090, 1103, 929 P.2d 596, 603 (Cal. 1997) (“The public nuisance doctrine is aimed at the protection and redress of community interests and, at least in theory, embodies a kind of collective ideal of civil life which the courts have vindicated by equitable remedies.”).
88 Id. at 39, 258 N.Y.S. at 231 (1932)
89 Id.
annoyance of his neighbor if the latter's enjoyment of life or property is materially lessened thereby.\textsuperscript{90} This limitation is based on the “co-existence of equal rights” among neighbors to the use and enjoyment of their own property.\textsuperscript{91} Nuisance requires an analysis of a neighbor’s or the public welfare’s needs for the purpose of limiting, but not defeating property rights, and as such, a nuisance claim is analyzed under factors designed to illuminate the reasonableness of the activity relative to the character of the neighborhood and location, the actual interference caused by the activity, and the nature and intensity of the use.\textsuperscript{92} Location may be the most important factor in a nuisance determination,\textsuperscript{93} as nuisance liability is not triggered by a mere annoyance\textsuperscript{94} and is generally directed at the impacts of land uses, rather than (in most cases) particular land uses (the impacts of which will vary from location to location).\textsuperscript{95}

Given the foregoing, nuisance law can be understood as reflecting on a constant negotiation between rights arising through an individual’s capture and property limits imposed by care. The capture element of this competition delineates the limits of nuisance. Take for instance, the “coming to the nuisance” defense against a nuisance claim. Historically, the first property owners in a community to make use of the land have been privileged under the doctrine of nuisance. Nuisance is not overtly intended as an allocation scheme that rewards the first to come. Nevertheless, because nuisance largely depends on how appropriate a use is to its location, and because the first owners to use their lands can be very influential in determining the character of a neighborhood, nuisance may be seen as a capture doctrine. Latecomers to a

\textsuperscript{90} Id.

\textsuperscript{91} Id. (quoting Booth v. R., W. & O. T. R. R. Co., 140 N. Y. 267, 274 (1893)) (“The general rule that no one has absolute freedom in the use of his property, but is restrained by the co-existence of equal rights in his neighbor to the use of his property, so that each in exercising his right must do no act which causes injury to his neighbor, is so well understood, is so universally recognized, and stands so impregnably in the necessities of the social state, that its vindication by argument would be superfluous. The maxim which embodies it is sometimes loosely interpreted as forbidding all use by one of his own property, which annoys or disturbs his neighbor in the enjoyment of his property. The real meaning of the rule is that one may not use his own property to the injury of any legal right of another.”).


\textsuperscript{93} Andrew Jackson Heimert, Keeping Pigs Out of Parlors: Using Nuisance Law to Affect the Location of Pollution, 27 Envtl. L. 403, 409 (1997) (“Location is almost everything in nuisance law. . . . The vast majority of activities are lawful in the abstract, but becomes nuisances per accidens ‘by reason of their location, or by reason of the manner in which they are constructed, maintained, or operated.’”).

\textsuperscript{94} Wernke v. Halas, 600 N.E.2d 117, 122 (Ind. App. 1992) (mere aesthetic annoyance of a toilet seat mounted on a 10-foot pole does not call for judicial intervention under nuisance).

\textsuperscript{95} Bove v. Donner-Hanna Coke Corp., 236 A.D. 37, 40, 258 N.Y.S. 229, 232 (4th Dep’t 1932) (“Whether the particular use to which one puts his property constitutes a nuisance or not is generally a question of fact, and depends upon whether such use is reasonable under all the surrounding circumstances. What would distress and annoy one person would have little or no effect upon another; what would be deemed a disturbance and a torment in one locality would be unnoticed in some other place; a condition which would cause little or no vexation in a business, manufacturing or industrial district might be extremely tantalizing to those living in a restricted and beautiful residential zone; what would be unreasonable under one set of circumstances would be deemed fair and just under another. Each case is unique. No hard and fast rule can be laid down which will apply in all instances.”).
neighborhood may be precluded from nuisance claims for having “come to the nuisance.”

In like manner, courts have gone so far as to suggest that one might be able to prescriptively capture a right to continue engaging in nuisance activity, even where the activity substantially deprives a neighbor of the right of enjoyment. As such, the idea behind prescriptive rights to pollute and the ‘coming to the nuisance’ defense could be described as a capture analogy, in which the law rewards the speedy capture of natural resources with rights to use common resources, such as air quality, water and views.

The care element of nuisance, on the other hand, operates by not just providing the injured party with a cause against an imposing land use, but in the affirmation of the bedrock principle that property rights are very much defined by the degree to which particular choices fit into the community character: an act which causes nuisance impacts is not protected within the scope of the actor’s property right, and a nuisance is always in the wrong place. The care approach to nuisance law recognizes that all property uses are best understood contextually - “as a collage or mosaic, a tapestry of voices that emerges out of felt experiences.”

As suggested above, a focus on context is an important means of undermining the “objective” understandings that operate to foreclose fringe voices. “Objective” and “neutral” descriptions of law tend to displace or ignore the values that centralize care, relationships to others, and community.

Indeed, under nuisance law, context and location, rather than objective standards and benchmarks, determine whether the pig is being kept in the barnyard or the parlor. The care element of nuisance law therefore occurs both in the democratic process of creating and protecting communities through public nuisance and by recognizing community character in

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99 Note that, in a strong sense, the capture underpinnings for nuisance law have ceded from view. The defense of ‘coming to the nuisance’ as a defense of the impacts caused by particular land uses has largely been sequestered and contextualized as a consideration, but not a bar to liability. See, e.g., Weida v. Ferry, 493 A.2d 824, 827 (R.I. 1985) (“The doctrine [of coming to the nuisance] has been modified so that one’s coming to the nuisance no longer acts as an absolute bar to recovering damages in a nuisance action.”). The notion of sustaining a noxious use to the point of vesting a prescriptive nuisance has remained an isolated incident.


102 Moreover, courts have come to recognize that neither a property right nor those interests protected under nuisance doctrine should be considered stronger, to the exclusion of the other. See, e.g., Boomer v. Atl. Cement Co., 26 N.Y.2d 219, 226—29, 257 N.E.2d 870, 871-75 (1970).

103 As part of the community exercise, local governments have traditionally exercised their police power to identify land uses that offend the public welfare and prohibit these uses as public nuisances. In like manner, but on less certain legal ground, local governments have also identified uses that cannot give rise to liability as nuisances. For instance, many state and local governments have adopted protections for agricultural uses in an effort to maintain
the judicial recognition of private nuisance claims.

What is important is to recognize that the contributions to nuisance law made by care are fundamental to nuisance: capture alone does not explain the law of nuisance. A better, more complete description of nuisance exhibits both the capture and care foundations of land uses within a community. In this understanding, it is assumed that all land uses will have some effects external to the particular property boundaries, and the doctrine of nuisance is a way of conditioning rights to use land in a manner that minimizes the adverse impacts on a community scale. Nuisance centralizes the importance of location and context in the propriety of a particular land use, some uses are more appropriate in particular locations, and a nuisance is “merely a right thing in the wrong place, - like a pig in the parlor instead of the barnyard.” Nuisance recognizes that there are systemic needs in a property system, and that there are public welfare needs tied to the systemic needs of property. Moreover, under nuisance doctrine, the constantly shifting and adapting field of public needs projects the scope of a property right as a function of public welfare, rather as an opponent to it.

From the law of nuisance and the embedded balance that is reflected in the determination

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104 Although this Article surveys only a handful of property doctrines, it is important to see how far the care analysis might extend throughout property in a manner similar to the one in the case of nuisance. For instance, it appears that courts have rejected the notion of strict physical boundaries in airspace by rejecting ad coelum claims in the form of trespass, in favor of reviewing claims to unreasonable injuries suffered due to the use of another’s airspace. See, e.g., U.S. v. Causby, 328 U.S. 256 (1946); Swetland v. Curtiss Airports Corp, 55 F.2d 201 (6th Cir. 1932). Surface water trespass doctrines, once considered divergent and at odds, have since largely converged on an analysis of the reasonableness of the offending party’s use. See, Dyer v. Hall, 928 N.E.2d 273 (Ind. Ct. App. 2010); Page Motor Co., Inc. v. Baker, 182 Conn. 484, 438 A.2d 739 (1980); Bassett v. Salisbury Mfg. Co., 43 N.H. 569 (1862). Riparian rights allocation schemes, which have also illustrated a variety of approaches, have also tended towards a nuisance-type common ground among the various jurisdictional approaches. See, e.g., Carpenter v. Gold, 88 Va. 551 (1892); Walker v. Board of Public Works, 16 Ohio 540 (1847)


106 See, e.g., Joseph William Singer, After the Flood: Equality & Humanity in Property Regimes, 52 Loy. L. Rev. 243, 273 (2006) (“When we speak about property, we generally talk about it as an individual right. However, when we do this, we forget that it is a system and not just an individual entitlement.”).
of how privately-caused impacts relate to both private and public needs in property, it might be reasonable to conclude that the process of identifying nuisances (and enforcing the protection that law provides from them) involves a process of negotiation, collaboration and community. In this process, law respects capture, but does so in a way that includes and integrates attention to context and circumstances. Nuisance law, then, incorporates both capture and care, and does so in a way that reflects the systemic needs for both.

2. Eminent Domain and Public Use

In order to benefit from the power of eminent domain, a condemning authority is subject to the Fifth Amendment’s prerequisite limitation that private property be taken for “public use.”

This limitation suggests that the Fifth Amendment allows for the public capture of private property. Of course, in large part, capture does provide an illustrative explanation of the manner in which eminent domain operates: eminent domain provides the rules under which the public, as an entity, can exercise dominion and control over property. However, capture provides (at best) an incomplete explanation of eminent domain, particularly in cases where the “public use” element is in question.

The “public use” requirement was traditionally considered a minor hindrance to liberal use of the eminent domain power. A significant development in understanding the “public use” element of eminent domain law corresponded to the increase in urban redevelopment programs. A focus on urban design, largely related to the Euclid decision in 1926, led to an interest in eliminating slums and blight in urban areas. Although there was some sporadic disapproval of the exercise of eminent domain for urban redevelopment, typically because of the role of private parties in redevelopment projects, the majority rule was in favor of these takings by viewing a cure for blight as a distinct “public advantage.”

In Berman v. Parker, the Court reviewed a plan in the District of Columbia to engage in an urban redevelopment project in which the redevelopment plan involved taking private property for lease or sale to other private entities. A unanimous Court rejected the department store owners’ argument that both the

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107 U.S. CONST. amend. V.
108 The Court’s limited case law on the subject suggests that the court construed “public use” to require only that the condemning authority seek “broad public benefit” from the condemnation. Clark v. Nash, 198 U.S. 361, 370 (1905) (the Court upheld statutory authority to initiate a private condemnation action for purposes of water transmission); Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30 31–32(1916) (upholding a power company’s authority to condemn in order to produce and sell hydroelectric power and formally rejecting the use-by-the-public test); Rindge Co. v. Los Angeles County, 262 U. S. 700, 707 (1923), (finding that it was “not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in an improvement in order to constitute a public use.”) (citing Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 161 (1896)).
110 See, Public Use As a Limitation on Eminent Domain In Urban Renewal, 68 HVLR 1422 (1955).
112 Id.
private involvement and condition of the property undermined the authority to condemn. The Court explained,

We deal ... with what has traditionally been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.

This authority was not affected even in cases involving the power of eminent domain was involved, since “[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.” Because the redevelopment plan, broadly conceived, served a public use, “the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.”

Then, in Hawaii Housing Authority v. Midkiff, a unanimous Supreme Court rejected a challenge to a land ownership reform plan in the State of Hawaii. The plan itself was intended to mitigate the effects of an oligopoly that resulted from the state’s history of feudal land tenure under its early Polynesian settlers. Claiming that the circumstances were contrary to the public welfare of the state, the Hawaiian legislature enacted a plan to use the power of eminent domain to redistribute land ownership from the present owners to the present tenants. In upholding the land reform plan, the Court observed that “[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.” With such a purpose in mind, Hawaii’s plan did not contemplate “a purely private taking,” and deference was required because “legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power.”

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113 Id at 31.
114 Id. at 32.
115 Id.
116 The Court also rejected the claim that the taking failed the public use test because the particular property was not itself blighted, stating that “[o]nce the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.” Id.
118 Id. at 232—34.
119 Id.
120 Id. at 241-242.
121 Id. at 244.
In *Kelo v. City of New London*, a controversy that continues to capture the passions and imaginations of property and privacy advocates, the Court upheld the authority of eminent domain for the express purpose of promoting economic development. Although the Court acknowledged that “the City would no doubt be forbidden from taking petitioners’ land for the purpose of conferring a private benefit on a particular private party,” the record in this case contained a “carefully considered” comprehensive development plan and a striking absence of evidence of an illegitimate purpose. In approving the taking, the Court specifically rejected the asserted divide between public use and economic development, holding that the promotion of economic development is a classic government function and converged with other iterations of public purposes that would otherwise justify eminent domain. Moreover, the Court recognized the concern that such a rule might “blur[] the boundary between public and private takings,” noting that “the government's pursuit of a public purpose will often benefit individual private parties.”

The court’s “public use” jurisprudence is an assault on the abstract individualism behind

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123 The *Kelo* case reached the Supreme Court at an interesting time. One of the most notorious public use decisions was made by the Supreme Court of Michigan in *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616 304 N.W.2d 455 (1981), involving Detroit’s attempt to condemn an entire neighborhood to make way for the construction of a General Motors assembly plant. The City claimed the project would prevent job loss, provide tax revenue, and otherwise be helpful to the public in the midst of an economic recession. Id. at 632—33, 304 N.W.2d at 458. Because the use of eminent domain would benefit “specific and identifiable private interests,” the court purported to inspect “with heightened scrutiny the claim that the public interest is the predominant interest being advanced.” Id. at 634—35, 304 N.W.2d at 459—60. While averring that "[t]he power of eminent domain is restricted to furthering public uses and purposes and is not to be exercised without substantial proof that the public is primarily to be benefitted," the court declared that the projected public benefit was "clear and significant.” Id.

The Michigan Supreme Court recently overturned *Poletown* in *County of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004), a case concerning whether the taking of property for the construction of an office park for economic development purposes constituted a public use under the Michigan Constitution. The court applied a three part test to determine whether a transfer of condemned property to a private entity meets the public use test:

1. The transfer involves "public necessity of the extreme sort ";
2. "Property remains subject to public oversight after transfer to a private entity "; and
3. The land is selected for condemnation based on "facts of independent public significance," rather than the private entity to which the property is eventually transferred.” Id. at 476, 684 N.W.2d at 783, citing *Poletown*, supra. at 674—81 (RYAN, J., dissenting)

Applying these three tests to the office project at issue, the court concluded that the proposed taking was not for a public use. Id. at 478, 684 N.W.2d at 784. The court reasoned that the very existence of the project did not depend on the use of eminent domain for assembling property:

To the contrary, the landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce. We do not believe, and plaintiff does not contend, that these constellations required the exercise of eminent domain or any other form of collective public action for their formation. Id. at 477, 684 N.W.2d at 783.

124 545 U.S. at 477.
125 Id. at 478.
126 Id. at 484.
127 Id. at 485.
128 Id. at 485.
the rule of capture. By rejecting both the asserted construction of “public use” which requires a physical use by the public, as well as the a challenge to eminent domain with a private party involvement, the court has essentially rejected the idea that eminent domain presents a competition between two property claimants, both vying for capture of the right to possession and control. The care element of eminent domain requires that a governmental decision to take private property be designed to provide a public benefit or advantage – not necessarily a physical occupation or otherwise quantifiable public benefit, but a benefit nonetheless. Where private participation (even with the consequence of private benefit) furthers or is necessary to the public purpose behind the taking, and is not itself the primary use for the taking, private involvement is deemed incidental, in furtherance of public advantage, and merely the result of a community’s use of the resources it has available. The harm to the individual property owner – loss of choice of whether to convey -- is subject to, and indeed subservient to, the public welfare where the particular public need is sufficient to involve the power of eminent domain. From the cases on eminent domain and the scope of the “public use” requirement, the public use dialogue reflects that property in eminent domain is not about boundaries and exclusion, dominion, or control, but about community, cooperation, and care.

C. Interests in Natural Resources: Capture, Nature, and Collaboration

Like the doctrines discussed above, the allocation of rights to natural resources has straddled the line between capture and care. Capture, of course, is easy to find in natural resource laws and related property doctrines. As the United States began its westward expansion, the country was faced with the circumstance of an untamed, wild and dangerous west. The rule of capture, with its focus on a uniquely common asset among pioneers – labor – provided a needed certainty and stability. In allocating claims to mining the subsurface of the west for oil and minerals, to the use of the water for mining and irrigation purposes, but also to timber, grazing pastures and wildlife, the act of opening public lands and resources to individual capture provided sufficient incentive to pioneers to cultivate these wild lands. In effect, the rule of capture encouraged the domination of an untamed “nature” and transformation of natural processes in a manner that suited pioneering needs. Soon the deferral to the rule of capture gave cause for concern. As a result of the invitation to capture resources, mineral lands were patented, water was overappropriated, and forests were cleared. In response, natural resources

130 This, of course, included eliminating the presence of Native Americans, who were already occupying the lands and interfered with the first possession idea behind capture. See DANIEL M. FRIEDENBERG, LIFE, LIBERTY AND THE PURSUIT OF LAND, 27 (1992).
131 As historian John Steele Gordon states: “So rapid an alteration of the landscape could only have a severe impact of the ecosystem as a whole. The loss of so much forest caused runoff to increase sharply, eroding the land and burdening the waters with silt, destroying more wetlands. Many animals’ habitats disappeared. And because the ancient biblical notion that humans had dominion over each other still held, others vanished entirely.” John Steele
laws adapted to the public’s needs in restricting free and unrestricted capture.\textsuperscript{132}

An obvious example of the ongoing negotiation between capture and care in natural resources property is western water law. The western states have customarily allocated water rights under the doctrine of “prior appropriation.”\textsuperscript{133} Contrary to riparian rights (generally applied in eastern states), rights vested under prior appropriation arise from the actual capture and use of the water itself: embedded in prior appropriation are the maxims that reflect its core relationship to the rule of capture: ‘first in time, first in right’, and ‘use it or lose it.’ Accordingly, to vest a water right in a prior appropriation state, an appropriator must have the intention of using water, must transform the resource by diverting water from its natural course, and must then apply it to land in some beneficial and productive manner.

Although the doctrine of prior appropriation appears to be based upon the concept of capture, the doctrine also contains elements that are not entirely consistent with a transformative capture analysis. Arguably, the interplay between the substantive, non-capture pillars of prior appropriation – “beneficial use, without waste”\textsuperscript{134} - provides a pluralistic, adaptive framework that may be responsive to context and public need, even if set within a framework that encourages individualism and investment. Today, natural resource agencies are in the process of adapting prior appropriation to the (relatively) new circumstances of water shortage, water

Gordon, The American Environment: The Big Picture is More Heartening than All the Little Ones, 44 AMERICAN HERITAGE, 40 (Oct. 1993).

\textsuperscript{132} The authority of governmental agencies to refine and modify the capture of natural resources has been repeatedly upheld by the courts. In \textit{U.S. v. Midwest Oil Co.}, 236 U.S. 459, 467, 483 (1915), the Court approved the authority of the executive branch to protect the public’s interest by withdrawing public lands from “all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public-land laws.” In \textit{Texaco v. Short}, 454 U.S. 516 (1982), the Court reviewed the constitutionality of Indiana’s Dormant Mineral Interests Act, which automatically reverted severed mineral interests that went unused for a period of twenty years or more. Although such mineral interests had not previously been subject to durational requirements, the Court upheld the Act: “just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest.” 454 U.S. at 526. In \textit{United States v. Locke}, 471 U.S. 84 (1985), the Court approved the forfeiture provisions of the Federal Land Policy and Management Act of 1976 (FLPMA), which triggered the forfeiture of unpatented mining claims for failure to comply with annual filing requirements. The \textit{Locke} Court refined the rule, noting that “[e]ven with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties.” 471 U.S. at 104.

\textsuperscript{133} See generally, Janet C. Neuman, \textit{Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use}, 28 ENV. L. 919 (1998). In \textit{Coffin v. Left Hand Ditch}, 6 Colo. 443 (1882), the Colorado court felt compelled to diverge from the riparian scheme: “The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive . . . . [A]rtificial irrigation for agriculture is an absolute necessity.” 6 Colo. at 446. As Janet Neuman pointed out, had the west adopted riparianism, “it would still be a desert.” Janet C. Neuman, \textit{Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use}, 28 Env'l. L. 919, 963 (1998). In addition, along with other natural resource allocation doctrines of the developing west, the doctrine was considered favorable to the policies of certainty and stability to westward pioneers and encouraged the quick capture of rights to the water resource in developing states.

planning, and a constantly shifting definition of what constitutes a “beneficial use.” The fact that prior appropriation states have adopted permitting systems adds complexity to the analysis -governing agencies constantly struggle with the scope and direction of delegated authority, the role of the permitting agency, and the degree of protection afforded to those rights injured by new water uses.135 In addition, in some states, water rights themselves are subject to the public trust doctrine or analysis of possible injury to the public interest from water allocation.136 More important are that the maxim, “beneficial use without waste,” which may be interpreted in a wide variety of ways,137 and the fact that prior appropriation systems may be adaptable to rights in non-use of water, such instream uses138 and instream water rights,139 both of which call into question whether prior appropriation is primarily a doctrine of capture or care.140

The property doctrines considered here – the public trust doctrine and allocation of rights to groundwater – provide more illustrations of how both capture and care function in the allocation of natural resources. In both of these areas of law, capture doctrines favor the domination of land or the things of nature, often in disregard for injuries caused or even an understanding of the resources at issue. Yet in both, the capture of individual property rights is modified, influenced, or otherwise obstructed by law’s insistence that privatization be subject to the concerns of care. In both, law exhibits a consideration for the needs of those other than the capturer.

1. The Public Trust

The public trust doctrine is founded in the notion that certain types of property are so “common to mankind” that the sovereign is obligated to insure they are not be privatized.141 As

135 See, e.g., Postema v. Pollution Control Hearings Board, 142 Wash. 2d 68, 11 P.3d 726 (2000) (struggling over who bears the burden of proving that a new water use would “impair” existing water rights).
139 See, e.g., OR. REV. STAT. ANN. §537.348 (1)-(2) (2010), which provides that “Any person may purchase or lease all or a portion of an existing water right... for conversion to an in-stream water right. Any water right converted to an in-stream water right under this section shall retain the priority date of the water right purchased.... T]he use of the water right as an in-stream water right shall be considered a beneficial use.”
140 Of course, one of the dilemmas in adapting prior appropriation to ecological needs is that there appears to be no common law right to non-use of water. See Janet C. Neuman, Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use, 28 Envl. L. 919, 963 (1998); Janet C. Neuman and Keith H. Hirokawa, How Good is an Old Water Right? The Application of Statutory Forfeiture to Pre-Code Water Rights, 4 U. Denv. Water L. Rev. 1, 24 (2000).
the Court held in *Illinois Central R.R. Co. v. Illinois*,\(^{142}\) such “property of a special character, like lands under navigable waters,”\(^{143}\) must be accessible to the public, and so must be held in governmental trust for the public to reflect “the public character of the property.”\(^{144}\) Hence, a conveyance of submerged lands by the State of Illinois to a private party was held to be “necessarily revocable,” and the state’s interest in the conveyed lands could “be resumed at any time.”\(^{145}\) Although public property may, under the appropriate circumstances, be conveyed or encumbered to some extent, the Court will examine and enforce a limitation on such conveyances to insure that the public’s interests are retained: “[t]he state can no more abdicate its trust over property in which the whole people are interested ... than it can abdicate its police powers.”\(^{146}\) Such a limitation is enforced on behalf of the public’s interest, even though the public trust doctrine “could dispossess thousands of blameless record owners and leaseholders of land that they and their predecessors in interest reasonably believed was lawfully theirs.”\(^{147}\)

If we view the public trust doctrine as a doctrine of title\(^{148}\) (or as a doctrine of vested rights in land uses\(^{149}\)), the doctrine is certainly amenable to an analysis based on a capture analogy under which the first to succeed to title can claim superior title: first in time, first in right, and the sovereign claims prior (and virtually inalienable) title to submerged lands under the public trust. Yet, the doctrine is contrasted here to the rule of capture, not based on the notion that all capturable *ferae naturae* are (or should be) protected under the trust,\(^{150}\) but because of the effect of the trust: the public trust doctrine operates as a condition precedent for certain lands and land uses to become ownable as “property;” the doctrine essentially removes certain lands and land uses from the realm of capturable interests.\(^{151}\) Because the public trust doctrine generally

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\(^{142}\) Ill. Cent. R.R. Co. v. Ill., 146 U.S. 387 (1892).

\(^{143}\) 146 U.S. at 454.

\(^{144}\) Id. at 456.

\(^{145}\) Id. at 455.

\(^{146}\) Id. at 453.


\(^{148}\) *Cinque Bambinos Partnership v. State*, 491 So.2d 508, 510 (Miss. 1986) (“Though great public interests and neither insignificant nor illegitimate private interests are present and in conflict, this in the end is a title suit.”).

\(^{149}\) To the extent that these are severable, the public trust doctrine clearly has implications in both contexts. For purposes here, thinking about the public trust as a restriction on land use converges with the Court’s analysis of the public trust as a background principle of property law under *Lucas*, 505 U.S. 1003, and emphasizes the manner in which the public trust controls the impacts of land uses on others.


\(^{151}\) This is Marc Poirier’s point: “Because of the public trust doctrine, private property in the shore, in land that is tidally flowed, or in formerly submerged land, can be thus understood to be different; limited ex ante, although the exact extent of the limitation only develops as time goes on, with the private owner and the state engaging in a dialogue about permissible uses through a permitting process or litigation.” Marc R. Poirier, *Modified Private Property: New Jersey’s Public Trust Doctrine, Private Development and Exclusion, and Shared Public Uses of Natural Resources*, 15 Se. Envtl. L.J. 71, 93 (2006-2007).
qualifies as a background principle of state property law,\textsuperscript{152} land use restrictions that are premised on trust ownership are immunized from the privatization effect of the takings doctrine.\textsuperscript{153}

Note, however, that this analysis appears a bit static: tracing the capture and care elements of the public trust doctrine as competing right between private interests and public access to the physical confines of the land ultimately ignores how adaptive the trust has needed to be. The public trust has not been confined to questions of title and has instead operated by triggering a duty in the sovereign to provide for the essential needs for the public.\textsuperscript{154} Because the doctrine has roots in the public interest, it has been expanded to represent those needs beyond the traditional confines of the beds of navigable waters,\textsuperscript{155} to other types of property,\textsuperscript{156} and beyond the traditional public needs in navigation, commerce and fishing to other public needs in water.\textsuperscript{157}

The care element of the public trust doctrine emphasizes the prioritization of common needs over privatization by fences.\textsuperscript{158} The public trust allows private capture and use of land, but only in a correlative and contingent manner, where the correlation favors systemic needs in natural resources over individual desires for the same, and the contingency favors flexibility to determine what those needs may be in the future.\textsuperscript{159} By operating as a condition precedent to

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\item \textsuperscript{152}See, e.g., Explanade Properties, LLC v. City of Seattle, 307 F.3d 978, 985 (9th Cir. 2002) (Rejecting a takings claim, despite loss of all economically viable use, on grounds that “the ‘restrictions that background principles’ of Washington law place upon such ownership are found in the public trust doctrine.”).
\item \textsuperscript{153}Lucas v. South Carolina Coastal Council, 505 U.S. 1003,1027—31 (1992).
\item \textsuperscript{154}Mary Turnipseed, Raphael Sagarin, and Larry B. Crowder, The Silver Anniversary of the United States’ Exclusive Economic Zone: Twenty-Five Years of Ocean Use and Abuse, and the Possibility of a Blue Water Public Trust Doctrine, 36 ECOLOGY L.Q.1, 10-11 (2009).
\item \textsuperscript{155}See, e.g., National Audubon Soc. v. Alpine County, 33 Cal.3d 419, 437, 658 P.2d 709, 721 (Cal. 1983), cert. denied, 464 U.S. 977 (1983) (extending the public trust doctrine to non-navigable tributaries of navigable water). However, states have been slow to adopt the reasoning of Nat'l Audubon, and some states have even rejected it. See, e.g., Idaho Code Ann. §58-1203(2)(b) (prohibiting the application of the public trust doctrine to the “appropriation or use of water, or the granting, transfer, administration or adjudication of water or water rights.”).
\item \textsuperscript{156}In re Water Use Permit Application, 94 Hawai'i 97, 135, 9 P.3d 409, 447 (Hawaii 2000) (finding “little sense in adhering to artificial distinctions [between surface water and groundwaters] neither recognized by the ancient system nor borne out in the present practical realities of this state.”).
\item \textsuperscript{157}See, e.g., Marks v. Whitney, 6 Cal.3d 251, 259, 491 P.2d 374, 380 (Cal. 1971) (recreation); Caminiti v. Boyle, 107 Wash.2d 662, 669, 732 P.2d 989, 994 (Wash. 1987) (the public trust extends to navigation and “its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes.”); Save Ourselves, Inc. v. Louisiana Envtl. Control Comm’n, 452 So.2d 1152, 1154 n.1, 1157 (La. 1984) (doctrine applies to all natural resources). See also, Richard J. Lazarus, Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine, 71 Iowa L. Rev. 631, 649 (1986) (noting that courts have construed the public trust doctrine to also “embrace the dry sand area of a beach, rural parklands, a historic battlefield, wildlife, archeological remains, and even a downtown area.”).
\item \textsuperscript{158}See Marc R. Poirier, Modified Private Property: New Jersey’s Public Trust Doctrine, Private Development and Exclusion, and Shared Public Uses of Natural Resources, 15 Se. Envtl. L.J. 71, 119 (2006-2007) (noting that the public trust “provides an important cautionary and practical counterweight to incessant pressures for the privatization and development of natural resources.”).
\item \textsuperscript{159}But see, Richard Delgado, Our Better Natures: A Revisionist View of Joseph Sax’s Public Trust Theory of
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both ownership of land and its use, the public trust doctrine intervenes in capture scenarios to prevent common resources from consumption, transformation, or other capture-like consequences of privatization.

2. Groundwater: Capture and Correlative Rights

Groundwater has always held a tenuous relationship to property, in which legitimately extracted waters have been captured as property, but uncaptured waters underlying property have been protected with some confusion.\(^{160}\) The 1843 case of *Acton v. Blundell*\(^{161}\) illustrates that law was historically disinterested in hydrogeology: that is, the law developed in a manner that championed uncertainty of ground water movement, and was not designed to overcome or account for the confusion.\(^{162}\) The *Acton* court declared:

> [I]n the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighbouring soil, does not flow openly in the sight of the neighbouring proprietor, but through the hidden veins of the earth beneath its surface; no man can tell what changes these underground sources have undergone in the progress of time: it may well be, that it is only yesterday’s date, that they first took the course and direction which enabled them to supply the well: again, no proprietor knows what portion of water is taken from the beneath his own soil: how much he gives originally, or how much he transmits only, or how much he receives: on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all.\(^{163}\)

Although the *Acton* decision comes from English courts, the decision remains one of the seminal cases establishing the doctrine of capture in groundwater resources.

Under the “English” rule, or absolute ownership rule, ownership of underlying waters is considered an incident to the ownership of overlying land. The English rule established the non-existence of liability for draining groundwater from a neighbor’s land.\(^{164}\) Hence, in *Wheatley v. Baugh*, the Pennsylvania Supreme Court addressed claims that the new water use for a mining

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\(^{160}\) See, e.g., *McNamara v. Rittman*, 107 Ohio St.3d 243, 249, 838 N.E.2d 640, 646 (Ohio 2005) (The “well-being of Ohio homeowners, the stability of Ohio’s economy, and the reliability of real estate transfers require the protection of groundwater rights. We therefore hold that Ohio landowners have a property interest in the groundwater underlying their land and that governmental interference with that right can constitute an unconstitutional taking.”).


\(^{162}\) See also, *Frazier v. Brown*, 12 Ohio St. 294, 311 (Ohio 1861) (finding that “an attempt to administer any set of legal rules to [groundwater] would be involved in hopeless uncertainty, and would be, therefore, practically impossible.”).

\(^{163}\) 152 Eng. Rep. at 1234.

\(^{164}\) See 29 A.L.R.2d 1354 discussing the application of the English rule.
operation destroyed neighboring and pre-existing use of an underground spring. The court relied on the mysterious nature of groundwater to resist judicial intervention. The court mused that relief for the plaintiffs was impossible:

[It] would amount to a total abrogation of the right of property. No man could dig a cellar, or a well, or build a house on his own land, because these operations necessarily interrupt the filtrations through the earth. Nor could he cut down the forest and clear his land for the purposes of husbandry, because the evaporation which would be caused by exposing the soil to the sun and air would inevitably diminish, to some extent, the supply of water which would otherwise filter through it.

The Court trivialized the plaintiff’s thirty year use of the resource, finding that, “(n)o man, by mere prior enjoyment of the advantages of his own land, can establish a servitude upon the land of another.” Thus, because the value placed on property ownership was high, and because courts were unwilling to dig into the character of groundwater movement, a rule of non-liability encouraged the quick and aggressive capture of most or all of the area’s groundwater resources, with penalties accruing only against those who rest on their rights. Under the rule of capture, might does make right.

Few states continue to follow the absolute ownership rule or the reasoning that once supported it. Even early, courts in some absolute ownership jurisdictions recognized that the rule


165 Wheatley v Baugh, 25 Pa. 528, *4 1855 W.L. 7282 (1855)
166 Id. at *4 (“percolations spread in every direction through the earth, and it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land.”).
167 Id. at *5.
168 Id. at *6.
169 See also, Adams v. Grigsby, 152 So. 2d 619, 622 (La. Ct. App. 1963) (groundwater’s “fugitive and wandering existence within the limits of a particular tract is uncertain.”).
170 See, e.g., Chatfield v. Wilson, 28 Vt. 49 (1855) (finding non-liability for each of neighbors’ successive efforts to deepen wells to capture more of others’ groundwater supplies).
171 More recently, Maine courts have upheld the groundwater capture rule against developments in science and equity. In Maddocks v. Giles, plaintiffs of adjacent property sued a gravel pit owner because excavations dried up their spring. Maddocks v. Giles, 728 A.2d 150, 151 (Maine 1999). In rejecting the plaintiffs’ claims of injury, the court explained that “the absolute dominion rule is based on the premise that groundwater is the absolute property of the owner of the land, just like the rocks and soil that compose it.” 728 A.2d at 152. Under this rule, “[O]ne may, for the convenience of himself or the improvement of his property, dig a well or make other excavations within his own bounds, and will be subject to no claim for damages although the effect may be to cut off and divert the water which finds its way through hidden veins which feed the well or spring of his neighbor.” Id. The opinion was slightly apologetic, but without remorse:

Although modern science has enlightened our knowledge of groundwater, this does not mean that the rule itself has interfered with water use or has caused the development of unwise water policy. The Maddockses did not present evidence or point to any studies showing that the absolute dominion rule has not functioned well in Maine. Furthermore, for over a century landowners in Maine have relied on the absolute dominion rule.

Id. at 154.
was as much led by aggression as it was property, influenced in part by Samuel Weil’s argument that the law “cannot prosper” in “ignorance or disregard” of the natural interconnections between ground and surface water. However, both the economies and technologies of the early twentieth century presented a significant challenge to incorporating the idea of ground and surface water connections into groundwater management. Then, increasing groundwater withdrawals and claims between competing users (both between groundwater users and between surface and groundwater users) brought policy questions of allocation to the courts, legislatures and agencies.

Several states have punctuated their divergence from the rule of capture by expressly rejecting the notion of absolute rights in groundwater in favor of an inquiry into the reasonableness of the use and impacts on other individual and public needs in the resource. For example, in *Stillwater Water Co. v. Farmer*, a city water supplier sought to enjoin the defendant from digging a trench for the purpose of diverting and draining plaintiff’s groundwater supply – not for a beneficial use, but instead to discharge the water into the city sewer system.

To prevent this effect on the water supply, the plaintiff deepened its well, and the defendant responded by lowering the level of his trench pipe. Following a temporary injunction against the defendant, the defendant then threatened to dig even deeper.

The court focused on whether there existed a “right to collect by drainage these fugitive subsurface waters, and then to waste them, to the annihilation of plaintiff's business, and to the great discomfort and injury of the people who depend upon the plaintiff [for] water for domestic use.” The court distinguished this case from circumstances in which water use by neighbors was merely competitive but rejected the argument that land owners enjoy an absolute and unrestrained right to groundwater use. The court held instead that, “irrespective and independent of his motive, [a property owner] has no absolute legal right to collect these subsurface waters solely that they may be wantonly wasted, and that he may be restrained from

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175 *Stillwater Water Co. v. Farmer*, 89 Minn. 58, 93 N.W. 907 (Minn. 1903).
176 Thus, the waters, “instead of serving the wants of the people, are dissipated and lost.” Id. at 59—60, 93 N.W. at 907.
177 The temporary injunction was granted based on a finding of imminent danger of major ground water loss through the pipe and into the sewer. Id. at 60—61, 93 N.W. at 907. Additionally, the relief was supported by a finding that the Plaintiff’s water supply would be harmed by preventing “it from furnishing the city and its inhabitants with sufficient water for domestic use, as it is obliged to do under its contract with the city, the result being to deprive the people of wholesome water, to destroy the plaintiff's business, and to render its plant valueless.” Id at 61, 93 N.W. at 908.
178 Id. at 61, 93 N.W. at 908.
179 Id. at 63, 93 N.W. at 908—09.
so doing.”\textsuperscript{180} Thus when considering groundwater rights, while they will “first to look to the extent of the defendant’s ownership in the land in which he has dug the trench, [they will not] lose sight of the fact that he has collected the water for no worthy purpose, and that he is squandering it, to the injury of the public.”\textsuperscript{181}

Of course, the court’s prohibition on waste of water was arguably consistent with the rule of capture: wasted resources are no more valuable than pre-captured ones, and as such, no property right should attach to waste. Nevertheless, reasoning that “neighbors cannot be mutually indifferent to each other’s doings,”\textsuperscript{182} the court found repugnant a rule that would prevent recovery “where the owner of the soil, for no beneficial purpose to himself or to his estate, and to the positive injury of his neighbor or the public, insists upon turning pure spring water into a city sewer, that it may be absolutely wasted.”\textsuperscript{183} The court classified its divergence from the English rule as a necessity “in order to secure the public health”\textsuperscript{184} and justified the evolution of law in order to prevent “[g]reat injury, distress, and disaster to the public ....”\textsuperscript{185} The court adopted the reasonable use rule because “it will tend to promote the prosperity and general welfare of all citizens whose necessities bring them within its influence.”\textsuperscript{186} Thus, as adopted, the rule is that,

“except for the benefit and improvement of his own premises, or for his own beneficial use, the owner of land has no right to drain, collect, or divert percolating waters thereon, when such acts will destroy or materially injure the spring of another person, the waters of which spring are used by the general public for domestic purposes. He must not drain, collect, or divert such waters for the sole purpose of wasting them. Briefly stated, a landowner must not collect and wantonly waste percolating waters which would otherwise be, or have theretofore been, appropriated by his neighbor for the general welfare of the people.”\textsuperscript{187}

This prohibition – perhaps from one perspective, against waste – was intended to fit into a reasonableness scheme, under which a groundwater use would be judged by the uses to which the water is put and the location where the water would serve a beneficial use. Therefore, under the reasonable use rule, it is not per se unreasonable to use even a substantial volume of water, to dig deep wells, or even to draw water in a manner that directly reasonably competes with the expectations of others. An owner “‘may consume it at will; but to fit it up with wells and pumps of such pervasive and potential reach that from their base he can tap the waters stored in the

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\textsuperscript{180} Id. at 63, 93 N.W. at 909. \\
\textsuperscript{181} Id. at 63—64, 93 N.W. at 909. \\
\textsuperscript{182} Id. at 64, 93 N.W. at 909. \\
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\textsuperscript{184} Id. at 65, 93 N.W. at 909. \\
\textsuperscript{185} Id. \\
\textsuperscript{186} Id. \\
\textsuperscript{187} Id. at 66, 93 N.W. at 910. \\
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lands of others, and thus lead them to his own land, and by merchandizing it prevent its return, to the injury of adjoining landowners, is an unreasonable use…”

In a third (and growing) category of groundwater allocation, rights are allocated by focusing less on water as property, and more on the capacity of the water source and the water needs that burden that source. Under the correlative rights doctrine, groundwater allocation may require courts to minimize the potential of groundwater overdraft, which “results when more water is extracted from the basin than is naturally replenished.” In contrast, “Natural ‘safe yield’ is the maximum quantity of ground water, not in excess of the long-term, average, natural replenishment (e.g., rainfall and runoff), which may be extracted annually without eventual depletion of the basin.” With such a focus, the correlative rights doctrine vests property not in flowing water, but in a share of extractable water. Thus, “as between overlying owners, the rights, like those of riparians, are correlative, i.e., they are mutual and reciprocal. This means that each has a common right to take all that he can beneficially use on his land if the quantity is sufficient; if the quantity is insufficient, each is limited to his proportionate fair share of the total amount available based upon his reasonable need.”

An appropriate share of water will be identified based on a variety of locational and use factors:

“where there is insufficient water for the current reasonable needs of all the overlying owners, many factors are to be considered in determining each owner's proportionate share: the amount of water available, the extent of ownership in the basin, the nature of the projected use-if for agriculture, the area sought to be irrigated, the character of the soil, the practicability of irrigation, i.e., the expense thereof, the comparative profit of the different crops which could be made of the water on the land-all these and many other considerations must enter into the solution of the problem.”

Under a correlative rights allocation, the property consequence of capture is at best delayed: water may become a commodity after the satisfaction of all reasonable needs for the resource. As such, the correlative rights analysis illustrates the distance that property can stray from the rule of capture. At least, the judicial abandonment of absolute ownership as an allocation system suggests that courts were becoming sensitive to the idea that allocation rules favoring privatization could make water into exclusive property, rather than a common resource. In the meantime, courts were rejecting capture rules in

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188 Rouse v. City of Kinston, 188 N.C. 1, 24, 123 S.E. 482, 493 (N.C. 1924) (affirming the reasoning of the court below).
190 Id. at 996 fn. 3, 122 Cal.Rptr. at 921.
191 Id. at 1001, 122 Cal.Rptr. at 924.
192 Id. at 1001 –02, 122 Cal.Rptr. at, 925.
groundwater on express grounds that the science of groundwater was illuminating the defects in the absolute ownership rule.

In some respects, the latter, scientific basis for diverging from past law poses a challenge for an application of care to property. The care approach questions “the presumption that science and its ‘objective’ epistemology is always beneficial and superior to alternative ways of knowing and understanding, such as natural processes or personal experience.”193 This presumption has operated as a value dualism that has prioritized historically male-associated characteristics, such as reason and rationality, over those historically associated with the feminine, such as emotion and experience.194

Of course, the general ecofeminist reservation about science and its epistemology is not intended to eschew informed decisionmaking or encourage acts in ignorance: the effort is instead to avoid crippling our understanding through tunnel vision in which we see only what we are biased to see.195 Care recognizes that structural prejudices and inattentive dealings with particular subjects can disregard both the thing and our relationship to it. In the case of property law, it also means avoiding allocating rights to act in disregard for understanding of how water moved underground, premised only on the logic that we have always done so. Therefore, notwithstanding the general ecofeminist reservation about science (and the conflation of scientific expertise with wisdom or correctness), Hughes argues that science must play a role in informing environmental decision making, but perhaps not in formulating environmental policy.196

Moreover, the turn from capture to care any groundwater allocation need not be cast an endorsement of the epistemology of science, so much as it is an attack on the manner in which a legal system premised on abstract individualism is able to effectively mask, hide, or ignore harm. In other words, a court’s rejection of the absolute ownership allocation of groundwater might be understood to correct the misunderstanding about hydrology (in essence, the same criticism that can be leveled against any understanding, when criticized from a different perspective197), but it might be more forcefully interpreted as a rejection of the idea that “private” actions should be insulated from liability for injuries outside of property boundaries. In the context of property

194 See Karen J. Warren, The Power and Promise of Ecological Feminism, 12 Env. Ethics 125, 140 (1990); Under such a scheme, “the personal and the emotional are seen as the enemy of the rational, as corrupting, capricious, and self-interested.” Val Plumwood, Nature, Self, and Gender: Feminism, Environmental Philosophy, and the Critique of Rationalism, in Zimmerman, at al., 291, 294.
196 Elaine L. Hughes, Fishwives and Other Tails: Ecofeminism and Environmental Law, 8 CAN. J. WOMEN & L. at 525 - 26.
law, certain constructions of “private” property rights can be seen as hiding the actions that cause harm by designating the act as a “private” action, subject to the expectations in property of an owner. 198 The care perspective on property undermines the distinction between the “private” sphere of interest and the effects of our purportedly “private” actions on others. 199

D. Regulatory Care of Market Captures: Land Use and Environmental Law

Up to now, this Article has focused on legal developments that were intended to resolve disputes between competing uses in and claims to land. As a resource allocation tool, capture poses intent, labor and transformation of resources as a method of allocation: under capture, natural resources will be used anytime individuals are protected in their exercise of power to dominate and subdue nature. The point made in the previous section, of course, was to question the pervasiveness of capture in property and to identify the ways in which care has undermined the effects of capture and its incidents.

Land use, environmental and natural resources law are subject to the same indeterminacies that make property law appear as an incomplete and disjointed mess from the capture perspective. Arguably, the historical impetus for natural resource allocation has been the settlement, domination and development of an untamed nature. Law, both through statutory and common law statements, has borrowed from capture to ensure human occupancy and transformation of the west, limited only by the conceptually important but questionably effective doctrine of nuisance. More recently, however, capture has been mitigated by the rise of regulatory controls in land use, environmental and natural resource laws. As we explore these changes and their influences from care, we find a coincidence of an individual’s interests in economically productive uses of land and systemic social and communal needs, as well as the balance of interests and values between a masculine, consumptive individual and a feminine, collaborative negotiator.

It should be noted that, much like the care analysis of property rights, the care analysis of environmental regulation admits of no single construction: as Linda Vance points out, “[a] commitment to ecofeminism means we have to accept a degree of uncertainty and disagreement.” 200 As an example, the most basic notions of environmental and land use law will draw divergent reactions based on how one understands the regulatory process. Hence, Nancy

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198 See, Sheila McIntyre, et al., Tracking and Resisting Gains in Sexual Backlash Against Equality Offence Law, 20 Can. Women Studies 72, 78 (2000) (“[M]uch of the thrust of feminist activism and analysis of male sexual violence has been to de-privatize and de-individuate its genesis, its harms, its social causes and its social beneficiaries.”).

199 “The opposition between the care and concern for particular others and generalized moral concern is associated with a sharp division between public (masculine) and private (feminine) realms.” Val Plumwood, Nature, Self, and Gender: Feminism, Environmental Philosophy, and the Critique of Rationalism, in Zimmerman, at al., 291, 294. Incident to this project is the effort to de-privitize harm, whether the harm is in the form of harm to the environment, to women, or to other people more generally.

Perkins Spyke has asserted a geo-feminist distinction between land use law and environmental law: land use law is characteristically masculine because of its purpose of permitting development of land; environmental law is characteristically feminine because its purpose is to protect. On the other hand, Kilmurray argues that “environmental law adopts paradigms and legitimizes world views that lead to environmental harm, such as legal neutrality, scientific objectivity and the imperative of economic growth.” Both analyses offer insights into both structural and non-structural biases in environmental law, and both assert ambitious goals for the project of an integrated ecofeminist legal program. Nevertheless, as discussed above, the project here remains critical and constructive: although environmental law has not dissolved the protections afforded to property rights, environmental law also ‘adopts paradigms and legitimizes world views’ that do not lend themselves (at least not directly) to environmental harm. That is, the law is structurally engorged with instances in which rights are allocated by negotiation, cooperation and collaboration, instead of domination after competition; the law illustrates choices in which legal entitlements or duties are premised on the importance of viewing collective needs over private, individualistic wants; the law binds value to collective concerns, reintroduces individual parcels to community property designs, and rejects the ultimate private property claim (taking) where the individual capture of market certainty is prevented by or even outweighed by public needs in private property.

Of course, at common law, what we now know of as environmental contamination was not pollution; it was waste disposal. What we now think about as loss of natural landscapes and habitats was the elimination of mosquito-infested swamps and other useless and noxious areas. Arguably, the common law did not have the vocabulary for environmental protection, even if it did provide the groundwork for the regulatory framework. Yet, in the absence of a pollution

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201 Nancy Perkins Spyke, The Land Use - Environmental Law Distinction: A Geo-Feminist Critique, 13 DUKE ENV. L. & POL’y F. 55, 81-82 (2002). Her analysis is interesting and appears far-reaching. However, to the extent that her analysis may represent a geo-feminist critique, we mention it only to distinguish this analysis from it: both land use law and environmental law operate as a permitting institution, and both are intended to protect certain interests (including social, economic and environmental interests). As such, the application of an ecofeminist approach may diverge from a geofeminist jurisprudence substantially, at least as to the initial confrontation with the structures of law: ecofeminism might be distinguished for prioritizing the process governing our relationship with nature, rather than the otherwise contingent substantive constraints in law.


203 Esplanade Properties, LLC v. City of Seattle, 307 F.3d 978, 987 (9th Cir. 2002). (holding that shoreline property is subject to the Public Trust Doctrine and the developer assumed the risk that the property purchased would be subject to regulations and interpretations of interference of use that had not yet been articulated).

204 Penn Central Transportation Co. v. New York, 438 U.S. 104, 148 –49 (1978) (Rehnquist, J., dissenting) (arguing that the significant investment by Penn Central was unfairly denied the opportunity to yield a return and instead Penn Central’s interests were outweighed by the public interest).

205 See, e.g., Leovy v. United States, 177 U.S. 621, 636 (1900) (holding that the eradication of swamps was well within the scope of the public welfare).

206 See generally, Karl Boyd Brooks, BEFORE EARTH DAY: THE ORIGINS OF AMERICAN ENVIRONMENTAL LAW,
control vocabulary, pollution was relatively unrestricted, a circumstance that provides some support for the notion that the incidents of property include the right to use property in any way that the owner wants.\textsuperscript{207} And, although it may not be entirely accurate to assert that property owners were vested with a right to pollute, the absence of preventative restrictions may have made it seem so.

Appearances aside, it is important to note that land use and environmental law are works in progress and illustrate an ongoing effort to shift priorities and adapt due to changes in the economy, due to sudden and gradual tragedies,\textsuperscript{208} due to the emergence of new insights,\textsuperscript{209} and due to the occasional wave of popular attention to a particular environmental value.\textsuperscript{210} Yet, for all of the motion, the laws comprising our contemporary legal scheme have occurred within a framework delineated by the rights and titles developed in the common law. In this framework of property, tort, the notion of police power, and the emergence of administrative law principles, ecofeminism’s description presents yet another illustration of the depth of the exchange that law attempts to manage between capture and care in the law of land.

1. The Local Exchange Between Capture and Care: Land Use Control

Land use regulations are primarily within the authority and control of state and local governments. Through land use control ordinances, local governments implement community visions, traditionally through the establishment of “land use districts” which identify permissible and compatible uses in a given area.\textsuperscript{211} As initially conceived, land use laws purported to keep the pig in the barnyard, instead of in the parlor, premised on the idea that every land use has its most appropriate location.\textsuperscript{212} In contrast to federal environmental law (which might be described as pollution prevention and containment), land use laws effectively located land uses in an exercise of pollution location.

What is the relationship between land use and ecofeminism? Some have argued that land

\textsuperscript{207} See, e.g., \textit{Bielecki v. City of Port Arthur}, 12 S.W. 2d 976, 978 (Tex.Comm’n App. 1929) (“A citizen has a lawful right to use his property for any purpose he may see fit, so long as such use does not operate to substantially injure the rights of others. A denial of the right of a citizen to so use his property is a deprivation of the property itself, hence falls within the protection afforded by the due process clauses of both State and Federal Constitutions.”).

\textsuperscript{208} For example, it is often said that current scheme of federal environmental law burst from the flames of the fire on the Cuyahoga River in 1969. See, for a thorough discussion of the facts and fables of this event and its relationship to the evolution of federal environmental law, Jonathon H. Adler, \textit{Fables of the Cuyahoga: Reconstructing a History of Environmental Protection}, 14 Fordham Env. L. Rev. 89 (2002).

\textsuperscript{209} See, e.g., \textit{Rachel Carson}, SILENT SPRING (1962).

\textsuperscript{210} For example, consider the recent trend toward sustainable land use practices and green building. See generally, Patricia E. Salkin, \textit{Sustainability and Land Use Planning: Greening State and Local Land Use Plans and Regulations to Address Climate Challenges and Preserve Resources for Future Generations}, 34 Wil. & Mary Env. L. & Pol’y Rev. 121 (2009).


\textsuperscript{212} Id. at 388
use laws are intended to facilitate land development and consumption: because “land use decisions are made predominantly by men and for the most part deal with the development of land. The focus on domination, order, and commerce place on land use decisions clearly on the masculine side of the spectrum.”

Although this critique may make some persuasive empirical points, it also might ignore how the process of land use decision making actually occurs, and in any event, is rather imprecise by taking an overly formulaic approach to land use and feminism. Growth and development are not necessarily masculine, particularly in those aspects of growth and development that result from the individual efforts of a community to collaborate and negotiate on shared values and community design, both with one another and with nature.

Of course, some aspects of the process of land use law might be cast as decidedly competitive, and in a sense, they are. The stress of land use controversy typically arises as an individual’s efforts to influence the land use process to her economic and property advantage (to the exclusion of community needs), as she attempts to capture the right to engage in a particular land use. From the capture perspective, the individual property owner is situated in an antagonistic struggle against the meddling interloper, a city council or other local government that seeks only to burden an individual’s choice by depriving the owner of the benefits of intense, valuable land uses and transferring the benefits of that property to the public (without compensation, of course).

The element of care in land use emerges in recognizing that the process of land use decision making is neither inherently nor pervasively competitive: in a successful land use plan, the community vision enables individual land uses to collaborate with and implement the needs and visions of the community as expressed in the public welfare.

The basic structure of zoning fits this description, where allowed land uses are identified based on their compatibility with other uses in a given zoning district (whether as permitted outright, or after being

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214 The point made here is that in many cases, growth may not be wise, but by itself a short-sighted development plan does not qualify it as a masculine activity.


216 Under most zoning schemes, land use districts are established to direct the most appropriate uses of land in their most appropriate locations. Permissible or permitted land uses are those land uses that are consistent with the purposes of the particular land use district. See *Euclid*, 272 U.S. at 388 (“[T]he question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality.”); *Chanhassen Estates Residents*
subjected to a conditional use review to ensure that the proposed use is compatible\(^{217}\). Despite the homogeneity that can result (and is occasionally encouraged) within an individual district under the basic scheme, zoning illustrates how the regulation of land use balances the incentive to capture with the oversight of community, collaboration, and care.

The vulnerability of the argument, of course, involves the acceptability of the “public welfare” as a standard that incorporates care. It is arguable, for instance, that indeterminacy in legal standards can operate to the exclusion and disenfranchisement of disadvantaged groups. Yet, as Lea VanderVelde notes, securing land use regulations on the community ideal of public welfare improved the transparency and accountability of zoning decisions:

“Public welfare,” though susceptible to multiple interpretations, tended to produce a more constructive discussion of the zoning rule's purpose and the community interest. In urging one definition of public welfare over another, Board members felt compelled to explain why their chosen definition was best. The Board discussed what they saw in the ordinance and whether the objective was served in the petitioner's case. This discussion made Board decisionmaking more accountable to both the public and the petitioner….\(^{218}\)

Additional consequences of focusing on “public welfare,” argues VanderVelde, were a greater likelihood of producing articulate consistency\(^{219}\) in governmental decisionmaking and a “deeper understanding of the community purposes and welfare by evoking reflection, reconsideration, and public participation.”\(^{220}\)

What is unmistakable is that the land use process ensures that putting land to a profitable use is no longer an isolated, individual decision. Indeed, the Supreme Court specifically and unequivocally rejected the type of abstract individualism as it harkened in the age of zoning in \textit{Euclid}.\(^{221}\) Land use laws are aimed at preventing and mitigating the effects of land use decisions

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\(^{217}\) The concept of the conditional use is employed in a zoning scheme where a particular land use might be compatible with the purposes of and other uses in the district, when appropriately conditioned for compatibility. See, e.g., \textit{Anderson v. Peden}, 569 P.2d 633, 637 (Or. Ct. App. 1977), aff'd, 587 P.2d 59 (Or. 1978) (“By providing that a given use will only be allowed conditionally in a given zone, a local government finds that there is a possible public need for that use in that zone, and simultaneously finds that introduction of that use into that zone may have disadvantages that outweigh the advantages.”).


\(^{221}\) \textit{Village of Euclid v. Ambler Realty Co.}, 272 U.S. 365, 375 (1926) (“In every ordered society the State must act as umpire to the extent of preventing one man from so using his property or rights as to prevent others from making a correspondingly full and free use of their property and rights. The abstract right of a man to build a fire trap is limited by the rights of other people not to have their houses subject to the peril created by it.”).
on the community. Most importantly, the land use process ensures a balance between individual land use gains and community needs by providing voice to interested parties, based on the notion that an open and public process will result in more inclusive, well-informed land use decisions (and a legitimated process due to lack of a citizenry’s exit). With the emphasis on front-end comprehensive planning, land use review is the tool through which land development provides linkages to community vision and identity. This is especially true with the trends in local land use decision making toward Smart Growth and sustainability, two related planning approaches that emphasize pluralistic and process-oriented community-building, eschewing both the idea of unfettered individualistic property determination and the notion of governmental decision making as the paternalistic source of land use values. Smart Growth and sustainability have degraded past practices in piecemeal land use planning in favor of a community-based process of public input and vision.

Land use laws have successfully integrated the individualistic desire to use land and the community needs in both specific land uses and non-use: land use laws maintain a balance of capture and non-capture influences. Moreover, the land use planning process is becoming more comprehensive and holistic, balancing the individualistic notions of value with the public needs in a property system. The public planning process embodies an intensely democratic effort of building on community strengths, which includes the identification of individual property needs as reflective of, or included in, the needs of the community. The process of land use control provides a vehicle for the balance of capture and care in property.

2. The Federal Negotiation: Environmental Law and Pollution Prevention

As noted above, one basic way of understanding environmental law might be to analyze the statistical outcomes of pollution proposals as they emerge from the permitting process: what types of pollution types, sources, and concentrations are being permitted, where are such sources located, and who bears the burden of the impacts? Based on the observation that the majority of


224 As noted by Martha Minow and Joseph Singer, “[u]ltimately, the plural view is more inclusive, more democratic, more educative, more persuasive, and we believe, more true.” Martha Minow and Joseph William Singer, In Favor of Foxes: Pluralism and Fact and Aid to the Pursuit of Justice, 90 B. U. L. Rev. 903, 920 (2010).

the ‘major federal actions’ are issued determinations of nonsignificance, and that the majority of development, discharge, dredge and fill, treatment, storage and disposal facilities (TSD), and other environmental permit applications are almost methodically approved, the argument might stress that the ultimate effect of current environmental regulations is merely the legitimization of pollution. On this shallow but empirical look at environmental law, the premise for the permitting schemes is markedly individualistic and results in the introduction of pollutants into the natural environment, and in this sense, much of environmental law exhibits the transformative, labor ethic that lies at the base of capture.

Early iterations of the federal environmental laws might confirm this interpretation and suggest that before the 1970s, the federal regulatory approach to pollution prevention illustrated a lack of commitment to reigning in the capture scheme. Consider, for instance, the many pre-1970s efforts at water quality legislation. The 1948 version, adopted as the Water Pollution Control Act, did not actually regulate the introduction of pollutants into the waterways. During debate, it was appropriately contended that the bill would do nothing to influence water quality, except for silencing the efforts to adopt effective water quality legislation. It was argued

Joseph v. Adams, 467 F.Supp. 141, 151 –52 (E.D. Mich. 1978) (declining to apply an arbitrary and capricious standard of review to an agency determination of nonsignificance under NEPA, finding instead that a reasonableness standard was all that was required).

Ten Local Citizen Group v. New England Wind, LLC, 457 Mass. 222, 227 –28, 233, --- N.E.2d --- (2010) (upholding agency decision to permit development in wetland area because commissioner’s review and decision were not arbitrary and capricious); Hines v. California Coastal Com’n., --- Cal.Rptr.3d ----, 2010 WL 2471683 *8 (Cal. Ct. App. 1st Dist., 2010) (holding that reduction of 100’ riparian habitat buffer requirement for coastal building permit approval was allowable because there was no environmentally sensitive area involved).

33 U.S.C.A. § 1342 (2008) (authorizes a permitting process for discharge of otherwise prohibited pollutants into water bodies); Int’l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987) (“By establishing a permit system for effluent discharges, Congress implicitly has recognized that the goal of the CWA-elimination of water pollution-cannot be achieved immediately…..”).

State of Del. Dep’t of Natural Res. & Env’t Control v. U.S. Army Corps of Eng’r, 681 F.Supp.2d 54, 562 – 63, (D.Del.,2010) (acknowledging the public interests at tension between environmental protection of resources and economic vitality of Delaware river and holding that dredging project on the river was allowed to proceed).


Frank Ackerman and Kevin Gallagher, Getting the Prices Wrong: The Limits of Market-Based Environmental Policy, 13 – 14 (2000) (unpublished working paper for the Global Development and Environment Institute, Tufts University, accessed at ase.tufts.edu/gdae/publications/priceswrong.PDF) (arguing that the effect of emissions trading is to create a “right to pollute” rather than to decrease or eliminate pollution).

that the bill would:

[N]ot stop pollution. It will not outlaw or prevent new sources of pollution. It will not even protect what virgin streams and clean waters [that] remain in America. But the polluters believe and I believe that this legislation will work to stop new attempts to write effective legislation, that it will protect present pollution practices, and that it will buy polluters additional time to practice their pagan program without being subjected to a workable formula for eliminating unjustifiable pollution.\(^{234}\)

The bill passed and, as predicted, largely left past practices in place.\(^{235}\)

What is relevant to this analysis, however, is that contemporary environmental laws have identified and magnified the exchange between capture and care in environmental permitting. This exchange is represented in the values embedded in the process of permit review, such as in the standards for permit issuance, risk and liability allocation, or regulatory information-gathering, places in which care might justifiably claim a pervasive presence in law both in substance and procedure. In this closer inspection, a persuasive case can be made that the manner in which individuals vest rights to interact with nature under environmental regulations tempers the property scheme with the principles of care, collaboration and community.\(^{236}\)

One illustration of the turn from capture to care in environmental law may be found in the unlikely but nonetheless essential model of the National Environmental Policy Act (NEPA).\(^{237}\) Under NEPA, no major nonexempt federal action may proceed before preparation of a “detailed statement” concerning the likely environmental impacts from the proposal.\(^{238}\) One concern with this analysis of NEPA would point out that NEPA is substantively vacant: \(^{239}\) NEPA does not require agencies to protect or preserve nature. Rather, NEPA is most fundamentally a process in which agencies take a “hard look” at the impacts of particular land use proposals.\(^{240}\) Although as environmental advocates we might prefer a more substantively robust approach to that taken in NEPA, it is nonetheless apparent that NEPA’s approach is consistent with a care approach to

\(^{234}\) 94 Cong. Rec. 8196-97 (1948).


\(^{237}\) 42 U.S.C 4321 et seq. (1970).


\(^{239}\) However, see Joel A. Mintz, *Taking Congress’s Words Seriously: Towards a Sounds Construction of NEPA’s Long Overlooked Interpretation Mandate*, 38 Env. L. 1031 (2008) (arguing that section 102(1) of NEPA was intended to play a more substantive role in the development and administration of federal environmental law).  

property law: NEPA imposes a procedural prerequisite to the capture of resources, requiring that an allocation of natural resources be open and informed, based on a process that is inclusive and debated.\(^\text{241}\) The process is not intended (by itself) to prohibit capture, and yet it is certainly arguable that capture will be prevented in any resource decision that does not exhibit care. Hence, NEPA adds to natural resources law procedures that make it “likely that the most intelligent, optimally beneficial decision will ultimately be made.”\(^\text{242}\)

Likewise, the destruction of wetlands, which was once thought to be a productive venture (to reduce the swampy, mosquito-breeding bogs),\(^\text{243}\) is now subject to a searching review process to determine whether a particular project is in the public interest. The wetlands permitting process under Section 404 of the Clean Water Act (CWA) is based on the propriety of development in the locational context, with the project’s purposes in mind, and in light of both the public’s interests and the need for the project.\(^\text{244}\) Wetland impacts are judged for their interference with the particular site’s ability to perform ecological services,\(^\text{245}\) including water purification, flood control, groundwater recharge, and also “significant natural biological functions, including food chain production, general habitat and nesting, spawning, rearing and resting sites for aquatic or land species.”\(^\text{246}\) As such, the “guiding principle” of the wetlands review process is that “degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.”\(^\text{247}\) Because “most wetlands” are considered a valuable and productive resource, degradation is considered contrary to the public interest.\(^\text{248}\)

Although to many, the current scheme of environmental law remains fundamentally a permitting scheme, it is undeniable that environmental regulations have altered the rights akin to land ownership, the values protected in the environment, and even the behaviors of property owners. When integrated with environmental law, capture is only one factor in how resources are allotted to private use. The other factors – serving the public interest, filling informational gaps, mitigating for impacts on ecosystems, etc. – ensure that property use is a matter of community concern.


\(^{243}\) See, e.g., *Leovy v. United States*, 177 U.S. 621, 636 (1900) (“If there is any fact which may be supposed to be known by everybody, and therefore by courts, it is that swamps and stagnant waters are the cause of malarial and malignant fevers, and that the police power is never more legitimately exercised that in removing such nuisances.”).

\(^{244}\) 33 C.F.R. 320.4(a)(1) (1986).

\(^{245}\) See 40 C.F.R. 230.11(e) (1980) (requiring the Corps to “determine the nature and degree of effect that the proposed discharge will have, both individually and cumulatively, on the structure and function of the aquatic ecosystem and organisms.”).


Whether in the form of pollution location or pollution prevention, the regulatory control of impacts from the use of land has seriously undermined the notion of property as a simple derivative of the rule of capture. Under the capture analogy, an interest in land use becomes an entitlement by being the first to demonstrate an intention to use, communicate that intent, and transform the land by adding labor to improve market value. The resulting right embodies the individualistic considerations of care-free autonomy, individualistic economic valuation, and a strikingly absent consideration for extra-boundary interests or how land uses impacts others.

What is interesting, then, is whether the regulatory control of the external effects of land use can be understood from the property-as-capture perspective: the tools of environmental and land use law, including environmental impact disclosure and review, approval standards and conditions for approval, have no meaning from the capture perspective. As such, where applicants are required to demonstrate that their proposals are in the “public interest” (such as in 404 wetlands review), or that their proposal be consistent with a comprehensive plan (such as in many zoning and planning jurisdictions), or that their proposal will not impair the public welfare (such as in variance and conditional use permit review), or even that a “hard look” has been taken at the impacts from the proposal (as in NEPA and its state counterparts), the capture-based objection is that such procedures and substance are a result of regulatory overreaching, abuse of power, or some other form of property or due process violation. Neither the regulatory process nor the standards themselves are commensurable with the capture perspective, or, at least they are not completely so.

In contrast, when we add care to our understanding of property, land use controls provide a basis for a more comprehensive and consistent understanding of how property rights can occur.


250 Variances balance individual hardships with the purposes of a zoning designation to provide flexibility. See, e.g., Erickson v. City of Portland, 9 Or.App. 256, 261, 496 P.2d 726, 29 (Or. 1972) (“Variances traditionally have been considered escape valves to allow property owners relief from zoning restrictions which, when applied to particular land, have the result of making that land completely unusable, or usable only with extraordinary effort.”).

251 NEPA has long been targeted by environmental advocates for being merely procedural. For an examination and analysis of state counterpart schemes, see generally Daniel P. Selmi, Themes in the Evolution of the State Environmental Policy Acts, 38 URB. LAW. 949 (2006) (examining state environmental policy acts (SEPAs)).

252 Given the foregoing, one reasonable conclusion might be that the allocation of natural resources use under the rule of capture has been in engaged in an elevating struggle to save resources from private domination. In that struggle, resource allocation policy has occasionally resorted to redefining the world of capturable things by withdrawing certain resources from the scope of capture, and instead dedicating those resources to uses that serve the public welfare by being open to public access, study and appreciation. At this level of analysis, capture and care are mutually exclusive, and care operates as a measure to prevent privatization as the public needs require. Hence, as Debra Donahue has argued, the cowboy is the icon of capture, but even the cowboy way of life (which has inexplicably retained control of public lands through grazing policies) is in jeopardy due to the emergence of non-capture paradigms. Debra L. Donahue, Western Grazing: The Capture of Grass, Ground, and Government, 35 Envtl. L. 721, 803 --04 (2005).
within a system in which rights to occupancy and use of land are transferred from the public to the individual. When we think of property as an exchange between capture and care, there is no inconsistency between property rights and the regulation of pollution: procedures that are designed to force the disclosure of information implement the communicative requirements for a right in land use and ensure that the intent to control is a wise, valuable choice; substantive standards relating to the ‘public interest’ and ‘public welfare’ demonstrate that land use does not occur in a vacuum; a requirement that a land use be consistent with a community’s land use plan is the basic assurance that the community’s welfare, interests, and identity remain intact. This approach gives meaning to regulatory control by insisting that property be composed of capture and care elements, and in the meantime, provides both a better understanding of the relationship between property rights and property limits and a better basis for identifying the goals that pollution regulation aims to accomplish.

IV. Remarks on Sketches of a Property Jurisprudence of Care

Before concluding, several concerns about this analysis should be raised, and to a certain extent addressed, so as to clear some of the philosophical underbrush that may obstruct meaningful discourse in legal matters.253 The first question is obvious: the purpose of this paper was to “borrow” from ecofeminism to explain the relevance of care to property doctrine, and it might be important to explain what I mean by the term “borrow.” The project for this paper was not to begin at the principles of ecofeminism and construct a legal system in the image of the theory.254 Such a strategy would be built upon the notion that “the feminine voice can design a [legal] system that encourages behavior that is caring about others’ safety and responsive to others’ needs or hurts, and that attends to human contexts and consequences.”255 From such a construction, we could be sure that, if the project bears fruit, the fruit will be consistent with and implement ecofeminist norms and values. The project here, in contrast, is to begin at law, using the concept of care as a filter to apply the critical methods of the theory and extract consistent examples of ecofeminism in the law. This approach is premised on the hunch that ecofeminism can provide a good platform for analyzing the existing property system to identify doctrines and rules that are not individualistic, consumptive, dominating, or otherwise destructive - not because ecofeminism holds an exclusive claim to the values expressed, such as community and collaboration, emotive attachment, negotiation, and nonreductionism, but because ecofeminism centers these ideas in a way that eases the categorization of private needs and public demands in property.

The concern with this approach is that by locating the notion of care within dominant

254 Such was Elaine Hughes’ approach, “to try to imagine a law in which nature is of central importance.” Elaine L. Hughes, Fishwives and Other Tails: Ecofeminism and Environmental Law, 8 CAN. J. WOMEN & L. 502, 519 (1995).
constructions of nature – natural resource allocations in the form of property rights – we have degraded, co-opted, and even abandoned the ecofeminist critique of the logic of domination.

The argument goes: the critique of rights compels us to recognize that the act of segregating dominant voices for special consideration entails a structural means of oppression; the critique of property offered by ecofeminism compels us to recognize that the allocation of rights in certain types of interests, to the exclusion of others, systemically silences and excludes gender-specific and non-human perspectives and interests from the aggregate of values that persist in property; to participate in this dialogue is to concede the “objectivity” of the structure of rights and property rights in particular.


257 Ecofeminism and feminist jurisprudences critique the rhetorical use of rights as a means to avoid vesting disenfranchised groups with access to the legal system: assuming a systemic prerequisite of a redressible injury to gain access to the legal system, rights-talk excludes others by refusing to recognize values and expectations that are not commensurable with the masculine perspective. The exclusion of non-human interests follows the logic:

Moral autonomy is the ability to act as a moral agent, that is, to act on the basis of an understanding of, and adherence to, moral rules or principles.... [But] if moral autonomy...is a necessary condition for having moral rights, then probably no nonhuman animal can qualify.... But why, we must ask, should the capacity for autonomy be regarded as a precondition for possessing moral rights? Autonomy is clearly crucial for the exercise of many human moral or legal rights, such as the right to vote or to run for public office. It is less clearly relevant, however, to the more basic human rights, such as the right to life or to freedom from unnecessary suffering. The fact that animals, like many human beings, cannot demand their moral rights (at least not in the words of any conventional human language) seems irrelevant.

Mary Anne Warren, The Rights of the Non-Human World, in Eugene C. Hargrove, ed., THE ANIMAL RIGHTS, ENVIRONMENTAL ETHICS DEBATE: THE ENVIRONMENTAL PERSPECTIVE (1992) 185, at 194. Ecofeminism’s critiques of both rights rhetoric and the concept of property itself focus on the manner in which property rights relate to the objects of ownership. A strong argument against the structure of rights, for instance, concerns the false promises of neutrality: ‘neutrality’ in rights is achieved when we break down barriers to accessing the benefits that are offered by those rights; yet if we define the rights in a manner that biases the values of a particular group, to the exclusion of the values of others, neutrality does not level the playing field at all. In the property context, neutrality is sought by placing property rights in a competitive relation to one another; yet, by dicing the world into small, ownable parts, the boundaries of which bear no relation to natural processes (e.g., City of Wichita, Kan. v. Trustees of APCO Oil Corp. Liquidating Trust, 306 F.Supp.2d 1040 (D.Kan. 2003)) and natural boundaries (e.g., Walton County v. Stop Beach Renourishment, Inc., 998 So.2d 1102 (Fla. 2008)), property rights operate to divest expectations that rely on those processes and boundaries.

Val Plumwood suggests that by privileging the rational, abstract, legal reasoning thinks the interests of the non-human world out of the legal scheme. Val Plumwood, Nature, Self, and Gender: Feminism, Environmental Philosophy, and the Critique of Rationalism, in ECOLOGICAL FEMINIST PHILOSOPHIES, Karen J. Warren, ed. (1996), 155, at 160. This objection focuses on how rights are allocated: in order to possess rights one must be able to assert them in recognized ways and in accepted political sites and venues. Reserving rights for humans, the argument goes, improperly excludes non-humans from even moral consideration by excluding them from legal protection. To avoid this practice of reasoning nature out of moral and legal rights, ecofeminists repudiate the role that rights-reasoning plays in valuing the legal worth of a natural being.

258 Hughes rephrases this argument (before embarking on her own legal construction of ecofeminist legal doctrine): “Joining with men as equals in the ‘masculine defined sphere’ of what is human culture is soundly rejected as an ecofeminist strategy, for the kind of public power ecofeminists wish to share is in not the kind of public power that
This criticism is significant, especially as it might be delivered from ecofeminist ethics. Indeed, notwithstanding the foregoing, it would be reasonable to assume that ecofeminism’s attack on abstract individualism and the concept of property rights leave ecofeminism and property incommensurable at a level so fundamental that there could be little in terms of constructive dialogue. Of course, ecofeminism sets out to undermine and expose the oppressive foundations of possession as the basis for ownership, as a purported building block of identity, and as a rule regulating interpersonal interaction. This tendency is additionally understandable given the history of women’s relationship to property, as property. Ecofeminism’s critique of possession as an exercise of dominion illustrates how nature is trivialized and denied of both a subjective identity and (as such) moral worth by transforming it into ‘property.’ This form of oppression is arguably exalted by the absolutist version of the property right, and it is illustrated in the defense of property by capture.\(^{259}\) The reasonable reaction, then, is that conventional, masculinist notions of land-as-property and the notion of land as partner, interlocutor, and relational other cannot be reconciled.

The pragmatic dilemma is whether this apparent irreconcilability is necessary, or if it is merely the result of a robust critique that has not yet been vigorously tried for its constructive applications. The pragmatic response, not surprisingly, is to test the critique to determine whether translation from ecofeminism to property is feasible. And it is the position here that such translation is not only feasible, but extremely helpful for property and environmental jurisprudence. The starting point for this examination is simply to recognize that ecofeminism could enter the jurisprudential dialogues concerning the scope and importance of ecofeminism’s insights and its contribution to contemporary environmental problems. Of course, the point of such an examination is not to dilute the force of ecofeminism’s critique of rights, nor the alternatives to property that might be uncovered in ecofeminism’s political philosophy. Rather, resetting ecofeminism into contemporary property jurisprudence is reflective of the pragmatic point that knowledge arises in context, and that the context of legal dialogue does come with a deeply embedded conception of rights, built upon a construction of nature that allows (and in some instances, encourages) allocation through the capture of resources and use of nature in a way that serve human interests in the interaction with and need for environmental amenities. Law is a human construct, the law of nature’s allocation to human needs is uniquely (though not exclusively) anthropocentric, and an examination of ecofeminism’s jurisprudential insights should therefore occur within that context; and, as Elaine Hughes notes, “a transition must begin

\(^{259}\) See, e.g., Chaone Mallory, *Acts of Objectification and the Repudiation of Dominance: Leopold, Ecofeminism, and the Ecological Narrative*, 6 Ethics & the Env. 59 (2001) (arguing that hunting assumes “a principle of human domination over the nonhuman world, a principle antithetical to those strains of environmental ethics – most notably ecofeminism – which affirm that humans and members of the more-than-human world possess comparable moral worth.”).
Karen Warren echoes this argument, albeit not to the conclusion offered here. Warren makes clear that the critique of rights, rules, and utility is particularly relevant where rights are oppressive as a matter of structure; the critique is contextual, and specifically applicable to hierarchy and categorization that enable oppressive frameworks of women and nature. However, as Warren notes, “[t]here may be many contexts in which talk of rights or of utility is useful or appropriate,” assuming that the appropriateness of the terms resolves the effect of this structure relative to the values represented in the hierarchy. Warren further asserts that rights-talk cannot adequately capture certain important values (values of care, trust, friendship), the same values which are, not coincidentally, thought to be excluded from constructions of nature that are reducible to property and resource use constructs. More importantly, Warren points out in passing that a conception of rights and their roles can be understood as growing out of a relational ethic. The point appears to be that if rights do not determine fundamental relationships, but arise out of relational identities, then rights might be understood as less of a structurally oppressive conceptual framework than the broader ecofeminist critique would suggest. Context is the key.

From this perspective, what is needed is an effort to explore the insights of an ecofeminist jurisprudence in a manner that recognizes the contingency of jurisprudence, the indeterminacy of legal language, and the co-dependency of social, economic, and legal knowledge. Of course, the care approach insists on recognizing a broader basis for judging value in matters of property expectations. The inclusion thesis of care demands that we acknowledge the contingency of dominant environmental and social values. Narratives matter, and place matters, and care’s embrace of storytelling situates law in a more robust dialogue on the allocation of rights to controlling our surroundings. As such, care helps up to look more closely at place-based needs, the role of identity in assessing legal claims, and why it is that law may seem unfair to

262 Id., at 141 n.28.
263 Ecofeminist literature often portrays the ethic of care through the use of narrative, telling stories of human and nature interactions, in which nature is approached not as a challenge or commodity, but as a partner or collaborator. Ecofeminist stories describe nature from the perspective of a loving eye instead of from arrogant perception - not as something to dominate and conquer, but as a participant in an experience. Karen Warren illustrates why ecofeminism relies on the power of narrative to undermine the patriarchal biases in rights rhetoric. Warren’s story invites the reader to the tension between the climber and a large rock edifice. Through her story, Warren is able to evaluate the process by which she reconsiders the goals of rock climbing, from which she arrives at an understanding of her relationship to this rock feature in which the two are engaged in one another as “silent conversational partners in a longstanding friendship.” Id., at 134. Narrative enables the expression of interests and behaviors that may be misunderstood, undermined or excluded in dominant rhetoric. By rejecting the restraints of dominant vocabularies, narrative offers “a way of conceiving of ethics and ethical meaning as emerging out of particular situations moral agents find themselves in, rather than as being imposed on those situations (e.g. as a derivation or instantiation of some predetermined abstract principle or rule.” Id., at 136.
some and “objective” to others. The care element of property serves the important role of including, rather than trivializing otherwise invisible claims of harm and expectation.

In the meantime, we need to reorganize how feminism applies this sense of contingency in matters of nature. In this project, a reorganization will allow us to identify those areas of law that are amenable to ecofeminist proposals, and to enable a translation of ecofeminism into an ecofeminist jurisprudence. Part of this project entails identifying places in the law where the law already can, or does, make use of ecofeminist insights. The other part recognizes that ecofeminism needs a property theory to enter the dialogue on environmental protection through law.\footnote{264}

By taking the pragmatic, contextual approach to the jurisprudential intersection of property and ecofeminism, we are freed to consider the feminist reflections in property law. Another way of making this point has been argued by Kate Green, who rejects the idea that feminism must be silent in the dialectic over rights to use land: “Land law can certainly (ha!) look like a man, but that is exactly how a masculine analysis will describe it.... In fact, the law is more complicated than that.”\footnote{265} Green argues that there is a “feminine” presence in law, and in the law of land in particular, as “land law is concerned not only with a simple masculine mastery of natural world, but also with feminine negotiation, informality and compromise in the face of the reality of the whole mystery of human action.”\footnote{267} Green reconstructs property as a collaborative project, reflecting both the masculine and feminine subjects.\footnote{268}

The inquiry and aim here takes on as its central purpose a reconceptualization of the relationship between property as domination (capture) and property as care (ecofeminism) by focusing on the negotiation between separate strains in particular sticks in the bundle of rights known as property. The outcomes of this project are hopefully twofold: first, by recognizing both the competition and complementary relationship between capture and care, we find property is understandable because it is pluralistic and not susceptible to a single unifying principle; and second, with such pluralism as a basis for the process of property, the bundle appears as the constitution, and not the disintegration of property.

\footnote{264} As noted by Heather McLeod-Kilmurray, “What is largely absent is the application of feminist legal analysis to environmental law. What is needed is an ecofeminist legal analysis. Ecofeminist legal analysis can uncover inherent biases within the law that not only fail to solve, but help to create or perpetuate structures, mindsets and institutions that lead to environmental harm.” \textit{Heather McLeod-Kilmurray, An Ecofeminist Legal Critique of Canadian Environmental Law: The Case Study of Genetically Modified Foods, 26 WINDSOR REV. LEGAL & SOC. ISSUES} \textit{129,132—33} (2009).

\footnote{265} \textit{Kate Green, Being Here - What a Woman Can Say About Land Law}, in \textbf{FEMINIST PERSPECTIVES ON THE FOUNDATIONAL SUBJECTS OF LAW} (Anne Bottomley, ed. 1996) 87, 102.

\footnote{266} “Woman/women are present in the concept, method and aims of, and actors in, land law, and not just hiding behind false beards.” Id. at 102.

\footnote{267} Id. at 102-103.

\footnote{268} Id. at 105 (“In reality masculine and feminine negotiate, collaborate, and to give birth to a child whose nature reflects the characters of both its parents.”).
V. Conclusion

This article considered the move from the project of ecofeminist ethics and politics to an ecofeminist jurisprudence. Of course, ecofeminism has no intentional, express presence in the law. The ecofeminist explanation for this circumstance – a philosophically and historically persuasive one – rests on the problems associated with a male dominated legal structure in matters of vocabulary and jurisprudence. Yet, this answer should leave us feeling denied of ecofeminism’s promise and potential. This article has explored and questioned the basis for that denial, specifically by arguing that the concept of care does (and should) make a substantial impact on property, land use, and environmental jurisprudence.

The argument here has been grounded in the rule of capture. Capture explains a great deal about how things become property, and in some cases, why property is protected as a right. However, as argued herein, property law cannot be explained by analogy to the rule of capture alone. At least, capture fails to account for the manner in which property rights are designed to co-exist with other such rights among many properties, possessors, neighbors and public needs. Although capture provides for rules under which things can become property, capture fails to provide criteria to identify which things can be captured. In addition, capture fails to explain some property rules which have evolved away from the rule of capture, or those rules which have been designed to balance capture with care. With its focus on community and collaboration, care adds the systemic justifications for property allocation. Care in property recognizes that identity is contextual and that property plays a role in framing that context. What care adds to the property analysis is an explanation for the disaggregation of property which, from a care perspective, leads not to the disintegration of property, but to its reconstitution.

Of course, the foregoing should not be read to propose that ecofeminism endorses property as a conceptual scheme for allocating rights to claim and use nature and the natural. At least, one could find persuasive a variety of critiques of both the structure and use of property rights: that property law has traditionally created and widened disparate entitlements according to biases based on gender, race, and socio-economic factors; that it has demonstrated an anti-wilderness bias; that the legal structure for the acquisition of protectable property expectations awards aggressive behavior; that the exercise of property rights in property use often appears

270 See, e.g., Comm.To Save Guilford Shoreline, Inc. v. Arrow Paving, 2007 WL 901573 *29 (Conn.Super. Ct. 2007) (refusing to grant injunction for alleged environmental harm because there was no evidence of current activities creating harm, finding no relief for past practices); Smith v. Town of Mendon, 4 N.Y.3d 1, 822 N.E.2d 1214, (N.Y.,2004) (holding that the requirement for a conservation easement dedicated in perpetuity as a condition of building permit approval when current zoning already accomplished goals of easement was allowable and did not constitute a taking); City of Thornton v. Bijou Irrigation Co., 926 P.2d 1, 24 (Colo. 1996) (finding that while appropriation of water was subject to use of uniform process and standardized forms to satisfy notice requirements, “[f]ailure to use these standardized forms, however, does not automatically result in the application being considered insufficient.”); Belotti v. Bickhardt , 228 N.Y. 296, 308, 127 N.E. 239, 243 (N.Y.1920) (upholding title by adverse
as protection for a right to destroy; and so on. Nevertheless, if the exercise undertaken in this article has been a fruitful one, the foregoing should be read as an endorsement of an ecofeminist engagement with law, and with property in particular. After all, “[a]n ecofeminist future... requires us to be visionary and patient at the same time.”