Special Topics in Max Weber’s Definition (September 23, 2004)

GROUP 5: Kim Changghone, Hwang Myeongjun, Kim Sukmin, Jung Kiwon, Choi Taehun, Kim Jinyoung

Spiritual and Material Interests

◄ Right of Speech►

(Hwang Myeongjun)

Objectivism and Free Speech

Free speech is one of the most jealously guarded rights Americans ensure themselves. It is a distinctively individual right; one maintains it on a personal basis even when it is defended as the right of a group. Upon this basis, it is clear that Ayn Rand's Objectivist (or Rational Individualist) philosophy would call for the careful protection of this freedom from the encroachment of either legislation or judicial interference, though it may call for the reservation of action based on one's own enlightened self-interest.

The subject of “questionable” content has been around as long as there has been public speech. Socrates was put to death for his speech as were Jesus and hundreds of other philosophers of ancient times. Their speech was considered "objectionable" by the authorities of the time, particularly because it challenged the social order of the day, often by advocating the empowerment of disenfranchised or marginalized groups. It is with this in mind that a Rational Individualist would place any restriction on the right to speech under extraordinary scrutiny.

Rational Individualists (including Ayn Rand in particular) argue that reason is the only truth which humanity can know. It is succinctly stated in a simple proposition: If one plus one equals two, all else follows. If we adopt a rationalist paradigm, then the interference of any other power - religious, political, social - is completely limited. As individuals, we understand that one plus one equals two; no government can tell us otherwise, nor can any religion declare it a heresy, without losing our support.

It then follows, under the Objectivist paradigm, that the conduct of free speech is simply the conduct of traffic in rational ideas. This is the "marketplace of ideas": a forum in which ideas are offered wholesale to a broad agora in which the public - as individuals and as a group - listens, evaluates, and responds. Where one idea is superior to another, argue the Objectivists, the superior one will "win" in the

marketplace and be adopted by rational "consumers" of thought. Where an idea is inferior (or fails the test of reason), it will wither away. Thus, even when a Rationalist finds an idea objectionable because of its irrationality or dishonesty, the Rationalist sees no reason for its censorship. Its placement in the marketplace of ideas simply offers more to the conduct of a free and open debate and its dismissal contributes to the drive to find a more rational idea.

Objectivists jealously guard their free speech, then, because none of it is "bad speech." Even when it is wrong, it has value because it contributes to the process of finding the right idea. Rational debate is better off when free from restriction by government or religious codes because it forces the individual to test and evaluate - strengthening one's own skills of ethical and moral evaluation. We cannot place a police officer on every streetcorner, nor can we adopt a law that can effectively guide every action; by adopting a philosophy of rational evaluation, though, we can make remarkable strides toward an open, free, and safe society. The Objectivist believes that the way to greater security lies in greater freedom rather than harsher restriction.

Besides its importance in the strengthening of one's individual moral conduct, the right to free speech is important to the Rational Individualist in that it is one of the "natural" rights of humankind. Government does not give the people a right to free speech; it recognizes that the natural right exists. Without regard as to whether free speech is a good unto its own self (which it is), the Objectivist sees free speech as a natural-born right of the individual, and considers the encroachment of government upon rights of this nature to be an affront. Objectivists draw directly from the text of the Declaration of the Independence: *We hold these rights to be self-evident, that all men are created equal, and are endowed by their Creator with certain unalienable rights [? That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed [.]* The Rational Individualist reads these words literally and with tremendous gravity.

The Objectivist's firm support for the legal defense of free speech under any range of circumstances having been established, the Objectivist's personal consideration of the ethics of the situation must also be discussed. The Rational Individualist believes that the active pursuit of what is best for the individual results in the production of the greatest good for society as a whole and is the highest moral plane to which humanity should aspire.

The individual's self-interest cannot be taken simply as pecuniary gain. While the author of a book on terrorist methods or assassination may benefit in a financial sense from the production of the work, the Rational Individualist would demand as well that the author consider the greater impact of the work on the society in which he or she lives - not as it pertains to others, but as it pertains to the self. While I may

derive monetary benefit from writing and selling a book on hiring a hit man, I may also contribute to the encouragement of that kind of behavior. This would be particularly unfortunate for me should someone close to me be killed; while my authorship of such a book would not have caused the death, it may have made me an unwitting contributor to my own misfortune.

Such an extreme example may be difficult to take seriously, but it has relevance on a broader scale as well. A Rational Individualist would look at a family-owned farm in the same way; while the application of harsh chemicals and aggressive practices may be my right as the owner of the land and may derive me short-term pecuniary gain, it may diminish my ability to use the land in the long run. In pursuing my rights to their fullest extent, I may violate moral obligations to my self. In the same way, while I may have a legal right to produce a "how-to" book on hired assassins (and while that right should be jealously guarded), the pursuit of that right in this particular circumstance may not be in my own enlightened self-interest.

The Rational Individualist believes in the sanctity of personal rights - both as goods unto themselves and as means of pursuing one's self-interest. While free speech may from time to time cause emotional distress or cognitive dissonance for some members of society, its absolute preservation is critical for the development of individual conscience, which is a far better "safety net" than any law. Ayn Rand's Objectivist philosophy recognizes the absolute necessity of defending and preserving personal liberties, but calls also for the individual's consideration of his or her own self-interest in a broad and enlightened sense - which may mean that the exercise of a legally preserved right may be contrary to personal betterment.

Near v. Minnesota, 283 U.S. 697 (1931)

Facts: A Minnesota law provided for abatement, as a public nuisance, of a malicious, scandalous and defamatory newspaper, magazine or other periodical. D’s newspaper published defamatory and scandalous articles and a court issued an injunction permanently enjoining the newspaper from publishing.

Issue: Was the law unconstitutional?

Holding: Yes

Rationale: According to the court, the injunction was prior restrain on press and was unconstitutional. The Court stated that the appropriate way of dealing with unprotected speech was after the fact punishment and not prior restraint on the freedom of press. Therefore, prior restrain can’t be used to punish a publication unless there exist some exceptional circumstances (e.g. national security during times of war).

◄ Right of Religion►

(Jung Kiwon)

Weber’s Approach

Max Weber's (1864-1920) sociology is the foundation of scientific sociology of religion in a sense of typological and objective understanding. Rejecting Karl Marx's evolutionary law of class society, or Emile Durkheim's sustained law of moral society, Weber established the understanding sociology of the subjective meaning of religious action or inaction. To make such knowledge of the understanding objective, he founded the methodology of the ideal type and the elective affinity of causal relationships.

Weber "elaborated a set of categories, such as types of prophecy, the idea of charisma (spiritual power), routinization, and other categories, which became tools to deal with the comparative material; he was thus the real founder of comparative sociology." Weber holds that there is no universal law of society as supposed in natural science, or the law of history which determines the course of the dynamic mechanically. The goal of Weber's sociology of religion is to understand religious action from the subjective meaning of the actor rationally and also emphatically; it is not to establish the laws of religion and society, or to extract the essence of religious action. Or the goal is not even to formulate and evaluate the social function of religion as Marx did that religion was the opium of the mass or as Durkheim did that religion was what made moral society hold together.

Typological and comparative understanding of religious action depends on the theoretical construction of the ideal type through thinking or empathic experiments. Objective understanding of religious action, on the other hand, depends on the value-judgment free analysis of the subjective meaning of social action from the viewpoint of ideas as well as material and mental interests. To avoid the injunction of value-judgments, one has to distinguish the empirical recognition of "what is" from the normative judgment of "what should be." The validity of an ethical claim is not the matter of social analysis, but the matter of conscience and belief. The criteria of value-judgment is imperative, and does not depend on empirical reality. The understanding of "what is," on the other hand, involves not just empirical facts of social action, but also the subjective meaning of the social action. Social action is not mechanical reaction of the law of material interests, but the dynamic of ideas and interests, which give the actor the conscious or unconscious meaning of life and the world. In order to understand sociological reality of religion, Weber holds the importance of religious idea, which cannot be reduced to the component of material interests (Marx) or to the social nexus and function (Durkheim). Weber says:

Not ideas, but material and ideal [ideological] interests, directly govern men's conduct. Yet very frequently the world images that have been created by ideas, like a switchman, have determined the tracks

along which action has been pushed by the dynamic of interest.

His Study of Religion

Weber's emphasis on the influence of religious ideas in the emergence of modern capitalism forced him into a running dialogue with the ghost of Karl Marx. He was most respectful of Marx's contributions, yet believed, in tune with his own methodology, that Marx had unduly emphasized one particular causal chain, the one leading from the economic infrastructure to the cultural superstructure. Weber argued that Marx had presented an overly simplified scheme that could not adequately take into account the tangled web of causative influences linking the economy and the social structure to cultural products and human action. Weber refused to see in ideas simple reflections of material interests. He contended instead that developments in the intellectual, psychic, scientific, political, and religious spheres have relative autonomy even though they all mutually influence one another. There is no pre-established harmony between the content of an idea and the material interests of those who become its champion, but an "elective affinity" may arise between the two. Weber's examples are many. In the seventeenth century, such an elective affinity developed between the ideas of the Calvinist divines and the concerns of certain bourgeois or petty-bourgeois strata, whether in England, Scotland or the Lowlands. Confucian ethics did not "express the needs" of the Chinese literati, but these men became the main carriers of Confucian ideas in so far as these were congenial to their life-styles. Or again: landowning warrior classes have an aversion to any form of emotional religiosity and to religions preaching salvation; instead, they are drawn to religious systems in which the gods are conceived as powerful, passionate beings who clash among themselves and are subject to cajolery through sacrifice or to coercion through magical manipulation. Peasants are attracted to nature worship while urban bourgeois strata incline toward Christian piety.

Weber attempted to document this development in a variety of institutional areas. His studies in the sociology of religion were meant to trace the complicated and tortuous ways in which the gradual "rationalization of religious life" had led to the displacement of magical procedure by wertrational systematizations of man's relation to the divine. He attempted to show how prophets with their charismatic appeals had undermined priestly powers based on tradition; how with the emergence of "book religion" the final systematization and rationalization of the religious sphere had set in, which found its culmination in the Protestant Ethic.

The Development of Right of Religion in U.S. Legal System

A. First Amendment Religious Freedoms

I. The Establishment Clause

The test of whether a law or practice has the required neutrality toward religion is determined according a three-part test developed in *Lemon v. Kurtzman*. The three criteria must be fulfilled to determine a law's religious neutrality:

♦ statute must have a secular legislative purpose

♦ principal effects neither advance nor inhibit religion

♦ statute must not foster an excessive government entanglement with religion

II. School Cases

Religion in Public School

- Wallace v. Jeffree, 472 U.S. 38 (1985)
- Stone v. Graham, 449 U.S. 39 (1980)

Financial Assistance to Religious Schools

III. Other Establishment Clause Issues

- McGowan v. State of Maryland, 366 U.S. 420 (1961)
- Allegheny County v. American Civil Liberties Union, 492 U.S. 573 (1989)

B. Free Exercise Clause

I. Traditional vs. New Free exercise Standards

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990)

II. Past Uses of the Traditional Test

- State of Wisconsin v. Yoder, 406 U.S. 205 (1975)

◄ Right of Privacy and Right of Abortion►

(Kim Jinyoung)

The Protection of Privacy Right

Amendment IX shows that the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. It means that there are some fundamental rights that are protected by the Constitution even though they are not explicitly listed in the text of the Constitution. The right of privacy is embraced within the absolute rights of personal security and personal liberty. It

recognizes that the right of privacy as a fundamental constitutional right; “having a value so essential to individual liberty in our society that its infringement merits careful scrutiny by the courts.”

Pavesich v. New England Life Ins., 122 Ga. 190, 197 (50 SE 68) (1905)

The right of privacy has a long and distinguished history in Georgia. In 1905, this Court expressly recognized that Georgia citizens have a “liberty of privacy" guaranteed by the Georgia constitutional provision which declares that no person shall be deprived of liberty except by due process of law.” Pavesich v. New England Life Ins.. The Georgia Supreme Court held that Mr. Pavesich stated a claim against New England Life for alleged wrongful use of his picture in an advertisement for the Defendant's insurance products. The Pavesich decision constituted the first time any court of last resort in this country recognized the right of privacy making this Court a pioneer in the realm of the right of privacy. By the time the U.S. Supreme Court recognized the existence of a right of privacy in the U.S. Constitution, Griswold v. Connecticut, 381 U.S. 479 (1965).

In Pavesich, the Court found the right of privacy to be “ancient law,” with “its foundation in the instincts of nature”, derived from “the Roman’s conception of justice” and natural law, making it immutable and absolute. The Court described the liberty interest derived from natural law as “embracing the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common good.” Liberty includes “the right to live as one will, so long as that will does not interfere with the rights of another or of the public”, and the individual is “entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has the right to arbitrarily take away from him his liberty.”

The Development and Extension of Privacy Right

Katz v. United States 389 U.S. 347 (1967)

Katz was convicted under an indictment charging him with transmitting wagering information by telephone across state lines. Specific parts of conversations were overheard by FBI Agents, who had attached an electronic listening and recording device to the outside of a telephone booth. Petitioner contended that the phone booth was a “constitutionally protected’’ area. The Plaintiff had a reasonable expectation to assume that the words he uttered while in the confines of the phone booth should be private, and constitutionally protected. The Court held that the Fourth Amendment protects people rather than places, but felt its “reach could not turn on the presence of absence of a physical intrusion in any given enclosure.’’

Traditional concept of privacy believes that the right of privacy is not infringed if there is no physical

trespass into a protected place. The Court, however, recognized that the purpose of legislation of privacy right is not to protect a certain place but to upkeep zone of privacy related to individual dignity. It made an opportunity that the way of interpreting law became more active and wide.

Below cases display that the development of privacy right “to be let alone” so long as one was not interfering with the rights of other individuals has influenced in various aspects of individual life. The rights have been recognized as fundamental for substantive due process purposes are ones related to the loose category of “right to autonomy” what is usually meant by this is a person’s right to make his own decisions about highly personal matters. Especially, individual’s interest in using birth control is fundamental. So whether a person is married or unmarried, he/she has a fundamental interest in contraception, and the state cannot impair that interest without satisfying strict scrutiny.

In 1965, Griswold, the executive director of planned parenthood was convicted under a Connecticut law for providing birth control information to married couples. The law prohibited the use of contraceptive devices, and it banned to counsel someone for the purpose of preventing conception. The Court held there are some fundamental rights that are protected by the Constitution even though they are not explicitly listed in the text of the Constitution. The use of contraceptive devices is up to the couple themselves because people have a right to choose what they want for their marital life. Thus to prohibit contraceptive devices is an impingement of privacy in marital relationships. Beyond the level of private life, this case extends the scope of privacy to the stage of absolute rights of personal security and personal liberty.

The right of marital privacy recognized by the Court’s path-breaking 1965 decision in Griswold v. Connecticut was soon extended to persons who were not married and to conduct that did not occur in the privacy of the home. The Court held that unmarried persons (Eisenstadt v. Baird, 405 U.S. 438 91972)), including minors (Casey v. Population Servs. Intl., 431 U.S. 678 (1977)), have the same fundamental liberty interest in using contraceptives as did the married couples protected by Griswold. The right of privacy also held to protect a married or unmarried woman’s liberty to choose an abortion. With this expansion of Griswold, it became increasingly difficult to speak of the right in question as being one of privacy, much less of marital privacy. What had begun as a right of privacy was thus transformed into a right of personal autonomy, “the interest in independence in making certain kinds of important decisions.”

Roe v. Wade, 410 U.S. 113, 153 (1973)

The Court’s first right of privacy decisions involved laws that, by barring the use of contraceptives, had the effect of forcing individuals to have children and create a family against their wishes. In striking down these laws, the Court held that one of the fundamental liberties protected by the Due Process Clause is the “decision whether to bear or beget a child.” This decision is as much impaired by laws outlawing abortion

as by bans on the use of contraceptives. In 1973, the Court recognized this fact, holding that the right of privacy in matters concerning procreation and family “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” Roe involved a Texas statute that made it illegal to have an abortion except where necessary to save the mother’s life. By absolutely prohibiting most abortions, the statute impinged on a woman’s fundamental liberty to choose an abortion, thus triggering strict scrutiny under the Due Process Clause.

According to the court, the right of privacy under the Fourteenth Amendment is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy. The right is fundamental but the right of the woman is not absolute. The state can regulate the woman’s actions in cases where the law serves a “compelling state interest”. The court rejected Texas argument that at conception, the unborn should be considered a person under the Constitution. According to the court, the word “person” as used in the Constitution does not refer to the unborn. Therefore, in the end, the court ruled that in the initial stages of the pregnancy (before the end of the first trimester) the woman and her physician are free to make their choice about abortion without the interference from the state. For the subsequent stage of pregnancy, the state can regulate the woman’s choice but only to serve the compelling interest of promoting the health of the mother. For the stage after viability, the state in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe, abortion except where it is necessary to preserve the life of the mother.

◄ Right of Assembly►

(Kim Sukmin)

Definition and History

The right to assemble allows people to gather for peaceful and lawful purposes. It is one of the twin guarantees, along with the right of freedom of speech, on which the right to peacefully gather and parade or demonstrate to make one's views known or to support or oppose a public policy is based on.

Implicit within this right is the right to association and belief. The Supreme Court has expressly recognized that a right to freedom of association and belief is implicit in the First, Fifth, and Fourteenth Amendments. This implicit right is limited to the right to associate for First Amendment purposes. The government may prohibit people from knowingly associating in groups that engage and promote illegal activities. The right to associate also prohibits the government from requiring a group to register or

disclose its members or from denying government benefits based on an individual's current or past membership in a particular group. There are exceptions to this rule where the Court finds that governmental interests in disclosure or registration outweigh interference with first amendment rights. The government may also, generally, not compel individuals to express themselves, hold certain beliefs, or belong to particular associations or groups.

The right of assembly also works with the right to petition the government for a redress of grievances by allowing people to join together and seek change from the government. On October 14, 1774, the Declaration and Resolves of the First Contintental Congress declared "[t]hat the inhabitants of the English colonies in North-America, … have a right peaceably to assemble, consider their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal." Later, the declarations of rights of the newly formed states of Pennsylvania (1776), North Carolina (1776), Massachusetts (1790), and New Hampshire (1784) included guarantees for peaceable assembly and petition.

United States v. Cruikshank, 92 U.S. 542 (1876)

The Supreme Court said that the "right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers and duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States." The high court applied the liberty only to any federal government's encroachment.

De Jonge v. Oregon, 299 U.S. 353 (1937)

De Jonge was convicted for conducting a public meeting under the auspices of the Communist Party. De Jonge had not advocated any illegal activity or criminal doctrine. The U.S. Supreme Court reversed his conviction as unnecessarily restrictive of his freedom of speech and right of peaceable assembly. In the unanimous ruling, the high court said that the right to peaceably assemble "for lawful discussion, however unpopular the sponsorship, cannot be made a crime." and "Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. ... The right of peaceable assembly is a right cognate to those of free speech and is equally fundamental." The decision applied the First Amendment right of peaceful assembly to the states through the due process clause of the Fourteenth Amendment, putting this right on equal footing with freedom of speech and the press.

◄ Right of Intellectual Property►

(Choi Tae Hun)

An intellectual property license provides the licensee rights to use the licensed matter in the manner described in the license in exchange for payment. The license may include patents, copyrights, trade secrets or trademarks. The art of licensing intellectual property is distinct from the sales of traditional goods or services, requiring a unique set of legal and business approaches for the success of the licensor. These tools are particularly important for high tech companies, because much of its success is focused on software, content, and consulting rather than traditional goods. A content license may be nothing more than the sale of a copy of a software program to a consumer, or it may be as complex as any merger between publicly held companies. The fundamentals of good licensing apply to any size transaction. The licensor must focus on the transaction's goals rather than the mechanics. By focusing on generating revenue, maximizing exploitation of the intellectual property, minimizing risk, and building a common understanding between the parties, the licensing agreement will serve both parties.

Intellectual Property covers two main areas: *industrial property* (inventions: patents, utility models; trade marks; industrial designs and protected designations of origin) and *copyright* (represented by literary, musical, artistic, photographic and audio-visual works).

Case Article

August 24, 2004 , San Francisco - Music publisher Ludlow Music, Inc., has officially backed down on its threats against web animation studio JibJab Media Inc. over the widely circulated "This Land" animated parody lampooning President Bush and Senator Kerry. JibJab had responded to Ludlow's threats by engaging the Electronic Frontier Foundation (EFF) to file suit on its behalf in San Francisco on July 29, 2004, seeking judicial confirmation that JibJab's work was a protected "fair use" and did not infringe Ludlow's copyrights. During the course of investigating the case, EFF learned that "This Land is Your Land," the classic Woody Guthrie song, is part of the public domain and has been for several decades. EFF's investigation revealed that "This Land is Your Land" appears to have been in the public domain since the early 1970s. Woody Guthrie wrote his classic American song in 1940, when the copyright laws granted a copyright term of 28 years, renewable once for an additional 28. According to EFF, the initial copyright term was triggered when Guthrie sold his first versions of the song as sheet music in 1945. The copyright on the song then ran out when Ludlow failed to renew its registration in 1973. Ludlow believes its copyright -- initially filed in 1956 and renewed in 1984 -- remains valid and disputes EFF's claims. "We believe that Guthrie's classic tune, 'This Land Is Your Land,' belongs to all of us now, just like Amazing Grace and Beethoven's symphonies" said Fred von Lohmann, senior staff attorney with EFF. "The idea of copyright law is that, after a time, every work comes back into the hands of the public,

where it can be reused, recycled, made part of new creativity without having to pay a fee or call in the lawyers. That's a great thing, the real genius of copyright." JibJab dismissed its suit against Ludlow today. As part of the settlement of the case, JibJab will remain free to continue distributing the "This Land" animation without further interference from Ludlow.

◄ Right of Own Property►

(Kim Changghone)

Scope and Sources

The roots of American property law are in the feudal land law of England. Accordingly, it distinguishes between real property, which historically consisted chiefly of feudally important estates in land, and personal property, which consisted of most other assets, corporeal and incorporeal.

Although the distinction persisted even after England had evolved into a commercial nation and personal property had taken on much greater importance, there has been a tendency in the United States toward its gradual elimination so that, for example, the rules of intestate succession are now largely the same for real and personal property.

But since commercial dealings in personal property are embraced by the distinct field of commercial law, property law is still concerned primarily with real property. It includes: the kinds of interests in and types of ownership of property; conveyances, mortgages, and other *inter vivos* transfers of such interests; wills and intestate succession; trusts; and restrictions on the use of property.

Property law in the United States is a matter of peculiarly local concern and its variations from state to state are more substantial than is the case, for example, for contracts or torts. In several areas once under the rule of Spain or France, the influence of the civil law can still be detected, and eight states now recognize what is known as community property, in which husband and wife have a variety of common ownership that is derived from the civil law. Each state has a substantial collection of statutes relating to property, most notably on matters of intestate succession. Some are uniform acts adopted in a number of states, and others have been borrowed from sister states, particularly New York. Rarely, however, do these states form a well organized and integrated whole. Occasionally federal legislation, such as the United States Housing Acts, providing financial assistance for urban redevelopment, also affects the work of the property lawyer.

Characteristics

The elaborate scheme of interests in land that distinguished English land law at the time of the Revolution was received almost in its entirety in the United States.2 First, interests such as easements and franchises, which consist only of limitations on the rights of another to the use and enjoyment of land, are distinguished from those interests that confer or may confer upon the holder the actual right to possession. The latter are then divided into possessory estates or interests, under which the holder has the present right to possession, and future or nonpossessory estates or interests, under which the holder mayor will come into possession at some future time.

Possessory interests in turn are classified according to duration, and future interests according to the probability or certainty of the holder coming into possession. The common law has shown itself capable of remarkable abstraction in dealing with interests in land. Ownership is viewed as projected in time and may be divided according to the needs of the owner and the ingenuity of the lawyer, with the result that all persons who have estates, whether possessory or future, are present owners of vested interests in the lands.

The most significant departure from English property law after the Revolution related to title assurance. The standard instrument of land transfer in America is the deed, a writing historically under seal that passes title by delivery. It sometimes contains a provision by which the transferror agrees to compensate the transferee for loss resulting from defective title. In England the transferee got further assurance by examination of the original deeds, which were passed on with the land. A different system that of public recordation, came into use in the colonies and subsequently spread throughout the United States.

State recording acts require that all conveyances be promptly recorded in a local public office so that the prospective transferee may rely, with some safety, upon an examination, usually by a local expert, of the resulting public records. The penalty for failure to record is loss of priority to other competing interests, a matter on which the details of state statutes differ considerably. To an increasing extent the assurance from recordation is now being supplemented by a system of voluntary private title insurance in which the title insurer, after a search of the records, agrees to indemnify the insured for loss due to defective title.

An alternative to recordation, known as title registration or the Torrens system, exists to some degree in a minority of states. Under this system the title itself, rather than the conveyance evidencing the transfer of title, is registered through a formal proceeding that results in a conclusive determination of title followed by issuance by the state of a certificate of title, which is then kept up-to-date by notation of later interests. Expansion of title registration seems unlikely, however, in the face of growth of title insurance based on recordation.

In recent decades the attention of the American property lawyer has turned increasingly from land transfer, and particularly the drafting of conveyances and wills, to restrictions on the use and enjoyment of land. The pressures of urban living have steadily increased as the percentage of city dwellers has grown from forty to sixty percent in the first half of this century and these pressures have been met by expanded governmental regulation, particularly on the local level. Under its power, known as the police power, to provide for the public welfare, the government may establish planning agencies, control the subdivision of land, restrict its use through zoning, and maintain minimum structural and sanitary standards.

Under its power of condemnation or eminent domain, it may also take private property for public uses, subject to the requirements of federal and state constitutions that include the payment of just compensation. Judicial restraints on governmental power with respect to land use have been gradually relaxed, but questions still arise whether governmental action is a "taking" for which it must pay compensation and, if it is not, whether it is a valid exercise of the police power. In a nation where roughly two-thirds of all families own their own housing, such issues are of immediate and vital importance to a considerable portion of the population.