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## No Matter How Small... Property, Autonomy, and State in Horton Hears a Who!

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JORGE L. CONTRERAS

No Matter How Small...  
Property, Autonomy, and State in *Horton*  
*Hears a Who!*

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ABOUT THE AUTHOR: Associate Professor, American University Washington College of Law. The author thanks the organizers of and participants in *New York Law School Law Review's* March 2013 symposium, *Exploring Civil Society Through the Writings of Dr. Seuss*. Research assistance by Sydney Kestle is greatly appreciated.

Dr. Seuss's *Horton Hears a Who!*<sup>1</sup> has long been viewed as a parable of human equality and dignity. Published in 1954, the same year as the U.S. Supreme Court's landmark anti-discrimination decision in *Brown v. Board of Education*,<sup>2</sup> *Horton's* famous refrain, "A person's a person, no matter how small," elegantly reflects the egalitarian principles espoused by the American civil rights movement. Theodor Seuss Geisel, the creator and alter ego of Dr. Seuss, had long opposed racial discrimination in the United States<sup>3</sup> and wrote *Horton*, according to biographer Donald Pease,<sup>4</sup> to "atone" for the xenophobic character of his World War II political cartoons.<sup>5</sup> *Horton* the elephant has since become a popular symbol of tolerance, equality, and human dignity.<sup>6</sup> Even more importantly, *Horton's* young readers have, for generations, taken from this lovable elephant a greater empathy for those who may be different than themselves.

But unlike later Seuss classics that convey similar messages of racial tolerance (e.g., *Green Eggs and Ham*<sup>7</sup> and *The Sneetches*<sup>8</sup>), beneath its characteristically childlike facade, *Horton* raises a cascade of complex issues that challenge conventional notions

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1. DR. SEUSS, *HORTON HEARS A WHO!* (1954). *Horton* was adapted as a half-hour animated television special in 1970, which was produced by Theodor Seuss Geisel. Geisel was not involved in the subsequent 2008 feature-length animated film distributed by 20th Century Fox.
  2. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).
  3. DONALD E. PEASE, THEODOR SEUSS GEISEL 65–66 (2010).
  4. Professor Pease has also contributed an essay to this *Law Review* issue. See Donald E. Pease, *Dr. Seuss's (Un)Civil Imaginaries*, 58 N.Y.L. SCH. L. REV. 509 (2013–2014).
  5. PEASE, *supra* note 3, at 92–93.
  6. There is a large body of literature that invokes *Horton* as a touchstone for such qualities. See, e.g., Jonathan Todres & Sarah Higinbotham, *A Person's a Person: Children's Rights in Children's Literature*, 45 COLUM. HUM. RTS L. REV. 1 (2013) (discussing children's rights); Tanya Jeffcoat, *From There to Here, from Here to There, Diversity Is Everywhere*, in DR. SEUSS AND PHILOSOPHY: OH, THE THINKS YOU CAN THINK! 93, 99–100 (Jacob M. Held ed., 2011) (explaining notions of societal diversity); Dean A. Kowalski, *Horton Hears You, Too! Seuss and Kant on Respecting Persons*, in DR. SEUSS AND PHILOSOPHY: OH, THE THINKS YOU CAN THINK!, *supra*, at 126 (describing *Horton* as a Kantian moral actor); Angela D. West, *Horton the Elephant Is a Criminal: Using Dr. Seuss to Teach Social Process, Conflict, and Labeling Theory*, 16 J. CRIM. JUST. EDUC. 340, 345 (2005) (noting *Horton's* widespread perception as a "cautionary tale against racial prejudice and discrimination"); Peter M. Cicchino, *Defending Humanity*, 9 AM. U. J. GENDER SOC. POL'Y & L. 1, 2 (2001) (noting that *Horton* reflects "the unique, the profound, the unavoidable moral and political consequences that flow from the recognition that the other whose presence we share is a person").
  7. DR. SEUSS, *GREEN EGGS AND HAM* (1960) (imparting the lesson that color does not matter when it comes to ham and eggs); see also PEASE, *supra* note 3, at 124 (discussing how *Green Eggs* evidences "the deep social bond concealed beneath socially entrenched antagonisms").
  8. DR. SEUSS, *The Sneetches*, in *THE SNEETCHES AND OTHER STORIES* (1961) (showing the disastrous consequences of racial discrimination to Sneetch society, which is sharply divided between those who bear stars on their bellies and those who do not); see also PEASE, *supra* note 3, at 120 ("The Sneetches remain trapped in a destructive social order until they arrive at a shared recognition: their need for a social order grounded in exclusionary oppositions victimizes both the Sneetches with and the Sneetches without stars.").

of property, autonomy, and state action.<sup>9</sup> In this essay, I explore the property-based undercurrents that run throughout *Horton*, from Horton the elephant's initial claim to the speck on which Who-ville resides, to the struggle for possession between Horton and the jungle "state" ruled by the kangaroo, to the unsettling conclusion in which Who-ville is taken under the state's protective arm. These undercurrents offer insight into the mid-twentieth-century American society in which Geisel lived and wrote, a society in which attitudes toward private property, capitalism, and government still basked in the rosy afterglow of Allied victory in World War II.

### *Finding Property in Horton*

It is axiomatic under the common law that a finder of lost property is entitled to keep it, and that he thereby obtains good title as against everyone in the world save for the original owner.<sup>10</sup> This point is illustrated in the frequently taught eighteenth-century case *Armory v. Delamerie*,<sup>11</sup> in which the Court of the King's Bench permits a poor chimneysweep to recover the value of a found jewel from the most famous silversmith in England. How did this rule arise? Through the application of the even more ancient notion that possession of a thing gives the possessor certain rights in that thing: rights that are superior to the rights of those who do *not* possess it.<sup>12</sup> Hence, in the canonical case *Pierson v. Post*,<sup>13</sup> the person who leaps out of the brush and kills a fox becomes the owner of the carcass, notwithstanding the fact that a pack of hunters and hounds spent the greater part of the morning driving the fox into the killer's hands. Possession, and in the case of *Pierson*, ultimate possession, is the key to ownership.

So, too, does Horton the elephant make his claim to a wayward speck of dust. To paraphrase the narrative, Horton, while bathing in the jungle, hears a faint cry emerge from a passing speck of dust. He hears it only by virtue of his large and sensitive elephantine ears. The speck, of course, turns out to be the home of a tiny civilization, Who-ville, which is populated by a diverse array of humanoid creatures called Whos. From all outward appearances, Horton is motivated to take possession of the speck through a combination of curiosity and altruism. He responds to the barely audible yelp, which appears to be a cry for help, as the speck floats precariously close to the pond in which Horton is bathing. To ensure its safety, Horton secures the speck atop a clover flower and then delights in becoming acquainted with the

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9. *Horton* is not the only Dr. Seuss story that raises issues of property and ownership. See, e.g., Aaron J. Skoble, *Thidwick the Big-Hearted Bearer of Property Rights*, in DR. SEUSS AND PHILOSOPHY: OH, THE THINKS YOU CAN THINK!, *supra* note 6, at 159.

10. See generally R.H. Helmholz, *Wrongful Possession of Chattels: Hornbook Law and Case Law*, 80 Nw. U. L. REV. 1221 (1986).

11. (1722) 93 Eng. Rep. 664 (K.B.).

12. See Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 74 (1985) ("For the common law, *possession* or 'occupancy' is the origin of property.").

13. 3 Cai. 175 (N.Y. Sup. Ct. 1805); see also OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 217 (Little, Brown, & Co. 1881) (discussing *Pierson* and related cases concerning possession).

tiny residents of Who-ville. But within a few pages of this felicitous encounter, a subtle transformation begins to color Horton's relationship with Who-ville.

*Horton as Possessor*

Soon after Horton comes into possession of the speck on which Who-ville is situated, he begins to refer to the speck, the clover, and the Whos as *his own*.

"What terrible splashing!" the elephant frowned.

"I can't let *my* very small persons get drowned!"<sup>14</sup>

Horton refers to the Whos as "my" persons. He does so with seemingly altruistic, protective intentions, but colored by a sense of possession and hence of ownership. This possessory linguistic formulation occurs not just once, but multiple times, especially as others attempt to wrest possession of the speck away from Horton.<sup>15</sup> Thus, when the sour kangaroo and her joey<sup>16</sup> jump into the pool creating a splash and endangering the Whos, Horton hustles *his* clover and speck away.

In Horton's view, the kangaroo is not simply endangering other inhabitants of the forest; she is endangering something that Horton owns. As one scholar has theorized, the ownership of property contributes to one's conception of self and sense of personhood.<sup>17</sup> Horton, very soon after encountering the Whos, seems to assimilate their identity into his own, to feel that they and the dust speck on which they reside constitute an integral part of him. Oliver Wendell Holmes, Jr. presages this sentiment in *The Common Law*, writing, "Possession is to be protected because a man by taking possession of an object has brought it within the sphere of his will. He has extended his personality into or over that object."<sup>18</sup> Such is certainly the case with respect to Horton and *his* speck of dust.

But let us consider in slightly more detail what, precisely, Horton owns when he takes possession of that wayward speck of dust. According to the ancient maxim *cuius est solum, ejus est usque ad caelum et ad inferos* (the rights of the surface landowner extend upward to the heavens and downward to the center of the earth),<sup>19</sup> the owner

14. *HORTON HEARS A WHO!*, *supra* note 1 (emphasis added).

15. As Richard Chused, Professor of Law at New York Law School, pointed out to me in a dinner conversation preceding the symposium on February 28, 2013, the first person possessive "my" is also commonly used to express kinship (e.g., *my* mother, *my* children) and group association ("let *my* people go"). Despite the fact that Horton the elephant shares no kinship or group identity with the Whos, he may, in fact, use the possessive "my" as a reflection of his feelings of (parental) kinship toward the Whos. But even if such were the case, notwithstanding Horton's gross biological misunderstanding, this justification would not in any event apply to the speck or the clover, to which Horton also refers as his own.

16. A "joey" is a baby kangaroo.

17. Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 959 (1982) ("Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world.").

18. HOLMES, *supra* note 13, at 207 (basing his reasoning on the work of Kant and Hegel).

19. BLACK'S LAW DICTIONARY 341 (5th ed. 1979); *see also*, *Edwards v. Sims*, 24 S.W.2d 619 (Ky. 1929).

of a parcel of land owns everything above and below it. This notion originated in Roman law and has been handed down today in only slightly modified form.<sup>20</sup> It is for this reason that a landowner can claim title to the minerals that lie below the surface, to the waterfowl that fly above it, and to the trees that grow upon it.<sup>21</sup> And not only to the trees, but to their trunks, their branches, every pinecone and leaf, every insect that crawls upon each leaf, and every atom of every such insect. All are owned by the owner of the land.<sup>22</sup>

So, too, it would go with Who-ville. Horton takes possession of the speck and all that resides upon it no matter how improbably small: its buildings, its streets, its outlandish instruments and vehicles. But what about its inhabitants?

### *Owning Whos?*

The disturbing notion of persons<sup>23</sup> as property is not a new one, finding its roots in laws as ancient as writing itself. Every ancient civilization enslaved persons against their will: enemies captured in battle, convicted criminals, and the populations of vanquished territories.<sup>24</sup> In feudal Europe, landowners held nearly absolute dominion over the serfs populating their lands, requiring them to work the fields and perform other labor under conditions that were akin to enslavement.<sup>25</sup> In Russia, this system

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20. See HOLMES, *supra* note 13, at 209 (discussing Roman law antecedents to common law property rules regarding possession).

21. See John G. Sprankling, *Owning the Center of the Earth*, 55 UCLA L. REV. 979 (2008).

22. This principle is known as the doctrine of “accession,” in which “the granting of title to some resource is based on its relationship to something that is already owned.” Peter Lee, *The Accession Insight and Patent Infringement Remedies*, 110 MICH. L. REV. 175, 195 (2011). For this reason, every landowner has an exclusive common law right to kill or capture game on his or her own land, subject to state regulation. See, e.g., *McKee v. Gratz*, 260 U.S. 127 (1922); *Hanson v. Fergus Falls Nat’l Bank*, 65 N.W.2d 857 (Minn. 1954); see also *State v. Taylor*, 214 S.W.2d 34 (Mo. 1948) (stating that in private waters subject to state regulation, the owner of the soil beneath the waters retains the exclusive right to fish, hunt, or trap animals). “For Blackstone, there were two forms of occupancy entitling the occupant to acquisition of property; firstly, and with particular reference to game, the occupier of land would have title to animals on his land by virtue of the land (*ratione soli*) or by virtue of some privileged position or grant from a superior granting body (*ratione privilegii*); secondly, there was the occupancy of a first finder.” Peter Cook, *The “Prerogative Property” Basis of the English Game Law System*, in PROPERTY AND PROTECTION: LEGAL RIGHTS AND RESTRICTIONS 124–25 (Brian W. Harvey et al. eds., 2000) (emphasis added).

23. Although the characters in *Horton* are not human, per se, they are anthropomorphized to such a degree that their characters are clearly more akin to humans than animals. I will thus treat them, for purposes of this essay, as human. The distinction is important, as animals have always been viewed as chattels under the common law and, for the most part, still are, whereas humans have not been viewed as property in the United States since the abolition of slavery in the nineteenth century.

24. See, e.g., Niall McKeown, *Greek and Roman Slavery*, in THE ROUTLEDGE HISTORY OF SLAVERY 19 (Gad Heuman & Trevor Burnard eds., 2011).

25. See JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW § 15.04[A] (3rd ed. 2012) (“In the early feudal era, the lands of the nobility and gentry were cultivated by landless serfs under customary arrangements that differed little from slavery.”).

persisted into the early twentieth century.<sup>26</sup> And even in the United States, through the middle of the twentieth century owners of “company towns” exerted significant control over the lives of their worker-inhabitants and their families, even to the extent of depriving them of basic rights.<sup>27</sup> In all of these cases, dominion over property gave rise to significant rights over, if not outright ownership of, persons.

But control of human property did not arise solely in connection with the acquisition of territory. Sometimes it came with possession of things, such as vessels. Consider the case of *La Amistad*, the infamous Spanish slave ship whose imprisoned passengers mutinied off the coast of Cuba in 1839.<sup>28</sup> After seizing control of the vessel, the mutineers demanded that they be returned to Sierra Leone, their homeland. But the two Spanish officers who survived deceived the mutineers and piloted *La Amistad* north, eventually making landfall on Long Island. There, while reprovisioning, the mutineers were apprehended by the crew of a U.S. naval vessel, the *Washington*. The Africans were taken into custody and tried. The ensuing legal proceedings were long and complex, involving both charges of mutiny and an action by the Spaniards to reclaim their lost human “cargo.”<sup>29</sup> In addition, the crew of the *Washington* argued that *La Amistad* and the slaves should be treated under the international law of salvage and thereby awarded to the Americans. That is, under salvage law, recovery of an abandoned ship entitles the finder to its entire contents. While most shipwreck and salvage cases involved claims over gold bullion and silver plate, the most valuable contents of *La Amistad* were fifty-three living persons. Had the crew’s salvage claim been successful,<sup>30</sup> ownership of those persons would have followed ownership of the vessel, to which the American crew of the *Washington* laid claim.

Consider in this light the microscopic passengers on Horton’s speck of dust, which he describes as “my very small persons.” Does the elephant’s possessory intuition regarding the Whos flow from his hard-won possession of the speck that they inhabit?

26. See Gregory L. Freeze, *Reform and Counter Reform 1855–1890*, in *RUSSIA: A HISTORY* 199 (Gregory L. Freeze ed., 2009).

27. See *State v. Shack*, 277 A.2d 369 (N.J. 1971) (concluding that by the late twentieth century, an owner of a camp for migrant workers was not entitled to prevent visits by health care workers).

28. The slaves, captured somewhere in western Africa, had recently been transported to Cuba aboard a Portuguese vessel. They were then being transported on *La Amistad* from Havana to the port of Guanaja in central Cuba, where they would be sold to owners of the booming sugar plantations there. MARKUS REDIKER, *THE AMISTAD REBELLION: AN ATLANTIC ODYSSEY OF SLAVERY AND FREEDOM* 1–2 (2012); see also Roger S. Clark, *Steven Spielberg’s Amistad and Other Things I Have Thought About in the Past Forty Years: International (Criminal) Law, Conflict of Laws, Insurance and Slavery*, 30 *RUTGERS L.J.* 371, 383–400 (1999).

29. The African mutineers, represented in the Supreme Court by then-Congressman, and former President, John Quincy Adams, were ultimately exonerated. The Court, in an opinion written by Justice Story, held that the Africans had been kidnapped in violation of Spanish treaty obligations and were therefore not slaves. *United States v. Libellants & Claimants of the Schooner Amistad*, 40 U.S. 518 (1841); see also REDIKER, *supra* note 28, at 190.

30. See HOWARD JONES, *MUTINY ON THE AMISTAD: THE SAGA OF A SLAVE REVOLT AND ITS IMPACT ON AMERICAN ABOLITION, LAW, AND DIPLOMACY* 101–02 (1987) (describing details of the salvage claims); Clark, *supra* note 28, at 386 n.43 (noting that the salvage claim for the Africans failed, as they were held to no longer be slaves, but succeeded as to the ship and its other cargo).

*Dispossession and Repossession*

Theft, of course, is a risk faced by all owners of property; and both the common law and our own sensibilities favor an owner's recovery of wrongfully taken property. It is for this reason that Horton (and we) feel aggrieved when the Wickersham Brothers<sup>31</sup> seize the speck-bearing clover from Horton's trunk, and even more so when the black-bottomed eagle Vlad Vlad-i-koff carries it away.<sup>32</sup> Here, the reader, or the young listener, becomes complicit in Horton's ownership claim. Horton is no longer the subjugator of a once-autonomous people, but a victim of simple property theft. And again, the language of ownership, and dispossession, is manifest in the text: "They snatched *Horton's* clover! They carried it off" and Horton's ensuing plea to Vlad-i-koff, "Please don't harm all *my* little folks . . ."<sup>33</sup>

It is at this point in the narrative that the great transformation in *Horton* occurs. Vlad-i-koff drops the clover bearing Who-ville into a vast field of clover one hundred miles wide. He doesn't destroy it, he doesn't drown it or burn it, he simply makes it hard to find. And Horton vows to get it back.

"I'll find it!" cried Horton, "I'll find it or bust!

I SHALL find my friends on *my* small speck of dust!"<sup>34</sup>

Why, the reader asks, does Horton pick through three million clovers until he finds the one bearing "his" speck of dust? Is Horton simply lonely, wishing to be reunited with his small friends? If so, he does not express this sentiment. Is Horton motivated by a sense of altruism and concern for the well-being of the Whos? If so, then surely he could have left them safely among the clover, where they would have remained hidden from unfriendly monkeys, eagles, kangaroos, and whatever other jungle denizens wished them ill.

But Horton doesn't let them be. He doesn't allow the Whos to live safely in the camouflaged anonymity afforded by three million identical clovers. Instead he undertakes a Herculean effort to find and retrieve *his* clover, *his* speck, *his* people. Why? Because, of course, the speck *belongs* to Horton. It is *his* speck and he wants it back, no matter the consequences. Horton expresses the common refrain of property owners young and old, a sentiment that would be universally understood by even the

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31. These vaguely sinister monkeys appear to be named after President Herbert Hoover's Wickersham Commission, which was established in 1929 to investigate instances of "lawlessness in law enforcement," including illegal arrests, bribery, entrapment, witness coercion, abusive interrogations, evidence fabrication, wiretapping, and police brutality. *See* West, *supra* note 6, at 353–54. Seuss's use of the name is ironic, as in *Horton* it is the Wickersham Brothers who are the instruments of the kangaroo's corrupt state, rather than its prosecutors. It is also interesting to note that the Wickersham Commission recommended the continuation of Prohibition in the United States, a law that devastated young Theodor Geisel's immigrant family, which operated a brewery in Springfield, Massachusetts. *See id.*; *see also* PEASE, *supra* note 3, at 16.

32. As Professor Radin explains, the loss of a possession (such as a wedding ring) that is bound up with the owner's sense of personhood is typically viewed as non-compensable. Radin, *supra* note 17, at 159.

33. HORTON HEARS A WHO!, *supra* note 1 (emphasis added).

34. *Id.* (emphasis added).



smallest reader of *Horton*: it's mine, give it back! And, as we know, Horton does find his speck, and the Whos, once again.

*The Condemnation of Who-ville*

But then the trouble really begins, as Horton and the Whos come face to face with the authority of the state, represented by the sour kangaroo. Shortly after Horton's recovery of *his* speck from the hundred-mile clover patch, the kangaroo again dispatches the Wickershams. They forcibly restrain Horton, seize the speck, and prepare to boil it in Beezle-Nut oil. As such, the kangaroo wields the traditional "police" power of the state to divest its citizens of their property and to condemn that property to destruction to preserve public health, safety, and welfare.

The taking of property for a public purpose, or eminent domain, is among the oldest prerogatives of the state and is said to have its origins in Roman law.<sup>35</sup> The power of eminent domain has been recognized under U.S. law since the earliest days, and is exemplified by the Supreme Court's 1879 decision in *Bowditch v. Boston*, affirming the city's unqualified right to dynamite a private citizen's warehouse, destroying it and its contents, in order to stop the spread of fire.<sup>36</sup> Since *Bowditch*, the eminent domain power of the state has been expanded to permit the condemnation of private property for public purposes, broadly defined. These purposes encompass the elimination of urban blight,<sup>37</sup> the facilitation of economic development,<sup>38</sup> the de-concentration of land ownership,<sup>39</sup> and the containment of harmful agricultural pathogens.<sup>40</sup>

In the kangaroo's jungle state, the public interest at stake is preservation of the peace. As she explains,

For almost two days you've run wild and insisted  
On chatting with persons who've never existed.  
Such carryings-on in our peaceable jungle!  
We've had quite enough of your bellowing bungle!<sup>41</sup>

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35. See generally JESSE DUKEMINIER ET AL., PROPERTY 1061–62 (7th ed. 2010) (discussing the origins of the state's eminent domain power).

36. 101 U.S. 16 (1879) (holding that no compensation was due to the plaintiff on account of the city's destruction of his warehouse when effected to address a fire emergency).

37. *Berman v. Parker*, 348 U.S. 26, 33 (1954) (justifying the demolition of a non-blighted block in an otherwise run-down area of Washington, D.C. on the theory that "[i]f [Congress] decides that the Nation's Capital shall be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way").

38. *Kelo v. City of New London*, 545 U.S. 469 (2005) (authorizing the condemnation of fifteen private residences under a city redevelopment plan that would have transferred the condemned property to Pfizer).

39. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (upholding the constitutionality of the Hawaii Land Reform Act of 1967, which allowed renters to acquire fee simple ownership of their rental property in order to break up the "oligopsonistic" character of Hawaiian land ownership).

40. *Miller v. Schoene*, 276 U.S. 272 (1928) (upholding a Virginia statute requiring the destruction, without compensation, of cedar trees infected by a plant disease to prevent its communication to Virginia's commercially valuable apple trees).

41. *HORTON HEARS A WHO!*, *supra* note 1.

In the kangaroo's view, Horton suffers from a delusion that sentient beings exist on a speck of dust. This eccentric behavior has, not surprisingly, created a stir within the jungle community, and she seeks to restore order by eliminating the source of Horton's delusion. Thus, while the kangaroo is often depicted as a villain eager to inflict grievous harm on Who-ville, in actuality she acts with two legitimate governmental purposes: (1) curing a diagnosed mental delusion in one of its citizens (Horton) and (2) restoring order to the community.<sup>42</sup> While Who-ville will be annihilated if her plan is carried out, she is, at the time, unaware that Who-ville actually exists (and, truth be told, acting pretty rationally in her disbelief of Horton's claim).

So the speck is seized and condemned by the state, this time slated for permanent destruction. Who-ville may thus join Detroit's Poletown,<sup>43</sup> Washington, D.C.'s "Area B,"<sup>44</sup> the block containing Suzy Kelo's house in New London, Connecticut,<sup>45</sup> and a long list of other neighborhoods that have fallen to state-sanctioned wrecking balls in the name of urban renewal, economic development, and other public purposes.<sup>46</sup>

#### *Recovery and Protection(ism)*

But, of course, *Horton* does not end tragically. The Whos manage to overcome their collective action problem<sup>47</sup> and make enough noise to be heard by the kangaroo and her minions, who then willingly abandon their plan of destruction. They do so because they receive faint but audible confirmation of the Whos' existence, and thus

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42. At this point in the narrative Dr. Seuss *does* appear to depict the kangaroo as a villain, both in her visual rendition and in the narrative. *See id.*

43. *See Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (condemning a neighborhood to make room for a General Motors plant).

44. *See Berman v. Parker*, 348 U.S. 26 (1954); *see also* Amy Lavine, *Urban Renewal and the Story of Berman v. Parker*, 42 URB. LAW. 423 (2010).

45. *See Kelo v. City of New London*, 545 U.S. 469 (2005).

46. Of course, under the Fifth Amendment of the U.S. Constitution, most takings of private property must be compensated. *See* Ann K. Wooster, Annotation, *What Constitutes Taking of Property Requiring Compensation Under Takings Clause of Fifth Amendment to United States Constitution—Supreme Court Cases*, 10 A.L.R. FED. 2d 231 (2014).

47. The classic collective action problem was described by economist and social scientist Mancur Olson in 1965:

If the members of a large group rationally seek to maximize their personal welfare, they will *not* act to advance their common or group objectives unless there is coercion to force them to do so, or unless some separate incentive, distinct from the achievement of the common or group interest, is offered to members of the group individually on the condition that they help bear the costs or burdens involved in the achievement of the group objectives. . . . These points hold true even when there is unanimous agreement in a group about the common good and the methods of achieving it.

MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 2 (2d ed. 1971). In effect, Olson's insight is that individuals will not act to achieve a common goal unless they have *individual* incentives to do so, the achievement of the *common* good being insufficient to motivate their action. This problem confronts the Mayor of Who-ville as he attempts to persuade young Jo-Jo to add his voice to the accumulated clamor and commotion generated by the rest of the citizens of Who-ville.

Horton's sanity. It is no longer necessary to eliminate Horton's speck to preserve the peace.

But *Horton's* denouement surprises the reader yet again. At this point, with the Whos recognized as real and not mere figments of Horton's imagination, the kangaroo might simply have returned the speck to Horton, or better yet released it back into the wild. But instead, the kangaroo issues a perplexing edict:

And, from now on, you know what I'm planning to do?...

From now on, I'm going to *protect them* with you!<sup>48</sup>

She declares that she will "protect" the speck and its inhabitants, dedicating the authority of the state to the security of the small and helpless Whos. It is not enough to leave the Whos alone, to let them lead an autonomous and unmolested existence in Who-ville. No. Presumably because of their small size and vulnerable nature, the Whos warrant the continued protection and oversight of the state. They are thus reduced to the status of wards, rather than fully autonomous citizens.

This move, too, has historical antecedents. One sees it most tellingly in the American treatment of native peoples, with the policy first announced by Chief Justice John Marshall in the landmark 1823 case *Johnson v. McIntosh*.<sup>49</sup> In *Johnson*, Marshall declines to recognize native title in the lands of North America, favoring instead the title claimed by European explorers three centuries earlier on behalf of England, Spain, and other Christian powers. He justifies this apparent seizure of property in part on the basis of the "character and habits" of the native inhabitants, whom he calls "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest."<sup>50</sup> People such as this, he reasons, have no business owning or disposing of valuable territory that could be put to more productive use by settlers of European descent.

Once divesting them of their title to the land, Marshall makes another notable move regarding the Native Americans. Rather than treating them as ordinary citizens of the young republic, he relegates them to a diminished status, like wards of the state. "[T]he Indian inhabitants are to be considered merely as occupants, to be *protected*, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others."<sup>51</sup> This view of the Native Americans as incompetent and in need of protection gave rise to the so-called "trust doctrine" in federal Indian law, under which tribal lands are held by the state in trust for the native occupants.<sup>52</sup> As confirmed by the Court more than sixty years after *Johnson*, "[t]hese Indian tribes are wards of the nation. . . . From their very weakness

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48. *HORTON HEARS A WHO!*, *supra* note 1 (emphasis added).

49. 21 U.S. (8 Wheat.) 543 (1823).

50. *Id.* at 589–90.

51. *Id.* at 591 (emphasis added).

52. See BLAKE A. WATSON, *BUYING AMERICA FROM THE INDIANS: JOHNSON V. MCINTOSH AND THE HISTORY OF NATIVE LAND RIGHTS* 334–36 (2012).

and helplessness . . . there arises the duty of protection.”<sup>53</sup> And, as a necessary corollary to the state’s obligation to protect, comes the ward’s duty to obey, as a child or other incompetent must comply with the decisions of his or her guardians. To this end, the Court observes in 1917 that with respect to the Native Americans, the “wish of the ward [must] yield to the will of the guardian.”<sup>54</sup>

It has been noted by innumerable commentators that the U.S. government’s treatment of the country’s native inhabitants was shameful, notwithstanding efforts to couch its actions in the rhetoric of legal process. Few have observed this trend with greater alacrity than the young French nobleman Alexis de Tocqueville, who visited the United States from 1831 to 1832 and published his observations in the seminal work *Democracy in America*. Just a few years after Marshall’s opinion in *Johnson*, de Tocqueville writes:

The Spaniards were unable to exterminate the Indian race by those unparalleled atrocities which brand them with indelible shame, nor did they even succeed in wholly depriving it of its rights; but the Americans of the United States have accomplished this twofold purpose with singular felicity; tranquilly, legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world. It is impossible to destroy men with more respect for the laws of humanity.<sup>55</sup>

So, despite the seemingly happy ending of *Horton*, one must consider the implications for Who-ville of the state’s “protective” stance. As the U.S. government’s treatment of its native peoples suggests, dominant societies have not always done well when extending their protection to servient ones. The rhetoric of “protection” has, in fact, been used throughout history to justify a wide range of oppressive governmental regimes. And while there is no indication that the kangaroo’s jungle regime will treat Who-ville with anything other than kindness,<sup>56</sup> the same regime clearly demonstrated its willingness to resort to brutal strong-arm tactics only a few pages earlier. Thus, the Whos might wish to carefully consider their newfound protectors.

### *Deconstructing Horton*

There is an old adage that observes, “If all you have is a hammer, everything looks like a nail.”<sup>57</sup> I teach property law, and I readily admit to seeing (imagining?)

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53. *United States v. Kagama*, 118 U.S. 375, 383–84 (1886).

54. *United States v. Rowell*, 23 U.S. 464, 468 (1917), *quoted in* WATSON, *supra* note 52, at 336.

55. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 353 (Henry Reeve trans., 3d Am. ed. 1898).

56. It is a tribute to Seuss’s artistry that his graphical depictions of the kangaroo, monkeys, and other jungle denizens is so radically transformed over the course of a few pages: from depraved and sinister glee as they prepare the pot of boiling oil, to childlike wonderment as they hear the cry of the Whos, to regal magnanimity as the kangaroo and her joey extend a protective umbrella over Horton’s speck of dust. *See HORTON HEARS A WHO!*, *supra* note 1.

57. This adage has been called “Baruch’s Observation,” after Bernard Baruch, who may or may not have originated it. ARTHUR BLOCH, *THE COMPLETE MURPHY’S LAW: A DEFINITIVE COLLECTION* (1991).

traces of property law in places where others might not.<sup>58</sup> My goal in this essay is not to argue that the property-based concepts described above are explicit messages intended by the author to be read into *Horton*. Nor am I suggesting that Theodor Geisel intended *Horton* to be a pro-property, pro-government, or, Heaven forbid, a pro-slavery tract. Of course not. One must not lose sight of the fact that *Horton* is a parable of equality and otherness, and its longstanding reputation as such is well deserved.<sup>59</sup> What I do contend, however, is that *Horton* offers valuable insights into mid-twentieth-century attitudes about ownership, autonomy, and the state; attitudes that stem, in large part, from prevailing legal rules governing property.

Horton the elephant does not think of the Whos as his own because he is greedy, because he wishes to exert his will over them, or because he has delusions of grandeur. Those who read Horton as being motivated by altruism, friendship, and even love are not without solid grounding in the text. However, the notions of ownership outlined in this essay are also present, albeit below the surface. They are present, I believe, because notions of private property and the value of ownership are deeply ingrained in the social fabric of the United States. They have long been viewed as an integral part of the American legal framework,<sup>60</sup> and as fundamental characteristics of an American society that was vastly superior, morally and economically, to the collectivist ideology of Bolshevik Russia and Maoist China.<sup>61</sup> Theodor Geisel, the son of German immigrants and business owners, undoubtedly shared this American respect for private property, and it is not surprising that this sentiment found its way into works such as *Horton*.<sup>62</sup> And while the salvage claim made in the *La Amistad* case would be unthinkable today, how far removed are Horton's assumptions regarding the Whos from those of the owners of company towns that flourished in mid-twentieth-century America?

Likewise, the idea of a protective, paternalistic state could not have been far from the minds of many Americans, least of all Geisel's, in the decade after World War II. Post-war America was steeped in patriotism, and the image of the (American) state as a protector of liberty and freedom was prevalent throughout the nation. It should

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58. Cf. Eric R. Claeys, *On Cowbells in Rock Anthems (and Property in IP): A Review of Justifying Intellectual Property*, 49 SAN DIEGO L. REV. 1033, 1033–34 (2012) (“When he heard (Don’t Fear) The Reaper, Bruce Dickinson had to have more cowbell; when I read IP scholarship, I gotta have more property.”).

59. See *supra* note 6.

60. See, e.g., Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467 (1976) (describing the predominance of property-based concepts on the thinking of Thomas Jefferson); William H. Taft, *The Right of Private Property*, 3 MICH. L.J. 215, 215 (1894) (“As far back as we can go in the history of the common law of England, the right of property of the freeman was theoretically inviolate.”).

61. See, e.g., Richard Pipes, *Human Nature and the Fall of Communism*, 49 AM. ACAD. ARTS & SCI. BULL. 38, 38 (1996) (arguing that the abolition of private property was a primary cause of the decline of the Soviet Union); Taft, *supra* note 60, at 218 (characterizing laws guaranteeing private property as buttresses against the “attacks of anarchy, socialism and communism”).

62. Geisel's family owned a prosperous brewing company in Springfield, Illinois during most of his childhood. The family's business was ruined by the passage of the Eighteenth Amendment and the introduction of Prohibition in 1919, when Geisel was fifteen. PEASE, *supra* note 3, at 16.

not be forgotten that Geisel conceived *Horton* during a 1950 trip to Japan, a devastated country that was still under occupation by U.S. and other Allied forces.<sup>63</sup> Geisel acknowledged the influence of his observations in Japan on themes appearing in *Horton*, notably the book's validation of individuality and self-worth (attributes that he found lacking among the post-war Japanese).<sup>64</sup> It would not be surprising, therefore, if other, less superficial manifestations of Geisel's Japanese visit found their way into *Horton*. For example, the need (or obligation) for powerful states to protect lesser, subjugated states, is sensitively depicted by the joey's extension of a small umbrella to shield Who-ville from the elements.<sup>65</sup>

The image of the state as a benevolent protector of its wards still bore currency in the era of *Horton*, though that rosy image would soon disappear amidst the civil unrest of the 1960s and the environmental crises of the 1970s. Geisel's later works, most notably *The Sneetches* (1961),<sup>66</sup> do not present a favorable impression of the state or societal governance mechanisms. These are instead represented as corrupt and ineffective in combating social ills such as inequality and discrimination. Thus, in *Yertle the Turtle* (1958), Seuss depicts an autocratic turtle king whose power rests, literally, on the backs of his subjects.<sup>67</sup> Finally, in *The Lorax* (1971), Seuss paints a dark picture of a society dominated by corporate greed and a rapacious thirst for resources.<sup>68</sup> In the depressing world of the Lorax, there is little sense that property ownership represents a social good, or that any but soulless despoilers seek to exercise their rights over the land and its hapless inhabitants.

But *Horton*, written in the less pessimistic post-war years, does not yet condemn capitalism and private ownership, and the signs of Geisel's early favorable disposition toward property ownership, property rules, and state protection emerge in the narrative. *Horton* thus offers a view, unsettling and surprising at times, but perhaps understandable, of how thoroughly property-based sensibilities permeated the thinking of mid-twentieth-century America.

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63. *See id.* at 92–93.

64. *Id.* at 93.

65. *But see* Timothy E. Cook, *Another Perspective on Political Authority in Children's Literature: The Fallible Leader in L. Frank Baum and Dr. Seuss*, 36 W. POL. Q. 326, 331–32 (1983) (reading *Horton* as portraying a general American "ethic of individual coping, self-reliance and responsibility for one's own destiny[,] particularly as exemplified by the salvation of Who-ville through the efforts of "the Smallest of All").

66. *The Sneetches*, *supra* note 8.

67. DR. SEUSS, *Yertle the Turtle*, in *YERTLE THE TURTLE AND OTHER STORIES* (1958). King Yertle is commonly viewed as an allegory of Hitler's autocratic state. *See* PEASE, *supra* note 3, at 118.

68. DR. SEUSS, *THE LORAX* (1971).