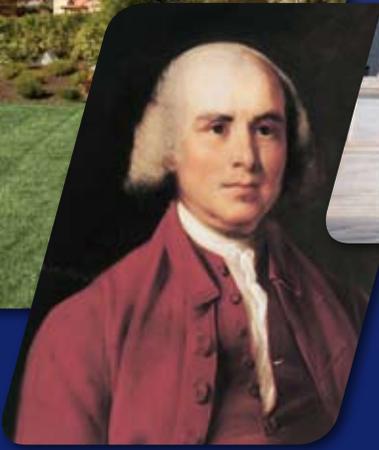
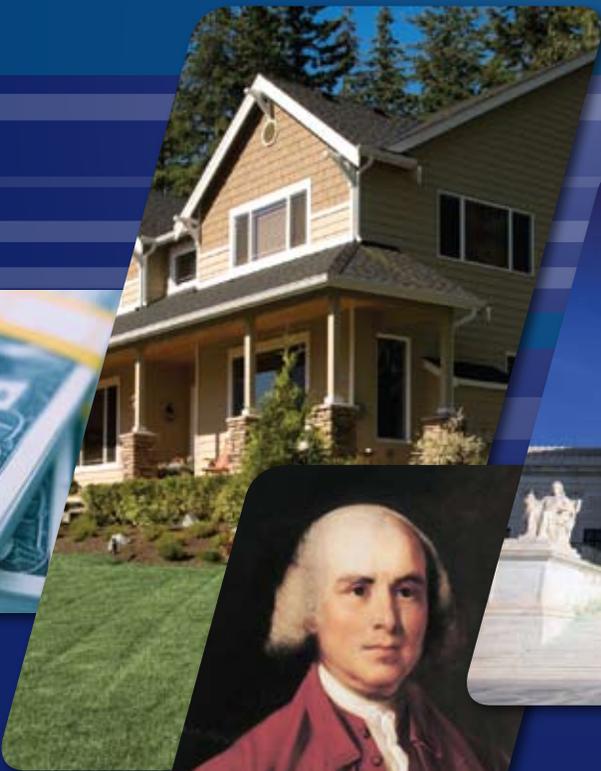


# PROPERTY RIGHTS

## IN AMERICA



yours, mine,  
or ours?

# PROPERTY RIGHTS IN AMERICA

yours, mine,  
or ours?



A program of the Bill of Rights Institute

200 North Glebe Road, Suite 200

Arlington, Virginia 22203

*[www.BillofRightsInstitute.org](http://www.BillofRightsInstitute.org)*

Founded in 1999, the Bill of Rights Institute pursues its mission to educate students and teachers about our country's Founding principles through classroom materials and programs that teach the words and ideas of the Founders; the liberties and freedoms guaranteed in our Founding documents; and how America's Founding principles affect and shape a free society. The Bill of Rights Institute is an educational nonprofit organization, classified by the Internal Revenue Service as a 501 (c)(3) organization, a public charity supported by 3,000 individual, corporate, and foundation donors.

**Instructional Design**

Veronica Burchard

**Editors**

Veronica Burchard

Claire McCaffery Griffin

**Copyeditor**

Catherine Wigginton Greene

**Design and Production**

Carolyn McKinney

*Perceptions Studio*

Amherst, New Hampshire

**Academic Advisors**

Ilya Somin

*George Mason University School of Law*

Dr. Richard Stroup

*Montana State University*

**Field Testing Teacher**

Eugene Woehr

*Dobbins High School*

Southampton, Pennsylvania

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Students will:

- Examine Aristotle’s maxim about “that which is common to the greatest number.”
- Examine excerpts from Garrett Hardin’s essay “The Tragedy of the Commons.”
- Analyze scenarios in which the “Tragedy” may apply.
- Evaluate the importance of private property in a free and prosperous society.

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### Property, the Bill of Rights, and the Supreme Court

The Founders were extremely concerned with protecting private property as a cornerstone of a free society. Throughout American history, the Supreme Court has heard numerous cases involving government’s power to take property for public use.

#### Objectives

Students will:

- Examine foundations of private property protections.
- Understand the Fifth Amendment’s protection of private property.
- Understand the facts of major U.S. Supreme Court cases involving property rights.
- Analyze James Madison’s *Property* and Samuel Adams’s *The Rights of the Colonists*.
- Evaluate Supreme Court rulings in *United States v. Causby* (1946); *Nollan v. California Coastal Commission* (1987); and *Kelo v. New London* (2005).

## LESSON THREE—PAGE 23

### Intellectual Property

The Internet is an extraordinary means of delivering and accessing information, and has also brought unprecedented challenges to intellectual property. What are the consequences for individuals and for society if books, songs, and videos are made available for free on the Web?

#### Objectives

Students will:

- Understand the meaning of intellectual property.
- Understand how the Constitution empowers Congress to protect the intellectual property of citizens.
- Analyze scenarios in which intellectual property protections may apply.
- Evaluate current challenges to intellectual property including file sharing; the *Harry Potter Lexicon* copyright case; and Web sites such as Turnitin.com.

# ACKNOWLEDGEMENTS

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# PREFACE

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The Founders believed in property rights as the foundation of all other personal rights. James Madison wrote in *Property* (1792), “[A]s a man is said to have a right to his property, he may be equally said to have a property in his rights.”

Asserting that “conscience is the most sacred property,” Madison’s words reflected the Founders’ view that one’s thoughts, religious beliefs, opinions—and the free communication of them—represented the essence of property. Property rights encompassed not only the right to physical possessions, but a more complete right of self-ownership. This meant that an individual has the right to integrity in his views, his body, his choice of occupation, as well as his belongings. Governments which did not respect one kind of property rights would inevitably trample on all the others: “Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions.”

Samuel Adams had written earlier in the *Rights of the Colonists* (1772), “Now what liberty can there be where property is taken away without consent?” He meant that people are not free when their property is not safe—from arbitrary seizure by government or from thieves where governments do not enforce property rights against bandits.

On the other hand, where people are secure in the knowledge that what they work to obtain and grow is theirs—it cannot justly be taken away from them arbitrarily—they are free to go about their lives, providing for themselves, their family, and their posterity.

This booklet provides you with a week of lesson plans to impart to students the ways property rights animate a free society. In Lesson One, students explore the implications of the “tragedy of the commons” and Aristotle’s maxim “that which is common to the greatest number has the least care bestowed upon it.” Lesson Two presents students with the Founders’ views on property and landmark Supreme Court Fifth Amendment cases up to the 21<sup>st</sup> century. Contemporary applications of intellectual property are analyzed in Lesson Three, including a *Harry Potter* copyright infringement case, plagiarism-deterrence Web sites such as Turnitin.com, and video exchange Web sites such as KaZaA. In all three lessons, students will understand the relevance of property rights to their own lives.

It is our hope at the Bill of Rights Institute that these resources will help your students understand some of the rights that they perhaps take most for granted, but which form the foundation of so many other rights Americans enjoy and which are vital to liberty.



Victoria Hughes  
President

# LESSON ONE

## Why Do Property Rights Matter?

### CRITICAL ENGAGEMENT QUESTION

What is the “tragedy of the commons”?

### OVERVIEW

The “tragedy of the commons” is a phenomenon that Ancient Greek philosophers analyzed, the first British colonists in America experienced, and that students will confront in their own lives.

### OBJECTIVES

Students will:

- Examine Aristotle’s maxim about “that which is common to the greatest number.”
- Examine excerpts from Garrett Hardin’s essay “The Tragedy of the Commons.”
- Analyze scenarios in which the “tragedy” may apply.
- Evaluate the importance of private property in a free and prosperous society.

*All men are created equally free and independent, and have certain inherent rights, of which they cannot, by any compact, deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing the obtaining of happiness and safety.*

—GEORGE MASON, 1776

*Our forebears believed that a commercial society would instruct all its members in hard work, regularity, and innovation ... [and] encourage an honest, responsible, self-denying and future-oriented citizenry.*

—MICHAEL NOVAK, 2008

# Why Do Property Rights Matter?

## LESSON PLAN

### MATERIALS

- Transparency Master A: Property Riddles
- Handout B: Focus Quotations
- Handout C: The 21st Century Tragedy of the Commons

### STANDARDS

NCEE: Standards 1, 3, and 4

NCSS: Strand 7

### TIME

One 50-minute high school class

### WARM-UP

[20 minutes]

- Put up an overhead of **Transparency Master A: Property Riddles**, concealing all but the description of Situation A. Ask a student to read the situation aloud, and ask students to brainstorm reasons for Annie and Jamie's different electricity usages.
- Once a few suggestions have been offered, reveal the clue and ask for more reasons based on this new information.
- Reveal the solution and ask the class for their response. Make sure students understand the definition of "incentive": a motivating factor.
- Repeat for Situations B and C.
- Debrief the class and ask what they can find in common among the three Property Riddles. As a large group, compose a one- or two-sentence lesson that can be learned from the three scenarios and write it on the board. For example:
  - When you have no reason to use less of something, you'll use more.
  - When there are no rules about owning something, no one takes responsibility for it.
  - That which is free will be freely used.

### ACTIVITY

[20 minutes]



- Distribute **Handout B: Focus Quotations**. A version of this handout with shorter quotes is available at [www.BillofRightsInstitute.org/property/quotes](http://www.BillofRightsInstitute.org/property/quotes).
- Have students work in pairs to complete the Handout, and then reconvene the class to share paraphrases and responses. See the Answer Key for suggested responses.
- Ask the class: What is "tragic" about the "tragedy of the commons"? What do these quotations assume about human nature? Do you agree that people generally tend to act in their own self-interest?
- Explain that private property is one solution to the "tragedy of the commons." Others include systems where property is allocated by a dictator, or by central planners. What are the advantages and disadvantages of each?

**WRAP-UP**

[10 minutes]

The pasture metaphor might seem irrelevant—particularly if students live in an urban or suburban environment. Ask them to come up with similar metaphors that make a similar point as the common pasture metaphor. In addition to responses students generate, or to facilitate discussion, you may suggest:

- A dormitory refrigerator that is shared by the entire dorm floor, with no one responsible for cleaning it.
- An apple orchard from which everyone is free to pick apples.
- A common closet where everyone is free to pick out the designer clothes they want to wear that day.

**HOMEWORK**

Have students complete **Handout C: The Twenty-First Century Tragedy of the Commons**.



**EXTENSIONS**

- A. Have students read the diary of William Bradford (1623) in which he describes the colonists' experiences with communal farming. What happened when communalism was replaced with private property, and each family was given its own land? What can the colonists' experiences teach us about the importance of private property? The diary can be found at: [www.BillofRightsInstitute.org/property/diary](http://www.BillofRightsInstitute.org/property/diary).
- B. Once students understand the “tragedy of the commons,” have them learn more about another economic problem, the “anticommons.” In the anticommons, a term coined by economist Michael Heller, *too many* property rights holders (instead of the lack of rights-holders) results in less innovation, because too many individuals or institutions have “veto-power” over the use of a resource. How might the anticommons apply to these real world examples? What solutions to the anticommons can students imagine?
  - Technology utilizing several thousand different pieces of patented hardware
  - Older films and television shows which include copyrighted music for which DVD rights were never negotiated
  - Medical breakthroughs that promise to cure disease, but which utilize many different patented medicines combined

Students can begin their research by reading “Can Patents Deter Innovation?” at: [www.sciencemag.org/cgi/content/full/280/5364/698](http://www.sciencemag.org/cgi/content/full/280/5364/698).



## PROPERTY RIDDLES

**A** Annie and Jamie were freshmen in college. They each moved into similar two-bedroom apartments. The apartments were similarly situated, in the same part of town. They were both on the ground floor and had the same square footage. After the first year, Jamie had used twice as much electricity and twice as much water as Annie. Why?

*Clue:* Jamie's monthly rent included all her utilities, including electricity and water.

*Solution:* With no incentive to conserve electricity and water, Jamie used more.

**B** The nests of the swiftlets of Borneo are sought after as delicacies. The birds build their nests in caves, and can rebuild any nests that are taken within a few days, as long as some nests remain for them to live in.

Many more of these birds live in Country A and Country B. Country A was able to supply a lot of the nests to restaurants at first, but then suddenly the supply of nests dropped off. In Country B, a steady supply of the nests can always be found. The environments of the two countries are the same, and they have about an equal number of caves. Why did the supply drop off in Country A?

*Clue:* Country A does not protect private property. Anyone can go into the caves where the birds nest. When they do, they must take as many nests as they can, before everyone else does. Soon, all the nests are gone and so are the birds.

*Solution:* Since Country B allows people to own the caves in which the birds nest, those people have an incentive to sustain the birds' habitat for the future.

**C** Luke and Pablo are both in high school. Their schools are the same size, and have the same technology budgets. Both Pablo and Luke turn in their English essays on disc instead of hard copy. In Luke's class, all the discs are scratched. In Pablo's class, however, the discs are rarely scratched.

*Clue:* In Luke's class, everyone takes a disc out of a storage box when they are ready to save their essays, and then the teacher returns them to the bin once she has saved their essays. In Pablo's class, each student is given one disc to use throughout the year. If it gets scratched, the student must replace the disc.

*Solution:* Students in Luke's class don't take as much care with their discs, because they know if they scratch one, they can just go get another one. Students in Pablo's class have an incentive to take care of their own discs, because they have to replace them if they get scratched.

# FOCUS QUOTATIONS



**Directions:** Read the first quotation and put it in your own words. Then select one of the quotations that follow, and explain how it builds on the first quotation.

The tragedy of the commons develops in this way. Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons.... The only sensible course for him to pursue is to add another animal to his herd. And another; and another.... But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy.

—Garrett Hardin

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For that which is common to the greatest number has the least care bestowed upon it. Every one thinks chiefly of his own, hardly at all of the common interest; and only when he is himself concerned as an individual. For besides other considerations, everybody is more inclined to neglect the duty which he expects another to fulfill.

—Aristotle

If land is not owned by anybody ... it is utilized without any regard to the disadvantages resulting. Those who are in a position to [take for] themselves the returns—lumber and game of the forests, fish of the water areas, and mineral deposits of the subsoil—do not bother about the later effects of their mode of exploitation. ...They cut down the trees without any regard for fresh shoots or reforestation. In hunting and fishing they do not shrink from methods preventing the repopulation of the hunting and fishing grounds.

—Ludwig von Mises

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# THE 21<sup>st</sup> CENTURY TRAGEDY OF THE COMMONS

**Directions:** *Now that you've learned about the ways ancient and modern philosophers have theorized about the "tragedy of the commons," write a metaphor that would make sense to people today. In the space below, illustrate your metaphor with a drawing(s) or photograph(s).*

**TITLE:** \_\_\_\_\_

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A large, empty rounded rectangle with a thin black border, intended for a student to draw or paste a photograph illustrating their metaphor.

# LESSON TWO

## Property, the Bill of Rights, and the Supreme Court

### CRITICAL ENGAGEMENT QUESTION

How does the  
Constitution protect  
property?

### OVERVIEW

The Founders were extremely concerned with protecting private property as a cornerstone of a free society. Throughout American history, the Supreme Court has heard numerous cases involving government's power to take property for public use.

### OBJECTIVES

Students will:

- Examine foundations of private property protections.
- Understand the Fifth Amendment's protection of private property.
- Understand the facts of major US Supreme Court cases involving property rights.
- Analyze James Madison's *Property* and Samuel Adams's *The Rights of the Colonists*.
- Evaluate Supreme Court rulings in *United States v. Causby* (1946); *Nollan v. California Coastal Commission* (1987); and *Kelo v. New London* (2005).

*As a man is said to have a right to his property, he may equally be said to have a property in his rights.*

—JAMES MADISON, 1792

*Ultimately property rights and personal rights are the same thing.*

—CALVIN COOLIDGE, 1914

## LESSON PLAN

### MATERIALS

- **Handout A:** English Origins of Property Protections
- **Handout B:** Samuel Adams, James Madison, and Property
- **Handout C:** The Bill of Rights and Property
- **Handout D:** The Takings Clause Up Close
- **Handout E:** Property and the Supreme Court
- **Transparency Master F:** Updates

### STANDARDS

NCHS: Era 3, Standard 3; Era 10, Standard 2  
 CCE: IA3, IB4, IC2, IIA1, IIB1, VB1, VB3  
 NCSS: Strands 2, 5, 6, and 10

### TIME

Two 50-minute high school classes

### WARM-UP, DAY ONE

[5 minutes]

Write the word “property” on the board and ask students how they would define the term. Write key terms and ideas on the board. Then ask students to brainstorm examples of property, continuing to record responses on the board.

### ACTIVITY I

[25 minutes]

- Distribute **Handout A: English Origins of Property Protections**. Using an overhead, read the excerpts from the *Magna Carta* and discuss the questions that follow. Do the same for the Blackstone and Locke documents. See the Answer Key for suggested responses.
- Explain in a mini-lecture that when the British colonists came to America, they brought with them a strong tradition of respect for property rights. Colonial governments enshrined protections for property and against arbitrary taxation in the Massachusetts Body of Liberties, the Fundamental Orders of Connecticut, and other documents. Property rights were one foundation of the colonists’ rallying-cry “No taxation without representation.” James Otis objected to the British officers’ use of general search warrants, declaring, “A man’s home is his castle, and whilst he is quiet, he is as well guarded as a prince in his castle.” When the colonies declared independence from England, they charged the King with taxing them without their consent, seizing their ships, and denying them due process in Admiralty Courts.

Students will now explore the writings of two important Founders, Samuel Adams and James Madison, on property rights. Their views were complex and varied, but Adams, Madison, and indeed all the Founders agreed that property rights were fundamental to liberty.

- Distribute **Handout B: Samuel Adams, James Madison, and Property**, and divide the class into groups of four. Have two students in each group read the excerpts from Adams’s *The Rights of the Colonists* and two read the excerpts from Madison’s *Property*.
- After they read, students should brief their group members on how each author used the word “property.”
- Reconvene the class and go over the questions on **Handout B**. See the Answer Key for suggested responses. Which definition(s) of property do students find most useful?

### WRAP-UP

[20 minutes]

- Distribute **Handout C: The Bill of Rights and Property**, reminding students that Madison was the chief author of the Bill of Rights. Have students return to working in their groups to complete the Handout.
- After students have finished, assign each group to represent either “physical property” (e.g. material goods) or “the most sacred property” (e.g. conscience). Using an overhead of **Handout C**, read aloud the Bill of Rights. Have students stand up whenever they believe their “type” of property is being protected. See the Answer Key for suggested responses.





# ENGLISH ORIGINS OF PROPERTY PROTECTIONS



**Directions:** Read the following excerpts from legal and philosophical sources, and answer the questions that follow each excerpt.

## ***Magna Carta (1215)***

12. No scutage [tax] or aid shall be imposed on our kingdom, unless by common counsel of our kingdom.

27. If any freeman shall die intestate (without a will), his chattels shall be distributed by the hands of his nearest kinsfolk and friends, under supervision of the Church, saving to every one the debts which the deceased owed to him.

30. No sheriff or bailiff of ours (the King), or other person, shall take the horses or carts of any freeman for transport duty, against the will of the said freeman.

31. Neither [the King nor his] bailiffs shall take, for our castles or for any other work of ours, wood which is not ours, against the will of the owner of that wood.

55. All fines made with us unjustly and against the law of the land ... shall be entirely remitted (set aside) ...

- ▶ What kinds of property protections do you see in the *Magna Carta* excerpts?

## **William Blackstone, *Commentaries 1:137-38 (1765)***

...Neither his majesty, nor his privy council, have any jurisdiction, power, or authority by English bill, petition, articles ... or by any other arbitrary way whatsoever, to examine, or draw into question, determine or dispose of the lands or goods of any subjects of this kingdom; but that the same ought to be tried and determined in the ordinary courts of justice, and by course of law.

- ▶ In his explanation of English common law, what power does Blackstone say the King does NOT have over his subjects' property?
- ▶ Who or what does Blackstone say may have power over the "lands or goods" of subjects?

## **John Locke, *Second Treatise of Civil Government (1689)***

[People are] willing to join in society with others ... for the mutual preservation of their lives, liberties and estates, which I call by the general name, property. The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property.

- ▶ Why does philosopher John Locke say that people choose to unite into societies?
- ▶ What does Locke say is the most important reason people need government?



# SAMUEL ADAMS, JAMES MADISON, AND PROPERTY

**Directions:** Read the following excerpts and answer the questions that follow.

## Excerpts from *The Rights of the Colonists* (1772), by Samuel Adams

Among the natural rights of the Colonists are these: First, a right to life; Secondly, to liberty; Thirdly, to property; together with the right to support and defend them in the best manner they can....

The Legislative has no right to absolute, arbitrary power over the lives and fortunes of the people; nor can mortals assume a prerogative not only too high for men, but for angels, and therefore reserved for the exercise of the Deity alone.

There should be one rule of justice for rich and poor, for the favorite at court, and the countryman at the plough....

The supreme power cannot justly take from any man any part of his property, without his consent in person or by his representative.

These are some of the first principles of natural law and justice.... Now what liberty can there be where property is taken away without consent?

- ▶ What do you believe Samuel Adams means by “property”?
- ▶ What role does Adams argue the government should have with respect to “property”?

## Excerpts from *Property* (1792), by James Madison

This term [property] ... means “that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.”

In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage.*

In the former sense, a man’s land, or merchandise, or money is called his property.

In the latter sense, a man has a property in his opinions and the free communication of them.

He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.

He has a property very dear to him in the safety and liberty of his person.

He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.

In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights....

Conscience is the most sacred of all property....

- ▶ What do you believe James Madison means by “property”?
- ▶ Circle each kind of property Madison refers to. Are these what you normally think of as “property”? Explain.

# THE BILL OF RIGHTS AND PROPERTY



**Directions:** *Read over the Bill of Rights and underline words and phrases that secure protections for physical property. Then circle words and phrases that secure protections for the other kinds of property Madison mentions.*

## AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

## AMENDMENT II

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

## AMENDMENT III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

## AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty,

or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## AMENDMENT VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

## AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

## AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.



# THE TAKINGS CLAUSE UP CLOSE

**Directions:** *Read the following excerpt from the Fifth Amendment. With your group members, come to a consensus about how best to define the terms below. Then, in the space below, brainstorm facilities or purposes that could be considered “public use.”*

***“No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”***

1. Definition of “due process of law”: \_\_\_\_\_  
\_\_\_\_\_
  
2. Definition of “taken”: \_\_\_\_\_  
\_\_\_\_\_
  
3. Definition of “public use”: \_\_\_\_\_  
\_\_\_\_\_
  
4. Definition of “just compensation”: \_\_\_\_\_  
\_\_\_\_\_
  
5. Examples of things that could be considered “public use”: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

# PROPERTY AND THE SUPREME COURT



## scenario one

1. **My name is Bob Dale**, and I work on the Ventura, California Coastal Commission. We're very proud of our gorgeous beaches. As our population has grown, more and more people want to experience them. Congestion on public beaches is worsening. We've made it a rule now that whenever people apply for building permits to do new construction on the beach, they will have to provide public walkways on their land. We believe this will cut down on congestion.
2. **My name is Mr. Nollan**. My wife and I have a small bungalow on our Ventura beachfront property. It has gotten kind of run down, and we'd like to tear it down and build a new, three-bedroom house similar to the other ones in the area. We applied to the city for a building permit, but we were told we would not be able to get one unless we let the government build a public walkway through the middle of our land so people can walk across it. We don't want to do this, and furthermore, we believe it's an unconstitutional demand.
3. **Dale**: We believe that a walkway would serve a legitimate public purpose, especially since the Nollan's land is surrounded by public beach on all sides. We told everyone we were going to make these walkways a condition of new building permits, so I don't know what they're complaining about. The government is not taking their land away; we're just asking that they let people walk through a small part of it. If they don't like it, then they don't have to build a new house.
4. **Nollan**: They can't restrict the use of our land this way without paying us for it.



## PROPERTY AND THE SUPREME COURT (CONT.)

### scenario two

1. **My name is Thomas Lee Causby.** My wife Tinnie and I bought 2.8 acres of land in North Carolina several years ago. We decided it would be the perfect place for raising chickens. It was the perfect place until Army planes started taking off from the nearby airport. Now it's unusable because of all the airplane noise. Therefore, I believe we're entitled to just compensation from the government, since the government is causing the noise.
2. **I am Rachel Ash,** an attorney for North Carolina. I don't believe the Causbys are entitled to compensation from the government. Their land was not taken from them. The government has never set foot on their land and has not physically intruded on it in any way. Furthermore, the Causbys knew the land was close to the airport when they bought the land.
3. **Causby:** We knew it was just over 2,000 feet from an airport, but only a few commercial flights and crop dusters took off from there. It was many years after we bought that the Army started using the airport. Their planes are constantly flying right over us—just 67 feet over us to be exact. The noise keeps us awake and we lost 150 chickens because they would get so scared from the noise that they'd fly into the walls of the barn and die. I think that even though the government didn't physically "take" our land, that we are entitled to just compensation.
4. **Ash:** I don't know why Mr. Causby is complaining; he and his wife still own every acre of land that they did before. The government has not "taken" anything.

# PROPERTY AND THE SUPREME COURT (CONT.)



## scenario three

1. **My name is Suzette Kelo.** About seven years ago I bought a Victorian home on the Thames River in Connecticut. I spent seven years restoring my house and I really love it here. The city has been somewhat depressed economically, although the area surrounding my home is in good shape. Now I just found out that the city wants to take my land so that the area can be re-energized.
2. **My name is Jason Helm,** and I am on the New London City Council. We plan to take Ms. Kelo’s land using our power of eminent domain and turn it over to a private developer. The developer will build a new facility for a pharmaceutical company that will create hundreds of jobs and \$680,000 in new tax revenue for the city. They will also build upscale condominiums. All these things will benefit the community and therefore amount to “public use.”
3. **Kelo:** I think this is an unconstitutional taking, because the Fifth Amendment only says that property can be taken “for public use.” This means something like a library or highway—something the public will actually use. I am fighting this because I believe it is an unconstitutional infringement on my right to private property. Fourteen of my neighbors are joining me.
4. **Helm:** The residents of New London can certainly “use” the additional money that will be brought in to this depressed area by the new development. I believe this taking is constitutional because it will benefit the city.



# UPDATES

## scenario one

In *Nollan v. California Coastal Commission* (1987) the Court held that “where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed,” there was a taking of property. Therefore, the government could not make the public walkway a condition of a building permit. If the government wished to take the property, it would have to exercise its power of eminent domain and provide the owners with just compensation: “If it wants an easement across the Nollans’s property, it must pay for it.”

## scenario two

The Court found a taking in *United States v. Causby* (1946) when low-flying jets at an airbase made farming impossible on nearby land even though the government never actually claimed the land itself. The Court held, “As a result of the noise, respondents had to give up their chicken business. As many as six to ten of their chickens were killed in one day by flying into the walls from fright.... Production also fell off. The result was the destruction of the use of the property as a commercial chicken farm.” The Causbys were entitled to just compensation from the government. “It is the owner’s loss, not the taker’s gain, which is the measure of the value of the property taken.”

## scenario three

The Supreme Court ruled on *Kelo v. New London* in 2005. The Court agreed with the city of New London and held that the government could take land from citizens in order to turn it over to a private developer. The Court explained that it had “rejected a literal requirement” of the phrase “public use” in the Takings Clause of the Fifth Amendment. The phrase “public use” could be interpreted as “public benefit.” Therefore, the government can take private property from an individual in order to turn it over to a private developer because the taking will result in “economic development” for the region.

# LESSON THREE

## Intellectual Property

### CRITICAL ENGAGEMENT QUESTION

Can you own  
an idea?

#### OVERVIEW

The Internet is an extraordinary means of delivering and accessing information, and has also brought unprecedented challenges to intellectual property. What are the consequences for individuals and for society if books, songs, and videos are made available for free on the Web?

#### OBJECTIVES

Students will:

- Understand the meaning of intellectual property.
- Understand how the Constitution empowers Congress to protect the intellectual property of citizens.
- Analyze scenarios in which intellectual property protections may apply.
- Evaluate current challenges to intellectual property including file sharing; the *Harry Potter Lexicon* copyright case; and Web sites such as Turnitin.com.

*The moment the idea is admitted into society that property is not as sacred as the law of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence.*

-JOHN ADAMS, 1778

*Intellectual property has the shelf life of a banana.*

-BILL GATES, ATTRIBUTED

# Intellectual Property

## LESSON PLAN

### MATERIALS

- **Handout A:**  
Artistic License
- **Handout B:**  
Poetic Justice
- **Handout C:**  
Case Studies
- **Handout D:**  
Technology  
and Intellectual  
Property

### STANDARDS

NCHS: Era 3, Standard 3; Era 10, Standard 2

CCE: IA3, IB4, IC2, IIA1, IIB1, VB1, VB3

NCSS: Strands 2, 5, 6, and 10

### TIME

Two 50-minute high school classes

### WARM-UP

[15 minutes]

- Distribute **Handout A: Artistic License**. Students should read the statements individually and circle the number that best describes the way they would treat their artwork.
- After students have made their determinations on **Handout A**, have them assemble into groups – all the 1's together, the 2's together, and so on. If needed, split groups to keep them in manageable sizes (no more than three or four).
- In their groups, have students discuss why they selected the statement they did. They should also discuss why they did NOT choose the other options.
- Reconvene the class and have students share their reasoning.
- Write the term “intellectual property” on the board and invite students to define the term. Write the definition on the board: “creations of the mind.” Ask students to brainstorm the kinds of people/professions who produce intellectual property, and keep a list on the board. In addition to the responses students generate, you may suggest: artists, authors, inventors, musicians, filmmakers, designers, computer programmers, architects, and students.
- In a mini-lecture, explain that the Constitution gives Congress the power to protect intellectual property. Article I, Section 8 empowers Congress “To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” Congress fulfills this responsibility through patents and copyright laws. Make sure students understand that an idea alone cannot be copyrighted or patented. Only the expression of an idea (for example, in words, music, computer code, engineering schematics) can be copyrighted or patented.

### ACTIVITY I

[35 minutes]

- Have students remain in their groups and assign each group one of the following identities: Group 1: Students; Group 2: Musicians; Group 3: Authors; Group 4: Filmmakers; Group 5: Inventors; Group 6: Software Engineers.
- Distribute to each group the corresponding card from **Handout B: Poetic Justice**.
- Have students read and discuss the scenarios and decide whether each one would constitute theft.
- Allow students the remainder of time to discuss the following questions in their groups: What is the difference between scenarios one and two? Between two and three?





# ARTISTIC LICENSE



**Directions:** *For this activity, imagine you are a painter. Read each of the following statements and decide which one would best describe you.*

1. You would sell all of your art and hope to make a profit.
2. You would sell most of your art, but give some pieces to friends as gifts.
3. You would sell most of your art, but donate many pieces to museums, libraries, or schools.
4. You would sell most of your art, but make many pieces available for free on the Internet in hopes of getting people to buy more.
5. You would sell your art to pay for your costs in producing it, but you would donate the rest (profits) to charity.
6. You would never accept any payment, at any time, for your art.



## POETIC JUSTICE, STUDENTS

**Directions:** *For this activity, keep your current identity as a student. Imagine that you have a big essay due in English class. Read each of the following situations and decide which, if any, should be considered “stealing.”*

**1** You arrive at school the day the essay is due with your essay in hand. English class is not until the end of the day, so you leave your essay in your locker. Before class you come to get it and find your locker has been broken into and your essay is gone.

Stealing     Not Stealing

**2** You wrote your essay on a computer in the lab at school. You only saved your work to a flash drive. However, another student used a document-recovery program to retrieve your essay, change a few words here and there, and then turn it in as his own.

Stealing     Not Stealing

**3** You are surfing the Internet one evening and come across a Web site that sells term papers. A familiar title catches your eye; you take a closer look and realize that your essay is one of the ones being sold.

Stealing     Not Stealing

# POETIC JUSTICE, MUSICIANS



**Directions:** *For this activity imagine you are a musician. You are in a band with your two siblings. You play gigs in small clubs and hope to make it big one day. When your cousin got married, the band wrote a song for her and even played it at the wedding. Read each of the following statements and decide which, if any, you would consider “stealing.”*

- 1 You write your songs out on sheet music. One day, you come home and find that all your sheet music has been stolen.  
 Stealing     Not Stealing
  
- 2 You learn that your cousin uploaded the song you wrote for her to a music exchange site, and people can download it for free.  
 Stealing     Not Stealing
  
- 3 You learn that another band has recorded its own version of the song—with the same music and lyrics. They’ve renamed it, put it up on iTunes, and it is #1 on the “top downloads” of the week.  
 Stealing     Not Stealing



## POETIC JUSTICE, AUTHORS

**Directions:** *For this activity imagine you are an author. You sell most of your writings to newspapers and journals, and you also donate your time by writing and editing your church newsletter. You've been working on your first novel and have an outline and several chapters written. Read each of the following statements and decide which, if any, you would consider "stealing."*

**1** You do all your writing on your laptop at the local coffeehouse. One day you get up to use the restroom, leaving your laptop on the table. When you return, it's gone.

Stealing     Not Stealing

**2** You're reading the Web version of a national newspaper and come across a story about a traveling museum exhibit that is coming to your city. You're interested in the article because you wrote about the same exhibit for your church newsletter. As you read the article, you realize the words are yours. You look at the byline and discover the story was written by the roommate of someone who attends your church.

Stealing     Not Stealing

**3** You've finally written your first novel and it is doing well. You are looking for an ego boost, so you Google yourself. You're pleased to see your list of publications and reviews. One hit catches your eye because you don't recognize the publisher. You realize that this publisher has printed your book without telling you and is selling it.

Stealing     Not Stealing

# POETIC JUSTICE, FILMMAKERS



**Directions:** *For this activity imagine you are an independent filmmaker. You put many pieces up on YouTube in hopes of making a name for yourself. Read each of the following statements and decide which, if any, you would consider “stealing.”*

**1** You work out of your home as you haven’t made it big yet. At the end of a long day’s shoot you return and find all your editing equipment is gone.

Stealing     Not Stealing

**2** One of your favorite pieces is a documentary you made on the environment. (You had put part of it on YouTube the week before your equipment was stolen.) You turn to the public access station on TV one day and are surprised to see your film. You watch as the credits roll and see that someone named “Chris Smith” has listed himself as director/producer.

Stealing     Not Stealing

**3** Months go by, and you’re watching the Oscar nominations live on television. Chris Smith—who has now been hired by a major studio—has been nominated in the Best Documentary Feature category for his piece on the environment.

Stealing     Not Stealing



## POETIC JUSTICE, INVENTORS

**Directions:** *For this activity imagine you are an inventor. You have other sources of income so you do not need to sell your inventions to make a living. Instead, you find happiness in making the world a better place by creating products that improve people’s lives. Therefore, you pay your costs in inventing—materials, office and factory space, salaries for engineers, technicians, and research assistants—but you donate any profits to charity. Read each of the following statements and decide which, if any, you would consider “stealing.”*

**1** You get a call from one of your engineers. She tells you that many of the computers were missing when she got to work that day, including some laptops with research and development information stored on them.

Stealing     Not Stealing

**2** You like to keep up with current trends by reading industry journals. You are reading a Web magazine one day and come across directions for making one of your inventions. The directions are so complete, that someone could easily make the product without having to buy it.

Stealing     Not Stealing

**3** Years go by and you are getting a new product ready for launch. You get a visit from a lawyer. He says his client already has a patent for the technology you’re about to launch and he will see you in court if you go ahead with the product. When you look at the papers he gives you, you realize the technology his client has patented was on the stolen laptops from years ago.

Stealing     Not Stealing

# POETIC JUSTICE, SOFTWARE ENGINEERS



**Directions:** *For this activity imagine you are a software engineer. You are independently wealthy, so you can buy all your own computers and equipment without having to take out loans. You enjoy doing programming. You never accept any payment, at any time, for the software you create. Read each of the following statements and decide which, if any, you would consider “stealing.”*

**1** You’ve written a new Web application and saved it to a flash drive. You accidentally leave it behind when you are having lunch with a former roommate, Bob. You return to the restaurant as soon as you realize the flash drive is missing, but no one there can seem to find it.

Stealing       Not Stealing

**2** You are browsing the “Top 25” in the “Free” section of a Web applications store and you see the application that was on your flash drive. You click on it for more information and see that Bob has listed himself as the programmer.

Stealing       Not Stealing

**3** You are browsing the “Top 25” in the “Paid” section of a Web applications store and you see the application that was on your flash drive for sale for \$9.99. You click on it for more information and see that Bob has listed himself as the programmer. Millions have been sold. When you call Bob to find out what’s going on, his personal assistant answers and tells you that Bob can’t be reached now because he’s on his private jet, headed to the new vacation home he just bought in the Florida Keys.

Stealing       Not Stealing



## CASE STUDIES

### Property Case A: The *Harry Potter Lexicon*

Steve Vander Ark was a huge *Harry Potter* fan. A librarian from Michigan, Vander Ark was such a big fan of the series that he created a Web site, “The Harry Potter Lexicon.” He packed the pages of the HPL, as it was known, with information on characters, places, magical creatures, spells, and gadgets related to the *Harry Potter* world.

Harry Potter series author J.K. Rowling knew about the HPL site. She had once said, “This is such a great site that I have been known to sneak into an Internet cafe while out writing and check a fact rather than go into a bookshop and buy a copy of *Harry Potter* (which is embarrassing).”

Vander Ark decided to do more with the resource he had created. He decided to publish a book called *The Harry Potter Lexicon*, which he described as an “encyclopedia of all things *Harry Potter*.” He and his publisher planned to print 10,000 copies, with a price of \$24.95 each.

Rowling took Vander Ark to court to stop him from publishing the book. She said in a statement: “The book at the heart of this case has overstepped a boundary so unreasonably that I have been forced, regretfully, to take legal action.... If this book is published, it will open the floodgates for anyone to lift an author’s work and present it as their own. But if it is not published, that will be a boon not only to all who create original works, but to all who enjoy those works.”

The district court in Manhattan agreed with Rowling, saying that Vander Ark’s work infringed on Rowling’s copyright.

Critics of the ruling complained that Rowling, a billionaire, only had a problem with Vander Ark’s work when he was poised to make money from it. One critic asked, “Vander Ark and others who work on the HPL have spent much time compiling it. Why shouldn’t they be entitled to profit from their labor? Does Rowling expect all scholars who make reference works to take vows of poverty?”

Rowling said in a statement after the ruling, “I went to court to uphold the right of authors everywhere to protect their own original work.”

In the weeks after the ruling, the publisher of the *Harry Potter Lexicon* filed an appeal in the case, but the appeal was withdrawn. Vander Ark intends to publish a new version which meets copyright requirements as explained in the court’s ruling.

- ▶ Do you agree with the court’s ruling? Why or why not?

# CASE STUDIES (CONT.)



## Property Case B: Turnitin.com

The newly-formed Committee for Student Rights began its meeting at McLean High School in northern Virginia. On the meeting's agenda was how best to express their grievance against the school's plans to submit student work to a Web site designed to catch cheaters: Turnitin.com.

Turnitin.com allows teachers to submit student essays into a database. The site then offers services for high-tech peer-reviewing, teacher grading, and what it calls an "originality check." The Web site processes 130,000 essays a day and expects that number to grow.

The McLean students did not condone cheating. Ben Donovan was one student who helped collect 1,190 student signatures on a petition against required use of Turnitin. He told the *Washington Post*, "It irked a lot of people because there's an implication of assumed guilt. It's like if you searched every car in the parking lot or drug-tested every student." The Committee for Student Rights wanted students to be able to opt-out.

Two students from McLean filed suit against Turnitin.com in US district court. They claimed the service violated copyright laws. Several universities took note of the students' claim. Three professors at Grand Valley State University issued a statement that Turnitin, "makes questionable use of student intellectual property." A University of Tampa professor objected, "These students are giving their work to a company that's making money and they are getting no compensation."

However, Turnitin and the school board said they had determined the service did not infringe on intellectual property rights. Moreover, plagiarism was a serious problem that was plaguing schools.

A Virginia judge dismissed the students' case, holding that archiving of student essays in order to compare them against other students' work was "fair use" under U.S. copyright law. Further, the services provided by Turnitin provided "a substantial public benefit through the network of institutions using Turnitin."

- ▶ Do you agree with the court's ruling? Why or why not?



## CASE STUDIES (CONT.)

### Property Case C: File Sharing Lawsuits

Like many people, Denise Barker loved music. As a kid, she had made “mix tapes” for her friends as gifts. As an adult, she had a nice CD collection and enjoyed listening to her favorite artists and songs at home on her CD player, and on walks using her MP3 player.

Barker was a young nursing student when she discovered a Web site called KaZaA. On this site, all kinds of music and videos were available for free. Users like Barker could make their own “libraries” of music available for people to choose from, and in turn have the chance to download from others’ libraries. Barker’s own “shared” library had 611 songs in it.

Then one day, Barker received a letter from the Recording Industry Association of America. The letter said:

*We have asked your Internet Service Provider to forward this letter to you in advance of our filing lawsuit against you in federal court for copyright infringement. We represent a number of large record companies ... in perusing claims of copyright infringement against individuals who have illegally uploaded or downloaded sound-recordings on peer-to-peer networks.*

*We have gathered evidence that you have been infringing copyrights owned by the Record Companies. In total, you were found to be distributing 611 files, a substantial number of which are sound recordings controlled by the Record Companies.*

*The reason we are sending this letter to you in advance of filing suit is to give you the opportunity to settle these claims as early as possible. If you contact us within the next twenty (20) calendar days, we will offer to settle the claims for a significantly reduced amount compared to the judgment amount a court may enter against you....*

Barker could have settled her case for about \$4,000. But she hired a lawyer and went to court. In the case of *Elektra v. Barker*, she argued that she did not know the songs she had in her shared library were copyrighted. The judge was not persuaded, though, and ordered Barker to pay \$6,050. Additionally, she would have to delete all music from her computer that had been illegally downloaded.

- ▶ Do you agree with the court’s ruling? Why or why not?

# TECHNOLOGY AND INTELLECTUAL PROPERTY



**Directions:** Complete the chart below using the case studies in *Handout C*.

	Facts of the case	What intellectual property was at stake in this case?	How did technology apply to this case?	What was the outcome of this case?
CASE STUDY A: THE <i>HARRY POTTER</i> LEXICON				
CASE STUDY B: TURNITIN.COM				
CASE STUDY C: FILE SHARING LAWSUITS				

1. In your opinion, was justice done in each of these cases? Why or why not?
2. What would it mean for intellectual property if the outcome had been different in each of these cases?



# ANSWER KEY

## LESSON ONE

### Handout B: Focus Quotations

Hardin: The tragedy of the commons plays out like this: Imagine a pasture where anyone can go. Everyone who owns cattle will want to let as many of their cattle graze on the land, because it's free to all. But this is what everyone decides to do. The pasture will be ruined, because all the grazing land will be used up.

Aristotle: Things which are shared by the most people are taken care of the least. Everyone thinks of himself, barely ever of others, and even when they do think of others, it is only because it could affect them personally. Furthermore, you are less likely to take on a responsibility for something when you think someone else will do it.

Von Mises: If no one owns a piece of land, everyone uses it no matter what the consequences of that use are. People who can use resources will do so, without caring about the results. They will chop down trees without caring about planting new ones, they will hunt until all the animals are gone.

## LESSON TWO

### Handout A: English Origins of Property Protections

*Magna Carta*: some protection from taxes without consent; rules for inheritances; payment of debts upon death; government cannot take horses, carts, or wood without consent of the owner; unjust and illegal fines set aside.

*Commentaries*: 1. The King does not have the power to randomly search, threaten, or take the property of his subjects. 2. the courts, and the rule of law.

*Second Treatise of Civil Government*: 1. for the mutual preservation of their lives, liberties, and estates. 2. the preservation of their property.

### Handout B: Samuel Adams, James Madison, and Property

1. Adams seems to be referring to physical property, such as land, homes, and other material goods.
2. Adams believes government's role is to protect property rights, and to enforce them equally among the rich and poor. Government cannot possibly legislate on the "lives and fortunes" of people, because such a task is impossible. Finally, governments cannot randomly take people's property away. To do so would be the end of freedom.

1. Madison means physical property as well as anything people value and have the right to.
2. land; merchandise; money; opinions and the free communication of them; religious opinions, and the profession and practice dictated by them; safety and liberty of one's person; the free use of faculties and free choice of the objects on which to employ them; rights; conscience.

### Handout C: The Bill of Rights and Property

Underline: the right of the people to keep and bear arms, shall not be infringed; No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law; The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation; In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; Excessive bail shall not be required, nor excessive fines imposed...

Circle: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances; The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; No person ... shall be compelled in any criminal case to be a witness against himself; The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people; The powers not delegated to the United States by the Constitution, nor prohibited to the states, are reserved to the states respectively, or to the people.

### Handout D: The Takings Clause Up Close

1. following the rules and procedures in place to ensure justice. 2. to receive with or without consent. 3. in the action or service of everyone. 4. a fair amount to be paid back. 5. Accept reasoned answers such as railroads, military bases, highways, public schools, public libraries, public utilities, and others.

## LESSON THREE

### Handout D: Technology and Intellectual Property

Row One: J.K. Rowling sued to stop publication of a fan-produced book, *The Harry Potter Lexicon*. The intellectual property at stake was the *Harry Potter* series—plots, characters, etc. Technology facilitated the development of the “HPL” Web site, which creator Steve Vander Ark wished to turn into a book. The court ruled in favor of Rowling, holding that the *Lexicon* infringed on Rowling’s copyright.

Row Two: Students at McLean High School objected to their school’s requirement that all students submit their essays to Turnitin.com. The intellectual property at stake was the students’ original essays. Turnitin.com services are Web-based. The court ruled in favor of the school, holding that Turnitin.com’s maintenance of a database of essays was “fair use.”

Row Three: Denise Barker was sued by the Recording Industry Association of America (RIAA) for making 611 songs available for download. The intellectual property at stake was 611 songs. The KaZaA Web site allowed for peer-to-peer exchange of music files. The court ruled in favor of the RIAA.

### A NOTE ON STANDARDS

The following national standards are referenced in this publication:

**CCE:** Center for Civic Education

**NCEE:** National Council on Economic Education

**NCHS:** National Council for History in the Schools

**NCSS:** National Council for the Social Studies

"As a man is said to have a right to his property, he may be equally said to have a property in his rights."

—JAMES MADISON

*Property Rights in America: Yours, Mine, or Ours?* gives you a full week of lesson plans to introduce your students to the foundations and on-going importance of property rights. Lessons feature economic philosophy, Founding documents, Supreme Court cases, intellectual property, and ways technologies like the Internet raise questions about property rights.

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### LESSON ONE

*Why Do Property Rights Matter?*

### LESSON TWO

*Property, the Bill of Rights, and the Supreme Court*

### LESSON THREE

*Intellectual Property*



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200 N. Glebe Road, Suite 200

Arlington, VA 22203

(800) 838-7870

[www.BillofRightsInstitute.org](http://www.BillofRightsInstitute.org)

## PRIMARY SOURCES YOUR STUDENTS WILL ANALYZE INCLUDE:

*Magna Carta*

*Second Treatise of Civil  
Government*, by John Locke

*The Rights of the Colonists*,  
by Samuel Adams

*Property*, by James Madison

Supreme Court Cases including  
*United States v. Causby* (1946);  
*Nollan v. California Coastal  
Commission* (1987); and  
*Kelo v. New London* (2005)

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