Those… who make use of the word, property, or right, or obligation, before they have explain’d the origin of justice, or even make use of it in that explication, are guilty of a very gross fallacy, and can never reason upon any solid foundation. A man’s property is some object related to him: This relation is not natural, but moral and founded upon justice. ’Tis very preposterous, therefore, to imagine, that we can have any idea of property, without fully comprehending the nature of justice... The origin of justice explains that of property.¹

There is a strong temptation for legal cultures to draw a sharp distinction between legal adjudication and politics. Such a separation seems to be demanded by modern ideals of political legitimacy. However, the aspiration to maintain this distinction faces special difficulties with respect to the common law, where the judiciary has the power to make law. In response to these difficulties, courts and commentators have often sought refuge in a conception of the private law as a system of corrective justice that is supposedly insulated from the concerns of distributive justice that dominate the political process. This chapter examines the effect of this perspective on our understanding of property.

The first section compares two conceptions of property. The first is a notion of property as pre-legal and absolute – one that is often found at the heart of an essentially libertarian vision of the private law as a system of corrective justice that is removed from political concerns. The second is a conception of property as a social construct – the product of policy choices that inevitably involve considerations of distributive justice. The second section examines a series of questions

* Gonville and Caius College, Cambridge.
about the nature and limits of property that emerge in the determination of rights to resources. This serves to emphasize the impossibility of the establishment of a baseline of entitlements without making distributive choices. In addition, it points to the nature of the choices being made and the role the two conceptions of property have in influencing those choices. The third section examines how fidelity to the absolutist conception of property is often maintained only at the level of form and not in substance. The final section explores how we might construct a normative discourse of property through understanding both the value of the absolutist paradigm of property and its limits.

1 Two conceptions of property and private law

This section outlines two conceptions of property. These are best understood as ideal-types. While they are useful analytical models, they can never entirely reflect the complexity of the law found in any jurisdiction at any particular time. The first conception was most fully realized in the late nineteenth century in English private law and in American constitutional law. Today, while the influence of these premises is diminished, they still exercise a surprisingly strong hold on English legal thought. In contrast, American property discourse has come to more closely reflect the second conception of property outlined below.

1.1 Property as the foundation of law

Property has often enjoyed a special place in political theory. In Locke’s work it was the very reason for which governments were created. Notions of fundamental property rights have performed a number of important functions in accounts of the law. First, some have looked to property to indicate the extent to which the state could legislate to regulate the lives of its subjects. This understanding is clearly seen in constitutional law in the United States at the turn of this century, where property largely marked the limits of state power. Secondly, this perspective equally suggests the basis of a theory of how the state should regulate interaction among its citizens – the subject matter of the private law. In particular, it lends itself to an account of the private law as a system of corrective justice that is independent of the concerns of distributive justice. According to this account, property delineates a zone of personal freedom for the individual from other individuals. Thirdly, such a conception of property can serve to differentiate the role of the judiciary from that of the legislature, thereby suggesting that the courts’ powers to shape the common law are subject to