

Our Joy: An Inclusive Right of Enjoyment in Property and Contract Law

Author : Kali Murray

Date : July 19, 2021

Nancy Leong, *Enjoyed by White Citizens*, 108 **Geo. L. J.** __ (forthcoming, 2021), available at [SSRN](#).

I recall being confused by how the average 1L Property course treated the “important” property provisions. I was struck that we spent all of our time on the 5th Amendment clause that required compensation by the government for the “taking” of private property by the government. But we did not cover the 13th Amendment, which eliminated slavery, thus impacting the property rights of (predominately) white citizens.

Why were we not talking about the 13th Amendment and the supporting legislation, §1981 and §1982 of the Civil Rights Act of 1866, which granted property rights to freed blacks? What did it mean in these statutes that all persons should have the “same right” of property as that “enjoyed by white citizens”?

Nancy Leong’s *Enjoyed by White Citizens* seeks to solve that mystery. In the process, she helps us better understand the meaning of property rights as a general matter and illuminates the role of property rights rhetoric in struggles for civil rights and against privileged caste status.

Leong accomplishes this task by investigating the meaning of two key terms in §1981 and §1982—“white citizen” and “enjoy”—and how such terms should shape reparative legislation to address long-standing civil rights harms.

Initially, Leong claims that the term “white citizens” should be understood in a socio-legal context. Specifically, Leong (citing the work of Brant Lee) examines how the “standard person”—whether it be in legal, educational, or economic contexts—is always assumed to be white, and how then whiteness becomes the default norm by which all experiences are judged.

The default norm of whiteness appears everywhere—in the curricular choices imposed in secondary and post-secondary contexts, rigid fashion standards, like the standard size of dresses tied to the basic sizes of white women, or the ways professional identities are defined against the unspoken default norm (i.e., “writers” versus “black writers”).

This default norm of whiteness, continues Leong, curdles into white privilege, since it obscures both the ways in which white people are privileged in social, political, and economic contexts, and the ways in which harm can flow to people of color from that white privilege.

Leong then explores the way the default norm of whiteness is present within law as well. After surveying both federal and state law, Leong concludes that the acknowledgement of racial status of whiteness is relatively limited; often occurring in idiosyncratic or archaic settings.

Consequently, §1981 and §1982, stand out for their use of the term of “white citizens.” While §1981 and §1982 encouraged the provision of civil rights for the newly freed blacks, the specific language of “white citizens” was included to address federalism concerns.

As Leong states, “[i]f the proposed statute required only that non-white people receive the same rights as white people in a particular jurisdiction, it did not require states and other localities to adopt any particular level of substantive rights. It just meant that everyone had to receive the *same* rights.” The primacy of federalism in shaping the legislative

history of the term “white citizens” suggests that its inclusion did not seek to shift the default norm of whiteness.

Leong’s treatment of the term “white citizens” in §1981 and §1982 is useful in two distinctive ways. First, Leong situates the absence of whiteness in federal and state law. Second, Leong emphasizes that while the plain meaning of the text could be read to directly confront the norm of white default, its actual legislative history suggests a more complicated, compromised vision of citizenry during Reconstruction. Leong’s pessimistic treatment of the term “enjoyed by white citizens”, however, is softened by her account of the ways in which the meaning of §1981 and §1982 have been used by judges to correct for discriminatory harms in contract and property law.

Additionally, beyond her important claims as to the meaning of the term “white citizens”, Leong advances an important reading of the term “enjoy” which may have substantial implications for property and contract law.

Leong employs three readings of the term “enjoy”: a textual reading, a contextual reading, and a subject-specific reading. The textual reading draws on dictionary definitions at the time of the passage of §1981 and §1982, to define enjoy as “take pleasure or satisfaction in the possession or experience of,” or “to possess with satisfaction; to take the pleasure or delight in possession or, “to have possess, use with satisfaction; to have hold or occupy, as a good or profitable things, or as something desirable.”

Using this definition, the term “enjoyment” could be read in a narrow or broad sense. In a narrow reading, the term “enjoy” means that non-white people should have the same right to use their property as white people do. In a broader reading, the term “enjoy” means that non-white people should be able to “take pleasure and satisfaction” in the use of their property rights in the same way as white people.

The contextual reading of enjoyment builds on the broader textual reading, situating the term “enjoy” in Founding-era documents such as the Declaration of Independence and the *Federalist Papers*. The subject-specific reading examines doctrines of quiet enjoyment and loss of enjoyment of life to conclude the enjoyment means those features of property, or quality of life, that go to an experience of satisfaction, functional, and pleasurable.

Leong’s consideration of the term “enjoyment” yields considerable benefits. Her reading of the term “enjoy” connects statutory interpretation, constitutional interpretation and common law interpretation. Understanding the term “enjoyment” across different interpretative strategies deepens its relationship to the types of discriminatory harms that may harm non-white people, including the ability to enjoy food, fashion, mobility, and home. Leong’s scholarship here may help resolve ongoing discriminatory harms that have plagued the sharing economy. Moreover, a broad reading of enjoyment connects civil rights concepts explicitly to key common law principles such as the right to use.

Rich in many ways, this article is an important addition to a growing body of scholarship that seeks to revive and reconsider the moment represented by the Reconstruction Amendments, including the 13th Amendment.

Cite as: Kali Murray, *Our Joy: An Inclusive Right of Enjoyment in Property and Contract Law*, JOTWELL (July 19, 2021) (reviewing Nancy Leong, *Enjoyed by White Citizens*, 108 **Geo. L. J.** __ (forthcoming, 2021), available at SSRN.), <https://property.jotwell.com/our-joy-an-inclusive-right-of-enjoyment-in-property-and-contract-law/>.