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To W. Haywood Burns and Alan Freeman,
our co-authors, who contributed and inspired so much
and are gone too soon.

10 JOSEPH WILLIAM SINGER

PROPERTY

PROPERTY RIGHTS SERVE HUMAN VALUES. THEY ARE RECOGNIZED TO THAT END, AND ARE LIMITED BY IT.

Chief Justice Joseph Weintraub
Supreme Court of New Jersey
State v. Shack (1971)

THE institution of private property is alive and well. The nations of eastern Europe and the former Soviet Union have been converting to market economies, a transformation that has been nothing short of a revolution. And the push to privatize government institutions by transferring them to private owners seems to have caught on around the world. Evidence of this change can be seen in Latin America, Africa, Asia and, closer to home, in Canada and Mexico. Private property appears to be sweeping the world.

The United States has witnessed a burgeoning "property rights" movement, accompanied by the end to the federal entitlement to welfare and a renewed commitment to end the era of "big government" by reducing regulation. Both businesses and owners of land are increasingly angry about environmental regulations and local zoning laws that limit their ability to develop their land. Laws have been passed in a number of states granting remedies to land owners whose property is significantly harmed by government regulations. Several bills have been introduced in Congress to prevent implementation of regulations that "take" more than some specified percentage of the property's fair market value unless the owner is compensated for the loss. Other proposed bills require agencies to undertake complicated cost-benefit analyses of new regulations, ostensibly to prevent passage of regulations that overburden property owners and businesses. The Supreme Court has been increasingly receptive to

these arguments, sending signals to lower courts and to legislatures to better protect property rights.

The movement to deregulate and respect private property is based on a particular conception of the meaning of private property. Ultimately, this conception of property as ownership rests on the assumption that every property interest has an identifiable owner and that the owner has absolute or almost absolute rights to use his or her property as he or she sees fit. This is the classical conception of property. Property is conventionally understood as comprising a bundle of rights, including the right to use the property, the right to exclude nonowners, the power to transfer it, and absolute, or almost absolute, control over the thing that is owned. The problem is that these conventional understandings contradict one another. It is not possible for property rights to be absolute and also to comprise this complete bundle. Some rights in the bundle conflict with other rights in the bundle; the property rights of one person impinge on, and interfere with, both the property and personal rights of others. Absolute property rights are self-defeating.

This chapter will explain and criticize the classical conception of property by focusing on (1) the sources of property rights, (2) the problem of competing property rights, (3) the historical origins of property law, and (4) the distribution of property.

FORMAL AND INFORMAL SOURCES OF PROPERTY RIGHTS

The classical view suggests that property rights have their origin in labor and possession. Rights theorists such as John Locke explained that individuals work the land and gather crops and therefore deserve property rights. Utilitarian philosophers such as Jeremy Bentham suggested that property rights promote investment by granting secured expectations. Individual labor and first possession appear to create legitimate interests that others should respect. The case of *Pierson v. Post* is often used to make this point.[1] The case concerns a hunt for a wild fox and the question is whether ownership is established by active pursuit, physical capture, or mortal wounding. All parties agree that possession or labor, in some form, establishes ownership rights.

This classical view is suspect. Historically, it is not true that property rights in the United States are generally based on first possession. In fact, virtually all the land in the United States was originally owned by American Indian nations, and under both colonial and U.S. law, title was

transferred from the tribes to the United States government before individual titles could vest. Thus, all titles to land in the United States have their source in a government grant or sale rather than in individual settlement. It is true that public law gave title to settlers in some cases, but settlement was not enough; title vested in private owners only if federal law provided as much. In many cases, title was not given to first settlers but to those who were given formal title by the government *before* settlement, either on the basis of a sale of the land by the government to the highest bidder or on a first come, first served basis.

Nor has labor been a consistent source of property rights. The labor of slaves was expropriated for more than a hundred years. No compensation for this stolen labor was ever given by the United States in the form of reparations. When the Civil War ended, many called for "forty acres and a mule"—that is, for the state to grant property rights to the freedmen. Yet this never occurred; instead, ownership of the plantations was vested in the former slave owners who had rebelled against the United States, rather than being granted to the slaves who had worked the land.

Although women continue to perform most of the labor in the household, they do this for free, or, more accurately, without any direct compensation from the labor market. Men as a group are heavily dependent on this uncompensated labor, as is the economy in general. In contrast, most of the work traditionally performed by men is monetarily compensated by means of an employment contract, by sale, or by investment. This social division of uncompensated versus compensated labor has a lot to do with the fact that women as a class are poorer than men, as well as the fact that the poverty rate for children is almost twice the poverty rate for adults. In 1991, 21.8 percent of all children were living in poverty, as opposed to 11.4 percent of adults aged 18–64 and 12.4 percent of adults over 65.[2]

The labor and first possession theses therefore mask tensions in property law between alternative sources of property rights. Sometimes, property law allocates rights to those who have been denominated owners by formal documents of title, such as government patents (grants of ownership), deeds, leases, wills, contracts, or trusts. At other times, property law grants rights on the basis of informal arrangements such as actual possession or labor.

Consider the law of adverse possession. Many owners have placed the fences or hedges around their property in positions that do not correspond precisely to the physical boundaries described in the deed they were given when they purchased the land. Adverse possession laws state

that if an owner visibly occupies land for a long enough period of time, that person becomes the owner, taking title away from the "true owner." Adverse possession law demonstrates a *tension* between formal title and informal possession as sources of property rights. This tension pervades the law of property, as well as the law of contract. Sometimes the law allocates property rights on the basis of formal title and sometimes it allocates property rights on the basis of informal social arrangements. These informal arrangements include behavior that creates expectations the law will respect. Adverse possession is a major example of actual possession prevailing over formal title in allocating property rights. It also allows the possession by a current owner to dispossess a prior owner, contrary to the theory that first possession establishes the source of rights.

Family relationships are another major example in which actual behavior and social arrangements may constitute a source of property rights that prevails over formal title. Upon divorce, most states will divide the property acquired during the marriage between husband and wife based on a variety of factors, regardless of who holds title to the property. In practice, this rule historically has had the effect of transferring substantial property from a husband to a wife when the man worked outside the home and the woman worked in the home for no salary. Oral promises constitute another example of informal arrangements superseding formal ones; the statute of frauds requires an agreement in writing to transfer interests in land, but a variety of doctrines relax this requirement. Even in the absence of a promise, courts sometimes assign property rights on the basis of actual arrangements or informal understandings even when they contradict formal arrangements.

In *Rase v. Castle Mountain Ranch*, an owner of a large ranch in Montana gave friends, neighbors, and employees permission to build summer cabins around a lake located on his land.[3] In reliance on that permission, they expended substantial amounts of money to build houses; yet the owner of the land gave them no formal property rights, such as a lease or an easement (a permanent, irrevocable right to do something on land owned by another person). The cabin owners occupied their homes for fifty years. Then the original owner died, and his brother took over the property and sold it to an out-of-state developer, who promptly notified the cabin owners that they had thirty days to leave the land. The court ruled that the cabin owners had the right to retain control of their cabins for a limited period of time (thirteen years) but that the new owner could take control of the cabins if the cabin owners were interested in selling the cabins immediately to him. As a formal

matter, the cabin owners only had naked permission to occupy the land; property law terms this right a "license," which is ordinarily revocable at will by the grantor. Despite this, the court created a "constructive trust" to convert the revocable license into a more permanent easement—a right of way over another's land that cannot be revoked by the owner of the land. Another doctrine, easement by estoppel, would achieve the same result.

These doctrines demonstrate that the source of property rights is sometimes formal title and sometimes informal social relationships or customs or understandings. They also demonstrate that, although owners are generally immune from losing their ownership rights without their consent, a variety of property rules give nonowners the power to take away an owner's rights by entering into particular kinds of relationships with the owner.

CONFLICTS OF PROPERTY RIGHTS

All property rights are limited by the rights of others, and most issues involving property law can be reconceptualized as conflicts *among* property rights. The rights that go along with full ownership are most basically the right to exclude, the privilege to use one's property, immunity from loss without one's consent, and the power to transfer during one's life or at death. Each of these rights has significant limits that demonstrate tensions within the concept of property itself and within the rules governing the ownership and use of property.

The Supreme Court has said that the "power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."[4] Yet public accommodations laws and fair housing laws substantially limit the owner's right to exclude nonowners on the ground of race, sex, religion, or other protected categories. In fact, these laws grant members of the public the right to enter restaurants and stores and to rent or buy homes over the objections of the owners of those properties. They do so to ensure that each person has the right to acquire property. The right to buy or use property open to use by others conflicts with the right to exclude and to determine when to sell. In order to establish a market that treats each person as an equal individual, capable of contracting and using property without exclusion, owners' powers to determine when and to whom to open their property must be limited.

Public accommodation statutes cannot be legitimately understood as

minor or exceptional limits to the right to exclude. It was not until 1964 (almost 100 years after the Civil War ended) that federal law clearly limited the rights of property owners to exclude on the basis of race. Racial discrimination in housing remains a problem today. Hardly a year goes by when one of my students does not tell me that a landlord refused to rent when he saw the student, giving an excuse such as a policy against renting to students. Federal law has prohibited discrimination in housing against families with children since 1988, but such discrimination is rampant in practice. Many landlords refuse to rent to unmarried couples or gay or lesbian tenants. The laws that require access to public accommodations or housing constitute important, invasive, and significant limits on the right to exclude.

Public accommodation and fair housing laws demonstrate a fundamental tension in property law between norms of exclusion and norms of access. Private homeowners have a legal right to choose their dinner guests on any basis, including a racially discriminatory one, while public accommodations have a duty to serve the public without unjust discrimination. This tension creates choices for judges and legislatures. Should a shopping mall be able to exclude teenagers from hanging around after school? Should it have the right to exclude homeless people? Should a private eating club have the right to exclude women when most of the male partners at major law firms in the city belong to the club and transact business discussions there?

These conflicts are not properly conceptualized only as tensions between property and equality. They are tensions within the concept of property itself. The right to exclude is well understood; the right of access is often ignored. The Civil Rights Act of 1866 states that every person shall have the same right to contract and to purchase property "as is enjoyed by white citizens."[5] This statute has been interpreted to prevent individuals from refusing to enter contracts because of the purchaser's race. The right to contract to purchase property means the right to force the seller to sell if the only reason for the refusal to sell is the race of the buyer. If this right were not recognized, then the ability to purchase property would differ depending on the race of the buyer. Thus, the right to buy property (without regard to one's race) conflicts with the owner's right to determine when to sell. Property entails a tension or contradiction between the norm of access and the norm of exclusion, the right to buy versus the right to choose when to sell.

Similar conflicts arise when we move from the right to exclude to the privilege to use property. In a 1978 case the Exxon Corporation asked

the Supreme Court of Texas to reaffirm earlier decisions holding that a property owner could drill to withdraw water without regard to the effects on others. The earlier cases involved owners who drilled wells on their land that effectively withdrew water from underneath neighboring land, drying up their neighbors' wells. But Exxon's withdrawal of water threatened to sink all the homes in the county, thereby destroying everyone else's property rights. The Texas Supreme Court found that Exxon's rights had reached their limit.[6] The security of everyone's property depended on each owner having due regard for a proper balance between one's own interests and those of one's neighbors. The free use of Exxon's property had to be limited to prevent Exxon from causing substantial harm to the neighbors' land.

Nuisance law, which prevents an owner from certain uses of his or her own property, is premised on the conflict between the owner's right to use the property as he or she sees fit and the right of others not to have their property harmed by actions on or off their land. Just as property law must draw a line between the right to exclude and the right of access, it must draw a line between the privilege to use property and the right to be secure from harm to one's property interests by neighboring conduct. In recent years, this doctrine has been used by neighbors to stop polluters on neighboring land and to recover damages for the contamination of property caused by toxic waste deposited by another owner.

The law of servitudes and future interests can also be understood through the tensions that characterize its rules. Servitudes involve land use restrictions imposed on future owners of particular parcels of property for the benefit of other owners in the neighborhood. For example, a real estate developer may include in the deed of sale a clause stating that the buyer agrees to use the property only for residential purposes. A buyer who opens a law office in her home violates this restriction. These restrictions are intended to benefit the owners of the neighboring property (the parcels whose owners have the right to enforce the restriction) while curtailing the free use rights of the owners of the restricted parcels. If the free use of one's property were the dominant ideal and goal, then servitudes should not be imposed on future owners who did not voluntarily agree to those restrictions created by past owners of the land. If, on the other hand, the right to control neighboring land use for one's benefit is the primary goal, then servitudes represent an ingenious device to create a new kind of property right.

For example, a residential neighborhood devoted to senior citizens can be created through the use of servitudes (as long as one complies with fair

housing laws that prohibit discrimination against children except in certain narrowly defined senior citizen housing complexes). This provides an elderly purchaser the security of knowing that children would not move in next door, but it is exclusionary and significantly infringes on the free use rights of owners in the neighborhood. The servitude against the residence of children in the neighborhood could prevent an elderly couple from taking in their grandchildren in an unanticipated crisis.

Future interests pose similar dilemmas. A grandfather leaves property to his granddaughter in his will and further provides that she will lose the income from the trust if she gets married. The granddaughter gets married. Is the restraint on marriage enforceable? The case poses a conflict between the donor's power to control the behavior of the future owner of the property and the freedom of the granddaughter to use the property as she sees fit without meddlesome interference in her private life from her ancestor.

In all these cases, it is unhelpful to address a question about property law by saying, "I am in favor of deregulation; the government should stop telling people what to do and just enforce people's property rights." This tells us nothing since most situations involve conflicts among property rights or conflicts between property rights and other rights. An attachment to the ideal of property cannot tell us what to do in these situations. One must make value judgments about the appropriate contours of social relationships to define the content of property law.

HISTORICAL ORIGINS OF PROPERTY RIGHTS

Throughout the nineteenth century, the common law of property in the United States revolved around the *estates system*, a complicated regulatory framework designed to limit and systematize property rights into established channels. This system originated in the rules that mediated the relations between lords and tenants and between the generations in the feudal era. Feudal property law created a vast social hierarchy with a few lords owning most of the land and then parceling it out to vassals who would provide them services. In turn, those vassals would "subinfeudate" the land, giving possession of it to subvassals who would provide specified services for them. At the bottom of the feudal ladder were the peasants who worked the land and who had very few rights; they were subject to the jurisdiction, and the whim, of the feudal lords above them.

As the feudal system developed, the lords tried to evade certain "incidents" of ownership that were similar to taxes; they did so by the process of subinfeudation. To restore royal revenues, a variety of laws were issued

that had the effect, over time, of pushing property rights downward from the lords to the peasants who worked the land. The primary principle was the prohibition of subinfeudation; instead of lords creating new lord-tenant relationships beneath them in a big hierarchical chain, the new rules encouraged transfer of title from the lord/owner to a new owner. This principle eventually became known as the principle of promoting the "alienability" of property. It has enormous impact under current law. It both pushes owners in the direction of consolidating ownership rights in a single owner and, in many cases, limits the power of prior owners to control the behavior of future owners.

The underlying premise of the estates system, as it exists today, is that strict regulation of property rights is necessary both to prevent the reemergence of feudalism and to ensure that current generations are not unduly controlled by their great-grandparents. The goal is to move power downwards from the feudal lord to the actual possessor of the land and from donors (prior generations) to current owners to ensure that power over property is decentralized and widely dispersed. The system did this by the rules governing future interests and property transfers, which restrict the ability of owners of property to limit the future uses and ownership. The intent is to disperse ownership by preventing concentration of power in a few landed families.[7]

In the United States, it is crucial to remember that property rights have their origin in American Indian nations. The United States took the land from them and gave it to white settlers. Although the United States often provided compensation for the lands it took, it did not always do so; nor were the amounts of compensation equal to fair market value, the amount the government would have paid to U.S. citizens if it had taken the land from them.

From the beginning, English colonists justified these seizures and the conquest and displacement of American Indians by arguing that the native nations had more property than they needed, were misusing it by not developing it properly, and had a moral obligation to share it with the Europeans who needed access to it.[8] Locke attempted to characterize America as a vast unclaimed territory free for settlement by industrious Europeans. His theory, in conjunction with the colonial justifications for conquest, rationalized a massive redistribution of property from American Indian nations to the colonial powers, then to the United States and its white citizens. Both the conquest of Indian nations and the homestead laws defy the typical characterization of nineteenth-century American law as opposed to redistribution of property.

DISTRIBUTION OF PROPERTY: "EVERYONE SHOULD HAVE SOME"

John Kenneth Galbraith reports that Professor Robert Montgomery, an economist at the University of Texas, was unpopular with the Texas legislature because of his liberal views. When asked whether he favored private property, he replied, "I do—so strongly that I want everyone in Texas to have some."[9] His answer contains a brilliant insight into the nature of property. Property law and property rights have an inescapable distributive component. As Jeremy Waldron explains, "[P]eople need private property for the development and exercise of their liberty; that is why it is wrong to take all of a person's private property away from him, and that is why it is wrong that some individuals should have had no private property at all."[10]

Other analysts suggest that property rights can be legitimately limited by other ideals, such as equality and liberty, or that common law understandings of property can be legitimately regulated by administrative and legislative action. Their perspectives, while useful, obfuscate a basic fact: Both property theory and our historical practice of property law contain principles that promote the norms of decentralization and distributive justice *within the concept and institution of property itself.* Once we recognize this, it makes no sense to argue that property rights must always be limited to achieve distributive justice. Private property systems always contain within them a partial component of distributive justice, and the prevailing norms of private property, as they have operated in the United States, have always contained a tension between the norm of protecting the rights of "title holders" (however defined) and the norm of shaping property rules to ensure widespread access to the system by which such titles are acquired.

The classical view of property concentrates on protecting those who *have* property. It addresses the conditions under which people *get* property but does not include the premise that such conditions must be structured so that everyone has the *right to get* property. The classical view focuses on individual owners and the actions they have to take to acquire property rights that will then be defended by the state. It assumes that the distribution of property is a consequence of the voluntary actions of individuals rather than a decision by the state. Property law does nothing more than protect property rights acquired by individual action. Distributional questions, in this conception, are foreign to property as a system. If the community is unhappy with the distribution of property

that emerges from individual actions, it is free to redistribute property through, for example, the tax system. Such a tax would be seen as an intervention because the legal system would be determining the distribution of property, which was and should be privately determined by individuals acting in their own interest. The property acquiring process is seen as free from governmental compulsion. No public policy decisions need to be made for such a system to work.

This view, though widely held, is fundamentally mistaken if we look at both property theory and the historical practice of property law in the United States.

DISTRIBUTIVE NORMS IN POLITICAL THEORIES JUSTIFYING PROPERTY

John Locke's theory of private property is the source of the classical conception of property. It has been monumentally influential in the history of the United States as a justificatory scheme. Locke justified property by arguing that individuals who took actions to mix their labor with natural resources thereby became entitled to be protected in controlling the fruits of their labor. This entitlement was based both on the moral claim of rights and on the utilitarian ground that legal protection for property justly produced or possessed through labor promoted useful work and increased social welfare. However, Locke qualified this theory by a significant proviso: Labor creates property rights *"at least where there is enough and as good left in common for others."*[11]

Lockean property rights are premised on individual actions; no general right to own property emerges from this kind of theory. One has a right to own property only if one undertakes the actions needed to generate a legitimate claim. Jeremy Waldron has characterized Locke's argument as a "special rights" theory, which is subject to two crucial criticisms.[12] First, it is not at all clear why an individual acting alone can impose any legitimate obligations on others who have agreed neither to that individual's course of action nor to the rules of the game that define what actions create enforceable property rights. Second, there is no reason to believe that individual actions should have a binding moral effect on others if those actions inhibit or prevent others from exercising similar actions.

The Lockean proviso looms large. The very legitimacy of a property system depends on conferring property rights on individuals and allowing those individuals to assert those rights against others. As Frank Michelman has explained,

> In a capitalist order, one person's proprietary value (or power) is obviously relative to other people's. A constitutional system of proprietary liberty is, therefore, incomplete without attending to the configurations of the values of various people's proprietary liberties. The question of distribution is endemic in the very idea of a constitutional scheme of proprietary liberty.[13]

A system of private property not only protects the rights of those who have acquired resources but also ensures the conditions that enable individuals to acquire those resources.[14]

DISTRIBUTIVE NORMS IN HISTORICAL PRACTICE IN THE UNITED STATES

This ineluctable distributive component of private property also has pervaded both historical practice and the social understanding of property in the United States. To put the argument in its simplest form, consider that a private property system requires more than one owner. This is not a *logical* requirement. After all, the state of New Jersey, where I grew up, was originally owned by two men, Sir George Carteret and John Lord Berkeley, while the Commonwealth of Pennsylvania was originally owned by William Penn, and several other colonies were similarly "proprietary." Nonetheless, under modern understandings of what it means to create a private property system, it is not an exaggeration to say that the requirement of multiple owners is close to a *definitional* component of a private property system. In the modern view, a private property system—in order to *count* as a private property system—requires some dispersal of property ownership. If an eastern European country moved from communism to a market system by distributing all the land in the country to ten families, it would be hard to conclude that the rulers of the country understood the normative premises underlying the private property systems of western Europe and the United States.

This conception not only is suggested by the political theory justifying private property but is embedded in U.S. history. In the nineteenth century, the United States adopted a practice of transferring public lands to many of its citizens through homestead laws that sometimes attempted to give priority to actual settlers.[15] These policies were premised on the idea that property was not a special right but a general right; everyone had the right to own some. Current theorists who focus on individual labor and possession as the origins of property forget the historical practice of government land distribution to settlers. They also forget that this

land was taken from American Indian nations—based on the redistributive theory that they had more than they needed, that they were not using the land efficiently, and that the citizens of the United States needed it more and would use it in a more socially efficacious manner.

DISTRIBUTIVE NORMS IN CURRENT PROPERTY LAW AT THE MACRO LEVEL

Substantial regulation of property transfers is required to ensure that sellers of land do not load it down with restrictions on use and ownership that will be enforceable far into the future. In other words, a system premised on absolute ownership rights must restrict freedom of contract (the power to transfer) to ensure that, most of the time, sellers transfer to buyers most of the interests associated with property ownership. The rules operate partially to decentralize control over property by bundling certain rights together and ensuring control in the actual possessors (buyers) of the land. By creating the "fee simple" form of property ownership (the closest thing we have to absolute ownership), power is vested in current possessors of land rather than absentee lords. The rules of the estates system, such as the rule against perpetuities, are intended to shape overall social relations to ensure a certain amount and quality of dispersal of power over land.

Another example of rules of property law that operate systemically to shape social relationships is the antidiscrimination laws discussed above, which prohibit racial discrimination in housing markets (both sale and rental) and in public accommodations (businesses serving the public). These rules regulate property use and transfer by limiting the rights of public accommodations to exclude customers on such grounds as race and by limiting the rights of housing sellers and employers to refuse to contract on invidious grounds. This complex of rules is intended to combat and prevent the establishment of a racial caste system supported by law. It is analogous at a deep level to the property rules embodied in the estates system that created the idea of absolute ownership. Both sets of rules are intended to combat pernicious forms of social hierarchy and to establish protected legal rights to participate on equal terms in the public sphere of the marketplace.

Public accommodation laws can therefore be understood as *systemic* requirements of a property system committed to abolishing apartheid. Rather than limitations of property rights, they are positive requirements of property systems that eschew legally enforceable connections between race and property ownership. In other words, they not only constitute a

fundamental distributive commitment but also institute the basic values of private property systems. It is true that those values instantiate conflicts between private rights to control one's own property and rights to access the property market. At the same time, the fundamental commitment to racial equality suggests that it is appropriate to understand such laws not as limits on property rights needed to achieve equality but as requirements of property systems committed to promoting access to property rights regardless of race.

DISTRIBUTIVE JUSTICE OF PROPERTY RELATIONS AT THE MICRO LEVEL

The distributive function of property law is evident not only on the level of overall social relations but also in the context of specific ongoing relationships. One major function of nuisance doctrine is to ensure that property use, as well as ownership, does not result in an unfair distribution of burdens associated with the development of land. Land uses that are perfectly legitimate in an isolated district become illegal if located in a built-up community. Each owner is entitled to *some* benefit from his or her land, and nuisance law ensures that the benefits and burdens of conflicting property uses are not distributed unfairly. Water law has a similar structure. Owners are generally entitled to withdraw water from beneath their land and even to sell it on the market. However, when they withdraw so much water that they undermine the subjacent support for neighboring land and begin to sink the surface of land in the surrounding area, the legal system may step in to limit their activities. Use of one's property cannot unreasonably interfere with the enjoyment of neighboring land.

The nuisance idea is based on the notion that the use of property rights cannot unfairly deprive others of the ability to use their own property. It has always suggested a limitation on property rights that cannot be fully comprehended by efficiency analysis. Certain types of property use will be prohibited because they interfere too much with the property rights of others, even if the social value of the conduct seems clearly to outweigh the social value of the other's property harmed by that conduct. Nuisance is therefore based on the notion that each owner should receive some benefit from the use of his or her land, and the benefits and burdens of land ownership should not be unfairly distributed between the parties. While a developer of a subdivision with a hundred houses may be required to pay for a drainage system on neighboring land to ensure that two or three neighboring houses are not flooded, it is not clear that

the owner of a single family home at the top of a hill should be required to pay for a drainage system for the hundred houses located further down the hill. Nuisance law allows contextual consideration of the appropriate distribution of benefits and burdens of land ownership and use among neighbors.

Other rules exhibit distributive concerns at the micro level. Reliance interests are protected for parties who have been granted access to the owner's property or have a long-term relationship with the owner that justifies forced sharing of property rights when the relationship ends. Such reliance interests distribute the benefits and burdens of social life by defining property rights to effectuate an appropriate balance between the interests of formal title holders and those with whom the title holder forms a relationship of mutual dependence.

The concept of entitlement may express, better than does the concept of ownership or title, the ability of property rights to be secure in certain ways and defeasible in others. Entitlement suggests a right that is not absolute and connotes the right to get a minimum—a raising up to a basic level—rather than the right to all there is. We presume only one person has title to a piece of property, while several people may have entitlements of various kinds in that property. The entitlement idea suggests a bundle of rights less capacious than fee simple absolute ownership and thus better captures the contextual definition and balancing of competing claims that characterize property rights.

PROPERTY AND SOCIAL RELATIONS

The classical ownership conception of property assumes that the institution of private property entails a commitment to a general policy of laissez-faire—abolishing or severely limiting "government regulation" of "private property." This conception of the relation between property rights and government power is the classical model of property. Under this model, private property is opposed to collective or governmental ownership. Privatization transfers power from government bureaucrats to free citizens, reducing regulation and establishing liberty—the liberty of individuals to control what they own. If property means ownership free from governmental regulation, then any regulations imposed on owners are limits on private property rights. As such, they are presumptively pernicious and bear a heavy burden of justification.

The classical model of property is dangerous because it is wrong, both as a description of the ways in which private property systems actually

operate and as a prescription for fairness and efficiency. The values that undergird the classical model are legitimate; the goals of increasing individual liberty, security, and well-being are justified and admirable. But the classical model is a flawed way to obtain these goals. Although the ownership concept has virtues, it is misleading as a description of the property rights we recognize and the rules of property law that define and regulate those rights. This descriptive inaccuracy is bad enough; far worse are the moral distortions created by the ownership model. Viewing all property as about the allocation of ownership suggests that everything has an owner who has presumptive total control over it. This normative paradigm hides from our consciousness the reality that almost all property is controlled by multiple owners and that property law is less about identifying who the owner is than about adjusting relationships among multiple owners and conflicting rights holders. The concept of ownership fails us just at the moment when a conceptual vocabulary for discussing property law is most needed.

The concept of ownership and the assumption of deregulation associated with it are not adequate means to achieve any of the legitimate goals we might seek to further by adopting a private property regime. Whether one conceives of the goal as promoting liberty, protecting security and reasonable expectations, rewarding hard work, establishing justice, or promoting social welfare, the classical ownership model fails as an adequate way to think about the meaning of private property.

The failure is twofold. First, property as ownership does not adequately express or implement the values we seek to foster by granting powers to owners. Its major problem is its failure to recognize that property rights have costs; the exercise of a property right by one person affects others. To structure property rights in a just and wise manner requires us to consider those effects. To do so, we must situate property in the context of social relationships.

The second problem with the ownership conception is that it fails to recognize conflicts among property rights. When two property rights conflict, it is not possible to address the conflict by asserting that one is in favor of limiting government regulation of property; such a formula is incoherent. The ownership conception of property fails to recognize that most of the conflicts that arise over the use or control of property can be best understood as conflicts *among property owners*, not conflicts between property owners and nonowners. The ownership conception misrepresents such situations and prevents us from adequately analyzing the conflicting values and interests presented by such problems.

The danger of the ownership conception is not only theoretical. Many policy makers and members of the general public in fact think about property through the simplistic lens of the ownership model. The model is simplistic because it presumes that it is easy to determine who the owner is and that, with minor exceptions, the owner wins any dispute regarding the property. Reality is far more complicated than this. Achieving the goals and protecting the principles underlying a just property regime requires a different understanding of property.

Because the ownership model of property is flawed, a variety of historical debates that continue to flourish have been wrongly formulated. Those debates include the proper extent of government regulation of private property, the legitimacy of redistribution of property, the correct balance between efficiency and rights in formulating legal rules, the legitimacy of "paternalistic" regulation, the commodification of all valuable interests, and the relation between legislative and judicial power to formulate law. All these traditional debates about property have been wrongly formulated because they all presume a simplistic model of property. The ownership conception of property prevents us from adequately analyzing public policy issues about organization of economic life. It also fails us when it comes to making moral judgments about public policy and law both by oversimplifying legal issues and by improperly allocating burdens of proof.

For example, most people assume that zoning or environmental laws take property rights by restricting the owner's right to use the property as he or she sees fit and that they therefore bear a heavy burden of justification. But when we realize that these laws are often intended to protect the property rights of others, it becomes far less easy to conclude that regulatory laws interfere with property rights rather than *protect* property rights. Zoning law, for example, protects the property rights of homeowners by preventing neighbors from building factories in the middle of residential neighborhoods. Although the zoning law limits the rights of the owner who wishes to build the factory, it does so to protect the property rights of the homeowners.

Another conception of property is available to us. Property rights concern relationships among people regarding control of valued resources. Rather than viewing property as equivalent to ownership, we can view it as defining a setting for human life. Property institutions create multiple settings to situate human relationships. Rather than identifying an owner and presuming that owner controls a particular resource for all purposes, we can understand property as rules that structure the contours of

human relationships by adjusting the relations among multiple "owners."

If we focus on the tensions that exist within the concept of property itself, and the conflicts among competing property rights holders, we see how it is possible to adopt different rules while adhering to the goal of protecting property rights. Understanding the tensions within property law also gives a basis for arguing that both the concept of property and property law as it has been implemented in practice include principles that require sharing of property and access to property by nonowners in situations in which considerations of justice or morality might counsel limitations on individualistic, selfish property claims.

NOTES

1. *Pierson v. Post,* 3 Caines' Reports 175, 2 Am. Dec. 264 (N.Y. 1805).
2. Cheryl Russell and Margaret Ambry, *The Official Guide to American Incomes* (New York: New Strategist, 1993), 278.
3. *Rase v. Castle Mountain Ranch,* 631 P.2d 680 (Mont. 1981).
4. *Loretto v. Teleprompter Manhattan CATV Corporation,* 458 U.S. 419, 435 (1982).
5. Civil Rights Act, 42 U.S.C. §§ 1981, 1982 (1866).
6. *Friendswood Development Co. v. Smith-Southwest Industries, Inc.,* 576 S.W.2d 21 (Tex. 1981).
7. This does not mean the rules operate this way completely. In fact, the consolidation of ownership rights in a single owner may give that owner power over nonowners in a way that may tend to establish the further concentration of ownership.
8. Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford, UK: Oxford University Press, 1990).
9. *The Little, Brown Book of Anecdotes,* ed. Clifton Fadiman (Boston: Little, Brown, 1985), 395.
10. Jeremy Waldron, *The Right to Private Property* (Oxford, UK: Clarendon Press, 1988), 329.
11. John Locke, *The Second Treatise of Government* (Indianapolis: Bobbs-Merrill, 1962 [1690]), 17.
12. Waldron, *The Right to Private Property,* 109–15, 127.

13. Frank Michelman, *Liberties, Fair Values, and Constitutional Method,* 59 University of Chicago Law Review 91, 99 (1992).
14. John A. Powell, *New Property Disaggregated: A Model to Address Employment Discrimination,* 24 University of San Francisco Law Review 363, 374 78 (1990).
15. Lawrence Friedman, *A History of American Law,* 2d ed. (New York: Simon & Schuster, 1985), 230–34, 414–19.

11 KEITH AOKI

THE STAKES OF INTELLECTUAL PROPERTY LAW

THE second largest export of the United States is not comprised of iron, wood, or plastic. It doesn't grow from the ground, and it's not assembled in factories. This increasingly vital component of the U.S. gross national product and the object of increasingly fractious international controversy is ownership and control over a broad range of intellectual properties: Mickey Mouse, McDonald's, Madonna, numinous digital bytes, and unique DNA sequences. Nor are the consequences only financial or limited to ownership and control. For example, Monsanto, a multinational agrochemical corporation based in the United States, recently genetically engineered and patented soybean and cotton seeds amenable to direct applications of another patented Monsanto product, the broad-spectrum herbicide Roundup™. These seeds are called Roundup Ready™, and they have a unique characteristic: crops will die if they are sprayed with broad-spectrum herbicides made by other companies.[1]

Not long ago, intellectual property was a somewhat eccentric and arcane area far from the center stage of American law and best left to technical experts. However, in the past few decades, intellectual property law and policy have moved to the front of the legal agenda in controversies both within and between nations. Recent domestic developments include patents in living organisms, proposals to prohibit temporary copies of computer documents in computer random access memory, and unprecedented protection of dilution of a trademark's distinct meaning. Internationally, trends such as the concentration of media protection under the umbrella of a decreasing number of transnational corporations, the uncontrolled and perhaps uncontrollable spread of digital communications networks, and the prevalence of uncompensated bio-