Joseph William Singer *

Property and Social Relations: From Title to Entitlement

What we do cannot be understood except in relation to those we touch [1].

— Justice Jack Pope
Supreme Court of Texas

Property rights serve human values. They are recognized to that end, and are limited by it [2].

— Chief Justice Joseph Weintraub
Supreme Court of New Jersey

§ 1. Family Squabbles: Inconsistencies and Ambiguities in the Concept of Property

The whole world seems to be embracing private property as a form of economic and political organization. What are we getting ourselves into? Property rights regulate relations among people by distributing powers to control valued resources. Property rights often involve bundles of particular entitlements. Among the most important of those entitlements are the privilege to use property, the right to exclude non-owners, the power to transfer property, and immunity from nonconsensual harm or loss. It is often assumed that these rights naturally go together and that a property system based on them is feasible. Yet if property involves a bundle of rights, it is not at all clear that all the sticks in the bundle fit comfortably together.

* I am grateful for having been invited to the Maastricht colloquium on *Property Law on the Threshold of the 21st Century* at the Rijksuniversiteit Limburg, in Maastricht, The Netherlands, to present this paper. It benefited from the comments and questions of the participants. This paper was also presented as the *Recht en Kritiek* lecture for 1995 in Utrecht, The Netherlands, and I am grateful for the comments I received there. Thanks and affection go to Martha Minow, Roel de Lange, Tracey Maclin, Frank Michelman, Jennifer Nedelsky, Nicholas Pappas, Carol Steiker, André van der Walt, Johan van der Walt, Lloyd Weinreb and Larry Yackle for helpful suggestions.

1. *Friendswood Development Co. v. Smith-Southwest Industries, Inc.*, 576 SW 2d 21, 33 (Tex. 1978) (Justice Pope dissenting).
2. *State v. Shack*, [1971] 277 A.2d NJ 369, 372.

Liberties such as the privilege to use or develop resources as one sees fit may conflict with rights to be secure from nonconsensual invasion or loss; uses of property that further the owner's interests may harm others or interfere with their settled and legitimate expectations[3]. The owner's right to exclude and her power to transfer may conflict with – and may be limited by – the public's rights of access to the market without discrimination based on race or sex or disability. If the individual entitlements comprising ownership constitute a family of rights of a certain class, the members of the family do not necessarily all get along with each other all the time. How should such conflicts be resolved?

Perhaps the notion of protecting reasonable expectations will help us. Yet some of the legal rules defining property entitlements protect expectations actually developed by individuals in the course of dealing with each other to exploit or enjoy resources, while other rules *shape* those expectations by determining which expectations are reasonable; rather than reflecting *what people expect*, they define what people have *a right to expect*. What happens when actual expectations deviate from moral or legal judgments about which expectations are legitimate or justified?

In analyzing such questions, scholars and judges appeal, more or less unconsciously, to a conception of property. The classical conception focuses on the concepts of title and ownership and presumes full control of specific valued resources by the "owner" backed up by state power. This conception remains powerful and exerts substantial determinative force in adjudicating and developing the rules of property law. The legal realists criticized the classical conception and argued that we should disaggregate property rights into their component parts, discussing each particular entitlement separately. Such a view presumes no utility for the general concept of property. I will present and criticize each of these conceptions. I will then develop a new model of property which conceptualizes it as a social system composed of entitlements which shape the contours of social relationships. I will argue that the traditional classical conception of property centered around absolute control of an owner should be replaced by some version of this social relations model.

§ 2. The Classical Conception

A. Title and Ownership: Absolute Powers Within Rigid Boundaries

The classical view is premised on the notion that property rights identify a private "owner" who has "title" to a set of valued resources with a presumption of full power over those resources. That property may be subject to some state regulation, but this regulation is always layered on top of the baseline property right of the title holder. This view presumes that it is always possible to identify some person as the "title holder" and that, in the absence of a contract or specific rule of law to the contrary, the "title

3. Kennedy, D., "Form and Substance in Private Law Adjudication", *Harvard Law Review*, 1976, 1685.

holder" is an "owner" who possesses the full bundle of privileges, rights, powers, and immunities[4] which accompany fee simple title to property. The concept of ownership sometimes refers to the consolidation of all these rights in the same person. Often, however, the title holder is still conceptualized as the "owner" even when most of her rights have been transferred to others. In either case, the image underlying ownership is absolute power of the owner within rigidly defined spatial boundaries. The classical conception assumes (a) consolidated rights; (b) a single, identifiable "owner" of that bundle of rights; (c) who is identifiable by formal title rather than informal relations or moral claims; (d) rigid, permanent rights (e) of absolute control (f) conceptualized in terms of boundaries which protect the owner from non-owners by granting the owner the absolute power to exclude; and (g) full power of the owner to transfer those rights completely or partially on such terms as the owner may choose.

B. Critique of the Classical Conception

The classical conception is premised on the value of protecting reasonable expectations. It is supported by widely shared norms of promoting autonomy, security, and privacy. Yet the classical model of property is distorted and misleading both because it is descriptively inaccurate and because it is normatively flawed[5]. The classical model misdescribes the way private property systems normally function by vastly oversimplifying both the kinds of property rights which exist and the rules governing the exercise of those rights. It also distorts normative judgment by hiding from consciousness relevant moral choices and by wrongly allocating burdens of proof. The classical conception makes it hard to formulate legal issues about property in a manner that is sufficiently nuanced and responsive to the normative choices implicated in conflicts over property rights.

The classical view not only assumes that most rights associated with property are ordinarily consolidated in the same owner but that it is possible to determine, in a relatively nondiscretionary manner, who that "owner" is by reference to formal indicia of "title". In other words, the classical view presumes that it is easy to tell who the title holder is. But in many cases, this is not easy at all. When a house is subject to a mortgage, for example, some states in the United States grant "title" to the "homeowner," reserving a "lien" for the bank while other states grant "title" to the bank while granting the owner a mere "equity of redemption". When a couple divorces, title to the house may be shifted from husband to wife or vice versa, as part of the property division awarded by the court. Thus the formal title holder's rights may be defeasible on divorce; it is not clear why one should not conceptualize the non-title-holding spouse as the "owner" of rights in the property which can be confirmed by a property division on divorce. Similarly, title can be lost through long-standing possession by a non-owner under the doctrine of adverse possession. Similarly, an owner who gives others permission to

4. Singer, J.W., "The Legal Rights Debate in Analytical Jurisprudence From Bentham to Hohfeld", *Wisconsin Law Review*, 1982, 975.
5. See Underkuffler, L.S., "On Property: An Essay", *Yale Law Journal*, 1990, 127.

occupy a portion of her land may be held to have waived her right to exclude them under the doctrines of constructive trust or easement by estoppel. Once again, the formal title holder may not be the lawful title holder if circumstances are such that the elements of adverse possession have been satisfied. Title is sometimes based on formal transfer and written documents and sometimes based on actual possession (as in the adverse possession case) or on supervening relationships (as in the case of divorcing spouses or easements by estoppel).

Who owns a corporation? We are accustomed to saying that the shareholders own it. Yet shareholders' rights have traditionally been incredibly limited in the United States. Courts have strictly limited the ability of shareholders to interfere with the day-to-day management of the business. More fundamentally, courts have placed roadblocks in the way of shareholders attempting to present independent candidates for the board of directors or to communicate with other shareholders. It has taken a new movement in recent years to reassert the rights of shareholders as "owners" [6]. Moreover, recent statutes have authorized corporate boards of directors to take into account the interests of "stakeholders" other than the shareholders in formulating corporate policy, such as workers, creditors, and the communities in which corporations operate [7].

Title is important to the classical conception because of the presumption that "owners" ordinarily win disputes about use or control of property. If it is not easy to identify which of several claimants is the "title holder," it will be difficult to assign ownership rights and thus to adjudicate disputes concerning control of the property. Yet a simple, non-controversial, morally defensible method for identifying the title holder is exactly what we lack [8].

Even if one could easily identify the title holder, we must recognize that many disputes about property involve conflicts *among* title holders. Consider land use disputes among neighbors. Property uses by one owner or title holder which interfere with the legitimate interests of neighboring owners are adjudicated through nuisance law as well as specific rules about particular types of interests [9]. In these situations, the legal issue involves multiple title holders whose property uses conflict. Such cases cannot reasonably be resolved or analyzed by reference to the concept of title.

6. Minow, N. and Monks, R.A.G., *Power and Accountability*, New York, Harper Business, 1991.
7. Singer, J.W., "Jobs and Justice: Rethinking the Stakeholder Debate", *University of Toronto Law Journal*, 1993, 475.
8. Perhaps more importantly, as I discuss below, it is not clear that it is morally appropriate to presume that the "owner" win certain types of disputes over land use; this presumption may require "non-owners" to defend their claims to have rights to use the property when it is the owner who should, in all fairness and justice, have to justify the harms her property use causes those ostensible "non-owners".
9. Special rules exist to allocate water rights (conflicts over ownership of groundwater or the use of surface streams or the disposal of diffuse surface water), support rights (both lateral and subjacent), and light and air.

In other cases, property rights in the same parcel of land have been divided – by contract or law – between two or more persons. If we observe the operation of private property systems, we see that full consolidation of property rights in the same person is the exception rather than the rule; most property rights are shared or divided among several persons. Indeed, almost every interesting dispute about control of or access to property can be described as conflict between property holders or between conflicting property rights. Typical situations include relations between landlords and tenants, mortgagors and mortgagees, homeowners and lien holders, servitude or easement owners and servient estates, present and future estate owners, parents and children, husbands and wives, testators and heirs, homeowners associations and unit owners, shareholders and managers, trustees of charitable foundations and their beneficiaries, employers and employees, creditors and debtors, buyers and sellers, bailors and bailees. In all these cases, property rights in the same parcel of land or structure or resource have been divided among two or more parties. When the owners of different rights in the same resource act in ways that impinge on each other's legally protected interests, we face the same problem present in nuisance cases – action by one owner which interferes with the use and enjoyment of another's property rights. In such cases, title and ownership are not helpful ways to conceptualize the dispute. Adjustment of the relationship between the parties is required.

Even if conventions exist to identify the "owner" or "title holder," and even if no conflict of owners is involved, knowing who the "owner" is does not help us to adjudicate most disputes concerning property. I often joke that most of the rules in my property casebook describe situations in which the owner loses [10]. Property owners' rights are often limited to promote the interests of "non-owners" [11]. Consider public accommodations laws which prohibit businesses open to the public from excluding or segregating customers on the basis of race. Convention dictates that the business or individual who has title to the land or who is the lessee of the space is the "owner" and that customers – members of the public – are not called "owners". The most central right associated with property, according to tradition and current constitutional law, is the right to exclude. Yet federal and state statutes substantially limit the rights of the "owner" to exclude members of the public on an invidious basis such as race. This is not a minor glitch in the system. It cannot usefully be described as a minimal interference with the property rights of the owner. It was not until 1964 that federal law unambiguously prohibited racial discrimination in places of public accommodation, and even then the statute did not regulate most businesses open to the public [12].

10. See Singer, J.W., *Property Law: Rules, Policies, and Practices*, Boston, Little Brown, 1993.
11. Of course, when the "owner" loses, one could easily state that some of the property rights we originally thought were vested in the owner are in fact owned by the person we called the "non-owner". In such cases, ownership rights have been shared or divided among the parties and each is a partial owner of some of the sticks in the bundle of rights comprising full fee simple title.
12. For example, the federal public accommodations law of 1964, 42 United States Code §2000a, does not cover retail stores.

The fact that property rights are often limited to promote the interests of other property owners or the public at large suggests the reason why the classical conception of property has distinct disadvantages from a moral point of view. The classical conception leads one to attempt to identify the "owner" and then to presume that the owner's interests prevail in any dispute over use of the property unless some sufficiently strong reason can be evinced to strip the owner of her rights. In this way, the classical conception allocates burdens of proof.

In the abstract, it appears useful to adopt conceptions that establish presumptions which allocate burdens of proof. Indeed, one might characterize all property rules as creating presumptions about who gets to control particular aspects of the external world. At the same time, the classical conception of ownership makes it hard to formulate legal issues about property in a manner that is sufficiently nuanced and responsive to our rational, intuitive judgments about the relevant moral features of some disputes about property use [13]. The ownership model of property utterly fails to incorporate an understanding of property rights as inherently limited both by the property rights of others and by public policies designed to ensure that property rights are exercised in a manner compatible with the public good. It makes "regulations" of "property" appear inherently suspect. It presumes that when "property rights" are "limited" by government "regulation," an evil has been effectuated which bears a heavy burden of justification. It places the burden of proof *consistently* in one direction. It has no vocabulary for describing or expressing certain types of property use as themselves inherently suspect. Nor can it adequately express the existence of conflicts between property owners.

Thus, for example, public accommodation laws appear to limit and interfere with property rights in order to promote equality. To justify them, we must explain why interests in equality justify taking or interfering with established property rights. The classical conception of property suggests that all owners have rights to exclude non-owners with a few exceptions; business owners have the same rights as homeowners to determine whom they will admit to their property. An alternative model might presume, for example, that businesses generally held open to the public have effectively transferred some of their property rights to the public at large. Businesses open to the public are in the "public" world in a way that homes are not. They are "public accommodations". This model suggests that property which is used in a way that affects the interests of non-owners or the community at large can be regulated in a way that responds to public policy concerns without impinging illegitimately on the owner's property rights. In such cases, it might be preferable to conceptualize the property right not in abstract terms, with a presumptive right in the title holder to exclude, but in more situated terms as a "public accommodation" – a form of property ownership which has limitations on the right to exclude built into it. If this model is chosen, then the burden will be on the "owner" of the public accommodation to justify her claim to be entitled to exclude members of the public arbitrarily. Rather than asking the excluded patron to justify her

13. See Anderson, E., *Value in Ethics and Economics*, Cambridge, Massachusetts, Harvard University Press, 1993.

claim to access to property possessed by another, one could conceptualize public accommodations laws as remedies available against actors who wrongfully violate the rights of others to contract and purchase property in the marketplace. The presumption should be that there is an equality right to participate in the market; actions which limit these rights must be justified by market actors. The classical conception warps our understanding of the policies involved in the context of public accommodations law. It is pernicious in defining the moral question in an inappropriate manner, not only by putting the burden of proof in the wrong direction but by defining a discriminatory exclusion from the market system as a presumptive exercise of protected property rights.

Perhaps more important, the "ownership" conception hides from consciousness the fact that exclusion from the marketplace on the basis of race interferes in the ability of those who are excluded to contract to purchase property in their own right. By presuming that the basic question is one of identifying the owner and justifying limits on the owner's rights, the classical conception obscures the conflict of interests that must be adjudicated by reference to a moral theory. Further, it obscures the fact that property rights exist on both sides: the right of the store owner to exclude and the right of members of the public to enter public accommodations and to engage in contractual relationships to purchase property. Truthful recognition of the conflict is a prerequisite to an adequate moral judgment. A better approach would express the inherent tensions within both property law and theory, freeing for judgment the actual moral choices implicated in developing property law.

§ 3. The Legal Realist Conception

A. Rights as Legally Protected Interests and Property as a Bundle of Rights

According to the legal realists, from Hohfeld to Corbin to the American Law Institutes' Restatement of Property to Thomas Grey's famous article on the disintegration of property, property has been exploded as a useful concept [14]. It merely describes a collection of legally protected interests which can be disaggregated into their component parts. Under this conception of legal rights, the crucial steps are (1) identifying the interests for which individuals seek legal protection and (2) using policy analysis to adjudicate conflicts among those interests and to determine the appropriate extent of legal protection for each interest. Further, it describes legal relations among people with regard to control of valued resources, rather than relations between persons and things. Under this conception, property as a category has no utility except to obfuscate the underlying policy choices which must be done at the level of the detailed individual

14. Hohfeld, W.N., "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", *Yale Law Journal*, 1913, 16; Hohfeld, W.N., "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", *Yale Law Journal*, 1917, 710; Corbin, A., "Offer, Acceptance, and Some of the Resulting Legal Relations", *Yale Law Journal*, 1917, 169; Restatement of Property (American Law Institute 1936-1944); Grey, Th., "The Disintegration of Property", *Nomos*, 1980, 69.

rules. Specific entitlements and policy concerns should replace the formalist and conceptualist attempt to imbue the concept of "property" with operative force in its own right.

B. Critique of the Bundle of Rights Idea

This view is appealing because it requires attention to specific social contexts, disputes, and relationships and to relevant values and policies rather than using formalistic arguments to adjudicate those disputes. It rightfully rejects the idea that a simple, all-encompassing theory can cleanly answer questions about property law. Despite its attractions, the legal realist view is limited and defective for one major reason. It fails to recognize the enduring cultural power of the concept of property for both citizens and judges. The ownership idea – for good or for ill – is extremely powerful and affects the way legal and social problems are analyzed. Demonstrating that it can be deconstructed does not deprive it of force as an organizing category. It retains its power to create unconscious presumptions about who should win particular disputes by appealing to common sense assumptions about who the owner is. In addition, it affects public discourse in ways that limit the creation of alternative solutions to public problems by presuming that all rights over property are ordinarily consolidated in the owner and that they are presumptively absolute.

We should recognize that property concepts perform a number of rhetorical functions. First, common discourse often identifies a particular person as the "owner" even when property rights have been split or distributed among several (or many) persons. Identification of someone as the "owner" establishes a presumption that the owner wins any dispute over use of the resource. In other words, the ownership concept structures legal doctrines in a rule/exception format to the effect that owners win unless specified conditions are established. Second, the property concept sometimes creates an assumption that certain sets of rights are bundled or consolidated together and must be owned by the same person. This idea is implemented, for example, through rules about estates and compulsory contract terms. Sometimes, however, the assumption is that particular rights can be disaggregated, as in landlord/tenant relationships. The structure of property doctrine effects presumptions about allowable forms of disaggregation. Third, calling something a property right often reflects an intuition that the right in question implicates a strong moral claim to immunity from loss by the voluntary action of both private and public actors and places a heavy burden on those seeking to "regulate" or "limit" the property right. Fourth, the property right idea often creates a perception that there should be a strong presumption that the right in question is alienable in the marketplace, and conversely, that non-alienable interests do not count as "property" rights.

Given the continuing force of the classical conception, it is important to bring to consciousness the hidden work of the property idea in setting presumptions such as these. In some cases, these presumptions are justified. But in other cases it is better from the standpoint of either social justice or efficiency to reconceptualize the legal problem in question to alter the unconscious presumption. This might be done by shifting the

presumption to the other party – perhaps by identifying that party as the "owner". Or it might be done by describing the situation as one in which legitimate property rights exist on both sides. By reconceptualizing the dispute in these ways, we can even attempt to harness the property conception in a way that can alter burdens of proof in a manner that more closely accords with our moral intuitions. I do not pretend this will be easy, but it must be done [15].

The legal realist wrongly assumes that it is possible to engage in policy analysis without implicit baselines. Property concepts distribute burdens of proof. The cases which apply the traditional common law rule giving businesses the freedom to choose their customers appeal to the notion of private property as their fundamental justification. Characterizing this as a policy choice does not aid in changing the perception of the appropriate baseline to apply in the absence of legislative action to the contrary. Only the creation of a new category – the public accommodation – can work to redistribute burdens of proof in a morally acceptable manner. Recognizing the role that the property idea plays in setting the baselines for analysis is crucial to developing an adequate conceptual vocabulary to understand and address legal disputes about the meaning and structure of property law rules. Lawyers know that when we cannot figure out how to adjudicate a dispute between conflicting interests, values or policies, we often do so by default – through adopting presumptions and burdens of proof. Property law, to a large extent, is about allocating those presumptions and those burdens. We need to reconstruct policy analysis by elucidating the structure of the tensions *within the concept of property itself* [16].

§ 4. The Social Relations Model

A. Entitlements Shaping the Contours of Social Relationships

Both the classical and the legal realist views of property tend to focus on individual rights in isolation. The classical view focuses on the relation between the owner and the thing, presuming that the state cannot interfere with the owner's power over the thing. The legal realist view shifts attention to relations among people with respect to the valued resource. At the same time, it both individualizes those relationships and universalizes the policies which justify the rules regulating those relationships. The legal realists jumped back and forth between individual interests and social policies. What they lacked was an adequate language which could comprehend social relationships as mediating terms. In addition, because of their preoccupation with combating formalism, the realists were loathe to generalize. They saw rules in particular context and failed adequately to describe property as a system.

15. See Nedelsky, J., *Private Property and Limits of American Constitutionalism*, Chicago, University of Chicago Press, 1990 (suggesting that it will not be easy to reform the property concept).
16. See Underkuffler, L.S., *l.c.*, 1990.

I propose a conception of property which is distinct from either the classical or the legal realist models: the social relations model. This model reconceptualizes property as a social system composed of entitlements which shape the contours of social relationships. The legal realist model was correct in recognizing that property rights can be and often are disaggregated. It was also correct in understanding property laws as beset by conflicting values and competing interests. Most important, it was correct in analyzing property rights in terms of human relationships rather than relations between persons and things. However, the classical model was correct in recognizing the pull of the ownership ideal in our culture generally and in the legal system in particular, especially the role that property rhetoric plays in setting baselines for legal analysis. Moreover, it suggests, as the legal realist conception did not, that it may be possible to generalize about the tensions within property law and that both property doctrine and policy analysis contain a built-in structure which can be elucidated.

We should understand property as a social system. It involves, not relations between people and things, but among people, both at the level of society as a whole (the macro level) and in the context of particular relationships (the micro level). Four features of this system deserve emphasis. First, multiple models exist for defining and controlling property relationships. Second, property rights must be understood as both contingent and contextually determined. Third, property law and property rights have an inescapable distributive component. Fourth, property law helps to structure and shape the contours of social relationships

B. Multiple Models of Property

1. Bundles of Rights

Multiple models exist for defining and controlling property relationships. These models can be described in more detail than the specific level of individual rules which were the focus of legal realist analysis. They effectively create paradigms which function as baselines in the consciousness of decision makers. Bringing these paradigms to the forefront should help to emphasize and clarify the choices which decision makers need to make in setting particular legal rules.

When most people think of property, they have an image in their minds of an individual owning a plot of land with a house on it. The land has clear borders and no doubt exists about who the owner is. Only one person is involved. Others enter the picture only if the "owner" invites them in or voluntarily transfers some of his rights to them[17]. I have argued that the "ownership" model is misleading even in the case of ownership of a single family home. It is particularly misleading if one considers the multiple contexts

17. I have deliberately used the masculine pronoun. The traditional image of the owner assumes the family members who may share use of the property with the owner have rights derivative of that owner and the traditional, patriarchal structure of the family – supported by legal rules – gave control over the property to the man.

in which property is owned, in the family, in the business world, and by government entities. When our view is broadened, it becomes evident that we have multiple models of property in the legal system rather than the simple "ownership" model.

It is implicit in our understanding that we have different models of property in different spheres of social life, such as family relations, business organization, and housing. Multiple models exist even within each of these social spheres. In the family, we have multiple models of marital property both during marriage and at divorce (community property versus separate property; enforceable antenuptial agreements versus equitable distribution), child support (children's claims on family assets), inheritance, parental support, and obligations to care for siblings or other relatives, marital ownership of real estate (tenancy by the entirety). In the field of housing, we have models of ownership which include individual ownership, joint ownership (tenancy in common, joint tenancy), leasing arrangements (perhaps subsidized by government welfare payments), cooperatives, condominiums, subdivisions, homeowners' associations, ground leases, charitable land trusts, limited equity cooperatives, tribal property (including original Indian title, recognized tribal title and restricted trust allotments), public housing, and government property. In the field of business, we have individual proprietorships, partnerships (both general and limited), corporations (close and public), quasi-public corporations and non-profit charitable institutions, such as hospitals, universities, and museums and private trusts and foundations.

These models are not merely glosses on the basic "title" or "full ownership" theory. Many of them depart so far from the basic model of a single owner with consolidated rights that use of that basic model is essentially misleading as a conceptual baseline from which to understand and critically analyze legal rules regarding that form of social relationship. For example, community property and equitable distribution laws reverse the usual presumption and vest interests in family members without regard to title; for many kinds of property, title is substantially irrelevant in dividing those interests on divorce. Similarly, title is not helpful in adjudicating conflicts between shareholders and managers in corporate law. Traditionally, corporate law has narrowly circumscribed the rights of shareholders. Recent expansions in those rights have been accompanied by state laws which arguably cut back on shareholder rights by requiring or authorizing managers to consider the interests of constituencies other than shareholders in managing corporate affairs [18].

Explicitly identifying multiple models of property can help to alter presumptions and burdens of proof in appropriate directions. Homeowners should be presumptively entitled to exclude others from their homes, but public accommodations should be presumptively obligated to serve members of the public who accept their implicit invitation to enter the business for service. Single persons generally possess immunities from forcible conscription of their property for the needs of others; those who marry, enter

18. Singer, J.W., *l.c.*, 1993.

into long-term intimate relationships or have children, on the other hand, have implicit obligations to their spouses, lovers, and children which cannot be avoided without adequate cause.

2. *Formality and Informality as Sources of Property Rights*

The classical conception of property suggests or assumes that ownership can be determined by reference to relatively formal indicia of title through such written documents as deeds, wills, marriage certificates and leases. It may be useful to adopt presumptions that title vests in the person identified in those formal documents. At the same time, numerous legal rules protect reliance interests of persons who have developed relationships with the owner or have been granted informal access to the property [19]. Oral representations, informal permission, a course of dealing, a personal relationship, and business custom all form crucial cultural backgrounds to property arrangements and often prevail over formal indicia of title. It may be possible to develop presumptions about the kinds of situations in which such relationships (rather than formal title) constitute the determining factor for allocation of property rights.

C. The Contingency of Property Rights

1. *Property Situated in Human Relations over Space and Time*

Property rights must be understood as both contingent and contextual. That context includes both effects of exercises of property rights on others and changing conditions and values. Property rights are contingent because changing circumstances change the rights which are recognized by the system. This is true of *all* property rules, not merely rules which within themselves refer to effects on others, such as nuisance law. Effectively, the model of property law contained in nuisance doctrine can be used as the basis of a new conceptual system for property law in general.

The classical title theory of property rights conceptualizes them as fixed and certain, alterable only when the owner voluntarily relinquishes them. Property rights are *owned* and cannot be taken without the owner's consent. The meaning of ownership is that the owner has the right to use the property, as the owner sees fit, without having to account to others for how the property is used. This model legitimately focuses on property rights as describing strong claims to security for protection of the right to control the use of particular resources. At the same time, this model fails to recognize that all property rights in the legal system have in fact been contingent, changing over time, and dependent on the effects their exercise has on others [20]. In place of the title theory, it is useful to consider the model of nuisance doctrine.

19. Singer, J.W., "The Reliance Interest in Property", *Stanford Law Review*, 1988, 611.
20. Unger, R.M., *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy, Part I of Politics, a Work in Constructive Social Theory*, Cambridge, New York, Cambridge University Press, 1987 (working out a conception of property rights that incorporates contingency).

2. Nuisance as the Basis for a New Model of Property Rights

Nuisance doctrine expressly qualifies property rights by reference to their effects on other property owners and on the public at large. It is premised on the notion that any action, if taken to the extreme, may become unlawful. Property rights must be exercised in a manner that allows similarly situated owners to have some reasonable use of their property and to be protected from undue interference with their legitimate property interests. A similar example is antitrust law. A business that is operating perfectly lawfully may come to monopolize a particular industry. When it gets too much power and acts to inhibit other entrants to the market in a wrongful manner, the law may step in to limit activity that used to be perfectly lawful simply because the effects of the conduct of the business have changed over time. The actual *effects* of uses of property may qualify property rights, such that a nuisance is a "pig in the parlor instead of the barnyard" [21]. Whether an action constitutes an improper use of property which violates the property or personal rights of others is something that cannot be determined in the abstract.

All contested questions of property law can be recast either as disputes about which party has title generally or as debates about which party has title to the particular strand of property right at issue in the case. In other words, the nuisance model can be used to reconceptualize all the basic rights of "owners," including privileges to use, rights to exclude, powers to transfer, and immunities from loss. The privilege to use property is limited by nuisance doctrine, as well as other legal rules, to protect the legitimate interests of other property owners and the public at large from the harmful effects of the use of property. The extent of the privilege to use is thus *contingent* on its effects on others. The right to exclude is limited, for example, by public accommodations law and the defense of necessity. The power to transfer is limited by the estates system to prevent the re-emergence of feudalism and to devolve power over property to present generations. The immunity from loss is limited by adverse possession law and the law of constructive trusts, estoppel and necessity which redistribute property rights from "owners" to non-owners when the owner has acted so as to create legitimate reliance interests in others. Title to property and even title to the particular right in question does not settle the question of whether an owner is entitled to protection for a claimed property interest; ownership is not a solving word for most disputes about property.

In all of these cases, the scope and extent of property rights is dependent on the effects the exercise of those rights have on other people. Questions about the proper rules of property law therefore are better understood as contingent on the context within which property rights operate and the effects those rights have on other people than on rules which assign title.

21. Village of Euclid v. Ambler Realty Co., (1962) 272 US 365, 388.

D. The Distributive Component of Property

1. "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" [22]. His answer contains a brilliant and inescapable 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" [23].

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 which 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 system of distributive justice and the prevailing norms of private property, as it has 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 which will then be defended by the state [24]. 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 which emerges from individual actions, it is free to *redistribute* property through the tax system. Such a tax would constitute the first time the legal system got involved in determining the distribution of property; before such a tax, distribution was privately determined by individuals acting in their own interest. Governmental compul-

22. Fadiman, C., (Ed.), *The Little, Brown Book of Anecdotes*, Boston, Little Brown, 1985, 395.
23. Waldron, J., *The Right to Private Property*, Oxford, Clarendon Press, New York, Oxford University Press, 1988, 329.
24. Waldron, J., *o.c.*, 1988, 329.

sion is absent from this property acquiring-process. No public policy decisions need to be made about property distribution for such a system to work.

This view is fundamentally mistaken. It is both normatively deficient and descriptively flawed. It distorts our understanding of private property as a social and legal institution. The distortions apply both to property theory and to historical practice of property law in the United States.

2. 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[25]. 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. Locke qualified this theory by a significant proviso. Locke noted that labor creates property rights "*at least where there is enough and as good left in common for others*"[26].

Jeremy Waldron has characterized Locke's argument as a "special rights" theory[27]. 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. Waldron has made two crucial criticisms of special rights theories. First, it is not at all clear why the actions of 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 which 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.

To some extent, Waldron's twin critiques state, in a more precise form, the Lockean proviso. Property rights can only be justified if their creation and exercise do not

25. It has been far less successful as an accurate description of legal and social practice.
26. Locke, J., *The Second Treatise of Government*, 17, Bobbs-Merrill, 1962, 1690. A second significant proviso was that the use of money allowed and enabled a market system to operate in which individuals could legitimately acquire more resources than were necessary to satisfy their immediate wants. Exchange of resources meant that the property would not be wasted. For my purposes, this argument is peripheral to the underlying moral basis for initial acquisition which itself is qualified by the proviso that individual property rights are only justified if the system is administered so as not to exclude any individual from the opportunity to acquire property in the first place.
27. Waldron, J., *o.c.*, 1988, at 109-15. For a sympathetic critique of Waldron's theory, see Jeremy Paul, "Can Rights Move Left?", *Michigan Law Review*, 1990, 1622 (review of Jeremy Waldron, *The Right to Private Property*, 1988).

wrongly deprive others of similar rights. Waldron took the proviso one step further, however, and argued that it undermines Locke's theory itself. Possession of unowned land cannot be justified, in Locke's view, if it leaves others out of the system by which such property can be acquired. Waldron went further and argued that property rights initially could not be justified merely by appealing to actions taken by individuals. Rather, one had to back one step further, to the social contract itself to determine whether free and rational individuals would accept a system that would leave them with nothing.

From this perspective, the Lockean proviso looms large. The very legitimacy of a property system depends on the effect of 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" [28].

3. Distributive Norms in Historical Practice in the United States

This ineluctable distributive component of private property has also 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" [29]. Nonetheless, under modern understandings of what it means to create a private property system, it is not an exaggeration to say that 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 is not only suggested by the political theory justifying private property but is embedded in United States history. First, in the nineteenth century, the United States adopted a practice of transferring public lands to many of its citizens through homestead laws which attempted (some of the time) to give priority to actual

28. Michelman, F., "Liberties, Fair Values, and Constitutional Method", *University of Chicago Law Review*, 1992, 91, 99.
29. Middleton, R., *Colonial America*, Cambridge, Blackwell, 1992, 131-32. Other proprietary colonies included North and South Carolina. Id. at 172.

settlers[30]. 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.

This policy had a pernicious aspect to it. Where did the United States get the land to give out to white settlers? It took the land from American Indian nations. How were those seizures justified? From the beginning, English colonists justified 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[31]. Locke himself 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.

4. Distributive Norms in Current Property Law

a. Distributive Justice of Property Systems at the Macro Level

(1) The Estates System and Decentralization: Combating Class Hierarchy

Throughout the nineteenth century – including the *Lochner* era – 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 which mediated the relations between lords and tenants in the feudal era and between the generations. The underlying premise of the estates system 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.

Substantial regulation of property transfers is required to ensure that sellers of land do not load it down with restrictions on use and ownership which 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

30. Friedman, L., *A History of American Law*, 2nd ed., New York, Simon & Schuster, 1985, 230-34, 414-19.

31. Williams, R.A. Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest*, New York, Oxford University Press, 1990.

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 [32].

(2) Public Accommodations and Fair Housing Law: Combating Racial Caste

Another example of rules of property law which operate systemically to shape social relationships are antidiscrimination laws which prohibit racial discrimination in housing markets (both sale and rental) and in public accommodations (businesses which serve 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 which 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 in (obtain access to) the public sphere of the marketplace.

b. 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 in the context of ongoing specific 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 which are perfectly legitimate, when done in an isolated district, become illegal if done in a built-up community. Each owner is entitled to *some* benefit from their 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 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.

32. I do not mean to argue that the system always functions this way in practice. Until recently, land ownership in the state of Hawaii was extremely concentrated with fewer than one hundred owners of much of the land in the state. This concentration of ownership persisted until the state passed a land reform act forcibly redistributing property from landlords to tenants. I mean to argue that the policy behind the estates system rules is to combat the kinds of social hierarchy and centralized power over land associated with feudalism.

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 which 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 defendant's conduct seems clearly to outweigh the social value of the plaintiff's property harmed by that conduct [33]. Nuisance is therefore based on the notion that each owner should receive some benefit from the use of their 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 on the hill. Nuisance law allows consideration of the appropriate distribution of benefits and burdens of land ownership and use among neighbors.

Other rules that exhibit distributive concerns at the micro level are those that protect reliance interests of parties who have been granted access to the owner's property or have a long-term relationship with the owner which 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 [34].

By substituting the concept of "entitlement" for the concept of "title," we can better express the inherent distributive component of a private property system and the defeasible quality of property rights. "Entitlement" expresses something missing from the title or ownership conception of property – that is, a right to be accorded the right in question. The very word "entitlement" includes a verb inside it; it describes, not just the result (being granted title or control) but the process by which that control came to be recognized (becoming "entitled"). In its uses to refer to government welfare benefits, it may also connote the right to get a minimum, a raising up to a basic level. It therefore expresses not only the right to secure control of property one has; it expresses property rights as control rights which should be granted or recognized. The entitlement idea brings within the property concept itself the notion that property is a social system which organizes access to and control over valued resources in order to create and maintain universal ability to obtain access to the system by which property rights are acquired.

33. Nuisance law does not have to be interpreted this way. One can argue for a rigorously utilitarian, efficiency-oriented form of nuisance law. This simply would not represent the way nuisance law has been used or understood historically in the United States and rejects a portion of the normative underpinning of the doctrine.

34. Singer, J.W., *l.c.*, 1988.

Entitlement also suggests a right that may not be absolute. I am aware that others have used the concept of entitlement to express an absolute property right. I believe the concept of entitlement is simply not used with the same presumption of absoluteness that attaches to the concept of ownership or title. 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 may therefore suggest a bundle of rights less capacious than fee simple absolute ownership and thus better capture property rights which are contextually defined. If entitlements are strongly protected legal rights, they are nonetheless subject to limitations to protect the entitlements of others. When the word entitlement is used today to refer to government benefits, it does suggest an absolute right to get some level of benefit, but the *amount* of government benefit had never been thought to be non-modifiable. The concept of entitlement may express (better than does the concept of title) the ability of property rights to be secure in certain ways and defeasible in others.

E. Property and Social Relations

Property law helps to structure and shape the contours of social relationships. Choices of property rules ineluctably entail choices about the quality and character of human relationships. It entails myriad choices about the kind of society we will collectively create. Consider a developer of a residential subdivision who includes in each deed a clause requiring all future purchasers of the land both to pay a fee or tax to the developer and to obtain the developer's consent to the sale. Several rules of property law render these clauses void. It constitutes an illegal restraint on alienation and it constitutes an attempt to create an estate which is not recognized by the common law [35]. On the other hand, a clause which grants a homeowners' association a right of first refusal which can be effectively exercised to control the identity of future purchasers will generally be enforced by courts [36].

What accounts for the difference?

One might argue that transaction costs might block negotiations between the developer and all the homeowners to induce the developer to give up its control rights while those costs are lower in the presence of a homeowners' association which can act by majority rule through a managing board rather than through the individual assent of each owner. Yet this distinction does not work. The developer's veto will be struck down by courts even if a homeowners' association exists. A permanent right of first refusal in the developer is likely to be struck down as an invalid restraint on alienation. The real objection is to the developer's attempt to exercise continuing control over the property

35. Singer, J.W., *l.c.*, 1993, at 544-556.
36. At the same time, the right of first refusal will not be upheld if it exercised in a racially discriminatory manner. This confirms the hypothesis that the objection is to a way of life – here a racial caste system by which white people have greater access to participation in the real estate market than do African Americans.

once all the units have been sold. Continuing control by the developer looks too much like feudalism – control by an absentee lord. The rules of the estates system serve to push power downwards from the lord to the actual possessors of the land. The objection to continuing control by the developer is not an objection based on its inefficiency. It is an objection to a way of life.

Consider the lessons of public accommodations law[37]. In the antebellum era from 1800 to 1860, the law enacted a particular conception of private property in the context of businesses open to the public. Any business which held itself out as ready to serve anyone who came seeking services had an obligation to serve its customers. This rule of law rested on a combination of moral and social policy considerations. Travelers were vulnerable to both cold weather and bandits if inns refused to take them in and carriers refused to transport them. The services provided by such businesses were needed by customers who relied on their being available. On the other side, the business was conceptualized as having voluntarily agreed to enter the public world to provide these services. It could not renege on its commitment to serve the public in particular cases without adequate reason. Property rights, in this conception, are not premised on the absolute right of owners to control their property as they see fit. Rather, property owners have obligations as well as rights. In return for the rights property law confers on them, owners have duties to others to use their property so as not to cause harm or let others down who rely on the public uses to which they have devoted their property.

From the time of the Civil War until 1964, public accommodation law was constantly changing and contested. The primary question was whether the public right to be served in places of public accommodation should extend to African Americans. Some states required access to all businesses open to the public regardless of race. Others required public service but allowed, and eventually required, segregation. These states eventually allowed businesses such as hotels and restaurants to refuse entirely to serve African Americans. In all states, the common law rule was substantially narrowed. Rather than a general rule requiring businesses to serve the public, most businesses (other than innkeepers and common carriers) were exempted from this obligation on the ground that property owners have a right to control access to their property and have no duty to contract with others if they do not wish to do so. This conception of property presumed that title holders have full rights to control access to their property without regard to the effects such control has on others. In addition, this new conception of property reinforced and helped to implement the emerging Jim Crow system which at first encouraged and then required businesses to segregate customers on the basis of race. This emerging system replaced the right of access with a right to exclude.

This legal system was overturned in many Northern states over the course of the twentieth century. However, not until the civil rights movement in the 1940s and 1950s and the civil rights statutes of the 1960s did both law and custom significantly alter the

37. This historical discussion summarizes the argument in Singer, J.W., *No Right to Exclude: Public Accommodations and Private Property*, (manuscript in possession of author) 1995.

social practice of racial segregation in both the North and the South. Current law in the United States is therefore characterized by an odd mixture of the antebellum model (requiring access) and the classical Jim Crow model (authorizing exclusion).

The history of public accommodations law is the history of race relations. The antebellum law presented itself in a neutral framework, yet obscured the fact that African Americans were not included in the right-holders protected by the right of access to businesses which held themselves out as open to the public. The post-Civil War period brought in an era of confusion and turmoil as social groups attempted to work out the new relations between the races, experimenting with full, equal and integrated access to segregation to outright exclusion. The Jim Crow era constituted property rights in a manner that both established and perpetuated a racial caste system while suppressing the contradiction between segregation laws and emerging conceptions of absolute private property rights. The civil rights era again revolutionized social relations in the 1960's. Public accommodations are clearly "private" property because they are privately owned; yet they are "public" both in the sense that they are open to the public and in the sense they should be open to the public. They should be open because they constitute a form of property use that injects the property into market relations – a sphere of social life to which everyone should have access. Property rights used in this way are regulated to ensure that they do not exclude particular individuals or segments of the population from participation in this inherently social area of life. In addition, the history of the duty to serve, and the changes in race relations it reflected and helped to shape, strongly suggests that property rules do not merely concern the distribution of wealth and power but help to create a form of social life. The question of whether a black man gets to sit next to a white woman on a bus or in a restaurant is not merely a question of how wealth and power are distributed – although it surely is that. It is a question about what form of social life we are going to have.

Jennifer Nedelsky argues that "we must now think about the problem (of property) differently. We can no longer believe that "property" has a single, fixed meaning" [38]. But if it no longer has a "single, fixed meaning," what good is it? She answers that "(t)he concept of property reflects collective choices about what sorts of goods should be given the status of secure entitlements, and what sort of security and what sort of entitlement – and those choices change" [39]. Property is a social system, as the law of public accommodations demonstrates. It is designed to disaggregate power and to promote equal access to the conditions necessary for a full human life. Property law implicates and structures social relationships and can be adequately understood and judged only in that light.

38. Nedelsky, J., *l.c.*, 1990, at 209.
39. Id.