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Gregory S. Alexander
Cornell Law School, gsa9@cornell.edu

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Five Easy Pieces: 
Recurrent Themes in American Property Law

Gregory S. Alexander*

The title of my article, “Five Easy Pieces,” may not resonate with those of you who are too young to remember Jack Nicholson as a budding young movie star cut out of the James Dean mold. For those who do remember, it is, of course, the title of one of Nicholson’s early (and, to my mind, greatest) movies.¹ Jack’s five easy pieces were piano pieces, easy for him to perform, less so for others.² There was a certain irony about the word “easy” in the title. The irony lay not only in the fact that just about everyone else consider those pieces difficult, but, more deeply, because those piano pieces were the only pieces of the life of Bobby Dupea, the character whom Jack portrayed, that were easy for him. Life as a whole, the big picture, was one great, almost impossible challenge for him.

My five easy pieces have their own ironic twist. They are rather different but equally challenging in their own ways that first-year law students here will readily recognize. My pieces, this piece, is really aimed at them. The pieces I will discuss are five recurrent themes in American property law, leit motifs, to continue the metaphor from the Nicholson movie, that run throughout American legal doctrines. These themes provide a way of structuring all of property law, adding coherence to what so often appears to law students as an unintelligible rag-tag collection of rules and doctrines that defy any attempt to construct an overarching framework for analysis. I have given five simple labels to these recurrent topics: “conceptualizing property,” “categorizing property,” “historicizing property,” “enforcing property,” and “de-marginalizing property.” We begin with how we conceptualize property.

* A. Robert Noll Professor of Law, Cornell University. This article is a somewhat expanded version of the Gifford Lecture, delivered at the University of Hawai‘i Richardson School of Law. I wish to thank Dean Avi Soifer for his typically warm and gracious hospitality during my visit at the Richardson School of Law. I am deeply grateful to him. I am also grateful to Joe Singer, who graciously and helpfully commented on an earlier draft.

¹ Five Easy Pieces (Columbia Pictures 1970).
I. CONCEPTUALIZING PROPERTY

At least three different ways of conceptualizing ownership of property exist in American legal thought and legal discourse. Introducing them in chronological order, the first might be called the classical conception. This is the understanding of ownership that is customarily attributed to Sir William Blackstone, the great eighteenth-century English jurist, academic, and scholar whose treatise, Commentaries on the Laws of England,\(^3\) was enormously influential on American lawyers into the twentieth century. The classical view was captured by Blackstone’s memorable definition of ownership as “that sole and despotic dominion which one man claims and exercises over the things of the world, in total exclusion of the right of any other individual in the universe.”\(^4\) As Jane Baron notes, “The Blackstonian view posits nearly limitless rights consolidated in a single owner, who can exclude all others.”\(^5\) Blackstone himself did not hold that view of ownership.\(^6\) What we call the Blackstonian conception is really a trope, a construct that we have come to attribute to Blackstone. This is why it is better to refer to this conception as the “classical” conception of ownership.

The classical conception has three defining features. First, it conceives of ownership as unified, rather than fragmented, a very important point, as we will soon see. Second, it constructs ownership in terms of the simple relationship between a person and a “thing.” Third, the person in that relationship is considered to have exclusive dominion over the thing, to be the master of it, to the exclusion of everyone else in the world.

Now, this way of looking at ownership arguably captures the ordinary non-lawyer’s understanding of what it means to own property. Professor Bruce Ackerman made that contention a number of years ago in his book Private Property and the Constitution.\(^7\) Ackerman argued that the classical conception reflects just the way in which a hypothetical ordinary lay person, whom he dubbed “Layman,” thought, or at least talked about property and ownership. Ackerman asserted that lay people think of


\(^{4}\) 2 Blackstone, supra note 3, at 2.


\(^{7}\) Bruce A. Ackerman, Private Property and the Constitution (1977).
ownership pretty much in accordance with the classical conception: as unitary, as a person-thing relationship, and as exclusive dominion.

Whether or not lay people think of ownership that way, it is no longer the way in which most American lawyers think or talk about ownership. The American Legal Realist movement of the 1920s and 30s replaced the classical conception with a second conception, commonly called the “bundles-of-rights” conception. The attraction of the bundles-of-rights metaphor to the Legal Realists and subsequent generations of American lawyers is its flexibility. The bundle-of-rights theory has three significant insights that contribute to its flexibility. First, as its name indicates, it rejected the old idea that ownership is unitary, in favor of a fragmented understanding of ownership. What this means is that ownership is comprised of a number of claim-rights, such as the rights to use, possess, exclude, manage, give, sell, and so on, and that no single one of these claim-rights is essential to ownership.

Second, and closely related to the first, the bundles idea relaxed the view of ownership as absolute, or nearly so, dominion by focusing attention on the fact that ownership is a matter of one person’s claim being relatively better than another’s, leaving open the possibility that such a claim might yet be relatively weaker than a third person’s claim. “Title,” as we say, “is relative.”

Third, the bundle-of-rights conception shifts the focus from the relationship between a person and a thing to the relationship between persons. Ownership is a person-to-person relationship with respect to things (not even really things, but assets). This aspect of the bundle-of-rights conception was important to the Legal Realists because they wanted to emphasize the social character of ownership, that is, the fact that private ownership of property is a matter of human relationships.

Although the bundle-of-rights conception has dominated American legal discourse about ownership for nearly a century, today it is under attack. It has been attacked by scholars who wish to concentrate attention on the ends of property, including those who argue that a regime of private property should aim at producing outcomes that are conducive of a “free and democratic society.”\(^8\) The primary source of attack, however, comes from scholars who view property as the “law of things.”\(^9\) These scholars object to the bundle-of-rights conception not only because it does not focus attention on things as the subject matter of property law but also, and perhaps more importantly, because it tends to treat all of the twigs in the

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bundle as of a piece. According to these scholars, not all the twigs are equally important or expendable. In particular, to them, the right to exclude is the core of ownership, indeed the very *sine qua non* of ownership, and the bundle metaphor obscures this central point.\(^\text{10}\)

The leading exponents of this view, which we can call the exclusion theory, are Professors Thomas Merrill, of Columbia Law School, and Henry Smith, of Harvard. Writing both separately and together, Merrill and Smith argue, “[t]he most basic principle is that property at its core entails the right to exclude others from some discrete thing. This right gives rise to a general duty on the part of others to abstain from interfering with the thing.” They go on to assert:

The materials [in our Property casebook] are designed to challenge each student to decide for him or herself whether property is defined by common principles such as the right to exclude others, or whether any such principle is so riddled with exceptions that property can only be regarded as an ad hoc ‘bundle of rights.’\(^\text{11}\)

Several aspects of this claim need to be noticed. The most important of these is the claimed centrality of the right to exclude to ownership. Professors Merrill and Smith argue that the right to exclude is the core of ownership of property. One of them, Professor Merrill, goes so far as to assert that this right is the very essence of ownership itself; take that right away and you no longer have ownership.\(^\text{12}\) However true that claim may be under American law and American society, it is not true of all legal systems or societies, even in the western world. At best, the claim is only culturally true; it is culturally contingent. Scotland, for example, has enacted a so-called “right to roam” law, which permits any person to be upon anyone else’s land, subject to certain limitations (such as not coming within a few yards of a person’s home).\(^\text{13}\) One might distinguish the Scottish example from American law in certain respects. For example, Scotland is not a common-law country. Instead, it has a mixed legal system, combining the common law with the civil law. Moreover, the ancient system of feudal

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\(^{12}\) See Merrill, *Right to Exclude*, supra note 10.

estates was not abolished in Scotland until as late as 2000. England, however, is a common law country par excellence, and it too now has a right to roam statute. The English statute differs from its Scottish predecessor in certain notable respects, the most important of which is that its coverage is more limited. Under the English Act, the public has the right to wander only over registered “common land” and lands classified as “open country,” defined as mountain, moorland, heath and downland. Qualified land covers approximately twelve percent of England and Wales, in contrast with the nearly one hundred percent covered by the Scottish statutory right.

Professors Merrill and Smith claim that this exclusion theory captures the ordinary person’s morality of property. The “traditional everyday view,” they assert, is that property just is a “right to a thing good against the world.” But just which ordinary person’s morality is this? Apparently not the ordinary Scot’s morality, for the statute recognizing the right to roam had strong popular support. Nor, apparently, does it reflect the ordinary English person’s morality of property. So, the morality, if it be a morality at all, is neither timeless nor universal. It is, at best, culturally-based; it is contingent.

Moreover, there is reason to be skeptical that it is the ordinary American’s morality. Perhaps ordinary Americans talk about ownership of property in these simplistic ways, but they surely don’t think about ownership that way, at least not when faced with a situation in which it makes a difference. In analyzing the ways in which ordinary people understand ownership of property, the relevant social judgments are not simply the judgments as to which specific interests people apply the words “ownership” or “property” in ordinary language usage. Rather, the relevant

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16 Countryside and Rights of Way Act 2000, c. 37, § 1 (Eng.).
19 Merrill & Smith, supra note 11, at 1.
21 See Lovett, supra note 13, at 301-02.
22 See ACKERMAN, supra note 7.
23 For some empirical evidence indicating the greater complexity of ordinary people’s thinking regarding ownership and boundaries, see Nicholas Blomley, The Boundaries of Property, 48 CANADIAN GEOGRAPHER 91 (2004).
considerations are the shared impressions about the circumstances in which given interests would be entitled, prima facie, to legal protection against non-consensual encroachments. Such expectations are not always expressed in ordinary speech in terms of “ownership” or “property.” Those terms are perhaps most commonly used in connection with the forms of wealth that are dominant in the given speaker’s social spheres. People may nevertheless consider other interests, less commonly encountered within their particular group, prima facie legally protectable whenever they are threatened or challenged. The boundary between legally protectable and non-protectable interests in the expectations of well-socialized lay persons does not always track speech habits concerning the terms “ownership” and “property.” Moreover, why should we suppose that most ordinary folk regard the right to exclude as the maximal right, the essence of ownership, as it were? Apparently some people consider the right to use, which might be seen as the opposite side of the coin from the right to exclude, as equally important. Others consider the power to transfer as essential to ownership.

To the extent that it is possible to identify an ordinary American’s morality concerning property at all, that morality seems closer to the morality that lay behind James Madison’s vision for the Fifth Amendment’s property clause that he drafted. As various scholars have observed, Madison’s aim in proposing that clause was protecting a sphere of individual autonomy against depredations by the state. It was state action that was the source of Madison’s anxiety, for Madison understood that individuals are social creatures, embedded in multiple social networks. Consequently, property itself is social. Abusive behavior by one’s neighbors is one thing; abusive behavior by the state, armed as it is with vast power, is another. Disputes between neighbors were to be left to the private arena, negotiation and, hopefully, eventual cooperation, but in disputes between individuals and the state the status of the individual property owner had to be raised to a different level in order to enable property to do its autonomy-protecting work. It is this connection

26 See id.
between property and individual autonomy that lies at the heart of any ostensible ordinary conception of property.

Where, then, does this leave us with regard to the debate over conceptualizing property? My sense is that it leaves us with no single, universally-applicable or correct conception of property. We need multiple conceptions of property ownership.29 The reason is that no single conception of property, or ownership, adequately captures all of the diverse social contexts in which people own property. Property is not solely a creature of market; it is also an institution of marriage and the family, of neighborhoods, of community groups, and other social contexts. In some of these contexts the exclusion conception of ownership fits well, while in others, some version of the bundles-of-rights conception works much better. As Hanoch Dagan has argued, with respect to the exclusion conception:

numerous [property] rules prescribe the rights and obligations of members of local communities, neighbors, co-owners, partners, and family members, including . . . the governance of these property institutions. These property rules cannot fairly be analyzed in terms of exclusion or exclusivity: . . . the whole point of these elaborate property governance doctrines is to provide structures for cooperative rather than competitive or hierarchical relationships.30

At the same time, Dagan points out, the bundles-of-rights conception, while capturing part of the picture, is somewhat misleading.31 As Dagan puts it, ownership is not "a mere laundry list of rights with limitless permutations."32 For one thing, under the so-called numerus clausus doctrine, property law itself imposes limits on the forms that ownership can take. The bundles-of-rights is not open-ended. Better to think of ownership as tending to be structured by different assemblages of rights and obligations according to different contexts. These different assemblages are not purely ad hoc but tend to be patterned according to certain repeated domains of social life. Thus, ownership of property in the strictly commercial sphere usually carries with it a particular bundle of rights and obligations, whereas ownership within the marital realm has a rather different configuration of rights and duties. So, for example, both the classical and exclusion conceptions have greater traction if we are dealing

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30 Id. at 41. On the importance of doctrines providing for the internal governance of property institutions, see also Gregory S. Alexander, Governance Property, 160 U. PA. L. REV. 1853 (2012).
31 DAGAN, supra note 29, at 41-42.
32 Id. at 42.
with my status as the owner of my laptop computer than they do my status as owner of a condominium in a residential community. One size does not fit all.

II. CATEGORIZING PROPERTY

The next theme is categorizing property. Here again, I am going to examine this theme in a somewhat unconventional fashion. In referring to categories, one might suppose that my topic will be property law’s internal categorical structure of estates, servitudes, and other such interests. Instead, I am going to address the familiar public/private categorical distinction, but not in the way that the distinction is usually discussed. Rather than addressing the question of which aspects of property law are a matter of private law and which are public law, I am going to talk about the more fundamental question of property law’s basic values, the values that support property law, and whether those values properly belong to the private or the public realm.

We commonly associate property with certain private law values. Those values include individual autonomy, personal security/privacy, self-determination, self-expression, and responsibility (along with other virtues). These values, the values that theorists take to be among the intended ends of private property, are not in conflict or incompatible with fundamental public values, values such as equality, inclusiveness, community, and participation. Quite the contrary, the private law values at times require recognition of public values for property’s own values to be realized. That is, they are internal to private law and are constitutive of its ends. The relationship between private property and public values should be seen as symbiotic rather than antagonistic.

Just what does it mean to say that fulfillment of a traditional private law end requires one or more conventional public values? Consider first the private law value of individual autonomy. Every major liberal theory of property gives special place to autonomy as a justification for private property rights. Two theories--Kantianism and libertarianism--identify it as property’s foundational end. Even utilitarianism and its modern variant, welfarism, indirectly recognize the special contribution of personal autonomy to overall social well-being, whether defined in terms of utility or wealth. No one would dispute that autonomy is at least a component of property’s ends. But autonomy is not self-realizing. We are not born as autonomous agents. We depend upon others to help us develop those capabilities that enable us to function as independent practical reasoners. As Alasdair MacIntyre states, “To become an effective independent practical reasoner is an achievement, but it is always one to which others
have made essential contributions."33 We enter the world utterly dependent on others for our physical survival, but our dependence on others doesn’t end with infancy or even with childhood. Even upon reaching adulthood, we continue to place at least partial physical dependence (and even emotional or psychological dependence) on others as we move through a dangerous world. Often, little more than dumb luck separates the independent adult from the dependent one. And, as we reach the final years of our lives, the possibility of physical dependence once again looms ever larger.

Our dependence on others to develop autonomy goes beyond sheer physical dependence. MacIntyre observes:

What we need from others, if we are...to develop the capacities of independent practical reasoners, are those relationships necessary for fostering the ability to evaluate, modify, or reject our own practical judgments, to ask, that is, whether what we take to be good reasons for action really are sufficiently good reasons, and the ability to imagine realistically alternative possible futures, so as to be able to make rational choices between them, and the ability to stand back from our desires, so as to be able to enquire rationally what the pursuit of our good here and now requires and how our desires must be directed and, if necessary, reeducated, if we are to attain it.34

This kind of nurturing and this sort of capability development is carried out through communities, through networks of family members, friends, teachers, and others who constitute the multiple social spheres of our lives. Individual autonomy can be acquired only within a vital matrix of social structures and practices. Its continued existence and exercise depends upon a richly social, cultural, and institutional context, and the free and autonomous individual must rely upon others to provide this context.

The interdependence between private and public values in the context of property law can be illustrated by several cases. Consider the well-known right-to-exclude case, *Jacque v. Steenberg Homes, Inc.*35 In that case, home owners, Lois and Harvey Jacque, sued Steenberg Homes for damages for intentional trespass to the Jacques’ land.36 Steenberg delivered a mobile home by plowing a path across the Jacques’ snow-covered field despite strenuous protests from the Jacques.37 Although other means of accessing the delivery location were available, Steenberg used the path across the

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34 Id. at 83 (emphasis omitted).
35 563 N.W.2d 154 (Wis. 1997).
36 Id. at 156.
37 Id.
Jacques’ land because that was the easiest route for it. The jury awarded the Jacques one dollar in nominal damages and $100,000 in punitive damages. On appeal, the Wisconsin Supreme Court held that if a jury awards nominal damages for intentional trespass, the jury may also award punitive damages. The Jacques had good autonomy-based reasons for excluding Steenberg Homes. If home-dwellers are to feel secure in their own homes and to be uncoerced in making decisions regarding what uses of their land will make their lives go best for them, they must be free of intentional trespass. There are exceptional situations, of course, such as the need for police or fire fighters to access a person’s home in case of emergency, but the owner is not likely to object to entrance upon her property under such circumstances.

Contrast Jacques with the famous Civil Rights Era “Lunch Counter” cases. In those cases, young African Americans were arrested for and convicted of criminal trespass when they refused to leave restaurants after being requested to do so solely because of their race. The alleged trespassers, who were protesting “whites-only” practices at lunch counters in Southern retail stores, had asked to be served lunch but were refused and were asked to leave. The defendants appealed their convictions arguing that the convictions violated their rights under the Equal Protection Clause of the Fourteenth Amendment. The cases raised the question whether state action was involved or whether the discrimination was strictly private. In each case the Court found state action.

Would such cases be decided differently under the common law? Would they be viewed the same as Jacques, with the restaurant owner having the right to exclude anyone for whatever reason? Although there certainly are older decisions that indicate otherwise, I suggest that it would be possible for a court to hold that a restaurant owner does not have the right to exclude for racially discriminatory reasons (or other reasons based on grounds of invidious discrimination) under the private law of property. The public values that nurture property’s private values push against the freedom of owners of restaurants that are otherwise open to the public to exclude members of the owners’ communities because of their race. Because the owners have otherwise opened their restaurants to the general public, the owner’s personal security is not at stake in this situation. Admitting African American patrons in no way adds to the risk of the owners’ security beyond the level of risk that the owners have already voluntarily accepted.


More fundamentally, the public value of self-constitution, which is necessary for personal autonomy, resists recognition of the owners’ right to exclude under these circumstances. I said earlier that self-constitution -- the process of interpreting oneself within a social context -- is always dialogical in character. I also said that self-constitution’s social dimension poses a risk of undermining rather than promoting personal autonomy and that the purpose of the right to exclude is to mitigate that risk. Where the interaction between the owner and others is already in a social and public setting, one that the owner has created, the owner has already assumed that risk by creating the setting. In that situation, the right to exclude cannot perform its risk-mitigation function. Requiring that the owner admit to his restaurant patrons who he would otherwise admit but for their race does not undermine his personal autonomy in any meaningful sense. He has already made choices about his goals with respect to the use of his property, choices that are immediately relevant to his right to exclude in this circumstance. Hence, it is quite arguable that the public accommodation cases such as these could have been decided the same way as they were on private law grounds as by relying on constitutional or statutory provisions.\footnote{Gregory S. Alexander, Property's Ends: The Publicness of Private Law Values, 99 IOWA L. REV. 1257, 1291 (2014); Cf. Note, The Antidiscrimination Principle in the Common Law, 102 HARV. L. REV. 1993 (1989).}

Consider another example. Most, perhaps all, of us are familiar with common interest communities, also known as homeowner association. The relations between common interest communities, called CICs for short, and their members often are friendly and cooperative, but sometimes enforcement of restrictive covenants create bad blood between CICs, which are created to enforce these rules, and the owners who are subject to them. Consider the case of Donald Lamp. He was the father-in-law of U.S. Supreme Court Justice Clarence Thomas. He got into a dispute with the governing board of his condo association several years back when he hung an American flag from the balcony of his Omaha, Nebraska apartment on a particular July 4th morning, a ritual he had observed every year. Citing a violation of one of the covenants in the master plan that governs the development, the condo association board told him to remove the flag, but Mr. Lamp, a World War II veteran, would have none of it.

Lamp’s case got national attention, much of it unfavorable for the homeowner association. A typical reaction was this posting on a blog site: “Donald Lamp fought for our right and his right to display our nation’s flag anywhere and anytime.”\footnote{Yoe, Comment to Nebraska Retiree Fights to Hang American Flag, FOX NEWS (May 28, 2004, 5:00 PM), http://www.freerepublic.com/focus/f-news/1144102/posts.}
The question, of course, is, does Mr. Lamp have such a right? On one view, a view informed by the private law values of property law, the answer, quite clearly, is no. The covenant restricting the display of flags within the development was included in Mr. Lamp's deed. He had legal notice, either actual or record notice, of it at the time he entered into the purchase of his unit, and he agreed to be bound to it. The matter is strictly one of consent. So long as he had notice of the restrictive covenant at the time he entered into the agreement with the association, he is bound by it. Donald Lamp and his supporters did not see the matter this way. To them, some values cannot be contracted away. These are fundamental values--public values--and among them is the right to display the American flag. So the argument goes.\(^{42}\)

What private and public values are at stake in this dispute? At one level, disputes such as Donald Lamp's seem easily resolved by looking at the matter through the lens of personal responsibility with its concomitant legal principle of contractual obligation. Lamp signed an agreement expressly restricting his freedom to display flags publicly, and he is responsible for that contractual commitment. Yet if we examine the matter a bit more deeply, it becomes apparent that personal responsibility does not exhaust the list of private law values that are at stake in Lamp's dispute. For personal autonomy seems just as obviously involved in the controversy. Personal autonomy means being the creator of one's own ideas and preferences. To be sure, it does not mean being immune from all involvement by others in one's affairs; that is an impossible situation. But it does mean that one's plans, ideas, beliefs, and so on, are one's own, and not coerced by others.

One can certainly point out that, by signing the deed that included the restrictive covenant, Mr. Lamp freely chose to restrict his own autonomy with respect to displaying flags outside his apartment. From that perspective, personal responsibility trumps any view of personal autonomy that suggests tension between the two values in this case. Yet closely related to personal autonomy in this situation is yet another value--self-expression. Sometimes it is not enough simply to hold views that are the creations of one's own making; one feels compelled to express those views. On these occasions self-expression supports, and even extends, personal autonomy. Lamp held deeply personal beliefs and chose to use his position as homeowner to express those beliefs publicly. The American flag symbolized beliefs that Lamp considered expressive of his identity, and he wished to communicate those beliefs with his neighbors in a particularly prominent and effective way. Self-expression is an important value that does not merely augment autonomy, but also enables the exercise of

\(^{42}\) Id.
autonomy. From that perspective, autonomy alone cannot justify Lamp’s waiver of self-expression.

One possible basis for justifying waiver is freedom of association. Homeowner associations, like other voluntary associations, rely on freedom of association for their integrity and, ultimately, their existence. If we lack the freedom not only to choose the persons with whom we associate, but also the ground rules by which our association abides, we cannot truly realize our social character.

The connection between freedom of association and human sociability suggests that freedom of association implicates a deeper value—community. Conceptually, community is relevant here as a value, a regulative ideal, and as a sociological phenomenon. As a regulative ideal, community operates as a norm by which relationships may be regulated and something that we experience in our actual lives. Community is also a sociological concept. In this sense it describes a group mode of living and social interaction with others with whom we share particular interests and values. Homeowner associations are frequently identified as communities in this latter, sociological sense. Common interest developments often stress the club-like quality of their living experience, explicitly emphasizing their group-like character.

Community has both private and public aspects. It is private in the sense that it is constitutive of the self. Community’s public side regulates the external relations of communities as institutions, that is, their relations with each other, especially the larger communities of which it is a part. The most important of these larger communities is the state, for the state facilitates these smaller communities through its rules of private ordering and fundamental norms respecting rights of association, assembly, and the like.

The general point is that the categories of public and private are unhelpful with respect to community. The line between them is as porous as it is with respect to all of the values underlying property. Both institutionally and normatively, community operates in a Janus-faced fashion, always looking inward to itself and yet outward to the increasingly larger spheres of social life with which it is inextricably enmeshed.

This double life of community is essential to a proper understanding of community’s role as a value, or end, of property. It means that community’s normative valence is not always clear. When other

43 See Gregory S. Alexander & Eduardo M. Peñalver, Introduction to Property and Community, at xxviii, xxix (Gregory S. Alexander and Eduardo M. Peñalver eds., 2010).
substantive values of small institutional communities conflict with those of one or more of the larger institutional communities within which the smaller communities are nested, the normative implication of community does not unambiguously favor one substantive value or the other. There is no trumping effect of community as a value. What matters in these situations of nested communities with conflicting substantive values is the nature of the relationship between the institutional communities.

The private side of community poses a risk of undermining rather than promoting personal autonomy. The core of community’s private side is autonomy, the value that supports the power of communities, as institutions, to exclude those who do not share the constituent values and interests of particular communities. That value --autonomy-- confers upon communities power to set the terms and conditions of membership in voluntary communities, requiring members to subordinate their own personal autonomy for the good of the larger institution’s values.

The public side of community, as a private law value, places a limit on this subordination of personal autonomy and supports autonomy as one of property’s ends by striking a balance between personal and institutional autonomy. The basis for this limit is the fact that the state, as the community that enables the creation of voluntary communities through its private legal rules of contract and constitutional rights of assembly and free association, and facilitates the operation of those communities through its legal system, is literally constitutive of them. As the foundational community that makes the existence of smaller, nested communities possible, the state sets the basic parameters for their membership within the foundational, constitutive community. Those parameters are set by the state’s own foundational values, the values of which it is normatively constituted. Among these foundational values is personal autonomy, augmented by its ancillary value of self-expression. These values are constitutive of the state as a political community. Self-expression, which is manifested, among other ways, in the right of freedom of speech, is essential to the existence of a particular kind of political community, and for that reason the state treats it as fundamental. Because self-expression is so existential, it cannot be subordinated to conflicting values of smaller voluntary communities. This is not a matter of state action or public law. The priority of the state’s fundamental values, values such as personal autonomy and self-expression, over the values of nested voluntary communities, is established by private law, through its values.

In cases such as Mr. Lamp’s, the public side of community as a private law value resists recognition of the right of voluntary groups, including those created by private agreement, to subordinate values that are existential to the particular kind of political community that the state
represents to the group’s own conflicting values. Hence, the question whether Lamp waived his right to display the American flag in front of his condominium unit is moot because, properly understood, the private law of property makes the value of self-expression non-waivable as applied to such forms of self-expression as political speech.\textsuperscript{45}

Of course, there are limits to this principle of subordination. It applies only to those values that are truly existential to the particular kind of political community that the state represents. Hence, in the case of homeowner associations, not all instances of self-expression or other acts of personal autonomy are or should be beyond the group’s power to regulate. So, for example, a homeowner association covenant prohibiting outdoor displays of plastic pink flamingoes is valid. Such an aesthetic regulation, although restricting self-expression, in no way implicates values that are existential to the substantive character of the larger political community. The same will be true of the vast majority of homeowner association rules. Group autonomy, which promotes the integrally related values of free association and sociability, should normally prevail because it is supported by community’s private aspect and does not interfere with its public dimension.

The relationship between the public and private often turns out to be supportive rather than in conflict. The values that are part of property’s public dimension in many instances are necessary to support, facilitate, and enable property’s private ends. Hence, any account of public and private values that depicts them as categorically separate is seriously misleading.

III. HISTORICIZING PROPERTY

The third theme is historicizing property. More than all of the other first-year law school courses, perhaps, Property is strongly influenced by history. As the preface to an old Property casebook states, “[M]uch of the modern law of Property is understandable only in light of its origins and development and ... only through a knowledge of the historical factors can law students get an intelligent understanding of the evolution of the institution.”\textsuperscript{46}

\textsuperscript{45} This is essentially the position adopted in the Restatement (Third) of Property. See Restatement (Third) of Property: Servitudes § 3.1 (2000). As to the specific issue of the American flag, the primacy of the individual’s autonomy is now codified by federal statute. See 4 U.S.C. § 5 (2012) (“A condominium association ... may not adopt or enforce any policy ... that would restrict or prevent a member of the association from displaying the flag of the United States on residential property”).

\textsuperscript{46} 1 RALPH AIGLER, ALLEN SMITH & SHELDON TEFFT, CASES AND MATERIALS ON THE LAW OF PROPERTY, at vii (2d ed. 1951).
Virtually all of the Property casebooks, including my own, depict property's evolution as linear. This view of property law's history is entirely unsurprising, for it squares neatly with a larger view of the historical development of property. With only a few exceptions, historians and political theorists, along with legal scholars, have tended to accept uncritically the claim that there is a single tradition of property that runs throughout American history and American historical thought. According to this view, property has served one core purpose and has had a single constant meaning throughout American history: to define in material terms the legal and political sphere within which individuals are free to pursue their own private agendas and satisfy their own preferences, free from governmental coercion or other forms of external interference. Property, according to this line of thought, is the foundation for the categorical separation between the public and private spheres of life, the individual and the collective, the market and the polity.

The economic expression of this individual preference-satisfying conception of property is market commodity. Property satisfies individual preferences most effectively through the process of market exchange, or what lawyers call market-alienability. The exchange function of property is so important in American society property is often thought to be synonymous with the idea of market commodity.

This commodity view of property is only half right. Property-as-commodity is one-half of a dialectic that American legal thought and legal writing has continuously expressed from the nation's very beginning to the present. The other half of the dialectic is a view that I call property as propriety.47 According to the propriety view, property is the material foundation for creating and maintaining the proper social order, the private basis for the public good. This proprietarian tradition, whose roots are very old indeed, has always understood the individual as an inherently social being, inevitably dependent upon others not only to thrive but just to survive. The irreducible interdependency means that individuals owe one another obligations, not by virtue of consent alone but as an inherent incident of the human condition. This view of human nature provides the basis for the political-legal principle in proprietarian thought that when individuals fail to meet their precontractual social obligations, the state may legitimately compel them to act for the good of the entire community.

The concept of the common weal, moreover, was understood to have substantive meaning. The common law maxim salus populi suprema est

47 Id. (citing Carol M. Rose, Property as Wealth, Property as Propriety, 33 J. OF THE AM. SOC’Y FOR LEGAL AND POL. PHIL. 223, 223-47(1991)).
lex (the welfare of the people is the supreme law) had real content.\textsuperscript{48} The public good was not understood as simply whatever the market produces, for the market was viewed as a realm in which individuals were too vulnerable to the temptation to act out of narrow self-interest rather than, as proprietarian principles required, for the purpose of maintaining the properly ordered society.

Just what the proper social order is has been an enormously controversial issue throughout American history. The existence of different substantive conceptions of the properly ordered society means that there have been multiple versions of the proprietarian conception of property in American legal history. To illustrate, let me quickly sketch three such conceptions of property that fit within the proprietarian definition but whose substantive terms differ greatly from each other.

The first example is the civic republican conception of property, most eloquently and forcefully championed by Thomas Jefferson. Contrary to some popular misconceptions, Jefferson’s understanding of property was not grounded on individual liberty, at least not for its own sake. Jefferson was no Lockean. Unlike Locke, Jefferson thought that law creates property rights and that law ought continually to control them.

Jefferson believed that every citizen—remember that citizenship was confined to white males—ought to own land and own it in fee simple. The republic was constituted by nothing less than the “fee simple empire.” Citizens were men who cultivated—they owned freely; so positioned, they were beholden to no one and were independent in the most literal sense. This form of independence was necessary for them to act virtuously, free of corruption, strictly in the interest of the common good.

The form of property that Jefferson opposed, the form of property that he found threatening to the virtuous republic, was not just commercial property, but industrial property. The opposition, then, was between agricultural property and industrial property, i.e., cultivation of the land and manufacturing. “Those who labor in the earth,” he stated, were the “chosen people of God.”\textsuperscript{49} They held this exalted status insofar as they were not exposed to the corrupting influence of manufacturing. “As ‘[d]ependence begets subservience,’ he continued, manufacturing begets dependence.”

Jefferson’s concern with dependence led him to oppose aspects of the English system of inheritance that perpetuated hierarchy and dependence. Notable among these aspects were primogeniture and the fee tail. Under


\textsuperscript{49} Id. (citing Thomas Jefferson, Notes on the State of Virginia (1781), http://www.masshist.org/thomasjeffersonpapers/notes/nsvviewer.php?page=99&nav=query&q=19&results=0page).
the doctrine of primogeniture, when a man died intestate (without a legally valid will) his lands descended to his eldest son. Primogeniture could be avoided by devising one’s land by will, as most wealthy eighteenth-century American landowners did. But the symbolic significance of primogeniture alone was enough to draw republican opposition.

Republicans similarly opposed entailments of land, which involved keeping land within the family by restricting the power of the person to whom a testator might devise land to transfer it outside the line of lineal descendants. Through this arrangement land would pass through a series of descendants, one generation to the next, possibly for hundreds of years. Such an arrangement sapped citizens of their independence, republicans believed. Under Jefferson’s leadership, Virginia enacted legislation abolishing both primogeniture and the fee tail. Virginia’s example was quickly followed in other colonies, pursuing the same vision of republican property.

The next example of property-as-propriety comes from the antebellum South. Southern slavery theory was primarily a social theory. The major theorists, including legal theorists, who defended slavery did so on the basis of a coherent, albeit utterly immoral, theory of the ideal society whose core institution was chattel slavery. That ideal society was in many ways pre-modern and in many ways the antithesis of the modern society they saw developing in the North. Pro-slavery theorists identified the modern society by three characteristics that were anathema to them: (1) social leveling, that is, the decline of a natural social hierarchy; (2) the decline of internal, that is, nonconsensual social obligations; and (3) the alienation of labor from capital. Modern society was characterized by fluidity in all aspects of social life.

Pro-slavery legal theory, particularly after 1840, was in many respects hostile to the classical economic teachings of Adam Smith and David Ricardo. These Southern slavery theorists constructed a world order that was an alternative to social modernity, as they understood it. What made modernity unacceptable for them was that it seemingly meant the market’s total domination over all social relations.

“The Southern theorists’ ideal society was certainly a market society in the sense that the market allocated economic resources.” What set their ideal society apart from modern society was the fact that the market’s influence on social life was strictly limited. Above all, these Southern defenders of slavery insisted, the market could not be permitted to

50 Id. at 214.
51 Id. at 213.
destabilize the South’s rigid social hierarchy, which they considered to be organic, moral, and proper. 52

The foundation for the new social order that the Southern theorists imagined was, of course, the South’s “peculiar institution.” 53 More precisely, the foundation was the conception of slaves as a unique form of property. Though they could be used as a commodity, slaves were not primarily valued for that function. Their core function, rather, was to anchor and maintain the stability of the proper social hierarchy. It was the preservation of that hierarchy, not the production of wealth, that was the vital interest of the slaves-as-property system.

Within this social vision the commodity conception of property was highly problematic. The commodity conception was the product of a modern commercial social order that was in many ways the antithesis of what proslavery theorists valued. Slave property, used primarily as an item of commerce, threatened to transform the Southern social order into the fluid sort of society that existed in the bourgeois communities of the North. 54

The South’s order required stability at all costs, the slavery theorists thought, so that the hierarchy that was the very heart of the proper social order could be preserved.

The key to maintaining that hierarchy was keeping a strict distinction between property that was fungible, that is, market property, and property that is not fungible because its primary function is civic, not economic. In the center of this non-fungible property stood the slave. The slave was to mid-nineteenth century Southern theorists what land was to eighteenth-century century civic republicans, the anchor of virtuous citizenship. Although land was clearly superior to intangible forms of property (such as credit) in the Southern hierarchy of property, it was nevertheless inferior in importance to slaves.

Still, land and slaves were different in respects that were relevant to the Southern theorists. Primarily, the difference for their purposes is that land is immobile but slaves are not.

The shift from immobile land to mobile slaves as the primary form of economic attachment...threatened to transform the South from a traditional society in which property owners are civically, as well as physically, unconnected. In this latter sort of society citizens are less citizens than they are autonomous, preference-maximizing agents, precisely the sort of *homo economicus* that political economists...in the

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52 Id.
53 Id. at 215.
54 Id.
North... described with admiration but that [Southern theorists] viewed with anxiety. As [one Southern writer] put it, "It is useless to seek to excite patriotic emotion in behalf of the land of birth, when self-interest speaks so loudly."55

The pro-slavery theorists’ unwillingness to abolish the market left them with a dilemma of which they were aware. Their writings frequently reflected a sense of uncertainty about the future of slavery. The only way in which they could cover up their unease was to pull out the old wretched racist rhetoric on which time and again they relied. In the end their so-called republic was doomed.

The final example of property-as-propriety comes from the rise of the modern welfare state, especially during the post-War period. "Welfarism as a state policy fundamentally changed private property, both as a social institution and as a legal concept. As an institution, property in the welfare state was more obviously public than it had been throughout the nineteenth century."56

Housing is a particularly striking example of how the regulatory state became more involved in seemingly private relations. The relationship between landlords and their tenants, which traditionally was subject to minimal legal regulation, underwent a massive legal change during the 1960s. Federal legislation like the Fair Housing Act of 1968 prohibited discrimination in the private housing market on the basis of race, religion, gender, and national origin. At the state level, many states, prompted by court decisions, enacted statutes creating a "warranty of habitability" that guaranteed tenants the right to live in safe and habitable conditions. These statutes reversed the traditional legal rule that allocated to tenants the responsibility for care and condition of rental housing. The most important aspect of this new warranty was that it was non-waivable; landlords and tenants could not bargain around the new warranty even if they were so inclined. The overall effect of these and other changes was substantially to remove landlord-tenant relations, especially in the residential context, from the realm of private ordering to the domain of public regulation.57

The welfare state changed ideas about property as much as it did the institution of property. The most important effect of social welfare programs on legal thought about property was that they undermined the commodity conception in some areas of social life.

Various types of property [that] traditionally were regarded as market assets came to be seen as serving other, non-market functions. On those

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55 Alexander, Commodity & Propriety, supra note 6, at 239 n.42.
56 Id. at 359.
57 Id. at 360.
occasions when free market transferability seemed to threaten these functions, the law changed to protect the non-commodified aspects of property arrangements.

Landlord-tenant law again provides a clear example. The “revolution,” as it has been called, in the law regulating landlord-tenant relations was based on the implicit premise that residential housing should not be treated solely as a market asset, subject to being bought and sold on whatever terms the parties wanted. At least as important as the economic function is a political-moral function: residential housing is one of the crucial material conditions that determine whether and how people will flourish personally and as citizens. Courts and legal scholars explained the legal changes creating new rights for tenants as based on a shift from antiquated feudal property law to contract law, but that account was very misleading. The new rules establishing tenants’ rights were not entirely consistent with contract law and certainly not contractarian in the sense of reflecting a commitment to private ordering. The real basis for the overall doctrinal shift was a change in how the legal culture perceived the character of residential housing.

While the landlord’s interest . . . is (usually) strictly financial—a commodity—the tenant’s interest is primarily personal and only secondarily financial. Tenants enter into a lease primarily to have a home, a place in which to belong, not as an investment. Protecting that personal interest means treating it as at least somewhat outside the domain of market ordering, in which the rights and duties of the two sides are set through the process of bargaining. The new landlord-tenant rule replaced bargaining with legally-imposed terms regulating the relationship precisely to protect the tenant’s non-commodity interest from the possibly corrosive effects of the market.\(^{58}\)

As this quick survey hopefully reveals, the market conception—the commodity conception—although it remains the dominant conception, is not the only available way of thinking about property. The propriety conception remains alive and well, perhaps even thriving, at least in some areas of law and social life. In this respect, historically, then, nothing has changed. American legal thought is and has always been characterized by a dualism in ways of conceiving property.

\(^{58}\) *Id.* at 361-62; see Gregory S. Alexander, *Property as Propriety*, 77 NEB. L. REV. 667, 688 (2014).
IV. ENFORCING PROPERTY

The fourth theme should be familiar to all law students. I call this theme “enforcing property,” and it has to do with the distinction between rules and standards. Rules and standards are legal norms through which law enforces property duties and protect property rights. As we all know, the distinction between them is that rules are hard-edged, clear, predictable, and easily understood and applied. Standards, on the other hand, are more open-ended, vaguer or opaque, less predictable. The conventional wisdom is that property law is and ought to be by and large the domain of rules, or “crystals,” as one scholar calls them, with only the occasion use of standards, or “mud.” Property law, more than tort law and even more than contract, the argument goes, requires predictability, and predictability is possible only in a regime of clear-cut rules. I want to suggest that this wisdom is quite misleading, that, as a descriptive matter, property law has shifted substantially toward the use of standards over the past quarter of a century and that standards and predictability are not necessarily incompatible.

Professor Joseph Singer has recently written an article showing that property law seems to be moving away from clear rules and toward flexible rules. Over the past few decades, Singer shows, both courts and legislatures have increasingly discarded traditional hard-edged rules and adopted in their place standards of various sorts. As Singer puts it, “Reasonableness tests now abound in property law.”

One area of property law that illustrates this trend is servitude law, the province of easements and covenants. Traditionally, this was an area that was governed by rules. For real covenants to run with the land, as we lawyers say, horizontal privity of estate had to exist between the original parties to the covenant, and the covenant could be enforced against someone who was not the original promisor only if vertical privity existed between that party and the defendant. The list of technical rules such as these has bewildered law students for generations.

62 See Singer, supra note 60, at 1372-73.
63 See id. at 1373.
64 See RESTATEMENT OF PROPERTY § 2.4 cmt. a.
65 See id. § 5.2 cmt. b.
Another traditional rule of servitude law is the requirement that a real covenant or an equitable servitude must “touch and concern” the land.\textsuperscript{66} This rule illustrates one of the problems with rules. Some legal norms that are nominally rules turn out to be standards in practice. That is, they exhibit the same characteristics that we commonly attribute to standards; they are opaque, open-ended, and unpredictable. Precisely in reaction to this problem with the touch-and-concern requirement, modern servitude law has shifted from a nominal rule approach to an explicitly standard-based approach. The Restatement (Third) of Servitudes has abandoned the touch-and-concern requirement and substituted in its place a policy-focus standard. Under the new Restatement a covenant is invalid if it is “illegal or unconstitutional or [against] public policy.”\textsuperscript{67} It is the last ground of invalidity—of course, against public policy—that is the standard. The Restatement does provide some guidelines regarding what factors might lead to offenses of public policy, among them servitudes burdening a “fundamental constitutional right” and servitudes that are spiteful or capricious, but the boundaries of these factors are hardly hard-edged.

Another example is the case of the “improving trespasser.”\textsuperscript{68} This case occurs when someone constructs an improvement, say, a garage, on what she thinks is her own land but because of some error (maybe by the surveyor) it really is on her neighbor’s land. Traditionally, property law treated this as a trespass, pure and simple. The trespasser’s only remedy was to try to reach an agreement with her neighbor to allow her to leave her improvement as is in return, say, for some payment. If the neighbor refused, the neighbor had a clear right to force the trespasser to remove the improvement, regardless of the cost and regardless of its importance to the trespasser. Even if the intrusion was minimal, the victim could compel removal at the trespasser’s expense. The trespasser’s innocence and good faith were entirely irrelevant. Most courts today have abandoned this clear rule in favor of a murkier “relative hardship” standard.\textsuperscript{69} Under this standard the court, rather than summarily ordering removal of the improvement, will order a forced sale of the land on which the improvement sits to the improving trespasser if several conditions are met: (1) the improvement was constructed in a good faith belief that the trespasser is constructing on her own land; (2) the encroachment is small, or relatively so; and (3) the cost of removing the improvement is large. However, if the encroachment was constructed in bad faith, that is, with the

\textsuperscript{66} See id. § 3.2.
\textsuperscript{67} See id. § 3.1.
\textsuperscript{68} See JESSE DUKEMINIER, ET AL., PROPERTY, 8th ed.
knowledge that it was on the neighbor’s land, the court will revert to the old rule and order removal.

The pattern of shifting from traditional hard-and-fast rules toward more open-ended standards seems clear enough. This pattern raises the question whether the trend is wise. Are the values that are commonly associated with rules, i.e., predictability and ease of application, being sacrificed for some other values? To consider this question let us return to the right to exclude, which we discussed earlier. In recent years courts have weakened the right to exclude through various standards that transform acts that would otherwise have constituted trespass into permissible encroachments upon private property. A famous example is *State v. Shack*. In that case the defendants entered upon the plaintiff’s land for the purpose of providing aid, specifically, health care and legal advice, to migrant farm workers who worked for the plaintiff and lived on his farm. The plaintiff-owner ordered them to leave, and after they refused, the plaintiff executed a complaint against them, charging trespass. The defendants were convicted of criminal trespass. On appeal, the New Jersey Supreme Court reversed the conviction, finding that no trespass had occurred. “Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premise,” the Court stated. “It is unthinkable,” the Court continued, “that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker’s well-being.” Hence, “the migrant worker must be allowed to receive visitors [upon the employer’s farm] of his own choice, so long as there is no behavior hurtful to others. . .” The question for my purposes is whether the case, creating an exception to the owner’s right to exclude through the use of a standard, renders trespass law in New Jersey unpredictable. The answer, I think, is no.

Viewed in the context of New Jersey right-to-exclude case law, *Shack* fits within an identifiable pattern that provides a degree of regularity, if not a strict rule, to New Jersey’s right-to-exclude decisions. In *State v. Schmid*, the New Jersey Supreme Court held that under the state’s constitution, individuals have a free speech right to distribute political leaflets on the Princeton University campus by virtue of the fact that the university, though private, invited numerous public uses of its resources in order to fulfill its broader educational ideals and goals. In *Uston v. Resorts*

70 277 A.2d 369 (N.J. 1971).
71 Id. at 372.
72 Id. at 374.
73 Id.
74 423 A.2d 615 (N.J. 1980).
International Hotel, Inc., the court restricted a casino owner’s right to exclude a patron, a notorious card-counter in blackjack, stressing the same factor, namely, “the more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property.” Although this norm is certainly a standard, rather than a binary, on-off rule, it is certainly not at the open-ended, ad hoc end of the scale where Smith put it. Under Shack and its cognate New Jersey right-to-exclude decisions, an owner’s right to exclude is very much alive and well, and the limits on that right are reasonably predictable. Finally, in New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., the same court held that this free speech right extended to protestors against the first Gulf War who were distributing leaflets in the “public” areas of shopping malls. The case involved a group that opposed military intervention in the Persian Gulf. They sought permission to enter a shopping mall for the purpose of distributing leaflets and were denied entry. The shopping mall permitted and encouraged non-shopping activities on its premises, including access for community groups, speech, politics and community issues. The Court stated that the shopping mall had impliedly made an invitation to leaflet under these circumstances. Shopping malls intentionally draw people in and encourage public use of their space. This diminishes their private property interest.

What the New Jersey Supreme Court has done in these cases is to create a kind of sliding scale approach to the right to exclude. The right to exclude does not operate in a binary, on/off fashion, but rather is a matter of degree. Its strength depends upon several factors, including how private the owner’s property is. The more the owner opens her property to the general public for their own private interests, the less they are able to exclude people for whatever reason they wish.

This sliding scale approach is precisely the sort of seemingly ad hoc and indeterminate approach that advocates of rules deplore. In their view it sacrifices all predictability. But a close look at the New Jersey approach reveals that this is not so. Elsewhere, Dean Eduardo Peñalver and I have created a graph that plots the outcomes of various New Jersey exclusion cases along two axes. “The horizontal axis reflects the degree to which

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75 445 A.2d 370 (N.J. 1982).
76 Id. at 376 (quoting Schmid, 423 A.2d at 629).
78 Id. at 780.
79 See GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 142 (2012).
80 See GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, PROPERTY AND COMMUNITY
the owner has invited the owner onto her property.” Using the New Jersey approach we can view this variable as inversely related to the objective weight of the owner’s interest in being able to exclude those seeking entry to the owner’s property without her permission. The vertical axis represents the importance of the values (which is not the same as the intensity of the preferences) that would be vindicated by granting the entrant access to the property. Plotting the cases out on the basis of these two axes, a rather clear pattern emerges. Although not based on a mechanical application of any single rule, the New Jersey Court’s approach comes to be seen as a mix of rules and standards interacting in an intelligible way that avoids the high degree of uncertainty that rule advocates predict will result from just this sort of approach to enforcing property. Standards do not, at least not always, give rise to unpredictability.

Moreover, the converse is also the case; that is, clear rules do not always promote predictability. Joseph Singer points out how the subprime housing crisis illustrates this.

The securitization of subprime mortgages occurred within the context of a regime of fairly clear rules. Property law requires that parties to real estate transactions reduce their agreement to a signed writing and further that the paperwork be recorded in the local deed registration office. Banks as lending institutions did not always follow these rules, however. Many bypassed the public recording office, thus keeping mortgage information private, and many also failed to formalize all their mortgage transactions in the securitization process. The result, as Singer observes, is clouded titles and insecure property rights.

The two points that emerge from this discussion are that, first, property law is no longer solely, even mainly, the domain of rules; standards now proliferate the doctrinal landscape. Second, there is no necessary reason to believe that this movement from rules to standards has led to a loss of predictability or stability in property law. Rules are not always as crystal-clear as they are sometimes claimed to be, and standards, in practice, often lead to predictable patterns.

142 (2010).

81 Id.
82 See Singer, supra note 60, at 1372.
83 See id.
84 See id.
The final theme is a development that I call “de-marginalizing property.” As that neologism may suggest, the development concerns the status of socially and economically marginalized groups. Within the past several decades property law has changed in ways designed to improve the lives of members of these groups to “de-marginalize” them, as it were. De-marginalizing property is a form of property designed to create a robustly democratic society, in which democracy is defined not simply by political rights but by social and economic rights as well. Another term for it might be “inclusionary property.” Although de-marginalizing property has had some successes, it has a long way to go. There are multiple reasons for the shortfalls in this effort to improve the status of members of marginalized groups as fully sharing members of American society through property law. In this last part of my talk I want to briefly touch on its successes but also focus on its shortcomings. I will conclude with some remarks about de-marginalizing property’s deepest challenge.

De-marginalizing property represents a signal break from property law’s roots in private ordering. Its most common and obvious forms have been legislative interventions that have the effect, if not the purpose, of cutting back, to one degree or another, on individual freedom to use, possess, or transfer property. A clear and, for the most part, successful example is the federal Fair Housing Act of 1968, since amended several times to broaden its coverage. The Act bans various acts of discrimination in the sale or rental of housing on the basis of race, religion, sex, familial status, national origin, or handicap. It is difficult, for obvious reasons, to get an accurate read on the actual prevalence of housing discrimination today. Few individuals who engage in acts of discrimination are likely to acknowledge their conduct. Moreover, discrimination sometimes comes in subtler forms, such as individuals who are protected by the Act being steered away from certain neighborhoods or not shown certain units that are otherwise available. The current method of measuring discrimination today is through the use of testers. Two testers are sent out to housing providers, agents, and lenders with identical fictitious backgrounds, with one

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85 For an incomparable analysis of property law, primarily, but not exclusively, South Africa’s, from a marginal perspective, see A.J. VAN DER WALT, PROPERTY IN THE MARGINS (2009). Professor van der Walt defines marginal persons and groups as “those suffered under the injustices of [a] discredited regime or whose position must be taken seriously because of political changes . . . .” Id. at 21.


87 See id. § 3604.

88 This discussion draws on DUKEMINIER, supra note 68, at 460-61.
exception—membership in a protected group. If the two testers experience differential treatment, discrimination may be inferred. The results of the most recent large-scale study using testers were released in 2013. Although they showed that most blatant forms of discrimination have declined sharply over the past four decades, African Americans, Hispanics, and Asians still experience subtle forms of discrimination. For example, African American renters who contact real estate agents learn about 11.4 percent fewer available housing units compared with equally qualified white renters. The disparities for Hispanics and Asians are 12.5 percent and 9.8 percent, respectively.\(^89\) Based on such figures, one can say that the Fair Housing Act is been an attempt at de-marginalizing property that has achieved mixed success.

Another example of de-marginalizing property is the warranty of habitability, which applies to all residential leases in nearly all states.\(^90\) As I noted earlier,\(^91\) this doctrine was first introduced into property law as part of the tenants’ rights movement of the late 1960s and earlier 1970s. Viewed narrowly, its purpose was to require landlords to repair blighted housing.\(^92\) Viewed broadly, it was an effort to de-marginalize poor urban tenants, many of whom were people of color, by redistributing wealth from wealthier landlords to poor tenants\(^93\) or by creating conditions for better lives for the urban poor.\(^94\) The results that the warranty of habitability doctrine actually achieved, however, have fallen far short of either goal.\(^95\)

There are several markers of the doctrine’s failure. A very large percentage of eviction cases never reach open court.\(^96\) Landlord-tenant courts, which would hear these disputes, have extremely high default rates.\(^97\) In the few cases that do reach court, the vast majority are decided with no reference made to the condition of the premises.\(^98\) Finally, data

\(^90\) See DUKEMINIER, supra note 68, at 522.
\(^91\) See note 144 supra.
\(^94\) See Carl Schier, Draftsman: Formulation of Policy, 2 PROSPECTUS 227 (1968).
\(^95\) See Super, supra note 92, at 394 and passim. This extraordinary article is well worth reading in its entirety. The following discussion draws upon Professor Super’s piece.
\(^96\) See id. at 434.
\(^97\) See id.
\(^98\) See id. at 435.
indicate that landlords win in a large percentage of cases brought for non-payment of rent.\footnote{See id. at 437.}

The habitability doctrine's failure has a number of reasons. For one, low-income tenants are often unaware of the doctrine's existence. Even if they are aware of its existence, tenants often lack incentives assert the doctrine. As Professor David Super explains:

inducing tenants in tight housing markets to assert the warranty requires highly favorable values for the other elements in the calculation, including the tenant's chances of winning in the initial action and in avoiding retaliation, the damages (or rent abatement) awarded, and the likelihood that the landlord will repair. \footnote{Id. at 409.} \footnote{Id.}

Moreover, as Super further points out, moving costs skew the warranty's impact in favor of better-off tenants.\footnote{See, e.g., Uniform Residential Landlord-Tenant Act § 4.105.} \footnote{See Super, supra note 92, at 426.} These moving costs include a deposit, which must be paid up-front before the tenant has received any money she may eventually receive as damages in a successful warranty action. For poor tenants with severely limited available cash, this effectively means that they must remain in substandard housing. Yet another factor contributing to the warranty's failure are landlords' protective orders (LPOs), which are court orders or statutory requirements that tenants deposit rent with the court during the pendency of these actions as a condition to being heard on their defenses.\footnote{See Entry for Urban Homestead Program, Directory of New York City Affordable Housing Programs, N.Y.U. SCHOOL OF LAW - Furman Center, Mar. 3, 2014.} \footnote{See Sarah Ferguson, Better Homes and Squatters, The Village Voice (Aug. 27, 2014).} In Professor Super’s words, for poor tenants, “these orders may effectively keep the implied warranty out of court.”

More recently, we have witnessed the appearance of other novel forms of de-marginalizing property. Some of these forms really do not aim at de-marginalizing groups as much as simply housing individuals, getting them off the streets. An example is urban homesteading. Cities like New York have policies that encourage squatters in abandoned buildings to improve the properties in which they live.\footnote{See Sarah Ferguson, Better Homes and Squatters, The Village Voice (Aug. 27, 2014).} In New York, the phenomenon began during the 1980s, when squatters took over many old tenement building in Manhattan's Lower East Side that owners had simply abandoned. In 2002, the City of New York granted ownership of eleven of these squats to the Urban Homesteading Assistance Board (UHAB), a private not-for-profit organization.\footnote{See Entry for Urban Homestead Program, Directory of New York City Affordable Housing Programs, N.Y.U. SCHOOL OF LAW - Furman Center, Mar. 3, 2014.} UHAB provides loans for essential renovations to bring the
buildings up to city code regulations, after which the city will turn over title to the occupants for one dollar. Ownership will be organized in the form of a limited-equity cooperative.106

In response to the home foreclosure crisis, a growing number of cities have exercised their power of eminent domain in a remarkably new way—to acquire underwater mortgages. Despite rising home values, there are still some 9.8 million households underwater, representing 19.4 percent of all mortgaged homes—nearly one out of every five such homes.107 The problem disproportionately affects communities of color. In seventy-one of the one-hundred hardest-hit cities, African Americans and Latinos account for at least forty percent of the population.108 In 146 of the 395 hardest-hit ZIP codes, African Americans and Latinos account for at least seventy-five percent of the population.109 Between 2005 and 2009, African Americans and Latinos have experienced a decline in household wealth, of fifty-two and sixty-six percent, respectively, compared to sixteen percent for whites.110 The new plan to use eminent domain aims to substantially alleviate this injustice.

First developed by my colleague Robert Hockett, the plan basically partners cities with private investors to purchase troubled mortgages at their fair market value, refinance the mortgage by writing down the principal owed, and thereby recoup value for all. In the process, the strategy mitigates urban blight and keeps borrowers, many of whom are people of color, in their homes. It is a kind of “inverse Kelo” action in which the eminent domain power is used to keep people in their homes rather than throw them out.111 The city, after purchasing possession, works with each willing mortgagor to accept discounted repayment of the mortgagor’s obligation. Repayment is set at a level that corresponds to the level at which the mortgagor can obtain new financing in the current mortgage market. The mortgagor then conveys the new mortgage to trusts that are created to collect private investor funds. The city receives discounted repayment in the form of proceeds from the new mortgage loan. The city then conveys these proceeds to the trusts, which in turn convey them to the

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106 See id.

107 See, Peter Dreier, et al., Underwater America, HAAS INSTITUTE FOR A FAIR AND INCLUSIVE SOCIETY, UC-BERKELEY, at 5.

108 See id. at 4.

109 See id.

110 See id.

private investors as repayment in kind for the moneys that the investors lent the city upfront to finance the initial condemnation award.112

This innovative strategy has already been adopted or being considered by several municipalities around the country.113 Recently, a report from the Haas Institute for a Fair and Inclusive Society at UC-Berkeley, specifically endorsed the reverse eminent domain strategy.114 Obviously, this is a bold and unprecedented form of property, but underwater mortgages remain a deeply entrenched problem for many Americans, especially people of color, and problems of this magnitude require novel solutions.

A more familiar form of de-marginalizing property is housing subsidies. A major housing problem today throughout the nation is the high level of rent, high rent costs have crowded out other financial obligations, and this has exacerbated the gap between the large majority of low-income people receiving no major housing subsidies and the minority that do.115 Yet, as David Super has pointed out, “direct subsidies have far more potential than regulatory action to improve low-income tenants’ housing conditions.”116 Yet the supply of vouchers comes nowhere close to meeting demand. Only one in five eligible families receives a voucher today.117 Housing subsidies are a form of de-marginalizing property that badly needs revival.

Housing subsidies are not the only form of direct subsidy that needs resuscitation these days. Food stamps are another. Contrary to some news reports,118 the Supplemental Nutrition Assistance Program (“SNAP”), formerly known as the Food Stamp program, will not come to an end March 15, 2015.119 Nevertheless, Congress recently cut the food stamp program by $8.6 billion over ten years.120 The importance of food stamps

112 See id. at 150-151.


114 See Dreier, supra note 107, at 6.

115 See Super, supra note 92, at 457.

116 See id. at 461.

117 See id.


to people who live at, near, or below the federal poverty line can hardly be underestimated. A Department of Agriculture report released this September stated that fourteen percent of American households remain food-insecure, that is, had difficulty at some time during the year in providing enough food for all their members. Food stamps disproportionately benefit people of color and women. As of 2012, women were about twice as likely as men (twenty-three percent versus twelve percent) to have received food stamps at some point in their lives. African Americans are roughly twice as likely as whites to have received them during their lives (thirty-one percent versus fifteen percent). Among Latinos, about twenty-two percent said they have received food stamps.

It is difficult to measure the success of SNAP with, in terms of reducing food insecurity, with any precision. Households that do and do not receive SNAP benefits can differ in systematic ways, complicating the task of measuring SNAP’s success rate. A study that uses instrumental variable models to control for the endogeneity of SNAP receipt shows that the receipt of SNAP benefits reduces the likelihood of being food insecure food insecure. The study provides evidence that SNAP is meeting its key goal of reducing food-related hardship. Hence, a robust food stamp program would be an effective form of de-marginalizing property.

A tension exists between extant property interests and the interests of members of marginalized groups, for the real legal, political, and social changes that are necessary to fundamentally improve the lives of these individuals—require redistribution of wealth. These changes involve not simply making the pie bigger, but changing how the pieces of the pie are distributed. De-marginalization is a matter of relative position, i.e., how the worst-off members of society are economically situated, not in absolute terms, but relative to the rest of society. Even if my thin wedge of the new, bigger pie is larger than its former counterpart, making me better-off in absolute terms, I remain marginalized if the wedges of everyone else also have grown proportionately larger.

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In today’s political environmental the prospects of effecting such redistribution through legislation are not good, to say the least. Alternative methods must be sought. One is through changes in property doctrines that have the potential to use property law in a way that goes beyond its traditional role in promoting order and stability and instead to fulfill its potential to shift entitlements. Some property doctrines do this already. What I am talking about is a matter of exploiting the potential of these and other doctrines to effect further change. This is what Eduardo Peñalver and Sonia Katyal have in mind in their wonderful article, *Property Outlaws.*

By that term, Peñalver and Katyal refer to individuals who have deliberately encroached upon the settled property rights of others. The term includes situations such as adverse possessors, persons who trespass for reasons of necessity, and persons who trespass as an express of political protest. Peñalver and Katyal argue that “the apparent order and stability that property law provides owe much to the destabilizing role of the lawbreaker, who occasionally forces shifts of entitlements and laws.”

They argue in favor of an expansion of doctrines like the necessity defense to allow redistribution of entitlements in ways that track the de-marginalizing role of property I have described here.

This proposal will likely strike most of us as an extreme, even outrageous, method of addressing the problem of social and economic marginalization. Perhaps it is. However, in a society that is unwilling to take substantial measures in an open and frontal way at alleviating the property (or non-property) conditions of marginalized groups, it is hardly surprising that legal scholars propose highly novel means of redistributing entitlements. Legal doctrine is pliable, at least to a degree, and in the absence of legislative action progressive legal theorists have no alternative but doctrine as the means of advancing the project of de-marginalizing property.

VI. CONCLUSION

It is time to wrap things up. Perhaps my five pieces—the recurrent themes I have noted—are not so easy after all. Still, I hope enough has been said here to indicate their fundamental importance to an understanding of American property law. The pieces—conceptualizing property, categorizing property, historicizing property, enforcing property, de-marginalizing property—do not appear in Gilbert’s or other commercial outlines, but

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125 *Id.* at 1098.
126 *Id.* at 1172-77.
students will gain a much firmer grasp of the property doctrines covered in those outlines if they understand property law’s recurrent themes. Finally, the doctrines will become easy for them like Bobby Dupea’s piano pieces through the same method he used—practice, practice, and more practice.