

ESSAY

DEMOCRATIC ESTATES: PROPERTY LAW IN A FREE AND DEMOCRATIC SOCIETY

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“I am of opinion that the law forbidding the creating of new tenants by means of subinfeudation was always the law of the Colony, and that it was the law of this State, as well before as after the passage of our act concerning tenures, in 1787.”

Van Rensselaer v. Hays

Court of Appeals of New York (1859)¹

“[T]he existence of a town or city where the streets, alleys, school houses, business houses, sewerage system, hotels, churches, theaters, waterworks, market places, dwellings, and tenements are the exclusive property of a corporation is opposed to good public policy, and incompatible with the theory and spirit of our institutions.”

People ex rel. Moloney v. Pullman’s Palace-Car Co.

Supreme Court of Illinois (1898)²

“In our judgment, ‘no trespass’ signs represent the last dying remnants of paternalistic behavior.”

State v. Shack

Supreme Court of New Jersey (1971)³

I.

PROPERTY AND THE AMERICAN DREAM

Property is a social and political institution and not merely an individual entitlement. For this reason, the legal structure of property reflects norms and values that are not fully expressed by reference to the market value of property rights. Consider the current subprime mortgage crisis in the United States: The family home is the core of the American Dream, and that means that property is central to the way we Americans define ourselves as a people. Does the prospect of several million foreclosures jeopardize property rights or vindicate them? Families need a place to live, and we therefore expect affordable housing to be available; at the same time, no one has a right to a home he cannot afford, and we cannot expect to stay in a home when we are not paying the mortgage. Are the massive foreclosures we are experiencing a problem or a solution to a problem? We cannot answer this question merely by reference to current law or to economic considerations; rather, we must attend to the full range of our values. This requires us to attend to the ways that property law shapes social life and either supports or undermines democratic values.

¹ 19 N.Y. 68, 74 (N.Y. 1859).

² 51 N.E. 664, 674 (Ill. 1898).

³ 277 A.2d 369, 373 (N.J. 1971) (quoting N.J. GOVERNOR’S TASK FORCE ON MIGRANT FARM LABOR, THE REPORT OF THE GOVERNOR’S TASK FORCE ON MIGRANT FARM LABOR 63 (1968)).

The foreclosure crisis was a prime issue in the 2008 presidential election.⁴ This occurred not only because of the effects of the foreclosure crisis on the overall economy, but because the families who face foreclosure have a claim that they are suffering unjust treatment. What makes the problem a political one is not only the assertion of economic interest by those vulnerable to foreclosure, but also their sense that they should be entitled to remain in their homes if they can restructure their loans to make them affordable. The question of whether families should be entitled to remain in their homes in such circumstances requires consideration of our deepest values. It implicates choices about the kind of society we want to live in and the nature of the obligations we owe to each other.

Many families bought homes with little or no down payment and initially low interest rates that are now blooming into unaffordable, high rates.⁵ Those mortgages were then securitized and sold in transactions that hid their shaky economic foundations.⁶ This made it difficult for home owners to figure out whom to call to attempt negotiations when they fell behind in their mortgage payments. Foreclosures have ensued at a time when real estate values have collapsed.⁷ This foreclosure explosion has now triggered a grave financial crisis for those mortgage lenders who face homes valued less than the outstanding debts, with repercussions for the entire U.S. economy.⁸ Concentrations of foreclosed properties in particular neighborhoods are leading to downward spirals that threaten the economic underpinnings of many localities.⁹ Figuring out how to think about this crisis not only involves economic policy and political calculation; it challenges our conceptions of both property and property law. How should property law respond to this crisis in property ownership?

Republicans and Democrats tend to disagree about how to answer this question. While Republicans generally take a more libertarian, free-market approach,¹⁰ Democrats favor a more regulatory,

⁴ See John McCain Outlines New Initiatives to Provide Immediate Help for American Families (Apr. 10, 2008), <http://www.ohiogop.org/news/articles/2008/04/john-mccain-outlines-new-initiatives-provide-immediate-help-american-families> (on file with author) [hereinafter McCain Outlines New Initiatives]; Sen. Barack Obama, Plan to Strengthen the Economy, <http://www.barackobama.com/issues/economy/#home-ownership> (last visited Feb. 1, 2009).

⁵ See President George W. Bush, President's Address to the Nation on the Economic Crisis (Sept. 24, 2008), available at http://www.nytimes.com/2008/09/24/business/economy/24text-bush.html?_r=1&oref=slogin.

⁶ See *id.*

⁷ See *id.*

⁸ See *id.*

⁹ Richard E. Gottlieb & Andrew J. McGuinness, *When Bad Things Happen to Good Cities: Are Lenders to Blame?*, 17 BUS. L. TODAY, July–Aug. 2007, at 13.

¹⁰ See Nick Timiraos, *Homeownership Push Is Rethought: Both Candidates Weigh the Best Path to American Dream*, WALL ST. J., Sept. 12, 2008, at A4 (explaining that Senator McCain

protective, and progressive one.¹¹ Republicans are champions of “liberty” and believe that government interference in the economy kills the goose that laid the golden egg. They also generally adopt the libertarian view that regulations constitute an assault on individual autonomy because they interfere with freedom of contract. Worse still, government intervention constitutes illegitimate paternalism: it treats individuals like children who cannot make their own decisions, and it saps their independence by rejecting the notion of personal responsibility and self-reliance. People who act foolishly should suffer the consequences of their own mistakes rather than expect the government to bail them out. Whether they reason from efficiency or liberty concerns, Republicans are likely to argue that it is best just to let this drama play itself out.

Democrats, on the other hand, adopt the progressive view that the market is an arena of social life, structured and regulated by law, and are thus far more comfortable with conscious government efforts to shape economic relationships to promote fair arrangements. They view government regulation of market relationships as desirable, for example, when it protects consumers from misleading and unfair contract terms. Fraudulent and abusive practices constitute both market failures and assaults on individual dignity and thereby justify government intervention. More fundamentally, markets are not states of nature; rather, they are structured by law. Far from impeding the market, regulations set the ground rules for economic interaction by defining and allocating property rights and appropriately enforcing contracts. Regulation is simply another word for the rule of law, without which the free market would be replaced by the war of all against all. Hobbes and Locke taught us that law enables the creation of wealth,¹² and Rawls reminds us that it establishes the basic structures that determine whether property is fairly distributed.¹³ Unlike Republicans, Democrats also assume that individuals can face hard times through no fault of their own: self-reliance is not a sufficient answer to the vicissitudes of economic life. Democrats therefore favor government action to provide a safety net when things get rough.¹⁴ If

“has warned against lending to homeowners who don’t have enough of their own capital in the investment” and discussing McCain’s support of a bill making “it harder for lower- and middle-class consumers to file for bankruptcy”).

¹¹ See, e.g., *id.* (explaining Senator Obama’s support of greater regulation and discussing Obama’s advisors’ aversion to “privatization” as the only plan to solve the housing crisis).

¹² See generally THOMAS HOBBS, *LEVIATHAN* (G.A.J. Rogers & Karl Schuhmann eds., Oxford World Classics 1998) (1651); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

¹³ See generally JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999) (1971).

¹⁴ See Sen. Barack Obama, Remarks of Senator Barack Obama: Our Common Stake in America’s Prosperity (Sept. 17, 2007) [hereinafter *Our Common Stake*], <http://www.ba->

Republicans favor such a safety net at all, they tend to do so only grudgingly: it would be political suicide to attempt to abolish Social Security and Medicare entirely, even if the Republicans' underlying philosophy would counsel in favor of doing so.

President Bush generally followed the libertarian line—for instance, he threatened to veto legislation (sponsored by Representative Barney Frank) that would make federally insured mortgages available to help distressed home owners refinance their loans on more affordable terms.¹⁵ Surprisingly however, President Bush changed his mind and signed the legislation eventually passed by Congress.¹⁶ In a similar surprise, the major candidates for President in 2008, Barack Obama and John McCain, agreed on how to respond to the housing crisis. For one thing, they both professed to favor a pragmatic approach, seeking to solve the problem and not to do anything that would backfire and make things worse. They both rejected approaching the problem from a dogmatic, ideological point of view. “I will not allow dogma to override common sense,” said John McCain.¹⁷ Barack Obama similarly commented that “we cannot simply look backwards for solutions . . . to hope that the New Deal programs born of a different era are, by themselves, somehow adequate to meet the challenges of the future. No, we are going to have to adapt our institutions to a new world as we always have.”¹⁸ But more surprisingly, McCain and Obama both favored government assistance to home owners to help them keep their homes.¹⁹

At the same time, at least initially, McCain and Obama had rather different ways of evaluating what the problem is and what kinds of solutions should be considered to fix it. Their approaches reflected differences of principle. John McCain initially asserted, for example, “I will not play election year politics with the housing crisis I will consider any and all proposals based on their cost and benefits.”²⁰ This framing of pragmatism suggests that a rational approach to the

rackobama.com/2007/09/17/remarks_of_senator_barack_obam_24.php (“[P]art of my agenda will be to modernize and strengthen America’s safety net for working Americans.”).

¹⁵ David M. Herszenhorn, *Bush Advisers Oppose Housing Measure, and Vow a Veto*, N.Y. TIMES, May 7, 2008, at C2; see Press Release, Rep. Barney Frank, Frank Announces New Economic, Mortgage and Housing Rescue Proposal (Mar. 13, 2008), available at <http://www.house.gov/frank/fha0308.html>.

¹⁶ Jennifer Loven, *Bush Signs Housing Bill to Provide Mortgage Relief*, ASSOCIATED PRESS, July 30, 2001, LexisNexis Academic.

¹⁷ Press Release, Sen. John McCain, John McCain Addresses the Housing Crisis (Mar. 25, 2008), available at <http://www.procon.org/sourcefiles/McCain20080325.pdf>.

¹⁸ Our Common Stake, *supra* note 14.

¹⁹ See sources cited *supra* note 4.

²⁰ Liz Sidoti, *McCain Leaves Housing Crisis Options on Table: GOP Presidential Nominee Places Limits on Government Assistance*, ASSOCIATED PRESS, Mar. 26, 2008, LexisNexis Academic.

problem requires objectively and realistically assessing the consequences of alternative courses of action. The rhetoric of “costs and benefits” suggests that those consequences should be measured by market values rather than by idealistic assumptions about the world or controversial value judgments. In contrast, Obama invoked Franklin D. Roosevelt in calling for a “re-appraisal of our values as a nation,”²¹ arguing that “in this country, our right to live must also include the right to live comfortably” and that we need “a renewed trust in the market and a renewed spirit of obligation and cooperation between business and workers; between a people and their government.”²² Obama thus framed the question differently than McCain. He agreed with McCain that a pragmatic approach requires attention to the likely consequences of alternative courses of action, but he suggested that we should assess those consequences through the lens of value judgments rather than reliance solely on market prices.

Like most Republicans, McCain professes a libertarian approach to economics and law. He is far more skeptical than Obama about government regulation and financial support to help individuals and institutions faced with economic crises. Initially, for example, McCain opposed assistance to the families who bought homes with loans they could not afford to pay back. Rather, he obliquely suggested that those families are to blame for their own troubles: they face foreclosure because they made poor decisions. “I have always been committed to the principle that it is not the duty of government to bail out and reward those who act irresponsibly, whether they are big banks or small borrowers,” McCain said.²³ On the other hand, McCain did favor help to the banking industry if the systemic effects of nonintervention were substantial. “Government assistance to the banking system should be based solely on preventing systemic risk that would endanger the entire financial system and the economy.”²⁴ Based on this approach, he grudgingly seemed to favor the Federal Reserve Bank’s bailout of Bear Stearns.²⁵ When asked if “the Fed went too far in helping Bear Stearns,” McCain said, “It’s a close call, but I don’t think so.”²⁶

The libertarian view that those who enter a bad deal have only themselves to blame is the basis for the idea that individuals should face the consequences of their own mistakes. The moral principle of

²¹ Our Common Stake, *supra* note 14.

²² *Id.*

²³ Sidoti, *supra* note 20.

²⁴ *Id.*

²⁵ *Casting McCain as Opponent of Fed Intervention in Mortgage Crisis, Blitzer Ignored His Approval of Bear Stearns Aid*, MEDIA MATTERS, Mar. 26, 2008, <http://mediamatters.org/items/200803280005>.

²⁶ *Id.*

self-reliance means that if individuals cannot comply with the contract terms to which they committed themselves, they should lose their homes through foreclosure. Painful though this may be, there is nothing government should do about it; after all, this is the remedy they agreed to in the event they did not make their payments. Such interventions only mess up the free market, encourage dependence, and foster an ethic of paternalism that denies dignity to those supposedly being helped. Intervention to help big financial institutions is another matter: the whole economy depends on their continuing to function, and failing to help them would affect the rest of us.

This view suggests that there are no externalities that we suffer when millions of families lose their homes; unlike the financial effects of the failure of large financial institutions that would harm our pocketbooks, these individual foreclosure stories are tragedies that do not affect the rest of us, at least not in ways that justify government intervention. The effect is thought to be merely emotional rather than financial; it is, in some sense, not “real,” or at least it is not the kind of harm that government action should remedy. If we feel affected by these individual tragedies, we can always indulge in charity to our neighbors. Charity is something McCain believes that mortgage lenders may engage in as well. Those lenders have “been asking the government to help them out,” McCain said. “I’m now calling upon them to help their customers, and their nation, out.”²⁷ It is not clear, however, that such lenders are entitled to do so under current law, unless they can show that such help improves the bottom line. If not, current law appears to prohibit or discourage corporate charity to customers; after all, corporations owe their prime duties to their shareholders, not their customers or the public at large.²⁸

Democrats, in contrast, are more inclined to help the little guy: they hope to help prevent families from losing their homes. For example, Barack Obama supports “cracking down on mortgage fraud” and “protect[ing] consumers against abusive lending practices.”²⁹ If home buyers were misled into purchasing homes through mortgages they could not afford, their inability to comply with contractual mort-

²⁷ Domenico Montanaro, *McCain: “We’re Succeeding”*, MSNBC, Mar. 25, 2008, <http://firstread.msnbc.msn.com/archive/2008/03/25/803794.aspx>.

²⁸ For a contrary view, see KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* (2006); Joseph William Singer, *Corporate Responsibility in a Free and Democratic Society*, 58 CASE W. RES. L. REV. (forthcoming 2009) (both arguing that corporations have responsibilities to the public and to stakeholders other than shareholders).

²⁹ Sen. Barack Obama, *Barack Obama’s Policy on the Foreclosure Crisis* [hereinafter *Policy on the Foreclosure Crisis*], <http://www.barackobama.com/issues/economy/#homeownership> (last visited Feb. 1, 2009); see also Sen. Barack Obama, *Protecting Homeownership and Cracking Down on Mortgage Fraud*, <http://www.barackobama.com/issues/economy/> (last visited Feb 1, 2009); Our Common Stake, *supra* note 14.

gage terms is arguably not their fault, but the fault of those who got them in over their heads. These individual home buyers are victims of fraud, a wrong we can conceptualize as a wrongful taking of property under false pretenses. The fact that millions of families are facing foreclosure now suggests that this was not merely a matter of a few irresponsible miscreants. Rather, an entire market was created in selling and financing homes to those who could not qualify for more traditional mortgages. The widespread nature of this market suggests that reasonable people could have been taken-in by clever (and perhaps misleading) marketing, as well as the widespread desire to participate in the American Dream of owning a home.

Government regulates business to ensure the safety of consumer products. Perhaps, as Elizabeth Warren has argued, we need government protection from defective financial products as well.³⁰ Although we value self-reliance in the United States, we also expect businesses to comply with minimum standards; they are obligated to treat their customers with common decency.

Democrats are also far less averse than Republicans to government intervention to help people out in hard times, regardless of who is at fault for their predicament. When natural disasters like Hurricane Katrina strike, Americans clamor for federal intervention and aid. Why should economic disasters be any different? Of course, we do not want to adopt policies that promote irresponsibility, but most economic misfortune befalls individuals because of events beyond their control. Thus, Obama supported the Barney Frank bill that would “create a fund to help [people] refinance their mortgages and provide comprehensive supports to innocent homeowners.”³¹ Obama also supported regulations to alter the terms of existing mortgages. While Hillary Clinton proposed achieving this end through imposing a mortgage-foreclosure moratorium, Obama proposed accomplishing this end by amending bankruptcy laws to allow bankruptcy courts to modify mortgages to lower payments owed to lenders.³² The eventual law moves in the direction of rewriting the terms of mortgages but does so in an oblique fashion. If lenders of subprime mortgages agree to reduce the principal owed on the loan (to 90 percent of the home’s

³⁰ Elizabeth Warren, *Making Credit Safer: The Case for Regulation*, HARVARD MAG., May–June 2008, at 34 [hereinafter Warren, *Making Credit Safer*]; Elizabeth Warren, *Unsafe at Any Rate: If It’s Good Enough for Microwaves, It’s Good Enough for Mortgages. Why We Need a Financial Product Safety Commission*, DEMOCRACY J., Summer 2007, available at <http://democracyjournal.org/article.php?ID=6528>.

³¹ Sen. Barack Obama, *Protecting Homeownership and Cracking Down on Mortgage Fraud in Iowa*, http://obama.3cdn.net/54d4a826cbee880b5e_4gulmv19d.pdf (last visited Feb. 1, 2009).

³² Compare Sen. Hillary Clinton, *Remarks on Wall Street on Housing Crisis* (Dec. 5, 2007), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=77081>, with Policy on the Foreclosure Crisis, *supra* note 29.

current fair market value) and if they replace those mortgages with more conventional, affordable, fixed-rate mortgages, the federal government will subsidize the arrangement by insuring payment of the new loans.³³

The Democratic approach assumes that we are all affected when there are millions of foreclosures. Some of this effect is economic: neighborhoods with numerous empty homes lower property values for everyone and depress economic activity. But some of the externalities are moral rather than financial: contrary to the ideology of self-reliance, the progressive mantra is that we are in this together and we owe obligations to our fellows who face hard times. Obama explained,

We have not come this far because we practice survival of the fittest. America is America because we believe in creating a framework in which all can succeed. Our free market was never meant to be a free license to take whatever you can get, however you can get it. And so from time to time, we have put in place certain rules of the road to make competition fair, and open, and honest. We have done this not to stifle prosperity or liberty, but to foster those things and ensure that they are shared and spread as widely as possible.³⁴

Interestingly, whether out of a change of heart or political convenience, John McCain came to repudiate substantially his earlier embrace of the philosophy of small government and self-reliance (at least in the context of the foreclosure crisis), as well as his use of cost-benefit analysis as the appropriate framework for judging how to respond to it. Instead of preaching self-reliance and the virtues of economic efficiency, McCain stated that he sought to “help[] Americans with the housing crisis” and that he “believes there is nothing more important than keeping alive the American Dream of owning a home.”³⁵ His website repeated McCain’s view that, as a matter of principle, the government should only assist the banking system to prevent “systemic risk” and that no assistance should be forthcoming to “real estate speculators or financial market participants who failed to perform due diligence in assessing credit risks.”³⁶ At the same time, McCain’s website also reported that he now favored federal government funding to help “those hurt by the housing crisis,” including “every deserving American family or homeowner.”³⁷ McCain defined “deserving American families” as those who took out subprime mortgages after 2005 that “can prove creditworthiness at the time of the original loan;

³³ Loven, *supra* note 16; *Provisions of Housing-Mortgage Relief Bill*, ASSOCIATED PRESS, July 30, 2008, LexisNexis Academic.

³⁴ Our Common Stake, *supra* note 14.

³⁵ McCain Outlines New Initiatives, *supra* note 4.

³⁶ *Id.*

³⁷ *Id.*

are . . . unable to continue to meet their mortgage obligations; and can meet the terms of a new 30 year fixed-rate mortgage on the existing home,” and he wanted to help by replacing their unaffordable mortgage with a new conventional mortgage through a loan from the Federal Housing Administration.³⁸ This suggests support for the core elements of the legislation that Congress and the President eventually enacted into law. McCain also supported a Justice Department task force that would “aggressively investigate potential criminal wrongdoing in the mortgage industry and bring to justice any who violated the law.”³⁹ While this proposal does not recommend legislative or regulatory reforms like those proposed by the Democrats, it does suggest support for regulations designed to avoid false or misleading sales tactics.

The change in position by both McCain and Bush is instructive. Americans reflexively oppose “big government” but support the myriad regulations and social programs that government enacts. They do not want regulations, but they do want laws that protect them from defective products and unsafe workplaces; laws that protect them from polluted air and water; and laws that regulate land use to prevent factories from being located in the middle of residential subdivisions.⁴⁰ They do not want government to interfere with the free market but they do want government to protect “hard-working Americans” from losing their homes. They are skeptical of big government but just as skeptical of big business. They like the idea of small government but not the practice: when hard times strike, they demand government action. This suggests that the American people embrace both sides of the libertarian/progressive split. It turns out that we are deeply ambivalent about the relationship between law and economics. It also means that we have a similar ambivalence about property rights.

Libertarian and progressive approaches to the subprime mortgage crisis reflect competing views of the appropriate role of government in the economy, but they also reflect very different conceptions of property and property law. The libertarian story McCain initially told suggests that it is better to have owned and lost than never to have owned at all. Work hard and you can buy a home, but you have no right to a home you cannot afford. If you cannot afford a house, that must be your own fault; America provides opportunity if you will

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Joseph William Singer, *Things That We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society*, 2 HARV. L. & POL'Y REV. 139, 140 (2008) (“This means that liberty is not possible without regulation; paradoxically, the liberty we experience in the private sphere is only possible because of the regulation we impose in the public sphere.”).

only take it. Those who have property deserve to keep it, and those who want property must work for it. If you bought a house you cannot afford, and it is now being taken away because you failed to make your payments, what have you to complain about? You have no right to a home you have not paid for.

The progressive story suggests, in contrast, that the foreclosure crisis is (for the most part) not the result of irresponsible conduct on the part of home buyers, but the result of irresponsible conduct on the part of mortgage lenders. Those lenders should not have been pitching loans to families that could not afford them. Contrary to the libertarian story, it is not better to have owned and lost than never to have owned at all. Rather, it would be better not to buy a home one cannot afford; financially, a family is likely to be better off by renting than by paying a higher monthly mortgage fee and then losing all the equity in the home when home prices fall.⁴¹ The disruption of eviction from a foreclosed home and of having one's credit rating destroyed is best avoided. No family wants to face this and, if these families had better information, they would not have entered these deals. In contrast to the libertarian argument that contracts are fair if the parties agree to them, the progressive response is that fairness requires contract terms that one could accept if one did not know on which side of the bargaining table one would be sitting.⁴² Contracts should not be enforceable if they do not have reasonable terms, and if a family is able to make payments that reflect reasonable rates of return, then home financing contracts should be rewritten to change the terms of the deal to reflect more reasonable arrangements. In this way, both banks and home owners may avoid the costs of foreclosure. The banks earn less than they otherwise would have, but they are partly or mainly at fault for marketing financial products to customers who could not afford them; on the other side, home owners have a legitimate interest in keeping their homes that justifies market regulation to prevent displacement and homelessness. The legislation passed by Congress in response to the foreclosure crisis broadly reflects this set of progressive understandings.

⁴¹ Of course, the tax deduction given for interest payments on mortgages may change the economic calculation dramatically; at the same time, foreclosure may ruin the borrower's credit rating in a manner that makes her worse off in the long run.

⁴² Singer, *supra* note 40, at 159 (noting that such egalitarian-minded questions highlight how regulations not only set rules but also set standards of conduct requiring each person to be treated with concern and respect).

II.

PROPERTY LAW AS A PROBLEM

What do these competing stories tell us about the place of property and property law in American life? Property is central to the American story. In their first history lessons, children are taught about brave western settlers staking claims in the wilderness, building the family home, planting the crops, and reaping the rewards of hard labor. John Locke is the ultimate Founding Father. In our national myth, we conveniently set aside, for the moment, the little problems of conquest of Indian nations, the enslavement of Africans, and the unequal status of women. We imagine instead an abundant land open to all who are willing to work hard. Property is there for the taking and, once acquired, legitimately kept until transferred voluntarily by the owner. Family homes and businesses are established, and trades occur with the resulting security and wealth for all. To top it all off, our property rights are constitutionally protected against state interference or seizure, at least without compensation;⁴³ they are a core bulwark protecting us from big government, thereby securing our liberties.

Although property is at the core of the American Dream, the place of property law is far less certain, despite its almost ubiquitous presence in the first year curriculum of law schools. For one thing, property law has always been depressingly technical and complicated. Though relished by those who enjoy puzzles, geometry, and paradoxes, the estates system has long had an old-fashioned, encrusted, anomalous feel about it. Its very vocabulary boggles the mind: who but a lawyer has ever heard of “privity of estate” or the “fee simple subject to executory limitation”? But more worrisome than its complexity and technicality is property law’s tendency to impose limitations on the freedom of owners to control their own land. These worries afflict both grantors and grantees. On the grantor side, if I want to create a future interest, why will the law not let me do so? On the grantee side, if one’s home is one’s castle, why are owners limited by things like easements, covenants, rights of entry, and liens? Who is the lord of this castle anyway?

Because property law is both technical and intrusive, there are perennial attempts to figure out what, if anything, is good about it. Suppose we reformed property law to excise all those technicalities and intrusive limitations on liberties of owners. What would be left? The answer: not much. Most of the property law course could fold into the other basic courses. Conflicts among neighbors about land use (the realm of nuisance doctrine) is arguably the province of tort

⁴³ U.S. CONST. amend. V.

law. Regulations of land use through zoning and environmental law can be relegated to municipal and environmental law courses. Limitations on takings of property should really be part of the constitutional law course. And why are contracts concerning the use and transfer of land not simply part of the contracts course? There are special rules about such transactions, but then there are special rules about insurance contracts, employment contracts, partnerships, marriages, and corporations too. If we parcel out property law to other courses in this manner, is anything left? And if there is, is it important?

The answers are: yes, something is left, and it is important. However, explaining what is unique about property turns out to be a surprisingly complicated task. When you ask law professors why property law is a crucial building block for legal education, they are likely to give three answers: The first thing they will say is that no other course considers the *origins* of the rights we bring to the bargaining table when we begin to contract with each other. This is why almost every casebook has a chapter on the original acquisition of property rights.

The second unique thing about property law is the fact that it protects rights against the world rather than rights against particular individuals, as is the case with contract law. Just as criminal and tort law protect our bodies from harm by limiting the freedom of everyone in the world, our property rights are protected against invasion by everyone. We say property rights are held in rem rather than in personam.⁴⁴ And in order for this protection to be meaningful, property law identifies a bundle of rights that owners have against the world. These rights are not things you have to bargain for; they are rights that go along with ownership.

The in rem nature of property rights leads to the third unique thing about property law. Although property law allows owners to transfer particular sticks in the bundle of rights to others, it also limits our ability to disaggregate that bundle by transferring some sticks while keeping others. On the contrary, property law requires that cer-

⁴⁴ Professors Henry Smith and Thomas Merrill have usefully explored the implications of this fact about property rights. See, e.g., Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 54–55 (2000) [hereinafter Merrill & Smith, *Optimal Standardization*] (noting that it is impractical to bundle in personam rights to create an in rem right and that therefore transaction costs will prevent assignable contracts from replacing property rights); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 *passim* (2001) [hereinafter Merrill & Smith, *Property/Contract Interface*] (considering why the legal system maintains the distinction between in rem and in personam rights through an analysis of four legal institutions: bailments, landlord/tenant law, security interests, and trusts); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 385–98 (2001) [hereinafter Merrill & Smith, *What Happened?*] (discussing the costs of adopting an economic analysis of property that ignores the in rem nature of property rights).

tain sets of rights in the bundle stick together (so to speak); when you transfer certain property rights, others have to go along for the ride. Unlike the law of contracts, which revolves around the central normative premise of freedom of contract, property law partially limits the bundles of rights we can create by identifying a predefined set of prepackaged estates defined by law. Antitrust law would call these “tying arrangements”; contract law would call them “mandatory terms”; property law calls them “estates.” The law limits the estates one can create to ensure that, at any moment, we can identify an owner for the property in question, and we have some notion of the bundle of powers that the owner has over the resources.

These answers of course only raise more questions. For one thing, the origins story told in property law courses is remarkably misleading. If you believe the casebooks, we acquire original title to property by conquering other nations, hunting animals, encroaching on our neighbors’ lands, and finding lost jewels.⁴⁵ These methods of acquisition are historically inaccurate: they do not describe the actual ways in which property titles were originally created in the United States.⁴⁶ Moreover, none of them describes a major method by which property is created or acquired today. To the contrary, most property is acquired today from family sources through inheritance and marriage or from market relationships centered on work and investment.

Why then do we focus on conquest and possession as the origins of rights in land? I believe we do so in order to frame property issues in an ideological manner to suggest that existing property rights legitimately originate in actions that reflect individual desert.⁴⁷ The idea of first possession embodies a Lockean image of a vast unimproved land, open for the taking by hardy settlers who establish property rights through hard labor.⁴⁸ While this story may serve the ideological purpose of pretending that property has just origins in American history, it tells us almost nothing about the source of property rights that we bring to the bargaining table today. Moreover, if we were to take seri-

⁴⁵ See, e.g., *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805); *Hannah v. Peel*, (1945) 1 K.B. 509.

⁴⁶ I have criticized this litany elsewhere. See Joseph William Singer, *Starting Property*, 46 Sr. LOUIS U. L.J. 565, 571–72 (2002) [hereinafter Singer, *Starting Property*]; see also Joseph William Singer, *Original Acquisition of Property: From Conquest and Possession to Equal Opportunity* (2008) (unpublished manuscript, on file with author).

⁴⁷ Even the conquest story reflects the norm of first possession. It does so either by emphasizing that the land in the United States was obtained from the Indian nations through treaties or peace agreements following wars, or by acknowledging the injustice of forced seizure of Indian lands but relegating such questions to the distant past and thus allaying these concerns. See Singer, *Starting Property*, *supra* note 46, at 568–69.

⁴⁸ Even adverse possession trades on the image of first possession since it invariably describes a case in which the true (or record) owner acquiesces in the encroachment by effectively abandoning exclusionary claims. See *id.* at 568.

ously the idea that property rights are legitimate only if they have legitimate origins, then we would have to reorient our thinking to focus on the concept of equal opportunity and the extent to which it is present or lacking in contemporary American society. Property origins are only legitimate if we have equal chances to become owners, not just in the distant past, but today. Philosopher Brian Barry has argued, for example, that if we took the principle of equal opportunity seriously, we would have to make major changes in government policy and law.⁴⁹ We would also have to change, in fundamental ways, the law of property.

A more fruitful reason to treat property law as a basic subject in law school is the estates concept. Traditionally, the estates system was justified by the idea of promoting alienability and the policy of limiting the power of the “dead hand” of prior owners to curtail the freedom of current owners. Yet, it is not clear that the technical estates system we have inherited serves these purposes well at all. That lack of fit has generated a great deal of skepticism about the estates system, especially surrounding its technicalities. Indeed, one of the major reasons for publication of the *Restatement (Third) of Property (Servitudes)* was to get rid of technicalities like privity of estate and the “touch and concern” requirement for covenants.⁵⁰

In response to this skepticism about the estates system, some property scholars have begun rethinking the justifications for it. In recent articles, Thomas Merrill and Henry Smith have usefully explained the core importance of property law (and especially the estates concept) for the legal system.⁵¹ They have argued that what is unique about property is its in rem nature and that because property rights are held against the whole world, they need to be clear and understandable. The estates system limits the bundles of rights we can create in land (what they call the “*numerus clausus* principle”), and this allows potential buyers to know what rights go along with ownership of particular resources. The informational advantage of bundled rights not only has efficiency effects by lowering the costs of transactions through clarifying who owns what and defining what rights the owners have, but also has a moral foundation in cohering with ordi-

⁴⁹ See BRIAN BARRY, WHY SOCIAL JUSTICE MATTERS 44 (2005) (noting that a just system would have to provide people more than one chance, such that losing out at the beginning does not permanently close doors).

⁵⁰ See Susan F. French, *Highlights of the New Restatement (Third) of Property: Servitudes*, 35 REAL PROP. PROB. & TR. J. 225, 228, 229 (2000) (arguing that the major goals of the *Third Restatement* were to avoid “confusion and unnecessary complexity in the law” as well as to get rid of “obsolete doctrines” like privity of estate and the touch and concern test).

⁵¹ See generally sources cited *supra* note 44.

nary expectations about the powers of owners.⁵² Their argument is a welcome corrective to the prevailing skepticism about the very idea of the estates system.

Let us recall why the estates system is so disturbing to modern sensibilities. A libertarian of Lockean or Nozickian bent would find the estates concept baffling. We start with a full owner of land who (we assume) acquired her property rights legitimately. That owner has no lord and owes no allegiance to any superior. She has full rights over her own property. She is, so to speak, lord of her own castle. She is free to use her property as she likes as long as she does not harm others or invade their space. She is also free to transfer her property to anyone she wishes, and no one can take her land from her without her consent. If she does transfer it, a libertarian might well believe that the idea of freedom of contract suggests that she should be free to transfer one of the sticks in the bundle—or two or three—while keeping the others. She should also be free to place conditions on the transfer of rights. Why should government stop her from disaggregating her property rights in this way or conditioning their transfer? If both parties are better off from a contract to create an easement or a covenant or a future interest, then respecting these newly created packages of rights not only furthers autonomy but is wealth maximizing and efficient. From this libertarian, free-contract perspective, the estates system is anathema. It prevents the creation of certain packages of rights that the owner wishes to create and that the buyer wishes to buy and does so for no good reason. Although gifts do not involve mutual agreements about terms, donees are free to reject gifts with conditions they do not like, and if they accept the gift terms, we arguably have evidence that they believe they are better off with a conditional gift than no gift at all; regulating the terms of the gift decreases the freedom and welfare of both parties.

From both the libertarian and efficiency point of view, there seems to be nothing to gain (and a lot to lose) by limiting freedom of contract or freedom of disposition. Restrictions on disaggregation of property rights can only decrease freedom and well-being by preventing individuals from entering mutually beneficial arrangements. And anyone who wants to reassemble a fee simple (full ownership rights) can simply bargain with the owners of each of the sticks, just as one could try to buy four contiguous parcels of land to develop a large project.

Professors Merrill and Smith respond to these libertarian and efficiency critiques of estates by explaining why there are both efficiency and moral advantages to limiting our ability to disaggregate property

⁵² See Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1857 (2007).

rights as we wish. Freedom of contract and freedom of disposition are important values, but they have their limits.⁵³ Merrill and Smith argue that a system that imposes no limits on our ability to create estates would allow highly complicated packages of rights to exist.⁵⁴ This would increase transaction costs; after all, one may have to read a complicated document before one can find out what rights one will acquire if one buys a house.⁵⁵ Moreover, if one fails to investigate fully—a fact of life that property lawyers know is commonplace in a country where lawyers are often not involved in routine property transactions—a buyer will be unfairly surprised by odd encumbrances on her title, thereby decreasing her welfare and defying her justified expectations. And the transaction costs of getting out of the deal then are very high. Simplification and standardization of the bundles of rights associated with forms of ownership thus arguably lower information costs, promote property use and transfer, and confer moral legitimacy on property arrangements.⁵⁶

While this argument is a highly welcome corrective to the traditional suspicion of the estates system, it does not tell the whole story. First, Merrill and Smith recognize that while the estates system limits the bundles of rights one may create, it does so in a manner that actually allows an enormous amount of freedom and complexity.⁵⁷ There are particular property arrangements that are outlawed (more on this later), but it is not really true that the estates system currently functions to simplify things. After all, even though the law limits us to the fee simple, the defeasible fee, the life estate, the lease, and mortgage-financing arrangements of various kinds, property law places few limits on the kinds of conditions and covenants that can be imposed on land ownership. There is no rule against transferring property to another person “until Barack Obama wins the presidency,” for example. The conditions and restrictions one can create can be quite weird, defying ordinary expectations. Nor does the current system result in anything close to simplification. Indeed, the widespread use of homeowners associations means that buyers of land must search the voluminous covenants, conditions, and restrictions contained in the recorded declaration, as well as the governing rules of the association, to find out what their rights will be if they buy the property. Worse

⁵³ Freedom of disposition refers to grants through gifts or wills that do not involve a contract between individuals but rather are voluntary transfers from one to another. Gifts can be rejected, of course, and thus have a flavor of mutuality, but they are not the subject of a prior mutual agreement.

⁵⁴ See Merrill & Smith, *Optimal Standardization*, *supra* note 44, at 3–10.

⁵⁵ See *id.*

⁵⁶ *Id.* at 8.

⁵⁷ See Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449, 1483–84 (2004) (making this argument).

still, doing so will give them no security; after all, covenants and condominium rules can change over time as the homeowners association chooses. Owners of such homes are subject to the whim of their neighbors, just as feudal tenants were subject to the whim of their lords.

Merrill and Smith are correct that our system lowers information costs by identifying presumptive owners of physical plots of land and that standardization of packages of property rights can lower information costs.⁵⁸ However, it is not at all clear that our current system of property law results in any type of simplification or standardization of the package of rights that goes along with ownership. And if that is true, then it is not clear how our estates system actually lowers information costs at all. Nor is it clear that the estates system, as currently structured, coheres with ordinary morality and thus protects justified expectations. After all, perhaps the most surprising thing about the property law course is the estates system. Few people but lawyers have heard about the life estate or the “fee simple” or future interests such as “rights of entry” and “possibilities of reverter.” Students have heard of leases and mortgages and, depending on the kind of housing they have, they may be (perhaps acutely) aware of easements and covenants. Merrill and Smith are correct that property law helps preserve the perceived legitimacy of property by identifying owners, but it may well overstate the case to identify simplification with common morality.⁵⁹ Indeed, in many cases, the exact opposite is true.

Common morality often sides with complexity rather than simplicity. For example, the implied warranty of habitability was invented because tenants expected landlords to provide services like heat and hot water when they rented apartments even though neither their leases nor the common law required landlords to provide these things.⁶⁰ Similarly, owners tend to rely on long-fixed borders rather than the “metes and bounds” measurements contained in documents filed in the registry of deeds: hence the doctrine of adverse possession.⁶¹ When an owner builds a new house in her backyard, the buyer of that house expects to be able to get to it by going over the common driveway, regardless of what the deed says.⁶² When a developer promises to restrict lots to residential uses, buyers expect the developer to abide by that promise, even if the formal covenants give the developer the power to control the architectural commission, and the developer uses that power to renege on that promise for the last lots

⁵⁸ See Merrill & Smith, *Optimal Standardization*, *supra* note 44, at 24–42.

⁵⁹ See, e.g., Merrill & Smith, *supra* note 52, at 1850.

⁶⁰ See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970).

⁶¹ See, e.g., *Brown v. Gobble*, 474 S.E.2d 489, 496 (W. Va. 1996).

⁶² See, e.g., *Finn v. Williams*, 33 N.E.2d 226, 228 (Ill. 1941).

sold.⁶³ A ranch owner who gives dozens of friends and employees the right to erect homes around a lake on his ranch should not be surprised that they expect to be able to continue to use those homes, even if he did not give them formal leases, easements, or deeds.⁶⁴

I do not mean to argue that all these cases are easy; indeed, we see substantial disagreement among the states on how to handle these cases and the many variations of them that can arise in practice. I do want to claim that our estates system creates a combination of simplicity and complexity and that it is a mistake to focus on one without the other. Laura Underkuffler teaches us to look at property and property law through two different lenses: our reigning idea of property revolves around the absolute rights of owners, but the institution of property embodied in our law is complicated with property rights limited to protecting the rights of other owners and non-owners, as well as the public at large.⁶⁵ We have, she argues, both a “common” conception of property as absolute rights and an “operative” conception that involves substantial complexity.⁶⁶

Professor Underkuffler argues that that the common conception of property revolves around the idea of ownership as absolute rights and that this idea not only exerts a powerful cultural force but has great utility.⁶⁷ The ownership idea does serve the purpose of identifying a person or institution that has the presumptive power to control land. It is absolutely correct to say, with Merrill and Smith, that the estates system is associated with limitations on the sets of rights that can be created in land, but I think Underkuffler’s description gives us the key to understanding the significance of those limitations. With the exceptions of leases, mortgages, and options to purchase land, future interests are not commonly used in land transfers today in the United States, although they are still common in trusts of personal property. The key to the estates system is the idea of ownership itself—an idea that reflects an image of property as a castle.⁶⁸ There are efficiency gains in presumptively identifying owners of parcels of land, and there are strong moral and political reasons to promote individual autonomy by conferring broad powers on owners to live their lives as they please in their own homes. There are similar reasons

⁶³ See, e.g., *Appel v. Presley Cos.*, 806 P.2d 1054, 1056 (N.M. 1991).

⁶⁴ See, e.g., *Rase v. Castle Mountain Ranch, Inc.*, 631 P.2d 680, 685–86 (Mont. 1981).

⁶⁵ See LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 51 (2003).

⁶⁶ See *id.*

⁶⁷ See generally *id.*

⁶⁸ Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 314–16 (2006) (discussing the castle model of property and arguing that the citizenship model provides a better framework from which to analyze the Takings Clause).

(within limits) for giving individuals the power to control small businesses. (Big business raises different questions entirely.)

But let's not overstate the case. When we move from identifying owners to defining the rights that go along with ownership, we move from simplicity to complexity. After all, we give home owners more power over what happens inside their homes than we give to those who run businesses. You are allowed to choose your friends based on race if you like, but restaurants cannot choose customers on this basis.⁶⁹ When you open your property to others, the law intervenes to protect the legitimate rights of employees and customers. And when you get married, the law steps in to regulate marital property rights. The law protects the rights of neighbors on the ground that land use often imposes externalities on those neighbors: hence the law of nuisance (not to mention zoning, land use, and environmental law). And when owners condition or restrict land transfers, we find conflicting interests among owners mediated by the law of servitudes and the law of leaseholds and mortgages. Some of these rules of law regulate how property is used, but others insert complexity into the task of determining who the owner is.

Underkuffler argues that there are good reasons why the institution of property is complex. She does not deny that, from an efficiency standpoint, Merrill and Smith are correct in voicing the oft-stated claim that markets can only work if we have fairly clear rules to divide up assets and identify who owns them.⁷⁰ Before people can buy and sell resources, we have to know who owns them, and we have to know what rights go along with ownership. The efficiency gains of consolidating rights (by limiting the ability of owners to disaggregate rights into complex packages) are enormous. Consolidation promotes alienability, protects legitimate expectations, and enables individuals to experience and exercise autonomy. But it is also obviously true that there are efficiency gains from complexity. After all, one of the most powerful traditional justifications for freedom of contract is that we should give people the freedom to make arrangements that suit their individual interests; social welfare improves when we enforce mutually advantageous agreements, and it suffers if we prevent people from tailoring property rights in ways that serve their mutual interests.

Merrill and Smith are right that strong protection for the "rights of owners" does accord with some core aspects of common morality. But the reason property law is so complicated is precisely because absolute property rights are so contrary to common morality and hence justified expectations. Time and again, when the owner argues for absolute freedom in ways that harm what are perceived to be the legit-

⁶⁹ See, e.g., CAL. CIV. CODE § 51–51.3 (West 2007).

⁷⁰ See generally UNDERKUFFLER, *supra* note 65, at 37–51.

imate interests of others, the courts or legislatures intervene to limit owners' prerogatives; the law steps in to protect the interests of owners' family members, their guests, their tenants, their employees, their customers, their neighbors, and their communities. If property law were simple, the property law books would be short, but the opposite is the case. Indeed, we property professors generally have more rules of law to teach than do contracts and torts professors. To be sure, some of this complexity comes from old-fashioned technical rules that we would best reform, as the *Restatement (Third) of Property (Servitudes)* seeks to accomplish. But I want to argue that much of this complexity is here to stay; this is because the exercise of property rights often imposes externalities on others. Those externalities are not limited to physical harms or discomfort but include effects that alter the character of the environment and the neighborhood in which the property is situated.⁷¹ When this happens, the law consistently limits the rights of owners to protect the legitimate interests of both other owners and non-owners who interact with owners. Underkuffler is right to emphasize the complexity of the institution of property.

III.

SCHOOLS OF THOUGHT ABOUT PROPERTY LAW

So how should we view the estates system? Let us consider six approaches: (i) the *traditional alienability* approach; (ii) the *legal realist* (or "*bundle of rights*") approach; (iii) the *efficiency* approach; (iv) the *libertarian* approach; (v) the *liberal egalitarian* approach; and (vi) the *personality, human flourishing, capabilities, and virtue ethics* approaches. I will briefly explain how each approach views the estates system and suggest what is good and bad about each way of thinking about the issue. I will then propose a new paradigm, which I will call the *democratic* approach (with a small "d").

A. The Traditional Alienability Approach

The oldest view justified property law's technicalities by reference to custom and the "nature of things." Many cases, for example, talk about restraints on alienation as being "repugnant to the fee."⁷² By this, they mean that the very nature of a fee simple interest in land is that it be alienable. This view could be a conceptualist one that focuses on the nature of the concept of full ownership embodied in the

⁷¹ See Joseph William Singer, *How Property Norms Construct the Externalities of Ownership* 4–5 (Harvard Law Sch., Harvard Pub. Law Working Paper No. 08–06, 2008), available at <http://www.ssrn.com/abstract=1093341> (discussing a methodology for identifying externalities and the forms that externalities may take).

⁷² See, e.g., *Nw. Real Estate Co. v. Serio*, 144 A. 245, 246 (Md. 1929) (describing a restraint on alienation as "clearly repugnant to the fee-simple title").

fee simple, or it could be a customary one based on long held understandings about the nature of ownership. Alternatively, it could be related to a conception of natural rights that was reflected in property law through a long-term shift from feudal to allodial property. Duncan Kennedy notes that in the first half of the nineteenth century, courts in the United States sought to excise technical aspects of law in order to shape law in a manner that promoted policy concerns and that protected natural rights.⁷³ The shift away from old estates, such as the fee tail, was associated with the movement from a feudal and hierarchical social structure to a natural-rights conception of free and equal individuals with rights to full ownership over land.⁷⁴ This shift was partial, however; the estates system, with its limitations on ownership and its inherent complexity and technicality, have persisted to this day. Property law could have been simplified by abolishing future interests entirely. But alas, to the chagrin of law students everywhere, this did not happen. Why not?

Over time, the traditional estates were justified by two general policies: the promotion of alienability and freedom from the dead-hand control of past owners. When particular packages of rights in land were outlawed, the usual justification was the promotion of alienability. Giving current owners the power to use property as they see fit and to transfer it without needing to obtain the consent of future interest or servitude owners made land more marketable. This allowed land to operate as a commodity, changing hands from one owner to another, while simultaneously giving owners the freedom to move to another place rather than get stuck on the family estate. It also allowed owners to change land use without getting the consent of a lord or a future interest holder or other family members. Alienability thus was thought to promote autonomy, equality, and social welfare. Similarly, rules limiting the creation of certain future interests freed current generations from undue control by prior generations, again promoting autonomy, equal rights, and welfare.

The problem is that, as the efficiency theorists remind us, the estates system both promoted and discouraged alienability. While aggregating rights in current owners may free those owners to use the land as they wish and transfer it without the consent of others (thereby lowering transaction costs), the estates system limits the

⁷³ DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* 115–45 (paperback ed. 2006).

⁷⁴ See GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970*, at 21 (1997) (noting the early American efforts at “dismantling of ‘aristocracy’ and getting rid of all vestiges of feudalism”); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 230–55, 232, 239 (2d ed. 1985) (explaining the new “ideal of a country of free citizens, small-holders living on their own bits of land” and the rejection of the “tyrannical” and “feudal” past).

power of owners to place conditions on the land when it is sold. If one is nervous about the uses to which the land will be put once one sells it (for example, if one continues to own neighboring land or wishes to control the behavior of one's children), one will be reluctant to part with the property unless one can condition its future use or ownership. The traditional justification of the estates system as promoting alienability focuses on the interests of grantees. But if we focus on the interests of grantors, it is obvious that the ability to condition future use and ownership may actually increase alienability by protecting the expectations and interests of sellers and donors of land. And while children always want to be free of restrictions placed on them by their parents, the children inevitably grow up and seek to impose similar controls on their children.

Justification of the estates system by reference to the alienability policy always sat in exquisite tension with the *Lochner* era's freedom-of-contract policy. After all, the free-contract idea suggested that one should be able to make any agreements one liked; that would mean having the power to disaggregate property rights as one wishes by either contract or gift or will. The alienability policy stood in tension with the free-contract idea because the estates system prohibited certain contracts by requiring particular property rights to be bundled together; in effect, the estates system imposes mandatory terms on real estate transfers. There is a deep tension between the idea of ownership (with the current possessor having full rights over the land) and freedom of contract (which would allow owners to condition the sale of land on covenants, easements, future interests, leases, and liens, thereby substantially limiting the powers of future owners). Adopting a policy of "promoting alienability" thus creates a paradox: the estates system both promotes and discourages alienability.

What norms do the alienability and dead-hand policies promote? Both policies promote autonomy by giving owners greater freedom to control their own lives; at the same time, by limiting the estates that can be created, these policies also arguably limit autonomy. Similarly, both policies promote marketability of land—and potentially efficiency—by freeing landowners from undue control by third parties. At the same time, limits on the estates that we can create may inhibit efficiency by preventing the creation of mutually beneficial arrangements. If that is so, where do we go from here?

B. The Legal Realist (or "Bundle of Rights") Approach

The legal realists helped us see the internal contradictions in the policies underlying the estates system by unpacking the rights that go along with ownership. Rather than assuming that we could use logic or custom or reason to deduce what packages of property rights are

“natural” or which ones promote alienability, they suggested that we analyze the various rights that go along with ownership separately and begin to think through the justifications for aggregation and disaggregation of property rights. John Chipman Gray is a transitional figure who tried to straddle both sides of the alienability and dead-hand paradoxes. Gregory Alexander explains that Gray’s scholarship both espoused the traditional justifications of the estates system and displayed the legal realist inclination to use policy concerns to shape rules of law.⁷⁵ Professor Gray pointed the way to a full-scale critique of the traditional view that eventually bloomed into Wesley Hohfeld’s legal realist conception of property as a “bundle of rights” whose content should be determined by reference to policy considerations. Rather than arguing that policy considerations require aggregating property rights in an “owner,” as Gray suggested, Professor Hohfeld argued that one could not logically link ownership of any particular right of ownership with any other particular right.⁷⁶ If property is just a bundle of rights, then it is a policy question which rights (if any) must be bundled together and which can be usefully disaggregated.

The legal realist critique of the alienability approach was a useful corrective to the traditional justification of the estates system for three reasons. First, it pointed out the tension (or contradiction) between the free-contract/free-disposition policies and the alienability policy. Second, it clarified the analytical components of ownership and demanded careful justifications for allocating particular sticks in the bundle of property rights to one person or another. Third, Hohfeld’s analytical terms were premised on the core idea that law involves relations among people and not relations between people and objects. The legal realists argued that we should not think of ownership as power over things; rather, we should conceptualize property rights as relations among people with respect to things. This idea was a major advance because it focused attention on the externalities of ownership—for example, the ways the exercise of property rights affects other owners, non-owners, and society as a whole.

At the same time, the legal realist approach had its own problems. Taken to its extreme, the bundle-of-rights idea could suggest that property has no meaning whatsoever as a legal category and

⁷⁵ See ALEXANDER, *supra* note 74, at 285–89 (discussing Gray, his scholarship on restraints on alienation, and his belief that most property law was based on a few core principles and policies).

⁷⁶ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 718–24 (1917); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30–36 (1913) [hereinafter Hohfeld, *Some Fundamental Legal Conceptions*]; see also Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 986–89 (1983).

that it only obscured the real issues underlying rule choices. What matters are the particular rights in the bundle. We can allocate those rights in any way we like based on the policy considerations we find relevant. Thomas Grey's article, *The Disintegration of Property*, is usually cited for this proposition.⁷⁷ Professor Grey usefully questioned the meaning of the general concept of property. Yet, just as there has been somewhat of a backlash against Grant Gilmore's book, *The Death of Contract*,⁷⁸ there has been a scholarly backlash against Grey's thesis.⁷⁹

On the efficiency side, the legal realist idea that property is just a bunch of entitlements that are not logically bound together has been met with arguments that there are reasons of efficiency for particular sets of bundled rights. As we have seen, Professors Merrill and Smith have championed the informational advantages of bundled rights, thereby giving a powerful efficiency justification for certain aspects of the traditional approach.⁸⁰ Similarly, Henry Hansmann and Reinier Kraakman have revived the idea that property is as important a concept as contract in understanding the corporate structure.⁸¹

On the justice and fairness side, the legal realist approach has been criticized by libertarians and natural law theorists who seek to revive the notion that property rights have a rationally discernible content and that bundled rights are essential to protect individual liberties.⁸² Liberal egalitarians have also criticized the realist approach, explaining the continuing power of the conception of absolute ownership. As noted earlier, Professor Underkuffler has powerfully argued

⁷⁷ Thomas C. Grey, *The Disintegration of Property*, in PROPERTY: NOMOS XXII, at 69, 69–85 (J. Roland Pennock & John W. Chapman eds., 1980).

⁷⁸ GRANT GILMORE, *THE DEATH OF CONTRACT* (1995).

⁷⁹ As an example of the backlash, see Alan Schwartz, *Justice and the Law of Contracts: A Case for the Traditional Approach*, 9 HARV. J.L. & PUB. POL'Y 107 (1986).

⁸⁰ See Merrill & Smith, *Optimal Standardization*, *supra* note 44, *passim*.

⁸¹ Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. S373, S405–07 (2002).

⁸² See generally RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1669–71 (2003) [hereinafter Claeys, *Takings, Regulations*]; Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights* 20–25 (George Mason Univ. School of Law, George Mason Law & Econ. Research Paper No. 08–20, 2008) [hereinafter Claeys, *Jefferson Meets Coase*], available at http://ssrn.com/abstract_id=1117999. Neither Professor Epstein nor Professor Claeys identifies himself as a libertarian; each has complicated and sophisticated theories of the boundaries of property rights, and each combines a number of norms in defining those rights. Epstein combines deontological arguments with consequentialist ones, and Claeys develops a modern form of natural law analysis. Nevertheless, both Epstein and Claeys privilege the value of free use and disposition of land and narrowly constrain the legitimate sphere of regulations designed to promote other goals, such as redistribution of wealth to avoid undue inequality or zoning laws designed to promote particular neighborhood character.

that the idea of property as full ownership not only is certain to persist but that it serves useful functions in our understanding of the normative order of which property is a part.⁸³ Similarly, I have argued that the castle conception of ownership does important work in shaping property norms that affect our understanding of the presumptive results in particular types of property disputes.⁸⁴ And Professor Alexander has similarly argued that internal contradictions in the commodity conception of property require supplementation by reference to norms concerning the role of property in the social order.⁸⁵ These critiques of the legal realist idea of property as a bundle of rights suggests that we need to rethink the benefits of the estates system.

C. The Efficiency Approach

As I noted earlier, contemporary legal theorists generally view the estates system with a jaundiced eye. This is especially so for efficiency theorists who worry a great deal about limitations on freedom of contract. By limiting the packages of rights one can create, the estates system embodies mandatory rules that limit the substantive terms of agreements respecting land. Efficiency theorists tend to view such mandatory terms extremely skeptically. Merrill and Smith bring much-needed correction to that view by reminding us of the numerous efficiency advantages of packaged rights and the inefficiencies of having property rights that are too fragmented.⁸⁶ Michael Heller also makes this point in his notion of the anticommons problem that can arise from excessive multiplication of property rights.⁸⁷ Frank Michelman has made a similar point.⁸⁸

But something very important is missing from the approach to the estates system from the efficiency standpoint. In his monumental work, *Commodity & Propriety: Competing Visions of Property in American Legal Thought*, Professor Alexander explains that property institutions and property law serve multiple social functions.⁸⁹ Specifically, property serves a commodity function, allowing valued resources to be

⁸³ UNDERKUFFLER, *supra* note 65, at 64–74.

⁸⁴ Singer, *supra* note 68, at 316–22.

⁸⁵ ALEXANDER, *supra* note 74, at 1 (arguing that property as commodity is only “one-half of a dialect” and that “property is the material foundation for creating and maintaining the proper social order, the private basis for public good”).

⁸⁶ See Merrill & Smith, *Optimal Standardization*, *supra* note 44, at 3–10.

⁸⁷ Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998) (“When there are too many owners holding rights of exclusion, the resource is prone to underuse.”).

⁸⁸ See Frank I. Michelman, *Ethics, Economics, and the Law of Property*, 39 TULSA L. REV. 663, 668 (2004) (“[W]e can safely conclude that the [private property] form must require *some* restriction on decomposition of full ownership into privileges held without their congruent rights, or rights without their congruent privileges.” (emphasis in original)).

⁸⁹ See ALEXANDER, *supra* note 74, at 1–15.

used and exchanged in market transactions.⁹⁰ The law treating property as commodity is generally concerned with increasing, if not maximizing, its market value, or alternatively with ensuring the utility and transferability of property rights so that they can satisfy human wants and needs. At the same time, Alexander argues that both property and property law serve a different, more fundamental function: they help to shape and establish the proper social order.⁹¹ The law treating property as a form of “propriety” is concerned not with fair market value and market exchange, but with establishing property rights and institutions that are consistent with and help establish the desired set of social and political relationships.

Efficiency is too narrow a lens through which to view property and property law. In his article, *The Social-Obligation Norm in American Property Law*, Professor Alexander argues that property law promotes human flourishing and human dignity and that it does so through shaping desirable human relationships of reciprocity and community.⁹² While efficiency analysis focuses on satisfying individual interests, Alexander’s more communitarian and dignity-based approach assumes that we have obligations to others in our community and to those with whom we form relationships. He therefore analyzes the social-obligation norm that shapes the legal definition of property and argues that it better accounts for property law than explanations narrowly based on efficiency concerns.⁹³ Alexander further argues that this communitarian analysis is more normatively attractive than efficiency analysis because it focuses our attention not only on market values but also on appropriate social relations.⁹⁴ In so doing, he argues that we must critically analyze preferences to determine whether satisfying them is legitimate in particular contexts; rather than assume that we have a moral right to demand anything we want, Alexander argues that we have obligations to treat others with equal concern and respect. This may mean that we have a duty to moderate our demands that affect them.⁹⁵ This in turn means that we need to shape property rights with broader goals in mind.

Similarly, in his article, *Land Virtues*, Eduardo Peñalver, in thinking about the rights that go along with ownership of land, details a number of limitations of efficiency analysis.⁹⁶ Professor Peñalver argues that efficiency theorists tend to focus on maximizing the market

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 760–73 (2009).

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ See Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 832–60 (2009).

value of land, and that even welfare theorists have a tendency to use market values as their only proxy for judging costs and benefits and hence the extent to which the rules in force promote satisfaction of human preferences.⁹⁷ Peñalver convincingly demonstrates the inadequacy of market value as the supreme metric for property. He shows, for example, why residents in a gentrifying neighborhood may rationally oppose gentrification even if it substantially increases the market value of their land.⁹⁸ Efficiency theorists tend to treat such reactions as irrational, but Peñalver shows that the complexity of human motivation requires attention to plural, incommensurable values that cannot be reduced to a simple, common metric.⁹⁹

Like Alexander and Peñalver, I have argued the inadequacy of efficiency approaches to property rights.¹⁰⁰ Efficiency theorists believe that the only way to think clearly and rationally about rule choices is to consider their consequences and to compare their costs and benefits. To the contrary, efficiency analysis is actually premised on a controversial version of a controversial moral theory. First, efficiency analysts tend not to count any interests that cannot be converted to dollar amounts. In so doing, they leave off the table fundamental human concerns that most people think matter in forming law and social policy.

Second, efficiency analysts judge the presence and magnitude of costs and benefits by reference to satisfaction of human preferences. They do so because they assume that we have no objective basis for judging preferences and that any such judgments interfere with both autonomy and equality by imposing the values of some on others.¹⁰¹ However, no one actually thinks that all preferences are equal. Some preferences count as human values that are preferred in any calculus of costs and benefits. Moreover, some preferences should not be counted at all: other-regarding, harmful preferences, such as the desire to refuse to sell a house to someone because of their race, do not or should not count in any social calculus of costs and benefits. The goal of efficiency analysis is to promote autonomy and equality, but, as Will Kymlicka explains, we must interpret what it means to live an autonomous life and to treat each person equally. Counting the

⁹⁷ See *id.*

⁹⁸ See *id.* at 842–44.

⁹⁹ See *id.* at 850–53.

¹⁰⁰ See, e.g., JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000); Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. (forthcoming 2009) (manuscript at 15–22, on file with author).

¹⁰¹ For critiques of this view, see Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326, 330–31 (2006); Singer, *supra* note 100 (manuscript at 17); Joseph William Singer, *Something Important in Humanity*, 37 HARV. C.R.-C.L. L. REV. 103, 113–19 (2002).

desires of those who seek to exclude persons from public life on a racial basis denies the very reason why we are counting preferences in the first place and thus arguably should not count at all in normative analysis.¹⁰²

Third, to say that we are prohibiting racial discrimination in the housing market because its costs outweigh its benefits (a proposition that may or may not be true if we count the preferences of racists) is to give an irrelevant reason for prohibiting race discrimination. It pretends that we are indifferent on the matter; we are skeptical, rational scientists simply trying to figure out what people think, so we can give them what they want. We have no views on the matter and make no judgments. But to say that we passed the Fair Housing Act (FHA) because discrimination was simply too costly (it just wasn't worth it) is to use inappropriate rhetoric; more than that, it is to state a reason that is offensive. We passed the FHA not because the costs of discrimination exceeded its benefits, but because we came to the conclusion that we do not want to live in an apartheid society. We regulate race discrimination in the housing market because it is wrong, not because it reduces social welfare.

Finally, efficiency analysis fails to confront our need to make qualitative distinctions among considerations, to speak of values and not just preferences, to make judgments of worth central to normative reflection.¹⁰³ We are interested, or we should be interested, not just in maximizing something (like wealth, welfare, well-being, or even human flourishing) but in interpreting what it means to create a free and democratic society that treats each person with equal concern and respect. Because the moral and political philosophy on which efficiency analysis is based is flawed, we need some way to talk about justice, fairness, morality, liberty, and equality that is more nuanced, less quantitative and more qualitative, and better attuned to mature ethical reflection. Hence, Professor Peñalver suggests that we use virtue ethics to think through the contours of an acceptable property system.¹⁰⁴ Alexander suggests we focus on human flourishing and the scope of legitimate social obligations.¹⁰⁵ Jedediah Purdy suggests that we think through the complex meaning of liberty in the American

¹⁰² WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* (2d ed. 2002).

¹⁰³ See generally Joseph William Singer, *Critical Normativity*, LAW & CRITIQUE (forthcoming 2009), available at <http://www.springerlink.com/content/kkx784526925u220/?p=051f026194bb46af92a3610c5e2e9531&pi=4> (discussing the weaknesses of efficiency analysis).

¹⁰⁴ See generally Peñalver, *supra* note 96 (proposing a virtue ethics system of property).

¹⁰⁵ See Alexander, *supra* note 92, at 748 (“[T]he version of the social-obligation norm that I develop here is morally superior to other candidates . . . because it best promotes human flourishing . . .”).

tradition and shape property law to enhance that vision of liberty.¹⁰⁶ All these suggestions emerge from limitations in efficiency analysis as a normative framework.

D. The Libertarian Approach

In recent years, libertarian thought has powerfully reemerged in the political sphere (witness the candidacies of Ron Paul and Bob Barr in the 2008 presidential race). It is evident in litigation brought by public interest groups and figures in prominent Supreme Court cases, such as the *Kelo* decision.¹⁰⁷ We can see its effect in some referenda, such as Measure 37 in Oregon¹⁰⁸ and Proposition 207 in Arizona,¹⁰⁹ that limited the enforceability of many land-use regulations. Libertarianism has also reemerged among some law professors, such as Randy Barnett and Richard Epstein.¹¹⁰ This new popularity of libertarianism can be attributed, to some extent, to a discomfort with cost-benefit analysis and its associated philosophy of utilitarianism. If liberty is a primary value, then the rights we cherish should not be put up for grabs simply because someone can show that the market costs of protecting those rights outweigh their benefits as measured in dollar terms. This worry is especially strong in a time when civil liberties are in jeopardy in our desire to protect ourselves from attacks by terrorists. It is the precise refusal of cost-benefit theorists to make value judgments that worries libertarians; without a normative framing other than maximizing satisfaction of preferences, there is arguably no limit to government power and no check on tyranny.

Libertarians respond to the critique of efficiency analysis by arguing that owners should presumptively have the freedom to use their property as they wish unless they actually harm others.¹¹¹ Govern-

¹⁰⁶ See generally Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237 (2005) (proposing a property system that embraces individual freedom).

¹⁰⁷ *Kelo v. City of New London*, 545 U.S. 469 (2005).

¹⁰⁸ See Or. Ballot Measure 37 (codified at OR. REV. STAT. § 195.305 (West 2009)), available at http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_text.html, superseded by Or. Ballot Measure 49 (codified in scattered sections of OR. REV. STAT.), available at http://www.oregonvotes.org/nov62007/guide/m49_text.html.

¹⁰⁹ See Private Property Rights Protection Act (codified at ARIZ. REV. STAT. ANN. §§ 12-1131 to -38 (2009)).

¹¹⁰ See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (2000); RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995); EPSTEIN, *supra* note 82.

¹¹¹ See EPSTEIN, *supra* note 82, at 60 (“The idea of ownership entails that whatever uses are permitted must fall within the exclusive province of the owner.”). For such arguments by a natural law theorist, see Claeys, *Takings, Regulations*, *supra* note 82, at 1567–68 (“[E]very person ‘has a right to exert those powers . . . in such a manner, and upon such objects, as his inclination and judgment shall direct; provided he does no injury to others.’” (quoting JAMES WILSON, *Lectures on Law*, in 1 THE WORKS OF JAMES WILSON 69,

ment regulations of property are justified only to prevent such harms. What does this approach mean for the estates system? Professor Epstein has argued that it generally means that we should deregulate property agreements, allowing owners to place such conditions as they like on their land.¹¹² As I noted earlier, this approach is therefore deeply skeptical of the traditional estates system because it limits freedom of contract by requiring particular rights to be bundled together.

However, as I have explained, the libertarian conception of ownership masks underlying tensions. First, it is not clear that the freedom-of-contract idea applies equally to the problem of free disposition. Owners who leave property in a will to their children do not reach a mutually advantageous agreement; rather, they impose restrictions on the donee who can either take it or leave it. We could argue that the freedom to reject the bequest means that acceptance suggests that the recipient is better off with a conditional bequest than no bequest at all, but this response does not banish the problem that conditions imposed unilaterally by donors on gift recipients or heirs may have the effect of limiting the freedom of the recipient. More fundamentally, the estates system arose as a response to feudalism. If there were no limits on the conditions that could be placed on land transfers, then there would be no legal barrier to the re-creation of feudalism—a system of land ownership that is the very opposite of a libertarian system.

It seems we cannot easily avoid the tension between the alienability principle and the free contract/fee disposition principle, and it is not clear how libertarian thought resolves this dispute. Several years ago, my property law students discussed the problem faced by Justice Clarence Thomas's father-in-law, Donald Lamp, when he posted an American flag from his condominium balcony after 9/11.¹¹³ The condominium association asked him to take it down because it had a rule against any external adornments on the building, including flags, banners, structures, wind chimes, etc. Lamp refused to do so. I asked my

241–42 (Robert Green McCloskey ed., 1967)); Claey's, *Jefferson Meets Coase*, *supra* note 82, at 23–24 (“Property . . . consists not so much of specific entitlements as a general domain of practical discretion in relation to an external asset. That discretion protects in the owner free choice how actively to use and enjoy the asset in relation to his own individual needs.”).

¹¹² Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1354 (1982) (“[T]he only need for public regulation, either judicial or legislative, is to provide notice by recordation of the interests privately created.”).

¹¹³ See Eric Olson, *Supreme Court Justice's In-Laws Told to Remove Flag; "I'm Not About to," He Says*, ASSOCIATED PRESS, May 28, 2004, LexisNexis Academic; see also Tony Mauro, *An Unwelcome Mat for Free Speech*, USA TODAY, Aug. 18, 2004, at 13A; Eric Olson, *Father-in-Law of High Court Justice Defies Rule, Flies Flag*, ST. LOUIS POST-DISPATCH, May 29, 2004, at 6, LexisNexis Academic.

students what a libertarian would say about this issue. Luckily, I had two articulate libertarians in my class.

The first libertarian said that Lamp should take down the flag. He bought a home in a condominium and, in so doing, he implicitly promised to abide by the rules of the association. This is freedom of contract at work; there should be no government regulations limiting the packages of property rights one can create. Indeed, if this is so, the neighbors own the right to order him to take down the flag. If he refuses to take it down, he is violating the property rights of his neighbors, as well as breaking his own promise. Because libertarians are not anarchists, this student believed it was perfectly appropriate for the neighbors to call on the state to enforce their contract and property rights by suing him, getting a court order to take down the flag, and using state power to enforce their rights against him.

A second student—also a strong libertarian—became livid. “You mean to tell me,” he said, “that someone puts up an American flag on his own home after the nation has been attacked by foreign enemies, and you want the sheriff to come take it down? And you call yourself a libertarian?” To this second student, enforcing such a rule was akin to re-creating feudalism, allowing the neighbors to act like feudal lords, controlling the day-to-day life of tenants on the land, depriving them of autonomy, liberty, and equal rights. Indeed, in 2006, Congress passed a law agreeing with this second student. The statute prohibits enforcement of any condominium declaration or rule that bans a home owner from displaying the American flag.¹¹⁴

It is not easy to resolve the conflict between these two views. Consider the case of my friend who rents an apartment in a duplex in Cambridge. She wanted to put an Obama sign in the front lawn, but the landlord refused to let her. The federal statute does not protect her. For one thing, the act protects the right to fly the American flag but not the right to support candidates for public office. But further, Congress apparently wanted to give rights to home owners but not to tenants.¹¹⁵ This suggests that the one who has the right of free speech is the “owner,” not the “possessor,” and that Congress views the unit owner as the “owner” in the condominium complex (rather than viewing the owner as the unit owners acting collectively through the

¹¹⁴ See Freedom to Display the American Flag Act of 2005, Pub. L. 109-243, 120 Stat. 572, 572 (2006) (codified as amended at 4 U.S.C. § 5 (2006)).

¹¹⁵ The operative portion of the statute states:

A condominium association, cooperative association, or residential real estate management association may not adopt or enforce any policy, or enter into any agreement, that would restrict or prevent a member of the association from displaying the flag of the United States on residential property within the association with respect to which such member has a separate ownership interest or a right to exclusive possession or use.

Id. § 3.

condo association) and as the landlord in the leasehold situation. But determining who the “owner” is to determine whether a regulation of land use is an intrusion on property rights or a protection of them requires an exercise of judgment. And this judgment is not easily solved by the libertarian injunction to deregulate property and promote freedom of contract.

We must make a qualitative judgment about whose interests the law should be protect; the injunction to maximize “liberty” does not get us all the way to solving the problem or justifying one solution over another. The only way to resolve the problem is to make a normative judgment about the contours of our way of life. As Professor Purdy demonstrates, liberty is not the same as the state of nature; it describes a way of life that entails freedom within legitimate political, social, and economic institutions.¹¹⁶ Defining what it means to promote liberty requires qualitative judgments about human values, not merely conceptual analysis of what it means to harm others. Just as efficiency analysis reduces all human values to costs and benefits, libertarian analysis reduces all choices to freedom and coercion or to distinguishing what is and is not a harm.

E. The Liberal Egalitarian Approach

I have argued, along with Professors Alexander and Peñalver, that efficiency theorists flatten our values into mere preferences and fail to consider qualitative distinctions among human interests. They also fail to see that we judge preferences rather than merely seek to satisfy them. I have also argued, with Professor Purdy, that the vision of liberty promoted by libertarians is too simple to give us any help defining the contours of legitimate property institutions. Are liberal egalitarians any better at analyzing property? The answer: yes, but only a little.

Liberals are more comfortable with government regulation in general and specifically government regulation of property. They understand the complexities involved in defining liberty. They also are very focused on the concept of equal opportunity and understand how the unjust origins of property rights have persistent effects over time. Liberal egalitarians therefore focus on promoting widespread access to property. Professor Underkuffler has eloquently explained the difference between property rights and other kinds of rights. Free speech may be necessary for democracy, but property, she reminds us, is necessary for life itself. Moreover, although everyone can have free speech if they take turns, the granting of property rights in a particular resource necessarily denies those property rights to others.¹¹⁷

¹¹⁶ See Purdy, *supra* note 106, at 1259.

¹¹⁷ UNDERKUFFLER, *supra* note 65, at 125–27; Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1039 (1996) (“The protection of property . . . is

Property law therefore allocates something necessary for human life, and in so doing, denies it to others. Only if the system of property law allows every person to become an owner of the things needed for human life can we be satisfied that property law has treated each person with equal concern and respect.

The idea that every person must have access to the property system has its origins in the Bible, where the Book of Leviticus requires farmers to leave the corners of the field for the poor, the widow, and the orphan.¹¹⁸ In our political tradition, the idea originates in the Lockean proviso that suggested that one may justify the possession of land only if “there is enough, and as good left in common for others.”¹¹⁹ In modern times, Frank Michelman has argued for welfare rights on the Rawlsian ground that no one would accept a social framework that did not make it realistically possible to become an owner of the basic resources needed for human life.¹²⁰ He has also argued, agreeing with similar arguments by Jeremy Waldron,¹²¹ that we protect property rights to promote individual autonomy and welfare and that, if we believe in equality, it must be that each person has equal interests in obtaining the property necessary to promote their own autonomy and welfare.¹²² Because some sorts of property, such as land, are limited in supply, there are externalities to very unequal allocations of property. Protecting the right to exclude means, as Professor Underkuffler reminds us, that owners are entitled to deny to others things needed to sustain human life.¹²³ If we think protection of property rights is important to individuals, and we think each individual is equally entitled to the interests that property rights protect, then we cannot be indifferent to the distribution of property rights. I have similarly argued that we need to think of property and property

quite different [than the protection of free speech]. . . . The extension of property protection to one person *necessarily and inevitably* denies the same right to others.” (emphasis in original).

¹¹⁸ See JOSEPH WILLIAM SINGER, *THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP* 38–62 (2000).

¹¹⁹ 2 LOCKE, *supra* note 12, at 288.

¹²⁰ See Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 13–16 (1969) (discussing his theory of “minimum protection against economic hazard” that includes the idea that “persons are entitled to have certain wants satisfied . . . by government”).

¹²¹ See JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 287 (1988) (setting out a general right-based theory of property).

¹²² See Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1329 (1987) (discussing the importance of property as a vehicle for individual political and social power).

¹²³ See Underkuffler-Freund, *supra* note 117, at 1040 (“Any scheme for the supermajoritarian protection of the appropriations by some persons means, correspondingly, the denial of the appropriation of the same goods, resources, and essentials of life by others.”).

law not only as an individual right but as a system.¹²⁴ Just as we have antitrust law to prevent the emergence of monopoly power, we need laws that ensure that the allocation of property rights does not become so lopsided as to deny to others the possibility of becoming an owner.

These liberal egalitarian approaches get us closer to the core concerns we should be focusing on. However, there are some limitations in them as well. First, although the distribution of property is of central importance, focusing on how much property each person has fails to consider the kinds of social relationships that led to that distribution. For example, efficiency theorists tend to be indifferent as to the source of property. Consider two people that have the same yearly income. One has a job at McDonald's and earns the money; the other gets a welfare check. If the only thing we care about is the quantity of money, these people are equally well off. But no one in America thinks that we think only about amounts of property. We care about its source.¹²⁵ Why do we care about this? Because we have norms about self-respect, desert, and dependence that are implicated in these situations. That means that the qualitative human relationships that generate property rights must be at the center of our concern. Professor Purdy powerfully illustrates this point by arguing that we have qualitative limitations on "terms of recruitment," meaning the terms on which we establish collaborative relations with others.¹²⁶ Sharecropping after the Civil War, combined with a failure to give forty acres and a mule to the freed slaves, came close to reproducing slavery.¹²⁷ If we did not use law to regulate the terms of recruitment, a free society would be impossible to distinguish from one based on feudalism, plantation slavery, or apartheid.

Second, the prevailing liberal approach to these questions is the Rawlsian model. I have argued that this provides a useful lens with which to address normative questions; that is because it forces us to use something like a Golden Rule decision procedure.¹²⁸ Would you like it if she did that to you? Would you be happy with these property arrangements if you did not know which lot you would own? Would you be content with the contract if you did not know on which side of

¹²⁴ SINGER, *supra* note 100, at 140–78.

¹²⁵ See Lewinsohn-Zamir, *supra* note 101, at 331 (“[T]he benefit people derive from resources depends on complex factors, including the acts that generate the resources and the source from which they are received.”).

¹²⁶ See Jedediah Purdy, *People as Resources: Recruitment and Reciprocity in the Freedom-Promoting Approach to Property*, 56 DUKE L.J. 1047, 1094–98 (2007).

¹²⁷ See Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916, 1929 (1987).

¹²⁸ See Singer, *supra* note 100 (manuscript at 65, 71) (applying the Golden Rule to normative questions).

the bargaining table you would be sitting? But those who use the Rawlsian approach (including John Rawls himself) tend to focus on distributive questions rather than seeing the property system as part of the basic structure of society that should be addressed not just as a matter of economic distribution but of the nature of liberty.¹²⁹ Again, qualitative judgments must be front and center, and the Rawlsian approach gets us only so far. It asks an extraordinarily useful question by getting us to consider whether we would be happy with a particular set up, not knowing what role we would be playing, but it does not yet get us to core problem of making qualitative judgments about the contours of social relationships with respect to property.

The third limitation of the liberal egalitarian approach is its focus on individual rights. Rights are important, but so are obligations. Sometimes, rights and obligations are opposite sides of the same coin, but often they are very different ways to approach a problem. For example, most states have enacted laws denying recognition to same-sex marriages performed elsewhere. The debate about these laws revolves around the question of whether same-sex couples married in Massachusetts (and now Connecticut) have a right to have their marriages recognized elsewhere. This framing of the issue assumes that the basic reason for civil marriage is to confer rights on the married partners. But a cursory examination of the law of marriage shows that marriage entails a host of obligations of mutual support, both during the marriage and on its dissolution by death or divorce, and it also entails obligations to support the couple's children. By authorizing states to refuse to recognize marriages performed elsewhere, the federal Defense of Marriage Act¹³⁰ allows married partners to flee Massachusetts to other states and escape their obligations to support their children and share their property with their spouses.¹³¹ Looking at the problem by assuming that individuals have obligations as well as rights, we can understand the social relationships embodied in the law differently. This approach is both more accurate and better attuned to well-considered moral judgments about the contours of property rights in society. So liberal egalitarian approaches usefully focus our

¹²⁹ For example, in his reformation of his position in *Justice as Fairness*, Rawls emphasizes that the right to have personal property is necessary "for personal independence and a sense of self-respect." JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 114 (Erin Kelly ed., 2001). However, he does not analyze the role that property plays in structuring social relationships and thus emphasizes an individual conception of liberty rather than the idea of a citizen of a free and democratic society in which property is related, not only to individual powers, but to just social relations. *Id.* For discussion of a conception of freedom that recognizes the structural role that property plays in a free and democratic society, see generally Purdy, *supra* note 126.

¹³⁰ 28 U.S.C. § 1738C (2006).

¹³¹ See generally Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1 (2005).

attention on distributive issues, but they do not adequately address qualitative judgments about social relationships and obligations.

F. The Personality, Human Flourishing, Capabilities, and Virtue Ethics Approaches

A number of approaches do focus on qualitative judgments about the interests protected by property law. The dean of this approach is Margaret Jane Radin, who has argued that we must distinguish among types of property based on the meaning of the property to the owner and the character of the relationship between the owner and the property.¹³² Professor Radin suggests we think about what forms of property are central to personality and that we distinguish between property that has emotional content and normative import for us (such as wedding rings and the family home) from property that is fungible and of value to us simply because of the market power it represents. When a dispute involves personal property on one side and fungible property on the other, she suggests we put a thumb on the scale by protecting the interests that we cannot reduce to dollar amounts.¹³³ Radin has also usefully considered the limitations of commodification: certain rights should not be traded in the marketplace, which means that certain property rights cannot be recognized at all while others can be protected only by refusing to treat them as market commodities.¹³⁴

Professor Radin's work stands as an interesting counterpart to the recent work of Professors Merrill and Smith because she gives different reasons than they do as to why the law cannot legitimately recognize certain packages of property rights. She argues that the law cannot recognize some property interests without harm to our humanity. Human flourishing should be the central goal of property law, and this requires consideration of the legitimacy of interests and the qualitative externalities of converting particular interests into market commodities.¹³⁵ Professor Alexander similarly proposes human flourishing as a useful normative lens through which to think about the goals of property law.¹³⁶

In a similar vein, Amartya Sen and Martha Nussbaum have proposed that we think about central human capabilities in order to rea-

¹³² MARGARET JANE RADIN, REINTERPRETING PROPERTY 35–71 (1993).

¹³³ See *id.*

¹³⁴ MARGARET JANE RADIN, CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS 1–15 (paperback ed. 2001) (discussing the limits of market rhetoric).

¹³⁵ *Id.* at 79–101.

¹³⁶ See Alexander, *supra* note 92, at 748 (proposing a social-obligation norm system of property because such a system is most likely to promote human flourishing).

son normatively about property structures.¹³⁷ Rather than just trying to ensure that the distribution of property is sufficiently equal, they ask us to think about what equality means through normative reasoning about what human beings should be able to do with their lives. Identifying those capabilities may help us think about what quantity and type of property each person should have in order to exercise their capabilities. That may affect how we organize social and economic life to ensure that human capabilities can be developed for each person. Finally, Professor Peñalver identifies virtue ethics as the appropriate normative lens for thinking about property law.¹³⁸ His proposal is a major advance because it focuses our attention on obligations we have to others rather than just rights we can claim.

I am sympathetic to all these approaches. It is important to notice, however, that Alexander and Peñalver focus on something that is marginalized in the personality and capabilities approaches. Both Alexander and Peñalver ask us to think about the legitimate contours of the social relationships within which human needs are defined and satisfied. Again, suppose we describe two different societies, one that is regulated by racial segregation laws and the other by fair housing, employment, and public-accommodation laws. Both societies may satisfy material wants of persons and give them “equal capabilities” in some sense, but the character of the social relationships is very different. One might be able to fold these considerations back into the personality and capabilities theories. My point is that we should center our attention on the character of the society in which we are defining property rights. Property law involves relations among people; more broadly, it defines a particular social, economic, and political structure. This is what Alexander so powerfully reminds us of by linking property to conceptions of social order. And this is what Peñalver so eloquently points out by explaining that something is lost in a gentrifying neighborhood that cannot be compensated by dollars.

IV.

THE DEMOCRATIC MODEL OF PROPERTY LAW

How then should we think about property if we are interested in the qualitative character of social relationships? Professors Peñalver and Alexander are leading the charge in creating a new school of thought about property law. Their work, along with that of Professors

¹³⁷ MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 155 (2006); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999); AMARTYA SEN, *RATIONALITY AND FREEDOM* 206–20 (2002); Amartya Sen, *Capability and Well-Being*, in *THE QUALITY OF LIFE* 30 (Martha Nussbaum & Amartya Sen eds., 1993) (explaining the capability approach as a comprehensive approach to social advantage).

¹³⁸ See generally Peñalver, *supra* note 96.

Underkuffler, Purdy, and myself, among others, approaches property law by focusing on understanding the role that property and property law play in a free and democratic society that treats each person with equal concern and respect. Because this approach asks what property and property law look like in a democracy, we might call this the *democratic model* of property law. What are the features of this approach? The democratic model entails fundamental analytical insights, core substantive norms, and an approach to normative methods.

A. Analytical Insights

1. *Relations Among Persons*

The democratic approach recognizes that property law concerns not just relations between persons and things but *relations among persons* with respect to valued resources.¹³⁹ While modern property law theorists have long recognized this legal realist insight, it has not been given the prominence that it should have in property theory. We more often pay lip service to this idea rather than think through its full implications.

Every legal right should be understood not merely by reference to the powers and rights it gives the owner but by reference to the impacts of the exercise of those powers on others and the shape and character of the social relationships engendered by those rights and powers. Professor Hohfeld restated legal rights as “jural relations,” directing our attention to the correlatives of rights; he insisted that we think about how others are affected when a legal right is recognized and exercised.¹⁴⁰ Giving an owner the right to exclude affects others by imposing on them a duty to stay off the owner’s land. The freedom to use one’s land as one wishes affects others by making them vulnerable to the effects of one’s actions.¹⁴¹

We need not only understand rights as relationships; we need to consider the qualitative character of those relationships as well. For example, the libertarian and efficiency schools consider voluntary deals to be mutually beneficial, welfare-promoting arrangements. When a bank offers to lend money to help someone buy a home, for example, these schools assume that the bank is offering the potential borrower a free choice; accepting the offer shows that both parties are better off with the deal than without it, and the resulting contract is therefore necessarily legitimate.

¹³⁹ See generally SINGER, *supra* note 100, at 6 (“The recognition and exercise of property rights affects the interests of others, including other owners and nonowners.”).

¹⁴⁰ Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 76, at 28–32.

¹⁴¹ See *id.*

But this conclusion is too facile. Whether the relationship is legitimate depends on a moral judgment that the relationship is acceptable in a free and democratic society. After all, they could agree to a master/slave relationship or a lord/vassal relationship. In a free and democratic society, some relationships are out of bounds; this means that some contract terms are off the table. There are some things you should not ask of others; there are some demands that cannot justly be made in a free and democratic society. When a mortgage lender offers onerous terms to someone who is desperate to become a home owner and get a share in the American Dream, that lender is not merely giving that person a choice; she is offering to establish an exploitative relationship while misleading the buyer/borrower into thinking that the terms are acceptable. The fact that the buyer/borrower accepts such terms of recruitment does not mean that they are therefore legitimate. Because legal rights entail relations among persons, we cannot figure out what to think about the legitimacy (both moral and legal) of the relationship without attending to, and making a judgment about, the qualitative aspects of the relationship.

2. *Obligations, Externalities, and the Duty of Attentiveness*

Because property law concerns relations among people, property owners have obligations as well as rights.¹⁴² Because both the allocation and the exercise of property rights affect others, we are not free to ignore the externalities of property.¹⁴³ Indeed, property law is premised on a core principle apparent as well in contract and tort law: we have an obligation of attentiveness.¹⁴⁴ We are not free to ignore the effects of our actions on others; to the contrary, the common law requires us to pay attention to the immediate and not-so-immediate consequences of our actions, otherwise known as externalities.¹⁴⁵ Those externalities may be of various kinds; we are not only concerned with the fair market value of property but the character of the neighborhood in which property is situated. As Professor Peñalver argues, gen-

¹⁴² See generally ALEXANDER, *supra* note 74, at 2 (discussing the “political-legal principle in proprietary 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”); SINGER, *supra* note 100, at 16 (“[O]wners have obligations as well as rights.” (emphasis omitted)).

¹⁴³ See Singer, *supra* note 71, at 3.

¹⁴⁴ Singer, *supra* note 28 (manuscript at 8) (“All the basic areas of law governing the market system, including tort, contract, and property law, rest on the idea that we are obligated to attend to the effects our actions have on others.”).

¹⁴⁵ See *id.* (manuscript at 8) (“The law of property is not indifferent to the effects of exercising property rights nor on the structure of those rights themselves.”).

trification may increase property values in the neighborhood yet still be resisted by owners who fear a loss of their way of life.¹⁴⁶

At the same time, we do make judgments about the legitimacy of complaints that individuals make when they are affected by the exercise of property rights. Sometimes we deem those claims to be illegitimate.¹⁴⁷ An owner may object to the fact that you painted your house green, but we do not, in general, give neighbors veto rights over their neighbors' house colors, unless all the neighbors agreed to abide by the decisions of a homeowners association on such matters. The choice of house color is legitimately viewed as a self-regarding act—not because others are not affected by your paint choice but because others have no legitimate interest in limiting your paint choices. We have obligations to avoid actions that harm the legitimate interests of others, if possible. Although this sometimes means limiting our freedom in order to protect the security of the neighbors, at other times it means deferring to the ability of others to make choices for themselves even though their actions impinge on our sensibilities. You may object to the Obama sign on my front lawn, but you have no legitimate complaint about its presence there; you have no moral or legal right to insist that I take it down.

3. *Property as a Social System*

The democratic approach to property understands property not merely as an individual right but a social system.¹⁴⁸ We cannot understand property law without understanding the social relationships it embodies and promotes. To understand our working estates system, we must look beyond legal categories to both social custom and legislation setting the boundaries of allowable social relationships. As Professor Purdy explains in his forthcoming book, *Aspects of Mastery: Property, Freedom, and the Legal Imagination*, we must “understand a legal institution within that context of social practices” and “the image of common life in which the law is set.”¹⁴⁹ Property law is part of the way we define a legitimate social order. This means that certain property arrangements are defined as out of bounds. While the particular rules embodied in the estates system may be outmoded historical leftovers rather than embodiments of contemporary values, the idea

¹⁴⁶ See Peñalver, *supra* note 96, at 831–32 (“Land’s memory, and the attachments on which it depends, also shed light on the ambiguous status of gentrification, helping to explain why communities frequently (and sometimes almost reflexively) resist change, even when they stand to gain financially from the process.” (footnote omitted)).

¹⁴⁷ See Singer, *supra* note 71, at 2.

¹⁴⁸ See generally ALEXANDER, *supra* note 74, at 311–51; SINGER, *supra* note 100, at 95–139.

¹⁴⁹ JEDEDIAH PURDY, *ASPECTS OF MASTERY: PROPERTY, FREEDOM, AND THE LEGAL IMAGINATION* (forthcoming 2009) (manuscript at xii, on file with author).

of the estates system reflects a persisting norm that defines certain property arrangements as incompatible with our way of life.

When we combine this insight with the idea that we must attend to the externalities of property, we see that we cannot conclude that a particular set of property rules or institutions is acceptable unless we attend to the systemic effects of exercising those property rights. For example, you have no legitimate claim to sleep in my house without my consent; my ability to control access to my house is part of my ability to have a safe and comfortable home. However, if every person has the right to exclude others from his home, and if there is no place that a homeless person is allowed to sleep, then the allocation and exercise of the right to exclude has the cumulative effect of making it illegal for homeless persons to sleep anywhere. The right to exclude can only be legitimately asserted in such circumstances if there are places that homeless people are allowed to be.¹⁵⁰ The shape and quality of human relationships should be at the core of our concern in determining whether a set of property rights can be accepted as legitimate in a free and democratic society.

4. *Bundled Rights*

Property is not only comprised of “bundles of rights” but is defined by a set of “bundled rights.” As Professors Merrill and Smith explain, the estates system limits the packages of rights that the legal system will recognize.¹⁵¹ It does so in order to ensure that property institutions are compatible with our form of life. The reason we do not allow complete freedom of contract with respect to property is because many forms of property contradict values that shape the contours of social relationships in a free and democratic society. Our estates system is not limited to the rules defining the technicalities of future interests; our working estates system reflects more fundamental, normative judgments about social life.¹⁵² We live in a particular kind of society with particular economic, social, and political structures and practices. We can call our society a democracy. What are the implications of a democratic society for property and property law? The primary implication is that some packages of property rights must be illegal in a free and democratic society. If this is so, what would democratic estates look like? This requires us to consider some

¹⁵⁰ See Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 300–01 (1991).

¹⁵¹ Merrill & Smith, *Optimal Standardization*, *supra* note 44, at 12–14.

¹⁵² See *id.* at 14 (noting that courts may choose an appropriate characterization of an estate based on what “is most consistent with the testator’s intentions or is otherwise ‘best’ in terms of policy concerns such as promoting the free alienability of property”).

substantive limitations on the packages of rights property law will recognize. How do we do that?

B. Substantive Norms

1. *The Features of a Free and Democratic Society*

We can begin by thinking about what a democratic society is not. A democracy is not a monarchy; it is not a feudal society; it is not a slave society; it is not an aristocracy or oligarchy; it is not apartheid, or racially segregated, or a caste, or “corporate” society defined by inherited social statuses; it is not a male-dominated society. The quotes at the beginning of this Essay suggest the outer limits of property rights in a democracy. We have abolished feudalism; we are skeptical about the “company town” that confers power over all the town’s land in a business corporation rather than a homeowners association or town government. We do not allow farm owners to treat workers as serfs or indentured servants or peasants who can be isolated from contact with others. Our property law system thus outlaws the creation of property rights that enact such prohibited social and political relationships.

We tend to forget this fundamental purpose of the estates system because custom has evolved so that no one seeks to create feudal or slave relationships today. For that reason, we tend to take for granted that our society does not exhibit or allow those property arrangements. Because my students, for example, generally were born in the early-to-mid 1980s, they take for granted that restaurants cannot exclude patrons based on their race.¹⁵³ But because I was born in 1954, I do not take this for granted; I remember when that kind of property arrangement was not only legal but mandatory in some states. Democratic estates place limits on the contours of the relationships that can be legitimately established with regard to control of land and other forms of property.

Some rules of law that accomplish these ends are formal, such as the rule abolishing the fee tail and the Thirteenth Amendment’s prohibition on slavery. Some are based on general common law values such as the prohibition on the creation of “new estates.”¹⁵⁴ Many of these prohibitions are not formalized in law because social custom has evolved so that no one would think of creating such property interests. Our property law system operates with a combination of formal rules and social customs to shape property rights in a manner consistent with the norms of a free and democratic society. The estates system and the *numerus clausus* principle championed by Merrill and Smith outlaw particular packages of legal rights with respect to property.

¹⁵³ See, e.g., CAL. CIV. CODE §§ 51–51.3 (West 2007).

¹⁵⁴ Merrill & Smith, *Optimal Standardization*, *supra* note 44, at 4.

But they do so not only to lower the information costs of determining who the owner is, but to shape social life in a manner consistent with the normative commitments of a democratic society composed of free and equal individuals who treat each other respectfully. Property law therefore both reflects and puts into practice value judgments about the appropriate contours of social, economic, and political life.

2. *Minimum-Standards Regulations*

The democratic model of property law recognizes that market relationships are legitimate only if they comply with minimum-standards regulations that ensure that individuals treat each other with common decency.¹⁵⁵ Libertarians and efficiency theorists may be skeptical of all government regulations, but the American people demand laws that ensure that property relationships protect justified expectations, and they justifiably expect property to be used in a manner that is consistent with the obligation to treat others with dignity. Thus, we have consumer protection laws to ensure that property does not harm us and that it does what the sellers claim it will do. We have antidiscrimination laws to ensure that we can participate in public economic and social life without regard to race or religion or disability. We have antitrust laws to ensure that markets do not become monopolized. We have zoning laws to ensure protection from incompatible neighboring uses. We have environmental laws so that we are protected from pollution and so that our children may inherit a world that is livable. We regulate insurance and banking so that our money will be there when we need it. We have an estates system to ensure that we have adequate rights with respect to our own property. And we have the Housing and Economic Recovery Act of 2008, passed on July 30, 2008, to help foreclosure victims keep their homes and restructure their mortgages to make them affordable.¹⁵⁶

The traditional approach to the estates system focuses on common law regulation of future interests and servitudes. A contemporary understanding of the operation of the estates system must look as well to the numerous statutes that regulate the contours of market relationships, especially fair housing laws, consumer protection statutes, zoning, land use, mortgage and foreclosure laws, environmental laws, and marital property laws. It is a mistake to think about property law in a manner that is divorced from these statutory regulations. We use a combination of common law, statutes, and social custom to define the boundaries of allowable packages of property rights, and we will better understand the function of property law in our economic

¹⁵⁵ See Singer, *supra* note 40, at 141–42 (“[W]e should recognize that all contracts are subject to regulations that set minimum standards for economic and social relationships.”).

¹⁵⁶ Pub. L. No. 110-289, 122 Stat. 2654 (2008).

and legal system if we broaden our concept of estates to include the entire social and legal structure that defines the property-rights system.

C. Normative Methods

1. *Political and Moral Theory*

In thinking about property and property law, we cannot confine ourselves to the techniques of economic theory or cost-benefit analysis. Rather, we must look to basic moral and political theory for the normative frameworks that economic theory lacks.¹⁵⁷ Although economic analysis of property rights appears to be the dominant approach in law schools these days, the utilitarian moral theory on which it is based is generally regarded by moral and political philosophers as fatally flawed—at least unless it is supplemented or cabined by normative analyses of other kinds, such as considerations of justice, fairness, obligations, and ethics.¹⁵⁸ The only form of utilitarian analysis that has strong support among moral theorists these days is a morally constrained utilitarianism; preference-based theories are generally deemed defective unless they focus on idealized preferences—what preferences would be if perfectly informed and chosen in a suitable decision setting. Moral theorists espouse a variety of ways of thinking about right conduct but almost all of them ask us to consider the ways that our actions affect others and the extent to which we could justify our actions to those affected by them.¹⁵⁹ Cost-benefit analysis fails to meet this basic test because it fails to respect the separateness of persons, each of whom is entitled to be treated with equal concern and respect.

Moreover, political theorists wrestle with the question of how to structure a society of free and equal persons with differing conceptions of the good. Liberty and justice in such a society can only be established by fair ground rules for exercising political and economic power. Political and moral theory, as well as sophisticated economic theory, requires us to judge the legitimacy of individual interests and the shape of basic institutional structures. We do not take preferences merely as given, partly because some preferences are illegitimate in a democracy and partly because preferences are shaped by law and custom. Moreover, markets are not states of nature; they are regulated by law, and the legal rules defining property rights are a major element

¹⁵⁷ Singer, *supra* note 100 (manuscript at 6) (“We lawyers have borrowed liberally from economic theory; it is time to extend our reach to political and moral theory in an equally sustained way.”).

¹⁵⁸ I have explained this in depth in Singer, *supra* note 100 (manuscript at 15–22).

¹⁵⁹ See generally CHRISTINE M. KORSGAARD ET AL., *THE SOURCES OF NORMATIVITY* (1996); T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 147–68 (1998).

of that regulation. One cannot ask what the market solution to a problem is without first defining the legal parameters of market institutions and economic relationships. It is circular to ask economic analysis to define property rights when one needs to define property rights first to determine what market transactions will emerge. There is no escape from the need to use some other form of analysis, such as political and moral theory, to define and shape the basic structure of society. Political theory supports the idea of creating a democracy that respects fundamental human rights. This institutional setting forms the background within which the market can operate, not the reverse.

2. *Plural Values*

The democratic model of property recognizes that property serves plural values and that law should reflect those multiple values.¹⁶⁰ Property gives us freedom and stability, provides a source of wealth and well-being, the bases for creative work and useful investment. Property provides a place to create a family life, to nurture friendships, to rest, and to have fun. Property allows us to be good neighbors and good citizens, and it promotes various human values, including privacy, the freedom to associate with others, religious liberty, tranquility, and peace of mind. It is a mistake to try to reduce values to a single metric such as wealth, utility, well-being, welfare, or even liberty. We care about qualitative distinctions among values, not just the extent to which our preferences are satisfied. As both Professors Peñalver and Purdy so eloquently argue, the more nuanced language of values allows us to think more deeply about our multiple concerns and to reason normatively about the scope of property rights and the nature of the obligations of ownership.¹⁶¹

The qualitative character of social relationships, rather than mere maximization of market value, should be at the core of our concern. Most things we care about cannot be adequately expressed in terms of price. And market values are useful indicators of value only if they are set within the boundaries defined by rules that shape the contours of legitimate social relationships. Market values are useful indicators only if their limitations as a normative metric are recognized.

What are the normative features of property law in a free and democratic society? We value autonomy; individuals must have the freedom to determine the shape of their own lives, in a manner consistent with a similar freedom for others. Thus, they cannot be forced to remain on the family homestead or pressed into the family business

¹⁶⁰ See generally ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993); PURDY, *supra* note 149; Alexander, *supra* note 92; Peñalver, *supra* note 96; Singer, *supra* note 100.

¹⁶¹ PURDY, *supra* note 149; Peñalver, *supra* note 96.

against their will. We value mobility; people should not be “tied to the land” and prevented from moving to another place, taking another job, or forming new family and friendships and business relations. Thus, we view restraints on alienation of property with a highly skeptical eye. We value widespread distribution of property and realistic potential for access to ownership. Thus, we enact laws to promote equal opportunity. We create public schools and we prohibit discrimination in housing, employment, and public accommodations. We value freedom of contract but we also ensure that market participants comply with minimum standards for economic and social relationships. Thus, we have consumer protection statutes, the implied warranty of habitability, and workplace safety laws. We feel obligations to each other in times of need, so we have unemployment compensation, Social Security, Medicare, and disaster relief. We value both stability and change so we allow easements and covenants to be created but we limit the veto rights of easement owners by denying injunctive relief and relegating owners to damages or using doctrines of frustration or of changed conditions to allow easements to be modified. We allow homeowners associations to adopt various rules governing the use of property but we allow rules to be changed by majority vote so that individuals do not exercise too much power over their neighbors in preventing desirable change. Different property rules and regulations serve different purposes, and some serve multiple purposes. The plural values we hold underlie those regulations and definitions of property rights.

3. *Plural Methods*

In analyzing the legitimate contours of social relationships in a democracy, we need not limit ourselves to a single method of normative reasoning.¹⁶² Indeed, a variety of normative frameworks are useful—yes, including economic analysis, but also including Rawlsian theory, narrative and literary theory, deontological theory, historical analysis, balancing of interests, virtue ethics, elaboration of human values, deconstruction, and rhetorical theory. We have rich resources for thinking about, criticizing, judging, and justifying rules choices, and institutional frameworks and various methods can both give us insight and constrain our choices so as to avoid injustice to the extent possible.

D. What Difference Does it Make?

What implications does the democratic model of property have for specific cases? Consider the question of whether a tenant has the

¹⁶² See, e.g., Singer, *supra* note 100.

right to post a sign supporting Obama or McCain in the front yard of a rented house. How should we think about this question?

Efficiency theorists suggest we should figure out the result that maximizes satisfaction of preferences as measured by market values. If the tenant values the right to post signs on the property, she should bargain for it; if the landlord refuses, we have evidence that the costs to the landlord outweigh the benefits to the tenant. Transaction costs are not likely to be high here, nor are externalities since the tenant can support her preferred candidate in other ways. And we can expect no different result if we created a default rule that individuals have a right to post such signs: landlords who do not like this will simply bargain around it. And we can save both bargaining and information costs by limiting the rights of tenants and letting them know that if they want access to someone else's land, they need to bargain for the terms they want. This leaves the specification of rights to the private marketplace (the bargaining of the parties) rather than the inefficient litigation process whereby judges try to approximate the welfare-maximizing result.

Libertarians will make similar but even stronger arguments. Owners have no duties to rent to tenants, and they have the right to determine the terms on which tenants access their land. The law should not prevent the parties from making the contracts that serve their mutual interests. Liberal egalitarians may be worried about denying tenants the right to engage in expressive speech, but it is not clear that they have a good answer to the question of why the tenant's right to post a sign is more important than the landlord's right to keep the property free of such signs, especially if the landlord supports a different candidate for President. They may argue that tenants have unequal bargaining power and that if tenants had sufficient market power, they would be unlikely to give up the right to engage in the political process in this manner. But this argument assumes that we know what bargains would occur in the absence of unequal market power, and such predictive claims are hard to back up; they seem much more based on substantive judgments about the relative importance of the parties' interests than a real prediction of what bargains would be reached if property were distributed differently. In other words, this "prediction" seems to mask or be based on a judgment about which interest is more important in a democratic society. Such a judgment goes beyond considerations of distributive justice; it requires discussion of qualitative differences among interests and the legitimate contours of the good society.

Professor Radin's personality theory does allow us to discuss qualitative distinctions;¹⁶³ the right to put up a political sign is associated with core elements of personality and humanity, and we could argue that individuals should not be forced to give up such rights. This suggests that the tenant's personal interest in posting the sign outweighs the landlord's fungible interest in protecting the market value of the property. At the same time, landlords may have personal interests in the appearance of their property, especially if the property is owner occupied. And, like tenants, landlords have personal interests in not having their property used to support candidates they do not support. Why should the tenant's interest outweigh the landlord's interest? The answer might be that the landlord can put up a sign on his own house. He does not have the right to also put up signs at property he has rented to others, nor may he deprive tenants of similar rights. This requires, however, a substantive judgment that landlords should not be allowed to treat rental property the same as they treat their homes. What is the basis of this conclusion? It rests on a notion of equality, but it also depends on an assumption about the liberties that property law both enables and constrains.

The personality theory asks us to look at how property is connected to personality, but it also suggests that we consider whether it is legitimate for landlords to claim the right to treat their business property in the same way they treat their personal property.¹⁶⁴ A landlord, for example, may wish to discriminate on the basis of race in his choice of tenants; this may even go to the core of his sense of himself. Racially segregated property is not fungible with integrated property in the mind of a racist landlord. But our system outlaws this arrangement regardless of the strength of the landlord's preference. This is because we judge this arrangement to be beyond the contours of allowable social relationships in a free and democratic society.

In contrast to traditional approaches, the democratic model of property focuses our attention on the need to make normative judgments about the appropriate contours of property relationships in a free and democratic society.¹⁶⁵ We may do this on a number of levels. We would first ask whether denying someone the right to put up a political sign on her property violates basic norms governing social, political, and economic relationships in a polity that treats each person with equal concern and respect. Even if we do not consider this to be a basic human right (whether or not based in the First Amendment or other aspects of constitutional law), we should still consider whether such a regulation should be imposed as a matter of consumer

¹⁶³ See RADIN, *supra* note 132, at 35–71.

¹⁶⁴ See *id.*

¹⁶⁵ See *supra* 1047–55.

protection law, either because it protects justified expectations or because it accords with settled convictions about rights that ought to go along with possession of land.

The law gives us some guidance here. Courts have interpreted the First Amendment to give home owners the freedom to post signs on their property, although towns can regulate the size and appearance of those signs.¹⁶⁶ This means that any city ordinances that prevent owners from putting up a sign supporting Obama or McCain for President are unenforceable; assuming the Supreme Court was correct in its decision in *City of Ladue v. Gilleo*, such laws are incompatible with the basic framework of a free and democratic society.¹⁶⁷

The question then is whether owners should be free to waive those protections when they buy property regulated by a homeowners association or when they take a lease to an apartment.¹⁶⁸ Can we view those waivers as freely negotiated agreements, and if so, should they be enforceable by state action through court enforcement? Do we value the rights of landlords and neighbors to live in a setting without such signs more than we value the right to post signs relevant to political contests? Do the landlord's aesthetic interests outweigh the tenant's political interests? Is the landlord's desire to refuse to allow signs supporting candidates the landlord opposes a legitimate one that the legal system should respect when it would prevent tenants from exercising similar rights?

These questions revolve around a core normative issue: Is the right to post a political sign on one's property one of those self-evident inalienable rights that democracies should recognize? Or should tenants be free to give up such rights in return for other benefits? Answering these questions requires us to make substantive choices about the interests at stake, the values those interests implicate, the relative strength, relevance, and cogency of those values in particular social settings, the social relationships that will result from the choice of legal rule, the opportunities that will be enabled or cut off, and the relation between property rights and political and social life. A calculus of economic costs and benefits is wholly inadequate as a way to analyze these questions. Indeed, I believe it would be irrational to analyze this legal issue by assigning dollar amounts to the relevant interests and seeing how the math comes out.

¹⁶⁶ See *City of Ladue v. Gilleo*, 512 U.S. 43, 58–59 (1994) (holding that Ladue's ban on almost all residential signs violates the First Amendment).

¹⁶⁷ See *id.*

¹⁶⁸ See *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 890 A.2d 947 (N.J. Super. Ct. App. Div. 2006) (questioning whether the authority of a community association is limited by the expressive rights guarantee in the New Jersey Constitution), *rev'd*, 929 A.2d 1060 (N.J. 2007).

There are various ways to think through and justify alternative resolutions to these questions. None of them gives us a mechanical decision procedure to generate an outcome. They include, for example, exercises in framing the issue; telling the story; balancing the parties' interests; defining the values of a free and democratic society; asking what rule we would favor if we did not know whether we would be the landlord or the tenant; considering the legitimate scope of obligations we have to others as equal human beings; considering our national history and customs; and evaluating the availability of alternative means of expressing political support for candidates.¹⁶⁹ We must also consider the consequences of adopting one rule over another. Will people get around the rule by creating new property rights we have not yet imagined? Will we make things worse for people by depriving them of the power to give up this right? Will we be depriving people of the power to create a living space free of political campaigning?

The democratic model of property does not confine us to a single normative methodology or a single value. What is distinctive about the democratic approach, however, is that it recognizes that choices about property law are choices about social and political structure.¹⁷⁰ We are obligated to recognize that the definition of property rights does not merely involve promoting the autonomy of the owner; the allocation and exercise of property rights imposes externalities on others and on social life in general. Property owners have obligations to use their rights in ways that are compatible with the basic norms of our society, some of which are fundamental structural matters and some of which are more specifically related to consumer protection policies. In both cases, property law must comply with minimum standards for social relationships. In defining rights and obligations with respect to property, we are obligated to consider the full range of human values we care about rather than merely thinking quantitatively about how to maximize preferences.

My own view is that it is hard to see why the landlord's interests would outweigh the tenant's interest in participating in the political process in a manner that is customary in the United States, especially when the landlord's prohibition is one that would be illegal if imposed by a municipal ordinance. Treating tenants as less than owners by denying them the power to put up such signs (unless they can get the landlord's consent) puts them in a position akin to peasants on the lord's land, subject to his whim. Could the landlord condition the lease on the tenant agreeing to give money to support the Republican candidate for President? If not, why not? The answer has to do with

¹⁶⁹ I have described the variety of such normative methods in Singer, *supra* note 100.

¹⁷⁰ See *supra* Part IV.A.3.

the illegitimacy of mixing the lease of residential property with choices about democratic elections. This is not a demand the landlord can legitimately make of the tenant. There are, of course, counterarguments to these claims. The other tenants (and the neighbors) may wish to live in a tranquil neighborhood that does not exhibit contentious political views. But my point is that the democratic model requires us to evaluate the legitimacy of claims on both sides by reference to norms underlying the framework of a free and democratic society.

What does the democratic model of property contribute to our thinking about the normative issues raised by the subprime mortgage foreclosure mess? Both the libertarian and the efficiency approaches would suggest getting rid of most regulations of property contracts, including financing arrangements. This would suggest bringing back strict foreclosure where any default, no matter how small, resulted in loss of the entire property with no protection for built-in equity and no need for notice and a hearing. It would suggest no usury laws of any kind and no restrictions on the services home owners are allowed to promise sellers and financiers of land. But our society has firmly rejected such a radical approach. Although we have a lot of land financing arrangements that approximate this *laissez-faire* model, we also have strict regulations of many kinds of mortgage arrangements to prevent the worst abuses, and in most cases, we outlaw arrangements akin to strict foreclosure, just as we now outlaw self-help evictions of tenants where landlords put the tenant's belongings on the street at the first sight of trouble.¹⁷¹ As the recent housing legislation shows, current norms support public policies designed to lead to the rewriting of onerous mortgage agreements to replace them with affordable terms so that families will not be unnecessarily evicted from their homes.

What are the minimum standards for mortgage contracts in a free and democratic society that treats each person with equal concern and respect? Those minimum standards should prevent false, fraudulent, and misleading sales tactics. They should discourage lending institutions from inducing people to buy homes they cannot afford and are very likely to lose, while paying exorbitant rates they could avoid if they leased instead of buying. The law should limit the expected external social harms from displacement through foreclosure—harms that are not only financial in nature. If we are interested in promoting home ownership, we should do so in a way that seems likely to achieve its purpose, rather than inducing people to buy

¹⁷¹ See *Berg v. Wiley*, 264 N.W.2d 145 (Minn. 1978) (holding that self-help eviction was unlawful).

homes on terms they cannot afford, resulting in displacement and loss of family wealth.

All this suggests a need for regulations to prevent mortgage providers from selling what Elizabeth Warren calls “dangerous financial products”¹⁷² and to protect homeowners who have the capacity to comply with reasonable contract terms. Access to property is important, but so is the stability of neighborhoods and families; that stability is crucial to the social structure needed to provide tranquility and development for individuals and their families. This does not mean that we want government to manage everything; it does not mean that there should never be any foreclosures. It does mean that we should adopt appropriate regulations to protect families from getting into contracts they would avoid if they had better information and which will impose negative externalities on their neighbors that the neighbors would avoid if they could. It means that mortgage financing arrangements are not defensible if they do not treat borrowers with dignity. Our response to the mortgage foreclosure crisis will not be true to our values if we do not consider the legitimate contours of market relationships in a free and democratic society that treats each person with equal concern and respect. This approach may or may not give a clear answer; it does, however, frame the issue appropriately and it does ask the right questions.

V.

THINGS THAT WE WOULD LIKE TO TAKE FOR GRANTED

Democracies care about each person, and they seek to treat every person with humanity. “I am asking you to remind yourselves that in this country, we rise or fall as one people,” said Barack Obama.¹⁷³ “[A] country in which only a few prosper is antithetical to our ideals and our democracy”¹⁷⁴ This means that we must structure our legal institutions so that each person can flourish, and that means that we have obligations to others and not only rights for ourselves. “I am asking you to join me in ushering in a new era of mutual responsibility in America,” Obama said.¹⁷⁵ “[T]hose of us who have benefited greatly from the blessings of this country have a solemn obligation to open the doors of opportunity, not just for our children, but to all of America’s children.”¹⁷⁶ The goal of such mutual responsibility is not merely for property and wealth to be widely distributed but to ensure

¹⁷² See Warren, *Making Credit Safer*, *supra* note 30, at 35–36.

¹⁷³ Our Common Stake, *supra* note 14.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

that each of us can have the power to develop a full human life in which we can flourish.

A democratic society requires thoughtful engagement with the appropriate contours of social relationships among people who treat each other as persons worthy of respect and dignity. People are entitled to pursue happiness, satisfy their preferences, amass wealth, and exercise their liberties, as long as they comply with reasonable regulations designed to ensure the legitimate interests of others. Property law defines the structure within which market and social relationships go on. Rather than consisting of rules that limit freedom of contract, property law sets the minimum standards for those market relationships. Rather than an oppressive limitation on freedom, the estates system, properly construed, protects us from illegitimate demands. Because we live in a free and democratic society, we limit the terms on which we can deal with each other; we do so to ensure that we treat each other with common decency or equal concern and respect. Rather than a crushing limitation on liberty imposed by a powerful state, property law builds the floor on which we stand; it is the foundation that lets us live our lives in conditions of human decency.

Hobbes and Locke argued that we institute government so that we can attain security and prosperity.¹⁷⁷ The rule of law gives us a certain amount of peace of mind. We need not worry (or we can worry less) about being assaulted on the street, about having strangers intrude in our homes and take our things, about having to obey the whim of an arbitrary lord. Property law defines things that we would like to take for granted; it does so by setting the boundaries of just social relationships.¹⁷⁸ Choosing those boundaries requires us to attend to the full range of values that democracies represent. Those choices cannot reasonably be made by reducing all interests to dollar amounts and adding up costs and benefits; they cannot, in other words, be reduced to a math problem. Because they involve fundamental values, they require human judgment about the contours of social relationships in a free and democratic society that treats each person with equal concern and respect.

¹⁷⁷ See generally sources cited *supra* note 12.

¹⁷⁸ See Singer, *supra* note 40, at 141 (“Our regulations . . . shape the house that we live in, and the liberty that we value comes from having built that house and the environment around it. . . . [T]he character of those background regulations matters enormously; they determine the shape of our social world and the character of our economic relationships.”).