The Rhetoric of Property

Joan C. Williams

UC Hastings College of the Law, williams@uchastings.edu

Follow this and additional works at: http://repository.uchastings.edu/faculty_scholarship

Part of the Property Law and Real Estate Commons

Recommended Citation
Available at: http://repository.uchastings.edu/faculty_scholarship/834

This Article is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact marcus@uchastings.edu.
Faculty Publications
UC Hastings College of the Law Library

Author: Joan C. Williams
Source: Iowa Law Review
Citation: 83 Iowa L. Rev. 277 (1998).
Title: The Rhetoric of Property

Originally published in IOWA LAW REVIEW. This article is reprinted with permission from IOWA LAW REVIEW and University of Iowa.
The Rhetoric of Property

Joan Williams

Introduction ........................................... 278

I. The Intuitive Image of Property ........................ 280
   A. The Intuitive Image of Absoluteness ............... 280
   B. Who Holds the Intuitive Image of Property? ...... 283
   C. Of Foxes, Chimney Sweeps, and Other Pressing
      Legal Issues: How Contemporary Casebooks Meld
      Absolutist Rhetoric with the Political Theory
      of Possessive Individualism ........................ 284
   D. Reading Feudal History as Support for the
      Intuitive Image ...................................... 290
   E. Why the Intuitive Image Retains Its Power ........ 293

II. Challenging the Intuitive Image Through
    a Pragmatic Approach .................................. 295
    A. Singer's "Social Relations" Approach ............... 296
    B. Radin's Property and Personhood Approach ......... 300
    C. Property, Pragmatism, and the Moral Imagination .... 304

III. Republican Visions of Property: Property as a Stable
    Stake in Society ...................................... 308
    A. The Career of a Concept Revisited .................. 308
    B. Republican Rhetorics of Property .................... 316
    C. Republicanism and Social Dissent: Melds of
       Liberalism and Republicanism ....................... 318
    D. The Romance of the Single-Family House:
       Republicanism Transmuted into Domesticity .......... 326
       1. The trance ......................................... 326
       2. The romance with homeownership in American
          law: Euclid as an example .......................... 329

* My thanks to the extensive comments given by Laura Kalman, Frank Michelman, Nell
  Newton, Terry Fisher, Lea Vander Velde, and Steve Winter, and participants at workshops at
  Harvard Law School, University of Virginia Law School, Northwestern University Law School,
  University of Toronto Law School, Vanderbilt Law School, University of Pennsylvania Law
  School, and American University, Washington College of Law. Thanks as well to my friends
  and colleagues Ken Anderson, James Boyle, William Forbath, Egon Guttman, Mark Hager,
  Richard Lazarus, James May, Binny Miller, and Jamie Raskin for helping me with references
  and critical assessment of my ideas. Thanks also to my research assistants Al Brophy, Gabriela
  Richeimer, and Laura Geyer, and to the American University Summer Research Fund. Special
  thanks to Lea Vander Velde and Laura Kalman, without whose encouragement this Article
  would not have been published.
In a famous article, Thomas Grey posits a dichotomy between the intuitive image of property as absolute power over things and the more sophisticated legal view of property as defining relationships among people. In this Article, I argue that the intuitive image is the "common sense" of layfolk and experts alike. This is not to say it "presents reality neat". "Common sense is not what the mind cleared of cant spontaneously apprehends; it is what the mind filled with suppositions ... concludes." This Article seeks to identify those suppositions and to defamiliarize them, so that we can recognize them as embedding one distinct image of property that coexists with others in American property law. Section I argues that the intuitive image combines a constitutional tradition of absolutist rhetoric with the political theory of possessive individualism. It

---

1. Thomas C. Grey, The Disintegration of Property (citing Bruce Ackerman, Private Property and the Constitution 97-100, 113-67 (1977)), in 22 Nomos: Property 69 (J. Roland Pennock & John W. Chapman eds., 1980). Grey's dichotomy is between laypeople and experts, whom he identifies as lawyers and economists. Id.
3. Id. at 84.
4. Today, intellectual historians commonly use the term "possessive individualism" to refer to the "market liberalism" that Locke's thought was eventually interpreted to support, although this is not what Locke himself believed. Locke framed liberal imagery in a religious outlook and assumed that self-interest would be bound by virtue. See James T. Kloppenberg, The Virtues of Liberalism: Christianity, Republicanism & Ethics in Early American Political Discourse, 74 J. Am. Hist. 9, 16 (1987) (quoting Locke's April, 1687 letter to Edward Clarke: "He that
also contests Thomas Grey's assertion that lawyers do not hold the intuitive image; an examination of property casebooks shows lawyers firmly in its grip.

Section II examines recent property theory, focusing on the work of the two theorists who have been most influential in articulating alternatives to the intuitive image: Joseph William Singer and Margaret Jane Radin. It then articulates a pragmatic approach to property theory, designed to redescribe our traditions in a way that creates a new conversation in which the intuitive image becomes nothing more than one strain of property rhetoric among others.

The focus here is not on law as a set of policy choices, but on law as "constitutive rhetoric" dedicated to the "art of constituting culture and community." Rhetoric in this expanded sense refers not to manipulative persuasion, but to the process "by which community and culture are established, maintained, and transformed." This approach is pragmatic in the sense that "the task of future philosophy is to clarify men's minds as to the social and moral strifes of their own day." This Article seeks to sketch out the "external, empirically discoverable set of cultural resources" available to those whose goal is to challenge the intuitive image of property and to create a conversation that examines what kind of community we want, both within first-year property courses and within society at large.

To quote historian Daniel Rodgers, "The stock of arguments and assertions with life in them has limits; the cupboard is a product of culture and history." Sections III and IV examine this cupboard. Section III examines three strains of republican rhetoric about property, a topic that requires a reassessment of the republican revival in constitutional law. Section IV attempts to recover the complexity of the liberal tradition by examining another theme I call the "liberal dignity strain," which proposes to limit rights when they threaten human dignity. Because the liberal dignity strain exists in both religious and secular formulations, this analysis

has not a mastery over his inclinations, he that knows not how to resist the importunity of present pleasure, or pain, for the sake of what, reason tells him, is fit to be done, wants the true principle of Virtue, and industry ... "). In other words, contemporary intellectual historians have uncovered another interpretation of Locke so they call "possessive individualism" what used to be called "liberalism," i.e., that strain of liberal thought that eventually married Locke with market logic.

8. White, Law as Rhetoric, supra note 5, at 689.
9. Id. at 690; see also Robert B. Westbrook, John Dewey and American Democracy (1991) (discussing empirical philosophy and its role in society).
leads to a reassessment of the relationship of lawyers to religious language.

As I explore the different rhetorics of property, I will—for obvious didactic purposes—often highlight the differences between them. This is not to say that each is a coherent tradition consciously transmitted. In fact, judges, commentators, and the general public often mix intuitive imagery with imagery that conflicts with it, or combine two rhetorics to form new mixtures, or, occasionally, new compounds that achieve a stable presence in the rhetoric of property. This pragmatic, and often unreflective, intermixture is a key element of American property rhetoric both inside and outside the law.

If these themes transmute in Protean fashion, why tease out a number of discrete “rhetorics”? My goal in this Article, as in my property course, stems from my pragmatic understanding of truth as an expression of identity. The traditional assumption was that one set of truths would hold for everyone. Instead, I view one’s “truths” about property—like all truths—to be expressions of personal and political identity. Accompanying these truths will be characteristic images of “the facts,” which in turn lead to predictable legal and political conclusions.

Teasing out the complexity of our beliefs about property plays two important roles. It allows us to be more effective lawyers, by enabling us to frame arguments to persuade not only someone who shares our vision of property, but someone who does not. It also allows us fuller development as human beings in a democratic society. By holding up a mirror to ourselves and our students, we can start a democratic conversation about whether we like the reflection we see in our “truths” about property.

I. THE INTUITIVE IMAGE OF PROPERTY

A. The Intuitive Image of Absoluteness

This land is my land
And it ain’t your land
I got a shotgun
And you don’t got one
If you don’t get off
I’ll blow your head off
This land is private property.\

Schoolyard ditty, 1997

Many commentators have noted the gap between the political rhetoric of absolute property rights and the practice of limited property rights.\[16\]
What can we conclude about property when we compare its treatment in the law and in political rhetoric? asks David Schultz. He notes a "gap between political rhetoric and institutional practice." Schultz proposes to distinguish between absolutist political rhetoric and "the law." This is a good first cut. But absolutist rhetoric also shows up inside the law. In fact, one of the most often cited sources for the intuitive image of absoluteness is Blackstone's Commentaries to the effect that property entails "the sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."

Blackstone is a legal source, and this is a clear statement of absolutism. Thus Schultz's proposed distinction between political rhetoric and "the law" does not fully capture what is happening, in the sense that the political rhetoric of absolutism has sometimes been embedded into legal texts. But Schultz is correct that an important distinction exists between the (political and legal) rhetoric of absolute property rights and the practice of limited ones. As historian Forrest McDonald wryly notes: "Blackstone's sweeping definition overstated the case; indeed, he devoted the succeeding 518 pages of Book 2 of his Commentaries to qualifying and specifying the exceptions to his definition." McDonald points out that the government in Blackstone's period exercised extensive regulatory power; historian William Novak has shown that extensive regulatory power persisted throughout much of the nineteenth century. McDonald also points out that English landowners' traditional dominion was far from absolute: not only did the Crown own all swans, whales, many minerals, and tall timbers suitable for ship masts, it had extensive powers to take property without compensation through forfeiture and eminent domain.
An owner's neighbors also had substantial rights over his land—including the right to hunt, gather wood, graze animals, pass over, and use water from his land—many of which were carried over to the colonies and persisted well into the nineteenth century.\(^{20}\)

If property rights have never been absolute, why is the rhetoric of absolutism such a hardy perennial? Many have dismissed the rhetoric of absolutism as "the mythology of property."\(^{21}\) An alternative interpretation is that the rhetoric of absolutism is one distinct strain of rhetoric whose purpose has never been to define actual practice.

Instead, absolutism reflects a strain of rhetoric crystallized by John Locke. "The history of Locke's theory of property . . . is primarily political, with the language of property used to defend the political liberty of Englishmen (including the colonies) against the Crown.\(^{22}\)" Two Treatises on Government\(^{23}\) was written in opposition to the abuses of the Crown, to explain why the English Revolution did not destabilize the property rights of the aristocracy. "The difficulty . . . which first emerged in 1688 and is best expressed in the work of John Locke, was to destroy the monarchy without destroying . . . the right to property everywhere in the society."\(^{24}\) This problem emerged in sharp profile because the Crown was a hereditary property right. "If this most significant of all property rights could be abolished,"\(^{25}\) whose property was safe?

Absolutist rhetoric arose as part of a conversation about the scope of central power and the need for limited government. The English Revolution was an early, important context, but absolutist rhetoric re-emerged whenever the scope of government power was at issue: it was adopted by the colonists in their fight with Parliament;\(^{26}\) in the debates over the Constitution (as Jennifer Nedelsky documents in elegant detail);\(^{27}\) by the federalists in their fights with redistributive legislatures; and,

---

20. See id. at 29-36 (discussing the limitations on an owner's individual property rights caused by property rights held by the public).
21. See Regan, supra note 13, at 2299 ("[P]roperty rhetoric is comprised of diverse strands that co-exist in some tension, rather than forming a unified and harmonious whole. Nonetheless, certain strands have had particularly powerful influence on the cultural imagination, and together constitute what we might describe as the mythology of property."); Schultz, supra note 13, at 466 ("[T]he rhetoric of property was so loud during colonial and early America (and now so colored by 20th century prejudices and myths) that scholars of the American Founding often miss the more subtle, institutional, legalistic, and paradoxical meaning and context of the term during this era.").
22. Schultz, supra note 13, at 472.
25. Katz, supra note 24, at 469.
27. Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism:
This strain of constitutional rhetoric fuels the self-righteous fury reflected in the schoolyard distortion of *This Land is My Land* (the song) with which this Section begins. But, if this rhetoric is not mere mythology, neither is it an actual description of Americans’ conflicting intuitions about property. Some commentators, notably Jennifer Nedelsky, in her influential *Private Property and the Limits of American Constitutionalism*, at times overlook this. So do many of us much of the time. The “This land is my land” strain of constitutional rhetoric tends to dominate Americans’ self-description of their beliefs about property. The challenge is to create a conversation that allows us to see that our beliefs about property are, in fact, far more complex.

B. Who Holds the Intuitive Image of Property?

In the English-speaking countries today, the conception of property held by the specialist (the lawyer or economist) is quite different from that held by the ordinary person. Most people, including most specialists in their unprofessional moments, conceive of property as things that are owned by persons. To own property is to have exclusive control of something—to be able to use it as one wishes, to sell it, give it away, leave it idle, or destroy it. Legal restraints on the free use of one’s property are conceived as departures from an ideal conception of full ownership.

*Thomas C. Grey, The Disintegration of Property*  

Grey accurately depicts the image of property held by nonexperts. When I begin the property course by asking “What does it mean to own property?,” the answers track Grey’s description: you can sell it, you can pass it on to your heirs, destroy it, leave it idle, and so forth. Invariably someone says, “If it’s my property, I can do what I want with it.” This intuitive image of absoluteness does not match social practice. Nuisance precludes an owner from using his land in a way that unreasonably interferes with the rights of his neighbor; implied

---

The Madisonian Framework and Its Legacy (1990). A limitation of Nedelsky’s treatment is her tendency to assume that the constitutional rhetoric of property was the only relevant rhetoric in the American tradition, ignoring republican rhetorics and other traditions of limited rights. See William W. Fisher III, *Making Sense of Madison: Nedelsky on Private Property*, 18 L. & Soc. Inquiry 547, 552-58 (1993) (disputing Nedelsky’s claim that there never were two competing ideologies of property).


29. For similar assessments of Nedelsky’s book, see Fisher, *supra* note 27, at 552-58 (disputing Nedelsky’s claim that courts have not questioned the Madisonian vision of property); Schultz, *supra* note 13, at 477-81.


easements and covenants may preclude him from using part, or all, of the land as he wishes; and adverse possession limits his right to leave it idle. Legislative limits on land use are pervasive as well. Mary Ann Glendon tartly notes that a defender of flag burning who claimed that "it's my property . . . I have a right to do anything I want with it . . . probably does not even have the right to burn dead leaves in his own back yard."

If Grey provides an accurate description of the intuitive image of absoluteness, his distinction between the specialists and layfolk is less convincing. He is correct in stating that the rarified domain of official property theory rejects the intuitive image in favor of the Hohfeldian view of property as a bundle of rights and has done so since the 1936 Restatement. But this does not prove that the general run of lawyers has rejected the intuitive image. To judge from property casebooks, they have not. The remainder of this Section tracks the intuitive image in property casebooks, identifies it as a meld of absolutist constitutional rhetoric with the political theory of possessive individualism, and contests the claim that it "presents reality neat."

C. Of Foxes, Chimney Sweeps, and Other Pressing Legal Issues: How Contemporary Casebooks Meld Absolutist Rhetoric with the Political Theory of Possessive Individualism

Remarkable unanimity exists about how to start the first-year property course. Most casebooks start out with cases involving wild animals and/or lost property—one famous finders case involves a chimney sweep who

32. For examples of implied easements cases, see Estate of Waggoner v. Gleghorn, 378 S.W.2d 47 (Tex. 1964) (finding an implied easement precluding the landowner from using part of his property); Berkeley Dev. Corp. v. Hutzler, 229 S.E.2d 732 (W. Va. 1976) (holding that evidence warranted a finding on an implied easement by necessity over another person's adjacent land).

33. For a case involving an implied covenant that severely restricts the uses an owner can make of his property, see Sanborn v. McLean, 206 N.W. 496 (Mich. 1925) (finding an implied reciprocal servitude).

34. See Nome 2000 v. Fagerstrom, 799 P.2d 304 (Alaska 1990) (allowing adverse possession of a piece of land used by the possessor as a seasonal recreation site).


36. See Grey, supra note 1, at 81-82 (predicting that the adoption of a bundle-of-rights conception of property will cause the decline of property as a control).

37. See Restatement of Property §§ 1-4 (1936).

38. See Geertz, supra note 2, at 76.

39. Of 11 casebooks surveyed, 7 start with wild animal or finders cases. See Olin L. Browder et al., Basic Property Law (5th ed. 1989) (beginning with a chapter entitled "Property, Possession and Ownership," in which the first case is a wild animal case and the second is a finders case); A. James Casner & W. Barton Leach, Cases and Text on Property (3d ed. 1984) (considering in chapter one the qualities needed to be a good lawyer in the field of property while entitling chapter two "Acquiring Title to Wild Animals"); Charles Donahue, Jr. et al., Cases and Materials on Property: An Introduction to the Concept and the
finds a gem in eighteenth century England. Since no one practices wild animal law, and finders law is now largely superseded by statute, the message sought to be conveyed by this material must be primarily theoretical or ideological.

The wild animal cases play the most central ideological role, as is indicated by the fact that nearly all property casebooks still include the 1805 case of *Pierson v. Post.* On its face, the case does not seem indispensable to an introduction to modern property law. It involves one Mr. Post, who initially pursued a fox, and Mr. Pierson, who intercepted and killed it.

The starting point for an analysis of *Pierson* is John Locke, who sought to establish the bona fides of property rights through a narrative of acorns in the wild:

> He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself. Nobody can deny but the nourishment is his. I ask, then, When did they begin to be his? when he digested? or when he ate? or when he boiled? or when he brought them home? or when he picked them up? and 'tis
plain, if the first gathering made them not his, nothing else
could. That labour put a distinction between them and
common . . . . And will any one say he had no right to those
acorns or apples he thus appropriated, because he had not the
consent of all mankind to make them his? Was it a robbery thus
to assume to himself what belonged to all in common? If such a
consent as that was necessary, man had starved, notwithstanding
the plenty God had given him. We see in commons, which remain
so by compact, that 'tis the taking any part of what is common,
and removing it out of the state nature leaves it in, which begins
the property, without which the common is of no use.43

Pierson authenticates Locke by placing his mythic story in early nineteenth
century New York, where it shows the hunter wrestling his property from
the common by injecting his labor into it.

Locke's nature narrative is a powerful rhetorical tool that establishes
two important assumptions about property law.44 The first is that property
rights stem from human biology, specifically from human hunger.45 The
second is that property rights are "naturally" of the on-off (I eat it or you
eat it) variety: in other words, that property rights grant exclusive use (and
presumably have since men were savages in the wild).46 This is an
important nexus between the strain of Locke that developed into the
constitutional rhetoric of absolutism and the somewhat different strain that
developed into possessive individualism.

Locke's image of individuals wresting food from a wild terrain also
sends messages about the moral status of ownership.47 Pierson intimates
that ownership is tied to the sweat of the hunter's brow, thereby implying
(without ever being so crass as to state it) that property is open to all and
reflects the owner's hard work. Pierson intimates that to reconsider the
allocation of property rights today would be like tearing the fox from the
sweaty hands of the still-panting hunter.

The finders cases reinforce these messages. They inject a note of "why
not give property to the person who takes it out of the common?" Since we
have to give the lost property to someone, they intimate, we might as well
give it to the first finder—although finders cases simultaneously reinforce
the intuitive image of eternal ownership through their careful insistence

1683).
44. This discussion to some extent follows, and to some extent differs from, Carol Rose's
discussion. Carol M. Rose, Property as Storytelling: Perspectives from Game Theory, Narrative Theory,
Feminist Theory, 2 Yale J.L. & Human. 37 (1990) [hereinafter Rose, Property as Storytelling].
45. For a recent restatement of this assertion, see id. at 41 ("[Locke] pointed out that life
depends on property, in a primitive sense; if one cannot literally appropriate those berries and
fruits, one will simply die.").
46. This claim ignores all of feudal history.
47. See Katz, supra note 24, at 468-69 (arguing that Locke's goal was to justify destruction
of the monarchy—traditionally seen as the King's hereditary property right—while preserving
the legitimacy of property rights).
that the true owner can always reclaim the lost item if he shows up. 48

The finders and wild animal cases also endorse the Lockean
assumption that ownership is naturally focused on an individual acting
alone. The labor of the woman who cooks the hunter's dinner and cares
for his children is (for reasons not explained) not of the type that creates
property rights. In fact, in both finders and wild animal cases, the entire
social system is read off the map: the implicit message is that the hunter's
dependence on the network of human relationships that created and
sustains his life is irrelevant to the design of "his" property rights. 49 In an
era supposedly dominated by Hohfeld's analysis of property in terms of
social relationships, this is a remarkable achievement. 50

When finders cases are linked with Pierson in the traditional
introduction to the property course, they serve to deny that the intuitive
image embeds one particular theory about property, with a particular
intellectual history. Instead, they endorse the view that this theory is mere
"common sense," derived from human hunger and human sweat.

This approach has important consequences for the students' reading
of the law that follows. In various contexts—landlord/tenant law and
exclusionary zoning cases spring to mind—the unequal distribution of
property rights in this country has played a direct and explicit role in the
law. 51 The traditional introduction subtly sets all this off limits. Indeed,

48. Unless, of course, it has been abandoned or adversely possessed. See Burke, supra note
39, at 58, 162 (noting but not stressing these possibilities).
49. For a contrary argument, see Joan Williams, Is Coverture Dead? Beyond a New Theory of
Alimony, 82 Geo. L.J. 2227 (1994) (proposing an alternative formulation of the issues
underlying post-divorce impoverishment).
50. Note that finders law can be taught as an illustration of the Hohfeldian idea that
property rights define the relationships among people, instead of giving absolute rights: for
example, Finder #1 "owns" an item as against Finder #2, but not against the true owner.
Although some casebooks do teach finders law as an illustration of relativity of title, in my
experience, that is not the way finders cases are usually taught.
municipalities have a constitutional obligation to provide a fair share of lower income
housing); Southern Burlington County NAACP v. Mt. Laurel, 456 A.2d 390 (N.J. 1983)
defining and reinforcing the "Mt. Laurel" doctrine in the context of practical litigation);
Southern Burlington County NAACP v. Mt. Laurel, 336 A.2d 713 (N.J. 1975) (creating the
"Mt. Laurel" doctrine, which requires municipalities' land use regulations to provide realistic
opportunity for low and moderate income housing). In the context of landlord/tenant law,
the concern for tenants' lack of access to property in a fit condition typically is expressed as
concern over their lack of bargaining power. See, e.g., Javins v. First Nat'l Realty Corp., 428
F.2d 1071, 1079 (D.C. Cir. 1970) ("The inequality in bargaining power between landlord and
tenant has been well documented. Tenants have very little leverage to enforce demands for
better housing."); Green v. Superior Court, 517 P.2d 1168, 1173 (Cal. 1974) ("T[he severe
shortage of low and moderate income housing has left tenants with little bargaining power
through which they might gain express warranties of habitability from landlords, and thus the
mechanism of the 'free market' no longer serves as a viable means for fairly allocating the
duty to repair leased premises between landlord and tenant."); Trentacost v. Brussel, 412 A.2d
436, 442 (N.J. 1980) ("There is no doubt that New Jersey has been faced with a chronic,
desperate need for rental housing. Increasing urbanization, population growth and inflated
construction costs have contributed to this shortage, thereby creating an inequality of

HeinOnline -- 83 Iowa L. Rev. 287 1997-1998
the convention of focusing on the creation of property rights—a message reinforced when Pierson is taught along with cases involving finders law, or, in more updated introductions, with Moore or Vanna White—suggests that the current distribution of property rights is not relevant to the design of the institution of property. When stated explicitly, this assertion is a controversial one. In fact, an alternative theory that places the need for equal distribution of property at center stage is totally ignored.

Pierson v. Post proves so indispensable not only because it embeds the Lockean nature narrative but also the strain of utilitarianism with which the nature narrative ultimately was wedded to create a theory of property Locke himself did not hold. In Pierson, both the majority and the dissenting opinions use utilitarian arguments to support their positions, eloquently establishing the point that utilitarian considerations are an inevitable element in cases involving property. When Pierson is juxtaposed with Harold Demsetz's modern retelling of the nature narrative, it creates a seamless bond between Locke's nature narrative and the notions that property rights are inevitably economic and that their design is tied to wealth creation. Demsetz examines the linkage of property rights with the fur trade and argues that private property replaced common ownership because the latter "naturally" leads to waste. Demsetz's modern rewrite of the nature narrative mistakes ideology for history in a way that has been

bargaining power between the landlord and tenant.

52. See Moore v. Regents of UCLA, 793 P.2d 479 (Cal. 1990) (discussing creation of property rights in cell line developed from plaintiff's T-lymphocytes).


54. See infra Section III.C. (discussing the republican egalitarian theory of property).

55. See John Dunn, Rethinking Modern Political Theory: Essays, 1979-83, at 25 (1985) (describing Locke's repressed religious upbringing and how it affected his concept of self-limitation); McDonald, supra note 13, at 60-66 (citing Locke's requirement that for a civil law to be valid, it must not violate the laws of nature); Kloppenberg, supra note 4, at 16 (noting that Locke himself was a deeply religious man who assumed that self-interest would be limited by the bounds of virtue). Compare Wendy J. Gordon, A Property Right in Self Expression: Equality and Individualism in the Natural Law of Intellectual Property, 102 Yale L.J. 1533, 1562 (1993) (discussing Locke's proviso that labor gives rise to property rights only to the extent that "as much and as good" are left for others), with C.B. Macpherson, The Political Theory of Possessive Individualism 97-99 (1962) (interpreting Locke in terms of the market liberalism that eventually grew out of his work).

56. See Dukeminier & Krier, supra note 39, at 22 (arguing that awarding ownership of a wild beast on first sight would lead to "quarrels and litigation").

57. See id. at 18 (maintaining that allowing the fruits of a hunt to be taken from a hunter will discourage hunters from working to tame wild beasts).

attacked both as bad history and bad economics. Yet Demsetz continues to be included, even in casebooks now aware of the need for a long note on the discrediting literature, for the same reason we still teach an 1805 case about wild animals in 1998: it perpetuates and naturalizes a particular vision of property.

In summary, an analysis of contemporary casebooks shows experts firmly in the grasp of the intuitive image and fleshes out the contours of that image, which combines the constitutional rhetoric of absolutism with (one version of) Locke’s nature narrative and (one version of) Bentham’s utilitarianism. I will call this gel of Locke and Bentham “possessive individualism”: the notion that free-standing individuals with (property) rights making choices will create the best society if they are left to pursue their own self-interest. The intuitive image today typically combines the tradition of absolutist rhetoric with the political theory of possessive individualism.

This examination of the standard introduction to property casebooks suggests that specialists as well as laypeople adopt the intuitive image of

59. See Dukeminier & Krier, supra note 39, at 46-49 (noting logical, economic, and anthropological arguments criticizing Demsetz).

60. See id. (citing articles critical of Demsetz).

61. My understanding is that Demsetz’s study embeds one particular type of law and economics in which economic self-interest is treated as the only relevant human motivation and wealth creation as the only relevant value in the utilitarian calculus. Cf. Letter from Glen O. Robinson, Professor of Law, University of Virginia to the author (May 13, 1992). Other authors writing in an economic vein argue that self-interest is not the only relevant human motivation; see, e.g., Rose, Property as Storytelling, supra note 44, at 53 (“Cooperation, then, is a preference ordering that the classical property theorists weren’t counting on in theory, but that they can’t do without.”), or that wealth creation is not the only factor to be taken into account in social decisionmaking, see, e.g., Richard A. Posner, Law and Economics is Moral, 24 Val. U. L. Rev. 163 (1990). My project attempts to discern some values other than wealth creation. that economists, among others, might find suitable to include in a utilitarian calculus or other decisionmaking process.

62. An alternative interpretation of Locke stresses his religious outlook and his “proviso.” See Berger & Williams, supra note 39, at 67-68 (noting that “Locke’s nature narrative establishes a moral mandate for the current distribution of property”).

63. Utilitarianism can be used to undercut absolute property rights. See, e.g., Singer, Property Law, supra note 39, at 166-171; Gregory S. Alexander, History as Ideology in the Basic Property Course, 36 J. Legal Educ. 381, 386 (1986) [hereinafter Alexander, History as Ideology]. Both authors explore how an owner’s property rights can be limited, as well as defended, in the name of economic efficiency.

64. Note that the elements of the intuitive image—the image of property as absolute, Locke’s nature narrative, and utilitarianism—are logically independent. Their connections are historical and contingent: one can readily believe in one of these elements, without believing in the other two.

65. I use the term “possessive individualism” in a way that is close, but not identical, to the way C.B. Macpherson uses it. Macpherson, supra note 55. Note that Macpherson, writing before the republican revival, finds elements of what he calls “possessive individualism” both in authors commonly classified as republican (notably Harrington) and in authors commonly classified as liberal (notably Locke). The closest analogue to my use of “possessive individualism” is in Kloppenberg, supra note 4, at 16.
property. The following discussion of one casebook's analysis of feudal society supports this finding.

D. Reading Feudal History as Support for the Intuitive Image

Discussion of feudal society is unavoidable in any casebook that teaches estates in land, the traditional core of the property course. In this Subsection, I will examine the discussion of feudalism in the leading property casebook, written by Jesse Dukeminier and James Krier, to explore how the authors use the text of feudal history to affirm the intuitive image.

To highlight the contingent quality of their analysis, I will begin by showing how feudal history could be interpreted to undermine the intuitive image of property. I begin with a capsule description of feudal society and of property's role within it. Modern historians stress the internal logic and incommensurability of feudal society with the present. The central organizing principle of feudal society was the Great Chain of Being. Hierarchical and (in theory) unchanging social roles were designed around interdependent and mutual responsibilities between unequal social actors: from vassal to lord, to intermediate lord, to higher lords, to the king, and ultimately, to God. Each inferior was entitled to protection or other benefits from his superiors; in return, he owed them services as well as deference.

These social relationships were expressed through property. A limited number of approved estates in land cemented a limited number of "estates," i.e., social positions. The formalism of the system of estates represented feudal society's resistance to social change, its vision of virtue as fulfilling one's place in the Chain. Because these relationships were envisioned as permanent interdependencies, the key estates in land awarded simultaneous rights in a tenant, his lord, and on up the Chain. Exclusive ownership was virtually unknown; instead, the estates carved up property rights into various interlocking bundles of sticks. To quote historian Marc Bloch:

[T]he word "ownership," as applied to landed property, would have been almost meaningless [in feudal society], for nearly all land and a great many human beings were burdened at this time

66. Feudal influences are also apparent in the doctrine of waste and in landlord/tenant law. But see Michael Wienberg, From Contract to Conveyance: The Law of Landlord and Tenant, 1800-1920 (pt. I), 1980 S. Ill. U. L.J. 29 (arguing that landlord/tenant law had adopted a contract model by the eighteenth century, only to revert to a conveyance model in order to avoid contractual implied warranties of habitability).

67. Truly contemporary historical literature contests the coherence of the concept of feudalism. For purposes of drawing broad-brush comparisons between the past and the present, "feudal society" is a workable concept.


69. I am not trying to romanticize feudal society, which contained many elements that do not appeal to us today. For feudal interdependence was based on a formal and permanent hierarchy, which is not a concept most Americans aspire to.
with a multiplicity of obligations differing in their nature, but all apparently of equal importance. None implied that fixed proprietary exclusiveness which belonged to the conception of ownership in Roman law. The tenant who—from father to son, as a rule—ploughs the land and gathers the crop; his immediate lord, to whom he pays dues and who, in certain circumstances, can resume possession of the land; the lord of the lord, and so on, right up the feudal scale—how many persons there are who can say, each with as much justification as the other, “That is my field!” . . . This hierarchical complex of bonds between the man and the soil . . . blossomed out as never before [in feudal society] . . . Perhaps this attitude to legal rights could not be better defined than by borrowing a familiar formula from sociology and calling it the mentality of legal “participation.”

This description of feudal society undermines the intuitive image of property as “naturally” involving absolute dominion; it reinforces instead the Hohfeldian notion that property describes relationships among people. Moreover, the intuitive image that property has one “natural” set of characteristics is undermined by the wide array of estates recognized at feudal law, an array that seems to confirm the Hohfeldian view of property as a “bundle of rights.” Finally, central developments in feudal property law—the rise and fall of the fee tail, the continuing fights over uses, the Rule Against Perpetuities—can also be interpreted to support the view that property rights do not have one “natural” set of characteristics, but instead are configured and reconfigured over time to achieve ever-varying sets of political goals.

My description of feudal society also undermines the history implicit in the nature narrative, which posits a period of common ownership, followed by a one-step transition to fully commodified property held in exclusive ownership. In fact, commodification of property developed over a period of at least five hundred years: in the era directly after the Norman Conquest of 1066, land was not freely inheritable; it was not salable until 1290; nor devisable by will until the mid-sixteenth century.

71. Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied to Judicial Reasoning, 23 Yale L.J. 16, 22-23 (1913) (arguing that the divergence among scholars regarding the rules and definitions of trusts and equitable estates requires that the area be studied more intensely than other areas of the law).
72. For a good, concise description of each of these episodes, see Dukeminier & Krier, supra note 39, at 211-16 (the fee tail); id. at 269-82 (the Rule Against Perpetuities); id at 299-318 (uses).
73. See Demsetz, supra note 58, at 354-59.
74. See Berger & Williams, supra note 39, at 114-15. Indeed, land may not have been fully commodified in Britain even much later. In a nineteenth century novel by Anthony Trollope, a squire opines that his neighbor was wrong to end an agricultural lease “so long as [the tenant] had paid the rent.” See Anthony Trollope, Orley Farm 39 (Henry S. Drinker ed., Knopf 1950) (1862). The flourishing of secure tenancies in the modern period can be viewed as evidence that land still was not fully commodified as late as 1980. See Trevor Aldridge, Rent
Given the ease with which feudal history can be interpreted to undermine the intuitive image, the absence of this interpretation is striking. Instead, Dukeminier and Krier—like many others—interpret feudal history as confirming the desirability and inevitability of exclusive property rights and market structures.76

"Up from Feudalism" reads the heading of Dukeminier and Krier's discussion of feudal history in the first edition of the casebook.77 Why "up"? This word signals the underlying message of the history that follows: feudalism held certain backward views from which "we moderns" have progressed.78 This is the standard Enlightenment story of the "Dark Ages"—when ignorance reigned supreme—a characterization stressed to students as they struggle through the arcane arithmetic of future interests. The subtext is often that any Ages that produced this headache must have been Dark Indeed.

The rhetorical goals served by this characterization emerge only gradually. Virtually the only theme consistently developed is the march towards the full commodification of property,79 as property becomes first inheritable,80 then freely salable,81 then fully devisable,82 along with the emergence of rules furthering marketability, notably the rule against restraints on alienation,83 the Rule in Shelley's Case,84 the Doctrine of Worthier Title,85 the destructibility of contingent remainders,86 and the Rule Against Perpetuities. Although a number of these doctrines have been abolished,87 the casebook editors do not discuss what this means for the "march to commodification" thesis. Instead, they assume a natural and inevitable evolution to full commodification of land and a legal system that

75. See supra note 39.
76. According to Gregory Alexander, this "Whig history" interpretation originated in the nineteenth century. See Alexander, History as Ideology, supra note 63, at 583.
77. See Jesse Dukeminier & James E. Krier, Property 350 (1st ed. 1981). Another casebook continues to use this phrase. See Casner & Leach, supra note 39, at 185. Although the Dukeminier and Krier casebook has dropped it, the casebook continues to express this outlook in its description of feudal society.
78. This interpretation is reinforced in the Dukeminier and Krier casebook by the excerpt in which Henry Maine sketches the progress from status to contract. See Dukeminier & Krier, supra note 39, at 203.
79. This point is noted in the informative and insightful History as Ideology. Alexander, History as Ideology, supra note 63, at 384.
80. See Dukeminier & Krier, supra note 39, at 157.
81. Id. at 206.
82. Id. at 185.
83. Id. at 140.
84. Id. at 242-44.
85. Dukeminier & Krier, supra note 39, at 244-46.
86. Id. at 246-50.
87. Id. at 250. Doctrines that have been abolished in many jurisdictions include the Rule in Shelley's Case, the Doctrine of Worthier Title, and the destructibility of contingent remainders. See id. at 244-45, 248-50. In many jurisdictions, the Rule Against Perpetuities has been sharply constricted as well. Id. at 276.
RHETORIC OF PROPERTY

discourages dead hand control. Dukeminier and Krier consider the nature narrative only to interpret historical change as evidence of a scientific process (evolution) that follows natural laws to reach a society where individuals with (fully commodified property) rights make choices free of dead hand control. This version of feudal history is used to reinforce the intuitive image of property and the political theory of possessive individualism and to define both as part of the inherent structure of the universe as determined by objective scientific laws of nature.

E. Why the Intuitive Image Retains Its Power

The discussion so far shows that professionals as well as laypeople hold the intuitive image of property. We are now in a better position to seek reasons why Hohfeld’s alternative imagery has made so little headway into “common sense” despite its status as the official view of the legal establishment since Hohfeld’s view was incorporated into The Restatement of Property in 1936. Historian Dorothy Ross notes a tendency in American social thought to erase history in favor of explanations that link nature with “the classical ideology of liberal individualism.” Such explanations typically work, she notes, to avoid confronting the possibility that American society has failed to live up to its republican ideals. “[T]he main body of social scientists tried to carve out within or beneath history a realm of nature that would ward off the lingering fears of decline and insure the realization of a harmonious liberal society...” Ross links this approach with the ideology of American exceptionalism, which she defines as “the idea that America occupies an exceptional place in history, based on her republican government and economic opportunity,” and therefore will avoid entrenched poverty and class differentials.

The intuitive image of property is an integral part of this pattern of social thought: it links possessive individualism with the laws of nature. If the intuitive image of property is an integral part of American exceptionalism, its persistence is understandable. If the alternative

88. The law of covenants and easements is not generally interpreted as a counter-theme, although in that context American courts have upheld dead hand control to a much greater degree than English courts have been willing to do. See infra Section III.D.3 (discussing the law of covenants).
89. This is what Joseph Singer refers to as “the question of why the legal realist revolution never took hold in property.” Conversation with Joseph Singer (Spring 1994).
90. Dorothy Ross, The Origins of American Social Science at xiii (1991). Ross’s focus is on social science; I generalize her conclusions to include social thought.
91. Id. at xv. Ross posits this harmonious society “in the future;” in my view, most property casebooks, with their complete lack of any information about the actual distribution of wealth in the contemporary United States, carry the subtext that a “harmonious liberal society” exists in the present day.
92. Id. at xiv.
93. Id.
Hohfeldian theory (of property as defining relationships among people) were to prevail, Americans would be brought face to face with data about social relationships that undermine American exceptionalism: statistics showing that many people remain poor despite persistent hard work and that property is distributed more unequally in the United States than in other industrialized countries.

The most profound effect of the intuitive image is to blur the differences between the diverse social institutions which are lumped together within our concept of property. Few Americans would disagree that the hard-earned house of a working class family deserves significant levels of constitutional protection. But this does not necessarily mean that property landbanked by a huge developer speculating on the inflation of land values deserves identical protection.

The assumption that these two situations are indistinguishable makes sense if you believe that what is good for General Motors is good for the country. But if that happy confluence is not taken as self-evident, it remains to be proven that the need for a high level of protection for the working class homeowner justifies an equally high level of protection for the fondest dreams of GM.

A key function of the intuitive image is to support demands for the same level of protection in both contexts, a strategy that has been used with stunning success by property rights advocates in recent takings cases. In those cases, “public interest” organizations representing landowners, notably the Pacific Legal Foundation, have used vivid absolutist rhetoric to paint a picture of innocent landowners faced with “extortionist” government demands. In doing so, they have used the intuitive image to

94. Cf. Sylvia Nasar, Rich and Poor Likely to Remain So, N.Y. Times, May 18, 1992, at D1 (reporting results of studies that show both rich and poor children have approximately 40% chance of staying at income level of their parents and 60% chance of ending up somewhere closer to middle; child whose father is in bottom 5% of earners has only 1-in-20 chance of making it into top 20% of families, 1-in-4 chance of rising above median wealth, and a 2-in-5 chance of staying poor or near poor).
96. See Karl Llewellyn, Through Title to Contract and a Bit Beyond, 15 N.Y.U. L. Rev. 159, 169 (1938) (arguing that legal concepts commonly blur important distinctions).
97. This argument has been around since the legal realists. See, e.g., Morris Cohen, Property and Sovereignty, 13 Cornell L. Rev. 8, 18 (1927) (explaining different things grouped within the concept of property); see also Felix Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809, 814-17 (1935) [hereinafter Cohen, Transcendental Nonsense] (noting the conflation of trademarks and real property). For a similar argument, see Joseph W. Singer, Property and Social Relations: From Title to Entitlement, in Property on the Threshold of the 21st Century 69, 79-88 (G.E. van Maanen & A.J. Van der Walt eds., 1995) [hereinafter Singer, Property and Social Relations].
bleach out the difference between the claims of developers like David Lucas in *Lucas v. South Carolina Coastal Council*[^100] or the dentist with the money investment in *Agins v. City of Tiburon*,[^101] and those of small landholders like Bernadine Suitum. (Suitum’s lawyer joked at a bar association meeting, that he had the “perfect client . . . an 82-year-old woman in a wheelchair.”)^

The following Section will introduce various ways of challenging the intuitive image of property. In some individual cases involving the property rights of large corporations or developers, the best strategy may well be to question whether our intuitive solicitude for Mrs. Suitum necessarily establishes David Lucas’ right to earn a $600,000 return on his investment in *Lucas*.[^103] The answer to this question seems far from clear.

II. CHALLENGING THE INTUITIVE IMAGE THROUGH A PRAGMATIC APPROACH

In recent decades, American legal theory has been dominated by law-and-economics, a tradition that reflects key tenets of the intuitive image.[^104] Assumptions adopted by law-and-economics scholars that reflect the intuitive image include the notion that property rights are by their nature economic not political, that they flow naturally from human hunger and scarcity, that they naturally grant exclusive use, and that any attempt by the public to exercise simultaneous rights in privately owned property constitutes “regulation.”[^105] Probably the two most influential alternatives to law-and-economics in recent legal theory are Margaret Jane Radin’s work on property and personhood[^105] and Joseph William Singer’s social relations approach to property, which are discussed below. Both are important contributions, but neither has yet realized the potential of a pragmatic approach to property theory.

[^104]: See *Perspectives on Property Law* (Robert C. Ellickson et al. eds., 2d ed. 1995) [hereinafter Perspectives] (reprinting a collection of articles written by various authors as a means of reviewing the canon of recent legal theory from the perspective of three prominent law-and-economics scholars).
[^105]: The “property rights versus regulation” dichotomy was invented in the late nineteenth century as part of the consolidation of the intuitive image of property as absolute. See Ross, supra note 90, at 154 (discussing the response of theorists on both sides of the property rights versus regulation dichotomy). The alternative is the Hohfeldian (or feudal) mentality of legal participation.
[^106]: See *infra* Section II.B. (discussing Radin’s personhood and property theory of property).
A. Singer’s “Social Relations” Approach

Joseph William Singer has written a casebook and long series of articles offering a sustained analysis of property law designed to challenge, both directly and indirectly, the intuitive image of property. His analysis begins by recovering the legal realist assault on conceptualism. Felix Cohen articulated this critique in 1935: "Legal arguments couched in terms of ‘magic solving words’ like property [are] necessarily circular, since these terms are themselves creations of law, and such arguments add precisely as much to our knowledge as Molière’s physician’s discovery that

opium puts men to sleep because it contains a dormative principle." Labeling something as property does not predetermine what rights an owner does or does not have in it.

If Felix Cohen established what property is not, Wesley Hohfeld’s analysis suggested a new approach to understanding what property is. Hohfeld argued that property rights do not define absolute dominion of people over things, but instead define shifting relationships among people. This analysis suggests that the relationships defined by property rights are more complex and varied than the intuitive image implies. For example, a landlord may own the building, but the tenant still has substantial rights in it; a fee owner’s rights coexist with those of an easement holder. The property rights of the landlord and the servient tenement owner do not have the kind of on-off, you-own-everything-or-nothing quality implied by the intuitive image. Hohfeld’s analysis also undermines the intuitive image of property rights as perpetual and unchanging; for if property rights reflect human relationships, presumably they should reflect the fact that those relationships change over time.

Singer’s most brilliant work is his rigorous exploration of Hohfeld’s imagery in contemporary legal doctrine. Both in his casebook and in law review articles, Singer points out the wide divergence between property law doctrines and the intuitive image.

The classical view not only assumes that most rights associated with property are ordinarily consolidated in the same manner but that it is possible to determine in a relatively nondiscretionary manner who that owner is by reference to formal indicia of title. In other words, the classical view presumes that it is easy to tell who the title holder is. Yet it is often not possible to determine who owns property by reference to formal title, Singer argues. He points to mortgages, where a shift in title to the mortgaged home may result; to divorce, where the courts often shift title to the marital home; and to adverse possession, where once again title shifts from the original owner to the adverse possessor. Moreover, Singer points out, shareholders in a corporation have title but limited control over its day-to-day management.

Singer also focuses on doctrinal contexts that do not involve title. In a
Singer notes:

most property rights are shared or divided among several persons[,] . . . between landlords and tenants, mortgagors and mortgagees, homeowners and lien holders, servitude or easement owners and servient estates, present and future estate owners, parents and children, husbands and wives, testators and heirs, homeowners associations and unit owners, shareholders and managers, trustees of charitable foundations and their beneficiaries, employers and employees, creditors and debtors, buyers and sellers, bailors and bailees.\(^{113}\)

Singer uses these and other examples to undermine the intuitive image's self-description of absoluteness.

Singer's rereading of property is remarkable both for the depth of his command of property doctrine and for his wide-ranging exploration of the implications of the deconstructive strain of the realist analysis. Less strong is his proposed reconstruction.

The realists assumed, and Singer follows them, that if property ownership is not as absolute as is suggested by the intuitive image, then it has "distintegrated."\(^{114}\) The assumption is that, once the intuitive image is slain, the definition of property is up for grabs; lawyers need to use policy arguments to delineate what owning property should mean. Yale realists in the 1930s and 1940s used this language with the self-confidence that rigorous analysis would yield the "right" policy answer and that they themselves were the right men for the job.\(^{115}\) For example, when Myers McDougal pronounced the "truths" derived from policy science, he firmly expected the world to listen.

Singer adopts the realists' "policy" language: his casebook is called Property Law: Rules, Policies, and Practices. In an article on takings, Singer and coauthor Jack Beermann criticized the Supreme Court's perspective on property as one with "the potential to both frustrate public policy goals and subvert democracy."\(^{116}\) That article defends "the legal realist notion that property rights can and should be defined through consideration of policies or values, and that property rights are instituted through the social and political construction of human relationships."\(^{117}\)

Note the linkage of "policies" with "values." In sharp contrast to some legal realists, Singer does not believe that rigorous policy analysis by a few good men will reveal the "right" policy prescription. Instead, he assumes that policy disagreements as often reflect different values as mistakes in logic.

\(^{113}\) Singer, No Right to Exclude, supra note 107, at 1455-56.

\(^{114}\) See Grey, supra note 1, at 69 (discussing the distinction between a layperson's and a professional's conception of property ownership).

\(^{115}\) See Joan C. Williams, At the Fusion of Horizons: Incommensurability and the Public Interest, 20 Vt. L. Rev. 625 (1996) (discussing legal realism).

\(^{116}\) Singer & Beermann, Social Origins, supra note 107, at 219.

\(^{117}\) Id. at 218.
One of the most attractive elements of Singer as a theorist is his open acknowledgment that our property system reflects moral choices. Thus, in his most recent article, he notes that “individuals should not have to face invidious discrimination.” Singer refers frequently to some rules as being “normatively flawed,” having advantages “from a moral point of view,” or as “having a strong moral claim.” His open use of the language of morality signals his sense, drawn from critical legal studies as well as other forms of legal postmodernism, that “law is politics,” not mere logic. It is refreshing to hear a legal commentator use terms like “disgracefully unjust” to ask “the central question of whether a regulation imposes an unfair distribution of social obligations” and to argue that “we must consider the form of social life we support and to which we are committed as a matter of principle.”

Yet this kind of language raises troubling questions. So long as policy analysis was viewed as a “science,” best entrusted to the best and the brightest, it left intact the realists’ authority to pronounce on the best policy. Once “policy science” is replaced with an understanding of policy as an expression of values, we are left asking why we should care about the values of a particular legal commentator.

Singer makes his social vision very clear:

[T]he social relations approach “assumes that there is a basic connectedness between people, instead of assuming that autonomy is the prior and essential dimension of personhood.” If we see people as situated in relation to others, rather than as isolated and autonomous, our understanding of social life changes, and with it, our understanding of the source of legal obligations.

The central focus of Singer’s social relations approach is “on the role that race, class, and gender play in shaping the concepts with which we understand human relations.” Consequently, for him, freedom from the intuitive image signals the chance to redefine property rights in ways that empower the powerless: factory workers as against corporate
owners; African Americans as against apartheid; and women as against male privilege. But these values do not necessarily follow from the assertion that property rights reflect human relationships. The most sophisticated proponents of strong property rights today typically articulate their defense of property on the grounds that strong property rights structure social relations in the best way possible; they not only protect the liberty and autonomy of owners, they also best serve redistributive goals by strengthening a market whose rising tide will raise all ships (unlike more direct redistributive measures, which will impede the functioning of the market, and by so doing will ultimately hurt their intended beneficiaries).

In short, Singer's insistence that property rights define social relations does not answer the question of what those social relations should be. Perhaps the social relations of inequality that result from possessive individualism as currently practiced represent a society as good as can reasonably be expected. Having deconstructed his own authority to make pronouncements as to policy, Singer can no longer rely on logic; he must turn to persuasion. Merely asserting his own social vision will not persuade those who do not already agree with him.

B. Radin's Property and Personhood Approach

Influential summaries of property theory by legal commentators often list Margaret Jane Radin's "property and personhood" approach as the chief (and often the only) alternative to possessive individualism.

Radin introduced her approach in an influential article in the Stanford Law Review in 1982. She posited two distinct kinds of property: personhood property, which is tied up with the identity of its owner, and fungible property, which is not. Citing Hegel, she argued that person-

---

128. See Singer, Reliance Interest in Property, supra note 107, at 662 (arguing that property rights can arise out of a relationship between parties or entities due to a reliance interest created in the relationship).
129. Singer, No Right to Exclude, supra note 107, at 1471 (finding property law as a source of possible change in the economic position of black Americans).
130. Id. at 1361.
131. See Singer, Increasing Weight of History, supra note 107, at 528-529.
132. Singer borrows the name "social relations theory" from his wife Martha Minow, a noted feminist legal theorist.
133. See Singer, Persuasion, supra note 107, at 2442 (describing the process of persuading law students and society of the value of the author's proposed land reforms).
134. Singer, Property and Social Relations, supra note 97, at 82.
135. See Perspectives, supra note 104; Margaret J. Radin, Time, Possession, and Alienation, 64 Wash. U. L.Q. 739, 739-42 (1986) (examining the role of the temporal dimension in different theories of property).
137. Radin calls this "personal property," but that terminology creates confusion between her notion and the common-law usage of the term "personal property" as that which is opposed to "real property." See id. at 957.
hood property deserves more protection than fungible property: "I am interested in developing a non-utilitarian, moral theory which would provide an alternative explanation for the observed hierarchy of protection . . . . It should be possible to give moral reasons why some claims are or should be subject to greater protection . . . than others . . . ."\footnote{138}

One of Radin's goals in her initial article was to generate a new rationale for tenants' rights which was more convincing than the welfare rights rationale that predominated in the early 1980s. "If the personhood dichotomy in property is taken as the source of a distributive mandate as part of such a general theory," Radin argued, "it would suggest that government should make it possible for all citizens to have whatever property is necessary for personhood."\footnote{139} According to Radin, "government should rearrange property rights so that the fungible property of some people does not overwhelm the opportunities of the rest to constitute themselves in property."\footnote{140} Radin's property and personhood rationale has not proved particularly successful, however, as a way of justifying limits on traditional property rights. I have found only two cases where a court has cited Radin's work to justify such limitations: in 

\begin{itemize}
\end{itemize}

Radin's project to limit traditional property rights relies primarily on imagery of the home: "The 'home'—usually conceived of as an owner-occupied single-family residence—seems to be a paradigm case of personal property in our social context."\footnote{144} Most of Radin's examples of personhood property concern is people's homes.\footnote{145} In her elaborate attempt to identify which personhood relationships are "normatively appropriate"\footnote{146} rather than inappropriately "fetishistic,"\footnote{147} her key exam-

\footnotesize
\textsuperscript{138.} \textit{Id.} at 985-86.
\textsuperscript{139.} \textit{Id.} at 990.
\textsuperscript{140.} \textit{Id.}
\textsuperscript{141.} 588 N.Y.S.2d 93, 97 (Sup. Ct. 1992) (citing Radin as support for the statement that "rent control/stabilization is fundamentally aimed at preserving stability of tenure").
\textsuperscript{142.} 727 F.2d 1121 (D.C. Cir. 1984).
\textsuperscript{143.} \textit{See, e.g.,} Curtis J. Berger, \textit{Response: Home Is Where the Heart Is: A Brief Reply to Professor Epstein}, 54 Brook. L. Rev. 1239, 1240 n.8 (1989) (noting Radin's contention that "personal" property—property which is bound to one's personality in a philosophical sense—is "more deserving of social protection").
\textsuperscript{145.} \textit{See, e.g.,} Radin, \textit{Property and Personhood}, supra note 136, at 1005-06 ("[O]ne might expect to find that a special class of property like a family home is protected against government by a 'property rule' and not just a 'liability rule.'").
\textsuperscript{146.} Margaret J. Radin, \textit{The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings}, 88 Colum. L. Rev. 1667, 1689 (1988) [hereinafter Radin, \textit{Cross Currents}].
\textsuperscript{147.} \textit{Radin, Property and Personhood}, supra note 136, at 987.
ples of normatively appropriate identification with property involve people’s relationship with their homes.148 The other key source of examples comes from takings law; much of her discussion of takings law also concerns people’s relationship with their homes.149

Radin’s linkage between social welfare and rights in one’s home rang true in the early 1980s. The “revolution in landlord/tenant law” was still underway,150 tenants’ rights commanded the attention of many people concerned with poverty and social welfare.151 Radin’s theory offered what many commentators were looking for: a rationale that would allow tenants’ (personhood) interest to trump the landlord’s (merely fungible) property interest in a wide variety of factual contexts.152 “Resident owners have security of tenure,” Radin argued, “as long as they can maintain the level of payment they planned for.”153 Radin’s essay on residential rent control “made the case for treating similarly situated resident tenants similarly.”154

Radin is correct in sensing that our values surrounding homeownership provide an important challenge to the “I own it, so I can do what I want with it” attitude. But what kind of a challenge, with what level of potential? Radin’s linkage of property and personhood with Hegel does not help us to judge the potential strengths and weakness of our

148. See, e.g., id. at 987 (“There is both a positive sense that people are bound up with their homes and a normative sense that this is not fetishistic.”); id. at 991-1002 (containing a long section on “The Sanctity of the Home”); see also Margaret J. Radin, Reinterpreting Property 19 (1993) [hereinafter Radin, Reinterpreting Property] (referring to the distinction between personal and fungible property rights in various fields of legal doctrine, including privacy in the home); Radin, Cross Currents, supra note 146, at 1694-95 (“In the landlord tenant situation, the systematic problem we face is not one in which the personhood interests of individual landlords are pitted against individual tenants, but rather, one in which a class of residents is unable to count on the continuity of residence.”).

149. See, e.g., Radin, Cross Currents, supra note 146, at 1689 (applying the concept of possession to the relationship of persons and their homes); Radin, Property and Personhood, supra note 136, at 1005-06 (recognizing the expectation that certain property, such as the family home, is protected against government by a “property rule” and not just a “liability rule”).

150. See Edward H. Rabin, The Revolution on Residential Landlord-Tenant Law: Causes and Consequences, 69 Cornell L. Rev. 1, 517, 520 (1976) (describing the revolution that has occurred in landlord-tenant law which resulted in “changes that favor the tenant as against the landlord”).


152. See Radin, Property and Personhood, supra note 136, at 987, 992-96 (discussing the preeminence of “personhood” in residential tenancy); Radin, Residential Rent Control, supra note 144, passim (emphasizing that a tenant’s interest in continuing to reside in an apartment is stronger than that of the commercial landlord).


154. Id.
intuitive sense that rights in our homes are different from other types of property ownership.

In particular, Radin’s focus on Hegel leads her to overlook the dark underside of America’s romance with homeownership, as Stephen Schnably has pointed out.155 Both the bright and the dark sides of this romance will be examined below. For now, the important point is that uncovering the complex potential of cultural intuitions requires a detailed analysis of the culture that gives rise to them.

The intuitions Radin explores in the redistributive strain of personhood analysis are quite different from those she explores in her analysis of commodification. In the latter, rather than talking about the ways the ideology of homeownership can be used for redistributive purposes, Radin discusses how various proposals to extend market logic to human bodies or body parts violate cultural intuitions about the inherent dignity of human beings.156 Radin examines, for example, whether market logic should be used in the contexts of surrogacy, adoption, rape, and prostitution157 and argues that unrestricted use of market logic in these contexts would constitute an affront to personhood.

Radin’s sense that “I . . . should perhaps have said more about Kant; I should perhaps have said less about Hegel”158 brings us back to methodological issues. What is the import of her citations to Hegel? Originally they served to support claims of an “objective moral consensus” in favor of personhood; today, however, Radin has demoted Hegel to the status of a “suggestive text.”159 “In my writings I found Hegel’s text on property suggestive for exposing my view, and several times returned to it, but in the end . . . [m]y project is a cultural description/critique of American institutions of property and the legal discourse in which they are couched.”160 If Radin’s project is a cultural description of Americans, she needs to focus on American society to examine both the intellectual history and the contemporary status of our general intuitions about property.

This raises the question of how either Kant or Hegel can offer what she needs. Radin’s goal, as she states it, is to examine our “intuitions.” If her goal is to uncover “shared cultural understandings,”161 “our cultural

156. Margaret J. Radin, Market-Inalienability, 100 Harv. L. Rev. 1849, 1880 (1987) [hereinafter Radin, Market-Inalienability] (stating that “market rhetoric seems intuitively out of place here, so inappropriate that it is either silly or somehow insulting to the value being discussed”); see Radin, Residential Rent Control, supra note 144, at 360 (making reference to “[t]he intuitive general rule”); id. at 361 (referring to “general intuition”).
157. Radin introduced her analysis in Radin, Market-Inalienability, supra note 156.
159. Id. at 8.
160. Id. at 9.
161. Id. at 2, 7, 11.
commitments surrounding property and personhood,
the best way to access those commitments is to focus not on Hegel, but on American intellectual history.

C. Property, Pragmatism, and the Moral Imagination

There has been much talk about pragmatism in property theory; indeed, both Radin and Singer think of themselves as pragmatic. When I refer to pragmatism, I use it in many of the senses in which they use the term, but also in some more specific ones derived from John Dewey.

Dewey saw pragmatism as involving a new role for philosophy that did not involve merely thinking in terms of real world, nonideal conditions or impatience with “rigid rules and frozen concepts.” Nor did Dewey (at his best) assume that the role formerly played by truth claims could, under pragmatism, be played by consensus. Pragmatism to Dewey signaled a shift in the role of the philosopher:

When it is acknowledged that under disguise of dealing with ultimate reality, philosophy has been occupied with the precious values embedded in social traditions . . . . it will be seen that the task of future philosophy is to clarify men’s ideas as to the social and moral strifes of their own day.

The goal of philosophy, according to Dewey, is to focus attention on the “precious values embedded in our social traditions” in works of “moral imagination,” not “scientific intelligence.” Our traditions offer not consensus or “proved knowledge of fact or truth, but a conviction about moral values, a sense for the better kind of life to be led.”

[Philosophies] start[] not from science, not from ascertained knowledge, but from moral convictions, and then resort[] to the best knowledge and the best intellectual methods available in their day to give the form of demonstration to what [is] essentially an attitude of will, or a moral resolution to prize one mode of life more highly than another, and the wish to persuade other men.

162. Id. at 18.
163. Radin, Reinterpreting Property, supra note 148, at 4-5 (stating that the author wished to express the “pragmatic understanding of objectivity”); Margaret J. Radin, The Pragmatist and the Feminist, 63 S. Cal. L. Rev. 1699 (1990) (offering four short essays describing the connection between pragmatism and feminism); Margaret J. Radin & Frank Michelman, Pragmatist and Poststructuralist Critical Legal Practice, 139 U. Pa. L. Rev. 1019 (1991) (suggesting more reflection on current social, cultural, and political conditions is need in legal writing); Singer, Property and Coercion, supra note 107, at 1821 (assessing pragmatism by asking how it affects the interests of those who are oppressed).
164. See Dewey, Reconstruction in Philosophy, supra note 7, at 94.
165. See Singer, Property and Coercion, supra note 107, at 1822 (describing how pragmatists are concerned primarily with discerning the facts and achieving results instead of developing legal rules).
166. Dewey, Reconstruction in Philosophy, supra note 7, at 94.
167. See Westbrook, supra note 9, at 145 (describing the distinction between philosophy and science).
168. Id.
that this [is] the wise way of living.\textsuperscript{169} Pragmatism, thus defined, promises not insight into preexisting truths that offer guarantees of agreement (metaphysical or cultural); instead, it starts from an acknowledgment that, if truths are to be had, they will have to be constructed as social phenomena, by persuading others to "prize one mode of life more highly than another." Our culture becomes, not a guarantee of preexisting agreements, but a reservoir from which to draw persuasive arguments to convince others of the wisest ways of living. Thus, the aim of a pragmatic approach to property theory is to create a conversation that will shift the institution of property in ways that will protect legitimate property claims without endorsing the inherited, highly unequal distribution of property rights in one of the world's most unequal industrialized societies.

This pragmatic approach suggests that the best way to undermine the intuitive image is not by presenting logical arguments against it, but by highlighting redistributive strains in our complex and conflicting beliefs about property that are resonant enough to challenge the intuitive image's status as "common sense." To accomplish this, the logical focus is not on the canon of philosophy but on intellectual history, on how ideas inherited from the Europeans have been used in particularly American contexts. Of particular interest is the approach delineated by Daniel T. Rodgers, whose focus is on the "keywords\textsuperscript{170}" of the American tradition. Those "keywords," he notes, are the words speech writers still use, "counting on something in us to nod in assent . . . .\textsuperscript{171} Rodgers offers important insight into political persuasion:\textsuperscript{172} "Words come to us in clusters, trailing associations and meanings we may not intend. Born into political languages we did not invent, we are never able to talk any which way we might want.\textsuperscript{173}

A critical examination of our contested truths does not assume we will find one clear path, long forgotten, to which we can readily return. Instead, a critical intellectual history and sociology of knowledge can uncover weapons that already exist, which probably need to be transformed in ways that diminish the associations we do not want and enhance the persuasive potential of those we do want. As James Boyd


\textsuperscript{170}. See Rodgers, supra note 10, at 6 (citing Raymond Williams, Keywords: A Vocabulary of Culture and Society (1976)).

\textsuperscript{171}. Rodgers, supra note 10, at 16.

\textsuperscript{172}. Note that not every challenge to the intuitive image will draw primarily on the historical rhetorics described here. Rhetorics without a deep historical foundation in Anglo-American law have also proved extremely influential in the twentieth century. Most notable is the ecological view of intergenerational equity, which draws as much or more on Native American as on Anglo traditions.

\textsuperscript{173}. Rodgers, supra note 10, at 10.
White has noted, "both the lawyer and the lawyer's audience live in a world in which their language and community are not fixed and certain but fluid, constantly remade, as their possibilities and limits are tested." 174

If we want to escape all of a word's traditional associations, we simply will not use it. Typically, we want to keep some associations but not others; to eliminate a given association, we must work at it, which means that any association we leave alone remains unquestioned and intact. Indeed, if this were not so, keywords would be useless, for their persuasive value lies precisely in their ability to "trail associations" without defending them. 175 As we turn to a study of keywords and rhetorics that persuade, we find alternative strains of property rhetoric that can help dislodge the intuitive image's status as "common sense."

As noted in the introduction, I use the term "rhetoric" not in the traditional sense of "the ignoble art of persuasion." 176 Rhetoric does not merely dress up preexisting truths. It is, instead, "the central art by which community and culture are established, maintained, and transformed. So regarded, rhetoric is continuous with law, and like it, has justice as its ultimate subject." 177 A view of law as rhetoric can help us "attend to the spiritual or meaningful side of our collective life." 178

A final note is necessary before beginning the process of creative excavation. As other commentators have noted, 179 lawyers and professional historians use historical texts for quite different purposes. Historians typically seek to paint a "contextualized, complexified, multivalent, ironic, contradictory, historicized" picture of a horizontal slice of the past. Their chief goal is to capture the pastness of the past, "the irretrievability and differentness" of prior eras. A history that stresses continuities threatens to violate contemporary historiographical norms by riding roughshod over incommensurability. 180 The emphasis on contextualization causes historians to highlight the fact that, even where themes persist over time, shifts in social and intellectual contexts mean that even

174. White, Law as Rhetoric, supra note 5, at 691.
176. White, Law as Rhetoric, supra note 5, at 684.
177. Id.
178. Id. at 698.
179. Perhaps the most sustained and interesting discussion of this issue is Laura Kalman, The Strange Career of Liberal Legalism 167-246 (1996) (containing a chapter entitled "Lawyers v. Historians").
the same phrase can mean something quite different when used in texts written a century apart.

Lawyers, on the other hand, typically cite history as authority for a proposed legal conclusion. Conservatives use history in narratives of a fall from the True Way, as in the arguments about original intent or in a narrative of progress, as in Dukeminier and Krier's discussion of feudal history. Liberal lawyers often use history to justify legal change on the grounds that the original reasons for a legal rule have disappeared, so that the rule now needs updating. In each case, "lawyers want to recover a single authoritative meaning from a past act or practice" in order to use history as authority or precedent.183

A pragmatic approach to history borrows some elements from each type of historical practice. Like the traditional legal orientation, the pragmatist seeks to recover a usable past; thus the stress is on continuities rather than on "a dead past . . . unlike the present." But a pragmatist seeks to recover not a single authoritative meaning to cite as precedent, but the complexity of American traditions: the roads less traveled by, the interpretations of our tradition that lost as well as those that won. Exactly a decade ago, the noted historian Joyce Appleby called for a new American constitutional history:

The idea of looking at the history of the Constitution as a fight between the heirs and the disinherited opens up some interesting perspectives. First of all because there was an American heritage—a national trust fund of political ideals—there were the roles of heirs and disinherited to be played out. That explains the loyalty of the disinherited to the Constitution and answers the question of why it is that the same Constitution that has been a bastion for the elite has also been a vehicle for reform.186

The goal of a pragmatic history of property is "to turn inherited legal doctrine to practical advantage," to rewrite the history of our traditions to include the image of property as forty acres and a mule as well as the intuitive image of absoluteness.

The difference between this project and "real" history is often misdescribed. The difference is not one of presentism: all history involves a fusion of horizons in which historical materials are interrogated to ask contemporary questions about contemporary life.188 Yet the fundamental

183. Id.

184. Although the focus is on continuities, the pragmatic approach differs in important ways from genetic history as traditionally practiced (e.g., of "our Anglo-Saxon liberties"), which stresses only continuities. Classic genetic history misses completely the way keywords and rhetorics transmute over time as different elements blur out, pop forward, or combine into fleeting mixtures or relatively stable compounds (e.g., possessive individualism).

185. See Gordon, Critical Historicism, supra note 182, at 1025.


187. Id. at 810.

188. Williams, supra note 115, at 643.
focus is different. Professional historians' chief goal is to understand the past. Mine is to change the future.

III. REPUBLICAN VISIONS OF PROPERTY: PROPERTY AS A STABLE STAKE IN SOCIETY

Anyone who talks about republicanism today fights the pervasive sense that it is out of fashion. Historians fell in love with republicanism in the 1970s and early 1980s, legal scholars did so slightly later. Historian Daniel Rodgers' 1992 assault on both legal and historical scholars' use of republicanism leaves those who use it on the defensive. I will first discuss how the lessons gleaned from the republican revival of the 1980s can inform our approach to republicanism today. I will then explore three major variations on the theme of republicanism that have played important roles in American property law.

A. The Career of a Concept Revisited

The sense among legal academics that republicanism is passe stems from the 1980s. During that period, republicanism was used in three ways that ultimately led to widespread dissatisfaction. First, influential constitutional law scholars used republicanism to promise privileged access to an objectively ascertainable "common good" in ways that ultimately proved indefensible. Other authors set up an artificial and unconvincing dichotomy between republicanism and liberalism that was sharply criticized by historians. Finally, republicanism came under attack because it did not fit the received model of a "tradition."

The most prominent use of republicanism in the republican revival in the law was by constitutional theorists Frank Michelman and Cass Sunstein. Both sought to challenge interest group pluralism, which used the imagery of possessive individualism to describe politics as the process of interest groups pursuing their own self-interest. The traditional Progressive alternative—of regulation in the public interest—had come to seem outdated and discredited. Republicanism offered an alternative vision of citizens who eschewed their selfish interests in favor of the common good. In a very early formulation, published before the republican revival got

189. The most influential recent essay reviewing republicanism is Daniel T. Rodgers, Republicanism: The Career of a Concept, 79 J. Am. Hist. 11 (1992). Rodgers cites to earlier reviews, most of which are more receptive to republicanism.
190. See id. at 33 (stating that law journals were reporting a "republican revival" in legal theory by the late 1980s).
191. See id. at 34 (stating that as republicanism "was catching up the imagination of more and more historians, explaining so much, it was quietly coming apart at its core").
192. See id. at 11.
193. See Cass R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 32 (1986) [hereinafter Sunstein, Interest Groups] (discussing various methods by which corruption leads into the elimination of civic virtue and the idea of pluralism which allows politics to mediate the struggle among self-interested groups for scarce political resources).
underway, Michelman already articulated the promise of republicanism in Progressive and objectivist language: the "public-interest model depends at bottom on a belief in the reality—or at least the possibility—of public or objective values and ends for human action." By the later 1980s, Michelman’s objectivism had been shaken by a shift in philosophical commitments away from the foundationalist belief in an objective common good. Yet Michelman—and Cass Sunstein, who joined Michelman in embracing republicanism in the mid-1980s—still found themselves powerfully attracted to it. 

In his initial article on republicanism and in the constitutional law casebook that followed it, Sunstein defined “the prerequisite of sound government [as] the willingness of citizens to subordinate their private interests to the general good.” This article included repeated references to "a more or less objective public interest" and "a public good that is distinct from the struggle of private interests," and, finally, the statement that: "There is, in short, something like a ‘common good’ or ‘public interest’ that may be distinct from the aggregation of private preferences or utilities." Note that Sunstein, in this article, used the republican "common good" formulation as interchangeable with the Progressive "public interest" formulation. Both Sunstein and Michelman used republicanism in the search for objective foundations of justice, so the need remained acute for an objective common good for the judiciary or legislature to enforce.

Michelman and Sunstein worried from the beginning about their claim of an objective common good. In his initial article, Sunstein noted that it was hard “to argue for the existence of a unitary public good, especially in a society consisting of disparate groups with competing

197. Id. at 64.
198. Id. at 68.
199. Id. at 82.
200. Sunstein at times identifies republicanism explicitly with Kant. See Cass R. Sunstein, The Republican Civic Tradition, Beyond the Republican Revival, 97 Yale L.J. 1539, 1548-49 n.202 (1988) [hereinafter Sunstein, Beyond the Republican Revival]. "The republican belief in deliberation counsels political actors to achieve a measure of critical distance from prevailing desire and practices, subjecting these desires and practices to scrutiny and review." Id. "Here there is a connection between republicanism and conceptions of politics associated with Kant," he continues in a footnote. Id. at 1549 n.46. Sunstein also cites extensively from Rawls for an image of deliberation that "embodies substantive limitations that in some settings lead to uniquely correct outcomes." Id. at 1550. Michelman also at times linked his republicanism to Kant. See Fallon, supra note 195, at 1725 (discussing Michelman’s brand of republicanism and its relation to Kant).
201. Kalman, supra note 179, at 67.
Michelman was even more apprehensive. While he had felt comfortable openly asserting a unitary common good in 1978, ten years later Michelman had gone (with Rawls, whose theory he initially embraced) through Rawls's well-publicized shift from a foundationalist-sounding A Theory of Justice to a nonfoundationalist theory of overlapping consensus. Though Michelman occasionally still referred to the common good as an objective value, or as an "objectivist moment," most often he stated his goal as achieving "a process of normative justification without ultimate objectivist foundations."

Michelman and Sunstein's problems compounded when their critics began to point out the strong strain of elitism in classical republicanism. Historians such as Linda Kerber and Hendrik Hartog, as well as law professors such as Kathleen Sullivan, Derrick Bell and Preeta Bansal, and Stephen Feldman, pointed to the exclusionary strain of republicanism, which ensured agreement on what constituted the common good by limiting citizenship to relatively affluent white men. Michelman and Sunstein, chastened, acknowledged this in the Yale Law Journal symposium that simultaneously signaled republicanism's arrival and the

202. Sunstein, Interest Groups, supra note 193, at 84.
204. See Michelman, Political Markets, supra note 194, at 149 (stating that the political interest model depends upon public or objective values).
205. Id.
207. See Linda K. Kerber, Making Republicanism Useful, 97 Yale L.J. 1663, 1664 (1988) (noting how classic republicanism favored only the small minority of individuals who owned property).
208. See Hendrik Hartog, Imposing Constitutional Traditions, 29 Wm. & Mary L. Rev. 75, 76 (1987) (stressing the classical republican view that a small and exclusive group is a necessary prerequisite for a participatory citizenship).
211. See Stephen M. Feldman, Whose Common Good? Racism in the Political Community, 80 Geo. L.J. 1835, 1836 (1992) ("Politics according to republicans . . . should provide an opportunity for citizens to participate in a communal dialogue that identifies the common good.")
beginning of its downfall.

Both Michelman and Sunstein began to distance themselves from republicanism in this symposium. Sunstein stressed that his was a “liberal republicanism” that melded republican virtues with a liberal insistence on equality; 213 he also shifted his central focus from republicanism to “deliberative democracy.” 214 Michelman also distanced himself from republicanism, shifting from the old-fashioned transcendence of the “public interest” to Habermas’ neo-transcendence and pragmatism. 215 In short, both Michelman and Sunstein ultimately shifted their primary focus from classical republicanism to the work of modern theorists (of deliberative democracy or the ideal speech situation) in search of a language in which to posit that all sensible people would (often, if not always) agree.

The lesson of the Michelman/Sunstein strand of the republican revival is that republicanism cannot serve, in a nonfoundationalist age, to establish the existence of a substantive common good as the basis for judicial review or for other purposes. The question of how to defend substantive judicial decisionmaking in a nonfoundational age is one that republicanism is ill-suited to answer. If one’s approach is to shift from a focus on substance to a focus on what procedures will assure one of good substantive decisions—not my instinct but a common one—surely Habermas is more on point than Harrington. And if one’s goal is to protect sexual privacy, as Michelman sought to do in Law’s Republic, 216 then surely liberalism’s insistence on individual rights in general and sexual freedom in particular is more suitable than a proceduralized and Habermas-ed republicanism.

A second use of republicanism at the height of the revival was to set up an abiding dichotomy between republicanism and liberalism at the

---

213. Sunstein, Beyond the Republican Revival, supra note 200, at 1541 (arguing for a form of republicanism which is not “antiliberal”).
215. See Frank I. Michelman, Bringing the Law to Life: A Plea for Disenchantment, 74 Cornell L. Rev. 256, 257-58 (1989) (stressing that politics is comprised of pragmatic decisions concerning questions of value); Michelman, Law’s Republic, supra note 212, at 1495 (distinguishing classical republicanism from a new form which extends political participation to previously unrepresented groups). For an astute study of this topic upon which I have relied, see Feldman, supra note 211.
216. See Michelman, Law’s Republic, supra note 212, at 1494 (discussing the Supreme Court’s constitutional analysis in Bowers v. Hardwick).
217. See Sager, supra note 206, at 920 (“[A] reformulated republicanism which seems bent on justifying items on the traditional liberal agenda in terms that invoke aspects of the republican sensibility seems in the end to be a rather awkward competitor with liberalism itself.”).
heart of American constitutional law. The most dramatic example was Morton Horwitz's *Republicanism and Liberalism in American Thought*, which used republicanism to critique a liberalism that promised a "neutral night-watchman state." Legal historian Hendrik Hartog responded skeptically to the notion "that liberalism and republicanism are useful categories to define the primary continuing traditions of conflict in two centuries of American constitutional history." Hartog pointed out that republic and liberal themes typically are mixed: "Much of the impressive recent work has suggested the continuing availability of republican categories of thought for a variety of groups in constitutional opposition to mainstream liberal doctrines.

Hartog was unconvinced, however, that "the vocabulary used by these groups was necessarily antiliberal simply because it played on republican themes." Hartog also pointed out that a tight focus on the republican themes often causes people to overlook the liberal ones.

More importantly, I fear that the fashion of investing republicanism with the colors of our official opposition discourse carries definite political costs. Such an assumption may blind us to the political and moral ambiguities that republicanism traditionally has borne. It may hide alternative voices and alternative traditions. It may keep us from recognizing the transformative and destabilizing visions that are a part of liberalism.

Mark Tushnet offered another version of the republicanism versus liberalism story in *Red, White and Blue*. Despite careful disclaimers that the republican and liberal traditions are often combined and that republicanism is too distant and elitist to be a viable candidate for adoption, Tushnet nonetheless consistently turns to republicanism for alternatives to a liberal tradition purged of many of the "virtues" recent historians have found in it. Tushnet ultimately falls into many of the traps Hartog warns against. Although Tushnet himself warns that liberalism

---

218. See Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 Win. & Mary L. Rev. 57, 58 (1987) (suggesting that a method to understanding the debate between republicanism and liberalism is to consider times when American political thought was dominated by the idea of a "neutral, night watchman" state).


220. *Id.*

221. *Id.*

222. See *id.* at 78 (warning against blindly focusing on republicanism and, in so doing, ignoring ideas of liberalism).

223. *Id.*


225. *Id.* at 19.

226. *Id.* at 6-7, 10-15, 40-41, 106-07, 148, 186-87, 274-76, 281-82, 290-91; see also Kloppenberg, *supra* note 4, at 9 (stating that the principles of autonomy and popular sovereignty have been enshrined in American imagination and have secured liberty and democracy throughout the nation's history).
and republicanism are often mixed, he does not explore any specific mixtures; instead, he consistently treats them as alternatives. And, although Tushnet does not shy away from republicanism's exclusionary potential, neither does he explore the potentially transformative elements within liberalism. Finally, Tushnet's virtually exclusive focus on republicanism and liberalism deflects his vision from alternative voices in American history that have been used to challenge liberal individualism. Most notably, Tushnet ignores the long history of demands for equality in religious language which had the effect of reigning in liberal materialism. (Instead, he discusses religion only in reference to republicanism.)

A third major message of the revival was that republicanism did not fit into the received definition of a tradition. Mark Tushnet articulated this position most explicitly. He noted that complexes of ideas may start out as a coherent whole but then,

the coherence of the whole may dissolve. Successors orient themselves to the tradition by identifying some elements in their predecessors' thought to which they continue to adhere and disregarding or explaining away other elements in that thought which they feel compelled to reject. Viewed in this light, republicanism as a tradition would consist of the orientation that successive generations had toward the historical complex of ideas now characterized as the republicanism of the late eighteenth century.

In other words, Tushnet proposed to abandon the conventional requirement that a tradition be a coherent whole, but he continued to insist that a tradition can only be defined by people consciously orienting themselves towards a complex of ideas. Under this test, republicanism does not qualify as a tradition because "few people in any generation after the founding conceived of themselves as having the requisite relation to [it]." Whatever linkages today's historians can find between elements of late-eighteenth-century republican theory and the concerns of artisans, peasants, and the like," to Tushnet it seems "indisputable that those people did not orient themselves to the republican tradition."

Do people have to consciously orient themselves towards the classical

---

229. See Kloppenberg, supra note 4, 12-14 (noting that religion contributed greatly to the shaping of American culture).
230. Tushnet, Red, White, and Blue, supra note 224, at 274-75.
232. Id.
233. Id. at 95.
version of republicanism in order to be influenced by it? They do not. To cite Daniel Rodgers once again, the strength of our tradition lies in their ability to “trail associations” and to mean different things to different people.\(^\text{234}\) Rodgers’s astute assessment of political rhetoric in *Contested Truths* shows the need to shift away from a search for “pure” traditions. Indeed, as historian Gordon Wood has pointed out, republicanism never existed as a pure tradition in America.\(^\text{235}\) By the time of the Revolution, the manly, militaristic virtue of classical republicanism had transmuted into “the new social virtue” that is often associated with the Scottish Enlightenment, but which drew from religious rhetoric as well.

Once the focus shifts from whether people are consciously oriented towards a tradition to a focus on keywords and rhetorics that often function unconsciously, the notion of a tradition changes. Replacing a canon-based study of “pure” traditions is a focus on language in context, on Protean traditions that transmute from one form to the next, often melding keywords from distinct traditions in the process.

The confusion over whether republicanism is a tradition reflects, in part, confusion over whether the different uses of republicanism need to share a common element.\(^\text{236}\) The notion that categories need to share one or more common elements in order to make sense is an old philosophical mistake. As the philosopher Ludwig Wittgenstein pointed out long ago, this is not the way language works. Categories often cohere through family relationships rather than by sharing a central core.

The debate over whether republicanism is a tradition also reflects an erroneous assumption that only clear constructs with a stable essence are useful. As Wittgenstein pointed out, vague concepts are often serviceable. To highlight the usefulness of vague concepts, Wittgenstein discusses the vagueness of the concept of a game.

One might say that the concept “game” is a concept with blurred edges.—“But is a blurred concept a concept at all?”... “If I tell someone, “Stand roughly here”—may not this explanation work perfectly? And cannot every other one fall too?\(^\text{237}\)

If concepts are fuzzy, sometimes this signals their uselessness; but at other times the fuzziness provides a key to how they are used. Republicanism is one such fuzzy but evocative concept. “There is not a more unintelligible word in the English language than republicanism,” John Adams declared in 1807.\(^\text{238}\) “Republicanism,” as Rodgers has asserted, “had its gravity sometimes in virtue, sometimes in independence, sometimes in con-

\(^{234}\) Rodgers, *supra* note 10, at 6-7.


\(^{236}\) Hartog, *supra* note 208, at 75.


\(^{238}\) Rodgers, *supra* note 189, at 38 (quoting John Adams).
sensus, sometimes in opposition to capitalism or to patriarchy." But this does not prove its incoherence; instead, it shows that ambiguity has always been integral to the grammar of the republicanism.

Ironically, Rodgers, a leader of the assault on republicanism, provides one of the best templates for an alternative approach to a study of the keywords and rhetorics "by which community and culture are established." Rodgers concludes an essay attacking republicanism with the conclusion that it was not a "tradition . . . . Without a name except a name of art applied long after the fact, without lasting institutions and the ability to command explicit loyalty, without, in short, a consciousness of itself, it hardly fits the term." Like Tushnet, Rodgers sets up an overly rigorous notion of tradition in order to announce that republicanism has failed the test. But if the goal is a pragmatic assessment of "stock of arguments and assertions with life in them" (to quote Rodgers himself), then republicanism remains an important resource for studying the rhetoric of property.

In the treatment of republican rhetorics of property that follows, I incorporate the lessons of the republican revival in four basic ways. First, I do not look to republicanism to justify contemporary judges' ability to perceive an objective common good, as did Sunstein and Michelman in their early articles on republicanism. Second, I do not set up republicanism in opposition to liberalism. Third, in contrast to earlier revivalists who often treated liberalism as if it were synonymous with possessive individualism, I clearly identify possessive individualism as one theme among others in liberalism. Finally, I do not attempt to capture a "pure" republicanism, but instead I stress the Protean quality of republicanism and focus on how three different strains of republican rhetoric meld with keywords of another tradition (liberalism, domesticity, and religion and Scottish moral philosophy) into a compound with the potential to challenge the intuitive image of property.

239. Id. at 32-33.
240. Id. at 38.
241. White, Law as Rhetoric, supra note 5, at 684.
242. Rodgers, supra note 189, at 37.
B. Republican Rhetorics of Propere

As many commentators have noted, republicanism is not one thing. "With only a little loss of accuracy, [republicanism] could be said to have embraced all those thinkers who thought that political power should be exercised by the people or their representatives, and not by a single individual with royal prerogative power." So long as the key political question was whether the body politic should be ruled by kings or not, the differences among republicans mattered very little. Once that threshold issue was resolved, however, the differences among republicans took on greater importance. In this Subsection, my goal is to introduce the novice to the keywords of republicanism and to schematize republicanism into two strains, egalitarian and elitist, which use the same basic vocabulary to send very different political messages.

The key theme in both strains is the need to foster a virtuous citizenry capable of pursuing the common good to prevent the republic from falling into tyranny. My focus is not on republicanism as a theory of government, but on republicanism as a theory of property. According to republican theory, property gave men (masculine gender intended) the indepen-


246. See Alexander, Fragmented Survival, supra note 244, at 76; Alexander, Time and Property, supra note 244, at 273-76. Notably lacking in my ideal type is eighteenth century historians' focus on republicanism as representing the pre-modern quality of eighteenth century thought. See White, Heracles' Bow, supra note 5, at 10. Also lacking is the emphasis on public deliberation that lay at the core of what constitutional scholars, notably Michelman and Sunstein, sought from republicanism. Obviously, my selectivity reflects my sense of what is useful to glean from republicanism to focus a discussion of the rhetoric of property.

247. See Kerber, supra note 207, at 1668-70 (describing republicanism as patriarchal). Classic studies of republicanism and gender include Hanna Fenichel Pitken, Fortune Is a Woman: Gender and Politics in the Thought of Niccolo Machiavelli (1984); Ruth H. Bloch,
dence to pursue the common good of the "commonwealth;" without property, men fell into venality and subservience. "Dependence begets subservience," asserted Thomas Jefferson: note the linkage of property and power.\textsuperscript{248} This theme is important because today the accepted languages for talking about the linkage of property and power—Marxism and postmodernism—too often consign their speakers to a marginalized fringe. In this context, tying the notion that property gives power over people to Thomas Jefferson seems an attractive alternative.\textsuperscript{249}

Republican rhetorics can be schematized into two strains: elitist and egalitarian. The elitist version proposed to create a republic run by virtuous citizens by eliminating from the franchise all those whose lack of property made them virtueless, \textit{i.e.}, subject to venality and subservience. (These included women, slaves, and unpropertied white males.)\textsuperscript{250} In the egalitarian version, a virtuous citizenry is fostered through widespread distribution of property in relatively small parcels, so that every citizen gains self-sufficiency and therefore virtue.\textsuperscript{251} A central tension in the egalitarian version is an ambivalence about redistribution: widespread property ownership seems clearly desirable, but redistribution appears to threaten the stability that creates the independence vital for the republic's survival.\textsuperscript{252}

Of the strains of republican rhetoric described below, the first two tap the egalitarian republican insistence on the widespread distribution of property. The third taps the republican conviction that property rights should be designed to achieve the common good.


\textsuperscript{250} For an insightful description of the elitist version, see Kerber, \textit{supra} note 207, at 1664 (discussing the early American political ideology which favored the recognition of a few people in control of the political world at the cost of disenfranchisement to the many).

\textsuperscript{251} See Alexander, \textit{Time and Property,} supra note 244, at 285-84; Katz, \textit{supra} note 24, at 475.

\textsuperscript{252} For a discussion of how Jefferson dealt with this tension, see Katz, \textit{supra} note 24, at 476-81.
C. Republicanism and Social Dissent: Melds of Liberalism and Republicanism

Property is so important that everybody should have some of it.

Jim Hightower, Former Texas Commissioner of Agriculture, now talk show host

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. “Necessitous men are not free men.”

Franklin D. Roosevelt, 1944 State of the Union Address

Linda Kerber, who notes “the continuous presence throughout the history of American dissent of the rhetoric of a commonwealth of cooperation and civic virtue,” contrasts classical republicanism with the egalitarian strain. While “classical republicanism emphatically favors the propertied few,” republicanism also has been used by the Many. In this tradition of social dissent, republican language is married to a liberal insistence on equality.

Historian Stanley Katz finds this strain of egalitarian rhetoric in the thought of Thomas Jefferson. Jefferson, of course, was a slaveholder and a man of property. But he also believed that property was so important that everyone should have some of it. In the constitution Jefferson drafted for Virginia, he showed his concern for the broad distribution of property: “Every person of full age neither owning nor having owned [fifty] acres of land, shall be entitled to an appropriation of [fifty] acres or to so much as shall make up what he owns or has owned [fifty] acres in full and absolute dominion . . . .” Jefferson also proposed the abolition of the two

---

253. For astute studies of republicanism’s elitist elements, see Alexander, Commodity and Property, supra note 243 (arguing that republicanism is part of a broader tradition of proprietary thought); G. Edward White, The Marshall Court and Cultural Change, 1815-35, in III-IV The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States (1988).

254. See Kerber, supra note 207, at 1672. Greg Alexander argues that the various expressions of what I call “egalitarian republicanism” do not form a “continuous” or “coherent tradition.” Alexander, Fragmented Survival, supra note 245. This is probably true, but (as the text makes clear) I think the question of whether or not a “coherent tradition” is at work is the wrong question to ask. For me, the important question is whether an analysis of republicanism can shed light on the “trails of association” that follow the words speech writers (and lawyers) “still zing through the air, counting on something in us to nod in assent.” Rodgers, supra note 189, at 16.

255. Kerber, supra note 207, at 1664.

256. See Katz, supra note 24, at 273. Let me stress again that my argument is not that eighteenth century republicanism in general conformed to the picture I will paint of egalitarian republicanism. As G. Edward White and Gregory Alexander have shown, it did not. See supra note 253. My goal instead is to gather together some strains of republican thought that gelled in the nineteenth century into the tradition of social dissent. The Katz article implies this may have some validity from the viewpoint of the historical conventions. Even if it does not, it is an important project from the viewpoint of a pragmatic theorist.

257. Thomas Jefferson, The Virginia Constitution: Third Draft of Jefferson, in 1 The
estates that had formed the basic legal infrastructure of aristocracy in England: the fee tail and primogeniture. Jefferson also believed that "every emigrant to the West must be able to take up and hold securely the lands he needed," a view expressed in the Northwest Ordinance of 1787, the Louisiana Purchase of 1803, and in his argument that the Virginia legislature, rather than the Crown or land speculators, should hold title to land west of the mountains and should sell it in small parcels for minimal fees.

Jefferson did not, Katz is careful to point out, advocate open redistribution of existing property. As Jefferson wrote in a 1785 letter from France: "I am conscious that an equal division of property is impracticable. But the consequences of this enormous inequality producing so much subdividing property, only taking care to let their subdivisions go hand in hand with the natural affections of the human mind." In most situations, and certainly in his own country, Jefferson felt that land could be redistributed by progressive taxation, by broadly distributing land on the frontier, and by redesigning inheritance laws to prevent large concentrations of land. But Jefferson also expressed a very tentative sense that in some situations, redistribution might be required:

Whenever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as the common stock for man to labour and live on. If, for the encouragement of industry we allow it to be appropriated, we must take care that other employment be furnished to those excluded from the appropriation. If we do not, the fundamental right to labor the earth returns to the unemployed. It is too soon yet in our country to say that every man who cannot find employment but who can find uncultivated land, shall be at liberty to cultivate it. But it is not too soon to provide by every possible means that as few as possible shall be without a little portion of land. The small landowners are the most precious part of the state.

If Thomas Jefferson opposed redistribution, the same was not true of these Americans (and sympathizers) who subscribed to the egalitarian tradition of social dissent. Thomas Paine, for example, proposed a direct redistribution of wealth through an inheritance tax levied on land. The funds collected would be distributed as a patrimony to people reaching the

---

259. See id. at 472-73; see also Allan David Heskin, Tenants and the American Dream: Ideology and the Tenant Movement 5 (1983) (describing Jefferson’s fear that, without reform, land monopoly would increase).
261. Id.
age of majority, ensuring independence and therefore virtue, as well as to people who reached fifty and were presumed to be unable to continue working. Sean Wilentz has documented the way "middling" merchants and artisans in late eighteenth and early nineteenth century New York created a discourse that "rested largely on four interlocking concepts" of republicanism:

[F]irst, that the ultimate goal of any political society should be the preservation of the public good, or commonwealth; second, that in order to maintain the commonwealth, the citizens of a republic has to be able and willing to exercise virtue, to subordinate private ends [the public good]; third, that in order to be virtuous, citizens had to be independent of the political will of other men, lest they lose cite of the common good; fourth, that in order to guard against the encroachments of would-be tyrants, citizens had to be active in politics, to exercise their citizenship.

To these elements drawn from republicanism, New York merchants and artisans added elements drawn from liberalism and religious sources. One striking example is Thomas Skidmore, who argued around 1830 for open redistribution of property. Skidmore began with the premise that each person has an equal claim to the Creator's endowment and that all existing property holdings were illegitimate:

Is the work of creation to be let out to hire? And are the great mass of mankind to be hirelings to those who undertake to set up a claim, as government is now constructed, that the world was made for them? Why not sell the winds of heaven, that man may not breathe without price? Why not sell the light of the sun, that a man should not see without making another rich?

Skidmore was immoderate, not only in his insistence on immediate redistribution, but in his aggressive extension of equality to include blacks and women.

Few in the tradition of social dissent have taken the egalitarian vision as far as Skidmore. Most were content to insist on a widespread distribution of property rights, rather than on equal portions for all. Nineteenth century federal land policy became the key institutional expression of the egalitarian strain.

That policy showed that the farther the idea of classical republicanism "receded from the dynamic reality of the 19th century [market] economy, the more Americans liked to think of themselves in its terms." Two of
the purer expressions of the classical republican vision were the Homestead Act of 1867, which distributed federal lands to individual settlers in small hundred-acre parcels, and the homestead exemptions, which typically exempted the family home and other assets from the claims of creditors. These policies were driven by the sense that Americans have a natural right “to live and to be upon this earth . . . to share the products of the earth, and hence a right to a portion of the earth,” to quote one advocate for homestead exemptions in 1846.268

The most poignant expression of the egalitarian strain was the freedmen's cry of “forty acres and a mule.” After the Civil War, the freedmen carried on the earlier assumption that citizenship entailed not only political rights but also economic independence. Eric Foner has portrayed in poignant terms the freedmen’s disillusionment, as it became apparent that the federal government had no intention of defining the freedmen’s citizenship in relation to property ownership.269 “De slaves expected a heap of freedom dey didn’t git,” said one freedman.270 The Freedmen's Bureau began itself making land grants to former slaves; by the end of 1865, some 40,000 freedmen had been settled in abandoned or confiscated lands. But President Andrew Johnson reversed this policy and ordered virtually all Confederate lands restored to their former owners.271

Other expressions of the republican egalitarian vision include the Republicans’ vision at the time of the passage of the Thirteenth Amendment272 and “free labor’s” vision in the Gilded Age.273 No doubt there are many more as well.274

In some of its manifestations, the tradition of social dissent I have called “egalitarian republicanism” links the need for the widespread distribution of property with attacks on the concentration of wealth and power. From Jeffersonian and Jacksonian social critics, to the Populists,275
and up to the present, this strain of rhetoric attacks corporate power, using language originally designed to attack the luxury and corruption of eighteenth century aristocrats.276

The point is not to trace an unvarying tradition consciously transmitted, but to point out the family resemblances and keywords that emerge and reemerge time and time again in this tradition of social dissent. Recent contributions to this tradition include Frank Michelman’s proposal to incorporate the egalitarian tradition into constitutional law,277 a project distinct from, and much more convincing, than his original use of republicanism described above.278 Lea Vander Velde’s proposal to interpret the Thirteenth Amendment as giving a floor of minimum rights as well as an unobstructed sky of opportunities is another contribution to the social dissent tradition.279

The most influential modern property theorist to carry on this tradition is Charles Reich, whose The New Property—one of the most-often cited law review articles ever written280—spawned a line of Supreme Court cases281 and was perhaps the most influential redistributive argument of the past half century. It is fashionable today to say that Reich’s “new property” had little impact. In my view, however, the fact that Reich’s sweeping claims ultimately were rejected as the Supreme Court swung to the right, is less significant than the fact that they ever were embraced at

276. The language of corruption is closely related to the republican language of virtue. See William E. Forbath, Law and the Shaping of the American Labor Movement 13 (1991) (discussing the goal of the Knights of Labor to prevent the “tyranny” of corporate power by helping make the worker independent and virtuous).

277. See Frank I. Michelman, Possession vs. Distribution in the Constitutional Idea of Property, 72 Iowa L. Rev. 1319, 1330-31 (1987) (arguing that we have inherited a Constitution comprised of both republican and democratic principles).

278. See supra Section III.A.


280. See Charles Reich, The New Property, 73 Yale L.J. 733 (1964); Fred R. Shapiro, The Most-Cited Law Review Articles, 73 Cal. L. Rev. 1540, 1549 (1985) (stating that The New Property is fourth most cited law review article). Note that I do not discuss the work of the two most prominent legal scholars to carry on the tradition of republicanism as a language of social dissent, Frank Michelman and Cass Sunstein, because their focus is not on property.

all. Reich did what few others have accomplished: he held the intuitive image at bay (albeit briefly) and made sweeping redistributive arguments plausible for those who wished to embrace them. Why did Reich’s innovative theory achieve such resonance and plausibility?

In the tradition of egalitarian republicanism, Reich used a meld of liberal and republican language. Once the two strands are separated, the article can be seen to work on two different levels. Reich begins with the liberal language of free-standing individuals with rights threatened by government power: “The institution of property guards the troubled boundary between the individual and the state.” This theme predominates throughout Reich’s article: “Ahead there stretches—to the farthest horizon—the joyless landscape of the public interest state. The life it promises will be comfortable and comforting. It will be well planned—with suitable areas for work and play. But there will be no precincts sacred to the spirit of individual man.” Reich’s conclusion is framed in the rhetoric of privacy: “[T]here must be a zone of privacy for each individual beyond which neither government nor private power can push—a hiding place from the all-pervasive system of regulation and control.”

Note the Foucauldian overtones of “the all-pervasive system of regulation and control.” Note, too, that the standard liberal theme with which Reich began (“the troubled boundary between the individual and the state”) has transmuted into “a zone of privacy” threatened not only by state, but also by private power. This subtle transformation of standard liberal themes suggests that the imaginative center of The New Property is Reich’s sexuality, which (particularly in 1964) may have given him insight into the need for “a precinct[] sacred to the spirit of individual man” that was protected not only from public, but also from private power.

If this desire to create a private space predominates Reich’s work, it is melded with language very different in focus. Reich argues that a central purpose of the institution of property is to make citizens self-sufficient. He recommends that welfare and other governmental benefits be considered property rights intended “to preserve the self-sufficiency of the individual.” This language reflects a republican focus on preserving a citizen’s independence in order to “allow him to be a valuable member of a family and a community; in theory they represent part of the individual’s rightful share in the commonwealth.” Reich not only uses a keyword of the republican tradition (“commonwealth”), but he also expresses the republican conviction that the purpose of property is to ensure self-sufficiency. When Reich describes why this is important, he quotes framers’ republican

282. Reich, supra note 280, at 734.
283. Id. at 778.
284. Id. at 785.
286. See Reich, supra note 280, at 785.
287. Id.
language: "a power over a man's subsistence amounts to a power over his will."\textsuperscript{288} In his conclusion, Reich advocates "a Homestead Act for rootless twentieth century man."\textsuperscript{289}

In the court opinions inspired by Reich's analysis, the theme of property as providing a stable stake in society and a basis for claims to government benefits, government jobs,\textsuperscript{290} and government housing,\textsuperscript{291} emerges repeatedly. One theme that emerges loud and clear from the "New Property" cases is the need for property to provide a stable stake in society.

Other than Reich's The New Property and its progeny, the republican egalitarian strain has not had much of an influence on American law. Legal historian William W. Fisher III's analysis of pre-Civil War adverse possession law suggests why. Fisher points out that, despite the prevalence of republican egalitarian rhetoric in pre-Civil War political debates over federal land distribution, courts did not utilize republican imagery of man's natural right to land in contemporary adverse possession cases. Fisher concludes that judges apparently felt such arguments "were too dangerous, too threatening to the existing distribution of wealth and power to be incorporated in their deliberations."\textsuperscript{292} Instead, courts constructed a model that intimated that adverse possession enforced the preexisting intent of the true owner and the adverse possessor.\textsuperscript{293} This transparent fiction avoided the charge that courts in adverse possession cases were redistributing property from A to B, by arguing that any change in (or disappearance of) the true owner's bundle of sticks reflected only his own intent.\textsuperscript{294}

Fisher's analysis helps explain the success of "The New Property." Note that Reich's proposal did not deprive any private party of preexisting property rights; in fact, it was framed as a defense of property rights rather than as a challenge to them. The "new property" cases picked up this approach. In Board of Regents v. Roth, the Supreme Court asserted: "[I]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."\textsuperscript{295} Note that the explicit focus is on the stability of property rights, although the rationale justifies redistribution of rights from employer

\begin{itemize}
  \item \textsuperscript{288} Id. at 787.
  \item \textsuperscript{289} Id.
  \item \textsuperscript{290} See Board of Regents v. Roth, 408 U.S. 564 (1972) (discussing a state teacher's challenge of his without-cause dismissal on Fifth and Fourteenth Amendment grounds).
  \item \textsuperscript{291} See Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973) (discussing a tenant challenging her eviction on Fifth and Fourteenth Amendment grounds).
  \item \textsuperscript{292} Fisher, supra note 243, at 179, cited in Berger & Williams, supra note 39, at 510.
  \item \textsuperscript{293} See infra text accompanying notes 475-76.
  \item \textsuperscript{294} This example provides an initial suggestion that property law's characteristic "crystals" may reflect a mutual nonaggression pact between the intuitive image of property as absolute and the social practice of malleable property rights. See Carol Rose, Crystals and Mud in Property Law, 40 Stan. L. Rev. 577, 608 (1983).
  \item \textsuperscript{295} Roth, 408 U.S. at 577.
\end{itemize}
to employee.\textsuperscript{296} Thus, even the most explicit adoption of egalitarian republicanism in contemporary case law simultaneously reassures us that republicanism is not "too dangerous, too threatening to the existing distribution of wealth and power."\textsuperscript{207} Moreover, in the procedural due process cases, the Supreme Court ultimately took away much of the "property" it had previously bestowed in the "new property" cases.\textsuperscript{209}

In summary, the strain of egalitarian republicanism that constitutes the most explicit and comprehensive alternative to the intuitive image of property has had relatively little influence on American law. The tradition of social dissent represented by social critics of the Jacksonian, Jeffersonian, Populist, and other eras has had significant influence, however, in American politics outside of the law. The challenge is how to incorporate this strain into the law without awakening judges' anxiety over redistribution.\textsuperscript{209}

Another strain of republican rhetoric has had a profound influence both on American law and on American politics outside the law: the romance of the single-family house.

\textsuperscript{296} See Daniels, 479 F.2d 1236, in which a court overrode the relevant lease provision to hold that landlords cannot evict without good cause. The court used the right-to-a-stable-stake-in-the-society rationale to protect the stability—not of the landlord's "old property" but—of the tenant's "new property," arguing that Congress intended to grant not only "adequate, safe and sanitary quarters," but also "an atmosphere of stability, security, neighborliness, and social justice." Id. at 1240. Note that even in the absence of explicit republican rhetoric, the court's language is reminiscent of core republican themes, notably, that stable relationships to property are the key to "neighborliness" (and virtue?) and "social justice" (and the common good?).

\textsuperscript{297} See Fisher, supra note 243, at 179, cited in Berger & Williams, supra note 39, at 510.

\textsuperscript{298} See Tribe, supra note 281, § 10-9, at 685 (showing expansion of procedural due process); id. § 10-10, at 694 (showing narrowing of procedural due process).

\textsuperscript{299} This is a complex question, which I will address in a future article on takings law. An important distinction exists between my use of republicanism and that of another strain of the republican revival best represented in the law by Suzanna Sherry. Sherry taps the egalitarian strain of republicanism to argue in favor of a right to education, but she embeds in her discussion a communitarian critique. Sherry argues that contemporary Americans often refuse to link rights with responsibilities and gives as examples welfare policies that do not require recipients to limit fertility and a "woman who starved her 13-week-old baby to death by deliberately failing to feed him [and] claim[ing] that she should be absolved of responsibility because she herself was a victim of abuse." Suzanna Sherry, Without Virtue There Can Be No Liberty, 78 Minn. L. Rev. 61, 72 (1993). These exhortations to virtue appear to lose touch with the central message of the republican egalitarian strain, namely that in cases where material deprivation has eroded social and personal responsibility, the solution is to eliminate the material deprivation, rather than to scold the person whose virtue has been eroded by poverty. Thus, if the young women who are now becoming pregnant felt they were throwing away a future, they would take greater pains to avoid pregnancy; the effective solution is not to scold their current behavior but to give them a future. (This, of course, also assumes they are in control of their sexual encounters, which at times they are not.) Another article by Sherry on republicanism is Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 Va. L. Rev. 543 (1986) (arguing that feminine jurisprudence could accept the command values of Jeffersonian republicanism).
D. The Romance of the Single-Family House: Republicanism Transmuted into Domesticity

[T]he sanctity of the home . . . has been embedded in our traditions since the origins of the Republic. *Payton v. New York* 300

Republican egalitarian rhetoric has lived on in the tradition of social dissent, but it also transmuted, in Protean fashion, into America's romance with the single-family house. This Subsection will first examine that romance, and then will examine its links to republican egalitarian rhetoric and the ideology of domesticity, a gender ideology that arose after 1780. 301 Unlike the pure form of republican egalitarianism, this hybrid strain of republicanism has had a significant influence on American law. Pinpointing it helps explain two questions that have long troubled property scholars: why the U.S. Supreme Court upheld zoning laws during a period when it was striking down most other regulatory legislation; and why the American law of covenants is such an "unspeakable quagmire." This Subsection ends by revisiting Radin's property and personhood analysis in order to argue that the redistributive strain of personhood analysis is in significant part an expression of Americans' intuition that owning a single-family house is different from owning most other kinds of property.

1. The trance

A key contemporary expression of republican themes emerges in the American obsession with homeownership. A recent Federal National Mortgage Association (Fannie Mae) study found that most Americans are willing to make dramatic sacrifices in order to own a home. 302 Many are willing to take a second job, place young children in child care, live farther away from work, 303 and spend up to half of their monthly income on mortgage payments. 304 In part, this stems from the fact that homeownership is the only effective form of wealth accumulation for Americans with modest incomes. 305 Yet the survey stressed that nonfinan-

301. *See* Nancy F. Cott, *The Bonds of Womanhood* 63-99 (1977) (discussing the rise of the metaphor of the home as a safe place).
302. *See* Fannie Mae, Fannie Mae National Housing Survey (June 1992) [hereinafter FNMA Survey] (listing some sacrifices Americans will make to own a home).
303. *Id.* at 9.
304. Critical Perspectives on Housing at xiv (Rachel G. Bratt et al. eds., 1986) (noting that 6.3 million Americans paid more than 50% of their disposable family income to cover housing costs).
305. Frank S. Levy & Richard C. Michel, *The Economic Future of American Families Income and Wealth Trends* 63 (1991) (discussing statistics which show the owner-occupied house to be the single most important component of net wealth for the baby boom generation). This obsession is, of course, part of what Radin picks up on in her discussion of property and personhood, as is most evident in her use of the cult of domesticity language when she refers to the "Sanctity of the Home." *See* Radin, *Property and Personhood, supra* note 186, at 991.
cial reasons play a significant role as well. Thirty-nine percent of Americans answered an open-ended question by saying that homeownership gave them a sense of "security, a sense of permanence." The report aptly notes that homeownership "is a metaphor for personal and family security. The sum total of the findings in this survey suggest that owning one's home is, in essence, an empowering act, giving people a stake in society and a sense of control over their lives. Put differently, homeownership strengthens the social fabric."\textsuperscript{306}

The continuing linkage between ownership, citizenship, and the strength of the republic, reflected in statistics that show markedly higher rates of political participation among homeowners than among renters,\textsuperscript{307} is a remarkable resonance of the republican vision. But if the obsession with home ownership carries on themes from the egalitarian republican strain, it also melds them with themes from the ideology of domesticity.

The ideology of domesticity divides the world into separate spheres of home and work.\textsuperscript{308} It depicts men as properly occupied in the public worlds of commerce and politics, and women as properly occupied with providing a refuge for men in the "home sweet home." A full study of domesticity is beyond the scope of this Article. For our purposes, the important theme is the way themes originally expressed in terms of egalitarian republicanism eventually transmuted into themes organized around domesticity.\textsuperscript{309}

Both egalitarian republicanism and domesticity link the distribution of property rights with the health of the political system. As we have seen, egalitarian republicanism calls for the widespread distribution of property, in order to give citizens the independence to pursue the common good, rather than their own selfish interests.\textsuperscript{310} Domesticity retained the linkage between property and good citizens, but shifted the focus away from the political arena, onto the family. Domesticity intimated that the key to creating good citizens lay in the creation of stable families in which mothers (or, later, parents) trained children in the virtues required for a stable society.

"The family and the good citizenship that homeownership is believed to instill are equally idealized and, therefore, equated," concludes anthropologist Connie Perin.\textsuperscript{311} She quotes Calvin Coolidge: "No greater contribution could be made to the stability of the Nation, and the

\textsuperscript{306} FNMA Survey, \textit{supra} note 302, at 10.
\textsuperscript{307} \textit{Id.} at 3.
\textsuperscript{309} For an influential review of the enormous body of literature on domesticity, see Linda K. Kerber, \textit{Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History}, 75 J. Am. Hist. 9 (1988) (discussing the historian's view of the woman's distinct and separate societal role during that time period).
\textsuperscript{310} \textit{See supra} Section III.C.
\textsuperscript{311} Constance Perin, Everything in Its Place 64 (1977).
advancement of its ideals, than to make it a Nation of homeowning families.\footnote{312}

The central imagery is that of a middle-class two-parent family in a single-family house. This is, of course, a class-based, gendered vision that assumes heterosexuality. Americans are quite explicit about the middle-class element of this vision: the love affair with homeownership focuses not on property ownership in general, but on the single-family home specifically. Fully eighty percent of all Americans identify the single-family house with a yard as the ideal place to live.\footnote{313}

This love affair with single-family housing has shaped the American landscape. During the post-World War II building boom, European countries generally built apartments,\footnote{314} while the U.S. was transformed from a nation of renters to a nation of homeowners\footnote{315} by massive tax subsidies to homeowners\footnote{316} as well as the restructuring of home financing by FHA and VA mortgages.\footnote{317} The result is geography dominated by suburbs and a housing market dominated by owners.\footnote{318}

The American obsession with ownership of the single-family house is politically ambiguous. On the one hand, it has resulted in the widespread distribution of property rights—the dream of the republican egalitarian strain. But the dark underside of America's romance with home ownership is the history of the exclusion of blacks\footnote{319} and of the poor from middle-class suburban neighborhoods and entire towns.\footnote{320} The suburbs also represent a physical expression of the cult of domesticity's separate spheres of home and work. Suburbs physically separate homes and workplaces, leaving women and children in suburbs that, during the day, are largely

\footnote{312. Id. at 72 (quoting Calvin Coolidge).}
\footnote{313. FNMA Survey, supra note 302, at 8.}
\footnote{314. Michael Harloe, Private Rented Housing in the United States and Europe 64 (1985) (showing how continental European housing policy was less biased towards homeownership than U.S. housing policy); see also Richard P. Applebaum, Swedish Housing in the Postwar Period: Some Lessons for American Housing Policy, in Critical Perspectives, supra note 304, at 535-545 (showing the commitment of the United States to homeownership and the commitment to apartment building in Europe).}
\footnote{315. George Sternlieb & James W. Hughes, Demographics and Housing in America, 4 Population Bull. 2, 5 (1986).}
\footnote{316. The mortgage interest deduction originated during the Civil War, but it gained importance only when the rate of homeownership rose after World War II, and again with the sharp inflation of housing prices after 1970. See Joan C. Williams, It's High Time to Get Homeowners' Deductions Under Control, 12 Tax Notes 963 (1981).}
\footnote{317. See Berger & Williams, supra note 39, at 60.}
\footnote{318. Perin, supra note 311, at 64, 71-72 (discussing the social value of homeownership).}
\footnote{319. See Douglass S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass 9 (1993) (noting that "middle-class households always attempt to segregate the poor" and, as a result, middle-class blacks and poor blacks lose compared to their white counterparts).}
\footnote{320. See, e.g., Southern Burlington County v. Township of Mount Laurel, 386 A.2d 713 (N.J. 1975) (dealing with a township which used land regulations to prevent certain classes of people from entering the community).}
bereft of men. In its default mode, the rhetoric of homeownership reinscribes traditional white middle class gender roles. The question remains whether this rhetoric can be used alternatively to achieve a broader range of egalitarian goals.

2. The romance with homeownership in American law: Euclid as an example

The obsession with ownership of the single-family house is not only embedded in the American landscape, but also in American law. An important example of its influence is the case of Village of Euclid v. Ambler Realty, which helped create the legal infrastructure of the suburb by upholding the constitutionality of zoning. A closer look at Euclid shows egalitarian republicanism transmuted into the ideology of domesticity.

Paradoxically, in an opinion written by Justice Sutherland, one of the “four horsemen” who struck down nineteenth century worker protective legislation, Euclid upheld land-use regulation at the height of the Lochner era. This fact that has long perplexed commentators. Why did the Supreme Court uphold zoning precisely during the period when it was striking down state health and safety regulation?

The conventional explanation today is that Sutherland upheld zoning out of self-interest, once he recognized it would protect the elite neighborhoods he and most judges inhabited. I suspect this does not

321. See Kenneth T. Jackson, Crabgrass Frontier: The Suburbanization of the United States 300 (1985) (“The dream house was designed around the needs of a bread-winning male and a full-time housewife who would provide her prince with a haven from the cold outside world... [A]lls, the American population no longer fits the stereotype of the nuclear family.”); Margaret Marsh, Suburban Lives (1990) (discussing popular television shows of the 1950s which portrayed a father’s work as remote from the home); Elaine Tyler May, Homeward Bound: American Families in the Cold War (1988) (noting that the home provided a myth of security in the insecure world of the 1950s).

322. 272 U.S. 365 (1926).

323. See, e.g., Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 108-14 (1928) (invalidating Pennsylvania restrictions on corporate ownership of pharmacies); Weaver v. Palmer Bros. Co., 270 U.S. 402, 408-15 (1926) (invalidating state prohibition of “shoddy” in manufacture of bedding materials where other means of protecting health and preventing deception were available); Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 527 (1924) (invalidating Nebraska law requiring standardized weights for loaves of bread and finding it “not necessary for the protection of purchases against ... fraud by short weights”); Adkins v. Children’s Hosp., 261 U.S. 525, 546-48 (1923) (striking down minimum wage laws for women on basis that government wage regulation was needed only within limited categories of activity); Lochner v. New York, 198 U.S. 45, 52-65 (1905) (striking down minimum work weeks for bakers on the basis that government regulation unduly interfered with baker’s right to contract); see also Tribe, supra note 281, § 8-3 at 568-70; id. § 8-4, at 570-73.

324. See Lochner, 198 U.S. at 45. I use the term “Lochner era” to refer to a period in the early twentieth century (roughly from 1905 to the late 1930s) during which the Supreme Court invalidated various federal and state statutes on the theory they violated the liberty of contract. See Tribe, supra note 281, § 8-4, at 570-73.

do justice to the complexity of Sutherland's motivations. Something convinced Sutherland of the need to consider parcels of land as neighborhoods, rather than the free-standing monads envisioned by Locke. What was it?

One hint is the Euclid Court's statement that "the crux of the more recent zoning legislation" is the segregation of residential uses. In the Court's search for policy reasons to allow the unfolding of the suburban form, it relied on precisely the kind of Progressive-era reports it had so often ignored in liberty of contracts cases.

These reports, which bear every evidence of painstaking consideration, concur in the view that segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, etc. With particular reference to apartment houses . . . [which] interfere[ ] by their height and bulk with the free circulation of air and monopolize[ ] the rays of the sun which would otherwise fall upon the smaller homes and bring[] as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the street, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in the more favored localities . . . .

Is it fair to read this passage as upholding the constitutionality of zoning because a key goal of property law is to protect the residential havens where the next generation of citizens are raised? Gone is the republican commitment to property rights designed to protect participation in civic life; in its place is a sense that property rights should protect the neighborhoods where people can create the best society by nurturing virtue in the home. The standard interpretation is that Sutherland was motivated by a desire to protect rich people's neighborhoods. This may well be true, but it overlooks Sutherland's belief in zoning's potential to bring "the privilege of quiet and open spaces for play" to "less favored localities," to bring to ordinary people what wealth delivers to the rich. Sutherland's rhetoric recalls the political dimension of the ideology of domesticity, sometimes expressed as the need for stable homes that will produce responsible citizens (imagery very much at the center of the current debate over "family values").

326. Euclid, 272 U.S. at 390.
327. Id. at 394.
328. Feminists have noted that the typical analysis of Euclid ignores the significance of its focus on raising children. See Marsha Ritzdorf, Whose American Dream? The Euclid Legacy and Cultural Change, 56 J. Am. Plan. Ass'n 386 (1990).
329. For a study of the way republicanism transmuted into domesticity that emphasizes the
This meld of classical republicanism and domesticity proves a powerful combination in many areas of American property law. While its preeminent influence is in the law of zoning, it also structures the law of covenants, although in a far less straightforward way. In the remainder of this Subsection, I will argue that through the law of covenants, U.S. courts have upheld a sweeping system of "dead hand control" that courts are unwilling or unable to articulate as "law" their reasons for doing so, and that these reasons stem from republicanism transmuted into domesticity.

3. The law of covenants

The law [of covenants] is an unspeakable quagmire. American courts have upheld a sweeping system of "dead hand control" through their expansive reading of the law of covenants. Unlike English courts, American courts have enforced covenants at law against successive landowners. Whereas English courts were unwilling to enforce affirmative obligations as equitable servitudes, most American courts were. Moreover, many American courts have even been willing to make up out of thin air residential-only restrictions against owners with no written restrictions whatsoever in their chain of title. American courts' willingness to enforce covenants against successors is all the more


330. I use "covenants" to refer to implied as well as written covenants, in contradistinction to easements.

331. The metaphor of "dead hand control" was coined in the context of estates in land and future interests. In using that term here, I am rejecting the assumption (common within law-and-economics) that covenants represent the intent both of the original parties to the covenant and of the subsequent owners of the burdened property. The notion that people buy a house or apartment because of a given covenant seems a fiction. Often people buy burdened land in spite of the covenant, or because they have not read the documents and do not know about the covenant, or they have no realistic choice because all suitable or affordable housing in the area they want or need to live is burdened by similar covenants.

332. See Rabin, supra note 39, at 489 (introducing equitable servitudes).
334. See Dukeminier & Krier, supra note 39, at 879-89 (applying private nuisance law where a neighbor's home limited the amount of sunlight available to the homeowner).
dramatic because it is a striking instance of "dead hand control," in that covenants running against successors limit future usage of land by upholding the will of a former owner. This tendency violates the truism that Anglo-American courts refuse to enforce "dead hand control." A more accurate statement is that they refuse to enforce it except if the control can be successfully characterized as a covenant.

Our courts' expansive attitude is one striking characteristic of the American law of covenants. Doctrinal chaos is a second. Commentators commonly deride the law of covenants:

The intrepid soul who ventures into this formidable wilderness never emerges unscarred. Some, the smarter ones, quickly turn back and take something easier like the income taxation of trusts and estates. Others, having lost their way, plunge on and after weeks of efforts emerge not far from where they began, clearly the worse for wear. On looking back they see the trail they thought they broke obscured with foul smelling waters and noxious weeds. Few willingly take up the challenge again.537

One famous thicket is the horizontal privity requirement, which mandates that the initial parties to a covenant at law must have a "mutual simultaneous interest" running between them as either landlord and tenant or grantor and grantee. Commentators have long pondered why the enforceability of a covenant against successors should depend upon the relationship of the original covenancing parties.539

The horizontal privity requirement can only be explained in terms of its usefulness in enabling courts to blur the difference between their novel holding that covenants could bind successive owners and the traditional English rule that covenants could bind only successive tenants.540 This blurring was accomplished through the assertion that covenants always had bound parties in privity of estate, without mentioning that only landlords and tenants traditionally had had privity of estate. American courts' extension of privity of estate to include successive owners was a linguistic dodge that got them off the hook from having to give reasons why they were extending the traditional English concept of covenants to allow for extensive dead hand control.

We see the same manhandling of technical terms in decisions involving equitable servitudes. Just as courts misused the term "privity of estate" to enforce covenants at law against successors, courts misused the

336. Property casebooks and commentators traditionally discuss the issue of dead hand control in the context of future interests, where it is declared a sweeping goal of Anglo-American property law to avoid it. The fact that American courts have upheld sweeping dead hand control through the law of covenants is not mentioned. See Dukeminier & Krier, supra note 39, at 299-318.
337. See Rabin, supra note 39, at 489.
339. See id. at 595-96.
340. The horizontal privity requirement, which has been the target of reformers for over half a century, will be omitted from the forthcoming Restatement.
term "easement" to enforce equitable servitudes.

American courts often justified their upholding of equitable servitudes on the grounds that the agreements at issue created "mutual easements."\textsuperscript{341} In fact, they were not easements at common law because they did not fit one of the four recognized negative easements.\textsuperscript{342} American courts nonetheless manipulated the "easement" language to offer legal relief. Instead of saying "this is not one of the four recognized negative easements and so is unenforceable," they said, "in this situation the claimant has an interest in the nature of an easement, so he can recover."\textsuperscript{343} The beauty of this argument is that—like the extension of privity of estate—it allows a court to change existing law without discussing its reasons for doing so.

Both covenants at law and equitable servitudes address the enforcement of written covenants against successors; the manipulation of the term "easement" continues in the context of implied covenants. In the typical implied covenant situation, a landowner is precluded from using land in a residential subdivision for commercial uses, despite the absence of any restrictions whatsoever in his chain of title. Some courts try to give the proposed restriction solidity and legitimacy by associating it with the word "easement" and uphold the implied covenant as an "implied reciprocal easement." This "easement," according to one such court, "runs with the land sold by virtue of express fastening and abides with the land retained until loosened by expiration of its period of service or by events working its destruction . . . . It originates for mutual benefit and exists with sufficient vigor to work its ends."\textsuperscript{344}

Note how the court uses easement language to make the proposed restriction sound bulky and substantial. Again the court wants to sound like it is giving reasons for its decision when it is not. But American courts can not completely avoid giving reasons; when they do so, they compound the confusion. For example, courts waffled for a long time in equitable servitude cases between the "mutual easements" rationale and the contract justification used in the landmark English case of \textit{Tulk v. Moxhay}.\textsuperscript{345}

A final maneuver in implied covenants cases, which will be discussed in greater detail below,\textsuperscript{346} is for courts to argue that they are merely enforcing the intent of the parties (evidently including the intent of the owner of the burdened parcel, who bought unrestricted land and now finds himself unable to use it as he wishes!).

American courts' reliance on clearly fictional intent arguments, their

\begin{itemize}
\item 341. \textit{But see} \textit{Tulk v. Moxhay}, 41 Eng. Rep. 1149 (Ch. 1848) (upholding equitable servitudes on a contract rationale).
\item 342. \textit{See} Berger, \textit{supra} note 333, at 589.
\item 343. Trustees of Columbia College v. Lynch, 70 N.Y. 440 (1877) (distinguishing between equitable rights and legal covenants not running with the land).
\item 345. \textit{See} Berger, \textit{supra} note 333, at 596.
\item 346. \textit{See infra} Section V (discussing intent arguments in property law).
\end{itemize}
manhandling of technical tests, and their wobbling amongst various rationales suggest that courts feel unable to say out loud the actual reasons behind their hell-bent determination to uphold these restrictions. Why?

This pattern of fictions and confusion is understandable because of what is at stake. The question is whether future owners will be able to “do what they want with their land”; American courts’ answer is no. Courts’ willingness to uphold “dead hand control” in the context of written covenants is bad enough; implied covenants go even further and allow courts to redistribute the bundle of sticks, taking commercial development rights away from the owner of the restricted parcel, and giving his neighbors the right to restrict his land to residential use.

The law of covenants has rarely been analyzed as a dramatic exception to the intuitive image of property that owners can “do what they want with their land,” but it is one. The classic explanation for covenants is that they enhance the utility of land:

The continuous widespread use of servitudes indicates their usefulness in efficiently allocating user rights between separately held possessory estates. Buying limited user rights or rights to have neighboring land used in a certain way enhances the utility of one’s own land. . . . The practice of allowing free market transactions to allocate user’s rights contributes to the overall efficient utilization of land. Hence, servitudes tend to allocate user rights efficiently. Because such land use adjustments “run with the land,” they provide the requisite degree of security to encourage capital investments.447

This argument is rarely questioned, which is odd in view of the fact that American courts use utilitarian arguments to justify their enforcement of covenants against successors, while British courts use utilitarian arguments to justify their refusal to enforce covenants against successive owners.448 The sharp contrast between English and American courts’ assessments of utility focuses attention on the importance of the cultural background against which “utility” is judged. Clearly, American courts thought the greatest good would emerge from a system that enforced substantial restrictions on the use of land, while English courts did not. Why the difference?

Conventional legal analysis, content with pronouncements about “public policy” or “social utility,” rarely delves deep enough to illuminate the cultural background behind “commonsense” pronouncements. To understand why American courts were willing “to enforce virtually any form of restriction at equity,”449 their expansive attitude must be placed in cultural context.

---

347. Reichman, supra note 335, at 1184.
348. See id. at 1184-90 (discussing the contrast between British and American courts in the enforcement of covenants against successive owners).
A textual hint of courts' motivation emerges in a case involving not the creation of restrictive covenants, but their proposed termination. Not surprisingly, American courts have proved extraordinarily reluctant to lift subdivision restrictions once they are imposed. The "doctrine of neighborhood change" requires a challenger to prove that not one person in the entire subdivision still benefits from a restriction before a court will lift it.\footnote{350}{See Berger, supra note 333, at 652, 655-66 (sampling the case law and literature on the doctrine of neighborhood change).} Most courts focus closely upon factual issues, but some take a different tack. To quote the Oregon Supreme Court:

We are not prepared to say, in view of the evidence, that the maintenance of this part of Laurelhurst as a residential district is of no substantial benefit to the plaintiff. It is true that it might be more valuable for business purposes, but there are some things in this strenuous age of commercialism that count more than cash. It is her home.\footnote{351}{Ludgate v. Somerville, 256 P. 1043, 1046 (Or. 1927), quoted in Blair v. Edwards Realty Co., 405 P.2d 538, 540 (Or. 1965).}

To unpack this statement requires an understanding of the relationship of republicanism, liberalism, and domesticity. The adage that "a man's home is his castle" starts off with republicanism; it captures both the homestead's role in providing citizens with self-sufficiency and the husband's role in ruling the "little commonwealth."\footnote{352}{This notion of the family as a little commonwealth dates back to Puritan society. See generally John Demos, The Little Commonwealth (1970) (describing the daily life and relationships of the typical family in Plymouth Colony).} Yet the court says not "his home is his castle," but "it is her home." This reflects the re-gendering of political ideology reflected in the rise of domesticity.\footnote{353}{This is the conventional dating of the emergence of the ideology of domesticity. See Cott, supra note 301, at 201-04 (sketching the late eighteenth century development of early feminist ideology, including the dominant notion of the "woman's sphere"). For an argument that domesticity and liberalism must be understood simultaneously, as two sides of the same coin, see Joan C. Williams, Domesticity as the Dangerous Supplement of Liberalism, 2 J. Women's Hist. 69 (1991).}

During the late eighteenth and early nineteenth centuries, liberalism and domesticity emerged as twin images. Men left the home to become the self-interested actors of liberalism, while women stayed behind, selflessly devoting themselves to a domestic realm in the home sweet home. This imagery underlies the court's unstated intimation that full commodification of "her home"\footnote{354}{This is an expression of what Radin has called the "property as personhood" theme in American property law. Radin, Property and Personhood, supra note 136; see supra Section II.B.} would do violence to her life; the court also intimates that "this age of strenuous commercialism" poses a threat to society as a whole.

By no means is this republicanism pure and simple.\footnote{355}{The property and personhood theme has elements of republicanism, the ideology of domesticity, and the liberal dignity strain of property.} American courts' solicitude for residential subdivisions is resonant of both the
Jeffersonian vision of citizens' property protecting them from vulnerability and of the subsequent regendered imagery of the home as a refuge. This intertwining of republican and domestic imagery crystallizes the worry that rampant commodification will threaten independence-through-property (in the republican version) or the home-as-sanctuary (in the domestic version).

The intertwining of republicanism and domesticity also holds important messages for a pragmatic approach to legal theory. One of the drawbacks of the canon-based approach—quite apart from its inability to see alternatives to possessive individualism because of the intuitive image's role in shaping the canon itself—is the rigid sense in legal and political philosophy of clear-cut traditions that persist without effective intermingling. We have seen the intermingling of Locke and Bentham in possessive individualism and the intermingling of possessive individualism and absolutist constitutional rhetoric in the intuitive image; now we see the intermingling of domesticity and republicanism in the American obsession with home ownership. An equally important point is that three different variants—the "pure" tradition of republican egalitarianism, the "pure" tradition of domesticity, and an intermixture of the two—all coexist simultaneously in American political (including legal) rhetoric.

E. From the "Salus Populi" Theorists to the Contemporary Takings Muddle

We think it a well settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, not injurious to the rights of the community. All property in this commonwealth... is derived directly or indirectly from the government, and hold subject to those general regulations, which are necessary to the common good and general welfare.

Commonwealth v. Alger (1851)

1. "Salus populi" theorists

The third strain of republican rhetoric that plays an important role in contemporary property law and rhetoric focuses not on the need for a widespread distribution of property (or houses), but on the need to design property rights in order to achieve the common good. Some historians have argued that, even in the colonial era, property rights were limited by the common good requirement. As of the early nineteenth century, according to legal historian William Novak, this tradition had transmuted into what Novak calls the "salus populi" tradition, which carried on certain

RHETORIC OF PROPERTY

elements of classical republicanism in combination with peculiarly nineteenth century elements. The group of thinkers Novak discusses held a vision expressed by two common-law maxims: *salus populi lex est* (the welfare of the people is the supreme law) and *sic utere tuo ut alrenumnon laedas* (use your land so as not to injure others). Novak argues that these maxims expressed the vision of a well-regulated society in which citizens were viewed as inherently social creatures whose self-fulfillment lay in their shared common life. According to one such thinker, William Sullivan, "Government is instituted for the common good; for the protection of property and prosperity, and happiness of the people; and not for the profit, honor, or private interest of any man, family or class of men." Regulation, Novak asserts, was at the center of this vision: "Only through ... regulation ... could man's social nature, his tendency toward society and the public good, be realized."

The tradition Novak describes combined rhetoric from civic republicanism with that from other traditions, notably evangelical Protestantism and Scottish moral philosophy. The tradition's notions of virtue were drawn more from sources in the Protestant tradition and and Scottish moral philosophy than from the manly, militaristic virtue of Harrington. Novak stresses that "the *salus populi* tradition was not so much a product of formal political philosophizing ... as a product of governance." While the vision of a well-regulated society differed in many ways from classical republicanism, notable resonances include the notions that property rights are socially created, that men become fully human only through their shared political and social life as citizens, and that property rights are inherently limited if necessary to achieve the common good. The sense of government as a positive force was reflected in the broad definition of the police power as necessary to achieve

358. Novak, People's Welfare, supra note 18, at 2 ("The republican synthesis is thus only the latest scholarly attempt to collar that elusive associational, corporative, governmental, and public-spirited strand in early American life that has captivated political commentators since Alexis de Tocqueville and James Bryce.") (citations omitted). See generally Novak, Well-Ordered Market, supra note 243; Novak, Salus Populi, supra note 243.

359. Novak, Salus Populi, supra note 243, at 22 (quoting William Sullivan's *The Political Class Book* (Boston, Richardson, Lord & Holbrook 1831)).

360. Id. at 22.

361. See Wood, supra note 225.


363. Novak, People's Welfare, supra note 18, at 12 ("Their reference point was the relationship of a citizen to a republic.").

364. While Novak acknowledges the resonances between the *salus populi* tradition and republican rhetoric, he warns that the *salus populi* tradition was "a fuzzy intellectual matrix not quite captured by the prevailing models of intellectual and legal history." Id. at 26. For Novak's purpose as an historian "to reconstruct an older world of meaning," this is certainly true, as is the linkage of his topic and Progressive notions of state regulatory power. Id. at 21. But if our goal, as here, is to bring to consciousness a resonant strain of American property rhetoric, then the linkage of the *salus populi* tradition with earlier republican rhetoric is useful.
the health, safety, and welfare of the public, which Novak found in nineteenth century cases.

Said one thinker, Thomas Cooper, ""The great object of all laws is the general welfare—public utility. There can be no rights inconsistent with this.""365 The sic utere maxim was viewed as a specific example of ""the more general rule, which require[d] that all the actions of individuals be so directed as to promote the good of the whole.""366 From this general principle flowed myriad restrictions on social and economic life. These thinkers defined the right of property as a social right which ""ought to be regulated and restrained, to extract from it the benefits it can produce, and to counteract the evils it can inflict.""367 An early nineteenth century Massachusetts Supreme Court opinion by Lemuel Shaw summarizes this view:

We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property nor injurious to the rights of the community. All property in the commonwealth . . . is derived directly or indirectly from the government . . . [and is] subject to such reasonable limitations . . . as the legislature . . . may think necessary and expedient.368

This view of property was reinforced by the view of law as ""a moral exercise for the promotion of public happiness in the good society.""369 From these roots emerged the broad police power that we find, to this day, in many state court takings opinions.

2. State court takings cases

For fifty years after the 1926 case of Euclid v. Ambler Realty,370 the United States Supreme Court heard no land use takings cases. But the state courts heard thousands371 and gradually developed a test that reflected the belief that states have broad police powers that enable them to pass an extensive range of land use regulations, as long as the


367. Novak, People's Welfare, supra note 18, at 25-26 (quoting John Taylor, Construction Construed and Constitutions Vindicated (Richmond, Shepherd & Pollard 1820)).


370. 272 U.S. 365 (1926).

landowner is left with some reasonable use of his land. This state court test lives on in cases such as *Just v. Marinette*, which cited the relevant takings test as one of whether "the restriction practically and substantially renders the land useless for all reasonable purposes;" in *Kaiser v. City of Honolulu*, a federal case applying Hawaii law and holding that there is no taking unless "no economically viable use" exists for the restricted land; and in *Norbeck Village v. Montgomery County Council*, a Maryland case that rejected a takings challenge on the grounds that "he who claims confiscatory action must show that the protested zoning precludes use of his property for any purpose for which it is reasonably adapted." These state courts carry on the salus populi tradition, which advocates a broad police power that enables the legislature to regulate landowners' rights to the extent that they harm the rights of the public. In the words of the South Carolina Supreme Court, the state "may properly regulate the use of property where uncontrolled use would be harmful to the public interest." Here the state court has translated the republican language of the common good into Progressive language of the public interest; for all the differences between classical republicanism and Progressivism, property rights were limited in both to the extent they interfered with the paramount rights of the public.

Once again, I am not unmindful of the significant differences between the republicanism of the Founders, the salus populi thinkers, and the Progressives, but in this context it is the continuities that are important. The key continuity is from the vision of property rights limited to the extent they do not serve the common good, to property rights regulated to protect the paramount rights of the public, to property rights regulated in the public interest. This continuity provides a new perspective on Justice Brandeis's famous dissenting opinion in *Pennsylvania Coal v. Mahon*, the takings case that first crystallized the battle lines that remain to this day. "The State merely prevents the owner from making a use that interferes with paramount rights of the public," Brandeis says, using salus populi language. From this principle Brandeis derives the tenet that "[i]f the public safety is imperiled, surely neither grant, nor contract, can prevail against an exercise of the police power." Nearly seventy years later, the South Carolina Supreme Court reiterated this truism, which fit naturally into state courts' vision of a sweeping police power and a

372. 201 N.W.2d 761 (Wis. 1972).
373. Id. at 767.
374. 913 F.2d 573 (9th Cir. 1990).
375. 254 A.2d 700 (Md. 1972).
376. Id. at 706.
378. 260 U.S. 393, 416 (1922) (Brandeis, J., dissenting).
379. Id. at 417.
380. Id. at 420.
stringent "confiscation" test for takings. After citing the sic utere maxim beloved of the salus populi thinkers, the South Carolina Supreme Court concludes that "[f]inding that the regulation under attack prevented a use seriously harming the public, we have concluded that no regulatory taking has occurred.

The U.S. Supreme Court, intent since 1978 upon wresting the takings case law away from the state courts and away from the republican vision, rejected the long-established notion that no taking exists where a regulation simply protects the "paramount rights of the public." Indeed, in the majority opinion in _Lucas v. South Carolina Coastal Council_, the Supreme Court cleverly used the intuitive image of property to undercut the salus populi tradition. Striking down South Carolina's coastal zoning, the Supreme Court noted that "our 'takings' jurisprudence... has traditionally been guided by the understandings of our citizens regarding the context of the State's power over the 'bundle of rights' that they acquire when they obtain title to property." In effect, the Court argues that because citizens have traditionally expected that if they own beachfront land they can build a house on it, their expectation is entitled to constitutional protection. As Carol Rose saw long ago, takings law is still a muddle because it represents a clash between the republican and liberal vision of property. Novak's work shows the particular strain of republicanism involved.

**F. The Redistributive Strain of Radin's Property and Personhood Analysis as Republican Rhetoric**

Margaret Jane Radin's goal was to identify our "intuitions" about the special status of homeownership, now we can link those intuitions to the strain of republicanism transmuted into domesticity. In fact, one of the two cases that cites the redistributive strain of Radin's personhood analysis links _Property and Personhood_ with the statement (quoted as the epigram to this Section) about our republic's tradition of the sanctity of the home. The other case, _Dawson v. Higgins_, links a cite to Radin with a

---

382. Id. at 899.
385. Carol M. Rose, _Mahon Reconstructed: Why the Takings Issue Is Still a Muddle_, 57 S. Cal. L. Rev. 561, 587-97 (1984). Since Rose has been cited as an exemplar of law and economics, some further explanation may be in order. Rose has a Ph.D. in history; her specialty has been to use her historical imagination to build a bridge between the law and economics and its critics. _Mahon Reconstructed_ provides one example; another is her use of the work of Albert Hirschman.
386. See, e.g., Novak, People's Welfare, _supra_ note 18, at 19-26 (outlining the common-law vision of property rights as fundamentally social and political).
387. _See supra_ Section II.B.
republican stress on the importance of stability.

Radin has come under attack because of her unself-conscious embrace of Americans' romance with homeownership. Radin critic Stephen Schnably argues that she should "begin by unpacking the home as an ideal." Schnably argues that "[the] suburban home represents . . . rejection of public spaces," and is closely linked with women's role as homemakers and with the exclusion from residential neighborhoods of any people of color and low-income people. Schnably is right to protest that Radin seems unaware of the darker, exclusionary sides of America's romance with the single-family house. This is a liability of her attempt to study our intuitions by reference to the canon of European philosophers.

But Schnably may well overstate his case, for he ignores the fact that Radin's goal is to expand the ideal of homeownership to include tenants who traditionally have been excluded from the stability and quality control traditionally available only to those people wealthy enough to buy a house. Radin's work has only scratched the surface of an important question: how to transmute America's romance with homeownership to reawaken its redistributive potential. In the last twenty years, homeownership has fallen out of reach not only of many poor people, but also of many moderate—and some middle—income people. Homeownership has always been far less accessible to blacks than to whites, and this is particularly alarming given the felt linkage between homeownership and citizenship. Once we link our special sense about homeownership with the intellectual tradition from which it springs, we can begin to consider how to tap the true potential of the personhood element of property.

G. Conclusion

Most republican revivalists have focused on either the salus populi or the egalitarian strain. This approach misses a basic point: republicanism is not one thing. Instead, it is a loose collection of keywords with Protean potential to transmute from one form to another. It can be, and has been, taken in very different directions.

The challenge is how to frame a description of republican rhetorics with the potential to create a conversation in which the booming voice of the intuitive image does not drown out the other meanings that property has had in our traditions.

390. See Schnably, supra note 155, at 364.
391. Id. at 365.
392. Id. at 365-67.
393. See Berger & Williams, supra note 39, at 60-63 (discussing homeownership in the United States).
394. See, e.g., Amar, supra note 279, at 37 (discussing the egalitarian strain); Sunstein, Interest Groups, supra note 193 (discussing the salus populi strain). Frank Michelman is virtually the only commentator to discuss both strains. Michelman, Political Markets, supra note 194 (discussing the salus populi strain); Michelman, supra note 277 (discussing the egalitarian strain).
The republican egalitarian tradition raises the issue of whether a democracy can survive with an increasingly unequal distribution of wealth. The foothold of the egalitarian strain in American law is far more precarious, however, than that of the other major republican strains. By far the strongest and most commanding strain is the mystique of the single-family house—although it also has the most exclusionary potential. The salus populi strain offers a direct language in which to speak about designing property to achieve the common good, yet for precisely that reason it is not useful (as Sunstein and Michelman initially tried to use it) as a way to justify specific substantive decisions. In our diverse and pluralistic society, we cannot assume a consensus on the common good.

Instead, the salus populi strain is useful as a way to defend the legitimacy of redesigning property rights if that is necessary to achieve the common good: the key point is that disagreements over what constitutes the common good are a legitimate part of our property traditions. The core message is that property rights involve political, not only economic, issues; or, perhaps more to the point, that economic issues are inseparable from the political question of what kind of a society we want to have.

Focusing attention on republican rhetorics of property sets up a dynamic quite different from the standard approach, which posits the intuitive image as the accepted wisdom, challenged by a more modern understanding of property rights as relative and socially constructed. The accepted formulation plays directly into the hands of those who claim the intuitive image as "Our Tradition," from which we moderns have fallen away to our detriment. This pits the reformer against the intuitive image of property. What republican rhetorics offer is an alternative formulation, which mobilizes the intuitive image in favor of reform.

Republican rhetorics allow critics of the absolutist image to protest that they are not opposing property rights. Instead, they are as concerned as their opponents with protecting property rights: they just disagree about the goals and the purpose of the property system. Republican rhetorics allow critics to argue that "You love property, I love property, we all love property": we don't disagree about the importance of property rights, only about who should have them, and what they should entail. The issue becomes not one of traditional absolute property rights versus modern relative ones. Instead, the issue becomes what we want property rights to achieve—in a context where not only economics, but all of politics is on the table.

The following Section examines resources offered critics by liberal rhetorics of property. To do so requires looking beyond the common picture of liberal individualism, to uncover the virtues of liberalism.  

---

395. See Kloppenberg, supra note 4.
IV. LIBERAL RHETORICS OF PROPERTY: LET A THOUSAND DEALS BLOOM?

Schematized descriptions of a dichotomy between liberal and republican rhetorics of property tend to recover only the strain of the liberal tradition we have called "possessive individualism." This Section focuses on an alternative strain, which is aimed at limiting property rights in the name of human dignity. My analysis is part of a larger attempt to recover versions of liberalism other than possessive individualism, a project that begins a reexamination of the relationship of religious and secular variants of certain strains of political rhetoric.

A. The Liberal Dignity Strain

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

Property rights serve human values. They are recognized to that end, and limited by it. *State v. Shack*[^396]

Possessive individualism is not the only strain of liberal rhetoric; an alternative strain emerges clearly every year when I teach a unit on commodification in my property course. I begin with the question of whether people should be property—including whether babies, kidneys, and other organs should be for sale—and then proceed to landlord/tenant law and the question of whether housing is or should be fully commodified.

My goal in these discussions is, first, to bring to the surface the general sense that property rhetoric is inappropriate in contexts involving slavery and babies[^397]. This sense is not universal among my students, but it has predominated in every class with which I have had these discussions over a period of a decade, and reflects the wince reaction that even many law-and-economics scholars have to the proposals of Posner and others for a market in babies.[^398] My second goal is to require students to articulate why they feel that full commodification is inappropriate in these contexts. Typically they have trouble providing reasons. Instead, they tend to blurt out that "the idea of selling babies is repulsive."[^399] The perceived boundaries of the market seem to be policed less by formal arguments than by an intuitive sense I call "commodification revulsion."

When pressed, students tend to say that slavery and baby-selling are an affront to human dignity. Courts and commentators attempting to articulate dissatisfaction with commodification also sometimes find themselves turning to "dignity" language. A New Jersey court in a homelessness case asserted that the "dignity of every human being

[^397]: I have found no consensus among law students on the issue of whether organs should be commodified.
[^399]: Harvard Law School student, fall 1993.
demands a right to be housed. It is an affront to the dignity of that human to provide indecent housing even for a short spell." Another example is J. Robert Prichard's discussion of babyselling, which notes that "certain things should be above the hustle and bustle of the market-place so as to preserve their dignity," and that babyselling schemes "would deprive participants of their dignity."

Prichard's first formulation is religious: he argues against babyselling on the grounds that "life is infinitely valuable—a pearl without price." Religious imagery also emerges in my law school classroom. For a long while, religious formulations never entered my classroom when I discussed commodification. Then I became interested in religion as a rhetoric of intuitive limits on property and began to eliminate certain subtle and barely conscious signals that religious rhetoric was off limits. Since then, in the unit on commodification, religious language emerges regularly in the articulation of the widely held intuition that property rights should be limited to the extent they threaten human dignity. The most striking example of religious imagery in my property classroom occurred when I was teaching at Harvard Law School and asked: "Why can't you sell your body?" "Because you don't own it," replied a young man from Indiana. When I asked "Who does?" he silently pointed up.

This experience raises several points. The first is that religious rhetoric in law school is risky. Several students after class told me they were thinking the same thing but would never have used religious rhetoric for fear of looking silly before their classmates. Note that even the student in question could not bring himself to use religious terminology out loud (although other students have done so outside the pressure-cooker atmosphere of Harvard Law School). The second two points are questions: why are the boundaries of the market policed less by arguments than by intuitions? And why do some students turn to religious language to articulate those intuitions?

401. Prichard, supra note 398, at 351.
402. Id. at 353.
403. The "pearl without price" comes from Matthew 13:46.
404. I am not saying that people agree on what constitutes an affront to human dignity; they don't. But they tend to agree in principle with the notion that property rights should be limited to the extent they constitute an affront to human dignity. The only true consensus I have found is that allowing slavery is inappropriate because treating people as property is an affront to human dignity.
405. Other colleagues have noted that religious rhetoric does not emerge in their classes on commodification. Conversation with Iowa law professor, Lea Vander Velde, Aug. 1997. Nor did it arise in mine for years, until I grew impatient with my students' inarticulateness and began to suspect that it stemmed from their inability to use religious rhetoric, so I pressed them harder to articulate their reasons in a context in which I had said in the introductory materials that limits on property rights were sometimes articulated in religious rhetoric. See Berger & Williams, supra note 39, at 93-95.
A hint comes in the widely cited case of State v. Shack,106 in which the New Jersey Supreme Court held that a farmer had to allow government workers access to his property so they could deliver social services to migrant farmworkers living there in “camps.” From within the traditional frame, this seems a strange decision. The right to exclude, which has been touted as the sine qua non of ownership at least since Blackstone,107 was denied to this owner by the New Jersey Supreme Court. The opinion begins with high rhetorical flourish:

Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law. Indeed . . . the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity.108

The court's commitment is to limit any property rights that (in its judgment) threaten human dignity. This passage highlights the rhetorical difficulties of the liberal dignity strain. “Property rights serve human values” is a stirring sentence, but what on earth does it mean? What, for that matter, are “human values”? The New Jersey Supreme Court, famous for its property opinions, sounds strangely inarticulate.

The opinion continues with the policy argument that government programs will be ineffective if government officials cannot gain access to migrant farmworkers who reside on their employers’ property.109 But the court faces the challenge of justifying its decision as one involving “law, not politics.”110

The court rises to the occasion with an assault on the intuitive image of property, beginning with an ancient maxim beloved of the salus populi theorists: “One should so use his property as not to injure the rights of others.”111 From this launchpad, the court uses legal realist arguments, asserting that property rights are relative and challenging the intuition of absoluteness. Characterizing property rights as a set of constantly shifting “adjustments between individualism and social interests,”112 the court challenges both the sense that property rights are stable and the intuitive sense that property belongs to the realm of economics, not politics.

408. Shack, 277 A.2d at 372.
409. See id. at 372 (referring to the benefits of government programs, the court states that “[t]hese ends would not be gained if the intended beneficiaries could be insulated from efforts to reach them”).
410. The issue of whether law is, in fact, politics is complex; here, again, I am talking about self-image, not the actual practice.
411. Shack, 277 A.2d at 373. Note that this is one of the two maxims that, according to Novak, played a central role in justifying extensive regulation of private property in the nineteenth century. See Novak, Salus Populi, supra note 243, at 39.
412. Shack, 277 A.2d at 373 (quoting 5 Powell, Real Property § 746, at 494-96 (1970)).
This deconstruction of the intuitive image, however, proves only what property is not. When the court attempts to say what property is, its opinion takes an unpredictable turn:

"As one looks back along the historic road traversed by the law of land in England and in America, one sees a change from the viewpoint that he who owns may do as he pleases with what he owns, to a position which hesitatingly embodies an ingredient of stewardship ... To one seeing history through the glasses of religion, these changes may seem to evidence increasing embodiments of the golden rule. To one thinking in terms of political and economic ideologies, they are likely to be labeled evidences of 'social enlightenment,' or of 'creeping socialism' or even of 'communistic infiltration'. . . ."415

Note, first, the distancing mechanism in this striking passage: the court appeals not through its own direct voice, but through that of Professor Powell on Property. Because the only alternative "political" languages it saw were socialism and communism, which are clearly outside the scope of mainstream political discourse, the court ultimately turned to religious language to justify its intuition about the limits of commodification. In short, the Shack court was in much the same situation as my students. Like them, it was faced with the need to articulate its intuitions in a context where the only clear vernacular articulation stemmed from religion.

Another example of a court using religious language to articulate limits on property rights is in the 1984 West Virginia case of Harris v. Crowder,414 which involved an attempt by a creditor of the husband to partition a joint tenancy in the family home of Marvin and Mary Ann Crowder. The common-law rule allows partition for any or no reason, but Justice Richard Neely, well known for his populist anticorporate rhetoric in products liability cases, refused to allow the creditor to partition. In his typically free-wheeling fashion, Neely explained:

Under the free enterprise system our economy is regulated through recurring cycles of human suffering . . . . There is little question that the free enterprise system has produced a higher rate of economic growth, a faster pace of job creation, and a substantially higher standard of living for the average person in the United States than any alternative system elsewhere. But it is important to recognize that the inability to pay debts in a free enterprise economy is randomly distributed as an inherent part of the market mechanism that controls resource allocation. Although some debtors are besieged by their creditors because of conduct that is morally blameworthy, the great majority are not. One of the functions of the law is to distribute the costs of operating this society in an equitable way: when loss is inevitable, it should fall on the strong and not upon the weak.415

413. Id. (quoting 5 Powell, supra note 412, § 746, at 494-96).
415. Crowder, 322 S.E.2d at 860.
Once again the court turns to religious language to argue that property rights should be limited to the extent they threaten human dignity.

Current interpretations of liberalism often overlook the liberal languages available to articulate limits on property rights based on human dignity. To find one, we need only return to Locke. Thus far, I have focused on what is today the dominant interpretation of Locke, of liberalism as possessive individualism. Recent scholarship, however, has pointed out that possessive individualism offers only one possible interpretation of Locke; others stress not the nature narrative but Locke's proviso and his intellectual commitment to religion.  

"[L]abour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough and as good left in common for others." The "enough and as good" language is referred to as Locke’s proviso. In his original text, Locke tied his proviso to his principle of equality.

It will perhaps be objected ... that if gathering the acorns, or other fruits of the earth, etc., makes a right to them, then any one may engross as much as he will. To which I answer, Not so. The same law of nature, that does by this means give us property, does also bind that property too. God has given us all things richly, I Tim. vi. 12.

In addition to this citation to the Biblical book of Timothy, Locke ties this "Law of Nature" even more explicitly to religion in another passage.

But though this be a state of liberty, yet it is not a state of license ... The state of nature has a law of nature to govern it, which obliges every one; and reason, which is that law, teaches all mankind ... that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions. For men being all the workmanship of one omnipotent and infinitely wise Maker—all the servants of one sovereign Master ... there cannot be supposed any such subordination among us ... All men are equal, according to Locke, because they are equal in the eyes of the Lord; property rights are limited to the extent that they threaten this God-given dignity. Once we take Locke on his own terms, instead of imposing on him "meanings gathered from the social consequences of capitalism," we see that his concept of property was bounded by a divinely established natural law.

Historian James Kloppenberg points out that religion has long been

417. Locke, supra note 43, § 27.
418. Id. § 31.
419. Id. § 6.
420. Kloppenberg, supra note 4, at 16.
one of the rhetorics defining the virtues of liberalism.\textsuperscript{421} The cases cited above suggest it still is. Three principles are commonly used as limitations on property rights. The principle of equality is the only one for which there exists a thoroughly secularized vernacular rhetoric; indeed, it would be hard to imagine a law student at a loss for a secular language of equality. The same is not true of the language of human dignity. Although the language of human dignity today exists simultaneously in religious and secular variants, the most common secular variant—Kantian liberalism—has a highly intellectual air, unlike the religious version, which has widespread vernacular appeal. The third principle mentioned in the case law—the Golden Rule—also exists simultaneously in religious and secular variants. Note the parallels between Kant’s categorical imperative and the Golden Rule.\textsuperscript{422} Christ said to treat your neighbor as yourself; Kant said to adopt only rules that you can apply both to yourself and to others or (another formulation of the categorical imperative) to treat others as ends, not means. The categorical imperative is not identical to the original religious injunction, to be sure. It is more rationalist and secular and differs in other ways whose importance I am not trying to minimize. But Kant’s central metaphor—defining ethical behavior by treating others as if they were yourself—is the same as the Christian image. John Rawls’s veil of ignorance embeds the same heuristic. Rawls proposes a thought experiment in which one designs a society without knowing where one will end up—presumably on the theory that this method will encourage the designer to treat one’s neighbor as oneself.\textsuperscript{423}

All this highlights that “the moral intuitions of those who are not religiously committed have been influenced by centuries of Christianity.”\textsuperscript{424} Judges in a secular society should be wary of open reliance on religious authority. They should heed the suggestion that “many elements and aspects of a religious ethic… can be presented in public discussion in ways that do not presume assent to them on the specific premises of a faith grounded in revelation.”\textsuperscript{425} (Perry calls this the test of “public

\textsuperscript{421} Id.

\textsuperscript{422} See Immanuel Kant, The Moral Law: Kant’s Groundwork of the Metaphysics of Morals 91 (H.J. Paton trans., 1967). The accompanying focus on the inherent dignity of every human being is a central thrust in the African-American church. See Anthony E. Cook, Beyond Critical Legal Studies: The Reconstructive Theory of Dr. Martin Luther King Jr., 103 Harv. L. Rev. 985, 986 (1990) (stating one of the article’s goal as follows: “by focusing on the African-American church and its role in the struggle for African-Americans, I hope to foster a greater knowledge of and appreciation for the concrete experiences of the powerless and oppressed”). This commitment to radical equality has, of course, been honored in the breach—and yet it gives Christianity its basic structure of overweening moral ambition. See Joan C. Williams, Rorty, Radicalism, Romanticism: The Politics of the Gaze, 1992 Wis. L. Rev. 131 (1992) (discussing Richard Rorty’s explorations of nonfoundationalism).

\textsuperscript{423} See Rawls, supra note 203, at 136-42 (discussing the “veil of ignorance”).


\textsuperscript{425} John A. Coleman, An American Strategic Theology 196 (1982).
accessibility".)

Lawyers have greater leeway than judges in the use of religious imagery. According to the prominent death penalty litigator Kevin Doyle:

"Most Americans... define life's ultimate moral questions in religious terms and in terms of virtue and personal moral responsibility... For those of you who have yet to locate the gift of faith, I am not suggesting you have to return to your church or synagogue. I am suggesting that you cheat your client when you kid yourself about the moral language your jurors speak or refuse to learn it yourself. So go out and study a children's Bible or try to remember what your parents taught you as a kid. But meet the jury in the moral world it occupies."

Following Perry's principle of "public accessibility," the most effective approach to religious rhetoric inside the courtroom is to use it in a way that resonates with believers but does not exclude those for whom it does not resonate. The same is also true of much, though not all, of lawyers' work outside the courtroom that involves wide audiences, such as work in politics, direct action, and media work. In situations where the audience is more limited—lobbying, counseling, alternative dispute resolution, and negotiation—the principle of public accessibility may be less important. A lawyer needs to think carefully in these less public contexts about whether secular variants are always preferable or whether religious rhetoric works better for a particular purpose.

Note that religious rhetoric can be used respectfully even by those who are not believers. As Doyle suggests, in certain contexts its use can signal "respect for the world [your audience] occupies," rather than personal revelation. Or, to quote a theorist rather than a practicing lawyer, "the lawyer, like any rhetorician, must always start by speaking the language of his or her audience."

Although the liberal dignity strain offers an attractive alternative to other republican and liberal theories, it also presents particular challenges. In many contexts, using religious language can be a risky and unconventional move, yet at times the risks may be worth it if alternative secular formulations sound rarified and lack "public accessibility." Moreover, in many contexts, neither religious nor philosophical formulations sound much like law. In some contexts—international human rights law comes readily to mind—the Kantian language of inviolable human dignity sounds respectably "legal"—but not in property.

This analysis offers insight into State v. Shack where the court was struggling with the awkwardness of trying to articulate the "equal dignity"

426. Perry, supra note 424, at 604.
427. Berger & Williams, supra note 39, at 94 (quoting Kevin Doyle).
428. White, Law as Rhetoric, supra note 5, at 688; see also Singer, Persuasion, supra note 107, at 2444.
tradition in a way that sounded suitably "legal."\textsuperscript{430} We see another court struggling with this challenge in the landmark implied warranty of habitability decision, \textit{Javins v. First National Realty.}\textsuperscript{431} The \textit{Javins} court, in overturning a rule settled as of 1485\textsuperscript{432} that tenants have the duty to keep premises in good repair, devotes the majority of its opinion to making an argument that it is just updating the common law as common-law courts have always done, calling upon analogies to products liability law. In a crucial paragraph, however, the \textit{Javins} court discusses "further compelling reasons" for protecting tenants:

The inequality of bargaining power between landlord and tenant . . . [leaves tenants with] very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as racial and class discrimination and standardized lease forms, mean that landlords place tenants in a take it or leave it situation. The increasingly severe shortage of adequate housing further increases the landlord's bargaining power and escalates the need for maintaining and improving the existing stock. Finally, the findings by various studies of the social impact of bad housing has led to the realization that poor housing is detrimental to the whole society, not merely to the unlucky ones who must suffer the daily indignity of living in a slum.\textsuperscript{433}

Here the court starts with market failure arguments ("inequality of bargaining power"), then throws in common good arguments ("detrimental to the whole society"), and wraps up with an argument that frames the issue as one of human dignity. In my experience, the \textit{Javins} court's approach convinces students far less effectively than a Vermont


\textsuperscript{431} 428 F.2d 1071 (D.C. Cir. 1970).

\textsuperscript{432} Berger & Williams, \textit{supra} note 39, at 295 n.30.

\textsuperscript{433} \textit{Javins}, 428 F.2d at 1079-80.
implied warranty of habitability case, *Hilder v. St. Peter*, which can stand as a model for persuasive use of the human dignity strain.

The core of the *Hilder* court's argument is in its description of the facts. For that reason, I will quote at length:

The facts are uncontested. In October, 1974, plaintiff began occupying an apartment at defendants' 10-12 Church Street apartment building in Rutland with her three children and newborn grandson. Plaintiff orally agreed to pay defendant Stuart St. Peter [rent and a deposit] . . . . Plaintiff has paid all rent due under her tenancy. Because the previous tenants had left behind garbage and items of personal belongings, defendant offered to refund plaintiff's damage deposit if she would clean the apartment herself prior to taking possession. Plaintiff did clean the apartment, but never received her deposit back because the defendant denied ever receiving it. Upon moving into the apartment, plaintiff discovered a broken kitchen window. Defendant promised to repair it, but after waiting a week and fearing that her two year old child might cut herself on the shards of glass, plaintiff repaired the window at her own expense. Although defendant promised to provide a front door key, he never did. For a period of time, whenever plaintiff left the apartment, a member of her family would remain behind for security reasons. Eventually, plaintiff purchased and installed a padlock, again at her own expense. After moving in, plaintiff discovered that the bathroom toilet was clogged with paper and feces and would flush only by dumping pails of water into it. Although plaintiff repeatedly complained about the toilet, and defendant promised to have it repaired, the toilet remained clogged and mechanically inoperable throughout the period of plaintiff's tenancy . . . . Plaintiff also discovered that water leaked from the water pipes of the upstairs apartment down the ceilings and walls of both her kitchen and back bedroom. Again, defendant promised to fix the leakage, but never did. As a result of this leakage, a large section of plaster fell from the back bedroom ceiling onto her bed and her grandson's crib. Other sections of plaster remained dangling from the ceiling. This condition was brought to the attention of the defendant, but he never corrected it. Fearing that the remaining plaster might fall when the room was occupied, plaintiff moved her and her grandson's bedroom furniture into the living room and ceased using the back bedroom. During the summer months an odor of raw sewage permeated plaintiff's apartment. The odor was so strong that the plaintiff was ashamed to have company in her apartment. Responding to plaintiff's complaints, Rutland City workers unearthed a broken sewage pipe in the basement . . . but defendant failed to clean it up . . . .

When I discuss this case in class, I begin by asking how it "smells."

---

435. Id. at 205-06 (footnote omitted).
The pervasive fecal odor, particularly in combination with the tenant's "shame," works with admirable economy to convey the message that human dignity has been affronted. Note the imagery of children in danger: of plaster falling into cribs, of jagged windows slicing little hands. The underlying message is that, even if rental contracts generally should be enforced, this one should not be enforced because it places blameless children at risk. The subtext is that we do not want to live in a society where property rights are extolled above the crushed heads of innocents.

The Hilder opinion intimates that this case only requires us to sign on to the conclusion that irresponsible, deceptive people like Mr. St. Peter should not be able to abuse model tenants like Mrs. Hilder. Surely whatever disagreements we might have about the limits of commodification, it argues, the Hilder case is beyond the pale.

In fact, Mr. St. Peter may not have been so evil, nor Mrs. Hilder such a model tenant. If they were not, this highlights the power of the court's rhetoric. For Hilder's insistence on personalizing the situation—characterizing Mrs. Hilder as virtuous and Mr. St. Peter as irresponsible—served an important rhetorical function. In contrast to Javins's sweeping attack on the market's ability to provide low-income housing, Hilder keeps things simple, intuitive, and (to my students' view) nonpolitical. I often summarize Hilder as follows: scoundrels lose; girl scouts win. A very broad range of students are willing to sign on to this proposition, including conservative students who react with distaste to Javins's "manifesto."

Hilder's brilliance lies in its ability to take this particular case out of the general run of cases (where, it implies, contracts should be enforced). Its forcefulness also stems from its smooth, untheoretical surface. Written by an accomplished trial lawyer, the opinion conveys the liberal dignity theme in an intuitive way, without stumbling over "inappropriate" religious language or vague phrases like "human values." In property law, where the dignity theme can so easily sound like mush or socialism, Hilder evades explicit political judgments. All the reader has to sign on to is that landlords should not be able to require tenants to live in excrement.

436. At the Society of American Law Teachers (SALT) conference in 1995 in New York City on incorporating novel perspectives in mainstream courses, Professor Linda McClain reported that a student of hers knew the landlord in Hilder. Mr. St. Peter had told him that the Vermont Supreme Court had gotten it all wrong and that Mrs. Hilder was a problem tenant.

437. Characterization of Javins by one of my American University-Washington College of Law students in the Fall of 1992. For another housing case that uses the language of human dignity, see Maticka v. City of Atlantic City, 524 A.2d 416, 425 (N.J. 1987) ("The dignity of every human being demands a right to be housed. It is an affront to the dignity of that human to provide indecent housing even for a short spell.").

438. In the interest of full disclosure, I should note that Justice Billings (author of Hilder) is a family friend.
B. The Virtues of Liberalism

My analysis is part of a larger attempt to resurrect a richer version of liberalism. For our purposes, the most useful synthesis of this trend is James Kloppenberg's 1987 article on The Virtues of Liberalism. Kloppenberg points out that, as of the late eighteenth century, most liberal thinkers (including Locke) assumed that self-interest would be pursued within the bounds of virtue, as defined by religion, republicanism, and other traditions. Locke's liberalism, Kloppenberg argues, "dissolves if it is removed from the context of divinely established natural law, which encumbers the freedom of individuals at every turn with the powerful commands of duty."

Kloppenberg’s synthesis places the liberal dignity strain in historical context. It is one of the limits set by religious and other "intuitions" on the model of freestanding actors with rights making choices. Until the nineteenth century, these limits were easy to spot because Americans felt comfortable using religion as a language of social ethics. My analysis suggests that the contemporary taboo against religious language in many intellectual circles often leaves lawyers—from my students to the New Jersey Supreme Court—at a loss for words when they are called upon to defend the "intuitions" reflected in the liberal dignity strain.

C. Radin’s Commodification Analysis and the Liberal Dignity Strain

Margaret Jane Radin’s analysis of market inalienability taps the liberal dignity strain of property rhetoric. "By making something nonsalable, we proclaim that it should not be conceived of or treated as a commodity."

Radin’s focus on “deeply contested issues of commodification” signals a shift from the focus of her earlier work on articulating the limits

439. See also William A. Galston, Liberal Purposes, Good Virtues and Diversity in the Liberal State (1991) (outlining the relationship between liberal political institutions and the liberal moral culture); Stephen Macedo, Liberal Virtues: Citizenship, Virtue and Community in Liberal Constitutionalism (1990) (illustrating the ideals and demands of a liberal society).


442. See Kloppenberg, supra note 4, at 16.

443. Radin, Market-Inalienability, supra note 156, at 1855.

444. Id. at 1856.
of traditional property rights, to her commodification analysis which explores whether to extend the property system to areas of life not traditionally conceptualized in market terms.

The most interesting passages in Radin's analysis of market inalienability are where she teases out the nonmarket elements of relationships we ordinarily describe in market terms. Of course, once we think about it, work and housing are examples of incomplete commodification: "work is not only the way we make our living, but also part of ourselves." One suspects that the same is true of many relations we assume are fully commodified: think of long-term business relationships and of the doux commerce theorists (up to and including Carol Rose). An important strength of Radin's commodification analysis is her uncanny ability to make us aware of the nonmarket elements of market interactions.

Less satisfying is Radin's attempt to articulate why we resist universal commodification. In her attempt to explain our "intuitions," Radin relies on a concept of human flourishing that remains full of good intentions but vague in content. "[W]e must reject universal commodification, because to see the rhetoric of the market ... as the sole rhetoric of human affairs is to foster an inferior conception of human flourishing." Radin protests that she is "not seeking to elaborate a complete view of personhood," but she identifies three elements. The first element is to have the power "to act for ourselves through free will in relation to the environment of things and other people." The second "identity aspect of personhood" requires us to "have selves that are integrated and continuous over time." The third "contextuality" aspect focuses on the "necessity of self-constitution in relation to the environment of things and other people."

Radin's personhood analysis helps explain why "we feel discomfort, or even insult, and ... degradation" when we think, for example, of rape.

445. Id. at 1918.
446. Id.
447. See Albert O. Hirschman, The Passions and the Interests: Political Arguments for Capitalism Before Its Triumph (1977); Carol M. Rose, "Enough And As Good" of What?, 81 NW. U. L. Rev. 417, 439 (1987); Carol M. Rose, Rhetoric and Romance: A Comment on Spouses and Strangers, 82 Geo. L.J. 2409, 2419 (1994) (departing perhaps for a moment in this piece to discuss marriage and divorce as somehow outside of mere business or property right terms to also include terms of relationship, needs, giving, nurturing, and caring in those intimate associations between people).
449. Id. at 1884.
450. Id. at 1886.
451. Id. at 1903-06.
452. Id. at 1904.
453. Radin, Market-Inalienability, supra note 156, at 1904.
454. Id.
455. Id. at 1891.
in terms of market rhetoric. Yet the language of human flourishing seems
to promise philosophical precision where our traditions hand us only a
vague sense of commodification revulsion that rests on an equally vague
sense of the inherent dignity of human beings. These traditions can be
stated in Kantian terms, as the need to treat others as ends not means; in
Christian terms, as the need to love your neighbor as yourself;\textsuperscript{455} or in
Jewish terms—for Hillel articulated what we now know as the Golden Rule
long before Jesus did—"Do not unto others that which is hateful unto
thee."\textsuperscript{456} The Buddhist doctrine of reincarnation is another heuristic for
encouraging people to treat their neighbors—from people to flies—as they
would like to be treated themselves.\textsuperscript{457} These themes can also be treated
in the language of human flourishing, although it has never been clear to
me what this adds, other than a promise (inevitably unfulfilled) to capture
our elusive commitment to human dignity in a rigorous and comprehen-
sive description of what it should mean to be human.

While philosophical commentators often prefer the language of
human flourishing, many courts and legal commentators prefer vernacular
dignity language. For example, though Radin buries Christian dignity
language in a "see also" reference in a footnote, a California court citing
Radin in a surrogacy case brought the Christian dignity language out of
the footnote and quoted in full the Magisterium (Catholic teaching) at
issue.\textsuperscript{458}

The key methodological question is whether the language of human
flourishing promises more precision than it can deliver. From our
viewpoint as lawyers and persuaders, we may need to translate the
commodification branch of Radin's personhood analysis back into the
language of human dignity, either directly (as in Javins), or indirectly (as
in Hilder).

D. Conclusion

Our examination of liberal rhetorics of property has taken us far
beyond Louis Hartz's imagery of an unbroken and unrelenting stream of
possessive individualism.\textsuperscript{459} Modern property law embeds two district
strands of liberal thought. One, possessive individualism, dominates the
self-image of American property law (much more than it dominates other
areas of the law, notably torts, as will be discussed in the following

\textsuperscript{456} Matthew 22:39.
\textsuperscript{457} The Jewish Encyclopedia (Isidore Singer ed., 1962) (quoting Hillel).
\textsuperscript{458} Dalai Lama of Tibet, My Land and My People: The Autobiography of His Holiness
the Dalai Lama of Tibet 29 (1997) ("Belief in rebirth should engender a universal love, for all
living beings and creatures, in the course of their numberless lives and our own, have been
our beloved parents, children, brothers, sisters, friends.").
\textsuperscript{459} Compare Radin, Market-Inalienability, supra note 156, at 1928 n.271, with Johnson v.
\textsuperscript{460} See Louis Hartz, The Liberal Tradition in America: An Interpretation of American
Political Thought Since the Revolution 7-11 (1955).
Section). The other, the liberal dignity strain, coexists with possessive individualism and serves to limit the acceptable scope of the pursuit of self-interest.

V. THE INTUITIVE IMAGE REVISITED: INTENT ARGUMENTS AS EXPRESSION OF THE INTUITIVE IMAGE OF PROPERTY

In this Section, I will discuss one small part of a much larger topic: given (as argued in Section I) that property rights never have been absolute, how does the rhetoric of absolutism retain its hold in the face of the gap between rhetoric and institutional practice? This Section shows how the language of intent serves to deflect the clash between absolutist imagery and the practice of malleable property rights.

As has been noted, in a variety of contexts in contemporary property law, the fee owner starts with the fullest bundle of sticks allowable at common law, and then, suddenly, loses part of her bundle when the court implies a right-of-way or a land use restriction on her property. In the well-known case of Sanborn v. McLean, the plaintiff landowners bought a parcel of land with no deed restriction in their chain of title, started to build a gas station, and were told by the court they could not build, despite the fact that their purchase price presumably reflected the value of an unrestricted parcel. In another case, a developer bought a parcel only to find its development potential limited by the neighbor's right to haul fruit over a dirt track. In other cases, someone pays good money for a deed only to find that she owns less than she thought (or owns nothing at all) because of adverse possession, a prescriptive easement, nuisance, or the doctrine of agreed boundaries.

Courts often (although not always) justify these unpleasant surprises on the grounds they are enforcing the preexisting intent of the parties. The doctrine of agreed boundaries provides a good example. This doctrine requires three elements to be met: (1) uncertainty as to the boundary line; (2) an agreement; and (3) acceptance and acquiescence in

461. In the case of adverse possession, a landowner may lose all of her bundle due to court action.
463. Id. at 497.
465. Prescriptive easement cases and nuisance cases are the primary exceptions. In those contexts, courts generally do not claim to be enforcing a preexisting agreement of the parties.
466. In implied easement cases, the intent theory is buried deeper in the tests, under the requirement of a common owner. The common-law test for an easement by necessity, for example, requires strict necessity to exist at the time the common owner severed the dominant and servient estates. See Othen v. Rosier, 226 S.W.2d 622 (Tex. 1950). The implicit theory is that, if necessity existed then, the common owner must have intended to create an easement to allow the landlocked grantee a right of way. The requirement of a quasi-easement in the context of an easement implied from prior use performs much the same function. See Van Sandt v. Royster, 83 P.2d 698 (Kan. 1938).
the new boundary. Although in theory courts merely enforce preexisting intent, in practice, "[a] longstanding acceptance of a fence as a boundary line gives rise to an inference that there was, in fact, a boundary agreement between coterminous owners." In other words, although the doctrine in *theory* enforces a preexisting agreement; in *practice*, the court often makes up the agreement out of thin air.

In implied covenants law we see the same gap between theory and practice. In *Sanborn v. McLean*, for example, the court upheld the residential-only restriction against owners with no such restriction in their chain of title on the theory that an "implied reciprocal easement" had arisen. When the developer granted out each parcel, the court intimates, he intended to burden each parcel with a residential-only restriction and to give each person in the subdivision a cause of action to enforce it against anyone else in the subdivision.

The obvious question is why, if the developer truly intended to burden each parcel with the restriction, did he not follow the simple expedient of including a written restriction in the deed? Why did he write restrictions into some deeds but not others? Presumably he had a hard time selling some lots subject to the restriction, so he sold them without it. Consequently, when the court imposes the restriction on the owners of unrestricted lots, it is not merely enforcing preexisting intent, but rather redistributing the bundle of sticks between the defendants and their neighbors. Yet courts deciding property cases strain hard to maintain the transparent fiction that they are enforcing preexisting intent. In tort cases, modern courts have openly admitted that they are engaging in social planning to achieve social goals, but not so in property cases. While in tort cases, courts openly use normative language, in property cases this would violate the "commonsense" notion that property is about economics, not cultural values.

Returning to *Sanborn v. McLean*, we see the court arguing that the defendant took his property with notice of the restriction because the residential character of the neighborhood imposed a duty to inquire into whether a residential-only covenant burdened his land. What the court really means is that it is imposing such a duty on the defendant, as part of the process of defining what ownership means in this society. Again, note

---

468. Id.
469. 206 N.W. 496 (Mich. 1925).
470. Id. at 497.
471. See, e.g., Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944) (concurring opinion by Justice Traynor); see also G. Edward White, Tort Law in America 208 (1980) (noting that torts judges often act as "activist policy makers").
472. See supra Section III.D. (discussing the trance of the single-family house); see also supra Section III.A. (discussing of liberal dignity strain).
473. 206 N.W. 496.
474. Id. at 498.
the court's determination to avoid resorting to the language of normativity.

The law of adverse possession provides a final and dramatic example of courts' use of fictional intent arguments. According to legal historian William W. Fisher III, English courts traditionally ignored intent in adverse possession cases. American courts, in sharp contrast, developed rules that focus persistently on the parties' intent. Early American cases painted the adverse possessor as either a knowing wrongdoer or a beleaguered rightful owner who had lost the documentation for his title. In time, these scenarios gave way to the image of the adverse possessor as one who found the premises unoccupied and undeveloped, erroneously assumed that he himself had title to it (or that no one did), and began to cultivate and improve the land in good faith. By 1830, this imagery of a more or less innocent adverse possessor who made productive use of the land had displaced the earlier scenarios. This progression fits the pattern of American courts willingness to fictionalize intent (in this case, the supposed "good faith" of the adverse possessor) in order to avoid language of normativity.

Possessive individualism so thoroughly dominates the self-image of American property law that intent is stretched to a rococo degree. Highly fictionalized intent arguments allow American courts to preserve the intuitive image of property as eternal, absolute, and unchangeable, even while they regularly redistribute property rights in the context of adverse possession cases, doctrine of agreed boundary cases, and implied easement and covenant cases. In summary, one way American courts deflect the clash between the intuitive image of stable and unchanging property rights and the practice of considerable redistribution is through the language of intent.

VI. CONCLUSION: USING THE RHETORIC OF PROPERTY

The past is never dead. It's not even past. William Faulkner

What kind of property theory is good for lawyers? For much of this century, most legal theory has focused on finding objective foundations for legal decisionmaking. "Once legal realists had questioned the existence of principled decision making," according to legal historian Laura Kalman, "academic lawyers spent the rest of the twentieth century searching for criteria that would enable them to identify objectivity in judicial decisions." William Fisher fleshes out this picture with brief descriptions of the key mainstream currents in legal theory. Legal process theorists argue that "if conducted in conformity with certain guidelines

475. See Fisher, supra note 243, quoted in Berger & Williams, supra note 39, at 526-27.
476. Note that the "tacking" requirement, which exists in the United States but not in England, also serves to sustain the fiction of a good faith adverse possessor (or, to be more precise, a series of them). Berger & Williams, supra note 39, at 498.
478. Kalman, supra note 179, at 5.
and confined to certain sorts of disputes, adjudication should be reasonably disciplined, constrained, and determinate.\footnote{479} Law and economics theorists argue that legal rules should be designed and interpreted to achieve a different kind of objectivity: the ideal of allocative efficiency.\footnote{480} Kantian liberalism offered its adherents (including the young Frank Michelman) "a set of firm, seemingly well-grounded principles that enabled them to criticize and reform legal doctrine..."\footnote{481} Radin and Singer, along with Ronald Dworkin, Charles Fried, and the neo-republicans, offer theories of the good "in various shapes and sizes.\footnote{482}

What all these approaches have in common, Fisher concludes, is that they "seek to supply judges with ... a principle or vision that, conscientiously applied, would lend coherence and predictability to judges' rulings."\footnote{483} As Kalman notes, mainstream theorists remain committed to a search for objective foundations. Today, such theorists often turn to Jürgen Habermas, whose work sustains the promise of agreement while avoiding foundationalist claims by focusing on the social conditions necessary to create consensus.\footnote{484} The property scholar who best summarizes this continuing search for objective foundations is Frank Michelman, who began by using Rawls's Kantian liberalism to anchor his theory of "just wants," then turned to republicanism in search of a common good, and most recently has turned to Habermas in search of the conditions that would produce an agreement not distorted by power differentials.\footnote{485}

Even legal theorists who do not seek out some supposed objectivity or consensus\footnote{486} often seek to persuade by relying on pure logic. Thus much of Joseph Singer's work seeks to undermine the intuitive image by using realist techniques that highlight the circularity and other logical limitations of legal opinions.\footnote{487} Singer also presents logical arguments in favor of his alternative, social relations approach.\footnote{488}

\footnotesize{480. \textit{Id.} at 303.}
\footnotesize{481. \textit{Id.} at 308.}
\footnotesize{482. \textit{Id.} at 310. Fisher also mentions the fact that an increasing number of outsider-scholars have begun to offer new varieties of legal theory. \textit{Id.} at 313.}
\footnotesize{483. \textit{Id.} at 313.}
\footnotesize{484. Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (1996).}
\footnotesize{485. Fisher, \textit{supra} note 479, at 308, 312.}
\footnotesize{486. Singer, \textit{Reliance Interest in Property, supra} note 107, at 627 ("[T]he kind of social vision I have in mind assumes contradiction rather than consensus.").}
\footnotesize{487. See, e.g., Singer, \textit{Legal Rights Debate, supra} note 107, at 975 (critiquing liberal legal theory and its conceptions); Singer, \textit{No Right to Exclude, supra} note 107, at 1450-73 (discussing the history of political accommodations law and family squabbles over private property); Singer, \textit{Reliance Interest in Property, supra} note 107, at 663-74 (analyzing the role of legal doctrine in protecting reliance interests).}
\footnotesize{488. See e.g., Singer, \textit{No Right to Exclude, supra} note 107, at 1446-48.
Singer’s work represents an important shift away from the mainstream search for objective foundations. Most significant is his linkage of legal theory with persuasion. However, a persuasive approach that relies primarily on logic does not draw on what trial lawyers know about persuasion; rational arguments do not hurt one’s case, but neither, in many cases, do they win it.

What does? To answer this question, one has to shift away from an image of law as logical argument towards an image of law as a “rhetorical and literary activity.” As every trial lawyer knows, persuasion is about painting a picture of the facts that resonates with the jury’s prior perceptions of the world. And those perceptions reflect less a picture of reality than “embodied history, internalized as a second nature and so forgotten as history.” To put it differently, persuasion “must act through the materials it is given—an inherited language, an established culture, and existing community—which in using it transforms.” James Boyd White stresses that persuasion reflects not only “a set of special-sounding words, but a set of intellectual and social activities, and these constitute both a culture—a set of resources for future speech and action, a set of ways of claiming meaning for experience—and a community, a set of relations among actual human beings.”

Rhetoric in this sense refers not only to the art of persuasion but also to “that art by which culture and community and character are constituted and transformed.” At an instrumental level, this approach to legal theory is beckoning to students because it teaches them how to be better advocates by adding to the traditional focus on logic a sustained examination of chaos, inarticulateness, inconsistency, and silences within the law.

In this study we have seen plenty of chaos. Why is covenants law such “an unspeakable quagmire”? I have argued that the doctrinal chaos of the law of covenants reflects a clash between the intuitive image of absoluteness and American courts’ unspoken commitment to protect single-family neighborhoods. Why is takings law still a muddle? I have argued that it reflects a clash between the intuitive image of and state courts’ traditional sense that property can be extensively regulated if necessary to achieve the common good. Nuisance is the third arena where property law remains an eternal thicket—again it involves a clash between the intuitive image of absoluteness and a legal tradition of limited ownership. This same clash explains judges’ frequent, if threadbare, claims to be enforcing the parties’ intent in property cases where they clearly are redistributing the bundle of sticks.

489. See Singer, Persuasion, supra note 107, at 2445-48 (discussing the importance of persuasion in the legal realm).
490. White, Heracles’ Bow, supra note 5, at x.
492. White, Heracles’ Bow, supra note 5, at x-xi.
493. Id. at xi.
494. Id.
In addition to chaos, we have seen plenty of inarticulateness and inconsistency. Why does the famously brainy New Jersey Supreme Court suddenly sound vague, sentimental, and religious in State v. Shack? I have linked this with the rhetorical challenges presented by the liberal dignity strain. Why did the Lochner Court uphold local zoning regulation in an era when it was striking down most other regulation in the public interest? This inconsistency, which has long puzzled commentators, is explained by the American obsession with home ownership. The final inconsistency is the most pervasive: why does the self-description of absolute ownership coexist with the practice of limited property rights? Many commentators have noted this inconsistency, but few have linked the intuitive image with a tradition of constitutional rhetoric of limited government which is at odds with the liberal dignity strain and various strains of republican rhetoric.

Finally, this Article explores the silences in American property law. Why does the egalitarian strain of republicanism have such a substantial presence in American property rhetoric outside the law but so little influence within it? This is perhaps the most sobering message of this study for those whose goal is to destabilize the intuitive image. Other than in Charles Reich’s The New Property—which only served to give stability to those who already had a stake in society (and then only for a very short period)—republican egalitarian rhetoric has not emerged as a major force in American property law. A key challenge is how to breathe new life into both this strain of republican rhetoric and the salus populi strain, and make them a live force within the law.495

Thus, a pragmatic approach to property rhetoric can help train better lawyers by awakening students to the full “cupboard” of resources available to them as advocates in property cases. Even more important, it can help create better citizens, both within the classroom and outside of it. Pragmatic legal theory seeks not to discover preexisting truths but to “treat[] knowledge as the method of active control of nature and of experience.”496 Its goal is to create a democratic conversation in which the intuitive image is demoted from its received status as common sense. Only then can we begin to improvise a future in which alternative visions of property regain a central role.

495. As noted above, I will further explore this theme in a future article on takings law.
496. Dewey, Reconstruction in Philosophy, supra note 7, at 122.