

THE IDEA OF PROPERTY IN LAND

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It is just over a century ago since, in a paper still regarded as seminal, Oliver Wendell Holmes observed that the trouble with law was not that there had been too much theory but rather that there had not been enough.¹ We must therefore begin with some conceptualisation about 'property'.

1 A brief introduction to the jurisprudence of property

Few concepts are quite so fragile, so elusive and so often misused as the idea of property. Most everyday references to property are unreflective, naive and relatively meaningless. Frequently the lay person (and even the lawyer) falls into the trap of supposing the term 'property' to connote the *thing* which is the object of 'ownership'. But the beginning of truth about property is the realisation that property is not a *thing* but rather a *relationship* which one has with a thing. It is infinitely more accurate, therefore, to say that one has property *in* a thing than to declare that the thing is one's property.²

To claim 'property' in a resource is, in effect, to assert a strategically important degree of control over that resource; and to conflate or confuse this relationship of control with the actual thing controlled may often prove to be an analytical error of some substance. For 'property' is, instead, the word used to describe particular concentrations of power *over* things and resources. The term 'property' is simply an abbreviated reference to a quantum of socially permissible power exercised in respect of a socially valued resource. Used in this way, the word 'property' reflects its semantically correct root by identifying the condition of a particular resource as being 'proper' to a particular person.³ In this deeper sense, as we shall see later, the language of 'property' may have more in common with 'propriety' than with entitlement; and the notion of a 'property right' may ultimately have more to do with perceptions of 'rightness' than with any understanding of enforceable exclusory title.

It may be noted, furthermore, that the power-relationship implicit in 'property' is not absolute but relative: there may well be gradations of 'property' in a resource. The amount of 'property' which a specified person may claim in any resource is capable of calibration -- along some sort of sliding scale -- from a maximum value to a minimum value. Of course, where this value tends towards zero it will become a misuse of language to say

¹ *The Path of the Law*, 10 Harv L Rev 457 at 476 (1896-97). See now 110 Harv L Rev 989 (1996-97).

² "In legal usage property is not the land or thing, but is *in* the land or thing" (*Dorman v Rodgers* (1982) 148 CLR 365, *per* Murphy J at 372). See also Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, (W. Harrison ed., 1948, Oxford University Press), p. 337, note 1 (Chapter XVI, section 26).

³ The sense conveyed here is similar to that in which a "proper thing" meant, in archaic usage, "one's own thing" (see Gray, *Elements of Land Law* (1987, Butterworths, 1st edn), p. 8).

that this person has any 'property' at all in the resource in question. Apart from such cases, however, it remains feasible -- and indeed important -- to measure the quantum of 'property' which someone has in a particular resource at a particular time. Far from being a monolithic notion of standard content and invariable intensity, 'property' thus turns out to have an almost infinitely gradable quality. And it follows, moreover, that to have 'property' in a resource may often be entirely consistent with the acquisition or retention by others of 'property' in the same resource. It is, in fact, the complex inter-relation of these myriad gradations of 'property' which comprises the stuff of modern land law.

But let us explore some of these ideas in a less abstract context.

2 Gradations of 'property'

When, as an invited guest, you attend a dinner party in our home in Eden Street, you would no more think of asserting that you have 'property' in our home than you would think of claiming any entitlement to walk away with our knives and forks or with our pictures and books. You are clearly no trespasser, for we requested the pleasure of your company. Provided that you do not abuse our invitation by sliding drunkenly down the bannisters,⁴ you continue to enjoy the jural immunity which attaches to the recipient of a bare licence or permission to enter upon another's land. At the end of the evening we will bid you goodbye at our door and, in Celtic (though not Anglo-Saxon) custom, one of us will stand watching respectfully until you disappear from sight. But it would strain accepted understandings of both lay and legal language to suggest that, even for the brief span of our dinner party, you had any 'property' in our land.⁵

This isolated vignette speaks volumes about the indefinable quality of 'property' in land and the complex psycho-spatial assumptions which underpin perceptions of ownership. Throughout this entire social encounter your relationship with 'our' land could never have been described as 'proprietary' in nature -- not even if, towards the end of the evening, you pottered around the kitchen helping to make the coffee or plundered the cupboards in a desperate search for another bottle of wine. Your land-based rights were, at all times, essentially personal, moral and social. You were entitled to the cordiality of welcome and mutuality of respect properly given to any duly invited guest. Your legal rights were measurable in negative terms only: your liability in trespass was suspended so long as you did not overstep the ambit of the licence granted by our invitation. But 'property' in the land never ceased to be ours; indeed it was by virtue of the prerogative of 'property' that we retained the right to dictate the terms on which access might be had to our land by a stranger. We admitted you to our home; by means of some implicit fiat we constrained your conduct whilst present there; and we finally saw you off the land at the conclusion of the licensed period of entry. Here -- albeit heavily suffused by the courtesies of social intercourse -- are found the indicia of the classical conception of property -- the power to control access, to prioritise competing modes of user and, ultimately, to exclude the stranger.

This apparently straightforward analysis of 'property' in land is, of course, capable of permutation through several hypothetical changes of circumstance. Suppose that, instead of inviting you to dinner in our home, we installed you as a lodger in one of the attic bedrooms. In return for a weekly rent, you now enjoy the use of this room together with a share of the kitchen and bathroom facilities in the house. Or suppose, alternatively,

⁴ See *The Carlgarth* [1927] P 93, *per* Scrutton LJ at 110 ("When you invite a person into your house to use the staircase, you do not invite him to slide down the bannisters").

⁵ This must be so notwithstanding the extremely broad definition of the word 'land' as inclusive of buildings and parts of buildings attached to the physical solum (see Law of Property Act 1925, ss 62(1), (2), 205(1)(ix); Land Registration Act 1925, s 3(viii)). See also *Elitestone Ltd v Morris* [1997] 1 WLR 687 at 691G-H.

that we converted a complete floor of our house into a self-contained flat which we let to you for a period of two years. Or even imagine that during our dinner party we agreed to sell you the entire house⁶ and have since transferred the registered title to you. On which of these various hypotheses could you now credibly claim to have 'property' in the land? In at least some of these instances the identification of 'property' in the land will have become suddenly more difficult -- partly because the issues postulated may not be principally, or even necessarily, legal in nature.

Just as perplexing, although perhaps in a different way, may be the question whether you could claim any 'property' in our land in Eden Street if you were our next-door neighbour and we permitted you a right of way across our back garden or promised you that we would use our own premises for residential purposes only. Yet, as will appear later, the standard interpretation of such events in English law would indicate that at least some of the 'property' in our land has been thereby been passed to you.

3 Ambivalent conceptual models of 'property'

The task of the present paper is to outline the various ways in which English law -- and perhaps, more generally, common law jurisprudence -- handles the idea of property in land. It will be argued that our dominant models of property in land fluctuate inconsistently between three rather different perspectives. It will be suggested that this doctrinal uncertainty -- this deep structural indeterminacy -- explains the intractable nature of some of land law's classic dilemmas, whilst simultaneously impeding constructive responses to the more immediately pressing challenges of 21st century land law. The common law world has never really resolved whether 'property' in land is to be understood in terms of empirical facts, artificially defined rights or duty-laden allocations of social utility. Although these three perspectives sometimes interact and overlap, it remains ultimately unclear whether the substance of 'property' resides in the raw data of human conduct or in essentially positive claims of abstract entitlement or in the socially directed control of land use. In short, the idea of 'property' in land oscillates ambivalently between the behavioural, the conceptual and the obligational, between competing models of property as a *fact*, property as a *right* and property as a *responsibility*.

(1) 'Property' as a fact

Much of the genius of the common law derives from a rough-and-ready grasp of the empirical realities of life. According to this perspective the identification of 'property' in land is an earthly pragmatic affair. There is a deeply anti-intellectual streak in the common law tradition which cares little for grand or abstract theories of ownership,⁷ preferring to fasten instead upon the raw organic facts of human behaviour. This perspective is preoccupied with what happens on the ground rather than with what emerges from the heaven of concepts. Accordingly, the crude empiricism of this outlook leaves the recognition of 'property' to rest upon essentially intuitive perceptions of the degree to which a claimant successfully asserts *de facto* possessory control over

⁶ For a bizarre instance, arising in Australia, of a house purchase allegedly agreed at a dinner party, see *Lezabar Pty Ltd v Hogan* (1989) 4 BPR 9498. See, however, Law of Property (Miscellaneous Provisions) Act 1989, s 2(1).

⁷ See *Commissioner for Railways et al v Valuer-General* [1974] AC 328, *per* Lord Wilberforce at 351H-352A.

land.⁸ On this view 'property' in land is more about fact than about right; it derives ultimately not from "words upon parchment"⁹ but from the elemental primacy of sustained possession.¹⁰ 'Property' in land is thus measurable with reference to essentially behavioural data; it expresses a visceral insight into the current balance of human power-relationships in respect of land. And it is, indeed, the psycho-social nature of this understanding of 'property' which serves to discriminate between many of the hypothetical variants of the 'property' question posed earlier in this paper.

Concealed within this behavioural notion of 'property' is, inevitably, some primal perception of the *propriety* of one's nexus with land.¹¹ To have 'property' in land is not merely to allege some casual physical affinity with a particular piece of land, but rather to stake out some sort of claim to the legitimacy of one's personal space in this land. It is to assert that the land is 'proper' to one; that one has some significant self-constituting, self-realising, self-identifying connection with the land; that the land is, in some measure, an embodiment of one's personality and autonomy. To claim 'property' in land is to arrogate at least a limited form of sovereignty over the land and to allege that one has some emotion- or investment-backed security in it. To have 'property' in land connotes, ultimately, a deeply instinctive self-affirming sense of belonging and control; and it is precisely this sense of possessory control which identifies the two proprietary estates acknowledged today in English law,¹² the fee simple absolute (or freehold estate) and the term of years absolute (or leasehold estate).

Such inner awareness of 'property' in land is, of course, essentially pre-legal in character. But no matter how elusive and inexpressible the nature of the psychological link, its absence is recognisably familiar. The obverse of 'property' in land is found in the lurking unease experienced by the trespasser and in the diffidently self-conscious demeanour evinced by those who do not feel quite "at home" in a stranger's territory. In some degree the obverse of 'property' is disempowerment, disorientation and alienation -- the uncomfortable realisation that one's presence on land is either improper or crucially dependent on the sufferance of another.¹³ The student who tiptoes across the landing for the two baths per week permitted by his landlady cannot credibly claim to have any 'property' in his landlady's house. Equally, for reasons soon to be reinforced, the lodger who takes up occupancy of our attic bedroom in Eden Street -- as distinct from the person who receives a lease of a self-contained flat in the same house -- can claim no proprietary estate in the land.¹⁴

⁸ 'Possession' has been described as "a conclusion of law defining the nature and status of a particular relationship of control by a person over land" (*Mabo v Queensland (No 2)* (1992) 175 CLR 1, *per* Toohey J at 207).

⁹ Blackstone could see "no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land ..." (*Commentaries*, Vol II, p. 2).

¹⁰ "In some deep sense the sustained exercise of exclusory power is perhaps all there really is to the grand claim of proprietary ownership. Behind all the brave philosophical and political rhetoric of conventional property talk there lurks only the unattractive rumble of state-sanctioned *force majeure*" (Kevin Gray, Property in Common Law Systems, in G.E. van Maanen and A.J. van der Walt ed., *Property Law on the Threshold of the 21st Century* (MAKLU, 1996), p. 265).

¹¹ Once again even the etymological links between such terms as 'property', 'proper', 'appropriate', and 'propriety' serve to underscore the value-laden complexity of the inter-relating nuances of property talk.

¹² See Law of Property Act 1925, s 1(1).

¹³ See P. Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U Miami L Rev 127 at 129 (1987).

¹⁴ It is in precisely the same sense that a guest cannot claim to have 'property' in a hotel room. The hotel guest may enjoy a temporarily exclusive use of his room but does not have overall territorial control (see *Bradley v Baylis* (1881) 8 QBD 195, *per* Jessel MR at 216).

So potent is this behavioural connotation of property relationships that, even today, common law courts frequently resort to curiously unlegalistic language in identifying the existence of the estates of the fee simple and the term of years. It is no accident that the legal notion of 'property' in land is still articulated in terms which are strikingly crude and unsophisticated. Thus, for instance, the 'property' enjoyed by the leaseholder, and *a fortiori* by the freeholder, is often said to be characterised by the freedom each has to "call the place his own".¹⁵ As Coke CJ famously observed long ago in *Semayne's Case*,¹⁶ "the house of every one is to him as his castle and fortress". Much more recently, in seeking to capture the essence of the leasehold estate, Lord Denning MR could frame the issue only as a deeply intuitive empirical inquiry, *ie* whether the relevant occupier had a "stake" in the premises, as distinct from a mere "permission for himself personally to occupy".¹⁷ It is by virtue of such stakeholding -- by virtue of some gut sense of belonging -- that the leaseholder or tenant can properly be described as "able to exercise the rights of an owner of land, which is in the real sense his land albeit temporarily and subject to certain restrictions."¹⁸

Throughout the history of English land law the operative concept has been *possession* rather than *ownership*: the common lawyer's overwhelming concern has been with the externally verifiable modalities of possessory control.¹⁹ Indeed, the 'property' of estate ownership is ultimately a derivative of 'exclusive possession',²⁰ a phrase used in English law to denote not merely an exclusive factual presence upon land but also some inner assumption as to the power relationships generated by such presence. Correspondingly, the absence of estate ownership is epitomised in the 'property deficit' inherent, for instance, in the status of the mere 'lodger'. The lodger, unlike the tenant, is subject to the supervisory authority of the owner, who at all times "retains his character of master of the house, and ... retains the general control and dominion over the whole house".²¹ In

¹⁵ *Street v Mountford* [1985] AC 809, *per* Lord Templeman at 818A. By contrast, "[a] licensee lacking exclusive possession can in no sense call the land his own" (*ibid*, *per* Lord Templeman at 816C).

¹⁶ (1604) 5 Co Rep 91a at 91b, 77 ER 194 at 195.

¹⁷ *Marchant v Charters* [1977] 1 WLR 1181 at 1185G. Here the Court of Appeal held that the occupier of the disputed "attractive bachelor service apartment" was merely a lodger and not a tenant, a finding later endorsed by the House of Lords in *Street v Mountford* [1985] AC 809 at 824G-825C. Similar outcomes have emerged in cases involving long-term hotel residents (*Appah v Parncliffe Investments Ltd* [1964] 1 WLR 1064 at 1071; *Luganda v Service Hotels Ltd* [1969] 2 Ch 209 at 217D) and residents in an old people's home (*Abbeyfield (Harpenden) Society Ltd v Woods* [1968] 1 WLR 374 at 376F-H).

¹⁸ *Street v Mountford* [1985] AC 809, *per* Lord Templeman at 816B.

¹⁹ This feature of the common law tradition is just as evident outside the English jurisdiction. In *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342-343, the High Court of Australia declared a statutory grazing licence to constitute a mere personal right and no proprietary "estate or interest" in land, emphasising the extraordinary fragility of the licence in question. In so far as it was liable to summary cancellation and conferred no right on the licensee to effect improvements on the land without permission, the licence failed to resonate with the plenitude of possessory control which characterises the notion of 'property' in land. See also *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 184 ('property' held not to include "a right to mere possession under a licence to occupy").

²⁰ "Exclusive possession de jure or de facto, now or in the future, is the bedrock of English land law" (*Hunter v Canary Wharf Ltd* [1997] 2 WLR 684, *per* Lord Hoffmann at 706B). See also Windeyer J's classic reference to exclusive possession as "the proper touchstone" of a lease or tenancy (*Radaich v Smith* (1959) 101 CLR 209 at 223).

²¹ *Thompson v Ward* (1871) LR 6 CP 327, *per* Bovill CJ at 361. Other early legal definitions of the term 'lodger' similarly emphasise the idea that lodgers "submit themselves to [the owner's] control" (*Ancketill v Baylis* (1882) 10 QBD 577 at 586). See also *Bradley v Baylis* (1881) 8 QBD 195 at 219. Significantly, in *Street v Mountford* [1985] AC 809 at 817H-818D, the House of Lords invoked this wealth of 19th century 'lodger' jurisprudence to illuminate the essence of leasehold tenure.

the modern context, declared Lord Templeman in *Street v Mountford*,²² a residential occupier can claim no proprietary estate in the land if he is provided with attendance or services which require the owner or his servants to "exercise unrestricted access to and use of the premises." In such circumstances it is the owner who "retains possession" precisely in order to supply the attendance or services.²³

In terms of this empirical perspective, the critical determinant of 'property' in land is the mode of behaviour consciously adopted by the claimant occupier. The occupier is, in some elusive sense, the master of his own destiny: he is accredited with the quantum of 'property' which corresponds most closely to the quality of his own behaviour. Estate ownership is thus self-determining and self-righting. Both the freehold and the leasehold estates are marked out by a distinctive degree of overall territorial control²⁴ and by a general immunity from uncontracted supervisory regulation.²⁵ Both estates imply extensive rights of quiet and exclusive enjoyment,²⁶ and the *de facto* assertion of such rights by an occupier tends to confirm the presence of a proprietary estate in this person.²⁷

It is on this basis that "exclusive and unrestricted use of a piece of land" generally connotes a claim to either a freehold²⁸ or a leasehold²⁹ estate rather than any claim of mere easement.³⁰ In *Copeland v Greenhalf*,³¹ for

²² [1985] AC 809 at 818A.

²³ *Antoniades v Villiers* [1990] 1 AC 417, *per* Lord Templeman at 459F-G.

²⁴ The right to exclude strangers is a "fundamental element of the property right" (*Kaiser Aetna v United States*, 444 US 164, *per* Justice Rehnquist at 179-180 (1979)) and "traditionally...one of the most treasured strands in an owner's bundle of property rights" (*Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419, *per* Justice Marshall at 435 (1982)). See also *Entick v Carrington* (1765) 19 Howell's State Trials 1029 at 1066; *Gerhardy v Brown* (1985) 159 CLR 70 at 150.

²⁵ Thus, in *Westminster CC v Clarke* [1992] 2 AC 288 at 301H-302A, the House of Lords denied that a tenancy might be claimed by an occupant of a room in a council-run hostel for homeless persons. The council's detailed control over and intimate surveillance of all activities on the premises was held to be inconsistent with the assertion of any proprietary estate. See also *Guppys (Bridport) Ltd v Brookling* (1984) 269 EG 846 at 850.

²⁶ Thus, for instance, the leaseholder may "keep out strangers and keep out the landlord unless the landlord is exercising limited rights reserved to him by the tenancy agreement to enter and view and repair" (*Street v Mountford* [1985] AC 809, *per* Lord Templeman at 816C).

²⁷ Even an express documentary denial or qualification of a particular occupier's exclusive possession may, paradoxically, indicate this degree of possessory control to have been an intrinsic (and possibly irreducible) attribute of the occupancy in question (see *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199, *per* Mason J at 213; *Wik Peoples v Queensland* (1996) 187 CLR 1, *per* Brennan CJ at 73, *per* Toohey J at 117).

²⁸ *Reilly v Booth* (1890) 44 Ch D 12, *per* Lopes LJ at 26. See also *Metropolitan Railway Co v Fowler* [1892] 1 QB 165 at 175. The conveyance of rights of exclusive user even over a defined quantum of air space constitutes a freehold grant rather than any easement (see *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (1971) 124 CLR 73 at 91; *Tileska v Bevelon* (1989) 4 BPR 9601 at 9606).

²⁹ See *Wik Peoples v Queensland* (1996) 187 CLR 1, *per* Toohey J at 116 ("the point is not so much that a 'lease' confers exclusive possession; it is that the conferring of exclusive possession is an indication that the arrangement in question is a lease").

³⁰ In proper cases the courts may reclassify a right as an easement irrespective of the precise label accorded by grantor and grantee (see *Riley v Penttila* [1974] VR 547 at 560).

³¹ [1952] Ch 488 at 498.

example, the wheelwright who littered an extensive strip of another's land with motor vehicles and junk metal was presumed to be asserting an ownership in fee simple, since his was "virtually a claim to possession of the servient tenement, if necessary to the exclusion of the owner."³² Likewise, a water company's installation of a sewer in privately owned land invests the company as a freeholder with "the absolute property in the sewer (the whole of the space occupied by the sewer)".³³ Indeed the distinction between fee simple and easement has been said to turn on whether a disputed grant of user rights so derogates from the totality of the grantor's rights that the grantee is left "free to act as if [he] were the owner of the freehold."³⁴ Accordingly user of a right of way merely as a means of non-exclusive passage and re-passage over another's land may qualify as a valid easement, but not the much more extensive claim to utilise the way as a parking lot.³⁵

The constitutive effect of empirical fact is also evident in other contexts. In delineating, for example, the borderline between the lease and the licence, courts are now accustomed to direct their attention towards the "factual matrix and genesis"³⁶ of any written occupancy agreement.³⁷ Attention must be paid "to the facts and surrounding circumstances and to what people do as well as to what people say".³⁸ In seeking out "the substance and reality of the transaction",³⁹ the courts effectively ensure that "where the language of licence contradicts the reality of lease, the facts must prevail."⁴⁰ The courts are therefore empowered to overturn any superficial label which falsely describes the parties' legal relationship,⁴¹ and any contractual terms which are blatantly or cynically inconsistent with the reasonably practical circumstances of an agreed occupancy are liable to be discarded as "pro non scripto".⁴²

³² See also *Ward v Kirkland* [1967] Ch 194 at 223E; *Grigsby v Melville* [1972] 1 WLR 1355, [1974] 1 WLR 80; *Harada v Registrar of Titles* [1981] VR 743 at 753.

³³ *Taylor v North West Water* (1995) 70 P & CR 94 at 107.

³⁴ *Mercantile General Life Reassurance Co of Australia Ltd v Permanent Trustee Australia Ltd* (1989) NSW ConvR _55-441, per Powell J at 58,211.

³⁵ See *Keefer v Arillotta* (1977) 72 DLR (3d) 182 at 189. In some circumstances the right to park a car may be validly created as an easement so long as the rights claimed do not amount to an arrogation of exclusive beneficial user of the entire servient tenement, thereby depriving the servient owner of "any reasonable use of his land, whether for parking or anything else" (*London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278 at 1288C).

³⁶ *Crancour Ltd v Da Silvaesa* (1986) 52 P & CR 204, per Purchas LJ at 229.

³⁷ The parties' conduct subsequent to the date of their agreement is highly relevant as to "whether the documents were or were not genuine documents giving effect to the parties' true intentions" (*Antoniades v Villiers* [1990] 1 AC 417, per Lord Oliver of Aylmerton at 469C, per Lord Jauncey of Tullichettle at 475F).

³⁸ *Antoniades v Villiers* [1990] 1 AC 417, per Lord Templeman at 463H-464A.

³⁹ *Antoniades v Villiers* [1990] 1 AC 417, per Lord Ackner at 466C.

⁴⁰ *Antoniades v Villiers* [1990] 1 AC 417, per Lord Templeman at 463C. Any element of "pretence" detected in this process is severable from the agreement as "obviously inconsistent with the realities of the situation" (*Hadjiloucas v Crean* [1988] 1 WLR 1006, per Mustill LJ at 1023H-1024A).

⁴¹ "A cat does not become a dog because the parties have agreed to call it a dog" (*Antoniades v Villiers* [1990] 1 AC 417, per Bingham LJ at 444B). See also *Street v Mountford* [1985] AC 809, per Lord Templeman at 819E-F.

⁴² *Antoniades v Villiers* [1990] 1 AC 417, per Lord Jauncey of Tullichettle at 477A.

The primarily factual orientation of this perspective has been borne out in a number of cases where the courts have castigated as mere "pretence"⁴³ a range of unrealistic or improbable terms aimed at disabling any proprietary claim on the part of the occupier. Accordingly effect is denied, for instance, to bizarre contractual terms, never enforced in practice, which require a "licensee" to vacate his rented room every day between 10.30 am and midday⁴⁴ or to allow a "licensor" at any time to use impossibly cramped premises in common with a young cohabiting couple "and such other licensees or invitees as the licensor may permit from time to time to use the said rooms."⁴⁵ In such circumstances the superficial denial of the occupiers' overall territorial control is amply falsified by the actual behaviour of the parties.⁴⁶

Nowhere is the self-defining quality of 'property' as an empirical fact more clearly demonstrated than in the law of adverse possession of land. Here, irrespective of the state of the proprietorship register or concurrent paper ownership, the fact of uncontested long possession eventually confers an impregnable title upon the actual occupier.⁴⁷ English law presumes that any person in possession of land has a fee simple estate in the land⁴⁸ unless and until the contrary is shown.⁴⁹ Possession of land, even if tortiously acquired,⁵⁰ immediately generates a 'property' in the land which, if unchallenged for the duration of the legally stipulated limitation period,⁵¹ conclusively bars all prior rights of recovery.⁵² Title to land being essentially relative, the law of adverse possession accordingly endorses an uncompensated shift of economic value to the squatter or interloper "in the interests of peace".⁵³ Such a compromise operates to ensure that 'property' in land conforms to the lived boundaries rather than the reverse; and in this way the long possession rule incorporates a controlled trade-off between documentary title and pragmatic fact which serves to avert endless and costly controversy.

⁴³ See *Antoniades v Villiers* [1990] 1 AC 417, per Lord Templeman at 462H.

⁴⁴ *Aslan v Murphy (No 1)* [1990] 1 WLR 766 at 772H-773A. See also *Crancour Ltd v Da Silva* (1986) 52 P & CR 204 at 215, 224.

⁴⁵ *Antoniades v Villiers* [1990] 1 AC 417 at 463E.

⁴⁶ As Lord Jauncey of Tullichettle observed in *Antoniades v Villiers* [1990] 1 AC 417 at 476D-E, the "common user" clause, read literally, would have permitted an unlimited number of strangers to share the flat with the young couple "even to the extent of sharing the joys of the double bed."

⁴⁷ *Buckinghamshire CC v Moran* [1990] Ch 623, per Nourse LJ at 644B-C.

⁴⁸ *Peaceable d Uncle v Watson* (1811) 4 Taunt 16 at 17, 128 ER 232.

⁴⁹ "[P]ossession is good against all the world except the person who can shew a good title" (*Asher v Whitlock* (1865) LR 1 QB 1, per Cockburn CJ at 5).

⁵⁰ "Every fee simple is not legitimum" (Coke, *The First Part of the Institutes of the Laws of England* (Co Litt), p. 2a). See also *Leach v Jay* (1878) 9 Ch D 42 at 45; *Newington v Windeyer* (1985) 3 NSWLR 555 at 563E; *Buckinghamshire CC v Moran* [1990] Ch 623 at 644D; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 209.

⁵¹ The normal limitation period is statutorily fixed as 12 years (Limitation Act 1980, s 15(1)).

⁵² See *Mabo v Queensland (No 2)* (1992) 175 CLR 1, per Toohey J at 211. Long possession thus matures a wrong into a right (see *Buckinghamshire CC v Moran* [1990] Ch 623, per Nourse LJ at 644C-D), but even before the squatter's title finally becomes unchallengeable, he acquires ancillary rights to defend his possession against strangers and to sell or devise his possessory fee simple interest (see *Asher v Whitlock* (1865) LR 1 QB 1 at 6-7; *Newington v Windeyer* (1985) 3 NSWLR 555 at 563F).

⁵³ *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, per Latham CJ at 276. It is perhaps worth noting that the areas of land involved in contemporary claims of long possession are rarely large tracts of uncharted wilderness but more commonly comprise a tiny slice of realty abstracted by mistake -- usually through inaccurate fencing -- from the tenement of a neighbour.

Even in this context, however, the possessory control which activates the Limitation Act bears a significantly qualified meaning: the concept of 'possession' is an amalgam of externally verifiable physical and mental phenomena. 'Possession' can be attributed to the squatter (and time can run in his favour) only if he has both factual possession (a *factum possessionis*) and the requisite intention to possess (*animus possidendi*).⁵⁴ The *factum* of possession depends upon a showing that the claimant has asserted a "complete and exclusive physical control"⁵⁵ over the land in question; and such evidence of *factum* must always be coupled with proof in the claimant of "an intention for the time being to possess the land to the exclusion of all other persons, including the owner with the paper title."⁵⁶

In this connection a survey of the physical facts relating to land can be heavily definitive of title. Should a squatter apply to register his title on the basis of adverse possession,⁵⁷ it is the practice of the Land Registry to instruct a surveyor to inspect the land in question. The surveyor records the exact position on site of physical boundary features such as fences and hedges; he estimates the age of these features; he reports on the way in which access to the land is obtained and controlled and on the person who appears to be in actual occupation; and he describes the use being made of the land by the squatter. The duration of the squatter's occupation, its exclusivity and the acts of user relied upon are thus subjected to empirical verification; and prior to inspection of the land the squatter will have been required to establish by statutory declaration the facts on which his claim is based and his intention in taking control of and making use of the land.

In a rather different context, further confirmation of the ultimately undeniable quality of empirically constituted 'property' emerges from contemporary experience relating to native land rights in Australia. Here controversy has centred on the current legal status of the customary rights of aboriginal peoples to roam and forage over traditional tracts of country. These rights, although scarcely expressible in terms of the common law doctrine of estates and interests in land, had been enjoyed for countless centuries prior to the arrival of European settlers. The aboriginal's intimate nexus with his land has often been characterised in terms of a "spiritual, cultural and social identity"⁵⁸ with the terrain, finding its highest fulfilment in the performance of a duty to "look after country". Aboriginal ownership, said Brennan J in *R v Toohey; Ex parte Meneling Station Pty Ltd*,⁵⁹ is "primarily a spiritual affair rather than a bundle of rights." Until relatively recently, however, courts tended firmly to deny the proprietary quality of the aboriginal's usufructuary relationship with his traditional lands,⁶⁰ taking the view that all native title had been extinguished in any event by the assumption of Crown sovereignty over lands then considered as unowned or *terra nullius*.

⁵⁴ *Powell v McFarlane* (1977) 38 P & CR 452, per Slade J at 470; *Buckinghamshire CC v Moran* [1990] Ch 623, per Slade LJ at 636B-C.

⁵⁵ *Buckinghamshire CC v Moran* [1990] Ch 623, per Slade LJ at 641B. Although the intensity of this control must vary with different kinds of terrain, it must be shown that "the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so" (*Powell v McFarlane* (1977) 38 P & CR 452 at 471).

⁵⁶ *Buckinghamshire CC v Moran* [1990] Ch 623, per Slade LJ at 643E. See also *Powell v McFarlane* (1977) 38 P & CR 452 at 471-472.

⁵⁷ Land Registration Act 1925, s 75(2).

⁵⁸ *Gerhardy v Brown* (1985) 159 CLR 70, per Brennan J at 136.

⁵⁹ (1982) 158 CLR 327 at 358.

⁶⁰ See *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 269-271, where Blackburn J expressly dismissed evidence that the aboriginal claimants "think and speak of the land as being theirs" as merely connoting that they "think and speak of the land as being in a very close relationship to them". For Blackburn J, it was "easier ... to say that the clan belongs to the land than that the land belongs to the clan".

In *Mabo v Queensland (No 2)* the High Court of Australia was finally forced to recognise the impossibility of declaring that, after tens of thousands of years of occupancy, the aboriginal peoples of Australia were mere "trespassers on the land on which they and their ancestors had lived"⁶¹ and had been converted by European colonisation into "intruders in their own homes and mendicants for a place to live."⁶² It is now acknowledged that native or traditional land rights survived the Crown's acquisition of sovereign or radical title⁶³ and may not necessarily have been extinguished even by subsequent Crown grants of leasehold titles to incoming settlers.⁶⁴ Brennan J (later Chief Justice of Australia) declined to believe that the indigenous inhabitants of a settled colony lost all "proprietary interest" in the land which they continued to occupy⁶⁵ or could "lawfully have been driven into the sea at any time after annexation".⁶⁶ For Brennan J, "a community which asserts and asserts effectively that none but its members has any right to occupy or use the land has an interest in the land that must be proprietary in nature: there is no other proprietor ... The ownership of land within a territory in the exclusive occupation of a people must be vested in that people."⁶⁷ Accordingly Brennan J accepted -- and it is now widely agreed to be clear law⁶⁸ -- that the customary land claims of aboriginals comprise a "proprietary community title" which represents "a burden on the Crown's radical title" even after the assumption of Crown sovereignty over the territory in question.⁶⁹

(2) 'Property' as a right

The foregoing analysis of the law of real property has concentrated on 'property' in land as a perception of socially constituted fact. A rather different -- and not entirely consistent -- focus is provided by the competing assessment of 'property' in land as comprising various assortments of artificially defined jural right.⁷⁰ On this view the law of real property becomes distanced from the physical reality of land and enters a world of conceptual -- indeed some would say virtually mathematical -- abstraction.⁷¹ In sharp contrast to the crudely empirical foundations of 'property' as a fact, the vision of 'property' as a right rests upon a complex calculus of carefully calibrated 'estates' and 'interests' in land, all underpinned by the political theory implicit in the

⁶¹ (1992) 175 CLR 1, *per* Toohey J at 184.

⁶² (1992) 175 CLR 1, *per* Brennan J at 29.

⁶³ A similar view has been taken by the Supreme Court of Canada in *R v Côté* (1996) 138 DLR (4th) 385.

⁶⁴ *Wik Peoples v Queensland* (1996) 187 CLR 1.

⁶⁵ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 40.

⁶⁶ (1992) 175 CLR 1 at 66.

⁶⁷ (1992) 175 CLR 1 at 51.

⁶⁸ See *Wik Peoples v Queensland* (1996) 187 CLR 1 at 214.

⁶⁹ See now Native Title Act 1993. For a similar approach in Canada, see *R v Van der Peet* (1996) 137 DLR (4th) 289, *per* McLachlin J at 382.

⁷⁰ "Property, in relation to land, is a bundle of rights exercisable with respect to the land" (*Minister of State for the Army v Dalziel* (1944) 68 CLR 261, *per* Rich J at 285).

⁷¹ The intellectual constructs of land law move "in a world of pure ideas from which everything physical or material is entirely excluded" (see F.H. Lawson, *The Rational Strength of the English Law* (1951, Oxford University Press), p. 79).

doctrine of tenure.⁷² All 'property' relationships with land are, accordingly, analysed at one remove -- through the intermediacy of an estate or interest in land. No citizen can claim that he or she owns the physical *solum*, merely that he or she owns some unitary jural right in or over that *solum*. One has 'property' in an abstract right rather than 'property' in a physical thing.

There is indeed much in English land law to support the characterisation of 'property' as composite bundles of incorporeal right. Here, however, an important distinction must be drawn between the Crown's ultimate or 'radical' title to all land and the proprietary estates or interests which may be parcelled out amongst the subjects of the Crown. The Crown's 'radical' title has been described as "a postulate of the doctrine of tenure and a concomitant of sovereignty".⁷³ This radical title is simply a brute emanation of the sovereign power acquired through physical conquest.⁷⁴ It denotes the political authority of the Crown both to grant interests in the land to be held of the Crown and also to prescribe the residue of unalienated land as the sovereign's beneficial demesne. The Crown's radical title is, in truth, no proprietary title at all,⁷⁵ but merely an expression of the *Realpolitik* which served historically to hold together the theory of tenure.⁷⁶ Under the tenurial system of tiered or hierarchical landholding all land in England (save unalienated Crown land) was held, in relationships of reciprocal obligation,⁷⁷ either mediately or immediately of the Crown. It remains the case even today that no subject can own lands allodially,⁷⁸ *ie* outside the tenurial scheme of things, although all tenures have now been commuted to a uniform 'socage tenure' directly from the Crown.⁷⁹

⁷² At one level the distinction between 'property' as a fact and 'property' as a right can seem merely a difference of emphasis; as indicated earlier, these two perceptions of proprietary essence are subtly inter-related. For instance, in the law of adverse possession, 'property', established as a fact, is deemed to generate 'property' as a right. In other contexts (such as those involving an express grant of rights), it is the right which ordinarily generates the fact. The threshold question is, however, whether 'property' is conceived *primarily* in predetermined categories of abstract right or as the raw emanation of socially constituted fact. Which is the more potent proprietary trigger -- artificially defined grant or essentially undeniable fact?

⁷³ *Mabo v Queensland (No 2)* (1992) 175 CLR 1, *per* Brennan J at 48.

⁷⁴ "Radical title links international and constitutional law notions with those which support the private law of proprietary rights and interests in land" (*Wik Peoples v Queensland* (1996) 187 CLR 1, *per* Gummow J at 186). For reference to the "uncannily parallel" notions of state sovereignty and private property, see Kevin Gray, *Property in Thin Air*, [1991] Cambridge LJ 252 at 304; The Ambivalence of Property, in G. Prins ed., *Threats without Enemies* (1993, Earthscan Publications), at p. 169.

⁷⁵ It is significant, for instance, that the ancient Crown lands still cannot be registered as freehold titles under the Land Registration Act 1925 -- "a major, but unremarked, lacuna in the system of land registration in England and Wales" (*Scmlla Properties Ltd v Gesso Properties (BVI) Ltd* [1995] BCC 793 at 798). The Crown cannot hold land of itself; and the Land Registry is empowered to register title only to "estates" in "land", the latter term statutorily requiring the existence of "tenure" (see Land Registration Act 1925, ss 2(1), 3(viii)).

⁷⁶ There is a danger that the location of radical title in the Crown may prompt the inaccurate suggestion that 'ownership' of all land reposes in the Crown or that the Crown is the only true 'owner' of land in England and Wales. This extrapolation from radical title to a concept of Crown 'ownership' is almost certainly a modern innovation, dating (significantly) only from the era of imperial expansion in the 17th and 18th centuries (*Wik Peoples v Queensland* (1996) 187 CLR 1, *per* Gummow J at 186-187). See also A.W.B. Simpson, *A History of the Land Law* (1986, Clarendon Press, 2nd edn) at pp. 47-48.

⁷⁷ "In an understanding of these relationships ... 'proprietary language is out of place'" (see *Wik Peoples v Queensland* (1996) 187 CLR 1, *per* Gummow J at 186, quoting S.F.C. Milsom, *The Legal Framework of English Feudalism* (1976, Cambridge University Press), p. 39).

⁷⁸ *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, *per* Latham CJ at 277.

⁷⁹ See Law of Property Act 1922, s 128, Sch12, para 1. All tenants in fee simple are today presumed to hold directly of the Crown as 'tenants in chief'. In consequence, where a fee simple is terminated by

It was left to the doctrine of estates to quantify the grades of abstract entitlement which might be enjoyed by any particular tenant (or landholder) within the tenurial framework. This doctrine spelt out a rich taxonomy of 'estates' in the land, each estate representing an artificial proprietary construct interposed between the tenant and the physical object of his tenure. Each tenant owned (and still owns) not land but an *estate* in land.⁸⁰ The precise nature of the estate was graded by its temporal duration and by the possible attachment of variegated conditions precedent or subsequent. Each common law estate -- whether the fee simple, the fee tail or the life estate -- comprised a time-related segment of the bundle of rights and powers exercisable over land; and the doctrine of estates effectively provided diverse ways in which three-dimensional realty might be carved up in a fourth dimension of time.⁸¹

In the form of the common law estates English land law thus comprised, from the earliest times, a field of highly manipulable abstract constructs which conferred enormous flexibility in the management of wealth. Of these proprietary rights in land the amplest was, of course, the fee simple, an estate of potentially unlimited duration which still confers "the widest powers of enjoyment in respect of all the advantages to be derived from the land itself and from anything found on it."⁸² Even in relation to this estate, however, it is significant that the effect of disclaimer⁸³ or other escheat is to terminate the freehold and to return the relevant land to the Crown.⁸⁴ Thus the implosion of the largest common law estate simply reverts the land within the allodium of the Crown,⁸⁵ in rather the same way in which a lease for years falls in for the lessor on the expiration of the term granted.

In general it can be said that the substitution of the abstract estate in land (in place of land itself) as the object of proprietary rights has had the profoundest influence on English law. Historically this conceptual legerdemain has facilitated almost endless disaggregations of title through grants of series of differentially graded estates in land. Thus each successive interest could enjoy an immediate jural reality as of the date of grant, each being freely commerciable (ie mortgageable) long before the estate in question vested in possession. Indeed, the ingenious compromise of the doctrine of estates often seemed to provide a

disclaimer, it is generally safe to assume that the escheat will be to the Crown rather than to some mesne (or intermediate) lord (see *Scmlla Properties Ltd v Gesso Properties (BVI) Ltd* [1995] BCC 793 at 799).

⁸⁰ *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, per Latham CJ at 277. "The 'estate' which a subject held in land as tenant was itself property which was the subject of 'ownership' both in law and in equity" (*Mabo v Queensland (No 2)* (1992) 175 CLR 1, per Deane and Gaudron JJ at 80).

⁸¹ As was argued so elegantly in *Walsingham's Case* (1573) 2 Plowd 547 at 555, 75 ER 805 at 816-817, "the land itself is one thing, and the estate in the land is another thing, for an estate in the land is a time in the land, or land for a time, and there are diversities of estates, which are no more than diversities of time ..."

⁸² *Wik Peoples v Queensland* (1996) 187 CLR 1, per Gummow J at 176. In so far as real property represents a "bundle of rights" exercisable with respect to the land, "the tenant of an unencumbered estate in fee simple has the largest possible bundle" (see *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, per Rich J at 285).

⁸³ Disclaimer nowadays occurs with increasing frequency pursuant to Insolvency Act 1986, s 178(2), which empowers a company liquidator to disclaim "onerous property" (see *Scmlla Properties Ltd v Gesso Properties (BVI) Ltd* [1995] BCC 793 at 805).

⁸⁴ See also *Re David James & Co Ltd* [1991] 1 NZLR 219 at 223-224; *Rural Banking and Finance Corp'n of New Zealand Ltd v Official Assignee* [1991] 2 NZLR 351 at 356.

⁸⁵ The freehold title "goes back to the Crown on the principle that all freehold estate originally came from the Crown, and that where there is no one entitled to the freehold estate by law it reverts to the Crown" (*In re Mercer and Moore* (1880) 14 Ch D 287, per Jessel MR at 295).

functional, and theoretically acceptable, form of substituted ownership in respect of the all-important resource of land.⁸⁶

Today the taxonomy of the common law estates is still largely preserved in the property legislation of 1925, although with necessary modifications and additions.⁸⁷ The fee simple absolute in possession remains as the primary estate in English law and is now joined as a legal estate by the term of years absolute.⁸⁸ Admittedly the fragmentation of title through the grant of successive estates and interests has become -- for reasons both fiscal and social -- rather less common, but the old estates of the common law survive albeit more often in equitable than in legal form.⁸⁹ In conjunction with this group of abstract proprietary constructs the 1925 Act confirms the existence of a range of other interests and charges (such as easements, mortgages, rights of entry, estate contracts, and interests under trust) which are variously capable of being held either at law or in equity or indiscriminately.⁹⁰ Thus the 1925 legislation seeks to maintain consistently the dogma that land ownership and use are mediated by the distribution, not of land as such, but of intangible jural entitlements interposed between persons and land. The perspective embraced by the statutory schema is of 'property' as a right, precisely on the footing that the only property one can have is *in* a right.

Yet English land law remains inevitably a curious blend of the conceptual and the pragmatic, the cerebral and the material. To be sure, the conceptual purity of systematically ordered estates and interests provides an intellectual base for the rational manipulation of axiomatic truths and for the multiple applications of propositional dogma so familiar to the student. But even the austere regime of the 1925 property legislation contains its share of mongrelised ideas, convenient adaptations and internal contradictions. English land law reveals, for instance, an intermittent tendency to conflate 'property' as fact with 'property' as right, as evidenced by the way in which statutory definitions of 'land' are expressly fashioned to include "an easement, right, privilege, or benefit in, over, or derived from land."⁹¹ This reification of intangible entitlement -- a frequent feature of the common law mind-set -- brings about the result that appurtenant easements become notionally affixed to their dominant tenement rather as fixtures become annexed to realty,⁹² their benefit passing with any subsequent conveyance or transfer of the relevant land.⁹³

Similar fusions of the abstract and the material appear elsewhere. A landlord's reversionary estate is deemed to constitute a notional dominant tenement sufficient to permit the enforcement of restrictive covenants

⁸⁶ See Kirby J's recent reference to the fee simple as the "local equivalent of full ownership" (*Wik Peoples v Queensland* (1996) 187 CLR 1 at 250). See also *Mabo v Queensland (No 2)* (1992) 175 CLR 1, *per* Deane and Gaudron JJ at 80).

⁸⁷ Indeed the scheme of title registration contained in the Land Registration Act 1925 is actually premised on the intellectual construct of the estate (see Land Registration Act 1925, s 2(1)).

⁸⁸ Law of Property Act 1925, s 1(1).

⁸⁹ See Law of Property Act 1925, ss 1(3), (8), 7(1). Being relegated to equitable status only, the life estate, the fee tail and all fee simple estates other than the absolute and conditional are nowadays capable of creation -- if at all -- only under a statutorily regulated "trust of land" (Trusts of Land and Appointment of Trustees Act 1996, s 2(1)).

⁹⁰ Law of Property Act 1925, s 1(2), (3).

⁹¹ Law of Property Act 1925, s 205(1)(ix); Land Registration Act 1925, s 3(viii).

⁹² Law of Property Act 1925, s 187(1).

⁹³ Law of Property Act 1925, s 62(1). See also Land Registration Rules 1925, r 251.

against a subtenant,⁹⁴ even though the term 'dominant tenement' is understood in most other contexts to connote a quite specific plot of physical land. Again, the doctrine of 'lost modern grant', which presumes the prescriptive acquisition of an easement following continuous user as of right for a period of 20 years, embodies a glaring juxtaposition of empirically founded and right-based notions of 'property' in land. Here the sheer fact of long user provides the basis for a "convenient and workable fiction"⁹⁵ that some incorporeal right of easement was once the subject of a formal grant which has since been misplaced and lost.⁹⁶

Irrespective of this kind of inconsistency, it is clear that other, perhaps far-reaching, consequences follow where the 'property' perspective focuses on artificial jural abstractions rather than on physically verifiable phenomena. In the absence of more empirical forms of identification, a premium is immediately placed on the maintenance of strict definitional boundaries around the various intellectual constructs which form part of the overall scheme. Thus the intangible character of 'property' entitlements dramatically intensifies the need for rigorous conceptual clarity, a feature which tends in turn to reinforce the apparent absoluteness of the abstract rights concerned. 'Property' must have a clear-cut or crystalline quality which admits of no doubt either as to its presence or, just as important, as to its absence or infringement. The rights to which 'property' relates must have a hard-edged definitional integrity conducive to the intellectual orderliness of the regime as a whole. 'Property' must come in neat, discrete, pre-packaged conceptual compartments, immune from capricious tampering or even well-intentioned amplification.⁹⁷

This preoccupation with definitional rigour is a consistent theme of English property law. In *National Provincial Bank Ltd v Ainsworth*,⁹⁸ in one of the most indicative passages of legal prose contained in the law reports, Lord Wilberforce famously declared that before a right or interest can be admitted into the "category of property, or of a right affecting property", it must be "definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability." A striking demonstration of this concern with discrete definition occurred in the relatively recent reaffirmation of the 'certainty of term' requirement in the law of leases. In *Prudential Assurance Co Ltd v London Residuary Body*⁹⁹ the House of Lords declined to overrule a 500 year-old principle that the maximum duration of a term of years must be ascertainable at the commencement of the lease. Although the decision was in many ways reached against its better judgment,¹⁰⁰ the House nevertheless endorsed the historic view that the conceptual parameters of asset entitlement must be definable with certainty *ab initio*.¹⁰¹ Open-endedness of definition

⁹⁴ *Hall v Ewin* (1888) 37 Ch D 74 at 79; *Teape v Douse* (1905) 92 LT 319 at 320; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 94.

⁹⁵ *Simmons v Dobson* [1991] 1 WLR 720, *per* Fox LJ at 723B.

⁹⁶ See *Bryant v Foot* (1867) LR 2 QB 161 at 181; *Dalton v Angus & Co* (1881) 6 App Cas 740 at 811-812.

⁹⁷ "It is not in the power of a vendor to create any rights not connected with the use or enjoyment of the land, and annex them to it: nor can the owner of land render it subject to a new species of burthen, so as to bind it in the hands of an assignee. 'Incidents of a novel kind cannot be devised, and attached to property, at the fancy or caprice of any owner'" (*Ackroyd v Smith* (1850) 10 CB 164 (1850) 10 CB 164 at 188, 138 ER 68, *per* Cresswell J at 77-78, quoting *Keppell v Bailey* (1834) 2 My & K 517 at 535, 39 ER 1042 at 1049).

⁹⁸ [1965] AC 1175 at 1247G-1248A.

⁹⁹ [1992] 2 AC 386 at 394E-H, confirming *Lace v Chantler* [1944] KB 368.

¹⁰⁰ [1992] 2 AC 386, *per* Lord Griffiths at 396B, *per* Lord Browne-Wilkinson at 396G-397A, *per* Lord Mustill at 397B.

¹⁰¹ Otherwise "the court does not know what to enforce" (*Ashburn Anstalt v Arnold* [1989] Ch 1, *per* Fox LJ at 12E).

would otherwise destroy the intrinsic orderliness of the common law estates by confusing the term of years with the one perpetual estate recognised by the common law, the estate in fee simple.

A similar concern with definitional boundaries is evident in the law of servitudes. English law has traditionally been concerned to draw stringent limits around the species of right which may properly be asserted as easements and negative covenants. The result has been the general imposition of rigorous requirements that incorporeal rights properly classifiable as servitudes should relate to ascertainable dominant and servient tenements and should confer a demonstrable element of 'accommodation', 'protection' or 'benefit' upon the alleged dominant tenement.¹⁰² Moreover, considerations of marketability, justiciability and enforceability have alike combined to force the categoric exclusion of any user rights which are loose, over-broad or ill-defined.¹⁰³ This definitional vigilance has been particularly apparent, for example, in relation to the law of easements. No right may be asserted as an easement if it is "too vague and too indefinite".¹⁰⁴ Thus there can be no easement in respect of a prospect or view.¹⁰⁵ Likewise there can be no claim of easement in relation to the uninterrupted access of light or air except through defined apertures in a building.¹⁰⁶ No easement can protect the unimpeded and general flow of air across one's neighbour's land for the purpose of preventing chimneys from smoking.¹⁰⁷ There is no easement of indefinite privacy¹⁰⁸; nor does English law recognise as an easement any claim to wander at will over another's land.¹⁰⁹

In conventional theory such tight definitional constrictions have served to distinguish and delimit the kinds of right which, unlike mere licences and contracts, have the capacity to affect later purchasers of land. The imposition of severely limiting criteria has thus been rationalised as necessary to prevent the proliferation of undesirable long-term burdens or 'clogs upon title' which would have sterilised land by rendering it unmarketable. Nowadays, however, it is far from clear that the restrictive definition of servitudes has any particularly beneficial effect: the admission of broader categories of utility and prohibition within the definition of allowable servitudes might well enhance the enjoyment of land in a crowded environment, promoting rather than inhibiting the character of a locality and its consequent attractiveness on the open market.

In reality the argument for conceptual discreteness in the law of servitudes tends to conceal, just as effectively today as it did over a century ago, that the crucial issue at stake is often the permissible boundary of entrepreneurial initiative in the exploitation and development of land resources. In rejecting any easement of wind access for a windmill in 1861, Erle CJ observed that such a claim would "operate as a prohibition to a most formidable extent to the owners of the adjoining lands -- especially in the neighbourhood of a growing

¹⁰² See Gray, *Elements of Land Law* (1993, Butterworths, 2nd edn), pp. 1065-1069, 1143-1147.

¹⁰³ See, for example, *Webb v Bird* (1861) 10 CB (NS) 268, *per* Erle CJ at 282, 142 ER 455 at 460 ("I am at a loss to conceive what would be an interruption of such a right as is claimed here").

¹⁰⁴ *Harris v De Pinna* (1886) 33 Ch D 238, *per* Chitty J at 250. See also *Copeland v Greenhalf* [1952] Ch 488 at 498 (where Upjohn J could find no authority in support of the idea that "a right of this wide and undefined nature can be the proper subject-matter of an easement").

¹⁰⁵ *William Aldred's Case* (1610) 9 Co Rep 57b at 58b, 77 ER 816 at 821; *Hunter v Canary Wharf Ltd* [1997] 2 WLR 684 at 702B, 711B-H, 727F-G.

¹⁰⁶ See *Harris v De Pinna* (1886) 33 Ch D 238 at 250-251, 262; *Allen v Greenwood* [1980] Ch 119 at 129C.

¹⁰⁷ *Bryant v Lefever* (1879) 4 CPD 172 at 178, 180.

¹⁰⁸ *Browne v Flower* [1911] 1 Ch 219 at 225.

¹⁰⁹ *In re Ellenborough Park* [1956] Ch 131 at 176, 180-184. See also *Attorney-General v Antrobus* [1905] 2 Ch 188 at 208.

town."¹¹⁰ Uncannily similar language was used in 1997 when, in *Hunter v Canary Wharf Ltd*,¹¹¹ the House of Lords held unactionable the extensive interference with television reception brought about by the recently constructed Canary Wharf Tower. Starting from the premise of a "rule of common law which, absent easements, entitles an owner of land to build what he likes on his land",¹¹² the House of Lords indicated that, just as in the case of disputed access to a prospect or wind and air flow, English law knows no such right as a prescriptive easement to receive a television signal.¹¹³ The House pointed in particular to the indeterminate nature of the amenity supposedly injured,¹¹⁴ the inordinate range of potentially aggrieved viewers,¹¹⁵ and the supposedly intolerable restriction otherwise imposed upon the freedom of the commercial developer.¹¹⁶ The correctness of the outcome may be disputed, but the *Canary Wharf* case clearly suggests that the discreteness of definition accorded to the conceptual abstractions of English land law may well have a critical interface with large issues relating to environmental protection and the quality of urban life in the 21st century.

On the less immediate plane of grand analysis, it remains one of the ironies of English law that the concentration on strict definition of crystalline fragments of entitlement has precluded the more general formulation of anything resembling a comprehensive or holistic theory of *dominium* in the continental sense.¹¹⁷ The tabulation of discrete, but inter-locking, estates and interests in land has quietly submerged any call to develop a fuller theory of title. Whether this shortcoming can ultimately survive the integration of English law within the emerging common law of Europe must rank as a matter of heightening speculation. Indeed, the single most striking feature of English land law is precisely the absence, within its conceptual apparatus, of overarching notions of *ownership*. The common law knows no absolute title¹¹⁸; all title remains relative and,

¹¹⁰ *Webb v Bird* (1861) 10 CB (NS) 268 at 284, 142 ER 455 at 461.

¹¹¹ [1997] 2 WLR 684.

¹¹² [1997] 2 WLR 684, *per* Lord Hoffmann at 712F. See also *per* Lord Goff of Chieveley at 689A-B, *per* Lord Hope of Craighead at 727B-728A. Compare Lord Cranworth's proposition in *Tapling v Jones* (1865) 11 HLC 290 at 311, 11 ER 1344 at 1353, that each might "use his own land by building on it as he thinks most to his interest".

¹¹³ [1997] 2 WLR 684 at 711H, 721A, 727H.

¹¹⁴ "Radio and television signals ... may come from various directions over a wide area as they cross the developer's property. They may be of various frequencies ... Their passage from one point to another is invisible ... " ([1997] 2 WLR 684, *per* Lord Hope of Craighead at 727H).

¹¹⁵ [1997] 2 WLR 684, *per* Lord Hoffmann at 712G.

¹¹⁶ [1997] 2 WLR 684, *per* Lord Hope of Craighead at 728A ("If he were to be restricted by an easement from putting up a building which interfered with these signals, he might not be able to put up any substantial structures at all. The interference with his freedom would be substantial"). See also *Phipps v Pears* [1965] 1 QB 76 at 83A.

¹¹⁷ Civilian systems of property law acknowledge ownership as an absolute jural relationship between a person and a thing. Following Roman law, the great codes of continental law define 'property' in highly abstract terms of *dominium* -- the right to enjoy a thing and to dispose of it in the most absolute manner (see art 544 *Code civil*; para 903 *Bürgerliches Gesetzbuch*; s 5:1 *Burgerlijk Wetboek*; art 641 Swiss Civil Code).

¹¹⁸ It is arguably only with the advent of a statutory regime of title registration -- particularly on a more comprehensive basis (see Land Registration, England and Wales: The Registration of Title Order 1989 (SI 1989 No. 1347)) -- that English law begins to recognise anything approaching absolute title in real property. In truth, however, registration of title under the Land Registration Act 1925 provides not so much for recordation of an intrinsically perfect form of ownership but rather for the artificial attribution of a statutorily defined "absolute title" as a consequence of state-endorsed registration (compare *Breskvar v Wall* (1971) 126 CLR 376, *per* Barwick CJ at 385, *per* Windeyer J at 400).

even in its statutory form, essentially defeasible.¹¹⁹ Accordingly, the common lawyer is fundamentally unable to make abstract pronouncements as to the ownership of land, for the entire methodology of the common law militates against such definitive identification. The common law's crude proprietary technique is restricted to determinations as to which of two claimants of an estate has the better claim. In this sense the common lawyer can never say who owns, but only who does not, albeit that such a ruling tends in practice to leave the preferred claimant with a fee simple title which is at least *pro tempore* unchallengeable.

Other, less obvious but not less significant, implications have gathered around the conceptualisation of 'property' as a *right* rather than as a *fact*. During the last 100 years a preoccupation with the supposedly crystalline essence of property rights has conduced to a wholly mistaken theory as to the potential significance of 'property' for third parties. Common lawyers, having once conceived of 'property' in terms of artificially pre-packaged commodities of tightly defined right, found it easy to embrace the seductive fallacy which still pervades the common law understanding of property. 'Property' appeared to comprise those rights which were sufficiently hard-edged and durable to be commerciable and, no less perversely, it seemed to follow that only those rights which could be bought and sold could ever constitute 'property'. In other words, the crisp definitional quality which facilitates the commercial trading of identifiable assets began -- in a wholly illusory relationship of cause and effect -- to make alienability or transmissibility appear as essential qualifying characteristics or hallmarks of 'property' itself.¹²⁰

Nor did the fallacy stop there. In a closely associated *non sequitur*, it came to be believed that, in order to enjoy 'proprietary' as distinct from merely 'personal' quality, rights must be capable of an even more general third party impact. Not only must rights of 'property' be capable of conferring benefits on third parties through onward sale; their proprietary character was, in turn, reinforced by their potential to impose enforceable burdens on other strangers. Beguiled again by the heavily formative pragmatics of the 19th century marketplace, the common lawyer fell into the lazy confusion that something was 'property' if sufficiently identifiable to burden third parties and, conversely, that the only rights which could adversely affect third parties were rights sufficiently clear-cut and durable to constitute 'property'.¹²¹ Hence emerged the convenient, but wholly mendacious, proposition that asset entitlements comprised 'property' if enforceable against strangers; and such entitlements were, of course, enforceable against strangers provided that they were 'proprietary'.

The absurd circularity of this concentration on assignability of benefit and enforceability of burden is almost too embarrassing to recount,¹²² yet its influence has infiltrated even the most exalted levels of common law decision-making. In so far as proprietary character is made to depend upon some supposed quality of "permanence" or "stability" -- to use the terms adopted by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth*¹²³ -- the definition of 'property' becomes patently self-fulfilling. Quite often, as for instance with the

¹¹⁹ See Land Registration Act 1925, s 82(1).

¹²⁰ See, for instance, *Dorman v Rodgers* (1982) 148 CLR 365, *per* Gibbs CJ at 367, *per* Stephen J at 369-370, *per* Aickin J at 378. It is relatively rare to find any judicial disclaimer of the proposition that transferability is an essential characteristic of property, but see *Dorman v Rodgers* (1982) 148 CLR 365, *per* Murphy J at 374; *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, *per* Mason J at 342-343.

¹²¹ See Russell LJ's reference in *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] Ch 665 at 696 to "... rights in reference to land which have the quality of being capable of enduring through different ownerships of the land, according to normal conceptions of title to real property ... "

¹²² See, however, *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25, *per* Windeyer J at 34. See also Kevin Gray, *Property in Thin Air*, [1991] Cambridge LJ 252 at 292-293.

¹²³ [1965] AC 1175 at 1247G-1248A.

'deserted wife's equity' in dispute in *Ainsworth* itself, the reason for asking whether a particular right is *proprietary* is precisely in order to determine whether the right is capable of binding third parties and thereby attaining the relevantly critical qualities of "permanence" and "stability". Proprietary character cannot be credibly or satisfactorily predicated in terms of tautological consequence, although this is exactly the trap induced by the common lawyer's ready disposition to see 'property' as discrete blocks of conceptual entitlement. The initial judgment whether a particular claim is sufficiently hard-edged and durable to rank as 'property' has tended, quite irrationally, to predetermine the question of binding impact on strangers.¹²⁴

Lord Wilberforce's proprietary criteria of alienability and enduring impact have often served to stultify emerging, and important, developments in the law -- another example coming to the fore in the contemporary recognition of traditional land rights in Australia. Once again it was, significantly, the conceptualisation of 'property' in terms of abstract right rather than empirical fact which, for two centuries, disabled the common law from recognising the proprietary nature of Australian native title. In dealing with aboriginal land claims in *Milirrpum v Nabalco Pty Ltd*,¹²⁵ Blackburn J had thought that "property, in its many forms, generally implies ... the right to alienate". In view, however, of the Gove Land claimants' express repudiation of any right of alienation, Blackburn J found "so little resemblance between property, as our law ... understands that term, and the claims of the plaintiffs for their clans" that these claims could not be considered "in the nature of proprietary interests". As already indicated in this paper, it was only some 20 years later, with the controversial decision of the High Court in *Mabo v Queensland (No 2)*,¹²⁶ that it finally became accepted that Australia's native peoples had not lost all "proprietary interest" in their traditional homelands.¹²⁷ The evidence of pragmatic fact had triumphed over the jurisprudence of abstract entitlement.

Recent case law developments across the common law world now point to one further disadvantageous implication of the tendency to package 'property' thinking into discretely defined units of abstract entitlement. The common law theory of estates concentrates almost exclusively on the temporal calibration of each particular estate and says little, if anything, about the precise content of the powers attached to the estate. Thus, effectively, the conceptual apparatus of 'property' in rights has disabled any deeper scrutiny of the variable intensity of 'property' in land. For instance, the common law tradition has generally accepted, albeit unthinkingly, that the estate owner enjoys an absolute prerogative to determine precisely who may enter or remain on his or her land.¹²⁸ The estate owner accordingly exercises an uncontrolled and virtually unchallengeable discretion to exclude any person from trespassing on that land.

¹²⁴ Exactly this preoccupation with the supposed substantive quality of the disputed right has bedevilled the chequered history of the law of contractual licences. In *Ashburn Anstalt v Arnold* [1989] Ch 1 at 24D, the Court of Appeal indicated, with heavy emphasis, that "a contractual licence does not create a property interest". Yet *Ashburn Anstalt* may ultimately mark something of a turning point, in that Fox LJ was prepared to concede (at 25H) that, in some limited circumstances, a contractual licence may bind a third party where "the conscience of the estate owner is affected" by the relevant transaction. The critical question may thus come to relate more closely to the conscientiousness of the third party than to the intrinsic nature of the rights which it is sought to enforce against him (see also *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, *per* Brennan J at 653).

¹²⁵ (1971) 17 FLR 141 at 272-273.

¹²⁶ (1992) 175 CLR 1 (*supra*, note 61).

¹²⁷ (1992) 175 CLR 1, *per* Brennan J at 40.

¹²⁸ See *Wood v Leadbitter* (1845) 13 M & W 838 at 844-845, 153 ER 351 at 354; *Marrone v Washington Jockey Club*, 227 US 633 at 636 (1912); *Madden v Queens County Jockey Club, Inc*, 72 NE2d 697 at 698 (1947); *Heatley v Tasmanian Racing and Gaming Commission* (1977) 14 ALR 519 at 538; *Lambert v Roberts* [1981] 2 All ER 15 at 19d; *Colet v The Queen* (1981) 119 DLR (3d) 521 at 526; *Gerhardy v Brown* (1985) 159 CLR 70 at 150; *Russo v Ontario Jockey Club* (1988) 46 DLR (4th) 359 at 364.

While this rule of peremptory exclusion may make perfect sense within, say, the domestic curtilage, there is today growing support for the proposition that arbitrary and potentially capricious powers of exclusion can no longer comprise an inevitable incident of property in *all* kinds of land and that the unqualified assertion of such powers may in practice derogate from fundamental principles of human freedom and dignity.¹²⁹ Can it really be the case, for example, that the corporate owner of a large shopping centre can exclude someone "simply for wearing a green hat or a paisley tie" or because he has "blond hair, or ... is from Pennsylvania"?¹³⁰ Is it really true that the owner of an extensive tract of uninhabited wild country may, on a whim, deny entry for reasonable and wholly harmless recreational use? The notion is slowly beginning to infiltrate the common law concept of property that the relative size or character of the territory and the social merit or virtue of competing uses impose an inevitable qualification on the workability of the trespassory concept.¹³¹

Many common law jurisdictions have, accordingly, seen a move away from an 'arbitrary exclusion rule' towards a 'reasonable access rule' under which the estate owner of quasi-public premises may exclude members of the public only on grounds which are objectively reasonable.¹³² This shift has necessarily involved a more subtle gradation of the exclusory powers inherent in estate ownership¹³³ and a more careful taxonomy of the kinds of land which are appropriately included within the scope of the 'reasonable access rule'.¹³⁴ In a crowded urban environment, where recreational, associational and expressional space is increasingly at a premium, an unanalysed, monolithic privilege of arbitrary exclusion is no longer tenable. Although the English

¹²⁹ See Kevin Gray, *Equitable Property*, (1994) 47(2) Current Legal Problems 157 at 172-181.

¹³⁰ *Brooks v Chicago Downs Association, Inc*, 791 F2d 512 at 514, 518 (1986).

¹³¹ There have been suggestions, particularly in Australia, that the scale of a land holding may impact upon the degree to which that land can properly be subjected to an estate owner's comprehensive regulatory control (see *Hackshaw v Shaw* (1984) 155 CLR 614, *per* Deane J at 659; *Gerhardy v Brown* (1985) 159 CLR 70, *per* Mason J at 103-104). See most recently *Wik Peoples v Queensland* (1996) 187 CLR 1 at 244, 246, where Kirby J thought it "unlikely" that there could have been any parliamentary intention to invest an estate owner with absolute exclusory power under pastoral leases covering "huge areas as extensive as many a county in England and bigger than some nations" in "remote and generally unvisited" terrain. In such areas, declared Kirby J (at 233), "talk of 'exclusive possession' or 'exclusive occupation' has an unreal quality" (see also *per* Gaudron J at 154).

¹³² See Kevin Gray, *Property in Common Law Systems*, in G.E. van Maanen and A.J. van der Walt ed., *Property Law on the Threshold of the 21st Century* (MAKLU, 1996), pp. 265-268).

¹³³ See, for example, the famous "sliding scale test" formulated by the Supreme Court of New Jersey in *State v Schmid*, 423 A2d 615 at 629-630 (1980), according to which "as private property becomes, on a sliding scale, committed either more or less to public use and enjoyment, there is actuated, in effect, a counterbalancing between expressional and property rights."

¹³⁴ Thus, for instance, the 'reasonable access rule' may properly apply to locations such as a shopping mall (*New Jersey Coalition Against War in the Middle East v JMB Realty Corporation*, 650 A2d 757 (NJ 1994)), a public library (*Kreimer v Bureau of Police for Town of Morristown*, 958 F2d 1242 (3rd Cir 1992)), a university campus (*State v Schmid*, 423 A2d 615 (1980)), a casino (*Uston v Resorts International Hotel, Inc*, 445 A2d 370 (1982)), an airport concourse (*The Queen in Right of Canada v Committee for the Commonwealth of Canada* (1991) 77 DLR (4th) 385), and a railway station (*Streetwatch v National Railroad Passenger Corporation*, 875 F Supp 1055 (SDNY 1995)); but not to a domestic residence (*Robins v PruneYard Shopping Centre*, 592 P2d 341 at 347 (1979)), a working laboratory (*Commonwealth v Hood*, 452 NE2d 188 (Mass 1983)), a hospital (*Estes v Kapiolani Medical Center*, 787 P2d 216 (Hawaii 1990)); *Attorney-General of Ontario v Dieleman* (1995) 117 DLR (4th) 449 at 730-732), a nursing home (*Cape Cod Nursing Home Council v Rambling Rose Rest Home*, 667 F2d 238 (1981)), an abortion clinic (*Darcey v Pre-Term Foundation Clinic* [1983] 2 NSWLR 497; *Attorney-General of Ontario v Dieleman* (1995) 117 DLR (4th) 449 at 732-6), or a nuclear installation (*Semple v Mant* (1985) 39 SASR 282).

experience has characteristically lagged behind that of other jurisdictions,¹³⁵ modern courts are being required to mark out a spectrum of differing intensities of exclusory power, ranging from the purely private zone (where unchallengeable exclusory power is still in order) through an intermediate category of quasi-public land and extending finally towards a category of genuinely public property (where the arbitrary exclusory power is manifestly and entirely unacceptable). In the process, however, it is clear that once again the recognition of a new contemporary morality in property relationships has been impeded, rather than promoted, by a right-based analysis of 'property' in land.

(3) **'Property' as a responsibility**

A third model of 'property' in land is provided by an alternative -- less widely acknowledged -- perspective which views 'property', not in terms of an abstract estate or interest, but in terms of each of the isolable strands of utility or use-power which combine variously as the constituent elements of any land interest. By a process sometimes known as "conceptual severance",¹³⁶ this approach separates and identifies the many elements of utility which can characterise relationships with land, and then concedes the label 'property' to each individual element in turn.

Land may, of course, be turned to advantage in many overlapping ways; it may generate utilities of occupancy, enjoyment, consumption, investment, exploitation, exchange, endowment, aesthetic appreciation, and so on. These elements of utility all require to be held in some sort of balance, and our third model of 'property' in land focuses on the way in which the precise balance or mix of utilities inherent in any particular landholding is subjected, through state intervention, to an overarching criterion of publicly defined responsibility.¹³⁷ It follows, moreover, that when there is any addition to, or subtraction from, the bundle of utilities enjoyed by any person, it can be suggested that a movement or transaction of 'property' has occurred -- a proposition not only of venerable authority in English law,¹³⁸ but also of huge contemporary relevance to the jurisprudence of environmental regulation and just compensation.

On the present analysis, 'property' comprises not so much a bundle of rights as a bundle of individuated elements of land-based utility. The modern governmental role in regulating all land use is now so pervasive that these elements of utility are best seen as dispensed in various combinations by the state, subject only to occasional alteration either by private bargain or in accordance with supervening considerations of community policy. A plethora of regulatory controls, over matters ranging from urban planning to the conservation of natural resources, testifies to the constant engagement of the modern state in the constraint of land user for purposes of public amenity and welfare. Estate ownership is thus constantly stripped back to a bare residuum of socially permitted power over land resources, and the regime of 'property' in land comprises simply a

¹³⁵ See *CIN Properties Ltd v Rawlins* [1995] 2 EGLR 130 at 134. Here the Court of Appeal endorsed the property owner's exclusion *sine die* of a group of black youths from a city centre shopping mall, even though no charge of misconduct (or other rational ground of eviction) had been made out against them. This decision is currently the subject of an application to the European Commission of Human Rights *sub nom Anderson and Others v United Kingdom*.

¹³⁶ The phrase originates in M.J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Col L Rev 1667 (1988).

¹³⁷ It is interesting, in view of the increasing drive towards European harmonisation, to note the prescription in Article 14(2) of the German *Grundgesetz* that "[p]roperty imposes duties. Its use should also serve the welfare of the community".

¹³⁸ See, for example, the effect achieved by the decision in *Tulk v Moxhay* (1848) 2 Ph 774, 41 ER 1143 (*infra*, note 147).

distribution -- on a vast scale -- of diverse patterns of state-approved usufruct, each heavily conditioned by the public interest. In effect, 'property' in land is constituted by those publicly endorsed user-forms which the state, at its discretion, allows individuals to enjoy consonantly with large strategies of public policy and social design. 'Property' is no more than a defeasible privilege for the citizen.

Once conceived as a variable aggregation of socially permitted land uses, 'property' in land comes to consist, not so much in a *fact* or a *right*, but rather in a state-directed *responsibility* to contribute towards the optimal exploitation of all land resources for communal benefit. Indeed our third model of 'property' emphatically incorporates a concept not of *right* but of *restraint*. 'Property' no longer articulates the arrogance of entitlement, but expresses instead the commonality of obligation. Far from being an untrammelled right, 'property' is liable to be curtailed on all sides by an interpenetrating sense of civic responsibility. All 'property' in land is held subject to -- and is redefined by -- a wide range of socially conditioned constraints. The estate owner may sometimes believe that he enjoys a plenitude of power to do as he wills with "his" land, but his freedom of action is dramatically circumscribed. In consequence of either privately bargained covenant or (more usually nowadays) statutory planning control, he has little or no automatic entitlement to alter "his" land, develop or extend it, change its use, paint it whatever colour he likes, still less to destroy it if he so chooses.¹³⁹ "His" land is, moreover, vulnerable to compulsory purchase by the state, on less than satisfactory terms, if such unconsented transfer should ever be found to serve a higher public interest¹⁴⁰ or if he should fail to maintain the land to a standard deemed appropriate by some state official.¹⁴¹ His proud claim of 'property' is in reality immensely fragile.

It follows, on this view, that the deep structure of 'property' is not absolute, autonomous and oppositional. It is, instead, delimited by a strong sense of community-directed obligation, and is rooted in a contextual network of mutual constraint and social accommodation mediated by the agencies of the state.¹⁴² So distant is this perception from the classic liberal image of 'property' as a self-interested claim of unfettered power that some American commentators have now begun to predict a wholesale reconstruction or reinterpretation of 'property' in terms of "socially derived" privileges of use.¹⁴³ 'Property' becomes not a summation of individualised power over scarce resources, but an allocative mechanism for promoting the efficient or ecologically prudent utilisation of such resources. So analysed, this community-oriented approach to 'property' in land plays a quite obviously pivotal role in the advancement of our environmental welfare.¹⁴⁴

¹³⁹ See Town and Country Planning Act 1990, Part III; Planning (Listed Buildings and Conservation Areas) Act 1990, Part I, Ch III.

¹⁴⁰ Planning and Compensation Act 1991, Part III.

¹⁴¹ See Environmental Protection Act 1990, s 81(4) (in conjunction with Local Land Charges Act 1975), s 1(1)(a); Housing Act 1985, s 300(3).

¹⁴² One American scholar, Eric Freyfogle, has spoken of a "a new property jurisprudence of human interdependence". For Freyfogle, "[a]utonomous, secure property rights have largely given way to use entitlements that are interconnected and relative ... Property use entitlements will be phrased in terms of responsibilities and accommodations rather than rights and autonomy. A property entitlement will acquire its bounds from the particular context of its use, and the entitlement holder will face the obligation to accommodate the interests of those affected by his ... use" (E.T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 Stan L Rev 1529 at 1530-1531 (1988-89)).

¹⁴³ For the roots of this approach, see Lynton K. Caldwell, *Rights of Ownership or Rights of Use? -- The Need for a New Conceptual Basis for Land Use Policy*, 15 William and Mary Law Rev 759 at 766 (1973-74).

¹⁴⁴ Thus, for example, in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, the House of Lords recently indicated that the considerations properly regarded as "material" to the outcome of a planning application to construct a supermarket would include the fact that the applicant had offered to fund communal off-site benefits (such as a new link road which would help to relieve the local traffic congestion likely to be exacerbated by the proposed development). Thus a willingness to defray the external

Implicit in this third perspective on 'property' is also the acknowledgement that distinct quantum of 'property' in the same land can be distributed simultaneously amongst a number of persons and entities (including the state). The 'property' held by each thus comprises some significant element of land-based utility directed and coordinated towards a defined common good; and the quantum of 'property' enjoyed by each in the same land may be subject to variation by means of either private negotiation or direct state intervention. For instance, the fee simple owner who grants a right of way to his neighbour has simply achieved a marginal shift -- in his neighbour's favour -- of the balance of utility which previously represented his 'property' in the land in question. Significantly, the recipient of such an easement is recognised, within the statutory canon of estates and interests, as holding 'property' in the servient land of either a legal or an equitable character.¹⁴⁵

The forerunner of modern state-controlled land use regulation was, of course, the privately bargained restrictive covenant,¹⁴⁶ and it seems clear that the law of restrictive covenants served as an early and valuable form of environmental protection in the developing urban context. When, from *Tulk v Moxhay*¹⁴⁷ onwards, English courts began to enforce freehold restrictive covenants against purchasers, there was no doubt that both the affected freeholder and the restrictive covenantee could truthfully assert that each held some form of 'property' in the servient land, albeit graded by differing degrees of intensity. The freeholder retained 'property' in his land although burdened by some qualified power of veto vested in the covenantee; and in so far as the covenantee enjoyed a significant control over the user of the freeholder's land, the utility thereby allocated to the covenantee also comprised a form of 'property' in the same land.

The restrictive covenantee's entitlement is now, of course, duly formalised as an equitable proprietary interest within the categories of estates and interests recognised by the 1925 legislation.¹⁴⁸ The proprietary interest created by mutually restrictive undertakings gave each covenantee, in practice, a stake in a common strategy for the constructive coordination of their respective user-preferences.¹⁴⁹ The regime of private ordering embodied in individually bargained restrictive covenants has now been superseded, in many respects, by the socialised obligations imposed by contemporary planning and environmental legislation.¹⁵⁰ On one view this

costs imposed on the community by a proposed development of land can properly be one of the conditions on which a local planning authority may grant permission for the development.

¹⁴⁵ Law of Property Act 1925, ss 1(2)(a), (3).

¹⁴⁶ It is not without significance that private restrictive covenants often came to operate as a localised form of private legislation, preserving various kinds of residential and environmental amenity for future generations of successive owners. Indeed the modern rejuvenation of the "building scheme" or "scheme of development" is explicitly premised on the recognition of an intention "to lay down what has been referred to as a local law for the estate for the common benefit of all the several purchasers of it" (see *In re Dolphin's Conveyance* [1970] Ch 654, per Stamp J at 662A).

¹⁴⁷ (1848) 2 Ph 774, 41 ER 1143.

¹⁴⁸ Law of Property Act 1925, s 1(3). See also *Commonwealth of Australia v State of Tasmania* (1983) 158 CLR 1, per Deane J at 286 ("The benefit of a restrictive covenant ... can constitute a valuable asset. It is incorporeal but it is, nonetheless, property"). For some the proprietary status of the restrictive covenant is reinforced by the fact that the covenantee (or his successor) can commonly command a cash premium or equivalent value for release of the covenant; and the Lands Tribunal has statutory power to order the payment of compensation on discharge or modification of a restriction (Law of Property Act 1925, s 84(1)(c)).

¹⁴⁹ In much the same way the law of easements has served to coordinate the simultaneous exercise of compatible modes of land use, without necessitating costly buy-outs of neighbouring land in order merely to secure the optimal utilisation of one's own land.

¹⁵⁰ See also Town and Country Planning Act 1990, s 106 (as substituted by Planning and Compensation Act 1991, s 12(1)), which adapts the restrictive covenant, in the guise of a "planning obligation", as a significant instrument of planning control.

development merely underscores the fact that the modern state retains an eminent domain or overriding 'property' in all land -- perhaps the most significant present-day emanation of the Crown's radical title¹⁵¹ -- which provides the state with a dominating stake in the determination of land use priorities. It is equally arguable that the existence today of a substantial regime of public planning control enables all citizens, in some quite important sense, to claim a certain quantum of 'property' in everyone else's land. Plain beyond cavil, however, is the point that 'property' in land, whether defined empirically or abstractly, is now vulnerable to the all-invasive effect of socially derived land use regulation.¹⁵² Today the concept of 'property' in land may well denote no more than a temporarily licensed form of utility or user-privilege which may be extended, varied or withdrawn at the sole discretion of the state and on terms dictated by it.

Some of the most pressing questions of 21st century land law are likely to revolve around the terms on which state intervention may alter the precise composition of the bundle of utilities which, at any time, comprise a citizen's 'property' in land. Amidst intensifying concern with environmental quality, the regulatory state exercises an ever increasing surveillance over permissible modes of land use and the definition of 'property' has suddenly emerged as one of the key variables of environmental argument. Many critical problems of environmental protection make sense only if their 'property' dimension is recognised -- and indeed recognised not in terms of empirical fact or abstract entitlement, but rather in terms of individuated elements of community-responsive utility. As yet, however, English courts, somewhat in arrear of their counterparts in other areas of the common law world, have been slow to acknowledge the 'property' component inherent in such issues.

In *R v Thurrock Borough Council, ex parte Blue Circle Industries*,¹⁵³ for instance, a local authority had been prepared, in return for money or money's worth, to release a tenant company from a leasehold covenant which would specifically have required the use of only high-density baled domestic refuse at a landfill site. The Court of Appeal declined to hold that the proposed relaxation of the leasehold terms would constitute a "disposal" to the tenant of "any interest in or over land",¹⁵⁴ taking the view that such a phrase covered only "some altogether more fundamental surrender of proprietary rights".¹⁵⁵ Nourse LJ found it "impossible" to describe a landlord's right to control the use of demised land as a "proprietary interest in an asset" or as "an interest in the land", since it was "at the most, a right in relation to land" rather than "a right over land".¹⁵⁶ Far-reaching consequences followed from this failure to recognise that variation of the tenant's permitted use of land would transfer to it more of the 'property' in that land. The Court of Appeal's decision effectively allowed the tenant to degrade the disputed land with other, less wholesome, forms of waste and even precluded the

¹⁵¹ Eminent domain -- the public power to requisition land -- has been aptly described as "the proprietary aspect of sovereignty" (*Minister of State for the Army v Dalziel* (1944) 68 CLR 261, *per* Rich J at 284).

¹⁵² The squatter's title may, for instance, be founded on brute fact, but he takes subject to all existing restrictive covenants affecting the land (see *In re Nisbet and Potts' Contract* [1906] 1 Ch 386 at 402-404) and his user of the land is just as clearly qualified by current planning controls.

¹⁵³ (1994) 69 P & CR 79.

¹⁵⁴ Town and Country Planning Act 1990, ss 233, 336.

¹⁵⁵ (1994) 69 P & CR 79, *per* Simon Brown LJ at 85.

¹⁵⁶ (1994) 69 P & CR 79 at 85-86. This outcome is strange, not least because it conflicts with longstanding authority that a landlord, armed with a restrictive covenant against a tenant, has an equitable proprietary interest enforceable, beyond the area of privity of estate, in accordance with the doctrine of notice (*Hall v Ewin* (1888) 37 Ch D 74 at 78-80; *Teape v Douse* (1905) 92 LT 319 at 320). See also *Mander v Falcke* [1891] 2 Ch 554 at 557-558.

local authority from obtaining, on behalf of the local community, money compensation for such spoliation.¹⁵⁷ The *Thurrock Borough Council* case amply demonstrates how a conventional concentration on 'property' as a crystalline bundle of *rights* can preclude a more realistic awareness of 'property' as comprehending a variable bundle of *utilities*.¹⁵⁸

Even more important implications may flow from the conceptualisation of 'property' as severable utilities rather than unitary rights. Much modern governmental activity involves, not the outright compulsory acquisition of a fee simple or leasehold interest by the state, but the imposition of substantial community-oriented restrictions upon the free enjoyment of estate ownership. Today most common law jurisdictions are therefore increasingly troubled by the question whether the imposition of extensive environmental regulation can ever constitute an acquisition or taking of 'property' from the citizen which requires the payment of publicly funded compensation. For instance, the alteration of a planning authority's structure plan¹⁵⁹ or the designation of an area as a "conservation area"¹⁶⁰ or the listing of a building as having "special architectural or historic interest"¹⁶¹ can exert a serious financial impact upon the development potential of a landholding. But the critical issue does not concern the statutory competence of regulatory measures in defence of the natural or cultural heritage. It relates instead to the identification of the precise source which should bear the cost of the environmental protection which we all profess to desire. Environmental amenity constantly comes at a price which must be paid by either the general community or some subset of it.

In England the consistent trend in recent years has been to truncate the availability of public compensation for the disadvantageous economic impact of land use regulation. The Planning and Compensation Act 1991 finally withdrew all but a few special circumstances from the scope of the compensatory mechanism.¹⁶² Although doubtless reflective of a parsimonious governmental fiscal policy, the general denial of compensation also derives substantial strength from a developing perception that the estate owner's bundle of utilities is intrinsically delimited by certain social or community-oriented obligations of a positive nature. Supervening community concerns -- particularly in the context of environmental integrity -- operate *ab initio* as a latent, but ever-present, qualification upon title.

There is, nevertheless, a risk that excessive regulation may, at some point, shade into confiscation,¹⁶³ thus disproportionately concentrating the cost of community-directed restrictions on a few selected landholders¹⁶⁴

¹⁵⁷ The decision in *Thurrock* even sits uncomfortably beside the general tendency in English property law to regard commerciable rights as *ipso facto* proprietary (see *supra*, text accompanying note 120). The local authority had seemed alarmingly willing to barter away environmental integrity in return for money payment.

¹⁵⁸ For a similar approach in a different context, see *Government of Mauritius v Union Flacq Sugar Estates Co Ltd* [1992] 1 WLR 903, *per* Lord Templeman at 911D.

¹⁵⁹ Town and Country Planning Act 1990, s 32(1).

¹⁶⁰ Planning (Listed Buildings and Conservation Areas) Act 1990, s 69(1).

¹⁶¹ Planning (Listed Buildings and Conservation Areas) Act 1990, s 1(1).

¹⁶² See Planning and Compensation Act 1991, s 31.

¹⁶³ In a classic discussion of this point, Justice Holmes once acknowledged that "while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking" (*Pennsylvania Coal Co v Mahon*, 260 US 393 at 415 (1922)). See also *Belfast Corpn v O.D. Cars Ltd* [1960] AC 490 at 519-520, 525, where both Viscount Simonds and Lord Radcliffe conceded that the extinction or excessive limitation of particular land users may sometimes, in substance, constitute an expropriation.

¹⁶⁴ The problem acquires an even sharper edge where a newly privatised commercial concern, having functioned formerly within the public sector, retains the advantage of a statutory power to diminish the utility enjoyed by the private citizen in circumstances where such regulation operates disproportionately for the

rather than diffusing this cost amongst the benefited public at large.¹⁶⁵ This danger will acquire a new significance as and when Britain ratifies or otherwise gives effect to Article 1 of the First Protocol of the European Convention on Human Rights, which guarantees that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions."¹⁶⁶ The European Court of Human Rights has already shown itself to be peculiarly sensitive, in the regulatory context, to the uncompensated abstraction of any of the individual elements of proprietary utility. In the *Case of Sporrong and Lönnroth*,¹⁶⁷ the Court noted that a state-directed zoning order and prohibition on construction, whilst leaving "intact" some of the applicants' use rights, had "affected the very substance of ownership", rendering their "right of property ... precarious and defeasible." Accordingly there had been "an interference with the applicants' right of property" in breach of Article 1. The Court insisted that regulatory activity must strike a "fair balance ... between the protection of the right of property and the requirements of the general interest".¹⁶⁸ Here the applicants had been caused to bear "an individual and excessive burden which could have been rendered legitimate only if they had had the possibility ... of claiming compensation."¹⁶⁹

Thus the question may soon again surface in England, as almost everywhere else in the common law world, whether governmental dislocation of existing use-powers can ever constitute a compensable taking of 'property' in land. One extreme view now gaining substantial support in the United States is that *any* state-directed subtraction from a landholder's utilities for environmental purposes is necessarily a taking of 'property' which requires public compensation.¹⁷⁰ Only in this way, it is argued, can the individual citizen be enabled to withstand the rampant environmental fascism nowadays practised by his government. If the community wants

benefit of the equity shareholders in the privatised company. When, for instance, the Environment Agency pays a privatised water company (or "water undertaker") for the right to operate jet-skis for profit on a reservoir constructed by the company (see Water Resources Act 1991, ss 20(2)(b), 158(1)(d)), it is the adjoining landowners who, by suffering the disutility of constant noise pollution, are compelled to contribute to the water company's profits and enhance the dividends received by its distant shareholders.

¹⁶⁵ See the classic proposition in American takings jurisprudence that regulatory intervention must be compensable if the withholding of compensation would amount to "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong v United States*, 364 US 40, *per* Black J at 49 (1960)). See also *Penn Central Transportation Co v New York City*, 438 US 104, *per* Brennan J at 124 (1978); *Newcrest Mining (WA) Ltd v Commonwealth of Australia* (1997) 147 ALR 42, *per* Kirby J at 134.

¹⁶⁶ Article 1 continues: "[n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

¹⁶⁷ Series A No 52, para 60 (1982).

¹⁶⁸ Series A No 52, para 73.

¹⁶⁹ Later property cases in the European Court have likewise emphasised the overriding importance of a test of 'proportionality'. In the *Case of The Holy Monasteries v Greece*, Series A No 301, paras 70-71 (1994), the Court reiterated the need for a "'fair balance' between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights." Significantly, the Court considered the statutory availability of compensation to be "material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden on the applicants."

¹⁷⁰ The Fifth Amendment to the United States Constitution provides that "[n]o person shall be ... deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation". Accordingly recent years have witnessed the introduction in many American state legislatures of a Private Property Rights Bills designed to "help slay the regulatory monster" (see Laura Underkuffler-Freund, *Takings and the Nature of Property*, 9 Can Jo Law and Juris 161 (1996)). The battle-cry is no longer *No taxation without representation*, but rather *No regulation without compensation*.

environmental welfare, it must purchase it fairly, rather than merely dumping the cost randomly on certain unlucky citizen-owners of real estate.

It is doubtful whether this anti-communitarian stance is ultimately sustainable, but care is certainly required to arrive at a more subtle evaluation of the true proprietary impact of environmental regulation. The recent history of the 'regulatory taking' problem evidences the weaknesses implicit in characterising 'property' in land merely as one or other of the abstract unitary rights contained within the formal canon of land interests. So often the crucial issues revolve around the impairment or abstraction of merely one of the individuated strands of utility woven into the composite jural entitlement of a common law estate or interest.¹⁷¹

In *Newcrest Mining (WA) Ltd v Commonwealth of Australia*,¹⁷² for example, a mineral company purchased mining leases in an area which was later incorporated by the Australian Federal Government within the Kakadu National Park. The mining company was now precluded, by force of federal statute, from any operations for the recovery of minerals. The question arose whether this regulatory exercise had resulted in any acquisition of 'property' by the Federal Government requiring the payment of just compensation.¹⁷³ In the Australian High Court McHugh J declined to find any such acquisition of 'property', not least on the ground that the mining company's "property interests ... in the land and minerals would continue as before." The effect of the Federal Government's regulatory action was "merely to impinge on [the company's] rights to exploit those interests".¹⁷⁴ The Commonwealth of Australia already owned the reversionary interests in the land and minerals and "[b]oth as a matter of substance and form ... obtained nothing which it did not already have."¹⁷⁵

This approach did not, however, find favour with other members of the High Court. Delivering the principal majority judgment, Gummow J considered that the Federal Government's action had the consequence "as a legal and practical matter, of denying to [the company] the exercise of its rights under the mining tenements." In his view there was here "an effective sterilisation of the rights constituting the property in question",¹⁷⁶ thereby activating the constitutional requirement of just compensation. Kirby J likewise thought it improper to expand a national park for public benefit "at an economic cost to the owners of valuable property interests in sections of the park whose rights are effectively confiscated to achieve that end."¹⁷⁷

Newcrest Mining may well demonstrate how proprietary subtraction is more accurately identified by reference to shifts of utility than by any analysis of formal rights. But it cannot be the case that *all* regulatory dislocations

¹⁷¹ Hence the current American preoccupation with the problem of "partial deprivation resulting from a regulatory imposition" (*Florida Rock Industries, Inc v United States*, 18 F3d 1560 at 1568 (Fed Cir 1994)).

¹⁷² (1997) 147 ALR 42.

¹⁷³ See section 51(xxxi) of the Constitution of the Commonwealth of Australia.

¹⁷⁴ A similar approach emerged in *Lucas v South Carolina Coastal Council* (1992) 505 US 1003. Here the US Supreme Court indicated a strong view that a supervening state prohibition of further residential construction in a fragile coastline area had the effect of depriving an aspiring property developer of "all economically beneficial uses in the name of the common good". This being so, the developer could claim compensation on the basis of a "taking" of his "property". Blackmun J dissented, however, on the basis that the Petitioner "can enjoy other attributes of ownership, such as the right to exclude others ... Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer ... Petitioner also retains the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house ..." ((1992) 505 US 1003 at 1043-1044).

¹⁷⁵ (1997) 147 ALR 42 at 81.

¹⁷⁶ (1997) 147 ALR 42 at 130.

¹⁷⁷ (1997) 147 ALR 42 at 133.

of a landholder's utility constitute compensable deprivations of 'property'. As Justice Holmes once observed, "[g]overnment could hardly go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law."¹⁷⁸ In some circumstances, moreover, environmental regulation results in no net loss at all to the affected landholder, as, for example, where the diffused public benefit of the regulation secures an "average reciprocity of advantage" to everyone concerned.¹⁷⁹ Indeed Eric Freyfogle has recently pointed out that "land-use restrictions do not so much limit property rights as they ... promote and protect them."¹⁸⁰

Accordingly the task facing the modern jurisprudence of environmental property is to discriminate between those elements of land-based utility whose impairment constitutes a true taking of 'property' (and is therefore compensable) and those other elements which a landholder may properly be expected (without compensation) to forgo in favour of the communal good. American courts have acknowledged, for instance, that some forms of regulatory intervention, whilst causing economic harm, do not interfere with "interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property'..."¹⁸¹ It is at this point, significantly, that we return full circle to a conception of 'property' as 'propriety'; and indeed a deep subtext of 'propriety' pervades the entire social and legal definition of 'property'.¹⁸² Thus American courts have long denied that any compensable taking occurs where a restriction is imposed "to protect the public health, safety, or morals from dangers threatened".¹⁸³ In such cases the restriction comprises merely the "prohibition of a noxious use" which, on any analysis, never fell within the original complement of powers incident to title. Title has never conferred any intrinsic power to inflict avoidable harm on the public interest.

In this context the crucial variable has now become the degree to which courts are prepared to hold that the proprietary utilities available to a landholder are inherently curtailed by a community-directed obligation to conserve and promote fragile features of the environment. It is precisely this identification of existing tacit constraints on user which has become the most difficult and controversial issue of modern takings law, effectively transforming the environmental debate into a major struggle about the definition of 'property' in land.

¹⁷⁸ *Pennsylvania Coal Co v Mahon*, 260 US 393 at 413 (1922). See also the remark of Viscount Simonds that legislative attenuation of an owner's user rights "can be affected without a cry being raised that Magna Carta is dethroned or a sacred principle of liberty infringed" (*Belfast Corpn v O.D. Cars Ltd* [1960] AC 490 at 519).

¹⁷⁹ *Pennsylvania Coal Co v Mahon*, 260 US 393, *per* Holmes J at 415 (1922). See also *Commonwealth of Australia v State of Tasmania* (1983) 158 CLR 1 at 283; *Lucas v South Carolina Coastal Council* (1992) 505 US 1003 at 1017-1018. "[T]he trial court must consider: are there direct compensating benefits accruing to the property, and others similarly situated, flowing from the regulatory environment? Or are the benefits, if any, generally and widely shared through the community and the society, while the costs are focused on a few?" (*Florida Rock Industries, Inc v United States*, 18 F3d 1560 at 1571 (Fed Cir 1994)).

¹⁸⁰ "The principal beneficiaries of land-use controls are not the public at large, but other landowners, and the principal proponents of land-use restrictions are the neighbors who expect to benefit from them" (E.T. Freyfogle, *The Construction of Ownership*, (1996) U Ill L Rev 173 at 181).

¹⁸¹ See *Penn Central Transportation Co v New York City*, 438 US 104, *per* Brennan J at 124-125 (1978).

¹⁸² See Kevin Gray, *Equitable Property*, (1994) 47(2) Current Legal Problems 157 at 183, 207-208.

¹⁸³ The phrase was originally that of the dissenting Justice Brandeis in *Pennsylvania Coal Co v Mahon*, 260 US 393 at 417 (1922). See also *Mugler v Kansas*, 123 US 623, *per* Harlan J at 665 (1887) ("all property ... is held under the implied obligation that the owner's use of it shall not be injurious to the community").

In *Lucas v South Carolina Coastal Council*,¹⁸⁴ for instance, a property speculator, intending to construct luxury beachfront homes in a notoriously unstable coastal area, was frustrated by supervening state legislation which prohibited further building operations on land purchased by him at a price of almost \$1 million. The Supreme Court of South Carolina denied that there had been any compensable taking of 'property', partly on the ground that the regulatory intervention, by arresting the hazardous development of an environmentally sensitive and hurricane-torn shoreline, was designed "to prevent serious public harm".¹⁸⁵ The United States Supreme Court overturned this outcome, ruling that public compensation could be denied only if the regulation merely confirmed the restrictions which "background principles of the State's law of property and nuisance already place on land ownership."¹⁸⁶ No compensation would be justified if a regulatory control merely made explicit some restriction which "inhere[s] in the title itself"¹⁸⁷ and the "proscribed use interests" were therefore "not part of [the owner's] title to begin with."¹⁸⁸ Where, however, a total prohibition of economically productive or beneficial land use went "beyond what the relevant background principles would dictate", there was, in the view of the Supreme Court majority, no question: "compensation must be paid to sustain it."¹⁸⁹

The hugely controversial ruling of the United States Supreme Court in *Lucas* gave significant symbolic enforcement to an individualist rather than communitarian perspective on property holdings; and indeed the Court betrayed little awareness that community obligation -- in the form of an inherent duty to avoid environmental degradation -- might be a tacit qualification on title. Although again views may differ as to the correctness of the outcome, *Lucas* aptly illustrates the way in which social assumptions relating to the ambit of civic responsibility constantly exert a visible impact upon the definition of 'property' in land. At stake is ultimately the boundary between the domain of the state and the domain of the individual citizen. In the words of a more recent American decision,¹⁹⁰ "the question is simply one of basic property ownership rights: within the bundle of rights which property lawyers understand to constitute property, is the right or interest at issue, as a matter of law, owned by the property owner or reserved to the state?" This inescapable engagement with

¹⁸⁴ (1992) 505 US 1003, 120 L Ed 2d 798, 112 S Ct 2608 (1992).

¹⁸⁵ 404 SE2d 895 at 899 (1991). South Carolina's coastline was particularly susceptible to storm damage and in 1989 Hurricane Hugo had caused 29 deaths and approximately \$6 billion in property damage, some of it caused by the fact that beachfront homes were torn up and driven, "like battering rams", into adjacent inland homes.

¹⁸⁶ (1992) 505 US 1003, *per* Scalia J at 1029.

¹⁸⁷ (1992) 505 US 1003 at 1029.

¹⁸⁸ (1992) 505 US 1003 at 1027. Justice Scalia, although remanding to the state courts the identification of the relevant "background principles of the ... law of property and nuisance", added the gratuitous guidance that it "seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land" (*ibid* at 1031).

¹⁸⁹ (1992) 505 US 1003 at 1030. "[A] State, by ipse dixit, may not transform private property into public property without compensation ... South Carolina must identify background principles of nuisance and property law that prohibit the uses [Lucas] now intends...Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing" (*ibid* at 1031-1032).

¹⁹⁰ *Loveladies Harbor, Inc v United States*, 28 F3d 1171 at 1179 (Fed Cir 1994).

the social and moral limitations of 'property' ensures that private property can never remain truly private and that, in the end, all 'property' in land is inevitably infected with an extensive public law significance.¹⁹¹

4 Conclusion

This paper has attempted to highlight three ways in which common law jurisprudence characteristically conceives of property in land. The paper has also adumbrated some of the difficulties and challenges implicit in each of these divergent approaches. At different times and in many different contexts our notion of property has resonated with a varying sense that 'property' emerges as a self-constituting fact or derives from some abstract jural entitlement or even emanates from the state control of socially responsible land use. The truth is, of course, that these alternative models of property do not exist in resolute opposition, for they are bound together in a creative tension which is part of the richness of our land law. Relativities of time and place certainly constrain the applicability of each of these modes of perception, and this paper has pointed to some of the problems generated by the mismatching of sense and context. Each analysis nevertheless provides, in its own way, an important focus upon the essentially human institution of property, whilst reminding us of the ultimately elusive quality which still attaches to the core of the phenomenon.

¹⁹¹ See Gray, (1994) 47(2) Current Legal Problems 157 at 211. "[T]he state takes on a critical, and so far little explored, role in defining the concept of 'property'. The state itself becomes a vital factor in the 'property' equation ... [I]n underpinning the law of 'property' the state indirectly adjudicates an exceedingly broad range of the power-relations permitted within society" (Gray, [1991] Cambridge LJ 252 at 304).