New Property Disaggregated: A Model to Address Employment Discrimination

by john a. powell*

Introduction

A QUARTER OF A CENTURY AGO, Professor Charles Reich, in his landmark article, *The New Property*, transformed the jurisprudence of property rights. Reich defines new property as government largess, which includes contracts, licenses, education, welfare benefits, and other forms of wealth distributed and regulated by the government. He asserts that new property performs many of the essential functions of traditional property in a liberal society. It protects the individual and provides the resources for livelihood. Reich’s concern with new property is derived from his concern for protecting the development of individuals in modern society.¹

In Part I of this essay, I will examine some of the most significant aspects of his theory as well as suggest some revisions. Although Reich anticipated many of these revisions, some of his themes are brought into sharper focus with a more explicit analysis of the disaggregate functions of property, which I will do in Part II. In Part III, I will examine one such effort and then look at how this revised model could have assisted in analyzing some of the recent Supreme Court’s decisions on employment discrimination.

I. Reich’s Theory of New Property

Reich’s analysis in *The New Property* focuses on the relationship between the government and the rightholder, instead of the relationship between concentrated private property and the rightholder. While he does not overstate the importance of the government in the dispensation and protection of rights, he understates the role of concentrated private

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* Legal Director, American Civil Liberties Union.
2. Although Reich focuses on how the government largess can undermine the individual’s independence, he is generally concerned with how concentrated power, private or public, can overwhelm the individual and destroy the goals of a liberal society.
property in the lives of the individual rightholders. Reich also does not address the relationship between the individual rightholder and other individual rightholders for reasons that I will suggest below.

Although Reich believes that property is the best system to protect the individual from the government and private concentrations of power, he is also aware that property can be used to suppress the individual. The term property is too ambiguous and inclusive to adequately serve Reich’s function of protecting and developing the individual. When property is concentrated, it can distort and undermine the individual’s independence. Our present system of property allows for both the development of the individual and the destruction of the individual. Without a refinement, our property system is supporting two conflicting objectives. One of Reich’s goals in The New Property is to provide the basis for that refinement.

I will suggest below that the disaggregation of the traditional concept of property plays an important part of the refinement to advance the goal of protecting the growth and the development of the individual. Indeed, I will suggest that it goes to the heart of Reich’s goal of protecting the individual in society from concentrated power. This power could manifest in many forms. It could be state power; it could be the power of the wealthy; or it could be the power of one class of workers dominating another. But, without a method of distinguishing different types of property, protection of property rights in general can in fact create and maintain the very problems that Reich wishes to mediate against. This insight is the summarized thesis of a number of writers including Baker, Unger and Radin.

Reich was aware of the potential need to protect private citizens from a power other than the government, but he underestimated the significance of it and therefore, did not adequately develop this part of his analysis. Reich focused on the government for a number of reasons. He correctly noted that the government was the single most powerful societal influence in creating and controlling new wealth. He also noted that, in particular, it was the government’s largess that is the fastest growing form of wealth in American society. Although the governmental abuse of power continues to be an area of serious concern, I will focus more generally on Reich’s central goal of providing the individual the immu-

6. Reich, supra note 1, at 739, 749.
nity and resources necessary for her to develop and be free in society.\(^7\) This requires extending the examination beyond governmental abuses of power.

Reich’s analysis weaves a delicate yet tensile fabric of relationships. Part of its strength is that it casts new property in traditional property language. Yet Reich’s analysis focuses on the role of power, dependence, and domination, angles that are usually missing from the traditional rights talk in property jurisprudence.\(^8\) In fact, power and consequent dependence is Reich’s central concern. This focus suggests how further analysis of property functions should proceed. One must look at property relationships generally but, and this is important, only after the property has been disaggregated.

There is another reason to be explicit about the different types of property and their respectively different functions. Because juris already accepts the construction that there are different types of property with differing functions, there needs to be some principled way both to distinguish these different functions of property and to order them hierarchically. Although property is already distinguished and ordered by the courts, there is little normative justification for this ordering, and the distinctions that the Supreme Court does make are still too few.\(^9\) Moreover, the Court’s model often works to subjugate and retard the individual’s development. Furthermore, while the traditional model of property has been discredited, and cannot be restored, the courts persist in using it.\(^10\)

Traditionally, property was viewed as an individual’s right over a thing that was self-regarding. It was the liberty of the rightholder to “shoot his gun” within his protected area with impunity. His boundary was closed off from the rest of the world by the bright line of his property. These property rights were seen as the quintessential right of the individual, shielding the individual from other individuals and the government. Property thus conceived was simply seen as a thing controlled

\(^7\) See Radin, supra note 5 (discussion of one type of property related to personhood).

\(^8\) See Kennedy, The Structure of Blackstone’s Commentaries, 28 BUFF. L. REV. 205 (1979).

\(^9\) See Note, Justice Rehnquist’s Theory of Property, 93 HARV. L. REV. 541 (1984). Rehnquist apparently takes the position that the old property requires the most protection largely because it is productive. While it is not clear that even if one adopted such a background justification, one would come up with the division that Rehnquist makes, what is more significant is that there be an opportunity to discuss the background assumption once it is in dispute.

\(^10\) For a discussion of the classical concept of property with its attending property, see Kennedy, supra note 8.
by the individual.¹¹ In practice, however, the Court has abstracted and
dephysicalized traditional notions of property.¹² It has recognized and
protected even the expectation of rights as actual legal property. How-
ever, this appropriate extension of property rights does not hold for eve-
ryone. For example, while the Court recognizes a property right in
expectation of profit, there is no similar recognition of the right of expect-
tation to develop one's skill in the labor market.

For Reich, the most important function of private property is to
protect the individual. He considers this true private property and be-
lieves that it cannot be separate from liberty. He asserts that it was a
mistake to try to separate true private property from liberty.¹³ It is this
function of property that Reich believes we must protect. He also noted
that in the main, corporate private property often creates a system of
domination and dependence for the individual. Reich believed that this
relationship sparked the Reformer Movement begun at the turn of the
century. Reformers called for regulation of private corporate power and
the creation of new property for the individual in the form of government
largess.¹⁴ But Reich maintained that the reformers in their efforts to pro-
tect the individual from large corporations have simply given the individ-
ual a new master—moving from the reign of the private corporation to
the government. While one might suppose the government a marginally
better master, the goal to create immunity and independence for the indi-
vidual was not achieved by greater governmental control and regula-
tion.¹⁵ Reich notes that as property became more concentrated in the
hands of corporations, and as it was increasingly separated from the per-
sonalities of real individuals, corporations begin to act like governments.
Private property in the hands of corporations transforms them into sov-
ereign entities, giving them power over the individual and shielding them
from the scrutiny of democratic processes. Reich noted that the reform-
ers responded to this by calling for the separation of liberty and prop-
erty.¹⁶ “The reform took away some of the power of the corporations
and transferred it to government. In this transfer there was much good,

11. See Unger, supra note 4; Singer, The Legal Rights Debate in Analytical Jurispru-
dence From Benthan to Hohfeld, 1982 Wisc. L. Rev. 975.
12. Vandevele, The New Property of the Nineteenth Century: The Development of the
Modern Concept of Property, 29 Buff. L. Rev. 325 (1980).
13. Reich, supra note 1, at 771.
14. Id. at 771-73.
15. Id. at 772. Simon takes issue with Reich’s reading of the goals and mistakes of the
1 (1985).
16. Reich, supra note 1, at 772.
for power was made responsive to the majority rather than to the arbitrary and selfish few. But the reform did not restore the individual to his domain.17 Indeed, Reich sees the current problem as the combined power of the government and the private corporate sector pressing the individual.18

Unless there is a distinction made between corporate private property with its attendant abuses and other types of private property, such as those that protect the individual from domination, then a call for private property is simply a call for the prior abuses of private corporate power and control. Reich noted that:

There can be no retreat from the public interest state. It is the inevitable outgrowth of an interdependent world. An effort to return to an earlier economic order would merely transfer power to giant private government which would rule not in the public interest, but in their own interest. If individualism and pluralism are to be preserved, this must be done not by marching backwards, but by building these values into today's society. If public and private property can no longer perform its protective function, it will be necessary to establish institutions to carry on the work that private property once did but can no longer do.19

The New Property is that institution for Reich.

Although he is aware of the partnership between government and large corporate private property, Reich does not address the potential and the consequences of a partnership between the government and a less powerful group of individuals.20 It is impossible for a completely industrial society to function without government and a system of property. Yet, the antinomy is that it is the same government and system of property that both abuses the individual and renders her in need of protection with one hand and may afford her protection with the other.21

Reich noted that there are different legitimate functions of property and delineates the type of protection he is calling for: "Our primary focus must be those forms of largess which chiefly control the rights and

17. Id. at 773. It is not clear when the individual was in the domain that Reich suggests. It is clear that one of the goals for private property was to protect the individual from the state and other individuals, but it is not clear when this was indeed the widespread practice. It is also important in looking at these issues to distinguish between productive property and other forms of property. See Baker, supra note 3.
18. Reich, supra note 1, at 773. It is not the corporation per se (although the special status on the corporation in modern American society can easily overwhelm the individual), but this is no less true of a private individual with vast concentrations of productive capital.
19. Id. at 778.
21. Kennedy, supra note 8; UNGER, POLITICS OF KNOWLEDGE (1975); UNGER, supra note 4.
status of the individual." Reich distinguished three functions of property: 1) the corporate function, which is to make money and amass power; 2) the individual privacy function; and 3) the livelihood function. The livelihood function both provides access to the ability to and the actuality of making a living. For Reich, the legitimate functions of private property are these latter two. While Reich believes that the corporate function of making money and amassing power is a legitimate function of property, it is not the function of true private property. He believes that this corporate function has distorted and overwhelmed the more important "individual" functions of private property. True private property protects the individual from both the government and corporate concentrated power.

The privacy function of property is to create a sphere where the individual may act without governmental interference; government must justify why it should be allowed into this sphere. This sphere "shifts the burden of proof: outside the individual has the burden; inside the burden is on government to demonstrate that something the owner wishes to do should not be done." This privacy function is closely tied to the individual's need for independence and dignity. For Reich, this privacy aspect of private property is closely related to civil liberties and to the Bill of Rights itself.

Large concentrations of property used to exercise rights over other individuals, in Reich's words, is not truly private property but "socialized" property. This socialized property allows for the individual rightholder to impact on the rights of others. It is exactly because of this attendant potential abuse of power that the government must remain in the business of imposing restraint on rightholders' excesses. Reich is not calling for a return to the formalist theories that dominated before the reform movement. Formalism failed to address the power imbalance between the holder of socialized property and the rightholder of true private property. Nor does he believe that this property relation is a simple outgrowth of the free market. He recognizes that all wealth is created by the society and that property is created by law. He rejects the concept

22. Reich, supra note 1, at 779.
23. Id. at 771.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
29. Id. at 772.
30. Id. at 771.
that private property should be regulated because it is prior to the state or because it is intrinsically private. Instead, he opposes the regulation of true private property because it reduces the independence of the individual. While there is a public interest in private property, the public interest in protecting the individual requires a zone of sovereignty for the individual. Reich believes property is the best way to achieve this. Some may reject this last claim. What is clear is that Reich’s paramount concern is protecting the independence and integrity of the individual. His property concern is derivative of this. Reich’s notion of private property includes a sphere of existence where the individual acts without impacting the rights of others. He accepts the classical model of liberty regarding true private property. This model assumes that property rights are self-regarding.31

Reich’s theory of the nature and function of private property is a modest reform of the existing concept of property. In his purview, property should provide a zone of privacy, secure individual’s livelihood, and even protect the other liberties necessary for a free society. Yet, Reich is critical of the public interest state in the form of government regulation and control of property. He rejects classical socialism for the same reason; it gives the government more control.32 Part of Reich’s justification for not regulating private property is based on the notion that property rights are self-regarding liberties. However, it is that very thesis that opens Reich’s theories to criticism.33

Although Reich’s criticism of regulation and the public interest state may be subject to attack to the extent it is related to the traditional concept of property rights, it is not central to his primary thesis. The essence of Reich’s analysis is that much of the wealth and access to wealth that an individual has is necessarily subject to the discretion of either a powerful state or a powerful private interest. This wealth does not protect the individual as private property is designed to do because of the inherent power imbalance between a mere individual and the state or large corporation. Reich’s solution is to provide the safeguard that traditional property performed by creating new wealth or new property. But this new wealth must be accorded the respect we have reserved for traditional property. Reich eloquently sets out what is required to protect the individual from being overwhelmed by the more powerful:

31. This liberal model assumes that all private property, and not just true private property, is self-regarding. It fails to distinguish between true private property and corporate private property.
32. Reich, supra note 1, at 764.
33. See, e.g., Singer, supra note 11; Kennedy, supra note 8; Unger, supra note 4.
First, the growth of government power based on the dispensing of wealth must be kept within bounds. Second, there must be a zone of privacy for each individual beyond which neither government nor private power can push—a hiding place from the all-pervasive system of regulation and control. Finally, it must be recognized that we are becoming a society based upon relationship and status—status deriving primarily from source of livelihood. Status is so closely linked to personality that destruction of one may well destroy the other.34

Reich would provide not only procedural protection for this new property but also substantive protection. To protect the individual in modern society, Reich argues that benefits and entitlements must be treated as unconditional rights and not gratuitous favors.35

I have suggested above that the central issue for rights is not government largess but the protection of the individual from concentration of power. Reich is aware that although he focuses on the accumulation and abuse of government power, it matters little to the individual whether she is being suppressed by the government or the private sector.36 Indeed, in theory, government power may be a little less oppressive because it is subject to democratic control in a manner that is not true of private power.37 Reich's theory of property is a functional one. It is based on normative societal concepts of the human personality. He believes that personality requires a social and economic structure that enhances independence and integrity. But because the state is a potential threat, such a structure resulting from decentralized private property is the best way to achieve this. He argues that the liberal concept of property is designed to do just that. While the government is one of the main entities to monitor, it is certainly not the only entity. Reich notes that the United States Bill of Rights clearly links this concept of a society and true private property to the protection of the individuals' freedom. Our most hallowed rights, such as freedom of speech, right to assembly, privacy, right to vote are all contingent upon having control over minimal resources. One only has to consider the situation of Homeless, as Judge Robert Coates

34. Reich, supra note 1, at 785.
35. Reich's theory has both a normative and positivist theme. He focuses primarily on the benefits that the government creates. He has been criticized for not focusing on need but only on protecting the entitlements that are created by the government. While it would appear that the entitlements that he would recognize are only those that the government has recognized, the protection would not be limited by the protection that the government would grant. In fact, he does recognize a need for entitlement not recognized by the government; this is one of the reasons he gives for not limiting the expansion of the government largess.
36. For a discussion of the partnership of public power see Reich, supra note 1, at 764; Lawrence, supra note 20.
37. Reich, supra note 1, at 774.
has done in this symposium. He shows how the lack of property rights can effectively disenfranchise one from all other rights. And for Reich, property is important because it is the primary mechanism to secure these liberty interests against the government. For Reich, the proper societal functions of property are indispensable to the existence of other liberties in our society.

II. Property Functions Disaggregated

If one focuses on the essential nature of property (private property in Reich's project), then the need to distinguish different forms of property related to their different functions becomes clear. Reich's contribution to this project is indeed significant, but in the last 25 years, contemporary scholars have considerably broadened the analysis of the function and role of property reforms. Reich recognizes that property can be used either as a shield to protect or a sword to wound the individual. If one is to segregate and protect the proper function of property from the other functions of property, one must establish some basis for disaggregation. A number of writers have engaged in just such a project. In order to disaggregate property, one might argue the need for a rational separation of function and a principled justification for the hierarchical ordering of these functions. This is the task Margaret Jane Radin has set for herself.

For Radin, the most important function of property is constitutive of the human personality, and its least important function is exchange. Radin sees these two extremes as poles on a continuum of various property functions. Yet, the spectrum is much richer than these two extremes suggest.

A brief examination of these disaggregate models will prove helpful in refining and updating Reich's new property theory. Radin notes that all property theories implicitly or explicitly use the assumption that property is tied to personhood to justify private property. Using the personhood perspective as a foundation, she attempts to show how other theories are either overinclusive in what they protect as private property, or underinclusive in what they fail to protect. She develops a continuum where property ranges from fungible to personal. Using this system,
she creates a hierarchy of protection for property: personal property being highest and fungible property being lowest.\textsuperscript{41}

In addition to developing this alternative justification of the protection of property that she sees grounded in personal integrity and autonomy, Radin is critical of both traditional and radical justifications of property. She notes an important methodological error in much of the traditional justification for property. Radin finds that these traditionalists confuse a proof of the specific for a proof of the general. They argue for a justification of property based on a single or narrow set of functions. Having shown that this narrow set of functions is justified, they then argue that all forms of property have been justified.\textsuperscript{42} This error becomes apparent when the functions of property are disaggregated.

Radical theorists are critical of traditional justifications for property. These critics do allow for the need to disaggregate the functions of property. But Radin points out that unless the nature and function of property is correctly identified, even after a process of disaggregation, any justification theory will simply incorporate other errors. She notes that a number of writers have disaggregated property along the power/use continuum.\textsuperscript{43} The power/use model is similar to Reich’s model of socialized property and true private property. Radin rejects this model as less exact than the personal/fungible continuum. She argues that the power/use model makes a number of mistakes. The power/use model wrongly assumes that there is discontinuity between use and power. Use/power proponents assume that “use” is self-regarding and does not entail power over others.\textsuperscript{44} Radin points out that a right we associate with the right to exclude, property, is not accurately a self-regarding right because inherent in such a right is the power to exclude others.\textsuperscript{45} But if power and use cannot be separated, then the model collapses into itself and the continuum becomes a power/power axis. Such a model does not suggest how we are to distinguish functions of property.

This is one of the problems with the model that Reich adopts in \textit{The New Property}. He asserts that the true function of private property does not give one power over another. He accepts the traditional claim that

\begin{itemize}
  \item \textsuperscript{41} Id.
  \item \textsuperscript{42} Id. at 979.
  \item \textsuperscript{43} Id. at 988. “Use” property is property that the rightholder holds for her own use; “power” property gives the rightholder power over others.
  \item \textsuperscript{44} This is analogous to Reich’s theory of true private property. For a good critique of the position that some rights are self-regarding and other rights are other-regarding, see Singer's discussion of Hohfeld, \textit{supra} note 11.
  \item \textsuperscript{45} Radin, \textit{supra} note 5, at 983 n.88.
\end{itemize}
there are self-regarding rights in the strong sense for the property holder.\textsuperscript{46} But this is not the case.

Property is never self-regarding in the strong sense. It potentially always affects others and gives the rightholder power over others, regardless of whether it is private property in Reich's sense or personal property in Radin's sense. It serves a set of functions that are enabling for the rightholder and disabling for the non-rightholder, including the power to exclude. This would appear simply to push the question to a different level. And while it does not resolve the issue of which types of property are more important to protect than others, it does add insight into the nature of property and allows the question to be framed in a concrete manner that will correct the over and under-inclusiveness of traditional property theory.

Radin's model suggests what should be considered in deciding whether a particular type of property should be limited. The property that deserves the greatest protection in Radin's scheme is property that is most closely bound up with the individual, i.e., personal property.\textsuperscript{47} What makes property bound up with the individual is not simply the property itself, but the relationship between the individual and the property. A ring owned by a jewelry dealer held for exchange is not personal property, while my mother's wedding ring is.\textsuperscript{48} The rights in this scheme of Radin's are properly understood to be emanating from the individual and only derivatively from the property in question. This is similar to Reich's concern.

There are two important additions to Radin's principle regarding personal property. First, personal property is personal both because it is bound up with the person and there is a normative understanding that such a relationship should be respected.\textsuperscript{49} This ameliorates the potential effect of being purely subjective and unworkable. The second correction is even more significant. There is an important limitation to what Radin would call personal property. She would not allow that personal property enables its rightholders power over others, denying the "other's" rights to be fully constituted beings in the larger community.\textsuperscript{50} When property serves this function, it is excluded from personal property, even

\textsuperscript{46} Reich suggests that it was the development of modern society and the loss of individuality in property that created the situation whereby property-holders have arbitrary power over others. But if property by its nature gives people power over others, then the individual power distinction is not useful. See Reich, supra note 1.

\textsuperscript{47} Radin, supra note 5, at 960.

\textsuperscript{48} Id. at 959-60.

\textsuperscript{49} Id. at 961.

\textsuperscript{50} Id. at 970. A similar point is made by Unger, supra note 4 and Baker, supra note 3.
if the individual rightholder is bound up with the property. A slaveholder's personal property interest in his slave should not be protected even if the slaveholder is "bound up" with the slave. The right to deny an individual personhood is the abuse of power that Reich associates with socialized property. Some property may be both held for exchange and yet necessary for being a fully constituted being.

Property associated with claims on resources for a meaningful life may be held in exchange for subsistence needs and intrinsic value at the same time. One may work for money to buy the things necessary to be a person in the community. Yet, the work itself, including the nature of the work, may also be bound up with one's personality that society acknowledges. Indeed, we often assume that people need meaningful work to have meaningful lives. Property that is associated with welfare or livelihood does not provide a zone of privacy in the strong sense. One may sell one's labor either for internal or external reasons, but in doing so, one does not have exclusive power over one's labor, nor does one have privacy or autonomy in the workplace. If one works in a workplace, one gives a great deal of power to the owner of that workplace. In fact, it directly impacts on one's personhood. The owner must be limited in what she can extract from the worker consistent with society's meaning of personhood. If the needs of the worker and the power imbalance between the worker and the owner are ignored, the worker is allowed to be subjugated in the name of private property.

Expectations are an important part of modern property theory. The above discussion helps us to determine which set of expectations should be given heightened property protection and which should not. Many of the same questions that have already been discussed above apply to the analysis of expectation as a right to be protected. The Court has often treated the expectation of a property right simply as a positive right created by the state and limited by the same creation. But more recently, the Court has also demonstrated concern for such a limited view of expectation. It is better normatively to recognize that these expectations

51. Reich's definition of socialized property was broader than Radin's. A fair reading of Reich, however, would treat his concern with abusive power as power that allows the rightholder to diminish the other's personhood in a way that liberal society must reject.

52. Baker, supra note 3, at 745.

53. Radin discusses property that is associated with welfare, but she is reluctant to call it property. She says that Reich has implicitly included this as part of his new property and that it deserves heightened protection. She believes that Reich has effectively collapsed property rights into rights generally. Radin, supra note 5, at 988-91.

are another form of personal property. A number of commentators have forcefully argued that the individual has a right to the resources that are necessary for her participation in the political/social community. Some extrapolate this from our concept of equality and the Fourteenth Amendment, while others base it on requirements for a just, liberal democratic society. Reich would argue that the right to expect resources for our livelihood is one such expectation that must be recognized in our society.

III. Revised New Property Model

I have taken some of the insight from an expanded theory of disaggregating the function of property to refine Reich's property theory and develop what I call the Revised New Property Model ("RNPM"). When property is disaggregated, a number of modifications to Reich's theory of "new property" are suggested. Reich had already anticipated most of these in his original work. The first is the move to recognize that all property involves relationships, and the rightholder's position directly infers power over non-rightholders. Although Reich's concern is with how to limit this power, it is clear that he is equally concerned with that power that makes the non-rightholder dependent, limiting her ability to be a fully constitutive and participating member of the community. Reich was concerned with this livelihood nature of property, and therefore supported the expanded need for government largess. This right to a livelihood is implicitly recognized by Reich, not only because of need, but because the state distributes all society's resources, and all property rights are ultimately society's. Reich's concern for the individual and the recognition of the government's role easily lead one to the role of property entitlement in welfare and livelihood. This corrects the overly positivist tone in Reich's original treatment of government entitlement.

Socialized property should not be distinguished by the traditional public-private dichotomy. Again, Reich was aware that large concentrations of private capital work in concert with public power to structure a system that overwhelms the individual and creates dependence.

55. Radin, supra note 5, at 968.
57. For another discussion of the public/private partnership, see Lawrence, supra note 20.
The last revision of Reich's property theory is not as obvious as the above. Reich's analysis of just compensation, as formulated in *The New Property*, has a number of problems. What Reich seems to suggest is that new property can be taken, but just compensation is required. But new property, as revised under this theory, includes personal property. Most of this property is important because of its close tie to the individual. Since exchange value assumes that everything is instrumental and profit-motivated, it is not often possible or desirable to put an exchange value on such property. The revised new property recognizes that some aspects of this social contract are intrinsic and sacred.

There also needs to be a hierarchy of "just compensation." The closer the effected property is tied to personal property (in the Radin sense), the greater the concern must be that taking the property does not diminish the personhood of the individual. When the property is socialized and therefore held for its exchange value, the concern is of a different and lower order. In this instance, there may be fair and efficient argument for compensating the latter rightholder. This is because the efficiency concerns are political and not moral, while the personhood claims are moral, rather than political. Finally, because property involves power allocation, a radical requirement to "justly compensate" would significantly curtail the ability of a society to redistribute resource from exchange property to personal.

The problem with just compensation is that it is built from the market concept of property being fungible. Yet, there are important types of property that are obviously not fungible. For example, Indians' sacred land, or a lover's letters. There is also the problem of distribution if there is to be just compensation. This cannot be a private concept that shows the public-private nature of all property, and especially market property. What the market may place as a value on property could easily conflict sharply with a personal valuation of the same property.

The Court has accepted the modest part of Reich's theory. It has recognized in a number of instances that government largess is necessary for some property protection. The Court has found that there are due process rights for a number of government entitlements. However, the strong parts of Reich's assertion that new property should be given substantive due process as well as procedural, have not been accepted by the Court. Reich not only suggests that new property receive similar protection as traditional property, but, in a number of instances, create protec-

tion as well. While recognizing that new property should be given some protection, the Court has generally been unwilling to give this new property the level of protection that it has traditionally given to old property.60

These revisions allow for a clearer picture of the RNPM. The RNPM continues Reich's initial project by developing many of the issues that he either touched on, or anticipated, but did not explicitly develop. This model helps to explain some of the Court's decisions, and suggests a framework for the Court and commentators to use when addressing issues of property dispute. There are four broad categories with many nuances. The broad categories are as follows: Category I - fungible property versus fungible property; Category II - fungible property versus personal property; Category III - personal property versus fungible property; and Category IV - personal property versus personal property. Because personal property is at the top of this hierarchical scale, Categories I through III are relatively easy to resolve.61

I will examine a few recent cases using the RNPM. The Court has not used this model in its reasoning but this alternative model better explains some of the Court's decisions as well as the problems that critics have had with other decisions.62

Until recently, the Court had developed much of Title VII law consistent with this model of analysis. For most employees, their job is closely bound up with their livelihood and therefore with their development as a person. Until recently, an employer was required to change any practice that discriminated against a protected class unless the employer could show that her business necessitated this action. The employer's interest is fungible, while the employee's interest is presumed to be both fungible and personal. Because the employer has control over the resources that the employee needs for personal fulfillment, the em-

60. See Note, supra note 9.
61. It would not be difficult to create additional hierarchies within a single category. For example, personal property that serves more than one function might be considered more important than personal property that serves only one function. Although there are not explicit criteria suggested for resolving disputes between two types of fungible property that have only an exchange function, this is a political question, and this model suggests considerations that only require basic procedural fairness. However, personal property is both a political and a moral question. And indeed the moral nature of the personal property should set as a limita-
62. In its recent employment cases, the Court often explains its holding in terms of the correct allocation of burden of proof and the probative value of certain facts. But since there are counter-positions on both of these issues, the Court needs to give either a positive explanation of why one position is better than the other, or a background position to support why it choose one position over another. It fails to give either.
ployer was required to structure the requirements of the job so that the prospective employee had fair access to resources for livelihood.

The Court has not expanded this right of access to resources for non-protected employees. More recently the Court has been placing a higher value on the nature of the fungible property of the employer, thereby diminishing the personal property claims of the employee. In *Wards Cove Packing Co. v. Atonio* the Court asserted that employers need no longer justify their actions toward employees upon doctrine of necessity. By this action, the Court seems to be willing to defer to the interest of the employer at the expense of the employee. The Court majority framed its reasoning in terms of the proper burden of proof, without adequately justifying why this burden of proof was being shifted to the employee. The RNPM suggests that when one form of property is personal, and the rights on the other side are based on fungible property, the presumption should favor the rightholder of the personal property, unless there is a strong reason not to do so. In a series of recent cases last term, the Court has shown a clear move toward favoring employers. Indeed, if one now looks at the 1988 Supreme Court term and knows no more about a case than that it is between an employer and an employee, one can assert with disturbing accuracy that the employer will win.

A much more difficult case occurs when a contest arises in Category IV — personal property versus personal property. The RNPM cannot mechanically resolve such a dispute. I do not believe that it is the limitation of the model itself, but a problem with the nature of the dispute in the category. Indeed, no model can mechanically resolve such a dispute. But it can suggest what some of the important considerations are. I stated above that property that is in the same category can at times be further disaggregated and reaggregated in a way that suggests a potential hierarchy. For example, when property is serving several personal property functions, and other property is serving only one of those functions, this model would suggest selecting the former over the latter.

There are two important additions that have to be made before making an effort to apply this model in this context. The first is to recognize that what is a legitimate personal function is not given but is created in the context of society at a particular time in history. Because of this,

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63. Although Title VII is statutory, and one could therefore claim that it is the role of the legislature to distribute resources in society, there is also both a strong normative claim and a constitutional claim that equal rights to society’s resources are part of our constitutional democracy. *See, e.g.*, Baker, supra note 56 and Michelman, supra note 56.

64. 109 S. Ct. 2115 (1989).

65. *See* Reich’s discussion on burden of proof, *supra* note 1, at 771.

what is necessary to constitute a person in a community is not universal, but neither is it subjective and arbitrary.\textsuperscript{67}

The second refinement to this model requires an acknowledgement that property functions are not necessarily equally balanced. It is conceivable that one function can be more important than the value of two lesser functions. While these changes make the application of the model more complex, they also tie the model closer to the real world that we experience. The final adjustment of this model requires that we acknowledge that a particular function of property will shift according to how conditional or unconditional the rightholder's interest in the property is. Reich has already anticipated this refinement in his theory of new property. He suggests that some property will be vested and some will be conditional. He supports greater protection for the vested property. This result is also consistent with Radin’s model of being bound up with property. We would not expect someone to be as “bound up” with property that they are simply expecting but have not received, as with property that they have possessed for a long period of time.

With these refinements in place, this model can now be applied to a conflict that involves personal property on both sides. There should be an effort to identify which set of personal interests are at issue and to aggregate and accumulate them respectively. One should also consider how bound up the rightholders are with the property. This should be based on whether the property interest is vested or whether it is a mere expectation. Although vested property has additional weight, this does not suggest that the interest cannot be divested.

When one examines the Court’s opinion in \textit{United Steelworkers of America v. Weber}\textsuperscript{68} case using this model, the decision and reasoning of the Court is consistent with the concerns stated above. In Weber, both the minority and the majority groups have a personal property interest in the promotion on the job. This suggests that not only equal opportunity, but the expectation of equal opportunity, is a property interest. However, neither group has a vested interest in the job itself. In dictum, Justice Brennan suggests that this is significant. He asserts that no worker is going to be laid off.\textsuperscript{69} But then why are the minority workers allowed to be affirmed over the white workers, especially since both groups of workers have the property right of expectation of equal access to the new job? One reason is that the body affirming the minority group is not from that group. This suggests that the majority is not stigmatized by the affirma-

\textsuperscript{67} See, e.g., M. Walzer, \textit{Sphere of Justice} (1983).

\textsuperscript{68} 443 U.S. 193 (1979).

\textsuperscript{69} \textit{Id.} at 208-09.
tive action policy. If the affirmative action policy affirms the majority, it will stigmatize the minority.\(^7\) In addition, stigmatization has long been recognized as having a disabling impact on the individual personality. Implicit in the Court's reasoning is a recognition that the lack of minorities in a job category supports the suggestion that minorities did not have equal access to the resource of the new job. The Court interprets equal access in a contextual manner, considering the impact of both power and domination. In \textit{Weber}, the Court did not discount the importance of social discrimination in evaluating real equal opportunity. \(^71\)

One of the salient issues in \textit{Weber} is equal opportunity, yet most of the analysis fails to notice that there is not equal opportunity for the majority and minority groups. The failure to notice this situation is in part explained by the Court's repeated rejection of relying on societal discrimination as sufficient proof of discrimination under the Equal Protection Clause. This dismisses the very thing that creates unequal opportunity for both the majority and the minority. If minorities have less than equal opportunity, a corollary is that the majority has more than equal opportunity.

The majority fails to see that it has an implicit partnership with the dispenser of resources, the government or private employer. The expectation that the current status quo will continue is not personal property because it is based on maintaining the condition that retards the development of personhood of disadvantaged minorities. To protect this expectation would be abusive power.

The RNPM requires some accommodation to correct this. Unfortunately, the workers are the partners that normally pay for the accommodation; it is seldom the government or the private employer. In deciding a remedy, this model would have a hierarchy that would look first to fungible property.\(^72\)

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70. Although there is a close connection between equal opportunity and social discrimination, the two concepts are quite distinct. The Court is concerned with invidious discrimination that stigmatizes and subjugates. It is for this reason that discrimination against whites is not constitutionally infirm. In the new property model, invidious discrimination is unpalatable because of its impact on the individual personality. Discrimination is backward looking, while equal opportunity can be forward looking. One could imagine a situation in which there had not been prior discrimination, and yet equal opportunity was not available for a certain group. For a discussion in support of this position, see Justice Steven's concurring opinion in \textit{Johnson v. Transportation Agency of Santa Clara Co.}, 480 U.S. 616 (1987).
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71. The private employer may be innocent in this situation, if she was not given an adequate pool. But in a situation such as that in \textit{Atonio}, which the Court recently decided, the employer was not innocent. One solution might require the employer to increase the number of jobs and use these new jobs to expand the equal opportunity of the disadvantaged minori-
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In a later case, \textit{Wygant v. Jackson Board of Education}, the Court rejected an affirmative action plan designed to lay off a white school teacher in order to affirm minority teachers, in part because the white teacher's personal property interest had vested.\textsuperscript{73} This alone is not sufficient to support the Court's decision under the RNPM. Under this model, vested rights are weighted more heavily than non-vested rights, which is consistent with the decision. But it is important to note, however, that in \textit{Wygant} the minority teacher also had vested property rights. One could argue that under a personal property theory, length of time suggests that one will be more bound up with the property. But there are other interests at stake. The lack of minority teachers at the senior level and societal discrimination suggest that the minority teacher was denied real equal opportunity. The Court indicated in this case that social discrimination was not probative. This is clearly at odds with the RNPM. Societal discrimination would clearly indicate a lack of equal opportunity, and as stated above, even without societal discrimination, there still could be a lack of equal opportunity. In \textit{Wygant}, the Court's retreat into formalism can be viewed as support for existing patterns of power.\textsuperscript{74} To acknowledge societal discrimination, but at the same time require a great showing by the discriminated minority group, clearly would violate the insight of the RNPM. If the Court had used the RNPM, it is not clear what the result would have been. What is clear is that the reasoning would have been substantially different. The minority that was to be affirmed appears to have more personal property interest at stake than the majority. For one, she had vested personal property, and two, she had expected property interest in equal opportunity. The majority, however, may have a valid claim on vested property rights based on greater seniority.

During the 1989 term, the Court decided another important case dealing with many of these same issues. In \textit{City of Richmond v. J.A. Crosen Co.},\textsuperscript{75} the majority of the Court again rejected the relevance of societal discrimination. But unlike \textit{Wygant}, there was no claim of vested interest by either party. Thus, \textit{City of Richmond} appears to be like

\textsuperscript{73} 476 U.S. 267 (1986).


\textsuperscript{75} 109 S. Ct. 706 (1989).
Weber. There is one additional factor that would be important in the RNPM. The City Council in City of Richmond was a majority-minority. This raised the question addressed in part by the Court: Is the non-affirmed majority stigmatized by the City Council? The answer to this question is beyond the scope of this paper. But it is clearly an important question. The Court obliquely addressed this question but did not squarely come to terms with it.

An analysis based upon stigmatization and subjugation requires insight that is inconsistent with the formal posture of equality that seems to be developing among several members of the Court. If the majority of the Court accepts a purely formal concept of equal opportunity, they will have to make the mistake of the 19th Century property theorists, who allowed the practice of property to be subverted from protecting the individual to suppressing the individual. Such a move would marginalize equality, and more importantly, legalize the domination of minorities in our society.76

These decisions indicate only some of the difficulties in mediating between personal property conflicts in Category IV.77 It is obviously better to avoid such a choice when possible. When such a choice is required, however, there should be an effort to structure a remedy that is true to the RNPM and does the least amount of harm to the personal property on the losing side. It appears that the Court was guided by this principle in Weber.

Conclusion

Although Reich’s “new property” theory has already had a significant impact on how the Court and commentators think of property, twenty-five years later, the major focus of his project still remains to be completed. Reich challenged jurists to look seriously at the function of property and to develop a legal model that would be animated by the needs of the individual in a liberal state. I have suggested a few to update

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76. The Court has focused on intentional discrimination which is largely irrelevant to the question of equal opportunity. For a discussion that challenges the need for intent, see Lawrence, The Id, The Ego and Equal Property, 39 Stan. L. Rev. 317 (1987); Baker, supra note 56. The Court’s choice of requiring intent is not grounded in a defensible normative theory but simply appears to favor the white majority. See Plessy v. Ferguson, 163 U.S. 537 (1896). For a more general discussion of how the Court is more concerned with protecting the white majority’s interest, see D. Bell, AND WE ARE NOT SAVED 51-74 (1987).

77. There are a number of difficulties with balancing, including the identification of what are appropriate factors for consideration in the balance. See Reich, supra note 1. Yet, I would argue there is no alternative. What can be done is to make such choices explicit so they can be judged and criticized.
Reich’s model based on what we have learned over the last quarter of a century. But we are still at the beginning of that project, and Reich’s article still remains the seminal effort in developing an adequate strategy of new property for the modern industrial state.