Lee Anne Fennell

THE UNBOUNDED HOME

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Excerpted from The Unbounded Home: Property Values Beyond Property Lines by Lee Anne Fennell, to be published in September 2009 by Yale University Press.
What does property mean, here and now, in the early twenty-first-century United States? This book approaches the question by examining a set of problems surrounding our society’s most familiar, important, and emotionally freighted manifestation of property—the home. That the home has evolved as a resource over the past two centuries should not surprise even the most casual observer of social history. In 1790, just over 5 percent of the U.S. population lived in urban areas; by 2000, the figure was 79 percent, and more than 80 percent of the population resided within metropolitan areas.¹ Homeownership rates have also grown significantly; about two thirds of metropolitan area householders are now homeowners.² The residential experience for most Americans thus uneasily combines the profound interdependence of metropolitan life with the promise of unbridled autonomy that homeownership connotes.

Property law has done surprisingly little to respond to these transformations in residential life or to address the resulting tension. Although land use controls attempt to counteract the spillovers that interdependence produces, they tend to operate in a blunt and categorical manner that introduces new difficulties. Meanwhile, our notion of home as a form of property remains mired in outdated concepts, dominated by fencelines and surveys, metes and bounds. My project here is to expose the increasingly poor fit between widespread property concepts and the home as it exists today, to isolate the problems caused by that divergence, and to suggest some ways of addressing it.
This book’s analysis proceeds from a single, simple premise: the value of residential property in metropolitan areas has come unbound from the four corners of the owned parcel. As the realtor’s mantra of “location, location, location” suggests, homebuyers are often much less interested in the on-site attributes of real estate than in the people, things, services, and conditions lying beyond what we continue to refer to as the property’s boundaries. Residential property now serves not only as a resource in its own right but also as a placeholder for a quite different set of resources that are not, and cannot be, contained within the physical edges delineated by plat surveys. Yet, law and theory continue to apply boundary-focused templates to homes that bear a greater conceptual resemblance to Bluetooth than to Blackacre. This book uses a series of problems central to residential life in the United States to spotlight this disconnect and to consider what it would mean for law and policy to take seriously the increasingly diffuse nature of residential property’s value.

To fix ideas, consider how property concepts surrounding the home might enter the consciousness of a fictitious household, the Middletons, over the course of a single month. The Middletons fret about a pending proposal to redraw elementary school attendance zones (even though their youngest is now in middle school). They speak out at a zoning meeting to oppose the introduction of townhouses in an area three blocks from their home that is currently zoned for single-family homes. They remark with approval on a news article about the planned condemnation of a “blighted” block eight miles from their home, to make way for a development that would offer convenient shopping. They are appalled by an inquiry from city officials about whether Maggie Middleton, who designs Web sites for dozens of clients and advertises her services in the yellow pages, is operating an unlicensed home business. They continue their long-standing dispute with their homeowners association about whether they can park their boat trailer in the driveway. And they register a complaint with the city authorities about their next-door neighbors, who seem to have rented out their basement to another family in violation of zoning law. And so on.

Socialized to view the home as a castle, the Middletons think it only natural that they should control what happens on their own property. As a result, they vehemently resist any intrusion into their ownership prerogatives. But, like most Americans, the Middletons have another reason to be hyper-
vigilant about their home: it represents the household’s single largest asset, aside from human capital. For this reason, they feel fully justified in opposing activities beyond their parcel’s borders that might devalue their most significant source of financial security. What we have, then, is a nation of homeowners, largely concentrated in metropolitan areas, who act both as castle-keepers bent on controlling their own space and as community crusaders bent on controlling everyone else’s. It would be easy to fault the Midletons for being inconsistent, but the real culprit lies in a popular notion of property that fails to square homeownership’s promise of dominion and control with the realities of a complex, interdependent world.

Of course, spillovers that affect neighboring properties are nothing new, and law has long possessed tools for addressing them. But when enough of the value of a resource is found beyond the edges of the site we call “the property,” we must ask whether we are looking in the right place when contemplating the resource. The question is not one of mere theoretical interest. I contend that the blunt mechanisms that have been used to deflect negative spillovers and to capture positive spillovers are not designed to bear the weight placed upon them by the outward shift in residential property’s center of gravity. As a result, efforts to address overwhelming and pervasive off-site influences have created new dilemmas of their own.

Two overlapping sets of homebuyer concerns produce especially challenging interactions among neighbors, developers, and municipalities: neighborhood ambience and community composition. The strategic dilemmas that surround these issues reveal a central fact about property’s unbounded nature: the physical exclusion of outsiders from individually owned parcels is a dramatically underprotective strategy for securing access to the resources that people mean to purchase when they buy a home. Unable to physically fence out unwanted impacts or fence in desired amenities, households collectively turn to property mechanisms like zoning and covenants to push control outward from the individual parcel. These mechanisms typically rely on categorical bans on particular land uses within a given neighborhood, zone, or jurisdiction.

The impulse to apply blunt principles of exclusion to a realm that extends beyond the individual parcel is comprehensible, but ultimately problematic. First, there is an obvious tension between the desire, grounded in traditional notions of property, to exercise dominion over one’s own parcel and the de-
sire, prompted by the realities of modern life, to control every aspect of the environment surrounding one’s parcel. The result has been confusion about what property ownership means, and equal measures of outrage against intrusions on one’s prerogatives as an owner and as an interested neighbor.

Second, even if individual communities can reach internal agreement about excluding particular land uses from their midst, the overall pattern of land use choices within a larger metropolitan area can create additional negative effects. Because excluding land uses (such as multifamily homes) often amounts to excluding households (those who cannot afford single-family homes), associational patterns in metropolitan areas are deeply impacted by the use of these property tools.

This book considers how society might design alternatives to existing property instruments that would address both localized extraparcel impacts and the larger-scale dilemmas produced by efforts to control those localized impacts. In broad terms, these alternatives involve reconfiguring property so that it does a better job of aligning the homeowner’s returns with the homeowner’s choices. These reconfigurations require us to move beyond the binary choices that have dominated the metropolitan residential experience—banning or permitting uses, allowing or forbidding exclusion, renting or owning a home. Conceiving conflicts like those faced by the Middletons as resource dilemmas not entirely unlike those surrounding resources like clean air or a sustainable fishery allows us to expand the menu of policy options.

One reconfiguration approach involves developing new forms of alienable entitlements, rather than simply banning or allowing a particular activity. Drawing on innovations in environmental law, we can imagine devising tradable entitlements to engage in acts with aesthetic impacts, and even (in carefully delineated contexts) tradable entitlements relating to association with preferred neighbors and peers. These instruments would allow responsibility for inputs into common environments to be more precisely allocated and priced. Another, quite different, approach would attenuate homeowners’ vulnerability to off-site impacts by scaling back their investment exposure so that it more closely aligns with their effective sphere of control. Here, building on an exciting line of work by Robert Shiller and his collaborators (among others), I examine the potential to reconfigure homeownership in a way that decouples the investment volatility associated with off-site factors from the homeowner’s bundle.
The analysis proceeds in four parts. Part I lays out the theoretical framework that will be employed throughout the balance of the book, working through and building on a set of concepts familiar to many academic readers—property rules and liability rules, competing models of property, the Tiebout Hypothesis, the tragedies of the commons and anticommons, and the strategic interactions captured in games like the Prisoner’s Dilemma and Chicken. Part II examines problems of neighborhood aesthetics, assesses current attempts to address those problems, and proposes a new approach involving transferable entitlements in aesthetic impacts. Part III takes on the most ambitious and controversial implications of recasting residential property to account for off-site impacts. Here, I suggest that residential association itself constitutes a resource dilemma that can, in certain cases, benefit from the theoretical tools of property. Part IV steps back to consider whether some of the theoretical and practical problems surveyed in the book could be alleviated through a more fundamental alteration of the types of investment volatility included in the homeownership bundle.

While the book focuses on the home’s theoretical place within the metropolis, my analytic method serves more generally to illustrate the interaction of collective action problems at different geographic scales. The commons, anticommons, and semicommons templates that I apply here to the metropolitan neighborhood context are general-purpose analytic tools that can be used to understand and respond to all manner of resource dilemmas. The unbounded home thus represents not only an especially pressing and important set of unresolved collective action problems but also a window into larger questions of property theory.

Before I continue, two stylistic matters bear mentioning. First, I follow the convention of using female and male pronouns, respectively, in alternating chapters. Second, the documentation style used in this book is much sparer than that which prevails in the law reviews. I employ endnotes rather than footnotes and, to avoid breaking the flow of the text, typically affix them to the ends of sentences or groups of sentences rather than tag them onto each individual proposition. The endnotes contain short-form citations to some of the most relevant sources as well as some explanatory notes; full citations appear in the bibliography. Readers desiring more background material may find the articles on which this book draws, which are listed in the Acknowledgments, to be useful sources of additional citations.