EJW
ECON JOURNAL WATCH
Scholarly Comments on Academic Economics

ECON JOURNAL WATCH 8(3)
September 2011: 193-204

Property: A Bundle of Rights? Prologue to the Property Symposium

Daniel B. Klein[1] and John Robinson[2]

LINK TO ABSTRACT

> The claim I wish to make here is that this "dominant paradigm" is really no explanatory model at all, but represents the absence of one. "Property is a bundle of rights" is little more than a slogan. The use of the word "slogan" is not intended to be merely polemical. By "slogan" I mean an expression that conjures up an image, but which does not represent any clear thesis or set of propositions.
>
> James E. Penner
> "The 'Bundle of Rights' Picture of Property," *UCLA Law Review* (1996, 714)

The word *bundle* plainly carries the connotations of its etymological roots from words meaning "bind" or "binding." Binding items together is an intentional act done by *someone*. The items gathered up and bound together existed separately and independently prior to the creation of the bundle, as in a bundle of groceries or bundle of sticks. Calling property a "bundle of rights" is like calling the human body a "bundle of organs," or a human nervous system a "bundle of cells." It might be appropriate to call a human body a *set* of organs, but to say "bundle" connotes, further, someone's intentionally binding the organs together into the set they make.

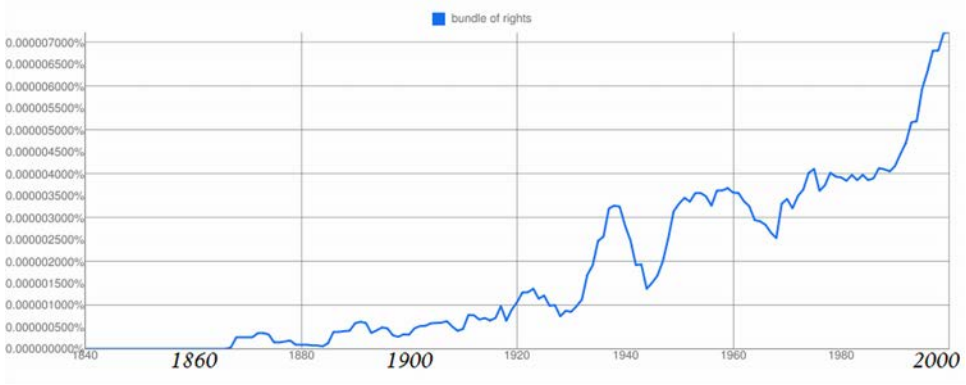
Even "set" is troublesome, however, for the rights inhering in ownership are not each definite or distinct, and their number is not finite. Characterizing

1. George Mason University, Fairfax, VA 22030.
2. George Mason University, Fairfax, VA 22030.
Acknowledgment: We thank Jason Briggeman for valuable comments.

ownership as a set of rights is like saying that a piano enables one to play a set of tunes. So the semantic trouble with "bundle" is twofold: First, it suggests an intentional binding together of items that previously were separate and independent. Second, it suggests a finite set of definite items.

As indicated by Professor Penner, the "bundle of rights" view of property is today widespread. "Bundle of rights" is new. Using Google's Ngram tool and three-year smoothing, Figure 1 charts the percentage of all three-word strings in English-language books that are "bundle of rights." (Incidentally, we also charted "bundle of clothes" just to make sure that "bundle of" did not happen to arise in the late nineteenth century; indeed, "bundle of clothes" has been robust since before 1800.)

Figure 1. "Bundle of rights" begins in the late nineteenth century.



"Bundle of rights" emerged in the late nineteenth century and gained ground thereafter. "Bundle of rights" was part of a wave of semantic changes, a wave that came in around 1880, a wave that altered or confused the meaning of many key words. Significantly, the Ngram chart for "property rights" is similar to that for "bundle of rights."

Prior to 1880, property was understood as entailing a thing owned, and ownership as entailing the owner's dominion over the thing. Ownership entailed the duty bearing on others to respect the owner's dominion, that is, not to mess with the property. Jane's ownership of a wagon is not constituted in a list of uses. Jane's ownership of a wagon entails norms or mechanisms against others messing with the wagon. The most essential rules constituting property are rules bearing *on others*, rules clarifying and proscribing "messing," not rules specifying, proscribing, or authorizing actions on the part of the owner. The Ngram chart for "right to property"—connoting integral ownership—shows pre-1800 origins and is generally flat between 1800 and 1940.

Various appellations have been used, or might be considered, for this older view of property: "exclusion," "*in rem*," "dominion," "boundary." Here we use

"exclusion." In waving an exclusion banner, we mean a broad heading covering any view that holds that "bundle" talk is unsuitable and that exclusion or dominion is central, even though it is not all that "property" signifies. The exclusion idea does not itself provide the justification of property; nor speak to how unowned things become property; nor clearly imply which things are amenable to ownership (or propertization); nor clearly imply specific delimitations of "exclusion," "dominion" or "messing with."

An idea of exclusion appears to have been important, if not primary, in Cicero, Grotius, Pufendorf, Locke, Carmichael, Hutcheson, Kames, Hume, Adam Smith, Blackstone, Bentham, and, indeed, ensuing Anglo-American writers generally. It seems fair to say that the exclusion view was the traditional view until the innovations and confusions after 1880.

The presumption against messing would go, too, for the government. The semantics of the liberal era, in particular, carried a presumption against government intervention. The liberal culture recognized that government was a different kind of player, not an equal, but, still, the presumption against messing was generally extended also to this special player of superior power. Even the government was to bear the burden of proof.

It seems to us that "bundle of rights" became fashionable in the age of expanding democracy and collectivism. Circa 1900 the rising culture of collectivism needed to unseat its rival, the classical-liberal culture. Characterizing property as a "bundle of rights" would make government intervention, not the violating of property, but rather the rearranging or redefining of the bundle. As the universe of all possible bundles is open-ended and unspecified, "bundle" talk tends to blur the boundaries that had become focal in liberal ideas of commutative justice.

The "bundle of rights" formulation enables its adherents to avoid the implication that the regulatory state is a tide of wholesale incursions on ownership. Also, a *bundle* is a man-made collection of items, as gathered up from a finite *list* of definite articles, just as a shopping list may be associated with the corresponding bundle of groceries. Thus, the bundle formulation tends to suggest that property depends on its being created, defined, recognized, and validated by the state—the maker and keeper of the implied list.

In later decades, when Ronald Coase and other classical-liberal thinkers embraced the bundle formulation, it certified such formulation as non-partisan, it prospered such thinkers within the intellectual culture, and it provided classical liberals a means of talking about property without challenging the culture too fundamentally—without, that is, decrying the regulatory state as wholesale coercions.

But eventually the shortcomings of the bundle view would draw attention. In recent decades the bundle view has been criticized by a number of scholars,

including James E. Penner, Thomas W. Merrill, Henry E. Smith, Eric R. Claeys, Adam Mossoff, Larissa Katz, Brian Sawers, Michael Heller, and Jeremy Waldron.

The impetus of this Symposium is to provide critics of the bundle-of-rights view an opportunity to address the issue directly and in plain language suitable to an informal conversation. Six of the symposium participants, namely, Penner, Merrill, Smith, Claeys, Katz, and Mossoff, have been active in criticizing the bundle formulation, leaning toward some version of the exclusion view. But the symposium also includes defenses of the bundle formulation by Stephen R. Munzer and Richard A. Epstein and, to an extent, Robert C. Ellickson. Also, some of the "bundle" critics explain why they endorse qualified use of the term. So the symposium is stacked against the bundle view but is not entirely one-sided.

When they were invited to participate in the symposium, the participants received an earlier version of this Prologue, including the following series of quotations and questions.

Quotations, to Frame the Issue and to Provoke Discussion

Some early employments of "bundle of rights"

John R. Commons, *The Distribution of Wealth* (1893, 92):

> Property is, therefore, not a single absolute right, but a *bundle of rights*. The different rights which compose it may be distributed among individuals and society—some are public and some private, some definite, and there is one that is indefinite. The terms which will best indicate this distinction are *partial* and *full* rights of property. Partial rights are definite. Full rights are the indefinite residuum. … The first definite right to be deducted from the total right of property is the public right of eminent domain. This is the definite right which belongs to the state in its organised capacity of purchasing any property whatsoever at its market value, whenever public safety, interest, or expediency requires. It is merely a definite restriction upon the unlimited control which belongs to the individual.

Richard T. Ely, "Political Economy," in *Political Economy, Political Science and Sociology*, edited by Richard T. Ely (1899, 543-544):

> The first fundamental institution in the distribution of wealth is Property. … For we must think of private property not as a single right

> but as a bundle of rights. … Should private property be abolished, distribution would have to be effected otherwise, and could indeed only be brought about by the collective authority of society.

John Maurice Clark, *Social Control of Business* (1939, 94):

> Most people think of property as a tangible thing which somebody owns. But the important question is What is this thing we call ownership? Ownership consists of a large and varied bundle of rights and liberties.

An early (and skeptical) remark about people being accustomed to "bundle of rights"

Everett V. Abbot, *Justice and the Modern Law* (1913, 24-25):

> Property, ownership, title, — these are merely synonyms in our law expressing the legal perception of a man's natural right to be untrammeled in the physical control which he establishes over inanimate things and the lower animals. We are accustomed to regard these terms as denoting a bundle of rights. Accurately understood, however, they indicate merely a single right, and that the right of freedom.

Ronald Coase

> We may speak of a person owning land and using it as a factor of production but what the land-owner in fact possesses is the right to carry out a circumscribed list of actions. (Coase 1960, 44)

> What does not seem to have been understood is that what is being allocated by the Federal Communications Commission, or, if there were a market, what would be sold, is the right to use a piece of equipment to transmit signals in a particular way. Once the question is looked at in this way, it is unnecessary to think in terms of ownership of frequencies or the ether. (Coase 1959, 33)

> It would be simpler to discuss what we should be allowed to do with a gun. (Coase 1959, 34)

> Throughout his writings, but especially in his highly influential papers…Coase presupposed a particular picture of property—that of

> property as a bundle of rights, or more precisely, as a collection of use rights authoritatively prescribed for each resource by the state. (Merrill and Smith, forthcoming)

Criticisms of the bundle formulation

> "[P]roperty is a bundle of rights" asserts the claim that property is a concept without a definable "essence"; different combinations of the bundle in different circumstances may all count as "property" and no particular right or set of rights in the bundle is determinative. (Penner 1996, 723)

> While the modern bundle-of-legal relations metaphor reflects well the possibility of complex relational fragmentation, it gives a weak sense of the "thingness" of private property. Conflating the economic language of entitlements with the language of property rights causes theorists to collapse inadvertently the boundaries of private property. As long as theorists and the Court rely on the bundle-of-legal relations metaphor, they need some analytical tool to distinguish things from fragments, bundles from rights, and private from nonprivate property. (Heller 1999, 1193)

> [T]he ad hoc bundle conception complicates the analysis. The owner loses a proverbial stick when the rent-control law caps his maximum rent, but he is allowed to keep other sticks in his bundle—how to use the lot, manage the premises exclusively, or negotiate rents below the legal maximum. … By reminding the owner and the law of the rights the owner retains, it suggests, the owner is being selfish to whine about the disposition rights being extinguished. (Claeys 2009, 19)

> If property rights can be adjusted along countless margins, often in the course of the rendering of specific judgments by courts, then it becomes natural to start to think of property as a kind of master list of rights and duties set forth by some authoritative state institution for each type of property—or indeed for each particular parcel of property… The right-duty relationship no longer runs between the owner and "the world," but between the owner and the state. (Merrill and Smith, forthcoming)

> Because it presumes that economic policy makers can resolve resource disputes by maximizing productive efficiency, accident law and

> economics assumes that property control and use rights refer to individualized use claims by competing resource users. This conceptual theory recasts the common law in the guise of interpreting it. (Claeys 2008, 54)
>
> The picture of property as an ever-mutable bundle of rights has long blinded economic scholars to the *in rem* features of property… (Merrill and Smith, forthcoming)

The exclusion/boundary/*in rem*/dominion formulation

> The reason why a right to a material object would seem to entail something like a right *in rem* is simply that a material object, existing as it does in the world, is therefore in principle accessible by anyone and subject to the depredations of anyone. The same thing goes for that particularly interesting material object, the human person, which is why something like a right to bodily security draws duties from all others. In general it would make no sense to protect a person's interest in his body or in some accessible object by means of specific rights generated against single individuals. (Penner 1996, 727)
>
> To be an owner, according to this picture, is to be the ruler over some thing. Just as the king was understood to be the ruler of the realm, so the owner of property was the ruler over some Blackacre or chattel within the realm. (Merrill and Smith, forthcoming)
>
> [W]hat we mean when we say that ownership is exclusive is that owners have a right to exclude and that the right to exclude has a certain effect: the indirect creation of the space within which the owner's liberty to pursue projects of her choosing is preserved. (Katz 2008, 281)
>
> Yet property does not entitle owners to exclude absolutely, with no considerations for the reasons why non-owners might want to enter or engage with their land. Socially, "property" instead institutes a series of presumptions, shifting the burden depending on the circumstances. So when Marshall says, "Stay off my land," he is actually making the much more qualified social assertion: "In general, I am rightfully entitled to decide how this land is used. On that basis, I am inclined to repel your entry as a wrongful interference, unless you articulate an interest in

> using my land that trumps my presumptive entitlement." Taney may be able to meet that challenge. (Claeys 2011, 19)
>
> [T]he tort perspective leads to an incomplete picture of property. From the tort perspective, each conflict is regarded as a stand-alone problem, and the resolution of each problem results in a new and different stick being inserted into or removed from the bundle of use rights. As we shall see, this picture fails to account for many of the key features of the system of property rights, which has far less varied and fine-grained distinctions than we would expect from the tort perspective. (Merrill and Smith 2001, 379)

Merits of the exclusion/boundary/*in rem*/dominion formulation

> A boundary approach, unlike a bundle-of-rights approach, properly recognizes that there is a concept of ownership at work in law, but it does not account for the phenomenon of ownership: it fails to explain its crucial features. We might better characterize a boundary approach as a theory of non-ownership. (Katz 2008, 277)
>
> [E]xclusion accounts for the dynamic efficiency of property, as opposed to the allocational efficiency that comes from the free exchange of rights. (Merrill and Smith, forthcoming)

Other passages

> The most important question any (successful) theory of property must address is which norms, i.e., what rights, rules, duties in a moral or legal system, are *property* norms, and why. "Property" will disappear as a meaningful category of rights if every valuable entitlement, from the right to vote to the right to the shirt on your back, is a property right. The chief rhetorical value of isolating property norms from others lies in the forceful way in which property norms carry weight in a normative system; if no meaningful basis for distinguishing property norms from other norms can be found, then this rhetorical advantage has no warrant. (Penner 2005, 75)
>
> For this reason, in disputes over the justification of property it is not uncommon to find—not uncommon! it is rather emblematic of such disputes—that those on the left seek to undermine the justification of

> property rights and confine property rights with all sorts of limitations while those on the right seek to bolster them, treating any limitation on property rights as an attack on the very soul of the owner. (Penner 2009, 195)
>
> Notwithstanding these variations, the motivation behind the realists' fascination with the bundle-of-rights conception was mainly political. They sought to undermine the notion that property is a natural right, and thereby smooth the way for activist state intervention in regulating and redistributing property. If property has no fixed core of meaning, but is just a variable collection of interests established by social convention, then there is no good reason why the state should not freely expand or, better yet, contract the list of interests in the name of the general welfare. The realist program of dethroning property was on the whole quite successful. The conception of property as an infinitely variable collection of rights, powers, and duties has today become a kind of orthodoxy. Not coincidentally, state intervention in economic matters greatly increased in the middle decades of the twentieth century, and the constitutional rights of property owners generally receded. (Merrill and Smith 2001, 365)

Questions for Discussion

We asked the symposium participants to prepare their comments with the following questions in mind.

1. In reference to "exclusion" versus "bundle of rights" views of property:
   a. Is there an important issue here?
   b. Are you comfortable with framing it as "exclusion" versus "bundle of rights"? Is there a better way to frame the issue?
   c. Why is the issue important?
2. Do you take a side on the debate? Please explain your position or attitude.
3. The phrase "bundle of rights" suggests a finite list of definite articles. Is property a finite list of definite uses or rights?
4. Does government law, in all its forms, delineate bundles of rights? That is, is Serena Williams' car, in fact, anywhere delineated as some bundle of rights?

5. It seems to us that most government law regulating private property is written as either restrictions or requirements on what the owner can do with the property, and not as a bundle of rights. Your thoughts in this connection are welcome. Are most government regulations in fact predicated, if only implicitly, on the exclusion view of property?
6. In affirming the exclusion view, we would suggest that the "claim" that is said to be "good against the world" is *merely presumptive*, it is not meant to be an absolute ethical trump. Contravening the claim, by restricting ownership, is something that should bear the burden of proof. But sometimes contraventions *are justified*, by a justice of a loose kind, a justice that lies *beyond* what Adam Smith called "commutative justice." Do these suggestions make sense to you?
7. If you would subscribe to the exclusion view, would you please parse the following items in such terms?:
    a. A condominium: Who owns the individual unit in a condominium complex?
    b. "Range country"/"fence-out" rules or Nordic "every man's right" to roam privately owned lands: Do these laws invest *property* rights to the peripatetic users/neighboring ranchers? Or do the laws invest rights *that are not property rights* to such users, and those rights authorize *violations* of the landowner's property?
    c. A patent: Is it a form of property? Or is it a set of restrictions on what others can do with their property?
8. We (Klein and Robinson, that is) would be inclined to make the exclusion view essential in an understanding of liberty. Thus, drug prohibition, for example, is a violation of liberty, in that it treads on the ownership (or property) of marijuana owners, etc. Does that move appeal to you? Would you associate the exclusion view of property with the idea of liberty? If not, how would you define liberty?
9. We are inclined to regard "Range country"/"fence-out" rules and patents as rules that violate property (or authorize the violation of property), but we maintain that that does not necessarily imply that they are undesirable. Does your way of thinking admit of the possibility that such a rule may be worthy of being institutionalized as government law even though it violates property? Or is your way of thinking, rather, that laws institutionalizing the ongoing violation of property are never desirable?
10. The "bundle of rights" characterization started at the end of the nineteenth century and thereafter continued to gain ground. In your opinion, why did it emerge when it did and why did it continue to gain ground?
11. Today, do most law school professors favor the bundle view? Is the debate gaining interest and attention? Is one side gaining ground?

12. This Prologue has touched on only a few of the dimensions of the debate. What are some of the important dimensions not touched on here? Please feel free to elaborate.

References

Abbot, Everett Vergnies. 1913. *Justice and the Modern Law*. Boston: Houghton Mifflin Company.

Claeys, Eric R. 2008. Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights. *Notre Dame Law Review* 85(4): 1379-1446.

Claeys, Eric R. 2009. Property 101: Is Property a Thing or a Bundle? *Seattle University Law Review* 32(3): 617-650.

Claeys, Eric R. 2011. Exclusion and Exclusivity in Gridlock. *Arizona Law Review* 53(9): 9-49.

Clark, John Maurice. 1939. *Social Control of Business*. New York: McGraw-Hill Company.

Coase, R. H. 1959. The Federal Communications Commission. *Journal of Law and Economics* 2: 1-40.

Coase, R. H. 1960. The Problem of Social Cost. *Journal of Law and Economics* 3: 1-44.

Commons, John Rogers. 1893. *The Distribution of Wealth*. London: Macmillan and Co.

Ely, Richard T. 1899. Political Economy. In *Political Economy, Political Science and Sociology*, ed. Richard T. Ely. Chicago: University Association.

Heller, Michael A. 1999. The Boundaries of Property. *Yale Law Journal* 108(5): 1163-1223.

Katz, Larissa. 2008. Exclusion and Exclusivity in Property Law. *University of Toronto Law Journal* 58(3): 275-315.

Merrill, Thomas W., and Henry E. Smith. 2001. What Happened to Property in Law and Economics? *Yale Law Journal* 111(2): 357-398.

Merrill, Thomas W., and Henry E. Smith. Forthcoming. Making Coasean Property More Coasean. *Journal of Law and Economics*. **Link**

Penner, James E. 1996. The "Bundle of Rights" Picture of Property. *UCLA Law Review* 43: 711-820.

Penner, James E. 2005. Misled by "Property." *Canadian Journal of Law and Jurisprudence* 18: 75-94.

Penner, James E. 2009. Property, Community, and the Problem of Distributive Justice. *Theoretical Inquiries in Law* 10(1): 194-216.

About the Authors

Daniel Klein is professor of economics at George Mason University, fellow of the Ratio Institute, and chief editor of *Econ Journal Watch*. He is the author of *Knowledge and Coordination: A Liberal Interpretation* (Oxford University Press, 2012). His email is dklein@gmu.edu.

John Robinson is a third year PhD student at George Mason University, concentrating in Law and Economics and Smithian Political Economy. His email is john.robinson.23@gmail.com.

Go to *Intellectual Tyranny of the Status Quo* section archive