INTELLECTUAL TYRANNY OF THE STATUS QUO
SYMPOSIUM: PROPERTY: A BUNDLE OF RIGHTS?

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

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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 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

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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,

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.


> 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”


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)

[The 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)

[What 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)

[Exclusion 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


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Bundle-of-Sticks Notions in Legal and Economic Scholarship

Eric R. Claeys

LINK TO ABSTRACT

The Prologue to this symposium asks: “Property: A Bundle of Rights?” (Klein and Robinson 2011). If the Prologue asks a strictly conceptual question, certainly not. If it asks whether the “bundle” provides a metaphor helpful for thinking about property, my answer depends on how the metaphor is being used.

Let me start with my answer to the conceptual question. It is common for economists and lawyers to describe property as a bundle. Consider this usage by Harold Demsetz: “When a transaction is concluded in the marketplace, two bundles of property rights are exchanged” (1967, 347). In this usage, if $G$ and $H$ have bundles of rights in the fees simple absolute they hold in their lots, $G$ may transfer a smaller bundle to $H$ and all future owners of $H$’s lot with a right of way and a covenant that $G$’s lot will only ever be used for single-family residential use. Similarly, $H$ may transfer to $G$ and all future owners of $G$’s lot reciprocal rights in a corresponding bundle. In another usage, known to legal property scholars as the “Hohfeld-Honoré vocabulary,” property interests may be restated in terms of correlative normative interests relating to different incidents of ownership. Thus, before transfer, $G$ held normative powers, rights, and privileges in the possession, use, and transfer of his land. After $G$ transferred a right of way, $G$ and his successors in interest held incomplete rights of possession, $H$ and his successors acquired rights and powers to enter consistent with the terms of the right of way, and $G$ and his successors were bound by liabilities and duties not to interfere with the legitimate exercise of the right of way (Munzer 1990, 17-27; Honoré 1961; Hohfeld 1913).
These “perspective[s] on property [are] entirely innocuous if regarded merely as an elaboration of the scope of action that ownership provides” (Penner 1996, 741). Speaking strictly and conceptually, however, one does not define a recipe simply by enumerating its ingredients or describing all the different ways in which the final product may be sliced. Similarly, one does not define a conceptual social relation simply by listing all of its constitutive parts or the particular implications that follow from it. If an employer $H$ signed an employment contract with $G$, $H$ would have a bundle of rights. $H$’s bundle would include rights to demand performance or expectation damages, to withhold consent if $G$ sought to renegotiate the contract, and to prevent $J$ from knowingly inducing $G$’s breach. But would any of $H$’s rights be property rights? Clearly not. Yet Demsetz’s usage cannot explain why not. Honoré’s taxonomy can. The right to demand performance, for instance, has nothing to do with a right to possess, use, or transfer some physical or intangible thing. Yet that taxonomy simply begs the question why rights to possess, use, or transfer a thing are property rights. Honoré’s taxonomy assumes an integrated conception of property without supplying one.

So if the bundle is not an adequate conceptual definition of property, is it a helpful metaphor? In some usages, yes. In one usage, particularly common among scholars of economics or law and economics, no.

In “The Problem of Social Cost,” Coase (1960) challenged a traditional view, which he attributed to A.C. Pigou, according to which the law could prevent divergence between private and social product by holding polluters responsible for the harmful effects of their pollution. To launch his critique, Coase begins:

The traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which $A$ inflicts harm on $B$ and what has to be decided is: how should we restrain $A$? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to $B$ would inflict harm on $A$. The real question that has to be decided is: should $A$ be allowed to harm $B$ or should $B$ be allowed to harm $A$? (Coase 1960, 2).

Coase elaborates how abatement rules, pollution taxes, and other Pigovian solutions may inflict on $A$ economic losses reciprocal to and possibly greater than the pollution losses suffered by $B$.

Coase’s portrait makes sense—from one limited perspective. It makes more sense to scholars of economics or law and economics than it does to lawyers. And even among economics scholars and their fellow travelers in law, Coase’s perspective makes sense primarily when studying how to maximize welfare from several existing uses of property. “Economists usually take the bundle of property rights as a datum and ask for an explanation of the forces determining the price and
the number of units of a good to which these rights attach” (Demsetz 1967, 347; see
Coase 1960, 44). In that framework, it makes sense to take A’s and B’s legal rights
as givens, inquire how different sources of transaction costs prevent A and B from
bargaining to welfare-enhancing alternatives, and then consider how to circumvent
those transaction costs.

Yet among many economists and law and economics scholars, this parochial
perspective has been assumed to portray a deep conceptual truth about property.
Coase bears some responsibility for encouraging this assumption. In “Social Cost,”
Coase said offhandedly that although “[w]e may speak of a person owning land
and using it as a factor of production, … what the land-owner in fact possesses is
the right to carry out a circumscribed list of actions” (Coase 1960, 44; see Merrill
and Smith 2001, 367). As Merrill and Smith have explained, many scholars in eco-
nomics or law and economics subsequently assumed that Coase had proven that
“[p]roperty is the collectively imposed allocation of use rights with respect to any
particular resource” (2001, 379). Such scholars have also assumed that the focus of
law and economics property scholarship is and should be “to elaborate how courts
should go about framing collective solutions to establish use rights to establish
efficiency” (ibid.).

Consider how Posner uses a train-sparks dispute, an example popularized by
“Social Cost,” to illustrate how law and economics regulates “incompatible uses”:

Truly exclusive (absolute, unqualified) property rights would be a
contradiction in terms. If a railroad is to enjoy the exclusive use of its
right-of-way, it must be permitted to emit engine sparks without legal
limitation; the value of its property will be impaired otherwise. But the
value of adjacent farmland will be reduced because of the fire hazard
from the sparks. Is the emission of sparks an incident of the railroad’s
property right (that is, part of its bundle of rights) or an invasion of the
farmer’s property right (or bundle)? (Posner 2011, 63)

In Posner’s portrait, there is no tight conceptual connection between railroad
A’s privilege to emit sparks and A’s property. The same goes for B’s right to
exclude sparks and B’s property. Each has “property” writ large in a list of indi-
vidual permissions to use his trains or land (respectively) at different levels
determined to be socially valuable by public officials. A court or regulator should
“approximate the [economically] optimum definition of property rights, [for] these
approximations may guide resource use more efficiently than would an
economically random assignment of rights” (ibid., 65). This is the view others and
I have called and criticized as an “ad hoc bundle conception.” This conception
recasts property as a list of permissions—individualized uses that public officials
deem it socially desirable for owners to have on case-by-case evaluation (Claeys 2009, 623-24; see Merrill and Smith forthcoming, 2).

Posner (and Coase as channeled through Posner) present “property” in a manner alien to social practice and the private law because they recast the “rights” in property. In social practice and private law, “rights” refer not to single-use permissions but to domains of freedom or decisional authority. Such domains are structured to give many different individuals authority to decide—simultaneously, each right-holder for himself—how to use a given resource or aspect of his personality for his own individual benefit. When they neglect or reject this understanding of rights, Posner and the Posnerian Coase invert the conceptual structure of “harm” and “causation.” The statement “[t]o avoid the harm to $B$ would inflict harm on $A$” makes sense if $A$ and $B$’s “rights” refer to incompatible and reciprocal permissions to engage in two particular conflicting uses. In practice, however, “causation” and “harm” fit social perceptions about who is threatening whose legitimate decisional authority. Assume that $B$ injures $A$ while successfully repelling $A$’s attempt to hold him up. In Coase’s framework, the injuries $B$ inflicts on $A$ are reciprocal negative externalities on $A$’s desire for money from $B$. In common sense, this portrait is grotesque. With appropriate adjustments, the same relations apply to property disputes. Even if $B$ planted crops where $A$’s cinders could burn them, if $A$ was the only party who invaded someone else’s rights, $A$ is the sole “cause” of recognized social “harm.” (See Claeys 2010, 1393-94, 1405-14; Merrill and Smith 2001, 391-97).

So if Posner and the Posnerian Coase conceive of property and rights wrongly, how are these institutions conceived of rightly? I prefer to define “property” as a right securing an interest in determining exclusively the use of an asset external to the owner’s person (Claeys 2011, 17-28). Because this definition focuses on external assets, it explains why an employment contract does not give rise to a bundle of property rights. The rights that accrue in such a contract arise by virtue of mutual enforceable promises—not by virtue of an owner’s interest in setting priorities for using a lot of land, an animal, a car, or an invention.

This definition also incorporates the idea of legitimate decisional authority lacking in Posner and the Posnerian Coase’s conception of property. For the same reason, this definition answers one of the Prologue’s questions: whether “property” consists of “a finite list of definite uses or rights.” No. Physical-invasion tests illustrate the idea of decisional authority vividly. These rules require public decision makers to conduct only simple and apolitical inquiries: Did train $A$ invade farmer $B$’s ground or airspace? These boundary rules prevent $A$ from emitting sparks or engaging in other uses that invade $B$’s land. More subtly, they limit the discretion of public regulators to administer $B$’s land. By focusing the inquiries of regulators on apolitical questions about invasions, boundary rules bar them from balancing
B’s intended uses against A’s in all but close cases. In doing so, such rules establish and conserve to both A and B parallel discretion to decide how best to use their rights of way or lands. B reserves the rights to enjoy a residential home, to farm, to operate a store, and conduct many other land uses consistent with his correlative responsibilities not to trespass, pollute on, or otherwise interfere unreasonably with his neighbors’ land uses. Yet these rights do not give B property in a finite list of uses; they are all specific implications of his general and undelineated property in determining exclusively the use of his land.

This definition of “property,” however, does not make property rigid, unchangeable, or immune from any qualification. The Prologue asks whether fence-out rules or rights to roam count as property rights or invasions of owners’ property rights. One may ask similar questions about rights of access for fishing, hunting, or stick-gathering. Such rules and rights confer property rights on non-owners. Even though the non-owners’ rights are not as broad as fees simple absolute, they are rights, grounded in the non-owners’ interests in using and engaging with the land. In addition, conceptually, such property rights are not diminutions or violations of owner property rights. When law and social practice institute rights of use or access for non-owners, they limit the owners’ property to conform to expectations implied in the conceptual meaning of “property.” When a political community entitles non-owners to claim use or access rights on the land of others, it recognizes the interests of ranchers, roamers, fishers, hunters, or stick-gatherers in “using” the land to conduct each of their particular activities. Of course, the law endows the owners with broad rights to exclusive control and possession over their land in all circumstances not covered by those use or access rights. In doing so, however, the law reflects a normative judgment, by the same community, that land owners deserve domains of “use” much broader than the activity-specific “uses” that go with use or access rights. When it entitles owners to all residual rights to control access to or use of their land, the political community endows them with a right to choose to which activities the land will be deployed most intensively and regularly—that is, to determine generally how the land will be used.

Indeed, in the right social and economic conditions, it would be consistent with my definition for a political community to declare land not to be owned privately at all. For example, if a tribe of aboriginal natives does not farm and instead hunts, it may institute private property in captured animals but leave land in a commons to which all members of the tribe have equal access. Such ownership makes the land most accessible for use by all for the most common intended uses, tracking and hunting. However, if the community begins to trade animal furs for objects of value, it may reconfigure land rights to institute private property in land. That reconfiguration lets the members of the community shift to animal husbandry
and fur production if most or all find land more useful for those purposes (see Demsetz 1967, 351-52).

My definition does make it more difficult to conduct some kinds of normative policy-making—policy-making at the level of granularity that Posner and fellow-travelers prefer. As Coase himself anticipated, Posner’s portrait of the economics of sparks “would require a detailed knowledge of individual preferences” (1960, 41). It is difficult or even impossible “to imagine how the data needed for such a … system could be assembled” (ibid.). While “Social Cost” legitimizes Posnerian law and economics in some respects, other aspects of Coasean comparative institutional analysis encourage strong skepticism about the Posnerian approach (Merrill and Smith forthcoming).

I am grateful to the authors of the Prologue for quoting several articles in which I have elaborated the claims and criticisms recounted here (see Klein and Robinson 2011, 198-200). However, some readers might assume from those quotations that I reject all conceptions of property used by economists or law and economics scholars. I do not. Alchian (2008) has defined property as “the exclusive authority to determine how a resource is used,” and I am fully satisfied with his definition. As critical as I am of Posner, I give him partial credit for defining property rights as “rights to the exclusive use of valuable resources.” Posner gets only partial credit because he applies this definition ad hoc. He treats property rights in terms of exclusive use when he focuses on “dynamic” issues relating to investment. He then flips to the list-of-uses approach in “static” disputes (e.g., disputes over sparks), where he assumes he can fine-tune a few parties’ conflicting uses without disturbing any party’s long-term incentives to invest (Posner 2011, 39-40).

Nor do I mean to suggest that all definitions of property by lawyers are well-conceived. The tendencies I am criticizing in Posner and Coase were first proposed by Legal Realist scholars who deconstructed property in the 1920s (see Merrill and Smith 2001, 364-366). Thanks to the Realists, many legal scholars who do not identify with Coase or Posner assume that the concept of property has “disintegrated” in contemporary practice (Grey 1980). And the contemporary U.S. Supreme Court relies on logic as deconstructionist as Posner’s to blur the extent to which state or local land-use, rent-control, or environmental regulations extinguish use rights classified at common law as property (see Claeys 2004, 203-20; Penn Central Transportation Co. v. New York City 1978).

Nor should my definition of property be confused with definitions holding that “property at its core entails the right to exclude others from a thing” (Merrill and Smith 2007, v; see Penner 1997, 71). There are subtle but important differences between a right to exclude and what I prefer to call a right of exclusive use-determination. In extremely telescoped form, exclusion is a consequence of use
and not the other way around. If $A$ has a right of access to fish, $B$ has a profit to pick apples, and $C$ retains all other general control over and use of a lot of land, a lawyer can predict when each may exclude the others or strangers from interfering with their uses. By contrast, if the lawyer knows only that $A$, $B$, and $C$ all have rights to exclude, she will not be able to predict whether $A$ has a fee simple, a right of access, or so forth. Nor will she be able to predict in what circumstances, or against which parties, $A$, $B$, or $C$ will be able to assert exclusionary power. Readers who are interested in further elaboration should consult Adam Mossoff’s contribution to this Symposium (Mossoff 2011; see also Mossoff 2003, 377-390; Katz 2008; Claeys 2009; and Claeys 2011).

The Prologue suggests that exclusion reflected the dominant understanding of property in Western law until the early 20th century and that the bundle notion correlated with the rise of collectivist theories of government administration in the U.S. and the West generally in the twentieth century (Klein and Robinson 2011, 194-195). Although I have assumed this suggestion in one article (Claeys 2006, 447-451), I have since disavowed it because I have come to see that the history is more complicated (Claeys 2009, 622-623 & n.24). Neither Roman law nor pre-Enlightenment political theory justified a view of property as an integrated concept nearly to the extent as did Pufendorf, Grotius, Locke, or their successors (on whom, see Mossoff 2003). Indeed, one might call the Roman law correlating to what we now know as property to consist of a bundle of rights of use, enjoyment, and consumption (see Nicholas 1962, 98-157).

Separately, the earliest American usage of the “bundle” of which I am aware used the term as a trump against government confiscation. This usage occurred in a treatise arguing that the government took property whenever it took any stick out of an owner’s bundle (Lewis 1888, 45). This is the usage Demsetz assumes when he speaks of “two bundles of property rights [being] exchanged” (1967, 347). I have no problem with this usage. In social practice and private law, this usage elaborates how a general right of use-determination implies many specific rights to use, transfer, set conditions on entry, and so forth. Even though contemporary eminent domain law uses an ad hoc bundle conception to obscure the extent to which public regulations interfere with property, Lewis’s usage helps clarify the real impact of those regulations.

To repeat, however, this usage is derivative. Assume $A$ owns land in fee simple absolute and seeks to sell it to $B$ with a substantive restriction that the land never be alienated again. If $A$’s property rights consist of a bundle, is the right to transfer in $A$’s bundle? Surely yes. Does the bundle then also include a right to impose a total restriction on future alienation as a condition on such transfer? This question is harder to answer. Conceptual theory can help frame the law’s answer to the question, but at the end of the day normative considerations must settle that
answer. Doctrinally, a total restraint on alienation is void. Normatively, that rule seems right. Conceptually, however, bundle metaphors do not help explain why. Those metaphors only suggest that the right to restrain alienation might belong or not belong in the property bundle. Yet they do not limit or identify the normative questions that the concept “property” will prompt a public official to ask before deciding whether that right belongs in the bundle.

By contrast, the conception I have proposed here does clarify and focus the relevant normative questions. If property consists of a right securing an interest in determining exclusively the use of a thing, then fee simple ownership should imply a right to impose total future-alienation restrictions only if it seems practically certain that the inclusion of this lesser right will enhance all present and potential future owners’ interests in determining their lots’ uses. Yet the right to impose permanent restraints on future alienation seems likely to choke the future use of lots burdened. If land-use patterns changed significantly over a century, such restrictions would almost certainly prevent the highest-valuing new users from acquiring the land and conforming it to changing land-use trends. That possibility provides a reason not to include the right to impose permanent alienation restrictions in the bundle. And this example illustrates my basic point: One cannot know which sticks belong in the property bundle without knowing how that bundle needs to be configured to enhance owners’ concurrent interests in determining exclusively the uses of their properties.

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Two Cheers for the Bundle-of-Sticks Metaphor, Three Cheers for Merrill and Smith

Robert C. Ellickson

LINK TO ABSTRACT

Property rights in a particular resource commonly are splintered among different owners. To account for this possibility, some legal commentators refer to the maximal set of ownership entitlements in a specific asset as a bundle that can potentially be disaggregated through consensual transactions or otherwise. This conception is often expressed in terms of a bundle of rights. For reasons that will become clear, I instead invoke the image of a “bundle of sticks,” an only slightly less popular metaphor for the same idea. Justice Benjamin Cardozo, a premier judicial wordsmith, is conventionally credited with having first likened a set of full property entitlements to a bundle of firewood. And in several opinions, Justices of the Supreme Court of the United States have invoked this image to describe the fullest possible set of private property rights.

In this usage, bundle of sticks is a metaphor. Metaphors, unlike synonyms, are invariably inexact and therefore potentially misleading. I anticipate that contributors to this symposium will highlight two types of mischief that the metaphor may cause. First, the conception that property rights come in bundles that are easily fragmented may be descriptively inapt because various legal rules limit a property

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2. “The bundle of power and privileges to which we give the name of ownership is not constant through the ages. The faggots must be put together and rebound from time to time” (Cardozo 1928, 129).
owner’s powers to disaggregate ownership. This theme has been central in the work of Thomas Merrill and Henry Smith (2001b and forthcoming), the leading critics of the bundle metaphor. Second, the metaphor may have negative normative consequences because it wrongly implies that the disaggregation of entitlements is unlikely to affect social welfare. According to Merrill and Smith, the legal realists who promoted the bundle-of-sticks metaphor had a political agenda, namely, dethroning the sanctity of private property and the private ordering it enables in order to enhance levels of “collective control and redistribution” (forthcoming, 11–12). Merrill and Smith themselves are more skeptical than the legal realists of the relative efficacy of collective control. They therefore object to the bundle metaphor partly because it is likely to foster legal measures that will lead to excessive splintering of entitlements in private resources. By and large, I agree with both of Merrill and Smith’s criticisms. Nonetheless, at the end of the day my assessment of the bundle-of-sticks metaphor is more charitable than theirs. In my view, the metaphor has come into common usage because it highlights an important feature of a private property system that lawyers and law students might otherwise have difficulty grasping. I therefore urge legal commentators not to abandon the bundle-of-sticks metaphor, but rather to be aware of its limitations and to invent complementary metaphors that might counter the bundle’s shortcomings.

The Merits of the Bundle-of-Sticks Metaphor

Virtually all American law schools require their students to enroll in an introductory course on Property. After spending a month or two on other issues, a Property instructor usually assigns a block of readings that depict how “full” ownership of a property interest may be fragmented among various partial entitlement holders. An illustration may help. Suppose that at the outset O owns a pasture known as Whiteacre in fee simple. (In Anglo-American law, fee simple denotes the fullest possible form of ownership, one that lasts in perpetuity.) Through voluntary acts, O might fragment rights in Whiteacre along at least the following five dimensions:

1) subdivision of Whiteacre into parcels of lesser acreage. O might, for example, divide Whiteacre into two parcels, Blackacre and Redacre, retain ownership of Blackacre, and sell Redacre in fee simple to neighbor N.

2) decomposition of particular privileges of use. Thereafter O might, for example, sell mineral rights in Blackacre to an oil company, enter into a grazing lease with farmer F, and grant N a easement entitling N to cross Blackacre to access Redacre.
(3) temporal limitations on entitlements. O could limit a transferee’s rights to a less-than-infinite period of time, and also create various forms of future interests. For example, O could limit F’s lease of grazing rights on Blackacre to a one-year term starting immediately, and simultaneously negotiate with farmer G a follow-on lease whose one-year term would commence as soon as F’s lease had come to an end.

(4) concurrent ownership. To make matters yet more complex, O’s follow-on grazing lessee might be with not just one farmer (G), but with three (G, H, and I), who would concurrently own undivided interests in the lease.

(5) security interests. O, after entering into all of the above transactions, might grant M a security interest in Blackacre to secure a loan that M had made to O.

Although most of the partial interests mentioned in this example—leases, mortgages, easements—are in no way exotic, their concatenation is likely to make a beginning law student’s head spin. To help beleaguered students, a teacher of Property therefore might invoke a metaphor. O, the instructor might say, once had a full bundle of sticks, but has since chosen to deal off specific sticks to a variety of transferees. “Aha,” say the students. “That’s clarifying.”

The Bundle-of-Sticks Metaphor Slights Agglomeration Effects

At this point, however, a teacher of Property should also note the limitations of the bundle metaphor that Merrill and Smith, among others, have identified. The market value of a bundle of sticks of firewood is roughly twice the market value of half the same bundle of sticks. In other words, the bundling or unbundling of packets of firewood seldom gives rise to either agglomeration gains or agglomeration losses. The decomposition of interests in many other resources, by contrast, commonly is either value-reducing or value-enhancing.

Potential losses from fragmentation. The bundle metaphor implies that there is no rationale for unifying the entitlements in a particular resource in a single private owner. This implication is flatly erroneous. It is hardly news that the value of a whole may exceed the sum of the values of its parts. For example, when two or more individuals share access to the same resource, each of them may opportunistically overuse it, undermaintain it, or torpedo plans for cooperative endeavor. The fragmentation of rights among partial owners thus introduces risks of tragedies of the commons (Hardin 1968) and anticommons (Heller 1998). Partial owners must either put up with the losses this opportunism causes or incur the transaction costs of either controlling each other’s opportunism or buying
each other out. These sorts of downsides of property fragmentation have figured prominently in the influential work of Michael Heller (1998; 2008). At the extreme, Heller might analogize full ownership of a resource not to a bundle of sticks but to a complete deck of 52 cards. In many contexts, the loss of a single card from a complete deck renders the remaining 51 cards virtually worthless.

Venerable enthusiasts of the bundle metaphor, such as Thomas Grey (1980) and the legal realists, seldom confronted this downside of fragmentation. Many policy analysts remain oblivious to it. For example, to make tenure in a single-family house more affordable, some commentators have proposed the creation of land trusts to acquire and lease the lands under houses (e.g., Kelly 2009) and the sale of shares of home equity to non-occupying investors (Caplin et al 1997). In most contexts, these sorts of arrangements would overly complicate governance of the shared real estate and thereby reduce, not enhance, the total value of the interests in it (Ellickson 2008, 85–86).

There also is evidence that, all else equal, most individuals are psychologically disposed to prefer a full bundle of rights in a resource. Jonathan Remy Nash and Stephanie Stern (2010) devised a survey instrument to test the effects of what they call “property frames.” Their respondents expressed a relative dissatisfaction with policies that confer less than full ownership.

Potential benefits of fragmented ownership. In many contexts, however, the carving out of partial interests in a resource can be value-enhancing. The value of an apartment development, for example, lies in its owner’s power to enter into leases, each of which presumably generates gains from trade for both the landlord and the tenant. A well-designed private property system therefore must enable many forms of consensual, and sometimes even nonconsensual, decomposition. In contexts where the disaggregation of property rights would greatly enhance value, full property rights might be better analogized not to a bundle of sticks but to a wholesale lot of rabbits’ feet. Because no individual desires to permanently possess a raft of good-luck charms, the value of the wholesale lot arises almost entirely out of the possibility of its future disaggregation.

A Few Friendly Criticisms of Merrill and Smith’s Essentialist View of Private Property

Merrill and Smith’s writings have permanently altered legal academic thinking about the nature of private property. Drawing on James Penner (1997) and

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4. This is the basis of Richard Epstein’s (2010, 462–472) spirited defense of an owner’s powers to transfer particular sticks in a bundle.
others, they have resurrected the important truth that the *in rem* quality of property rights makes this legal category distinctive. They have persuasively argued that the law of private property is shaped largely to reduce the informational burdens of the owners and non-owners who have to cope with the system. As mentioned, they have also stressed the inconsistency of the bundle-of-sticks metaphor with the actual principles of Anglo-American property law. In their maiden venture as co-authors, Merrill and Smith (2000) defended, for example, the *numerus clausus* principle that limits the menu of possible interests that an owner may create through voluntary transactions. In their view, the law is hostile to the introduction of new forms of property interests because the introduction of a “fancy” may increase informational burdens on those not involved in the transaction. If the law were to permit the creation of endlessly exotic forms of land ownership, for example, an entrepreneur might be deterred from trying to assemble land parcels. Many other property rules, such as an owner’s robust right to exclude, the doctrine of adverse possession, and the rule against perpetuities, similarly reduce the informational burdens of the system.

Hats off, then, to Merrill and Smith. That said, I now briefly identify three issues on which my take is somewhat different from theirs.

First, because Merrill and Smith define “property” as an entitlement in a “thing” as opposed to a “person” (2007, 18–19), they are unwilling to refer to a person’s rights in his own body, labor, and reputation as property. Why this definitional timidity? Returns to human capital constitute approximately three-quarters of GDP. Slavery, the most contested legal issue in U.S. history, involved rules governing the ownership of labor. Because property concepts can help clarify analysis of these momentous legal issues, it is not apparent why property scholars should cede, on the altar of definitional purity, this entire territory to other legal specialists.

Second, Merrill and Smith, in their understandable passion to rehabilitate a robust conception of private property from the onslaught it has endured over the course of the twentieth century, at times exaggerate the role of private property in the overall system of resource management. For example, the first chapter of their superb property casebook (2007) carries the title, “What Is Property?” By this, it becomes clear, they actually mean another question: “What Is Private Property?” On that issue, they distinguish between the “essentialist” view that “property” has a core meaning as a legal concept, and the skeptical view that it is a bundle of sticks whose composition may vary widely from context to context (2007, 15-16). Merrill (1998), even before he joined forces with Smith, had declared that he embraced an essentialist view of private property. In their casebook, Merrill and Smith nonetheless tactfully decline to reveal the depth of their disdain for the bundle metaphor.
Merrill and Smith’s casebook rightly places private property at center stage. Private property abounds in a market economy and is the form of greatest concern to both transactional lawyers and civil libertarians. But as Merrill and Smith know as well as anyone, even in market economies many valuable resources are not, and as a normative matter should not be, held in private ownership. The high seas, for example, are open-access resources that anyone can navigate, and many intellectual creations are in the public domain (that is, usable without charge). In ordinary speech, neither a pasture shared by villagers nor a common area in a condominium project is likely to be described as private property. Another phrase, perhaps limited-access commons, might better describe these arrangements (see generally Ellickson 1993, 1322–23). It is notable that in U.S. legal education, the names of most of the basic private-law courses are plurals—Contracts, Torts, Business Associations. Merrill and Smith perhaps should consider the virtues of retitling their casebook “Property Institutions,” and its first chapter, “What Are the Forms of Property?”

Third, Merrill and Smith rarely discuss the reality that affirmative duties may automatically attach to private ownership. They indeed have boldly asserted that any in rem duties of property owners, such as the duty of a landowner to refrain from carrying out a nuisance activity, are always negative (Merrill and Smith 2001a, 783, 789). This oversimplifies. The law may affirmatively require a landowner, for example, to control natural vegetation (Jones 1994) or to contribute to the costs that an abutting neighbor has incurred to fence a common boundary (Ellickson 1991, 65–81). One commentator (Ouellette 2011) supports imposing on each patent holder an affirmative duty to explain the nature of the patented invention to other researchers.

It is easy to understand why Merrill and Smith would tend to resist the notion that property ownership may come laden with affirmative in rem duties. Because they generally favor the simple packaging of entitlements, they are undoubtedly averse to layering on additional complexities. In many contexts, moreover, property owners may be able to use contracts or norms to elicit affirmative contributions from one another. Because Merrill and Smith exalt owner sovereignty, they likely would tend to prefer coordination by means of those mechanisms, as opposed to legal compulsion. Most important, they are acutely aware that some prominent property scholars have been urging lawmakers to affirm that property ownership entails broadly defined duties. Gregory Alexander (2009), for example, favors explicit legal recognition that an owner is bound by a “social-obligation norm,” and Joseph Singer (2009, 1048), by a general duty of “attentiveness.” Merrill and Smith understandably would be skittish about how a sitting judge might apply these amorphous concepts in a concrete case.

Yet, property law in fact does impose some narrowly circumscribed affirmative duties on owners. If Merrill and Smith aspire to accurately describe the
property system as it is, they might apply their exceptional analytical skills to this understudied set of obligations, perhaps to conclude that the category is narrowly cabined and should remain so.

References


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Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property

Richard A. Epstein

The Uneasy Status of Bundle-of-Rights Theory in Modern Property Law

In their Prologue to this symposium, Daniel Klein and John Robinson (2011) dwell on the dangers of using “the bundle of rights” image in property law. They offer a range of quotations that are intended to show that the bundle-of-rights approach appeals especially to statists. Some of the excerpts that they quote offer a clear indication of how that position is taken today by many of the most eminent theorists in property law. Thomas Merrill and Henry Smith worry that the ability to adjust property rights “along countless margins” carries with it the implication that these rights no longer run between the individual owner and the rest of the world, but instead run only between the individual and the all-powerful state (Klein and Robinson 2011, 198). James Penner fears that the bundle-of-rights metaphor leaves property without some “definable essence” such that no “particular right or set of rights in the bundle is determinative” (ibid.). Eric Claeys worries that the use of the bundle-of-rights language will give aid and comfort to the defenders of rent control, who can now portray property owners as “selfish to whine about” the loss of some sticks in the bundle of rights when they are entitled to retain others (ibid.).

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In making these broad claims, these writers insist that classical liberals must oppose the bundle-of-rights conception if they are to be true to their classical liberal origins. For the record, I am not on the list of quoted authorities. But I am a classical liberal, and I think that the bundle-of-rights image, rightly understood, offers the best path to preserving the institution of limited government. I used it extensively in my *Takings* book (Epstein 1985, 57–62), where I relied heavily on Roman and common law sources, and I continue to use that expression today. To be sure, the Romans had no explicit equivalent for the bundle of rights, but they did speak of the “incidents” of ownership, which they often described as *ius utendi fruendi abutendi* (or of use, fruits, and abuse). In practice these were immediately coupled with the right to convey property, but they were also part of some overarching conception of *dominium*, or a strong form of ownership, and so were all entitled to protection under the system (Buckland 1921, 187). Indeed, as a matter of juridical construction, the notion of the right to abuse property was extended to cover its disposition (Nicholas 1962, 154).

The most common modern formulation is offered by Tony Honoré, himself a Roman Dutch lawyer. Honoré uses just this approach when he lists nine incidents of ownership, of which the key ones are possession, use, and disposition (Honoré 1961, 107, 112–124). Indeed, American takings decisions that have been resolved favorably for private claimants have taken this position. Thus in *United States v. General Motors* (1945, 377–378), in which the Supreme Court allowed consequential damages for the taking of a short-term sublease for the duration of the Second World War, Justice Owen J. Roberts used the bundle-of-rights terminology to solidify the takings claim.

The critical terms are “property,” “taken” and “just compensation.” It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.

2. Buckland’s hesitation about endowing these three incidents with an absolute quality stems from his insistence, historically accurate, that height and setback limitations were inconsistent with absolute use. “The law might forbid him to build above a certain height, or within a certain distance of his boundary” (Buckland 1963, 187).

3. He lists in his original article nine such incidents: the right to possess, the right to use, the right to manage, the right to the income, the right to the capital, the right to security, the incident of transmissibility, the incident of the absence of harm, the prohibition against harmful use, and liability in execution.
The difference between this notion and the bundle-of-rights image is at most terminological. Understanding how the notion of ownership is put together is critical no matter which conception is used. In some form or another, the notion of a bundle of rights has a pedigree that long antedates the rise of Progressive thought toward the end of the nineteenth century.

Why the suspicion of a phrase with such deep historical roots? Much of it has to do with the definition of a “bundle,” which, whether one speaks of cloths, rags, or property rights, looks like some arbitrary assemblage with no inner coherence, kept together only because someone ties them together like stalks of wheat. When we deal with property rights, the fear is that the people who put the bundle together are public authorities who, for reasons that only they know, parcel it out as they see best.

I think that these claims are largely misplaced. To show why, I shall engage not in a direct criticism but in a flanking attack. I begin with a close analysis of a passage from John R. Commons, one of the most influential thinkers of the late nineteenth and early twentieth century. His views are of special interest because they provided, as no modern author could do, the intellectual fuel for many of the innovations of the Progressive Era, which did, without question, do so much to undermine the system of property rights. Afterwards, I relate these arguments to the passages that I quoted at the outset of the paper.

**John R. Commons on Property**

Ponder this passage from Commons:

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. 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. (1893, 92)

This passage, which contains much insight but manifold blunders, is an appropriate launching pad for thinking about the central question of whether calling property a bundle of rights greases the way toward a large and powerful state.
think that a fuller appreciation of how the bundle-of-rights language should work when it is properly understood produces exactly the opposite result. It gives a strong and internally coherent notion of what property is, which in turn shapes the state’s power of eminent domain. This power can then be usefully integrated with the state’s police power—a notion that is pervasive in the history of American constitutional law, but which nowhere makes it into the Prologue.

The difficulty in the Commons passage stems from his inveterate habit to write in the passive voice, as when he says that the different rights in the bundle “may be distributed among individuals and society.” The passive voice leaves open the question of who is going to undertake the distribution of these property rights. In the quoted passage, no determinate person takes on that role, so the clear implication of this proposition is that this honor belongs to the state. That impression is reinforced by the observation that the distribution of rights may be shared among individuals and society,” where the latter is a shadowy collective presence hovering over the individuals in question.

From this position, it is easy to see how the inference of a statist system of property regulation can develop. The state can decide which of the rights it wants to retain for society and which it wants to give away. In so doing, it could, for example, decide that a height restriction is a perfectly appropriate way to deal with the use rights of individuals. Indeed, just that decision was reached by the Supreme Court in *Welch v. Swasey*, in which Justice Rufus Peckham explicitly invoked the police power to hold that laws enacted “for the safety, comfort or convenience of the people and for the benefit of property owners generally, are valid” (1909, 106).

Peckham, of course, made no effort to determine whether the value of the real estate was reduced by the restrictions, or indeed whether the value of all real estate in a particular neighborhood was so reduced. The notion was that since the “benefit” of those restrictions was shared and widespread, there was sufficient reason for judges, on categorical grounds, to find the requisite return benefit for the property taken.

Dangerous principles have real consequences. *Welch* in turn provided one of the major props for Justice William Brennan’s disastrous flirtation with property theory in *Penn Central Transportation Company v. City of New York* (1978), which held that the confiscation of air rights over a building did not require compensation so long as the owner could cover his operating and capital costs from existing revenues. Put otherwise, the Brennan position was that the option to develop property, however valuable in the private market, counted for zero in eminent

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4. Peckham also wrote *Lochner v. New York* (1905), which he cited in *Swasey*. Clearly he believed in an extensive police power. In this regard, rightly or wrongly, he was following the early Roman tradition on state limitations of an owner’s use of his property, which took hold long before the modern era.
domain calculations so long as the underlying operations were not kept under
water. At no point did he address the question of whether it was permissible to
so limit these development rights if the property generated no current revenue or
operated at a loss—issues that have come to bedevil the entire area.

Justice William Rehnquist dissented in Penn Central, but only to protest the ad
hoc nature of restrictions that “singled out” individual structures for government
oversight and review. He argued that by regulating only individual structures, New
York City’s plan failed to provide reciprocal benefits of the sort found in the height
restrictions that were upheld in Welch—benefits which were necessary to sustain
that regulation against the charge of confiscation (Penn Central Transportation
Company v. City of New York 1978, 140). But larger zoning systems, such as those
which were implemented without compensation in Euclid v. Ambler Realty Co.
(1926), received Rehnquist’s implicit blessing, thus solidifying the core proposition
that the property rights that remained in private hands were largely held at the
sufferance of the state.

It is not clear that we can blame Commons for this form of statist
domination, because he does not write as if the state owns everything at the outset.
Rather, to him the key to understanding property rights lies in a distinction between
definite and indefinite rights. Under this distinction, the indefinite rights went to
the property owner, a view that tracks both the Roman and common law treatment
of the subject. Indeed, Commons’ view of eminent domain as a system of or-
ganized state purchases is more protective of property than are the modern zoning
decisions, which allow extensive government regulation with large diminutions in
value to take place without compensation, so long as they are done in the name
of the public good—which proponents of regulation always seem to articulate,
at least to their own satisfaction. It was this move, from compensated taking to
uncompensated regulatory taking, which allowed for the greatest expansion of
government power. Whatever the mistakes of Commons, the quoted passage does
not commit him to that expansion.

Bottom Up Versus Top Down

Neither the words from Commons nor the writings of the more modern
scholars come close to clinching the case that the bundle-of-rights language led
to the expansion of state authority. So the question is, what intellectual trans-
formations drove that change? On this issue it is critical to distinguish between two
related matters. The first is the bundle-of-rights terminology. The second is the
question of whether we think of property rights from a top-down or bottom-up
perspective. In my view, the nub of the difficulty with modern property law does
not stem from the bundle-of-rights conception, but from the top-down view of property that treats all property as being granted by the state and therefore subject to whatever terms and conditions the state wishes to impose on its grantees. The correct approach, in my view, keeps the bundle-of-rights terminology, but in the context of a bottom-up system of property rights.

Here is how it works. The critical distinction that begins the discussion of property in Justinian’s Institutes (Book II, Title I) is the line between common and private property. The former includes rights to air, lakes, rivers, and oceans, and to the beach or shoreline, which are open to all and which cannot be unilaterally reduced to private property. It is, however, a mistake to think of these common rights as though they belong to “society” in the fashion that Commons used. That societal notion suggests a system of centralized state control, when in fact Justinian’s distinction envisioned common property arising under natural law—i.e., before the creation of the state—which gives access to these public waters to all individuals in their private capacities. There is no element of centralized control in this conception of access rights, which lies, moreover, at the opposite end of the spectrum of rights to exclude. What follows is the recognition that the value of waterways and beaches for transportation is so great that they must be kept out of private ownership, which would allow multiple riparian owners to block movement along these natural arteries in ways that would stifle transportation and communication, thereby leading to endless tollbooths on the Rhine river (Heller 2008).5 This conception of common property is driven strongly by consequentialist logic, but it is still a bottom-up conception.6 Once it is faithfully applied, it leads, for example, to the strong constitutional protection of individual rights of access to public waters, which are in play when the government wishes to alter the flow of a river or block access to it by certain riparians (United States v. Cress 1917). This conception is in sharp contrast to the top-down system explicitly advanced by Justice Jackson, that “only those economic advantages are ‘rights’ which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion” (United States v. Willow River Power Co. 1945, 502). At this point, of course, it is judges or legislators who in ad hoc ways decide whether to back these rights. It is therefore no accident that just this formulation of water rights worked its way back into the land use area in Penn Central, where Justice Brennan referenced this passage to explain his neutralization of the air rights over the Grand Central station that were

5. By far the worst thing about Heller’s 2008 book is the title. The internal evidence, including his discussion of the Treaty of Westphalia, all points to excessive government controls as the source of the difficulty (Epstein 2011a).

6. For two extended accounts of how this works, see Epstein (2011b and forthcoming).

Historically, it was the top-down account that reduced the scope of private rights and increased, correlative, the domain of uncompensated state regulation. There is nothing in the bundle-of-rights conception of property that drove this conclusion. The ultimate judgment was political, insisting that vigilant state control was necessary to control common resources. The attitude entailed a faith in expert planning, often used to justify government control over rivers, which commanded that expertise was not to be impeded by requiring compensation to be paid to individuals. The tools that were used to achieve this end were twofold. The first was an expanded definition of what counted as a negative externality, so that matters such as aesthetics were covered by the state police power. The second was the uncritical extension of the notion of a regulated party’s return benefit, which was conclusively postulated generally without giving the owner any opportunity to prove a shortfall between the return benefits generated by the regulation and the value of the property rights lost to that regulation. The two were presumed equivalent, so that the just compensation requirement was satisfied by fiat alone.

The second piece of the puzzle has to do with private property—that is, the rights that one individual has against the entire world to require forbearance with respect to the use of force and fraud on one’s own possessions. The Roman and common law systems both initiated a system of private property from the bottom up: first possession of land (i.e., occupation) was the only mode by which to acquire property. Under the state-of-nature theory, it would be impossible to acquire property by a grant from the state, which, at the time of the original acquisition of property, did not exist. The question therefore concerned the attributes of the rights that were obtained bottom-up. These rights must be measured over a number of relevant dimensions. One is the element of time. The solution was that property was infinite in duration, lest there be a huge problem in deciding what happens to property that is improved and resold once the original ownership period is over. Infinite property rights solve that problem for land, even if they do not work as well for intellectual property, where at the expiration of a patent or copyright the once-protected information returns to the unorganized common, now christened the public domain.

A second element is that of space. The Roman and common law took seriously the ad coelum rule—cuius est solum eius est usque ad coelum usque ad inferos, or, “for whoever owns the soil, it is theirs up to Heaven and down to the Depths of the Earth”—because it again led to a unique allocation of a particular resource to a single owner who was in the best position to coordinate the use and disposition of the asset in question. This rule runs into difficulties with certain complex mineral interests that run in long and sinuous veins, and with overflight easements, which
require sensible modification of the rule. But once again the core conception makes
good sense. There is no reason to allow large parts of the physical universe to re-
main without an owner. If the surface owner could only get the surface, property
would literally be in two dimensions. The *ad coelum* rule solved that problem. Like
the temporal dimension, it paved the way for useful development of property
rights.

The third element deals with the incidents of property, which are squarely
implicated by the bundle-of-rights image. Clearly these include the right to exclude.
But by the same token, a parade of mistakes in modern American takings law has
stemmed from the willingness to say that the right to exclude is somehow special
in the law of property. Of course, it has to be protected, but, literally speaking,
the right to exclude the world does not even give the owner the right to enter his
property, let alone use or dispose of it. The very notion of property is at war with
so restricted a view, which suggests that however indispensable the right to exclude
may be, it hardly tells the whole story. Rather, a more robust sense of property
that embraces both use and disposition is needed to solve the hopeless division
of power that would come about if those incidents were given to another private
person, or worse, held to be part of the residual bundle of indefinite rights in the
hands of the state. If such were the case, the system would fall apart, because the
division of rights would create a set of vetoes that no one could circumvent.
The point here is that we need to keep the incidents of possession, use, disposition,
and (often neglected) access to common roads intact so as to facilitate further
transactions that explicitly allow for the voluntary creation of divided interests in
property. Such divided interests can increase value in the way that state holdups,
e.g., any permit system, completely block.

In this regard, an extra word must be said about the rights of disposition,
which can function in two ways. One is to allow the outright sale of property from
one person to another, so that the unitary bundle of rights now vests in different
hands. For legal theory, however, the more important move involves the voluntary
division of property rights into multiple parts. That division opens up new vistas
for gains from trade, by allowing, for example, the use of land as security for a
loan. That division in turn means that neither the borrower nor the lender is the
unitary common law owner. But far from being a dangerous situation, it has two
virtues. First, it increases total value between the parties. Second, it allows for the
protection of third persons by allowing the two parties to designate which of these
two persons is entitled to do business with the rest of the world. That person is
usually the borrower, although that control can, by contract, shift to the secured
lender if the loan, for example, falls into arrears. So long as the instructions in the
various contracts are clear, it is all to the good that neither party meets the definition
of an outright common law owner.
At this point, therefore, it is no longer correct to condemn the bundle-of-rights position as either internally incoherent or wholly arbitrary. Decidedly, it is neither. There is, in fact, no way that addition or subtraction from the common-law bundle of rights can improve the overall efficiency of a property rights system. We need all those rights. To protect only the right to exclude allows the state to wreck rights of use, development, and disposition, for under modern law these are mere “regulatory takings” that don’t receive the same level of scrutiny as do dispossessions. Thus, under current law, the state can frequently veto or limit my building on my land, without compensation, even if it cannot, without compensation, build on that land itself.

The next question is what legal regime has to be put in place to enforce this delineation of rights. Let us begin with the private law. In this instance, the legal system wisely provides two tiers of protection, one that works for the whole of the property and the other that works for various incidents. Thus, the obvious takings case is the occupation of land by a stranger, which historically brought forth the early remedy of novel disseisin (recent dispossession from land). Unless that remedy is given, the entire system of property is at an end. But by the same token, the legal system has to deal with incursions that are short of entire dispossession. Here are some such incursions.

Encroachment: You take and occupy only part of my land, and you build on it. The usual remedy is to throw you off and to force the building to come down (with a narrow exception allowing one to buy his way out if he has inadvertently sunk huge resources into the project that are otherwise subject to expropriation by the landowner if he holds out for far more than the loss that he suffers from the encroachment). Encroachments count as physical takings under modern law, so that there is a per se rule that allows the private owner to obtain not only removal of the invader, but also compensation for the loss of use or other inconvenience. There are also analogous actions for ejecting people who take your minerals or who build over your land, so that the three dimensionality of the property relationship is fully protected. Here there is no gap in the property armor.

Nuisance: Here the list of non-trespassory invasions covers noise, filth, odors, and other noxious substances. These cases are all subject to both damages and injunctions. Think of them as protecting the possessor’s quiet enjoyment of property.

Interference with advantageous relations: Here the wrong is that the stranger interferes with the right to dispose of land, in whole or in part, or, conversely, to acquire that land in whole or in part. The classic case of the tort was shooting guns at the potential publics of a school, which gave the schoolmaster a cause of action for the loss of his right to deal with others. The same would apply to someone who forcibly prevented the sale of property to a stranger. Indeed, in these cases force is not required. It is possible to interfere with the right of disposition by, for
example, the slander of title, whereby the defendant claims to a potential buyer of land that the plaintiff does not have good title. This species of defamation is very old in the law, for it is an application of the libertarian prohibition against fraud (or in some cases even innocent misrepresentation) with respect to one critical incident of property—the right of disposition. The system on the private side thus coheres.

What remains is to show how this framework links up to the system of eminent domain in ways that acknowledge the power of the state to overcome coordination and holdout problems without conferring on government the unlimited power to regulate without compensating aggrieved owners. In doing this, we need the same two-tier system that is found in private law. The first tier protects an owner against absolute dispossession. In some cases it blocks a taking on the ground that it is not for a public use. In other cases it allows government occupation on payment of compensation. In still other cases the current regime allows regulation of rights of use, development, and disposition, all without compensation.

Let’s concentrate on the last distinction. Here, the rule of translation from private to public law is this: whenever one party can enjoin the conduct of another without compensation, the state may do so as his agent, again without compensation. Therein lies the core of a sensible police power limitation, allowing for the state to embark on the more efficient enforcement of traditional property rights without claiming new rights in its collective capacity. It was just this proposition that was explicitly denied by Justice Jackson in *Willow River*, when he said: “Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation” (*United States v. Willow River Power Co.* 1945, 510). It is this idea that special rights are inherent in the state that undermines the notion of private property. Once that dangerous proposition is rejected, the state can still enjoin nuisances and stop the use of force and defamation to disrupt advantageous relationships, all without compensation. But when it seeks to go beyond the enforcement of rights already held by the citizens whom it represents, it must compensate. No private landowner could stop his neighbor from building on his own land or paving over his driveway. The state, therefore, can only impose, say, height restrictions or wetland restrictions if it pays for the privilege. In some cases—as in some height restriction cases, perhaps—the interlocking restrictions that are uniform in the area could satisfy that rule, at which point in-kind compensation removes the need to pay hard cash. But most of the really aggressive political systems do not have that nice “reciprocal” feature, instead operating like the New York City landmark designation program, which preserves for the state the power to impose a net loss on the owner. Thus, we can see that the protection
of each incident of the standard bundle of rights from state regulation reduces state power.

At this point, we are in a position to see the mistakes that are implicit in the passages of the bundle-of-rights theory’s critics quoted at the outset of this paper. First, Merrill and Smith make the same mistake as Commons when they assert that it is dangerous to let property move on multiple margins. This view is misguided for two reasons. First, it hardly follows that the movement on these margins can only be done by the state. All voluntary transactions that create divided interests move along multiple margins. But there is no risk here so long as those divisions produce gains from trade to the parties and neither increase nor decrease rights against third persons. Put otherwise, the divided ownership between A and B does not stop them, acting separately or jointly, from asserting *in rem* claims against the rest of the world. In this connection, we have no reason to think that the disaggregation of property rights counts as a disintegration of property rights that somehow will eliminate some irreducible core to the notion. So long as we know how the rights were separated and how they could be reassembled, we can let the parties decide how they choose to interact among themselves and with the outside world.\(^7\)

Next, I think that Penner misunderstands how the classical system works when he worries about a malleable system of property rights without some definable essence. The key point is that the initial bundle of rights acquired by first possession is neither malleable nor without some definable essence. Rather, it has the strong and invariant characteristics noted above. The only time that it is difficult to figure out who counts as the owner is when private parties divide the incidents of ownership. But here, malleability and the loss of some essence—when done privately—only increases gains from trade, so long as the rest of the world knows whom it has to deal with.

And last, Claeys is wrong to worry that divided interests, in his case between a landlord and tenant, leads to a partial erosion of property rights by creeping regulation. That would be true if the state could take some of the parties’ rights so long as it leaves the remainder. But, in fact, the correct view under the bundle-of-rights theory is that the state pays for what it takes, no matter how many sticks of the original bundle the owner retains. In dealing with land, the state cannot take the north ten acres for free so long as it leaves you with the south ten acres. The same is true with rights of disposition and use. Keep the maxim “the more the state takes, the more it pays,” and all is well.

Indeed, I will venture, further, to assert that it is the unitary conception of property rights that is in fact vulnerable to creeping statism. Extol the vision of private property as one unitary thing, and the law will give strong protection against

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7. For further discussion see Epstein (2010).
outright dispossession but little against regulation. That is the nub of the legal difficulties in takings law today, and it is driven not by a bundle-of-rights theory as such but by an eerie willingness to infer return benefits to an owner whose property has been taken, whether by occupation or restriction, when none exist, or to postulate huge externalities from ordinary harm. The vast over-estimation of return benefits guts the just compensation requirement. The vast over-estimation of negative externalities expands the police power beyond recognition. Use the bundle-of-rights theory to constrain both of these abuses, and the system of property rights will flourish with what is, after all, a conception of property that long antedates the Progressive Era and the modern New Deal state that it spawned.

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The Regulative Function of Property Rights

Larissa Katz

Historically, philosophers who thought at all about the significance of property rights generally agreed on the conceptual structure of property as a right to exclude but were deeply divided on the point of property theory. Instrumentalists like Bentham and Hume understood property rights as a means to social wealth and stability while Kant and Hegel and their followers were engaged in a fundamentally different project, rationalizing property rights in terms of individual freedom. By contrast, contemporary property theory is overwhelmingly instrumentalist. Property theorists today may have fierce debates about the concept of property but broadly speaking agree on the point of property theory: it is to work out the morally best way to manage our collective goods, by which I mean those resources that in a state of nature we would think of as available to everyone. Many, if not most, contemporary property theorists thus share a common cause: uncovering the limits and potential of private property rights as an instrument for managing scarce resources. This common cause is not as clear as it might be. Too often, debates

1. Faculty of Law, Queen’s University, Kingston, Ontario K7L 3N6. I am grateful to Malcolm Thorburn for careful reading and insightful comments.
2. On the dominance of exclusion theory in the history of the philosophy of property, see Merrill and Smith (2001a).
3. Contemporary libertarians constitute an important minoritarian position in property theory. See, e.g., Epstein (1985) and Claeys (2003). Lockean generally straddle the fence between libertarians and instrumentalists. Some think of property rights as natural rights that we acquire by mixing our labor with things while others think that property is subject to fundamental reallocation within civil society in service of a collective goal. See Tuckness (2011) comparing Robert Nozick’s libertarian interpretation of Locke with James Tully’s reading, according to which property rights do not constrain government in civil society because civil society operates in conditions of scarcity.
among property theorists are tied to controversies that are better worked out off-stage, through more general moral theorizing and democratic deliberation (Smith 2009). Property theory cannot tell us very much about what our priorities should be, e.g., efficient markets, a healthy environment, stable communities, or individual freedom. But it can tell us quite a lot about how a system of property rights can function as a strategy for regulating our conduct with respect to things in the world.

In this paper, I want to consider three different models of how we manage our common resources through a system of private property rights. All three models see property rights as ways that we allocate power over things to individuals. One way is to allow owners to have the right to do just as they please but to allow them to take profits when things go well. This is the exclusion model. Another is to set out specifically what people can or cannot do with a thing. This is the bundle-of-rights model.

A third model, not as familiar as the other two, is to restrict the class of question that the owner may consider when dealing with the thing rather than the substantive answers that owners come up with. On this model, owners have the jurisdiction just to resolve the question of what is a worthwhile agenda for a thing. I will call this the “Basic Question.” Owners exceed their authority when their decisions are made for reasons that have nothing to do with resolving the Basic Question. Thus, when an owner wields her power just in order to pressure others to conform to her wishes, e.g., refusing to allow cranes to sail over her air space just in order to harm the neighboring developer’s interest (Lewest v. Scotia 1981), she abuses her right. This is true whether her ultimate plan is a valuable one, e.g., to maintain the neighborhood’s character by keeping big developers out, or simply opportunistic, e.g., to sell an easement at ransom prices. In such cases, the owner’s decision is not an answer to the Basic Question but rather an answer to some other question altogether, e.g., how best to use her position as owner to get the neighbor to come to heel. This model emerges from my own view of ownership as a position of exclusive agenda-setting authority (Katz 2008).

There will inevitably be an affinity between some modes of regulating conduct and some preferred outcomes, e.g., a right to exclude that shapes owners’ conduct indirectly by inviting market discipline may well lead to better and more efficient outcomes or enhanced individual freedom. Is this affinity between certain modes of regulation and certain desirable outcomes reason for preferring one view of property rights over another? I will argue not. It would not do to start in with the question “how should we structure property rights to achieve our preferred ends?” as if any and all options were open to us. This is because we are conferring a certain kind of authority on the owner, the authority to manage our collective

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goods on everyone’s behalf. The political foundations of ownership create certain preconditions for the legitimacy of private decisions about what are otherwise common goods: these decisions must be capable of standing as decisions made on behalf of us all. We have good reason to let one person act on her own opinion about what is a worthwhile use of a thing. This is after all how private property rights serve as a strategy for managing scarce resources without the costs of collective decision-making. Even if everyone acted reasonably in a state of nature, the potential for discord is very high, as there are many possible “good” uses of a thing.

A system of private property avoids the potential for conflict by delegating the authority to decide what constitutes a worthwhile agenda to owners. But that justifies only a very limited kind of authority to resolve the Basic Question. It is not enough that the owner maximize value by acting selfishly (the unseen hand taking care of the rest), as exclusion theorists suggest, for this is not acting on our behalf but only acting in our interest. And the same weakness is true of the realists’ bundle-of-rights model: placing restrictions on the pursuit of selfishness does not change the nature of the position to reflect the public quality of the decision-making. But my model of regulation does. Whereas the other two models focus their attention on the substance of owners’ decisions, my model is focused on the Basic Question owners are charged with resolving. It thus rules out the use of ownership as a general tool for the domination of others.

**Three Ways of Regulating Conduct**

Bundle-of-rights and exclusion theories connect up with two familiar strategies for regulating conduct: (i) specifying substantive limits on what people can and cannot do; and (ii) letting owners do as they like and keep their winnings, leaving it to markets to discipline their decisions. Let me begin by taking these two dominant ideas of ownership in turn. Bundle-of-rights theories of ownership are normatively and methodologically diverse. American legal realists and law and economics scholars as well as analytic jurists and jurisprudence like Honoré have all subscribed to some version of a bundle-of-rights approach (Merrill and Smith 2001a). This approach breaks ownership down into a bundle of individual use-rights. Bundle-of-rights theorists generally acknowledge that owners’ bundles are defined ex post, rather than ex ante: property on this view is seen not as an input but as “the output of a judicial balancing of uses, the sticks that a court has handed out in a particular case after comparing the efficiency or utility of conflicting uses” (Katz 2008, 276).

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5. See also Merrill and Smith (2007) (the bundle-of-rights metaphor suggests the content of rights mutates case by case) and Smith (2004a).
This strategy for managing resources leaves a lot of control over the specific uses of a thing in the hands of the state, through judicial decision-making or legislative action.

Exclusion theories point to a second way in which property rights regulate conduct with respect to scarce resources. For all the variety of methodological and normative commitments among exclusion theorists, there is agreement on the core idea of ownership: “The standard property right, on an exclusion-based or boundary approach, consists in a norm that protects the boundaries around a space or object so as to exclude the whole world but the owner” (Katz 2008, 281). The owner controls access to the attributes of the resource within the boundaries, which are hers in virtue of the exclusion of others; thus, “[a]n owner has, in effect, a gate-keeping function” (Katz 2008, 281). While there are important natural law accounts of property as a right to exclude, the instrumentalist strands of exclusion theory dominate property theory today. The most influential contemporary writers in this group are Thomas Merrill, Henry Smith, and James Penner. Penner analyzes the nature and structure of property rights in terms of our interest in determining the use of things (Penner 1997). The exclusion of others is just how the law goes about protecting this interest. Merrill and Smith have developed an information-cost account for the exclusion approach, which, they argue, is typical of property rights (Merrill and Smith 2001a). Exclusion is the form that property rights take because of the wide audience for the information that property rights impart. A simple “keep out message” minimizes information costs for the third parties who have an interest in figuring out the content of the right, e.g., market participants, potential trespassers, and even judges in property cases.

These exclusion accounts of ownership point to a simple market-based strategy for regulating owners’ conduct. The right itself protects the boundaries of a thing but does not specify the kinds of decisions owners can make within those boundaries. The category of uses that owners can make of a thing is open-ended

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6. See also Merrill and Smith (2007, 1891) (an understanding of harm to a property right is “conditioned in property law on spatial boundaries and things”) and Smith (2002) (boundaries are created by grouping complementary attributes of a resource together or by following natural boundaries).

7. See also Penner (1997 and 2006) and Merrill and Smith (2001b, 790) (property specifies which person acts as gate-keeper).

8. Many natural rights theories of property conceive of ownership as a right to exclude too. See Perry (1997, 364-365). Kantian and Hegelian accounts of property in particular stress the nature of property as a right to exclude. See, e.g., Ripstein (2006, 1406 and 2009). For the purposes of this paper, I focus my attention on the instrumentalist strands of exclusion theory that dominate the bundle of rights/exclusion debate in contemporary writing in property theory.

9. “[F]or reasons of information cost it is often advantageous and almost inevitable that rights will be delineated by … an ‘exclusion strategy’” (Smith 2004b, 1753).

because the right is defined just in terms of the duties others have to keep out. How then does an exclusion-based right regulate owners’ conduct? Exclusion can be seen as an indirect strategy to manage the substance of decisions that owners make. A simple right to exclude facilitates market exchanges by reducing information costs. It also puts owners in a position to respond to market incentives by allowing them a sphere of discretion free from interference by others and leaving them free to reap the benefits of their decisions. Owners thus face significant market pressure to make decisions that the market values. Property rights on this account are designed to attract market discipline.

There is a third way of regulating conduct that emerges from my own exclusivity-based approach to the idea of ownership. I have argued elsewhere that the idea of ownership is found not in the exclusionary function of the right but in the owner’s exclusive authority to set the agenda for a resource: “Ownership requires not that others keep out so much as that they fall in line with the agenda the owner has set. The law preserves the exclusivity of ownership not by excluding others but by harmonizing their interests in the object with the owner’s position of agenda-setting authority” (Katz 2008, 278). The crucial feature of ownership is the authoritative nature of owners’ decisions: owners make decisions about things that command deference from others. Thus, “[o]wnership, like sovereignty, relies on a kind of notional hierarchy, in which the owner’s authority to set the agenda is supreme, if not absolute, in relation to other private individuals” (Katz 2008, 278). The nature of an owner’s decisions concerns the thing itself but the position is importantly relational insofar as an owner’s decision binds the rest of us and so determines the uses that others can or cannot make of the thing.

On this exclusivity-based approach, property rights are not defined so as to specify the kinds of uses owners can or cannot make of a thing. Nor is the definition of rights especially oriented toward markets: information costs undoubtedly are higher when rights signal anything more complicated than simply “keep out”. How then do rights on my account regulate owners’ conduct? Rights regulate owners’ conduct through built-in constraints on the class of question that owners may consider. Owners are limited to resolving what I call the “Basic Question”: what, in their view, is a worthwhile use of a thing.

In its emphasis on the kind of question owners are authorized to consider, this third model departs from both bundle-of-rights approaches and exclusion approaches. Unlike bundle-of-rights approaches, which micromanage owners’ decisions by tinkering with the content of their rights, my approach says little about the substantive outcomes that owners should produce. The very point of

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11. Showing how it does so, by reducing information costs, was Merrill and Smith’s major contribution. See, inter alia, Merrill and Smith (2000 and 2001a).
private property as a strategy for managing resources is to provide an alternative to collective deliberation about how a thing ought to be used. When we employ a system of private property, it is because we want individuals to take over the business of deciding what constitutes a worthwhile use of a thing. This of course means that some objectionable answers get through. The worst of these we regulate from the outside (that is, not through the definition of property rights themselves but through criminal, tort, or administrative law), but for the most part we simply tolerate the plurality of answers that private decision-making produces.

So, my account departs from bundle-of-rights approaches in that it refrains from regulating the answers that owners come up with. But it also parts ways with conventional exclusion accounts in that it insists that property rights restrict the class of question that owners can consider. Exclusion approaches regulate neither the answers nor the questions that owners take themselves to be responding to but rather just the kind of protection that owners can claim against others: owners can insist that others exclude themselves from the thing (but cannot require other forms of protection, e.g., the ideal conditions within which to exercise their right or the absence of competition from others). Exclusion approaches are generally silent on the nature of owners’ authority within the boundaries of their rights.

Let me explain why I think it is so important to control the kind of question that owners can consider. If we see private property as a strategy for managing what start in a state of nature as common goods, we can begin to see why. Under what circumstances can individuals legitimately claim authority with respect to scarce resources that, in the absence of property rights, are available to all? In a state of nature, individuals taking charge of common goods run into what I think is quite an intuitive problem about standing. No matter how expert A’s opinions are, no matter how good or altruistic a manager he is, he must show what business it is of his to make decisions for the rest of us about these collective goods. This problem about standing is a function of our interest in autonomy: we all have an interest in good decisions about the use of things, but we also have an interest in making decisions for ourselves about our collective resources. The law is a very effective instrument for resolving such problems about standing. Ownership is the way that we publicly confer the authority on some, owners, to make decisions about collective resources on behalf of everyone. By delegating the authority to make decisions about collective resources to owners, we effectively rule autonomy-based objections out of court. The political foundations of ownership thus imply a limit on the kind of question that owners are authorized to resolve on behalf of everyone else. Owners’ decisions have a public quality only insofar as they are answers owners are charged with making on behalf of others, that is, answers to the Basic Question. This public quality is the source of their legitimacy. There are of course many other questions that control over things would enable us to resolve. A brute power over
things could be a very effective tool to dominate others in service of one’s larger plans, e.g., to create a family-friendly neighborhood, a clean environment, etc. But owners are not charged with creating these goods for the rest of us by any means possible. This explains why courts sometimes refuse to protect owners whose decisions do not reflect what owners actually think are worthwhile uses of a thing but rather reflect their views about how best to exert pressure on someone else (Katz 2010). When owners do not even take themselves to be setting what they think is a worthwhile agenda for a thing but rather make decisions designed just to dominate others, whatever ultimate good they have in mind, they are exceeding their jurisdiction.

This approach to abuse of power is much more familiar to us in the public law context. A famous Canadian constitutional law case from 1959 illustrates the point well.12 Maurice Duplessis, the Premier of Quebec at the time, used his position to ensure that the liquor licence of Roncarelli, a restauranteur and Jehovah’s Witness, was cancelled (Roncarelli v. Duplessis 1959). At the time, there was a general hysteria about Jehovah’s Witnesses sweeping the dominantly Catholic province. Numerous Jehovah’s Witnesses were arrested for distributing and selling pamphlets without a licence. Roncarelli used the profits from his restaurant to bail out hundreds of Jehovah’s Witnesses detained by police. In seeing to it that Roncarelli was denied a liquor licence, Duplessis himself thought, and many agreed, that he was performing a public service by limiting the influence of Jehovah’s Witnesses in Quebec. At one point, Duplessis is quoted as saying: “A certain Mr. Roncarelli has supplied bail for hundreds of witnesses of Jehovah. The sympathy which this man has shown for the Witnesses, in such an evident, repeated and audacious manner, is a provocation to public order, to the administration of justice and is definitely contrary to the aims of justice” (ibid., 122). The Supreme Court of Canada held that Duplessis’ actions in seeing to it that Roncarelli lost his licence was an abuse of power. Duplessis may have had the power to make decisions of the sort he made but not for the reasons he made it. How to limit the influence of Jehovah’s Witnesses simply was not a question that his ministerial power was meant to resolve. Abuse of property right has very much the same structure as abuse of public power in this case.

Seen one way, this approach is quite restrictive. Ownership is a position of authority that cannot be used in any manner that the holder sees fit. Owners are free to use their position to resolve the Basic Question, and must act for reasons that are adequate and appropriate to answering this kind of question. On this model of regulation, owners are free to ignore the opinions and even the interests of others

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12. I am grateful to David Dyzenhaus for suggesting this case as an illustration of the point I am making here.
so long as they do not act just in order to hurt the interests of others. This is not to say that owners must personally value every agenda they set. The law legitimately allows owners to act as a clearinghouse of ideas by substituting the opinions of others about what constitutes a worthwhile use of a thing for their own genuinely held view. Thus, a developer acts within his jurisdiction as owner when he builds a subdivision that he thinks is an appalling use of an environmentally sensitive piece of land but that tracks the interests of others, such as the future buyers of his homes. As long as he does not deliberately set out to harm the interests of others so as to gain leverage over them or to spite them, he has not abused his right.

We can imagine more restrictive approaches. Property theorists like Gregory Alexander and Eduardo Peñalver insist that owners are bound to consider how their decisions affect the interests of others and to ensure that the decisions they reach conform to the demands of virtue—the so-called “social responsibility norm” (Alexander 2009; Peñalver 2009). French philosophers have argued for an objective approach to abuse of right, according to which owners would be required to track the interests of society and to act in conformity with the social or economic values that justified the grant of authority in the first place (e.g., Josserand 1927). These sound much more like the demands that we might place on public officials in the exercise of their authority. It would hardly be controversial to require public officials to track the public interest and to avoid advancing their own interests. Nor would it be unusual to require that officials arrive at a decision that they genuinely think resolves the question they have been charged with answering rather than substituting the opinion of others, however genuinely held. So what accounts for the coarse-grained approach of property law to the regulation of owners’ authority?

Why are we satisfied with simply requiring that owners do what they think is worthwhile? The answer, I think, is one part principled and one part pragmatic. The liberty interests of owners limit the kinds of demands we can place on them to serve the interests and to listen to the opinions of others. If we want to delegate collective decision-making about things to private individuals, we need to make some accommodation for the moral limits that people in their private capacity have. It is one thing to require that owners genuinely pursue what they think is worthwhile. It is quite another to require that every decision they make in fact track the interests and opinions of others. Owners are not public officials but rather private individuals charged with making decisions about things that can stand on behalf of the rest of us. There is no more private sphere to which they can retreat than the world made up of things they control. We would suffer moral exhaustion

13. See Waldron (1991, 295) on moral exhaustion that would result if we constantly had to consider the interests and opinions of others.
if we were constantly required to attend to the interests and opinions of others. Liberty concerns should incline us to favor the coarse-grained approach I argue for.

The other problem with more fine-grained moral regulation is as much pragmatic as it is principled. Owners should not be counted on or expected to make distributively just decisions because they do not have the access to the necessary information on the moral merits of others that would make this possible. Owners may well be experts about the asset itself and its potential uses. Many indeed have argued that private individuals have relatively greater ability in this regard than officials. But distributively just decisions about things require much more than information about the thing: they require information about others. Owners are simply not in a position to gather and act on information about how best to use a thing all things considered. That would require access to information about the larger moral and economic context of the decision. What we are left with then is a form of coarse-grained regulation that restricts the class of questions owners are authorized to answer but not the answers themselves. The public quality of owners’ decisions, and so their legitimacy, depend not on the substance of their answers but rather on the kind of question they take themselves to be answering. This third approach to regulating owners’ conduct may or may not produce “better” ownership decisions, but it is importantly consistent with, and indeed required by, the political foundations of ownership.

**Conclusion**

A system of property rights may serve as a means to an end, but it is not an infinitely flexible instrument. We can be instrumentalist about property rights while also acknowledging that there are certain preconditions to legitimately using a system of private property rights to manage our common goods, those resources initially open to all in a state of nature. What I have done in this paper is to present three models of how we manage goods through property rights. The advantage of my exclusivity-based approach is that it is consistent with the political foundations of property, and so provides a better starting point for discussion of the roles property rights can legitimately play in support of our favored moral outcomes.

14. See Nozick (1974, 158), where he discusses Hayek’s view that we can never know enough to distribute to each according to his moral merits and questions whether justice would require us to do so if we did have that knowledge.

15. See, e.g., Smith (2004b, 1729, 1754) (“[p]lausible and widely accepted assumptions about the relative abilities of owners, takers, and officials to generate information about assets—and, as I emphasize, assign them to actuarial classes—provide a clear rationale for protecting owners with property rules”).

16. Using efficiency, fairness, or any other value as a metric.
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**About the Author**

Larissa Katz has written extensively about the law and theory of property. Her work has been published in such journals as *Legal Theory, University of Toronto Law Journal, McGill Law Journal, Jurisprudence*, and *Canadian Journal of Law and Jurisprudence*. Professor Katz has been a visiting professor at Sciences Po, a visiting fellow at Australia National University and in the coming year will be an HLA Hart Visiting Fellow at University College, Oxford University. She is currently an Associate Professor at Queen’s University, Faculty of Law. Her email is larissa.katz@queensu.ca.

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The Property Prism

Thomas W. Merrill

The “bundle of rights” metaphor has played a large role in framing the way we think about a number of critical issues regarding property. It has been invoked in controversies about the scope of constitutional protection for property; it has defined the terms of debate about the meaning of the concept of property; and it has underscored the complexity of property as an institution for the organization of resources. The bundle metaphor, however, has been more successful in framing questions than in answering them. The metaphor suggests that property is complicated and that it changes, but it does not tell us when, why, or how. Designed to emphasize the malleability of property, the metaphor itself is too malleable to offer clear guidance in resolving any important questions.

I suggest that a better metaphor is that of a prism. A prism takes on a different color from different angles, and so does property. I will suggest four angles from which property may be viewed, each corresponding to an “audience” of property rules. From the “stranger” angle, property is a very simple “keep out” rule. From other angles, it is a complex of rules decipherable by legal specialists but not by laymen. From still other angles, it partakes of rules and norms that vary from case to case and which are of interest only to insiders. The property prism, unlike the bundle, does not suggest that the constituent features of property are infinitely variable without regard to who is viewing it. The property prism also pushes us further down the path toward understanding the institution of property, by suggesting we start by asking who is looking at it and why.

The “bundle of rights” metaphor apparently entered into property discourse from constitutional law. The first documented use of the metaphor appears in a nineteenth century treatise about eminent domain (Lewis 1888, 43). It was later

embraced by the Legal Realists in the 1920s and 1930s as a rhetorical device for attacking the notion that property is a natural right that cannot be significantly modified by the state without paying just compensation (Hale 1922). If property is just a bundle of rights, the argument went, then adding or subtracting sticks from the bundle is an expected feature of social life and no particular configuration of rights should be privileged against inevitable change.

The bundle metaphor, however, has proved to be a two-edged sword in the battle between property owners and the activist state. The Realists and their modern heirs embraced the bundle because the idea of moving sticks in and out of bundles suggests the futility of giving significant constitutional protection to property. Contemporary property rights advocates, however, have turned the metaphor around, arguing that the bundle metaphor merely confirms that the attributes of property protected against change are many and various. Richard Epstein, most prominently, has argued that precisely because property is a bundle of rights, eliminating any one of the sticks from the bundle requires the payment of compensation, because this is a “taking” of “property” (Epstein 1985, 57-62). Thus, the Takings Clause applies not only to government expropriations but also to all sorts of taxes and regulations of the use of property.

Stepping back from this battle of the bundles, we can see that the metaphor is capable of framing the way we think about the constitutional issue but does not provide answers. One question is whether we attach the label “property” to the whole bundle or to each of the sticks (Wenar 1997). The bundle metaphor does not answer this question and provides no assistance about how to answer it. The Supreme Court has said that chopping through every stick in the bundle is a taking (Loretto v. Teleprompter Manhattan 1982, 435), but the significance of this cannot be determined without knowing the dimensions of the bundle or how to distinguish between a horizontal stick and a lateral chop. Again, the metaphor cannot tell us how to answer these questions.

A second controversy, which is essentially philosophical, concerns the meaning of the concept of property. Here too the bundle of rights metaphor has played a significant role in framing the debate. The issue is typically posed as whether the concept of property has any defining feature. One group, call them the “essentialists,” say there is such a feature. The feature most commonly identified is the right to exclude. To call something property is always to say that some designated person (the owner) has the right to exclude all non-owners from the thing (Penner 1997, Merrill 1998). Another group, call them the “nominalists,” say there is no such defining element. The identification of something as property is purely a matter of social convention (Grey 1980).

There is an obvious affinity between the nominalist view and the “bundle of rights” metaphor. But there is no reason why an essentialist must reject the bun-
The essentialist view merely claims that the right to exclude is a necessary condition of identifying something as property. It does not claim that exclusion is all there is or that there are no other rights or attributes of significance associated with ownership of property. Nor can the essentialist claim that the right to exclude, by itself, logically entails other attributes like the rights to inherit or to pledge property as security for a loan.

So the essentialist thesis can be re-described as the claim that there must always be one stick in the bundle—e.g., the right to exclude. It does not tell us what other sticks are in the bundle, and indeed it is fully compatible with the notion that other sticks can be added or subtracted as social conditions dictate without the bundle losing its identification as property. The distance between the essentialist and the nominalist views with respect to the bundle metaphor therefore reduces to one stick. Again, the bundle metaphor does not answer the question whether at least one stick is essential or all sticks are optional. Unless one caricatures the essentialist thesis as being that property consists of exclusion and nothing more, the metaphor cannot resolve the debate.

What then about a third inquiry: seeking an accurate understanding of how property functions as an institution? Property is not merely a constitutional right or a concept; it is a social institution. More precisely, it is an institution for organizing the management of resources, an institution that exists to one degree or another in every known human society. Does the “bundle of rights” metaphor help us in understanding the way property functions as a social institution?

To a very limited extent, it does. The bundle metaphor helps us perceive that property is a heterogeneous institution. In some contexts, where the law of trespass and conversion hold sway, property is simple and draconian. “Don’t enter!” and “Don’t take!” are the operative rules. In other contexts, where the different forms of ownership like the fee simple, the tenancy in common, the term of years, the trust, and the condominium come into play, property appears to entail rule-like but fairly arcane doctrine. Here, navigation is possible only with the aid of a lawyer. In still other contexts, such as the relationships between bailor and bailee, landlord and tenant, or trustee and beneficiary, property appears to function like a specialized version of the law of contracts. Relations among neighbors and those between the government and the owners of property present yet further variations. The bundle reminds us of this heterogeneity.

The bundle metaphor provides no assistance, however, in helping us discern patterns or explanations for the different dimensions of property that generate this heterogeneity. The bundle is formless. It highlights the complexity of the institution without offering any views about its nature or content. Like much Realist-inspired writing, it reflects hostility to property, which too often translates
into indifference about understanding how the institution actually functions and why.

If we want to start to understand property as an institution, a better metaphor is a prism. The institution of property is like a prism that takes on a different coloration when viewed from different angles. The point has been suggested by those who have stressed the importance of identifying the “audiences” of property (Rose 1985, Smith 2003, Chang and Smith 2011). Different audiences have different needs in interacting with property, and the nature of their interaction requires different information and can tolerate different degrees of complexity and information loads.

Simplifying a bit, the prism of property can be seen as having four sides, each corresponding to a different audience. I will call them “strangers,” “potential transactors,” “persons inside the zone of privity,” and “neighbors.”

For the audience of strangers, the property prism broadcasts a bright red light that corresponds to exclusion. Strangers know that they are to keep off and cannot take without permission—period. The simplicity and rigidity of the rules is made necessary by the information costs of communicating between the owner and all strangers that may interact with the property, which includes potentially “all the world.” All the world includes many people who are not very sophisticated and even more who remain rationally ignorant about the preferences of different owners (Merrill and Smith 2007, 1853-1854). A simple set of rules easily and universally comprehended at low cost is necessary in order to preserve a strategy of resource management that concentrates authority over particular resources in designated persons.

As for potential transactors, here I include persons who are on the lookout for particular types of property to purchase or rent, as well as persons who are willing to lend to owners in return for a security interest in property. For present purposes, I also include the government, insofar as it seeks to acquire resources, by purchase or eminent domain, or to satisfy a tax lien, collect a fine, or recover a forfeiture.

For potential transactors, the prism of property transmits light of a different hue, a kind of amber perhaps. Here, property presents itself in a finite number of standard forms: the fee simple, the lease, the condominium, the trust, the easement, the security interest, and so forth. The forms are sufficiently numerous that resources can be deployed in different ways to achieve different objectives. But the number of forms existing at any time is closed, and the rights and privileges associated with each form are sufficiently standardized that they can be explained to potential transactors by the proverbial country solicitor. The explanation for this *numerus clausus* of property forms, as Henry Smith and I have argued, is information costs (Merrill and Smith 2000). Given the small number of potential transactors
relative to strangers, and the much higher stakes involved for potential transactors relative to strangers, a significantly higher information cost burden can be imposed on potential transactors than on strangers: high enough to permit a menu of different forms of property to be established, but not so high as to dissuade potential transactors from seeking out new resources.

The third audience of property I call, somewhat awkwardly, “persons inside the zone of privity.” By this I mean persons who share an interest in some piece of property defined by contract, express or implied. Bailors and bailees, landlords and tenants, and trustees and beneficiaries would be familiar examples (Merrill and Smith 2001). Also included in this category would be co-tenants in a tenancy in common or a joint tenancy. And I would further include the partners and employees of a partnership and the directors, officers, and employees of corporations. In each case, control over an asset or a complex of assets is divided between two or more persons, and this division of authority is defined contractually, either by explicit contracts like leases or trusts or corporate bylaws, or by implicit contracts as in an oral bailment or mutual understandings among co-tenants.

For persons in the zone of privity, the prism of property reveals a steady green light. For those in the zone, a tremendous diversity of rules and practices is possible. The relationship among the actors in the zone is a personal one, and the division of responsibilities they establish over the use of the resource will largely be of concern only to themselves. There will be, ordinarily, few external effects on third parties outside the zone. The explanation for letting a thousand different contracts bloom is, again, information costs. Idiosyncratic rules and practices may be of high utility in particular situations involving the ongoing management of particular assets, making free customizability of rules and practices welfare-enhancing. At the same time, the costs of learning about these idiosyncratic rules and practices are lower for persons inside the zone, who typically interact on a regular basis and hence can learn the rules and practices without difficulty.

Finally, we reach the audience of neighbors, which can perhaps be generalized to include anyone who experiences significant external effects from the way the property is managed. Neighbors have a distinctive type of relationship to property. Neighbors are not strangers, since a neighbor typically has some knowledge about the identity of the owner and the nature of the activity the owner engages in on the property. Neighbors are also typically not potential transactors. Contractual agreements are in theory a solution to neighborhood conflicts (Coase 1960), but these agreements are in fact rare and are not standardized in a way designed to reduce the costs of searching for potential transactors. In some situations, such as condominium associations and subdivision associations, neighbors may be within a zone of privity with each other, in which case the analysis of persons within the
zone of privity would apply. But again, neighbors typically do not interact with each other under a pre-existing governance regime established by contract.

For neighbors, the prism of property reflects a kind of white light, composed of multiple colors on the spectrum. Where external effects are concerned, context is everything. The severity of the spillover, the nature of the affected property, the predominant use of property in the locality, cultural expectations—all are relevant. The law regulates external effects through a combination of ex ante rules—zoning and building permit requirements, subdivision covenants, and easements—and ex post liability in nuisance. The multifarious nature of legal protection for neighbors obviously presents relatively high information costs—much higher than we find with respect to strangers and higher even than those associated with potential transactors. The higher information cost burden is tolerable here because legal intervention to protect neighbors tends to be episodic. Most of the time, external effects are ignored under the maxim “live and let live” (Epstein 1979, 82-87). Legal machinery tends to be invoked only when some significant change has occurred or is imminent—a new factory is proposed, a dam is being built, a residential structure is being converted to commercial use. Since significant changes are episodic, the affected parties need to inform themselves about the relevant options only when a conflict arises and only when it is sufficiently serious to justify incurring the costs.

The “property prism” metaphor accomplishes some of the same things as the “bundle of rights” metaphor. It underscores that property law is heterogeneous and cannot be reduced to simple maxims about owner sovereignty. But unlike the bundle metaphor, the prism does not suggest that the constituent features of property are a random collection of rights or that the identity of the rights is completely plastic. It also helpfully points us toward asking who the relevant audience is when we consider the nature of property. Property casts a different light on different audiences, and the complexity of the rules that govern this institution vary tremendously depending on the relevant audience. The prism tells us that property is not a formless collection of random rights but has an inherent structural integrity whose shape can be explained by ideas like information costs.

The bundle of rights is a primitive metaphor, conjuring up a medieval peasant carrying a faggot of wood. It is time for a better metaphor. By using a prism, Newton discovered that light consists of different colors arrayed by wave length. It is time to see that property consists of different rules arrayed by type of audience. Abandoning the bundle for the prism would be a step toward enlightenment.
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Thomas W. Merrill is the Charles Evans Hughes Professor at Columbia Law School. He has written widely on property law, including The Oxford Introductions to U.S. Law: Property (Oxford U. Press, 2010) (with Henry E. Smith); Property: Principles and Policies (Foundation Press, March 2007) (with Henry E. Smith); and Property: Takings (Foundation Press, 2002) (with David Dana). His email is tmerri@law.columbia.edu.

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The False Promise of the Right to Exclude

Adam Mossoff

LINK TO ABSTRACT

This symposium addresses a debate of recent vintage within property theory. Since the early twentieth century, anyone asking if property was a “bundle of rights” would have been answered as if one was asking if the sky is blue. How this came to be is a topic I have explored in my scholarship (Mossoff 2003 and 2010). I am a critic of the bundle conception of property, as property rights have disintegrated under the acid wash of a nominalism first popularized in the law by the legal realists.

In this essay, however, I want to explore an issue emerging within the criticism of the “bundle.” Among scholars who reject the bundle conception of property, there have been two different and opposing positions. On the one hand, I and others have sought to recover the earlier concept of property that was buried by the realists, recognizing that it refers to a specific relationship between someone and something in the world. Thus, the right to property secures a use-right in, agenda-setting control over, or a sphere of liberty in using this thing (Mossoff 2003; Katz 2008; Claeys 2009). A “property right” refers to the conceptually and normatively integrated rights of possession, use, enjoyment, and disposal, which implies as a logical corollary that such rights are secured formally by making them exclusive against others.

On the other hand, Tom Merrill and Henry Smith advance an alternative approach to recovering the right to property. They accept the legal realists’ social conception of rights—the view of “property as social relationships” (F. Cohen 1954)—but they see this as important to staunching the nominalist, disintegrative

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effect of the bundle conception. Embracing the Hohfeldian analysis of property that led many legal realists to acknowledge that “the essence of private property is always the right to exclude others” (M. Cohen 1927), Merrill and Smith argue that property is at core a right to exclude (Merrill 1998; Merrill and Smith 2001). Although Merrill and Smith share with us a disapproval of the bundle conception of property, their neo-realist solution, which I call the “exclusion conception of property,” is different (Mossoff 2003; Mossoff 2010, 2009-2013).

Merrill and Smith’s exclusion conception of property has captured the attention of many legal scholars, especially those who do work in the field of “law and economics,” because it claims to both identify and model how property rights function in the world, as apart from other legal rights or entitlements. While rejecting the bundle conception of property implicit in Coasian economic analysis of the law, they arguably are following in the footsteps of Harold Demsetz, who recognized that “[p]rivate ownership implies…the right of the owner to exclude others” (Demsetz 1967, 354). Demsetz’s positive analysis of property rights concludes that “ownership of land will internalize many of the external costs associated with communal ownership, for now an owner, by virtue of his power to exclude others, …[has] incentives to utilize resources more efficiently” (ibid., 356, emphasis added). Working within this tradition of the positive economic analysis of property, Merrill and Smith offer a normative account of how the right to exclude provides determinate resolutions to real-world legal disputes over property rights.

But this is a false promise, at least in terms of its normative claim to determinative guidance in the adjudication of property rights. Merrill and Smith believe that their exclusion conception of property avoids the inevitable consequences of the bundle conception of property, which disintegrates property into specific, use-based entitlements that are governed by regulatory-style legal regimes (Merrill and Smith forthcoming, 2). Unfortunately, the exact opposite occurs; their exclusion conception of property leads to the same results. Historically, this is why Progressives eagerly embraced the exclusion conception of property, because it served their goal in creating and justifying the modern regulatory state (Mossoff 2010).

In an essay, I can only briefly describe how the exclusion conception of property leads in doctrinal practice to the same results as the bundle conception of property. This first requires me to explain the exclusion conception of property, and then I will discuss how the model developed by Merrill and Smith from this positive account of property—the “exclusion strategy”—leads to the same results in practice as the bundle conception of property: the indeterminate disintegration of property into permissive grants by courts and agencies of particular uses and social relationships concerning specific resources and assets. Thus, lawyers and economists should be wary of the theoretical promise of practical determinacy that is offered by the exclusion conception of property.
A Brief Summary of the Exclusion Conception of Property

The exclusion conception of property captures the imagination of legal scholars because it claims to frame how property rights function in the world. Broadly speaking, it defines the set of variables by which legal scholars and economists can model the what, how, and why of property rights. The key, according to Merrill and Smith, is the in rem nature of the right to exclude: property is good against the world (Merrill and Smith 2001). This is opposed to in personam rights, such as torts and contracts, which comprise specific rights and duties in highly contextualized personal relationships. Contrary to in personam rights, in rem rights are exclusive against everyone in all social contexts.

The right to exclude, according to Merrill and Smith, explains the in rem nature of property and ultimately this explains why property rights are normally secured through what they identify as “exclusion strategies” (Merrill and Smith 2007, 29-30; Smith 2002). Exclusion strategies are rule-based legal doctrines, such as trespass, that leave questions about resource-use decisions to a “gatekeeper,” i.e., a property owner, through property-rule remedies (injunctions) (Smith 2004a, 1755-1756; Smith 2002, S454-S455). An exclusion strategy is appealing normatively because it models precisely how property serves an important social function: the bright-line rules and injunctive remedies that secure a right to exclude reduce information costs in social interactions over scarce resources (Smith 2004b, 978-990). This reduces transaction costs, which facilitates efficient uses of resources. A right to property is at its “core” a right to exclude, which means it serves an important social function in facilitating efficient transactions.

One immediate concern with this model is that there is a heterogeneity problem, as property doctrines are more varied and complex than merely securing assets through bright-line legal rules of exclusion. The notoriously messy, multi-factor property doctrines like adverse possession, nuisance, easements by implication, and myriad other legal doctrines attest to this fact. To their credit, Merrill and Smith acknowledge this in their distinction between exclusion strategies and governance strategies (Merrill and Smith 2007, 29-30; Smith 2002). In contrast to exclusion strategies, governance strategies comprise multi-factor tests or contextualized legal standards, such as reasonableness, which require courts to make highly granular assessments of particular uses or in personam relationships (Merrill and Smith 2007, 29-30). Governance regimes can be costly, especially in their administration, given the institutional limitations in a court’s ability to understand
complex transactions concerning the use of scarce resources. This heightens the risk of errors in mandating or prohibiting particular uses of property.

In sum, the exclusion conception of property, according to Merrill and Smith, is not merely academic property theory; its virtue is that it has cash value in the real world. It explains why an exclusion strategy broadly secures the right to exclude through *in rem* legal rules and property-rule remedies, as opposed to governance strategies that intensively regulate the rights of use or disposition through *in personam* legal regimes and liability-rule remedies. As Smith explains: “Exclusion allows courts to avoid dividing rights into component use rights. Thus, exclusion carries with it information-cost savings even where transaction costs are high” (Smith 2004, 982). Although both exclusion and governance strategies are found throughout property law—think trespass versus nuisance—the key, according to Merrill and Smith, is to recognize that property represents at its core the right to exclude and thus governance strategies function only at the “periphery” of property rights or in “borderline” cases (Smith 2009, 964-965; Smith 2004, 980). When talking about the core of property, exclusion strategies predominate; governance strategies are the exception, not the rule.

**The Exclusion Conception of Property in Practice**

As lawyers know all too well, governance strategies are omnipresent throughout property law. This point is often lost in the elegant reductionism of the exclusion conception of property and its correspondingly simple model of how an *in rem* exclusion strategy functions in reducing information costs in the use of resources in the world. The now-classic example in the academic literature of an *in rem* exclusion strategy is of a parked car: one does not have to know anything about the owner, the owner’s uses of the car, or of the owner’s personal relationships with others in order to know that one should leave the car alone (Claeys 2009, 625; Smith 2009, 968; Penner 1997, 75-76). The fact that the car is property signals to everyone: “Hands off!”

Similarly, in the case of land, property rights serve the same *in rem* signaling function: “Keep out!” (Smith 2004b, 978). One of the principal examples of how an exclusion strategy secures the core of property is the now-famous case of *Jacque v. Steenberg Homes, Inc.* (1997). In *Jacque*, a mobile-home company brazenly disregarded an elderly couple’s request that it not drive their trucks across their unused farm-land to access a nearby development site. Since the Jacques’ snow-covered field was currently unused at the time of the trespass, they suffered no actual damage, but the jury awarded the Jacques $100,000 in punitive damages. In upholding the
punitive damages award, the Wisconsin Supreme Court explained that the “right to exclude” is the essential right in property and thus a property owner “has a strong interest in excluding trespassers” (ibid., 159).

Jacque is reprinted in almost every modern property law textbook, and Merrill and Smith (2007, 1–7, 29–30) rely on it in their own textbook as evidence of how the exclusion strategy functions in securing private decision-making to landowners in determining how and in what manner their property will be accessed and used. They use the nuisance case of Hendricks v. Stalnaker (1989) to illustrate a governance strategy, in which conflicting claims over competing uses of property lead “courts or other officials [to] determine directly how the property will be used along one or more dimensions singled out as critical” (Merrill and Smith 2007, 30). They explain that the distinction between trespass and nuisance is “one of the clearest examples” of the difference between exclusion and governance strategies.

In relying on the distinction between intentional trespass and nuisance to frame their distinction between exclusion and governance strategies, Merrill and Smith’s exclusion conception of property appears to provide a determinate framework by which to evaluate the costs and benefits of securing property rights to owners. As they explain at a somewhat high level of generality, property is at core a right to exclude. This explains the existence of in rem exclusion strategies, and traditional economic analysis can explain and justify why courts enforce the formalistic and bright-line rules in these governance strategies by such metrics as information costs, administrative costs, and other types of transaction costs.

But as economists recognize, a simple model such as intentional trespass sometimes has leakage—heterogeneity problems. The uses, transactions, and disputes over assets are as myriad and complex as the innovative ways by which people have created value in these assets. Practically, this means that property transactions—or more precisely, property disputes—arise in complex and ongoing interactions between individuals, firms, and the state, in which the formal right to exclude does not solely define the nature or the scope of entitlements asserted by the parties against each other. This fact is overshadowed in the academic literature by the oft-repeated examples of conversion of automobiles or intentional trespass of land, like Jacque, in which the assistant manager of Steenberg Homes said to his workers, “I don’t give a ---- what [Mr. Jacque] said, just get the home in there any way you can” (Jacque 1997, 157).

The relationship between the parties in most court cases is not one of an aggrieved property owner whose rights have been violated by an intentional trespasser, but rather of parties who have engaged in ex ante transactions concerning particularized uses of property. Property law accommodates this fact with numerous doctrines, all of which can be used as both swords and shields by litigants. These doctrines are employed depending on the context of the uses and
relationships concerning the property in dispute. Somewhat surprisingly, these are all doctrines that Merrill and Smith identify as merely “peripheral” governance strategies, but in reality these doctrines comprise the majority of property disputes.

This is the kernel of truth in the famous case of State v. Shack (1971), which is often juxtaposed against Jacque (Dukeminier et al 2010, 89-92). In Shack, the New Jersey Supreme Court reversed trespass convictions against individuals who entered a farmer’s land to inform migrant farm workers of their rights under federal law to certain government services; the court held that a “man’s right in his real property of course is not absolute” and that “rights are relative” (Shack 1971, 373). Shack is a prime example of how property rights disintegrate under the bundle conception of property; as the court emphasized, “Property rights serve human values” (ibid., 372). Ultimately, this meant that property disputes require individualized assessments of these specific “human values” and the specific social context in which they arise, such as the fact that “migrant farmworkers” are “unorganized and without economic or political power” (ibid.). Under such an approach, there is nothing really left to property that distinguishes it from any other in personam legal entitlements that the government distributes and regulates.

The truth, though, is that Shack represents a much more common type of property dispute than that of the brazenly intentional trespass in Jacque; that is, property disputes often arise in contexts rooted in some ex ante agreed-upon use of assets, or at least they arise from some type of interrelated social action taken by various parties with regard to an asset. In Shack, for instance, the farmer granted permission to the migrant farm workers to enter his property—in legal terms, he granted them a license—and such consent is a commonly accepted defense to a trespass lawsuit. Thus, the Shack court did not need to disintegrate property into “relative rights” and “values.” It readily had at hand a longstanding property doctrine to resolve this dispute: the migrant farm workers had a license to be on the property, and this implied a license for any others whose presence was related to this work. To grasp this point, no one would have given the New Jersey Supreme Court’s decision any notice if it dismissed Shack’s trespass lawsuit against pizza delivery men bringing lunch to the migrant farm workers toiling away on his farm.

The exclusion conception of property cannot explain this point in any determinate manner, though, because the consent defense is a governance strategy, not an exclusion strategy. Thus, a defendant’s assertion of a license, explicit or implied, requires a court to make in personam assessments of the circumstances of the grant of the license between the parties, such as what was the understanding of the parties in the creation of the license. Even more important, once the governance strategy of consent is invoked by the defendant, the court inevitably will be required to consider heavily disputed evidence submitted by the litigants concerning oral statements, ex post actions or uses of the property that ratified
expansions or limitations of the license, and other assorted contested facts. These are exactly the type of fine-grained assessments of use-rights and in personam rights comprising governance strategies, not exclusion strategies.

Moreover, in the back-and-forth arguments in the heat of litigation, property owners do not merely tuck their tails between their legs and run when faced with such affirmative defenses. The law provides a counter-argument to a consent defense: the licensee’s use of the property exceeded the bounds of the scope of permission granted by the property owner. This adds a new governance strategy (scope of license) on top of the existing governance strategy (consent in a license). Now a court must assess the reasonable construction of the terms of the license as to its scope of permissive use, including both express and implied permissions. To wit, the logical and predictable development of the litigation stances of the parties in a dispute concerning property rights inevitably leads courts to have to make contextualized inquiries into disputed facts concerning particular actions or statements by the parties.

This is but one example involving a single legal defense representing a governance strategy (consent). It shows that, contrary to the claim that governance strategies are deployed merely at the periphery or borderline of property law, governance strategies are quite common and easily proliferate in property cases. Significantly, the exclusion strategy model gives no determinate guidance to courts in these cases, and it cannot do so on its own terms. Its emphasis on the formal right to exclude—which Merrill and Smith correctly argue is empty of any reference to specific uses—does not positively frame the more substantive metrics that courts must use in assessing such governance strategies. As Judge Richard Posner recognized in a recent trespass case involving a highly contextualized assertion of consent as a defense, such cases are ultimately resolved based on the “specific interests” at stake in the property dispute (Desnick v. ABC, Inc. 1995, 1352).

And consent is only one of many countervailing doctrines within the broad category of governance strategies that are available to defendants in trespass cases. In addition to consent, a defendant may argue that he has title to the property through adverse possession, he may invoke numerous equitable defenses, such as estoppel, laches, and unclean hands, or he may claim the defense of necessity, which gives trespassers a free pass for saving a life or for preventing harm to the public, such as stopping a house fire from becoming a conflagration. Outside of rare cases of deliberate trespass like Jacque, parties invariably make arguments from available legal doctrines that mandate that courts shift to more complex and heterogeneous governance strategies concerning the nature of use-rights and specific relationships between the parties.

So far, we have been discussing only the ways in which the exclusion strategy in a trespass lawsuit shifts in almost all court cases into a variety of governance
strategies. And trespass is supposed to be the best example of the determinate application of the exclusion conception of property! The reality is that intentional trespass cases like *Jacque* represent just a microcosm of property cases. Most property disputes arise from run-of-the-mill social situations in which parties have ex ante interactions concerning the use of property, addressing such legal issues as easements, restrictive covenants, relations among joint tenants, leases, conveyances, and many others. Given that these legal disputes arise from *in personam* relationships concerning rights of use or possession of property, governance strategies are inevitably asserted in the back-and-forth exchanges within the crucible of a court action. This is the stuff of litigation.

To be clear, the point is not that *Shack*, *Desnick*, and the multitude of other property cases representing governance strategies were decided correctly. The point here is more limited: the claim to determinacy in the exclusion-strategy model of the exclusion conception of property is a false promise. Although Smith and Merrill frame governance strategies as applying only at the periphery of property law, suggesting that they are derivative to exclusion strategies, governance strategies are in fact omnipresent throughout all property law cases. In fact, Smith implicitly concedes this point by attempting to reframe how some prominent governance strategies, such as nuisance, actually function as de facto exclusion strategies (Smith 2004b). Assuming for the sake of argument that this exclusion account of nuisance and of a few other governance strategies is correct, this does little to establish how the many other myriad governance strategies function within the model of the *in rem* right to exclude.

### Conclusion

The exclusion conception of property seems appealing because it promises to bring back determinacy in the real-world adjudication of property rights. To their credit, Merrill and Smith’s rejection of the bundle conception is correct, and their exclusion conception of property does much to highlight the long-neglected role of information costs in explaining why certain legal doctrines, such as trespass and the highly formal estates system, are structured and enforced through exclusion strategies. But their generalization of the exclusion conception of property into a determinate model for all property rights cannot succeed. It is perhaps time for lawyers and economists to reconsider the legal presumptions built into property doctrines from the historical concept of property in Anglo-American property law: the integrated concept that secured the exclusive rights of possession, use, and disposition (Mossoff 2011; Claeys 2010).
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A Bundle Theorist Holds On to His Collection of Sticks

Stephen R. Munzer

LINK TO ABSTRACT

It is essential for scholars in any academic field to reexamine established paradigms and suggest different ways of thinking. For some time law teachers, law students, and many philosophers have thought of property chiefly as a bundle of rights or, colloquially, as a bundle of sticks. Although a right in this context is, broadly, an individual advantage secured by law, most bundle theories separate different normative modalities, and not all of these modalities are rights even in this broad sense. The most influential classification along these lines is Hohfeld’s set of “fundamental legal conceptions,” which he regards as the “lowest common denominators of the law” (Hohfeld 1978, 64). Table 1 gives a representation of Hohfeld’s scheme. The items in the elements and correlatives columns are the fundamental legal conceptions. Hohfeld thinks of correlatives in terms of two-way entailment and of opposites as involving external rather than internal negation (Munzer 1990, 18-19).

TABLE 1. Hohfeld’s Fundamental Legal Conceptions

<table>
<thead>
<tr>
<th>Elements</th>
<th>Correlatives</th>
<th>Opposites</th>
</tr>
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<tbody>
<tr>
<td>Claim-Right</td>
<td>Duty</td>
<td>No-Right</td>
</tr>
<tr>
<td>Privilege (Liberty)</td>
<td>No-Right</td>
<td>Duty</td>
</tr>
<tr>
<td>Power</td>
<td>Liability</td>
<td>Disability (No-Power)</td>
</tr>
<tr>
<td>Immunity</td>
<td>Disability</td>
<td>Liability</td>
</tr>
</tbody>
</table>

Source: Munzer 1990 (19)

1. School of Law, University of California, Los Angeles, 90095. I thank Jenifer Morrissey for perceptive comments.
This classificatory scheme is well short of a bundle theory of property because it contains no account as to which claim-rights, etc., are involved in property. At this point some scholars have taken a page from an essay on ownership by Honoré (1961). The following list captures some of the main normative modalities, or metaphorical sticks, in a bundle theory of property: claim-rights to possess, use, exclude, control, manage, and receive income; powers to exclude, sell, devise, bequeath, pledge, waive, and abandon; liberties to consume or destroy; immunity from expropriation without compensation; the duty not to use harmfully; and liability for execution to satisfy a court judgment. By “liability” Hohfeld understands a susceptibility to have one’s legal position altered by one’s own actions or the actions of others rather than an exposure to imprisonment for a crime or to an action in tort. These normative modalities do not involve a direct relation between persons and things but rather legal relations between persons with respect to things. Often these things, such as land or animals or tools, are physical objects. Sometimes, as with patents, copyrights, and corporations, they are not. This brief sketch is not a substitute for a more thorough account developed elsewhere, yet it gives the main lines of my particular bundle theory, which I incorporate by reference (Munzer 1990, 15-31).

By the mid 1990s, a few legal scholars began to articulate reservations not just about particular bundle theories of property but all such theories (Harris 1996; Penner 1996; Penner 1997). Penner’s views have some traction with, and perhaps influence on, American academic property lawyers, especially those who approach property from a law and economics perspective. A prime example of this traction is Merrill and Smith (2007), whose casebook promises to have an impact on a rising generation of law students (Claeys 2009). Because Penner (1996) made me something of a poster boy for a bundle-of-rights theory, I have long had an interest in this nascent shift within the legal academy. As yet, this shift does not seem to have affected many philosophers who write about property.

The purpose of this essay is to examine a few of these developments as evenhandedly as I can. I confine my attention to Merrill and Smith’s casebook and, glancingly, Merrill (2000), and leave the contributions of Harris and Penner for another occasion. I assess some of Merrill and Smith’s criticisms of the bundle picture and evaluate what is being suggested in its stead. I argue that they paint too simple a picture of property and that property law is a less unified subject than they claim.

The preface to Merrill and Smith (2007, v) makes several connected statements. “The most basic principle is that property at its core entails the right to exclude others from some discrete thing. This right gives rise to a general duty on the part of others to abstain from interfering with the thing.” They continue: “The materials [in our casebook] are designed to challenge each student to decide for
him or herself whether property is defined by common principles such as the right to exclude others, or whether any such principle is so riddled with qualifications that property can only be regarded as an ad hoc ‘bundle of rights’” (ibid.). If these statements are correct, that would support their view “that property law is a unified subject” (ibid.). These passages raise a number of questions.

1. What, exactly, is a right to exclude? Merrill and Smith say that “property…entails the right to exclude” and that this right “gives rise to” a duty. Hohfeld’s vocabulary is more precise in making a duty the correlative of a right/claim-right expressible as two-way entailment. The statement that A has a right to exclude B from Blackacre entails, and is entailed by, the statement that B has a duty not to interfere with Blackacre and its ownership and possession by A in specific ways. Two-way entailment is a logical relation which is more exact than saying that a right to exclude “gives rise to” a duty, for the latter expression suggests that some temporal process is occurring.

One can, moreover, improve on the protection and contextual impact of a right to exclude by bringing in legal powers. As a well-known article by H.L.A. Hart points out, Hohfeld’s understanding of a legal power, whose correlative is a liability, was a signal achievement. It was, however, anticipated by a much deeper account of powers proposed by Jeremy Bentham but not published till long after Hohfeld’s death (Bentham 1970; Hart 1972, 800-801).

Bentham divides legal powers into two main kinds: powers of “handling” and powers of “imperation” and “deimperation.” Powers of handling, which he more often calls powers of “contrectation,” are legally recognized powers to interfere physically with things and sometimes with the bodies of other persons. Examples include an owner’s power to drive a car he owns, or a landlord’s power to make needed repairs, upon reasonable notice to the tenant, to an apartment he owns, or the power of a police officer to make an arrest. Some powers of this kind are exclusive (the landlord case) and others are inexclusive (the powers of cotenants to occupy the premises) (Hart 1972, 801-805). Protecting a right to exclude involves legal powers of self-help by owners of real and personal property, though the limits on permissible self-help continue to tighten.

Powers of imperation and deimperation are powers, whether general or singular, over the active faculties of persons. A law that sets the conditions for making a will is a general power of imperation exercised by the legislature over an entire class of persons—roughly, those of sound mind who have attained the age of majority. Under this law an individual member of the class can exercise her singular power of imperation to make a will that, upon her death, transfers ownership of land and chattels to persons named or described in the will. The beneficiaries now have various powers of imperation and deimperation as well as handling over these assets (ibid., 805-810). To protect the right to exclude, the law...
confers general powers of imperation on owners, and in turn owners can exercise their singular powers of imperation to bring a civil lawsuit to guard against or remedy interference with their real property (e.g., trespass and nuisance) and their personal property (e.g., conversion, replevin, and trespass to chattels). Bentham thinks of powers of deimperation as granting permissions. He believes that a person’s title gives her a permission that is not available to anyone else—namely, a liberty (privilege) as well as the power to walk over her land and build a house on it. When she sells the land to someone else, it is as if she appoints the buyer to the “office” of owner. The new owner is no longer subject to a general duty to forbear interfering with the land and has powers of handling, imperation, and deimperation with respect to it. The former owner is now subject to a duty not to interfere with that property. Of course, the new owner can exercise his power of deimperation to exempt the former owner, or one of his neighbors, from a duty not to walk or drive on a broad path on his land (ibid., 810-813).

Merrill and Smith (2007, 393-439, 884-936) know better than I the legal details pertaining to protecting the right to exclude, recording titles, and transferring ownership. The point of the preceding paragraphs is to underscore that one gains a much richer understanding of the right to exclude by identifying the logical relations between right and duty and by appreciating the wide range of powers of handling, imperation, and deimperation over items of property. This point applies to me, too. My exposition of the bundle theory more than twenty years ago would have been stronger had it paid more attention to Bentham and Hart and not relied so much on Hohfeld’s comparatively impoverished understanding of powers. In particular, I should have paid more attention to Bentham’s treatment of deimperation and the alienation of property. Selling one’s land to someone else involves a complicated thicket of liberties and powers as well as rights and duties. A well-crafted bundle theory makes it easier to grasp the logical relations and complicated normative modalities involved in exclusion, title, and transfer.

2. What is a “discrete thing” according to Merrill and Smith? It would be too narrow to say that it must be a countable physical object, such as one automobile or two vases. The word “discrete” emphasizes individuality and lack of connection, but we also have to allow for physical stuffs, such as water or whale oil. Because a given quantity of water or whale oil can be divided in half and still remain water or whale oil, neither is discrete in the way that automobiles and vases are discrete.

Merrill and Smith allow for physical stuffs and intangible property by parsing discrete things as “discrete assets,” which are “valued resources” held in a legally recognized property form that are created, exchanged, or enforced by economic actors (Merrill 2000, 974). I have two reservations about this move. First, intangible property is better articulated as clusters of normative modalities as unpacked by some bundle theories of property rather than solely a right to exclude. Second,
their account encompasses only valued resources that a given legal system and a
given community of economic actors already recognize. If so, then it is unclear
how Merrill and Smith can accommodate any natural property rights, or any moral
property rights not yet recognized by law and economic actors. Though they could
respond that no such rights exist, I do not think that they are entitled to exclude
them at the stroke of a definition. Neither are they entitled to import into the
definition of valued resources the idea that all property rights must be recognized
by a community of economic actors. Economic value need not be the only sort of
value protected by property law.

3. What exactly does it mean to say that a bundle theory of property is,
as Merrill and Smith put it, ad hoc? (a) It might mean that the theory on offer
is intended for a particular purpose rather than some wider array of purposes. I
intended my version of the bundle theory in this way. My purpose in doing so was
to provide an analytical scheme applicable to many legal systems and the property
arrangements within them. A virtue of such a scheme is that it makes few if any
moral or political commitments. The analysis of property law is one thing and
proposals for its reform are quite another. The bundle theory I proposed can be
used by many different sorts of property scholars, whatever their moral or political
views. In contrast, their account of valued resources maintains that all property
be recognized by a community of economic actors. Although my book advances
arguments for certain moral and political positions, whether one considers those
arguments good, bad, or indifferent, they are not smuggled into the analytical
scheme.

(b) Perhaps they mean that a bundle theory differs from the “traditional
everyday view” that property is a “right to a thing good against the world” (Merrill
and Smith 2007, 1). The distinction they have in mind might seem identical with
my distinction between the “legal conception” of property as relations among
“persons or other entities with respect to things” and the “popular conception” of
property “as thing” (Munzer 1990, 16-17). Their view, though perhaps traditional
among some lawyers, is not an “everyday” view because most people are unaware
that “good against the world” rests on the notion of property as in rem rather than
in personam, or “multital” and “paucital” respectively in Hohfeld’s vocabulary. To
explain what it means for property to be good against the world, the bundle theory
is highly useful. To my mind, the difference they point to is somewhat ill expressed,
and it is unpersuasive to claim that it paints an accurate picture of how bundle
theories differ from their competitors.

(c) Later they draw a distinction between two conceptions of property in
another way. There are “essentialists,” such as Blackstone, Penner, and, more
complicatedly, Honoré, who hold “that there is one correct meaning of property”
(Merrill and Smith 2007, 15-16). And there are “skeptics,” such as John Lewis,
Benjamin Cardozo, Thomas Grey, the authors of the First Restatement of Property, and the legal realists generally, who hold that “‘property’ is just a word that means nothing until we spell out—using different words—exactly what we are talking about in any given context” (ibid., 16). Moreover, they say, the “skeptical view is reflected” in talk about a “bundle of rights” or a “bundle of sticks” (ibid.).

This distinction, I think, is muddled. Bundle theorists, such as Becker (1977, 18-21), often make use of Honoré, which suggests that they don’t view him as an essentialist. Anyway, the proper contrast with essentialism would seem to be nominalism rather than skepticism. However, I am aware of few bundle theorists who consider themselves either nominalists or skeptics. The American legal realists are a diverse group. Often they are seen, not as adherents of astringently depoliticized versions of the bundle theory, but as forerunners of the critical legal studies position that property is a set of social relations (Munzer 2001). It is hard to believe that Cardozo and Grey are skeptics in the same sense. If Grey is a skeptic, I certainly am not. At the end of my chapter expounding a bundle theory of property, I criticize Grey’s views on the disintegration of property (Munzer 1990, 31-36).

Be their distinction muddled or clear, they make a further point in the paragraph explaining it. The bundle of rights/sticks “metaphor implies that one can add to or subtract from the bundle more or less without limit, and still talk about the bundle as property” (Merrill and Smith 2007, 16). As metaphor, even if you could keep adding to the bundle, you cannot keep subtracting from it because no one would call a collection of items a bundle if it had zero or one or even two items. There are null sets but no null bundles. In any case, it is vital to separate the bundle metaphor from the different bundle theories proposed by philosophers and legal scholars. As for bundle theorists, I can think of no one who has either allowed the number of normative modalities to metastasize into the hundreds or thousands, or reduced the number to two or three.

(d) As I try to understand Merrill and Smith’s claim that bundle theories are ad hoc, there is another possibility that might capture what they mean. Given their emphasis on the right to exclude, perhaps they object to throwing in other rights, powers, liberties, and immunities on the ground that these are so trivial as to muck up the bracing clarity and force of the right to exclude.

This possible objection seems to me more powerful than some of the criticisms they voice explicitly, but Merrill and Smith over-emphasize the right to exclude. Over the years, I have received papers from students arguing for the centrality of either the right to use or the power to transfer, or both. None of these papers has wholly persuaded me but they have some merit. The right to use one’s property as one wishes might be seen as the opposite side of the coin from the right to exclude others, with both of these rights being highly important to the functioning of a system of property. Indeed, Claeyss (2009, 631) puts the two
together by defining property as “a right to determine exclusively how a thing may be used.” Further, law teachers are well versed in the power to transfer as it bears on wills, trusts, and real estate transactions. Yet because many of them do not also teach contract law on a regular basis, it is easy to lose sight of the importance of sales of goods in a market economy and thereby to underweight the power to transfer chattels.

(e) Perhaps Merrill and Smith (2007, 16) mean that bundle theories have so much “plasticity” as to render the limits of property poorly defined. That property is indeterminate at the margin shows only that it is an imprecise concept, like baldness, not that it is ill-defined. The ability to describe someone’s legal position in detail rarely requires a highly precise concept of property (Munzer 1990, 24).

4. What does it mean to say that property is a “unified subject”? Merrill and Smith seem to mean that some concept (e.g., a right to exclude), or some principle (e.g., that property at its core entails the right to exclude others from some discrete thing), explains why property law has a coherent structure. However, the right to exclude does not explain why property law is coherent. Consider the right to use a public park. If state law regards this right as property, the takings and property due process clauses may come into play. But the right to exclude does not explain this right, for the right-holder does not own the park and cannot exclude others. Merrill (2000, 893-894) avoids this result only by imposing a monetary-value condition on property, which makes property simpler than it is.

Merrill’s discussion of so-called constitutional property criticizes the Roth case (1972) on the ground that it appears “to require the [Supreme] Court to go along with any and all contractions or expansions on the domain of property dictated by nonconstitutional law” (Merrill 2000, 923). Yet some cases do not adhere to this reading of Roth. Webb’s Fabulous Pharmacies refused to follow a Florida law that would have transmuted, “ipse dixit, … private property into public property without compensation” (1980, 164). Later, the Craft case quite appropriately used bundle-theory language in maintaining that state law is not dispositive of what qualifies as property and that a husband’s interest in entireties property had more than enough sticks from the bundle to qualify (2002, 278-279, 283-285). The broader points here are that there is no constitutional property as such, only constitutional protections for property, and that what counts as constitutionally protected property is a more complicated matter than an anti-“positivist” critique allows (Merrill 2000, 917-954).

5. Merrill and Smith (2007) seeks to impose more unity on property than any other casebook in its field. It does so by putting the right to exclude front and center and by leading students through diverse areas of property law to search for the maximization of exclusion-efficiency. In these respects it is the most intellectually challenging property casebook on the market.
This unity and search for efficiency rest, however, on far too simple a picture of property. Unless one attends to other normative modalities in a bundle of rights theory of property, and in particular the right to use and the power to transfer, one does not supply students and law teachers with the richer view of property that they need and deserve. Moreover, Merrill and Smith’s unduly narrow theoretical understanding of property has consequences for the normative analysis they carry out in terms of economic value and efficiency. By my lights they do not give due weight either to underlying problems at the foundations of game theory and welfare economics or to bounded rationality and behavioral economics. A more complicated picture of property would insert at least a right to use and a power to transfer in addition to a right to exclude. But inserting only them would still leave out the ways in which many other powers, liberties (privileges), and immunities against government expropriation without compensation figure in property. Property law is not, I think, as unified a subject as Merrill and Smith claim.

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**About the Author**

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Potentiality, Actuality, and “Stick”-Theory

J. E. Penner

LINK TO ABSTRACT

There is nothing wrong with introducing students to the topic of property law by emphasising that property is facilitative. The right to property (in particular in the case of land, where the “numerus” in the *numerus clausus* is greatest) indeed comprises an array or set of liberties and powers, principally the liberty to use the property in any way one fancies within the strictures of the general law, including using it by transforming it or destroying it, and the powers to transfer it and create lesser property/proprietary rights like licences, leases, security interests, profits, restrictive covenants, and easements. So far so banal. Much the same could be said about one’s right to contract or to enter contracts. The right to contract is a set of liberties and powers to enter into consensual arrangements of various kinds, sales, contracts for services, contracts of employment, loans, security arrangements, agency agreements, and so on. Again, so far so banal. But the “bundle of rights” picture of property is intended to present more than this mundane observation. It is supposed somehow to illuminate some special feature of the legal nature of property. On one view of this illumination the word “bundle” is particularly significant, suggesting as I think it does the bundling together of things that are in principle independent, as opposed to “array” or “set”, which I think do not. The idea here is that the standard “full-blown liberal” right of ownership, the sort we normally have over land or chattels at common law, is not any kind of natural “default” position as regards the norms that could in principle shape the rights of access that individuals have in respect of things. Rather, all the various powers and liberties which make up the standard rights of an owner are just a conventional assembly of various normative elements which might well have been assembled otherwise, added to or diminished. I think this is fanciful. In past work I have examined how the concepts of exclusion and separability together make sense of the standard incidents of ownership in a way which shows how they naturally

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belong together. But I shall not on this occasion rehearse that criticism of the way
the “bundle of rights” picture of property is supposed to bring light. The other
main way in which it is intended to do so is through a contrast with the “layman’s
picture of property,” that is, that property is a “right to a thing”.

My view is that the layman is essentially right. The layman is not so deficient
in brain cells as to think that a right to property is a right “against” a thing, as if
he could take Blackacre to court if it disobeyed him; that is obviously a fatuous
construal of anything any layman might possibly think. Rather, the layman quite
properly thinks that the nature of his right is mediated by the existence of a thing.
The layman understands that he is wronged when someone interferes not with him,
with his person, but when someone interferes with his property—trespasses on
Blackacre, for instance. The layman understands that he benefits from the practice
of self-exclusion, which the law institutes to make the right to property the norm
that it is. The layman understands that everyone, himself included, has a duty not
to interfere with property that is not his own and that everyone benefits from
the observation of this duty. (Even the propertyless benefit from it, since when
someone addresses their need and hands them the money or the bowl of soup, they
are only legally secured in their receipt of it by the self-same duty upon all others
not to immediately snatch it away from them again.) The questions that are raised
by the “bundle of rights” picture of property, which as I say is meant to be opposed
to the layman’s view, are (a) what is wrong with the layman’s view? and (b) what
does the “bundle of rights” picture do to correct it? In my view, the answers are (a)
nothing, and (b) (therefore) nothing as well.

If that were all that needed to be said, I could stop there. But the “bundle of
rights” picture is not simply spinning its wheels to no good effect, not simply an
otiose bit of intellectual flotsam; in my view it is positively pernicious. It purports to
provide an alternative analysis of the liberties and powers that go with the ownership
of property. We see this amongst those who favour a “bundle of sticks” metaphor
for the nature of ownership. On this view, when an owner grants a lease to
Blackacre, the correct analysis of this transaction is not that he exercised a power to
create an interest in Blackacre that did not exist before—that again would be the
layman’s understanding—but rather that he transferred some pre-existing lease-
stick in his bundle to the lessee. I must say I am at a loss to understand quite
how this bit of nonsense has had the traction that it has, but never mind; its
popularity—amongst theorists, as no lay understanding of property has, as far as I
know, ever suggested anything like it, although the metaphor “selling one’s labour,”
which does have some lay resonance, commits an error in the same conceptual
ballpark—demands that we address it in some detail.

If we really wanted to conceive the grant of licenses, leases, easements,
mortgages, and so on, as transfers of previously existing rights which the owner

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himself already had, then we would have to hold that the owner has an infinite
number of rights. After all, an owner has the legal power to grant anyone the right
to do anything that can be done with his property; that is what a power to license
someone to come onto Blackacre empowers. Furthermore, the law recognises
other sorts of interests, such as security interests and interests under trusts, which
multiplies further the scope of what a person having title to Blackacre can do. The
“bundle of sticks” view says that an owner has one stick corresponding to each
right in his bundle, which together form a bundle of sticks comprising rights to do
every possible thing with his property, each of which can be transferred to others.

Now, this way of looking at things might make some sense of a grant of a
lease. The idea goes something like this: A transfers five years’ time in Blackacre,
which he would otherwise have kept for himself, in granting a five-year lease to B.
So the idea is that he transfers the right to five years’ occupation of Blackacre to B.
Since A already had the right to the next five years’ worth of occupation, that right
already existed, and so it can be the subject of a transfer. This analysis, of course,
is perfectly correct in the case of A’s fee simple in Blackacre, in the case where he
transfers his fee simple to B.

But, really, in the case of a right like a lease, the analogy to the fee simple is a
cheat. I shall return to the lease in a moment, but an easy way to see the nature of
the problem is first to consider an easement. A grants B an easement over Blackacre
for five years—a right of way, let us say. The important feature of the easement
for our purposes here is that B, the easement holder, has a right to exclude A in
the sense that henceforward A owes B a duty not to use his land in any way that
interferes with B’s right of way. Now let us account for this stick in A’s bundle
before he transferred it to B. Not only does A have the full right of exclusive use
in virtue of his fee simple, but surprisingly he also has the duty to exclude himself
from interfering with B’s right of way. On the “bundle of sticks” picture, *if we take
it seriously*, A’s bundle of rights (sticks) includes both a right to the full exclusive
use of Blackacre, but also the duty to exclude himself from B’s right of way over
it because he has that particular “easement-stick” in his bundle as well; though he
hasn’t *transferred* it to B yet, on the bundle of sticks view it is still there in the bundle,
and if a right (or duty) actually exists it means it guides the behaviour of those
subject to it. But of course it doesn’t actually exist, and A does not have any pre-
existing duty to exclude himself from B’s right of way.

This is not an artefact about easements or any other particular right someone
might have in Blackacre. This problem generalises to all the rights the stick-theorist
postulates. Consider again the five-year lease. Above we assumed that there could
be such a thing as an abstract right such as a “right to five years in Blackacre”. But
whilst a legal system could provide a “divisible” fee simple, such that (for example)
one’s fee simple ownership was conceived of as a battery of rights to time in the
land, say one right for each day, and so the grant of a lease for a year would amount
to the transfer of 365 such rights, that is not the way a lease is actually conceived in
the law. Given the formula of the fee simple common law grant “to A and his heirs”
which basically measured time in terms of lifetimes, this analysis might work more
or less for the grant of the freehold life estate, but leaseholds were never conceived
along these lines. In the case of a lease, just as with the easement, its creation is
conceived of as the grant of a particular right to the lessee which burdens the fee
simple of the lessor. It is for this reason that there necessarily exists a relationship
between the lessee and lessor, which, for example, supports the web of covenants
typical of leases, that distinguishes this case from that of the life estate.

Right/duty relationships of this kind are special and in personam; they have
their specific right-holders and duty-owers essentially, a distinction between rights
that are conferred and rights that are transferred which we will return to in a moment.
Thus from the “bundle of sticks” perspective, A must have a five-year lease-stick
in his bundle for every individual alive (as well, of course, as a stick for every
other length of lease for each individual, one for every possible easement for each
individual, and so on and so (infinitely) on); and since all of these rights cannot
genuinely co-exist (the genuine existence of any of these five-year leases excludes
the existence of all the others; they are, as an economist might put it, rivalrous) it
would seem that just in so far as they were actual they could not comprise part of
A’s bundle of rights in Blackacre. So these rights are really only “potential” rights,
rights which A might create by the exercise of his powers. So they do not exist
before A creates them, so they are not there for him in his bundle of sticks, and
so he cannot transfer them, for there is nothing to transfer. Any normative system
whose purpose is actually to guide people’s behaviour, including how they should
think about what they are doing, must founder on the kind of profound confusion
of potentiality with actuality that the “bundle of sticks” version of the “bundle of
rights” picture entails.

What is even more profoundly misleading in this picture, however, is the way
it draws our attention away from a genuine puzzle regarding property rights, which
I dramatically call the “mystery of transfer”. The “bundle of sticks” presumes
that the idea of the transfer of a right is somehow conceptually simple. But it is
not, really, really not. The transfer of possession of a tangible is not conceptually
puzzling. My handing you a stick (an actual piece of a tree with actual bark and so
on) with the intention that I will not take it away from you again, your realising my
intention, is a perfectly obvious and untroubling example. But what does it mean to
say that I transfer my right to the stick to you? I am not entirely sure what the right
answer to this is (it is one of the things I am trying to think hard about), but here is
a (popular) non-answer: your right to the stick arises by operation of law whenever
I put you in possession of it with the intention no longer to vindicate my prior
right to it (a sort of directional abandonment followed by your “appropriation” of the stick). People who think this (for example those unjust enrichment theorists in the UK who think that property rights are a “response” to legal “events” such as contracts of sale or mistaken payments) cannot make sense of the notion of title. The whole notion of title turns on the idea that my right can come to be your right (the very same right), not just that the object of my right can come to be the object of yours. This is the sense in which transferable property rights do not have their right-holders and duty-owers essentially, for the people occupying those normative positions change upon transfer without the identity of the right coming undone; the right now just belongs to someone else. To avoid any misimpression that might flow from using that stick as an example, it is well to point out that this is not just a matter concerning tangibles. The same issue arises when we are faced with the question whether the “assignment” of a chose in action is to be conceived of as a true transfer of a right or whether it amounts to a novation, the creation of a right de novo in favour of the assignee with the same content as that held by the assignor.

So another reason for rejecting the “bundle of sticks” metaphor for ownership is that it presents as simple one feature of property which is actually quite conceptually difficult, and it tacitly treats something that is much more conceptually straightforward—the exercise of powers to create rights, duties, and other powers—as beyond the grasp of property theorists (though not apparently beyond the grasp of contract theorists, trusts theorists, and public law theorists). Very odd.

About the Author

James Penner is Professor of Property Law at the Faculty of Laws, University College London. Since the publication of “The ‘Bundle of Rights’ Picture of Property” (UCLA Law Review 43: 711-820, 1996) and The Idea of Property in Law (Oxford: Clarendon Press, 1997) his work has become a reference point in the philosophy of property law. He has written widely on the philosophy of law, the philosophy of property and property law, and on the philosophical foundations of the common law. His email is j.penner@ucl.ac.uk.

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Property Is Not Just a Bundle of Rights

Henry E. Smith

Link to Abstract

Is property a bundle of rights? Yes and no. Is a diamond a collection of carbon atoms? Again, yes and no: A diamond does consist of carbon atoms, but there is a lot more to a diamond. The relations between the atoms help distinguish it from graphite. Properties like a diamond’s hardness and light dispersion are emergent properties from the overall structure. There is a lot more to a diamond than counting carbon atoms.

The bundle-of-rights picture of property treats property in atom-counting fashion. It sees property as a bundle of sticks but misses the trees, not to mention the forest. In this Essay I will compare the bundle view with a more “architectural” approach to property and show how the latter opens up whole areas of inquiry that the bundle picture obscures, if not forecloses altogether. At the end I will turn to the question why the bundle picture has retained such an enduring appeal and why the bundle picture and its alternatives matter to fundamental issues in private law.

Where Does the Bundle Come From?

The bundle picture as conventional wisdom is a legacy of Legal Realism. The roots of the bundle picture lie in the late nineteenth century and in early twentieth century analytical jurisprudence (Alexander 1997, 319-329; Merrill and Smith 2001b, 364-365). The most famous precursor of the bundle picture is Wesley Hohfeld’s theory of jural relations (Hohfeld 1913). Hohfeld sought to break down what people loosely called rights into clear and unambiguous pieces. Thus a right might be a right proper, or claim right—a legal right to insist that someone else do or refrain from some action with a corresponding duty in that person. Or it could

be a privilege (also called liberty)—a freedom to do or refrain from an action with a corresponding lack of a right in another to legally compel it. Somewhat similarly, Hohfeld (1917) analyzed *in rem* rights (rights availing against people generally) into a collection of *in personam* rights. As in the later bundle theory that builds on Hohfeld, the emphasis is on how rights (and other jural relations) hold between people, rather than seeing property as a “right to a thing.” Thus “property” could be broken down into more basic legal relations. Ownership of Blackacre includes the right to exclude B, C, D, etc., as well as privileges to use Blackacre for growing crops, for building a house, and for walking around on, such privileges availing against B, C, D, etc., who have corresponding “no-rights.” But a firefighter would have a privilege (or maybe even a right) to enter to fight a fire. An easement might give E a right to cross A’s land, and A would have a duty not to interfere (as would B, C, and so forth). Rights and other relations hold between persons, which is true, but the “thing” of property loses much of its importance.

Legal Realism took the step of adding nominalism to Hohfeld’s scheme (Radin 1938). Hohfeld was interested in clarifying concepts, but the Realists were against concepts, at least to the extent that they were not justified in terms of social policy. Thus the Realists found the bundle picture congenial because they thought they could replace notions like property and ownership that carried historical and moral baggage (to their minds) and replace them with a more scientific vocabulary that would not obscure the real design issues involved in making property serve society’s needs (Cohen 1935). Hohfeld’s tendency to make fine distinctions was embraced and extended because the social planner or judge could tinker with the bundle, and given the Progressive and New Deal agenda of the Realists, this would allow sticks to be transferred from owners to others with the result still being “property” (Grey 1980; Merrill and Smith 2001b). This picture carried into the American Law Institute’s *Restatement of the Law of Property of 1938* (§ 7, § 10), which defines “real property” as one of a number of present possessory estates and an “owner” as the person who has one or more interests. Objections on the grounds that policy-driven innovations violated property rights could simply be defined away as naïve and superstitious formalism and conceptualism in the service of an anti-Progress agenda masquerading as objective reality.

Realism has many children, and they have stuck close to the bundle picture despite their having gone off on their own. Mainstream policy-oriented legal studies still employ the bundle, and this is one reason why one constantly hears that “we are all realists now.” The bundle is self-evident wisdom to all but the unsophisticated who might employ the everyday notion of property as a right to a thing good against the world (Ackerman 1977, 26-29; Rubin 1984, 1086; Williams 1998, 297). But other strands of Post-Realism are equally committed to the bundle (Merrill and Smith 2001b). Critical Legal Studies and its offshoots like the bundle
for its nominalism because the agenda is to dethrone property further and to make bigger changes to the institution. Somewhat surprisingly, law and economics and the New Institutional Economics are equally committed to the bundle picture because of the analytical convenience that it offers (Coase 1960; Merrill and Smith 2001b and forthcoming). A thin notion of entitlement—a right to derive value from a resource—accords with what would seem to be economists’ concerns, because they are primarily concerned with expectations. Legal detail or structure does not immediately appear to correspond to expectations of deriving value, but the supposed sticks in the bundle—rights to exclude, liberties to use and so on—very clearly do. The traditional approach to property as an in rem right to a thing did not seem to be doing much work at all for any of these theorists.

What Is the Alternative to the Bundle?

The alternative to the bundle is not a return to pre-Realism or to pure doctrinalism. Unreflective conceptualism or formalism is a nonstarter. But it is worth noticing that the bundle picture has always had its detractors. It has been criticized by natural rights theorists, feminists, and some legal philosophers (Mossoff 2003; Schroeder 1994; Penner 1996). Among the objectors there is a general sense that property might have some essence or at least some content that is not fully captured by the analytical and nominal approach of the bundle theorists. Here I will present as an alternative to the bundle what I will call an architectural or modular theory of property that responds to information costs.

At the base of the architectural approach is a distinction that the bundle theory—along with other theories—tends to obscure. The interests we have in using things and the devices the law uses to protect those interests are related but distinct. Causes of action like trespass implement a right to exclude, but the right to exclude is not why we have property (Penner 1997; Newman, forthcoming; Smith 2007, 1751-53; Smith 2009, 964-65). Rather, the right to exclude is part of how property works. Rights to exclude are a means to an end, and the ends in property relate to our true interests served by property: interests in using things.

Property serves purposes related to use by employing a variety of delineation strategies. Because delineation costs are not zero, which strategy we use when will be dictated in part by the costs of delineation, not just by the benefits which correspond to the use-based purposes of property. Because it makes sense in modern property systems to delegate to owners a choice of a range of uses and because protection allows for stability, appropriability, facilitation of planning and investment, liberty, and autonomy, we start with an exclusion strategy, and that goes not just for private property but for common and public property as well. “Use”
can include nonconsumptive uses relating to conservation. The exclusion strategy defines a chunk of the world—a thing—under the owner’s control, and much of the information about the uses, their interactions, and the user are irrelevant to the outside world. Duty bearers know not to enter Blackacre or take a car without permission, and they know this without needing to know who the owner is, what the owner is using the land or vehicle for, who else might have rights and other interests, and so on. But dividing the world into chunks is not enough: spillovers and scale problems call for more specific rules to deal with problems like odors and lateral support and to facilitate coordination (covenants, common interest communities, trusts). These governance strategies focus more closely on narrower classes of use and sometimes make more specific reference to their purposes, and so they are more contextual (Smith 2002; Smith 2004).

In a zero transaction cost world we could use all governance all the time, whether supplied by government or through super fine-grained contracting among all the concerned parties. That is not our world, and the main point of exclusion as a delineation strategy is that it is a shortcut over this more “complete” set of legal relations (Merrill and Smith, forthcoming). Analytically it might be interesting to think of property as a list of use rights availing pairwise between all people in society, but this would be intractable in our world.

The architecture of property emerges from solving the problem of serving use-interests in a roughly cost-effective way. In modern societies this usually involves a first cut with a more use-neutral exclusion strategy and refinement through governance in the form of contracts, regulations, common law doctrine, and norms. At the core of this architecture is exclusion because it is a default, a convenient starting point. This does not mean that exclusion is the most important or “core” value; even entertaining this idea usually reflects the confusion of means and ends in property law. Exclusion is not a value at all: it is a rough first cut—and only that—at serving the purposes of property. It is true that exclusion piggybacks on everyday morality of “thou shalt not steal” and that governance reflects a more refined Golden Rule “do unto others” type of morality in more personal contexts (Merrill and Smith 2007). It is probably the case that our morality itself is shaped to a certain extent by the ease with which it can be communicated and enforced in more impersonal settings, but I leave that question for another day. The point here is that the exclusion-governance architecture is compatible with a wide range of purposes for property. Some societies will move from exclusion to governance—that is, some systems of laws and norms will focus more on individuated uses of resources—more readily than others and will do so for different reasons.

The bundle picture obscures the distinction between means and ends in property. Each stick can be (too) easily identified with a purpose. This confusion is furthered though the use of the word “interest.” I have noted that we have interests
in the use of things (but not an interest in exclusion), but “interest” can refer to legal interest, as in fee simple, life estate, and so forth, or even more finely to the sticks in the bundle. Again, the tendency is to analyze property into pieces that are transparent to purposes. On the architectural view, by contrast, nontransparency to purposes is directly related to the transaction cost savings from (sometimes) using the exclusion strategy.

In the service of transparent purposes, the bundle picture usually assumes a very unconstrained use of context. If trespass and conversion send a simple message of “keep off” and “don’t take” (without permission), other aspects of property like nuisance (which not coincidentally tend to involve neighbors rather than the world at large) involve more information about the value of uses, their harm, and the nature of the surrounding area. If delineation cost is left out of the picture, it becomes deceptively attractive to move in the direction of more governance-style contextualized inquiry into such matters. Suggesting the importation of copyright’s notoriously fuzzy and mysterious fair use doctrine into the law of trespass in order to capture all and sundry societal interests in potential boundary crossings is but an extreme example (Depoorter 2011). Promoting the promiscuous employment of contextual information in property is in keeping with ignoring the cost of delineation in the process of serving the purposes of property. Legal Realists and their successors object to delineation strategies that are not fully congruent with purposes for being too formalistic or conceptualistic. The implication is that right-thinking people would want to serve the purpose in question—say a right of access for hikers—and any reluctance to define this stick is mere apology for the owner class. Furthermore in designing a right to roam, one could take all sorts of context into account like the relative needs of the parties and so on (Anderson 2007; Lovett 2010). The right to roam as implemented in Scotland winds up being a complex, interests-balancing governance regime that fits uncomfortably in the existing “bundle” (Cooper 2011). The post-Realist reply would be that the law has to be contextual, and more generally, a classic Realist-style leap of logic has it that because the law sometimes uses context it should be available always (Smith 2003, 1180-1181). The burden is shifted to anyone who wants to deny the relevance of context, and when using context can be shown to be congruent with a virtuous purpose, then objections are labeled as formalistic or worse.

But context versus formalism, like exclusion itself, is not all or nothing or always or never (Smith 2003). Formalism is relative invariance to context (Heylighen 1999, 49-53), and in our world context is costly to incorporate into a legal rule or standard. In particular, when rights and other legal relations avail against people generally we can presume less in the way of background knowledge (Merrill and Smith 2000; Smith 2003). As a result, it is no accident that the more
in rem a legal institution or an aspect of a legal institution is, the more formal (relatively) it will be. Intermediate cases like bailments, landlord tenant, trusts, and security interests are standardized (including a degree of formality) somewhere in between (Merrill and Smith 2001a). In these situations, those aspects of the institution that implicate third parties are more formal and standardized than those that are confined in their impact to smaller and more definite groups of people.

**Why Is the Bundle Picture Incomplete?**

Because the bundle picture conflates use interests with legal interests, ignores delineation costs, and promiscuously invokes context, the bundle picture is incomplete and so winds up being wrong in practice. It is inadequate also because it is too unstructured, too fissiparous, and too internally homogeneous.

**The Bundle Picture Is Too Unstructured**

The bundle picture treats property as a collection—of rights or, metaphorically, of sticks. As mentioned at the outset of this essay, property rather is like a diamond in that it has a lot of very important internal structure. The exclusion-governance architecture leads to a characteristic structure of property. The use of boundaries, the sweeping of uses behind them, and the use of on/off proxies for violation all stem from the transaction cost savings of employing shortcuts over the complete or full set of maximally articulated rights—all governance all the time, as it were. That sticks come in standardized clumps—fee simple, defeasible fee, life estate, future interests, easements, and so on—looks more like happenstance on the bundle view.

But there’s more to the lack of structure in the bundle than simply missing the benefits of shortcuts. Delineating property rights using a mix of exclusion and governance strategies causes some features of property to follow automatically from the basic setup (Chang and Smith 2011). Start with the right to exclude. Now is not the time to get into how important it is to the notion of property (see, e.g., Claey 2009; Harris 1996; Katz 2008; Merrill 1998; Merrill and Smith 2001b; Penner 1997), and again I do not see exclusion or the right to exclude as an interest or value per se in property. But I am arguing for a special “first cut” role for exclusionary strategies in the delineation of property, and the style of delineation has implications for the right to exclude. By defining a right to a thing and employing use-neutral proxies for violations of the right to the thing, a right to exclude emerges. It is not a “stick” or a free-standing interest that can be added or
subtracted without changing the rest of the setup. It is an integral product of the
delineation process.

This does not make the right to exclude absolute. Exclusion is combined
with governance, and the latter is often implemented by overriding or making
exceptions to the “right to exclude.” But no modern system builds up a fee simple
by enumerating use rights, even those systems that qualify the right to exclude in
substantial and diverse ways.

Other aspects of property also fall into place. The residual claim could be
thought of as a collection of use rights, but that’s not how it is delineated. As its
name suggests, it is the result of defining property rights to an asset (or a pool of
assets), spelling out specific claims (often in personam) that subtract from the whole,
and calling the rest the “residual claim.” Delineation costs are saved by using the
outer contours of the asset and the specific claims, rather than going through a
lot of internal delineation. The point of a residual claim is that it can be treated
holistically by the system, and its owner can be left to manage its internal structure
and try to increase its value.

Likewise, running to successors is both characteristic of property and largely
follows automatically from the exclusion-governance architecture. To the extent
that exclusion is more formal in the sense of being invariant to context—it makes
less reference to use and users than governance strategies—then it is easier to
substitute one owner for another. The successor can step into the shoes of the
predecessor more easily if the shoe is one-size-fits-all than if it is tailored. Property
rights that are difficult to delineate in terms of exclusion, especially fluid resources
like water, are correspondingly more difficult to make fully alienable (Smith 2008).
The centrality to property of running to successors and the reliance of this feature
on decontextualization are not well captured on the bundle theory.

Some features of property are implicit and not separately delineated. Thus,
as we saw earlier, the right to exclude that emerges from the exclusion strategy
protects a wide range of privileges of use without the need to separately delineate
them. If the owner can control access to Blackacre, his interests in using Blackacre
for growing crops and so forth are implicitly protected. The protection may be
over- and under-inclusive—not everyone with unauthorized access would be
doing harm, and harm from the shadow cast by a high wall would not be
ameliorated—but the law need not delineate the liberty to use Blackacre for
growing crops, for residing, etc. When a use conflict becomes a large issue—think
solar access for solar panels—then the law may have to delineate a use separately
and create rights and duties with respect to specific uses (Bronin 2009; Rule 2010).
But many uses are taken care of implicitly—that’s the point of the exclusion short-
cut in the first place.
The Bundle Is Wrongly Made Up of Separable Sticks

Not all features of property are automatic consequences of the exclusion-governance architecture. The internal features—sticks, if you will—interact with each other. Part of the point of placing property boundaries where they are is that complementary attributes—those whose uses impact each other a lot—will be inside, and the boundary will to the extent possible not involve intense interaction between attributes inside and those outside the boundary (Smith 2007). This is what a modular structure means in a system that is nearly decomposable: intense interactions on the inside of components that are mostly hidden from other components that are (relatively) weakly interacting (Baldwin and Clark 2000; Langlois 2002; Sanchez and Mahoney 1996; Simon 1981). Thus, in the case of Blackacre, soil nutrients and moisture are highly complementary, and the top and bottom of the side of a hill for grape growing are complementary.

The flip side is that adding or subtracting a stick to the bundle affects the rest of the sticks. In principle the bundle theory could take this into account, but it typically does not. Instead, the metaphor of the bundle of sticks is used to imply precisely the opposite. In a bundle of sticks the sticks do not interact; you can add or subtract them at will, and still you will have a bundle with roughly the same properties. Not so with property: giving the right-to-roam stick to a neighbor or to the public affects the value of the remaining property, including “sticks” like the ability to grow plants, to eat dinner in peace, etc.

The Bundle Picture Obscures the Emergent Properties of Property

The emergent properties of property highlight another difficulty with the bundle theory. By making the pieces of the bundle transparent to purposes and obscuring the means-end relation between property law and the purposes it serves, the bundle theory leads to a fallacy of division. Just as water molecules don’t have to be wet for water to be wet, so each stick in the bundle or doctrine of property need not have the desirable features we want the system to have. Wetness is an emergent property of water. So with property. Allowing owners to exclude others in particular seems nasty and selfish, but whether it is efficient, fair, just, or virtue-promoting is sometimes only assessable in the context of the system as a whole. Properties like efficiency, fairness, justness, and virtue-promotion are emergent properties of the property system. It is certainly relatively easy to ask whether isolated individual rules like the doctrine of necessity, antidiscrimination law, and exemption of high-altitude airplane overflights from trespass serve a given purpose. And sometimes that makes some sense, but it makes more sense if we realize
that our decision in any such situation is not a freestanding one but impacts the rest of the owner’s rights and the working of the system. Requiring that each piece of the system and each stick in the bundle transparently reflect or promote our purposes is not necessary.

Nor is it wise. Again, some features of the system are emergent properties. Take stability. A Realist might want to treat this as yet another detachable feature or lever to be dialed up or down (Dagan 2011). But things don’t work that way; stability is a feature that can only be evaluated as an aspect of the system. Neither is stability a factor to be balanced whenever we are deciding on the supposedly separable sticks in the bundle. The idea that doctrines are part of an issue-by-issue balancing of values like community, autonomy, efficiency, personhood, labor, and distributive justice is to commit the fallacy of division. These are all important values for the system to serve, but the bundle picture creates the expectation that the pieces of the system will serve these values individually and separably as well as collectively. Little attention is directed toward the possible specialization of the parts in achieving the goals of the whole. Thus, trespass may contribute relatively more to owner security and autonomy, and the implied warranty of habitability to fairness and protection of tenant expectations, but if so, they do so in tandem (and with other rules). There is little reason to expect trespass law itself, for example, to be as fair or nuanced as property law as a whole. The alternative is to invoke a plethora of general principles to be balanced as specific situations present themselves. One can declare by fiat that such a system is not an ad hoc, unstructured bundle (Dagan 2011, 43), but ad hocery itself is not a feature that can easily be dialed down! Such an approach is indeed Realist but not realistic.

**Why Is the Bundle Picture So Appealing?**

By now, the attractions of the bundle theory should be apparent. It combines the convenient simplification of an analytical approach (in the spirit of Hohfeld) with an avoidance of the need to consider the cost of implementing all the good things that we in our wisdom as the experts and designers can come up with. It is designed to reduce humility and promote experimentation. It is ideal for “debunking” traditional notions of property that draw on lay intuitions, including those about morality, and for replacing them with a rule of experts. The alternative architectural view, far from being (as Dagan (2011, 41) contends) “condescending” about the lay view, takes lay views seriously. In our everyday lives, even we legal experts benefit when navigating through the social world by conserving our need to know for where it is truly needed. The architectural approach also raises the issue of whether major changes in the system are for legislatures or courts, and it points
to a general preference for the former. By contrast, the bundle view is an invitation for the heroic judge to innovate at will—and Realism and its successors have always tended to be court-centric.

The bundle is well suited for problems that are focused and detachable, and some difficult problems have this nature. Thus, tweaking the law of organizational forms or intellectual property licenses bears relatively little direct relation to the regime of trespass to land. But we should not kid ourselves that problems that might bulk large in the lives of lawyers and economists exhaust what property does. Property as a system is marvelously multipurpose, and as long as it is so, it needs the basic exclusion-governance architecture.

Like the very related nexus-of-contracts view of corporation, the bundle-of-rights picture of property is useful if understood more modestly. Breaking property down into a theoretical set of rights, privileges, duties, and so on can be illuminating. But to identify property with this “bundle” and to focus on these components to the exclusion of property’s automatic but not absolute features—property’s structure, the interaction of its parts, and the emergent properties of the property system—leaves out of the picture much of what is important about property and how it actually works. When the bundle-of-rights approach oversimplifies property and downplays the cost of innovation, it can be quite harmful.

What Is at Stake?

Whether to subscribe to—or go no further than—the bundle picture raises larger issues of baselines in private law. Turning the issue of how to delineate property in terms of some mix of exclusion and governance into a referendum on the morality of “giving” the right to exclude “stick” to owners distorts private law beyond recognition. Perhaps that is the point. Policy engineers need not overcome existing baselines if the whole notion of baselines can be wished away. The question of baselines pervades private law, and not just property, and it is also involved in the controversies—stemming again from Realism and its legacy—of whether there is a public/private distinction and a domain of private law at all. Analysis and even a degree of policy-oriented nominalism are appropriate to an institution that serves human purposes and carries with it a capacity for (bounded) change, but they can be used to obscure and even dissolve the architecture of property and private law. This is the unfortunate legacy of the bundle-of-rights picture of property and the Realism that inspired it.
References


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