BOOK REVIEW

PROPERTY 101: IS PROPERTY A THING OR A BUNDLE?

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PROPERTY: PRINCIPLES AND POLICIES. By Thomas W. Merrill & Henry E. Smith. New York: Foundation Press, 2007. Pp. xliii, 1396. $134.

I. INTRODUCTION

Normally, the market for property casebooks operates at near-perfect competition. All the books cover familiar topics—acquisition, estates, landlord-tenant, and land use. Casebooks differentiate by length, by choosing to stress practice or theory, or by illustrating property's unifying themes around land or other specialized fields of property law.

Occasionally, however, the market for a casebook gets hit by a gale of creative destruction.[1] One such gale may now be gathering in property law, thanks to *Property: Principles and Policies*, by Thomas Merrill and Henry Smith, both of Yale Law School.

Merrill and Smith organize *Property: Principles and Policies* around two important themes. The casebook integrates economic analysis into legal presentation more than any other casebook on the market. Merrill and Smith also organize their presentation around a conception of property grounded in exclusion. "[T]he right to exclude others," they claim, explains the core of property better than an "ad hoc 'bundle of rights' without any distinguishing features." (P. v.)

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1. *See* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 84 (George Allen & Unwin 1976) (1942).

This Review Essay has two aims. My more immediate aim is to assess where Merrill and Smith's contribution fits in the market for first-year Property casebooks. In short, *Property: Principles and Policies* represents an important advance in property pedagogy. By focusing thematically on exclusion's efficiency, Merrill and Smith have captured many important features of property overlooked by other casebooks.

My longer-range aim is to advance the reclamation project Merrill and Smith have begun, by clarifying further the work that exclusivity does in property law. *Property: Principles and Policies* brings contemporary scholarship a long way toward appreciating the virtues of exclusivity, but there is still a long way to go. Merrill and Smith conceive of property at its core as a right to exclude others from a thing. Others of us sympathetic to property's exclusive tendencies prefer to conceive of property as a right exclusively to determine a thing's use.

II. BUNDLES, THINGS, AND CASEBOOKS

Property: Principles and Policies portrays the foundational issues in the first-year property course in terms of a conflict between two different theoretical conceptions of property. The book's hypothesis is that "property at its core entails the right to exclude others from some discrete thing." (P. v.) Although this claim needs clarification,[2] for the time being I will call it the "thing" or "thing-ownership" conception of property. According to the alternative, all possible organizing conceptions for property are "so riddled with qualifications that property can only be regarded as an ad hoc 'bundle of rights' without any distinguishing features." (*Id.*) Here, Merrill and Smith tacitly distinguish their book from virtually all of its rivals, which refer to property as "a number of disparate rights, a 'bundle' of them: the right to possess, the right to use, the right to exclude, the right to transfer."[3] In this Essay, I refer to the conception to which Merrill, Smith, and this competitor are referring as "the ad hoc bundle" conception.

Although Merrill, Smith, and their competitors all agree that the thing versus ad hoc bundle contrast is significant, it is surprisingly difficult to specify what the contrast really means. Although Merrill and Smith's contrast *seems* to frame a conceptual disagreement, the thing and ad hoc bundle conceptions probably serve as shorthands for different normative accounts of property. Merrill and Smith are presuming as true and useful what might be called "applied" or "apologetic" conceptual theory. Since applied or apologetic conceptual theory sound like contra-

2. *See infra* part V.

3. JESSE DUKEMINIER ET AL., PROPERTY 81 n.2 (6th ed. 2006).

dictions in terms, let us consider Merrill and Smith's contrast more closely.

More so than other foundational fields of private law, property contains a tension between foundations and expertise. To push assets into private ownership, property law often endows owners with coarse and undifferentiated packages of use rights. The owner of land has near-total discretion to decide who may or may not enter his land, and a broad domain of discretion to decide how to use the land among many undelineated uses. That background discretion may facilitate further private ordering. The owner may use her land as the sole asset for a real estate development company, assign equity in the company to investors, mortgage the land to secure debt, or subdivide the land into smaller parcels and then impose reciprocal servitudes on all of the subdivided parcels. Specialized terms also facilitate government regulation more intricate than common law and private ordering would allow—like zoning or environmental regulations.

The competing needs for coarseness and granularity create a tension which Merrill and Smith have analogized to a pyramid. The "problem of order" lays the "base" of the pyramid, while "the maximization of welfare" sits at the "apex."[4] That tension leads to two extremes to be avoided in academic property scholarship. One is to analyze property issues strictly in terms of foundational priorities without explaining how complex arrangements build on simple foundations. The other is to focus on all of the considerations that make a specialized issue of property distinct, abstracting away from foundational priorities. In this Essay, I refer to that latter tendency as the "instrumentalist" tendency.

When judges and academic property lawyers refer to property as a bundle of rights, many of them use the bundle metaphor as conceptual shorthand for an implicit normative claim: that policy analysis may treat property as an instrument for directly promoting immediate policy goals, without disrupting property's foundational functions. Not all do, but enough do that other lawyers know what the former mean when they use the bundle metaphor the right way in the right contexts. For example, in a 1980 book on eminent domain, Bruce Ackerman views the first-year Property course as means to inculcate instrumentalist policy instincts in lawyers:

> [O]ne of the main points of the first-year Property course is to disabuse entering law students of their primitive lay notions regarding ownership. . . . Instead of defining the relationship between a person

4. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 398 (2001).

> and 'his' things, property law discusses the relationships that arise *between people* with respect to things. More precisely, the law of property considers the way rights to use things may be parceled out amongst a host of competing resource users.[5]

According to Ackerman, it is imprecise to assume that an asset must have a single "owner" and more precise to speak of her as one of several resource users who happens to have especially strong interests in the asset. Implicitly, expert regulators (Ackerman calls them "Scientific Policymakers"[6]) decide which competing resource users get which rights to use things—making these decisions all the while by focusing on the immediate claims of the claimants and not the more general and diffuse foundational priorities associated with thing-ownership. The ad hoc bundle conception implicit in this passage facilitates and reflects the sort of "expert-oriented view" at which Merrill and Smith are aiming.[7]

Many leading policy-oriented casebooks illustrate Ackerman's general approach.[8] Consider Joseph Singer's *Property Law: Rules, Policies, and Practices*.[9] The book's opening guide assumes "[o]wners of property generally possess a bundle of entitlements," and signals that the book is generally sympathetic to normative theories it clusters together as "social relations" theories, which examine "the role property rights play in structuring social relations" and vice versa.[10] Social-relations theories use the bundle conception to make property an instrument for equalizing power relations between sexes, among races, among people of different economic backgrounds, and in relation to other similar classifications.

Social-relations theory presupposes that property does and should consist of an ad hoc bundle of rights. *Property Law*'s epigraph comes from a criminal-trespass opinion, *State v. Shack*.[11] In *Shack*, the New

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5. BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 26 (1977). For a contemporaneous book review regarding Ackerman's book as a harbinger of trends like those discussed in the text, see Richard A. Epstein, *The Next Generation of Legal Scholarship?*, 30 STAN. L. REV. 635 (1978) (reviewing ACKERMAN, *supra*).

6. *See* ACKERMAN, *supra* note 5, at 11.

7. *See* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1866–67 & n.66 (2007).

8. For another example besides the examples considered in the text, see JOHN E. CRIBBET ET AL., PROPERTY: CASES AND MATERIALS 3 (9th ed. 2008) (questioning "what is meant by referring to Mary as the 'owner' of [a] car," and suggesting it is "more realistic to refer to specific enforceable claims by Mary regarding the car").

9. JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES (4th ed. 2006).

10. *Id.* at xxxix, xlix (emphases removed).

11. *See id.* at xi (quoting State v. Shack, 277 A.2d 369, 372 (N.J. 1971)). Singer's casebook is not the only casebook to make the move described in text. *See, e.g.*, CRIBBET ET AL., *supra* note 8, at 36 (using *Shack* to question "[a]t what point should an individual's right to exclude others give way to claims and interests of other persons and of society").

Jersey Supreme Court construed a farm owner's possessory interest in control narrowly, so he could not institute a trespass action against two government-funded migrant advocates who entered his property to meet a migrant worker he was housing on the farm.[12] To justify this holding, the court balanced the interests that justified the owner's claim to exclusion against the advocates' interests in doing their jobs and the migrants' interests in humane treatment.[13] The ad hoc bundle conception frames the legal issue so that the farmer's claim to exclude the advocates has no necessary relation to his rights to exclude competitors, squatters, or thieves. That conceptual framing subtly shifts the burden to the farmer. The advocates need not explain why they deserve to enter the farmer's land; he needs to explain why *he* deserves to exclude them.

A similar tendency occurs in economic writings on property, as one can see from consulting the Dukeminier-Krier casebook, *Property*.[14] *Property*'s presentation of nuisance illustrates important tendencies in mainline law and economics scholarship.[15] *Property* professes skepticism that nuisance has any internal coherence. In the introductory materials to the nuisance chapter, the editors ask, "Suppose two neighbors are engaged in incompatible land uses, such that if *A* gets his way *B* can't get her way, and vice versa. *Sic utere* gets you nowhere."[16] This question frames the property interests in nuisance in the same terms in which Ronald Coase framed them in *The Problem of Social Cost*,[17] and in which Guido Calabresi and A. Douglas Melamed did in *Property Rules, Liability Rules, and Inalienability*.[18] The Dukeminier-Krier casebook, like those works, assumes that the primary phenomena are "incompatible land uses." That framing leads the casebook, throughout the rest of the chapter, to ask how economic analysis might maximize the joint product of the two competing resource uses.[19]

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12. *See Shack*, 277 A.2d at 372–74.

13. *See id.* at 373–74.

14. The text refers to the "*Dukeminier-Krier*" book because *Property*'s living co-editors think the book "will always be" Dukeminier's. DUKEMINIER ET AL., *supra* note 3, at vii.

15. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 3.6, at 50–55 (7th ed. 2007); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 91–96 (2d ed. 1989).

16. DUKEMINIER ET AL., *supra* note 3, at 639. *Sic utere* refers to *sic utere tuo ut alienum non laedas*, or "use your own in such a manner that you don't harm another's." *See id.*

17. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

18. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

19. *See, e.g.*, DUKEMINIER ET AL., *supra* note 3, at 642–44, 648–49, 654–56. "Joint product" here refers to the sum of the values of the two productive uses, minus the negative externalities each inflicts on the other and any transaction costs. *See, e.g.*, ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 85–98 (3d ed. 2000).

A more comprehensive analysis would consider not only the parties' joint product but also the incentives legal rules would have on the judicial system and on all other parties that might be affected by the dispute's precedent. Some authorities, in that spirit, prefer to conceive of "use" as a zone, marked off by physical boundary rules, and proportionate to a land lot's size, which transfers to the owner policy control to decide how to use the land among a wide range of unenumerated uses.[20] Post-Coasean and *Cathedral* economic analysis, however, prefers to focus on the specific competing uses, because doing so allows the analysis to focus on fairly concrete, focused phenomena closely associated with the parties in dispute.[21]

Readers may object to the observations made thus far on the ground that the bundle of rights metaphor cannot make any normative claims. The bundle conception often refers to a formal analytical vocabulary, which consists of a series of pairs of rights and correlative obligations (claim-rights and duties, liberties and exposures, and so on) associated with Wesley Hohfeld and a list of specific incidents of ownership associated with Tony Honoré (use, disposition, income, and so forth).[22] This vocabulary is useful because it provides a language specifying what legal rights and obligations a particular property doctrine creates in terms of the precise obligations and parties.[23] Because it is a specification language, the Hohfeld-Honoré vocabulary cannot do justificatory work.[24]

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20. *See, e.g.*, Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979); Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965 (2004).

21. *See* Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights* (George Mason Law & Econ. Working Paper Series, Research Paper No. 08-20, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1117999.

22. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions in Legal Reasoning*, 23 YALE L.J. 16, 28–59 (1913), *reprinted in* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL LEGAL REASONING 35–64 (Walter Wheeler Cook ed., Greenwood Press 1978) (1919); A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest ed., 1961). Honoré's contribution may not actually support the claim in the text. As Merrill and Smith point out, *Ownership* is compatible with and premised on the assumption that "there is one correct meaning of property." (P. 16.)

23. *See, e.g.*, STEPHEN R. MUNZER, A THEORY OF PROPERTY 19 (1990) (praising the analytical vocabulary associated with the bundle for its "intellectual clarity, rigor, and power").

24. *See id.* at 18; Stephen R. Munzer, *Property as Social Relations*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 36, 45–46 (Stephen R. Munzer ed., 2001). In previous scholarship, I have not considered seriously enough the objections set forth in this paragraph. *See, e.g.*, Eric R. Claeys, *The* Penn Central *Test and Tensions in Liberal Property Theory*, 30 HARV. ENVTL. L. REV. 339, 354 (2006); Eric R. Claeys, Takings*: An Appreciative Retrospective*, 15 WM. & MARY BILL RTS. J. 439, 447–51 (2006) [hereinafter "Claeys, *Takings Retrospective*"]; Eric R. Claeys, *Takings and Private Property on the Rehnquist Court*, 99 NW. U. L. REV. 187, 203–20 (2004). The account set forth in this Part supersedes those discussions. In short, generalizations I make about the "bundle of rights" conception in those works are appropriately directed toward what I call here the "ad hoc bundle of rights" conception.

For example, the earliest usage of the term "bundle" of which I am aware comes from John Lewis's *Treatise on the Law of Eminent Domain*.[25] Lewis argues that the government condemns property whenever it removes any stick from the bundle.[26] If the bundle conception were as tied as thoroughly to instrumentalist policy analysis as I have suggested to this point, Lewis could not have used it.

Merrill and Smith do not deal with this objection explicitly, but I read them to finesse it. Merrill and Smith aim not at the bundle metaphor pure and simple, but rather at the ad hoc bundle conception of property.[27] As J.E. Penner has explained, "the bundle of rights perspective on property is entirely innocuous if regarded merely as an elaboration of the scope of action that ownership provides."[28] Merrill and Smith seem to agree, by refraining from contrasting their thesis with a bundle conception pure and simple. They seem to be targeting judicial opinions like *Shack* and academic scholarship like social-relations or post-Coasean economic scholarship, in which the bundle metaphor does covert normative work. Of course, conceptual philosophers may still think Merrill and Smith's targets in the law and the law reviews (and Merrill and Smith themselves) are using philosophical concepts badly. Yet, since Merrill and Smith are writing a casebook, they must take foundational property law and scholarship as it is—not in the pristine form in which conceptualists would like it to be.

To avoid confusion, this Essay uses the following conventions. When speaking of the bundle metaphor as a value-neutral analytical specification vocabulary, this Essay refers to "the Hohfeld-Honoré vocabulary." When referring to lawyers or scholars who argue, like Lewis, that property should include any valuable right that could conceivably belong in the bundle, this Essay refers to the "coordinated bundle conception." My main focus here, however, is on a third conception—which, following Merrill and Smith, I call the ad hoc bundle conception. In part, this conception assumes or states a conceptual claim

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25. JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 55, at 43 (1888) ("The dullest individual among the *people* knows and understands that his *property* in anything is a bundle of rights."). On the earliest reference to the bundle metaphor, see GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970, at 455 n.40 (1997).

26. *See* LEWIS, *supra* note 25, § 56, at 45 ("whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, *pro tanto*, taken").

27. P. v (emphasis added).

28. J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 741 (1996).

that "property" is a nominalist concept.[29] In part, the ad hoc bundle conception reflects a common tendency in a diverse collection of legal materials to use the bundle metaphor to frame policy issues in ways that facilitate instrumentalist normative arguments.

III. CHANGING TRENDS

Most leading first-year property casebooks reflect the instrumentalist tendencies that Merrill and Smith identify with the ad hoc bundle conception. Over the last generation, however, property scholarship has changed in ways that have created an opening for a new property casebook. Law and economics is more respectable now than it was an academic generation ago. Although other property casebooks cover law and economics, there now exists a market for a casebook that uses economics as the main analytical tool for critiquing property law.[30]

Separately, property scholarship has become more sympathetic to expansive conceptions of property. For example, Richard Epstein published *Takings*, which, among other things, resuscitated and explained classical-liberal assumptions about property already latent in American common law. As John Lewis had, Epstein argued that the state condemned property whenever it extinguished any specific right of ownership in an owner's coordinated bundle of rights.[31]

Separately, non-property law and economic scholarship has become more solicitous of expansive property rights. New institutional economists have explained how particular societies developed property rights for particular resources, or how property rights evolved to keep up with legal and economic developments.[32] Economic studies of regulation have raised serious public-choice objections to the claim, implicit in

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29. *See, e.g.*, Thomas C. Grey, *The Disintegration of Property*, *in* PROPERTY: NOMOS XXII 69, 81 (J. Roland Pennock & John W. Chapman eds., 1980) (concluding that "[t]he substitution of a bundle-of-rights for a thing-ownership conception of property has the ultimate consequence that property ceases to be an important category in legal and political theory"); Barry Hoffmaster, *Between the Sacred and the Profane: Bodies, Property, and Patents in the* Moore *Case*, 7 INTELL. PROP. J. 115, 130 (1992) ("A strategy that begins by defining the 'essence' of property and then applies this definition to the facts . . . is fallacious because if there are any essentialist concepts at all, property is not one of them.").

30. *See, e.g.*, Andrew P. Morriss, *Review of Jesse Dukeminier & James E. Krier,* Property *(4th Edition 1998)*, 22 SEATTLE U. L. REV. 997, 1008 (1999) (book review) (complaining that Dukeminier & Krier "pay little attention to the new, expanded approach to the economic analysis of the definition of property rights' associated with the new institutional economics").

31. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 35–158 (1985); Claeys, *Takings Retrospective*, *supra* note 24, at 451–52.

32. *See, e.g.*, GARY D. LIBECAP, CONTRACTING FOR PROPERTY RIGHTS (1989); Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163 (1975). *See also* HANDBOOK OF THE NEW INSTITUTIONAL ECONOMICS (Claude Ménard & Mary M. Shirley eds., 2005).

much instrumentalist economic scholarship, that political processes can direct how an asset is used without creating substantial rent-seeking or seriously diminishing productive use of the asset.[33] In economics, Friedrich Hayek argued that property was best understood as a clear set of legal and social "expectations . . . designating . . . ranges of objects over which only particular individuals are allowed to dispose and from the control of which all others are excluded."[34] Cumulatively, these various fields have suggested that owners are more productive with assets when the law endows owners with broad zones of control than when rights are "dictated from central authorities with less stake in the outcome."[35]

More recently, conceptual philosophers have proposed serious alternatives to the definition of property as a bundle of rights. Although J.W. Harris contributed importantly to this project,[36] I will follow Merrill and Smith, who focus more here on the work of J.E. Penner.[37] To the extent the bundle conception claims to be more than a specification jargon, Harris and Penner argued, it is problematic. The bundle conception is best at explaining specific *examples* of property rights and duties, but it is much less effective at explaining how owners and strangers both use property to process particular rights and duties without needing to keep tedious lists in hand.[38] For example, principals' and agents' obligations to one another may vary considerably depending on particular circumstances. By contrast, the owner of a car does not need to have any dealings with non-owners to reasonably expect that they will refrain from stealing his car.[39] The Hohfeld-Honoré vocabulary could specify all of the relevant relations in both cases. But that vocabulary misses fundamental facts. The term "property" structures the duties strangers owe an owner to apply more crudely and widely than the duties an agent owes a

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33. *See, e.g.*, ROGER G. NOLL, REFORMING REGULATION (1971); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974).

34. 1 FRIEDRICH A. HAYEK, LAW, LEGISLATION, AND LIBERTY 107 (1973).

35. TERRY L. ANDERSON & PETER J. HILL, THE *NOT SO* WILD, WILD WEST 8 (2004).

36. *See* J.W. HARRIS, PROPERTY AND JUSTICE (1996); J.W. Harris, *Reason or Mumbo Jumbo: The Common Law's Approach to Property*, 117 PROC. BRIT. ACAD. 445 (2002).

37. J.E. PENNER, THE IDEA OF PROPERTY IN LAW (1997); Penner, *supra* note 28. Penner and Harris were not the first to consider property from this perspective. For example, Munzer, who uses the Honoré-Hohfeld vocabulary, *see supra* note 23, acknowledges that it "is as applicable to tort and contract . . . as it is to property," *id.* at 22, and that the "popular [thing] conception has a depth which might be overlooked," *id.* at 74. That said, Harris and Penner drew stronger implications from the lay or thing perspective than previous scholarship had.

38. HARRIS, *supra* note 36, at 63–99; Harris, *supra* note 36, at 460.

39. *See* PENNER, *supra* note 37, at 75–76. Penner applies to the institution of property Joseph Raz's account of exclusionary reasons for action and abstention. *See* JOSEPH RAZ, PRACTICAL REASON AND NORMS 33–47 (2d ed. 1990), *cited in* PENNER, *supra* note 37, at 7–10.

principal; and property operates by signaling to strangers that they should abstain from using owners' assets.

Elaborating from insights like these, Harris and Penner proposed definitions of property stressing property's exclusionary tendencies. Harris defined property as a combination of core trespassory rules and a more nebulous "spectrum" of use interests an owner might claim in the object of trespassory protection.[40] Penner defined property as a legal right to exclude others from things.[41] This right is *in rem*, not *in personam*, which is to say that non-owners discharge their duty to abstain from an asset not by dealing directly with the owner but rather by keeping away from the thing. Even if 1,000 passers-by each owe a car owner the same Hohfeldian duty to refrain from stealing his car, all discharge it by internalizing a social norm not to take cars they do not own.[42]

These developments have challenged both aspects of the claim that property consists of an ad hoc bundle of rights. On the conceptual side, the fact that people manage to steer around the ownership rights of neighbors and strangers lends credibility to the idea that property can be organized around a simple concept like exclusion or exclusivity. On the economic side, property rights may be designed more for concerns at the base than for concerns at the apex of the proverbial pyramid. Merrill and Smith have drawn on both sets of insights in their academic scholarship;[43] now they are aiming to bring these insights into the classroom.

IV. *PROPERTY: PRINCIPLES AND POLICIES* VERSUS THE AD HOC BUNDLE

Property: Principles and Policies is organized around a tension between foundational ordering and expertise, which Merrill and Smith describe as "exclusion" and "governance." "Under an exclusion strategy, decisions about resource use are delegated to an owner who acts as the manager or gatekeeper of the resource," while governance "focuses on particular uses of resources, and prescribes particular rules about permitted and prohibited uses without regard to the other attributes of the resource." (P. 29.) In Merrill and Smith's account, property establishes "clarity at the core," for objects like land or cars, by endowing owners with an *in rem* and largely undifferentiated right to exclude outsiders. By contrast, there is "messiness at the perimeter" of property, as the

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40. HARRIS, *supra* note 36, at 5.

41. *See* PENNER, *supra* note 37, at 71; HARRIS, *supra* note 36, at 141–42 (defining property as including interests protected by trespassory protections).

42. *See* PENNER, *supra* note 37, at 25–28.

43. Rather than cite all of that scholarship here, I will cite it in footnotes relevant to particular topics raised in *Property: Principles and Policies* discussed hereafter.

gains from intensive and coordinated resource management start to dwarf the transaction costs of such management. (P. 22.)[44]

The book's first chapter illustrates this tension with basic trespass and nuisance. Other casebooks have no thematic discussions of trespass; the doctrine gets passing treatment in chapters on original acquisition[45] or on general property theory.[46] By contrast, *Property: Principles and Policies* starts with *Jacque v. Steenberg Homes, Inc.*,[47] in which the Wisconsin Supreme Court affirms a $100,000 punitive-damage award for a harmless but intentional trespass. (*See* pp. 1–7.) As a foil, Merrill and Smith present *Hinman v. Pacific Air Transport*, which adds elements to trespass to make it virtually impossible for land owners to enjoin high-altitude airplane overflights.[48] In *Jacque*, the court insists that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property,"[49] and worries that jeopardizing this right threatens "the integrity of the legal system."[50] Yet in *Hinman*, the court quietly limits the right to exclude.

Merrill and Smith explain the tension by introducing the thing and ad hoc bundle conceptions to students. They introduce students to Penner's stolen-car example and his definition of property as an *in rem* right to exclude others from a thing. (*See* pp. 16–17.) Property normally entitles an owner to security by imposing, on the hundreds or thousands of strangers likely to interact with her thing, a "strict liability" duty that is simple and easy to follow. (P. 7.) Because the duty is *in rem*, the strangers do not need to interface with the owner to discharge it. Of course, sometimes boundary rules need to give way to coordinated resource management for multiple parties. Hence *Hinman*. This dichotomy does not explain all of trespass. I am puzzled, for example, why Merrill and Smith do not consider whether *State v. Shack* presents a case at the core (in which case it was wrongly decided) or at the perimeter (in which case it was correctly decided).[51]

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44. *See also* Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13 (1985); Merrill & Smith, *supra* note 4, at 394–97; Smith, *supra* note 20.

45. *See* DUKEMINIER ET AL., *supra* note 3, at 86–93.

46. *See* CRIBBET ET AL., *supra* note 8, at 35–43.

47. 563 N.W.2d 154 (Wis. 1997).

48. Hinman v. Pac. Air Transp., 84 F.2d 755 (9th Cir. 1936), *excerpted* pp. 9–13.

49. *Jacque*, 563 N.W.2d at 159–60 (quoting Dolan v. City of Tigard, 512 U.S. 374, 384 (1994)).

50. *Jacque*, 563 N.W.2d at 160.

51. *See* pp. 405–08. For my doubts about *Shack*, see Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. (No. 4, forthcoming 2009) (manuscript at 149–55, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1331493).

In any case, Merrill and Smith use the same tension to explain another foundational principle—property presumes injunctions ("property rules") but leaves room for damages-only remedies ("liability rules") in extreme cases.[52] Injunctions reduce the information costs that nonowners must expend to understand what they need to do to abstain from owners' assets. Equity may balance interests when the facts of a case tip strongly in the other direction; as a first cut, however, the law enforces *in rem* exclusion by presuming that the law enjoins ongoing trespasses. (*See* pp. 53–55.) If these principles seem obvious, they are not—at least, not to students who learn that property consists of an ad hoc bundle of rights to be assigned in an instrumentalist fashion. For example, other leading casebooks do not discuss in substantial detail the standards for getting an injunction after a trespass.[53]

Merrill and Smith carry the same tension forward to their discussion of nuisance. In instrumentalist authorities, nuisance serves as a metaphor for the principle that property requires judges or regulators to choose between two conflicting resource uses. Post-Coasean economic scholarship exhibits this tendency, but so does the *Restatement (Second) of Torts*. The *Restatement* marks off any disturbance that could possibly annoy a land owner as a potential nuisance; to determine whether it is a legal nuisance, fact finders must balance the competing uses through utilitarian interest balancing.[54] Some prominent casebooks follow the *Restatement* literally. One book gives students a dispute between an owner who wants to add a second story to his house and a neighbor who will lose solar energy after the addition is built. The notes encourage readers to ask how they would balance seven pages of arguments about development, conservation, and other factors relevant to the dispute.[55]

In practice, however, nuisance cases are decided much more often by appeal to boundary-driven exclusion principles. Merrill and Smith drive this point home with the private-nuisance case *Hendricks v. Stalnaker*.[56] Stalnaker dug a water well on his own property, in large part to preempt Hendricks, with help from local zoning rules, from installing a septic tank on his adjacent property.[57] Dutifully citing the

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52. *Cf.* Calabresi & Melamed, *supra* note 18.

53. *See* CRIBBET ET AL., *supra* note 8, at 679–91; DUKEMINIER ET AL., *supra* note 3, at 646–65 (both discussing remedies in nuisance without any preceding substantial discussion of remedies in trespass).

54. *See* RESTATEMENT (SECOND) OF TORTS §§ 821D, 825–28 (1979).

55. *See* SINGER, *supra* note 9, § 4.4, at 309–16 (citing Prah v. Maretti, 321 N.W.2d 182 (Wis. 1982)).

56. 380 S.E.2d 198 (W. Va. 1989), *excerpted* pp. 23–27.

57. Under local regulations, septic systems and water wells could not be closer than 100 feet apart. *See id.* at 199–200, *quoted* pp. 23–24.

Restatement, the opinion announces that nuisance requires "a balancing of the landowners' interests."[58] Yet, *Hendricks* does not conduct a serious cost-benefit analysis—it instead reverses a jury verdict for Hendricks with instructions to dismiss his complaint. (*See* p. 27.) The court's interest balancing really consists of little more than the application of a simple boundary rule: Hendrick's "septic system, with its potential for drainage, places a more invasive burden on adjacent property" than Stalnaker's well.[59]

The term "invasive" is extremely revealing. Even though it cited the *Restatement*, the *Hendricks* court actually conceived of the possessory interest in nuisance as an *in rem* zone of exclusive policy control. To mark off that zone, nuisance law makes anything that is a "mini-trespass" a presumptive nuisance, and then qualifies that presumption to conform to "the general understanding in the relevant community of what constitute 'normal uses' of land." (P. 28.) Thus, access-to-light cases get thrown out as a threshold matter because they lack a physical invasion. (*See* p. 947.)[60] Light cases cannot be settled without fine-grained interest-balancing. Such balancing is often "too subjective to serve as the basis for a rule of property law" (p. 28) and imposes "decisional costs . . . too high." (Teacher's Manual p. 21.)

Merrill and Smith's organizing theme also helps them bring out interesting policy issues in areas of property that tend to resist policy analysis. For example, even in more theoretical casebooks, high theory usually takes a break in the chapters on estates and future interests. Students need to learn these rules, but most professors and books assume that the rules "have no better reason . . . than that so it was laid down in the time of Henry IV."[61] *Property: Principles and Policies* has a more sympathetic explanation. If property is going to be *in rem*, strangers need to be able to process easily what estates and interests the owners hold, and recipients of property need to know what rights they are getting. These needs limit the present possessory estates to a few simple and familiar forms, including the fee simple, the life estate, and the leasehold. (*See* pp. 576-95.)[62]

Some teachers assume that any casebook that stresses policy must not take doctrine seriously. I would not make this assumption about any

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58. *Id.* at 202 (citing RESTATEMENT (SECOND) OF TORTS § 826 (1979)), *quoted* p. 25.

59. *Id.*, *quoted* p. 26.

60. *Accord* Mohr v. Midas Realty Co., 431 N.W.2d 380 (Iowa 1988); Sher v. Leiderman, 226 Cal. Rptr. 698 (Cal. Ct. App. 1986); Green v. Castle Concrete Co., 509 P.2d 588 (Colo. 1973).

61. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

62. *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001).

of the well-established property casebooks, and I would not make it about *Property: Principles and Policies*. Chapter 1's introduction of the injunction/damages choice is presented not only to introduce the theory behind the *Cathedral* but also to make sure that students get some exposure to equity, while they are still learning foundational legal concepts in their first year. Chapter 8, on recording, provokes a rich discussion when the law needs centralized records. (Consistent with the exclusion/governance continuum, low-value and fungible assets do not need records, but high-value and non-fungible ones do. (*See* pp. 900–17.)) Before getting there, however, Merrill and Smith start with the common law default principle *nemo dat quod non habet*—"no one can give that which he does not have." (P. 884.) Merrill and Smith slip in a foundational lesson for the future practitioner here, about how statutes build on and interact with the common law.

By focusing so much on the exclusion/governance continuum, *Property: Principles and Policies* suffers where this continuum is not really relevant to the doctrine. For example, many other casebooks start with acquisition.[63] Substantively, land is usually subject to permanent and exclusionary ownership, and water to usufructuary rights. These generalizations are contingent on economics and social context which come out in sound discussions of acquisition.[64] Because *Property: Principles and Policies* is organized around exclusion, however, such questions are treated in a fragmented manner.

The acquisition of land, chattels, and property in ideas is covered in Chapter 2, on "original acquisition." (Pp. 81–164.) Yet Chapter 2 also covers several important rules of *secondary* acquisition: accession, finding, and adverse possession. (Pp. 165–242.) By contrast, the rules for acquiring property interests in water and spectrum are covered in Chapter 3, on "values subject to private ownership." (Pp. 349–92.) I am left wondering why *Property: Principles and Policies* did not organize these topics to track the underlying theoretical issues. All the same, teachers do not need to follow the book's organization in lockstep. Moreover, the modules on each topic are quite attentive to the subtleties along the border between public and private resources. For example, Merrill and Smith enrich the materials on first possession by excerpting from the new institutional-economics scholarship on "open access,"

63. *See, e.g.*, BARLOW BURKE ET AL., FUNDAMENTALS OF PROPERTY LAW 1–6 (2d ed. 2004); DUKEMINIER ET AL., *supra* note 3, at 3–86; SINGER, *supra* note 9, at 3–102.

64. *See, e.g.*, Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993).

"common property," and other forms of public commons.[65] One gem of the book is Merrill and Smith's systematic treatment of the phenomenon of accession, whereby the law assigns ownership of one resource (a calf or air space) to the owner of a second resource in close proximity to the first (a cow or the ground, respectively). (Pp. 165–94.) Accession reflects a deep preference in the law to get relatively valueless, but potentially valuable, assets out of the public realm and into private ownership.

Taking all the different parts of the book together, however, *Property: Principles and Policies*' focus on exclusion is an asset. Exclusion explains many foundational areas of property law that get short shrift or unsympathetic treatment in other casebooks that start from instrumentalist normative premises.

V. THING-OWNERSHIP AS AN ANALYTICAL CONCEPT

In the course of making exclusion respectable, Merrill and Smith have opened up a new round of questions about what exactly exclusion and thing-ownership mean. Merrill and Smith are economists using a "thing" conception in the course of normative economic arguments. When one is evaluating their project, one must treat it as one would treat scholarly arguments that draw on the ad hoc bundle metaphor—separate the conceptual claim from the normative claim and treat each on its own terms. This Part critiques the conceptual claims conceptually, and Part VI focuses primarily[66] on critiquing the normative claims economically.

A. Exclusivity: Traditional Conceptions

I disagree with Merrill and Smith that thing-ownership may be reduced to an owner's right to exclude others from his thing. Instead, I prefer to say that property refers to a right to determine exclusively how a thing may be used.[67]

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65. *See* Thráinn Eggertson, *Open Access versus Common Property*, *in* PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW (Terry L. Anderson & Fred S. McChesney eds., 2003), *excerpted* pp. 95–99.

66. To avoid unnecessary repetition of examples, Part VI also illustrates the conceptual criticisms explained in Part V. But Part VI focuses primarily on normative economic issues.

67. I borrow this phrase from PENNER, *supra* note 37, at 49, but I may be using it differently from the manner in which I read him to be doing so. As I understand Penner, he uses this definition to describe the normative interest that social and legal property vindicates. However, when a society reduces that interest to laws or social norms, it does so by vesting in owners rights to exclude others from their things. *See, e.g.*, *id.* at 103 (defining the right of property as "the right to determine the use or disposition of a thing *in so far as that can be achieved or aided by others excluding themselves from it*" (emphasis added)). The social–legal interests are, therefore, more binary and boundary-driven than the normative interests they seek to protect. My agreements and disagreements with Penner will need to be elaborated elsewhere.

Consider a definition of property from a time when thing-ownership was a much more settled feature of property law: "that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others."[68] In this definition, the core of property is the owner's "dominion" or "indefinite right of user and disposition." Dominion connotes a zone of policy control (if one is a social scientist), or a domain of practical discretion (if one stays closer to case law and everyday language[69]). In either case, that discretion endows the owner with freedom within which to deploy the property to any of a wide range of uses. Adam Mossoff calls this domain a "right of use," consistent with early Enlightenment property theory.[70] Larissa Katz calls the domain "agenda-setting,"[71] probably to avoid confusion with "use" in the sense of Coasean individualized-use entitlements.

This conception of property is not the only way to describe property as a social concept and, as a result, it has its limitations. At the same time, I doubt alternative definitions can hang together without reference to an owner's interest in determining the use of an asset. On the one hand, when the "bundle" metaphor is used to refer to a coordinated and robust set of property rights rather than a normative claim about property, exclusive use determination explains why all of the various rights that go into the bundle belong there. Analytically, a bundle conception can both explain why any slice of pizza is still "pizza," and describe and account for all the slices of a single pizza even if those slices come in different shapes and sizes. Yet one needs a separate definition of "pizza" to determine whether a bagel pizza or any slice of it really counts as "pizza." So too with property. In isolation, the bundle conception does not explain why any one bundle is peculiarly a bundle of *property* rights. Blackstone defined property as a bundle, as the "free use, enjoyment, and disposal of all [of an owner's] acquisitions, without any control or diminution, save only by the laws of the land."[72] But he balanced that definition by also defining property as "sole and despotic dominion which one man claims and exercises over the external things

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68. 19 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 284 (John Houston Merrill ed., 1892).

69. *See* JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 168 (1988) ("right to choose which of a number of possible uses shall be made of" the asset).

70. Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 396 (2003).

71. Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 278 & n.9 (2008).

72. WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND *134 (William S. Hein & Co., 1992) (1765).

of the world, in total exclusion of the right of any other individual."[73] Exclusive use determination provides at the core of property what Honoré calls the "delineation . . . essential . . . in order that it may be possible to assess the strength of the analogies in the peripheral cases."[74]

On the other hand, exclusive use determination gives conceptual focus to the "exclusion" in a right to exclude. In the encyclopedia definition that opened this Part, "exclusion" is not necessary to property; it is only "generally" a feature of property. Moreover, property exclusion does not exclude non-owners from the *res* or thing, but rather from the "dominion or indefinite right of user or disposition" associated with the thing.[75] Merrill and Smith are not sensitive enough to this difference, as they make clear when they treat the Blackstone definition just quoted above. Blackstone makes the operative noun "dominion."[76] Exclusion excludes others not from the thing, but from the owner's dominion over the thing's use. After quoting Blackstone's definition verbatim, however, Merrill and Smith paraphrase him to mean "the right of an owner to exclude others from her 'thing.'" (P. 393.) Dominion drops out and exclusion goes out of an adverbial clause into the center of the definition.[77]

An exclusive right of use determination has more focus and determinacy than a right to exclude. Exclusive use determination describes property as an interest. The bearer of such an interest enjoys a domain of negative liberty,[78] but the domain is structured to encourage owners to deploy ownable assets to most of the productive uses for which property is typically used. By contrast, a right to exclude from the thing merely

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73. 2 *id.* at *2.

74. Honoré, *supra* note 22, at 111. Richard Epstein suggests that the bundle of rights conception is an analytically complete account of property. *See* Richard A. Epstein, *The Disintegration of Intellectual Property* 7 (Univ. of Chicago Law & Econ., Olin Working Paper No. 423, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1236273. Although the argument in text requires more development than I can give it here, the text should suggest why I am not persuaded.

75. *Accord* Katz, *supra* note 71, at 277–78 (distinguishing an owner's exclusive "position" in relation to an object from the owner's power to exclude from the "object"); Mossoff, *supra* note 70, at 396 (the right to exclude "is the right to exclude from the *right of use*"). The reservations Katz, Mossoff, and I all draw toward about Merrill and Smith's definition of property apply as well to Harris's trespass-based definition of property. *See* notes 38 & 40 and accompanying text.

76. Some suggest that Blackstone did not mean this definition except as a hyperbolic first cut. *See, e.g.*, Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601 (1998); David Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQ. L. 103 (2009). I doubt these critics appreciate sufficiently how Blackstone uses "dominion" as a term of art.

77. *See* Mossoff, *supra* note 70, at 397–400.

78. *See* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 118–72 (1969), *cited in* PENNER, *supra* note 37, at 50 n.48.

states a particular outcome. It abstracts away from the general context and principles that explain why the outcome is justified.[79]

To appreciate the difference, consider the case study that launched Michael Heller's "anti-commons" theory—empty Moscow department stores.[80] Streetside kiosks sold far more goods than department stores because department stores could not sell goods or services without getting prior approval of six different regulatory agencies.[81] Heller calls these collectives and agencies "owners" because they have property "in the sense that they could block other rights-holders from using a store without permission."[82] Implicitly, Heller assumes that "property" means a right to exclude. The collectives and agencies are owners because they may exclude the real owners from productive commercial use. However, from Blackstone's perspective, Heller's classification makes a conceptual category mistake. The agencies' rights to exclude cannot be property rights because the exclusion does not protect any interest the agencies have in making productive use of the stores.

Although this insight is conceptual and not normative, it illustrates why sound concepts matter. As Heller points out, Moscow's regulatory system is simply indefensible. The system creates multiple hold-out opportunities for parties who have nothing to contribute to the stores' profitability. Yet a property system would grind to a halt if it needed to wait on academics like Heller to explain in great detail why the law should not entitle the agencies with rights to exclude. When legal and social actors internalize property as an interest in exclusive use determination, their conceptual priors automatically screen out veto or blockade rights. The legal system should not need to expend substantial administrative costs rejecting legal conceptions that will invite rent-seeking with no corresponding payoff.

B. Exclusion: The Realist Transformation

Now, a right to exclude can refer merely to a formal analytical right, without any necessary practical implications. All the same, the

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79. Stephen Munzer doubts that property is exclusive in this sense because joint tenants or partners may "have legal interests in the same thing." MUNZER, *supra* note 23, at 89. Yet the co-owners, as a group, enjoy ownership and use exclusive from the rest of the world. Their rights and duties to one another are more complicated, but their relations with the outside world remain property relations because of that exclusivity.

80. *See* MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES, at xiv–xv (2008); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

81. Heller, *supra* note 80, at 637–40.

82. *Id.* at 636.

right to exclude can get co-opted to do normative work in conceptual clothing. The Hohfeld-Honoré vocabulary has been co-opted in instrumentalist property law and scholarship to become the ad hoc bundle. The right to exclude was also co-opted by prominent Legal Realists.

This suggestion may sound surprising to contemporary property scholars, who often assume that the ad hoc bundle conception was the only legacy from Realist property scholarship.[83] (In their academic scholarship, Merrill and Smith have popularized this assumption.[84]) Yet other Realists contributed another legacy, of property as a formal right to exclude. This legacy is as susceptible to instrumentalist transformation as the ad hoc bundle conception. In trying to avoid the problems they see with ad hoc bundle theory, Merrill and Smith may not sufficiently appreciate the limitations of Realist's right to exclude theory.

Anglo-American property law has conceived of property in terms of dominion, indefinite user, or exclusive use determination in large part because it was developed when (loosely speaking) Lockean natural-rights theory shaped the law. According to this theory, property should be designed to maximize owners' policy-making control for likely productive uses of property, consistent with similar owners enjoying similar domains of freedom for productive use.[85] In the early twentieth century, however, natural-rights theory came under severe criticism. Leading American politicians and academics propounded new progressive theories of government, which justified instrumentalist regulation of property and contract to a much greater degree than had natural-rights theory.[86] As Merrill and Smith point out, many politically-involved Realists also sought to find a conceptual way to "smooth the way for activist state intervention in regulating and redistributing property."[87]

One account came from Hohfeld's taxonomy of correlative rights and duties. Hohfeld was not a Realist himself; he was a conceptualist clarifying what he regarded as longstanding misconceptions in legal practice and in analytical philosophy. Hohfeld developed the formal analytical vocabulary associated with the bundle of rights, even though he is not known to have used that phrase himself.[88] Nevertheless, lead-

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83. *See, e.g.*, Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 29 ARIZ. ST. L.J. 1075, 1077–80 (1997).

84. *See* Merrill & Smith, *supra* note 4, at 363–65.

85. *See* Mossoff, *supra* note 70.

86. *See* 1 RICHARD T. ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTIONS OF WEALTH 107 (1914); CHARLES EDWARD MERRIAM, A HISTORY OF AMERICAN POLITICAL THEORIES 307 (1924).

87. Merrill & Smith, *supra* note 4, at 365.

88. *See* ALEXANDER, *supra* note 25, at 319 & n.24.

ing Realists appropriated Hohfeld's conceptual work[89] and used it to justify interventionist property regulation.[90] We can all thank these Realists for making respectable "applied" conceptual theory generally and the ad hoc bundle conception particularly.[91]

Other Realists, however, shied away from the ad hoc bundle conception. As Merrill and Smith recognize, the ad hoc bundle conception justifies an "extreme nominalism" (Teacher's Manual p. 19), whereby property becomes a "general term for the miscellany of equities that persons hold in the commonwealth."[92] To avoid that tendency, in *The Common Law*, proto-Realist Oliver Wendell Holmes described the owner as the one who is "allowed to exclude all, and is accountable to no one."[93] According to Morris Cohen, "the law of property helps me directly only to exclude others from using the things which it assigns to me."[94] In opposition to the nominalism he must have encountered among other Realists, Felix Cohen concluded that "ownership is a particular kind of legal relation in which the owner has a right to exclude the non-owner from something or other."[95] In contrast with the ad hoc bundle conception, all three of these definitions preserve some "thingness" to property.

When these Realists reconfigured property to focus on exclusion, however, they diminished property's connection to productive use.[96] To illustrate, consider how the three different conceptions apply to a simple rent-control ordinance. Under the natural-rights regime, unless the state had granted the owner-landlord an exclusive, legal monopoly in the relevant rental market,[97] both common law and constitutional law pre-

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89. *See, e.g.*, Arthur R. Corbin, *Taxation of Seats on the Stock Exchange*, 31 YALE L.J. 429, 429 (1922) (asserting that "'property' has ceased to describe any *res*, or object of sense, at all, and has become merely a bundle of legal relations—rights, powers, privileges, immunities").

90. *See, e.g.*, Robert L. Hale, *Rate Making and the Revision of the Property Concept*, 22 COLUM. L. REV. 209, 214 (1922) (recasting "[t]he right of ownership in a manufacturing plant" as "a *privilege* to operate the plant, plus a *privilege* not to operate it, plus a *right* to keep others from operating it, plus a *power* to acquire all the rights of ownership in the products").

91. *See, e.g.*, RESTATEMENT OF PROPERTY §§ 1–4 (1936) (presenting as the foundation of property law Hohfeld's taxonomy of correlative legal relations).

92. *See, e.g.*, Walton H. Hamilton & Irene Till, *Property*, *in* 11 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 528 (Edward R. A. Seligman & Alvin Johnson eds., 1937).

93. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 246 (1881).

94. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 12 (1927).

95. Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 370 (1954).

96. Adam Mossoff deserves credit for focusing attention on the Realist right to exclude theory, and he has also suggested that this theory has important ramifications in patent law. *See* Mossoff, *supra* note 70, at 395–97; Adam Mossoff, *Patents As Property: Conceptualizing the Exclusive Right(s) in Patent Law*, HARV. J. L. & TECH. (forthcoming 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1239182.

97. *See, e.g.*, Munn v. Illinois, 94 U.S. 113, 147–54 (1876) (Field, J, dissenting). Natural-rights principles might also justify rate regulation when an owner enjoys not a legal but still a natural

sume that each property owner enjoys a broad right to "fix what price he pleases upon his own property or the use of it."[98] Both the general right and the anti-monopoly exception advance the substantive end of natural-rights theory—to encourage each owner productively to "make[] the most of his own."[99] Exclusive use determination gives conceptual focus to this normative interest. The landlord has a right to set rent because he has a more general and exclusive right to choose how to use his land. Unless it enforces the anti-monopoly proviso inherent in a landlord's title, the rent-control ordinance takes the landlord's property.[100]

By contrast, 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 delineating the owner's entitlements, of course, the ad hoc bundle conception does not determine whether the ordinance takes property. That determination is not conceptual but normative. In the hands of an interventionist, however, the ad hoc bundle conception accentuates the positive and eliminates the negatives. Reminding the owner and the law of the rights the owner retains suggests that the owner is being selfish to whine about the disposition rights being extinguished.[101] This preconception makes it easier for public law to discount the owner's lost disposition rights and rental income in context of the owner's other possible sources of income.

At least in this hypothetical, the Realist right to exclude conception recasts the owner's entitlements in a manner similar to the bundle of rights.[102] The owner has conceptual property in a right to exclude out-

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monopoly over a commercial service. However, some jurists who subscribed to natural-rights principles rejected this possibility, see for example, People v. Walsh, 22 N.E. 682, 684–89 (N.Y. 1889) (Peckham, J., dissenting), *aff'd sub nom.* Budd v. People, 143 U.S. 517 (1892), and we need not consider it here.

98. Allnutt v. Inglis, 104 Eng. Rep. 206, 210 (1810) (opinion of Lord Ellenborough). *See also* Wynehamer v. People, 13 N.Y. 378, 396 (1856) (opinion of Denio, J.) (deducing a general right of commercial disposition from the ownership of property).

99. *Allnutt*, 104 Eng. Rep. at 208.

100. According to Penner, when property is defined as a right of exclusive use determination, it need not cover the right to dispose of the asset or some portion of the asset by commercial transaction. That right can be covered by the social concept of "contract" without coming under the social concept of "property." *See* PENNER, *supra* note 37, at 91–92. Yet, Penner does not say that "property" *precludes* commercial use and disposition, only that the concept of property does not automatically *cover* commercial use and disposition. *See id.* As cases like *Allnut* suggest, natural-rights political morality shaped Anglo-American local conceptions of property to cover commercial use and disposition.

101. *See, e.g.*, Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130–31 (1978).

102. *See* Cohen, *supra* note 94, at 12–14; *cf.* Block v. Hirsh, 256 U.S. 135, 156 (1921) ("if to answer one need the legislature may limit height to answer another it may limit rent").

siders from the premises. The law might endow him with the right to capture all the commercial potential of the apartment building, but it could just as plausibly configure the landlord's rights to leave out the potential for commercialization. The U.S. Supreme Court now calls the "power to exclude . . . one of the most treasured strands in an owner's bundle of property rights."[103] Yet the Court has—unanimously—construed this power not to cover the power to exclude tenants who do not want to pay the rent the landlord wants to charge.[104]

Exclusion has more content in *Property: Principles and Policies* than it did for Holmes or the Cohens. When these Realists spoke of exclusion, they concentrated primarily on the blockade right Heller called property in the hands of Moscow regulatory agencies.[105] Merrill and Smith construe exclusion to refer to boundaries and the incidents of control and use protected by boundaries. Exclusion establishes a fence and designates the owner the gatekeeper of everything within the fence. (*See* p. 29.) At the same time, *Property: Principles and Policies*' rendition of exclusion still states an outcome and not an interest. Recall that the right to exclude is only "the core case" for property (p. 22), while out on the perimeter, exclusion gives way to welfare-maximizing governance regimes. (Pp. 29–30.)[106] One always needs to ask, then, whether a given area of property law lies at the core or out on the periphery. This is a tricky endeavor.

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103. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982), *excerpted* p. 1291.

104. *See, e.g.*, Yee v. Escondido, 503 U.S. 519 (1992) (rejecting a *per se* physical-taking challenge to a mobile-home-park rent-control ordinance); Pennell v. San Jose, 485 U.S. 1 (1988). *But see* Hall v. Santa Barbara, 833 F.2d 1270, 1275–80 (9th Cir. 1986) (interpreting *Loretto* to declare a rent-control ordinance a *per se* taking), *abrogated by Yee*, 503 U.S. 519.

105. To the world:

Keep off *X* unless you have my permission, which I may grant or withhold.

Signed: Private citizen

Endorsed: The state

Cohen, *supra* note 95, at 374. *Accord* Katz, *supra* note 71, at 284–85.

106. The exclusion/governance distinction mentioned in text comes from Smith's scholarship. *See* Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453, 467–74 (2002). Merrill probably conceives of the right to exclude as a more formal right, as shown here: "[T]he right to exclude others is a necessary and sufficient condition of identifying the existence of property. Whatever other sticks may exist in a property owner's bundle of rights in any given context, these other rights are purely contingent in terms of whether we speak of the bundle as property." Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731 (1998).

VI. THE RIGHT TO EXCLUDE AS AN ECONOMIC INSTRUMENT

A. Overview

Perhaps I am nitpicking, or displaying what Merrill and Smith have called "the grip of conceptualism . . . and a slavish devotion to the gods of Roman law."[107] Yet concepts matter. In their scholarship, Merrill and Smith have diagnosed many areas where the ad hoc bundle conception has "introduce[d] blind spots" in economic property scholarship.[108] *Property: Principles and Policies* is a path-breaking book simply because it corrects those blind spots in the first-year Property course. Most of those corrections lie at the base of Merrill and Smith's proverbial pyramid. Where their conception of the right to exclude is indeterminate, however, it creates distortions along the next layer immediately above the base.[109]

In this Part, I make two suggestions. Conceptually, a lawyer may conceive of the same property interest differently, depending on whether he assumes property consists of a right to exclude or a right of exclusive use determination. Economically, these conceptual differences correlate with an important economic debate about the economic value of autonomy. Recall that Hayek defined property in terms of exclusive use determination.[110] One may raise Hayekian challenges to Merrill and Smith's interpretations[111] of the doctrine by stressing the roles that temporal change, information disparities, and subjectivity problems play in the allocation of property rights.[112] Although the conceptual and normative suggestions should be kept separate,[113] they still provide important

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107. Merrill & Smith, *supra* note 4, at 359.

108. *Id.* at 375.

109. When I make substantive criticisms in this Part, I will articulate them in economic terms. I doubt that this terminology adds more clarity or determinacy than one can get from the common-sense moral vocabulary in a lot of the case law, when that vocabulary is properly understood. *See* Claeys, *supra* note 21, at 9–15, 47–62. That said, since *Property: Principles and Policies* is Merrill and Smith's casebook, I use their jargon and not mine.

110. *See supra* note 34 and accompanying text.

111. When, in this Part, I make economic arguments, they should be understood in three senses. First, they make explanatory claims about why doctrine is as it is. Second, they make plausible normative arguments, which need to be road-tested by conformity to the cases and by more general empirical verification. Third, they make contingent normative claims, assuming that subjectivity, change in response to changing conditions, and information asymmetries are the primary factors determining economic efficiency.

112. *See, e.g.*, ROY E. CORDATO, WELFARE ECONOMICS AND EXTERNALITIES IN AN OPEN ENDED UNIVERSE: A MODERN AUSTRIAN PERSPECTIVE 4–10 (1992); GERALD P. O'DRISCOLL & MARIO J. RIZZO, THE ECONOMICS OF TIME AND IGNORANCE 1–70 (1985).

113. For example, a scholar could use a coordinated bundle conception to voice normative concerns about the right to exclude similar to the ones I raise here. Richard Epstein makes this move while critiquing J.W. Harris's account of exclusion. *See* Richard A. Epstein, *Weak and Strong*

reminders why questionable conceptual theory can introduce normative blind spots.

B. Control and Use

The subtleties come out even in the foundational materials with which Merrill and Smith begin. Consider *Jacque*, the snowdrift case, and *Hinman*, the overflight case. *Jacque* is presented as an easy case, a metaphor for the "clarity at the core" of property. (P. 22.) Yet *Jacque* is not that easy. The case illustrates that trespass holds a trespasser liable "irrespective of whether he thereby causes *any* harm to any legally protected interest of" the landowner.[114] It is puzzling why the law endows owners with a right to exclude harmless boundary invasions.

Perhaps clear boundaries encourage owners to efficiently exploit the commercial potential in their land and non-owners to efficiently contract with owners.[115] This explanation is probably part of the answer, but not the entire answer. On the margins, the law does not add much clarity to boundaries by making harmless trespasses actionable, and harmless trespasses are by definition inefficient to litigate. Yet, the *Jacque* court insisted that a harmless trespass was still a trespass, quoting the English case *Merest v. Harvey*:

> Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner, is the trespasser permitted to say "here is a halfpenny for you which is the full extent of the mischief I have done." Would that be a compensation? I cannot say that it would be.[116]

As this passage suggests, the Jacques' *in rem* right to exclude endows them with property, not only in their boundaries, but also in autonomy, to determine how they will enjoy their land. Conceptually, the *Jacque* court assumes that the paddock owner and the Jacques' property interests cover not only a right to secure borders, but also "the privacy-driven agenda that the law imputes to ordinary homeowners."[117] The precise scope of that zone of privacy is not, to be sure, purely con-

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Conceptions of Property: An Essay in Memory of Jim Harris, *in* PROPERTIES OF LAW: ESSAYS IN HONOUR OF JIM HARRIS 97 (T. Endicott et al. eds., 2006).

114. RESTATEMENT (SECOND) OF TORTS § 158 (1965), *quoted* p. 7 (emphasis added by Merrill & Smith).

115. *See, e.g.*, Merrill, *supra* note 44; Merrill & Smith, *supra* note 7, at 1849, 1852–54; Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 81–82 (1985).

116. Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 159 (Wis. 1997) (quoting McWilliams v. Bragg, 3 Wis. 424, 428 (1854) (quoting Merest v. Harvey, 128 Eng. Rep. 761, 761 (1814) (opinion of Gibbs, C.J.))), *excerpted* pp. 4–5.

117. Katz, *supra* note 71, at 303.

ceptual; it is and must be informed by the substantive political morality informing local opinions about property. Yet, it is still significant that the *Jacque* court assumed that what it called a "right to exclude others"[118] included what an earlier precedent called owners' "right to the *exclusive enjoyment* of" their land.[119] Exclusive enjoyment reinforces not only property's commercialization function, but also its role as a hedge protecting the owner's power to price the land and its use at her own subjective value. *Jacque*'s principle doubts strongly that judges, juries, or non-owners can judge relative value more fairly than an owner.

Jacque's holding on punitive damages follows. Steenberg Homes had strong economic motives to disregard the Jacques' subjective values in the use or non-use of their field. Without a deterrent, Steenberg Homes (and parties like it) would be encouraged to expropriate an owner's subjective value (if their trespasses caused no damage) or the difference between owner subjective value and actual damages (if their trespasses did cause harm). The good faith requirement deters such parties from trying. We take for granted that most individuals are socialized not to steal property and instead to buy it from the owner. But many are so socialized because the law punishes strangers who interfere intentionally with an owner's autonomy over her property.[120]

On the other hand, under principles like these, *Hinman* does not seem as strong an example of governance or welfare-maximizing as Merrill and Smith suggest. Conceptually, it is unlikely that the owner will ever be able to make meaningful use of the air column higher than 500 feet. That air column is, therefore, a far weaker candidate to count as part of the owner's property than the Jacques' fallow field. Economically, then, the overflight exception makes sense as an exception from the boundary rules confirmed in *Jacque*. On a completely blank slate, it is reasonable to presume that assets will be used more productively in private hands than under public management and that boundary rules take an effective first cut at assigning use rights across adjoining assets.[121] For air columns above 500 or 1000 feet, however, it is rare if not impossible for owners to use those columns productively. When owners make claims about losing subjective value over that land,

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118. *Jacque*, 563 N.W.2d at 159, *excerpted* p. 5.

119. *Id.* at 160 (quoting Diana Shooting Club v. Lamoreaux, 89 N.W. 880, 886 (Wis. 1902)), *excerpted* p. 5. The emphasis is mine.

120. *See* Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2096–2101 (1997).

121. *See* ROBERT SUGDEN, THE ECONOMICS OF RIGHTS, CO-OPERATION AND WELFARE 91–92, 101–03 (2d ed., Palgrave Macmillan 2004) (efficiency of boundary rules), *excerpted* pp. 172–74; Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979) (advantages of private ownership); Rose, *supra* note 115, at 81–82 (efficiency of boundary rules).

those claims begin to resemble the claims of the agencies regulating Moscow department stores. All owners, therefore, benefit from a forced exchange in which they cede a crossing easement and get air travel, and the goods and services encouraged by it, in exchange.[122] This exchange sets a precedent for a narrow class of forced exchanges, but not broad welfare-maximization.

Property: Principles and Policies treats nuisance as inconsistently as it treats *Jacque* and *Hinman*. As Part III explained, the book's introductory cases suggest that nuisance is a core exclusion doctrine. The notes after those cases, however, describe nuisance as another example of governance, in which "courts or other officials determine directly how the property will be used along one or more dimensions." (Pp. 29–30.) Chapter 9, the nuisance chapter, repeats the same discrepancy. *Adams v. Cleveland-Cliffs Iron Co.*,[123] which rejects an appeal to treat mining pollution as a trespass, describes trespass as a rights-based tort and nuisance as an area for interest balancing.[124] Yet *Adams* focuses primarily not on the inner workings of nuisance, but on the distinction between trespass and nuisance. The first case on nuisance, *St. Helen's Smelting Co. v. Tipping*,[125] rejects governance. The case holds that the "unreasonability" element of nuisance asks not whether the defendant's land use is reasonable, but primarily whether the pollution emitted by that use is appropriate in its neighborhood.[126] The casenotes after *St. Helen's* then raise the question whether nuisance should follow "more formalistic" traditional principles, as in *St. Helen's*, or more instrumentalist principles, like the "standard of reasonableness" in tort. (P. 952.) If nuisance partakes of both exclusion and governance, it is not clear how helpful the exclusion–governance continuum really is.[127]

The cases excerpted in *Property: Principles and Policies* confirm a different story: not pure exclusion, not pure governance, but exclusivity qualified to encourage use. Again, as *Hendricks* teaches, courts start by presuming to follow boundary rules—to parcel out productive use poten-

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122. *See* Richard A. Epstein, Intel v. Hamidi*: The Role of Self-help in Cyberspace?*, 1 J.L. ECON. & POL'Y 147, 154–55 (2005); *contra* p. 14.

123. 602 N.W.2d 215 (Mich. Ct. App. 1999), *excerpted* pp. 938–46.

124. *See id.* at 218–19, *excerpted* pp. 941–42.

125. 11 Eng. Rep. 1483 (1865), *excerpted* pp. 948–51.

126. *See id.* at 1486–88, *excerpted* pp. 950–51.

127. In their individual scholarship, Merrill and Smith disagree about whether nuisance relies on exclusion or governance. Merrill reads nuisance to track interest-balancing as prescribed in the *Restatement (Second) of Torts*, see Merrill, *supra* note 44, at 26, while Smith reads nuisance to partake more of boundary rules and other exclusionary principles, see Smith, *supra* note 20, at 996–1000. So the above text is more sympathetic to Smith's individual interpretation of nuisance than to that of the casebook or Merrill's solo scholarship.

tial in a fairly simple and apolitical way.[128] At the remedy stage, courts continue to enforce exclusion by presuming that substantial pollution deserves an injunction if it is ongoing.[129]

Nuisance overcomes this presumption more often than trespass does for reasons similar to those at work in *Hinman*. Most productive uses of land emit low-level boundary invasions like smoke, noise, seepage, and so forth. It is to the reciprocal advantage of all land owners that each sacrifice the right to exclude minor disturbances in return for security to engage in productive uses. Many different aspects of nuisance follow this logic, most of all the unreasonability element for liability. Even though the *Restatement (Second) of Torts* makes "unreasonability" turn on interest balancing, courts normally rig the balance to tilt depending on whether the defendant is emitting a boundary invasion higher than the level ordinarily tolerated in the neighborhood.[130] *St. Helen's* locality rule confirms the point, and so does the doctrine relating to hyper-sensitive plaintiffs, who are denied "recovery . . . for irritations that would not disturb an ordinary landowner." (P. 953.) At the remedy stage, courts relax the presumption for injunctions more easily in nuisance than in trespass.[131]

All of these adjustments, however, reshape nuisance's exclusivity to make it enlarge owners' interests in use. In economics terms, "the mutual toleration of low-level interferences" generates "Pareto improvements."[132] As long as the interferences are low-level, nuisance presumes that these various qualifications stop owners from blockading productive uses to protect their own subjective valuations. Obviously, this logic gets strained more often in nuisance than in overflight cases because pollution threatens owners' possible effective possession and use of their land more often than does a high-altitude overflight. Even so, hard cases do not undermine the principles that order easy cases. To determine when an owner's claimed subjective value is genuine or spurious, it helps judges and lawyers to ask whether the rights to exclude

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128. *See supra* notes 38 & 40 and accompanying text.

129. *See, e.g.*, Scott v. Jordan, 661 P.2d 59 (N.M. Ct. App. 1983). *Estancias Dallas Corp. v. Schultz*, 500 S.W.2d 217 (Tex. Civ. App. 1973), *excerpted in* DUKEMINIER ET AL., *supra* note 3, at 646–48, illustrates better than any lead case in *Property: Principles and Policies*.

130. *See* Pestey v. Cushman, 788 A.2d 496, 508 (Conn. 2002) ("the focus in [a nuisance] cause of action is on the reasonableness of the interference and not on the use that is causing the interference"); Rose v. Chaikin, 453 A.2d 1378, 1382 (N.J. Super. Ct. Ch. Div. 1982) (conducting interest balancing but then relying primarily on the fact that the noise pollution at issue was "louder than others" in the neighborhood).

131. *See* Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970), *excerpted* pp. 956–62.

132. Epstein, *supra* note 122, at 156.

an owners' claim are in accord with "the common and ordinary *use* of land."[133]

C. Use Rights

On the other hand, nuisance also deviates from the exclusion paradigm—again, when doing so enlarges owners' free and likely use of their land. For example, lateral support makes a defendant liable for subsidence on a plaintiff's lot if the plaintiff can show that the digging would have caused the land to collapse in its natural state, or that the defendant's excavation was careless.[134] Other casebooks cover lateral support as part of private nuisance.[135] Since *Property: Principles and Policies* focuses on boundary exclusion, however, lateral support falls conceptually outside of nuisance and property law generally. Nevertheless, in case law, the right to lateral support for land in its natural state is deemed a "'*property right*,' . . . which accompanies the *ownership* and *enjoyment* of the land itself."[136] Ongoing lateral-support violations are presumptively remedied by property rules.[137]

Economically, lateral-support doctrine defies the exclusion–governance distinction. Lateral-support law does not clearly operate through exclusion or through governance. On the one hand, owners have security that their land will not collapse by virtue of their neighbor's digging; on the other, they have a fair opportunity to use their land without needing to support structures already built by neighbors. Lateral-support rules protect a policy interest shared by all owners without comparing the relative merits of intended land uses except in more extreme cases.

As the lateral-support cases suggest an exclusion-centered framework has a hard time explaining why owners can claim a property right against non-invasive interferences with use. That discrepancy raises important questions about how *Property: Principles and Policies* treats property doctrines with a heavy focus on use: water rights (pp. 349–72), spectrum (pp. 372–82), usufructuary interests in commercial information (see pp. 135–47), and many servitudes (pp. 971–1049).

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133. Bamford v. Turnley, 122 Eng. Rep. 27, 33 (Exch. 1862) (opinion of Bramwell, B.) (emphasis added).

134. *See, e.g.*, Noone v. Price, 298 S.E.2d 218, 221–22 (W. Va. 1982); C.J.S.2D ADJOINING LANDOWNERS § 9 (West 2008).

135. *See, e.g.*, CRIBBET ET AL., *supra* note 8, at 691–98; DUKEMINIER ET AL., *supra* note 3, at 645–46; SINGER, *supra* note 9, at 243–61.

136. Sanders v. St. Hwy. Comm'n, 508 P.2d 981, 987 (Kan. 1973) (quoting 2 THOMPSON ON REAL PROPERTY § 415, at 640 (1961)); *Sanders*, 508 P.2d at 990 (emphases added). *Accord* Gorton v. Schofield, 41 N.E.2d 12, 15 (Mass. 1942).

137. *See, e.g.*, *Gorton*, 41 N.E.2d at 15.

D. Enjoyment, and Subjective Valuation

The tensions sketched in Part VI.B involve subtle practical differences, but they matter significantly elsewhere. Boundary exclusion makes property a clear and stable platform for commercialization, but it says little or nothing about the rights owners need to optimize the value of their assets. In fairness, one could use a formal right to exclude conception to analyze whether different legal regimes fully compensate an owner's subjective value, and *Property: Principles and Policies* does voice this concern. (See p. 49–50.)[138] Even so, the formal conception deflects the analysis to a noticeable extent.

Consider private-law property-rule/liability-rule disputes in which the parties are not strangers and both have some interest in the asset in dispute. In a stranger trespass case, there is a strong presumption for an injunction (a property rule). In most cases, the stranger is trespassing with a less than innocent state of mind. His *scienter* threatens the property-respecting social norms discussed in *Jacque*, and equity reinforces those norms just as *Jacque* does through its punitive-damages holding.[139] These law and order concerns are not present, however, in a dispute over an easement when the dominant estate owner wants to increase use over the amount allowed by the deed conveying the easement. In these cases, should property law still favor an injunction? Merrill and Smith suggest not: these disputes are "ripe territory for shifting to some kind of governance regime." (Teacher's Manual p. 31.) Because both parties have "sunk investments" and "subjective attachments" in their portrait, "neighbors will be locked into bilateral monopoly situations with each other" unless courts are willing to balance equities. (*Id.*)

Yet, the cases excerpted in *Property: Principles and Policies* still presume in favor of the injunction. For example, in *Delfino v. Vealencis*, the Delfino brothers (two developers) moved to partition a twenty-acre lot of land they co-owned as tenants in common with Helen Vealencis (a garbage hauler who lived on the lot under litigation).[140] During the partition, Vealencis wanted a partition in kind (a property rule) so she could keep her house, business, and the subjective value inherent in both. The Delfinos preferred partition by sale (a liability rule) because they did not value Vealencis' attachments to the land, and because they wanted to outbid her for the lot.

The Connecticut Supreme Court reversed a judgment ordering a partition by sale. Following nineteenth-century precedent, the court

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138. *See also* Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1754–68 (2004) (defending a strong concept of boundary exclusion).

139. *See* pp. 50–56; Teacher's Manual p. 31.

140. 436 A.2d 27 (Conn. 1980), *excerpted* pp. 637–42.

warned: "'A sale of one's property without his consent is an extreme exercise of power warranted only in clear cases.'"[141] "A partition by sale would force the defendant to surrender her home," the court insisted, and "would jeopardize her livelihood. It is under just such circumstances . . . that the wisdom of the law's preference for partition in kind is evident."[142] In economic terms, the court presumed, it was better to err on the side of protecting subjective value. This preference matters not only in co-tenancies but also in easements[143] and covenants running with the land.[144]

As the rent-control example in Part V.B suggested, however, this preference matters most in eminent domain. Consider the public-use doctrine, which limits governments to exercising eminent domain only when the taking is for a public use.[145] Economically, condemnations can efficiently break up hold-out power, but they can also inefficiently short-change owners' subjective value.[146] In *Kelo v. City of New London*, the U.S. Supreme Court held that local urban-renewal plans may transfer private land to private developers if they have a rational and non-pretextual basis for claiming that the redistribution promotes general local economic development.[147]

Property: Principles and Policies is generally sympathetic to this result. The book refrains from editorializing about *Kelo*; but, the book's organization still suggests that local governments can get the hold-out/subjective-value balance more or less right. The book complains that

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141. *Id.* at 30 (quoting Ford v. Kirk, 41 Conn. 9, 12 (1874)), *excerpted* p. 639.

142. *Id.* at 33, *excerpted* p. 641. In fairness, the trial court gave Vealencis a worse deal with the partition in kind than she would have received in a sale. (*See* pp. 642–43.) The point important here, however, is not how the trial court found the facts. The appellate court declared a general partition standard that was pro-property rule, to protect subjective value.

143. *See, e.g.*, Penn Bowling Recreation Ctr., Inc. v. Hot Shoppes, Inc., 179 F.2d 64, 66 (D.C. Cir. 1949), *excerpted* p. 1010 (presuming that a servient tenement owner may enjoin a dominant tenement owner from using an easement to service a non-dominant parcel of land).

144. *See, e.g.*, Bolotin v. Rindge, 41 Cal. Rptr. 376, 378 (Ct. App. 1964) (quoting Miles v. Clark, 187 P. 167, 172 (Cal. App. 1919)), *excerpted* p. 1045 (holding, in litigation over a changed-circumstances defense to enforcing covenants running with the land, that "'[c]ourts in such cases are not controlled exclusively by money value, but may protect a home'").

145. *See, e.g.*, U.S. CONST. amend. V.

146. Merrill provided the model analysis of the relevant economic issues in Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 82–89 (1986).

147. 545 U.S. 469 (2005), *excerpted* pp. 1224–42. Merrill co-authored an amicus curiae brief in favor of the Court's eventual decision (and with a significant difference in outlook from his position in Merrill, *supra* note 146) in *Kelo* in Brief of the American Planning Association et al. as Amici Curiae in Support of Respondents, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108). In full disclosure, I co-authored an amicus curiae brief asking the Court to limit eminent domain to condemnations actually used by the public. *See Kelo*, 545 U.S. at 2679 (Thomas, J., dissenting); Brief of *Amicus Curiae* The Claremont Institute Center for Constitutional Jurisprudence In Support of Petitioners, *Kelo v. City of New London*, 545 U.S. 469 (2004) (No. 04-108).

"[n]one of the opinions in *Kelo* discusses the holdout problem" (p. 1244), without considering seriously the possibility that governments will overestimate the risk of hold-out. More tellingly, the section on *Kelo* and public use does not consider the subjective-value problem. That problem is relegated to the section on just compensation. (P. 1252.) Local governments and courts *can* get just compensation right, the reader reasonably infers often enough to make it worthwhile for governments to routinely redistribute private land.[148]

Since *Kelo* has been discussed extensively elsewhere, let me focus on two basic points.[149] First, conceptually, if property is a formal right to exclude, Kelo and the other homeowners have a long row to hoe to prove that their desires not to sell are interests covered by property rights and property rules. The conceptual framing makes more plausible New London's pretensions to economic expertise and regulatory governance. By contrast, if property consists of the exclusive determination of use, New London and a commercial developer seem more likely to be expropriating property. Kelo and the others want to determine whether or not their homes will be sold, and New London authorities are diminishing their discretion to decide.

Second, *Property: Principles and Policies* portrays the economics behind *Kelo* in a manner that accentuates the positives and eliminates the negatives in governance by local redevelopment. If the private law's instincts toward the economics are right,[150] *Kelo* encourages local governments to expropriate too much subjective value to break up too little hold-out power.[151]

To begin with, *Kelo*'s rational-basis standard wrongly assumes that subjective valuation is a minor problem. In *Kelo*, one of the home owners, Wilhelmina Dery, had been born in the house being condemned, she had lived there more than 80 years, and she had lived there with her hus-

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148. Here, *Property: Principles and Policies* has more or less the same editorial reactions toward *Kelo* as most other property casebooks. For one of the few more skeptical treatments, see JON W. BRUCE & JAMES W. ELY, JR., CASES AND MATERIALS ON MODERN PROPERTY LAW 680–89 (6th ed. 2007).

149. *See, e.g.*, Gary Chartier, *Urban Redevelopment and Land Reform: Theorizing Eminent Domain After* Kelo, 11 LEGAL THEORY 363 (2005); Daniel B. Kelly, *The "Public Use" Requirement in*
Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence, 92 CORNELL L. REV. 1 (2006); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 92–99 (2005); Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 S. CT. ECON. REV. 183 (2007). Because this Essay focuses on conceptual and economic issues, the discussion here abstracts from other relevant issues, including federalism values and the original meanings of public-use clauses.

150. *See supra* sections VI.B, VI.C, and notes 139–44 and accompanying text.

151. *See* Epstein, *supra* note 120, at 2111–14.

band more than 60 years.[152] Dery could quite reasonably have believed that she was likely to die soon if she did not sell but immediately if she did. This is not a situation like a high air column or the low-level pollution at issue in many non-actionable nuisances. Fair market value, even together with a generous relocation package,[153] could still short-change Dery's subjective value.

Next, in contrast with the parallel private law, *Kelo*'s rule does not consider seriously enough how information disparities limit the success of redevelopment programs. In the private law, as *Jacque* and *Delfino* suggest, liability and remedial rules presume that markets will predict better than courts which party will put land to its highest-value use. The public law may differ in that redevelopment planners may have more technical expertise than courts. Yet maybe these differences pale in contrast with differences between the two from markets.[154] In *Kelo*, local authorities approved the redevelopment plan without any signed development agreement. The plan committed that the developer could lease assigned property for $1 per year for 99 years, but it had no fall-back provisions in case the project did not meet expectations.[155] (According to contemporary news accounts, the project did not meet expectations.)[156] A footnote in *Kelo* notes the sweetheart lease,[157] but such problems are not otherwise considered in *Property: Principles and Policies*.[158]

Finally, *Kelo*'s rule seems static; it underestimates the possibility that actors may respond dynamically over time to the incentives that redevelopment statutes create. This possibility is especially strong because local governments are more political than courts. Because eminent

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152. *See Kelo*, 545 U.S. at 475, *excerpted* p. 1225.

153. Nicole Stelle Garnett has shown that relocation laws often force condemning authorities to compensate ousted owners substantially more than fair market value. *See* Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101 (2006). As Garnett points out, however, when relocation assistance is provided from a different revenue source than the source that funds eminent domain, it can increase the demand for inefficient use of eminent domain. *See id.* at 140–43.

154. *See* James M. Buchanan, *Social Choice, Democracy, and Free Markets*, 62 J. POL. ECON. 114, 122 (1954) (praising the free market "as a means by which the social group is able to move from one social state to another as a result of a change in environment without the necessity of making a collective choice").

155. *See Kelo*, 843 A.2d at 596–99 (Zarella, J., dissenting).

156. *See* William Yardley, *Eminent Domain Project at Standstill Despite Ruling*, N.Y. TIMES, Nov. 21, 2005, at A1.

157. *See Kelo*, 545 U.S. at 476 n.4, *excerpted* p. 1227.

158. It could be that New London's practice was not representative of local government's competence generally. But New London encountered problems similar to those of the next most recent major redevelopment case, *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 464 (Mich. 1981), *overruled by County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). *See* Ilya Somin, *Overcoming* Poletown*:* County of Wayne v. Hathcock*, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005.

domain condemns land at market value and not owner value, it gives developers and retailers an opportunity to seek rent. *Property: Principles and Policies* is sensitive to public-choice arguments elsewhere, but not in the constitutional context of *Kelo*. (See pp. 1244–45.) The book notes dutifully, but skeptically, that Pfizer had been lobbying New London authorities to redevelop the neighborhood adjacent to its site for a new plant.[159] (*See* p. 1243.)

If these public- and institutional-choice concerns count, eminent domain should be restricted to allow only takings used by the public or by common carriers. Oversimplified somewhat, local governments need to provide rigorous proof that land owners are holding out despite the absence of legitimate subjective value.[160] In *Kelo*, it was not credible to say the petitioners were hold-outs who could exercise real monopoly power. The petitioners' homes were small pieces of a 90-acre project.[161] The condemning authorities never committed how specifically the petitioners' lots would be used. Since the authorities had also spared an Italian Dramatic Club due to entreaties by leading New London figures (p. 1245), the authorities could have spared Kelo's and the other petitioners' properties.

VII. CONCLUSION

Property: Principles and Policies is the most important contribution to the market for first-year Property casebooks in at least a generation or more. At least since the Legal Realist era, judges and instrumentalist academics have used conceptual accounts of property apologetically to portray instrumentalist theories of property regulation in a justifying conceptual context. Many contemporary property casebooks reflect this trend by portraying legal property as an ad hoc bundle of rights. Merrill and Smith have pushed back by portraying property as an owner's right to exclude non-owners from an asset and (by extension) a wide range of undelineated use choices.

Yet *Property: Principles and Policies* also raises important follow-up questions about what it means to say that property consists of a right to exclude. The right to exclude conception of property is similar to the ad hoc bundle conception; both were propounded by Legal Realists to do covert normative work in conceptual clothing. Conceptually, it is more

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159. *See* Ted Mann, *Pfizer's Fingerprints on Fort Trumbull Plan—Wired in at Birth*, NEW LONDON DAY, Oct. 16, 2005.

160. *See, e.g.*, Head v. Amoskeag Mfg. Co., 113 U.S. 9 (1885); Miller v. Troost, 14 Minn. 365 (1869); Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 901–05, 919–28; Epstein, *supra* note 120, at 2111–14.

161. *See Kelo*, 545 U.S. at 474, *excerpted* p. 1225.

precise to say that property refers to an owner's interest in exclusively determining the use of the thing he owns. Economically, both conceptions justify property as a stable platform for coordination and commerce. But an exclusive right of use determination better justifies the rights owners have to use productively the things they own exclusively.