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### Property's Building Blocks: Hohfeld in Europe and Beyond

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PROPERTY’S BUILDING BLOCKS:  
HOHFELD IN EUROPE AND BEYOND

*Anna di Robilant & Talha Syed\**

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INTRODUCTION

In the hundred years since Hohfeld published his two “Fundamental Legal Conceptions” articles, the “bundle-of-rights” view of property associated with his work has come to enjoy the status of conventional wisdom in American legal scholarship.<sup>1</sup> Seen as a corrective to lay conceptions and a predecessor “Blackstonian” view of property as the “sole and despotic

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<sup>1</sup> See GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY 319 (1997) (“No expression better captures the modern legal understanding of ownership than the metaphor of property as a ‘bundle of rights.’”). As Professor Alexander points out, the “bundle of rights” phrase precedes Hohfeld, who in fact never used it. Nevertheless, it has become the conventional moniker for his analysis of property as “a complex aggregate of jural relations.” *Id.* at 319, 322. For a review of leading legal scholars and casebooks adopting the bundle of rights picture, see Eric Claeys, *Is Property a Thing or a Bundle?*, 32 SEA. U. L. REV. 617, 619-21 (2009). For a review of leading philosophical works doing the same, see J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 712-14 (1996).

dominion” of an “owner” over a thing,<sup>2</sup> the central insight of Hohfeldian analysis is standardly taken to be that property is not a single “thing” but rather a “bundle of rights” with respect to things and persons.<sup>3</sup> In recent years, however, this Hohfeldian view has come under increasing attack by critics calling to replace the bundle-of-rights picture with a return to lay or neo-Blackstonian conceptions of property, as the “right to a thing,” “thing-ownership” or, simply, “the law of things.”<sup>4</sup> Yet what precisely is at stake in this dispute has remained somewhat nebulous. In the words of one critic, although all sides to the debate “agree that the thing versus ad hoc bundle contrast is significant, it is surprisingly difficult to specify what the contrast really means.”<sup>5</sup> Do the critics really mean to claim that property, as a legal concept, should be taken to refer to the “thing” or object itself, rather than to legal rights pertaining to it? Or is it rather that the legal rights should be taken to pertain to a person-thing relation, rather than to one between persons? Or is it that the rights at issue should be seen as one or a few rather than many? Or, if many, then necessarily “unified” rather than disaggregated? Or, whether single or multiple, “absolute” rather than “qualified”? And, finally, is the dispute—with respect to any or all of these questions—a matter of descriptive or normative or conceptual disagreement?

The crux of the problem, we suggest, is a fundamental mischaracterization of the Hohfeldian analysis of property—by both critics *and* defenders. The “bundle of rights” label obscures from view a distinct—and more fundamental—dimension of Hohfeldian analysis, namely that property is a social relation. And as or more important than getting right the precise content of each of these claims is understanding their *inter-connection*: the “social relations” claim is the fundamental platform of the analysis, generating in its turn the “bundle of rights” claim as a conclusion. Indeed, if a short moniker were wanted for Hohfeldian analysis, *much* preferable to the “bundle of rights” would be the “*relational*” conception of property.

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<sup>2</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*2 (1779) (1765-1769). It is standard to refer to this view as “Blackstonian” since, as Professors Alexander and Dagan suggest, even if Blackstone himself “did not intend that phrase to be taken literally,” nevertheless the “dictum ... has become an icon of property theory.” GREGORY S. ALEXANDER & HANOCH DAGAN, PROPERTIES OF PROPERTY 100-01 (2012). For doubts that this was Blackstone’s own considered view, see 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). For doubts about the doubts, see Claeys, *id.* at 632-33. We take up this issue below at text accompanying note 24.

<sup>3</sup> See, in addition to references cited in note 1, BRUCE ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 26-29, 97-100 (1977); STEPHEN MUNZER, A THEORY OF PROPERTY 15-31 (1990); JOSEPH SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 3-13 (2000). We hasten to add that a central thrust of our argument in Part I below is that this standard understanding of the Hohfeldian conception given in the text is, in significant respects, misleading, when not simply flawed. See generally Part I and especially text accompanying notes 8, 15-17 *infra*.

<sup>4</sup> See Penner, *supra* note 1 at 799 (“despite the bundle of rights picture of property, property truly is a right to things”); J. E. PENNER, THE IDEA OF PROPERTY IN LAW (1997) (advocating, in place of the bundle of rights picture, the view “that property is what the average citizen ... thinks it is: the right to a thing”); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES (2007) v, 1 (defending, in contrast to “an ad hoc ‘bundle of rights’” view, a “traditional everyday view” of property as “a right to a thing good against the world”); Claeys, *supra* note 1 at 618, 631ff (advancing “a ‘thing’ or ‘thing-ownership’ conception of property” in opposition to “the ad hoc bundle’ conception”); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691(2012) (arguing that “property is, after all, a law of things” contrary to the “conventional wisdom” that “property is a bundle of rights”). See generally Symposium: *Property: A Bundle of Rights?* 8 ECON. J. WATCH (2011). We use “neo-Blackstonian” here as an umbrella term to group those critics of the Hohfeldian conception, such as the foregoing, who propose to replace it with a “thing”-based alternative of some sort. We do so while noting, again, that there remains debate on the extent to which Blackstone himself subscribed to what is called the “Blackstonian” conception—see discussion in note 2, *supra*—and while also bearing in mind the need to attend to important differences amongst the critics themselves (see, e.g., notes 15, 89 and 90, *infra* and accompanying text).

<sup>5</sup> Claeys, *supra* note 1 at 618.

Fully absorbing this point, in turn, would fundamentally recast our understanding of the “bundle of rights” claim. It is *neither* merely a descriptive claim about how existing law in fact treats property rights *nor* a normative claim about they should be treated, but rather a *conceptual claim* about the character of property analysis in any existing or potential legal system.

Finally, each of these components of Hohfeldian analysis—social relations and bundle of rights—is fundamentally distinct from a *third* set of points with which they are commonly fused, concerning the *dematerialization* of the objects and interests of property. It is the blurring of what are three distinct lines of analysis—what we may call *dephysicalization*, *disaggregation* and *dematerialization*—that has led many to the conclusion that Hohfeldian analysis results in the “disintegration” of property, rendering it no longer a distinct concept or field of law. An outcome embraced by some (neo-Hohfeldians) and decried by others (neo-Blackstonians).

This conclusion, we believe, is both too hasty and imprecise. Imprecise because it fails to locate the contest between Hohfeldian and neo-Blackstonian conceptions of property as pivoting around not one, but at least two and perhaps three, points of contrast, tracking each of the central but distinct lines of Hohfeldian analysis: dephysicalization, disaggregation and dematerialization. It is too hasty because the dephysicalization of property, as a social relation, poses no problems; and while disaggregation and dematerialization may indeed lead to troubling—if *very* distinct—forms of disintegration, the fault lies less with the specific content of Hohfeld’s claims than with a failure, post-Hohfeld, to follow through on his underlying method and structure of analysis in a constructive fashion. And so the solution to disintegration, we urge, is *not* a “rethingification” of property but rather its “reintegration”—by carrying forward the method of Hohfeldian analysis in two constructive directions: (a) a *resource-specific* answer to the question of “what is property about?” and (b) in answer to “what does property consist of?” an architectural analysis of the basic entitlements that serve as the *fundamental building blocks* of all property forms.

Our aims in this article are three-fold. First, we provide a somewhat novel distillation of the central insights and structure of the Hohfeldian analysis of property, and use it to pinpoint the central fault lines of the contemporary debate in American property theory. Second, we set this analytical scheme into comparative-historical context, drawing insights from European traditions of property analysis on the resource-specific character of property entitlements that further enrich and develop our scheme. Finally, drawing simultaneously on the tools of Hohfeldian analysis and the lessons of both the American and European debates, we chart two constructive ways forward for the legal-institutional analysis of property, as social relations regarding resources.

The article is structured in three parts. Part I sets out our distinct view of the fundamental components and structure of Hohfeldian analysis. Part II then examines what Hohfeld has to teach Europe and vice versa. Part III points to a way forward with two constructive lessons, each responding to one of the central perils of disintegration facing Hohfeldian analysis.

## I. THE STRUCTURE OF HOHFELDIAN ANALYSIS

The Hohfeldian analysis of property consists, on our view, of two pairs of distinct but inter-related *conceptual* claims, each one leading to the next in a tightly-integrated theoretical structure. Each discrete claim should on its own seem somewhat familiar, but this may also prove rather misleading in two respects. First, our treatment of the exact content and implications of each point, even on its own, often differs from standard understandings among both defenders and critics (as we indicate in the margins)—in ways that may at first seem subtle but ultimately

yield very powerful implications.<sup>6</sup> Second, in any case what merits special emphasis is our view of the *inter-connection* of the claims, specifically of their order of conceptual priority and the distinct role played by each in the structure of the analysis.<sup>7</sup> The full-blown implications of the distinct content and structure of our analysis will only emerge at the end, when we deploy it to clarify the precise fault lines of the debate on “distintegration” and specify where, on our view, both defenders and critics of Hohfeldian analysis go awry in their understanding of the sources of the problem and potential ways forward.

(A) *Property is a social relation*

(1) *Social-relationality: A relation between persons regarding things*

The beginning of wisdom for Hohfeldian analysis, the foundational claim from which all others flow, is that property is—*always and only*—a social relation.<sup>8</sup> As Hohfeld goes to great pains and length to emphasize at the outset of both his 1913 and 1917 articles, property as a legal concept refers *neither* to the thing that may be the ultimate object of legal entitlements *nor* to the relation of a person to the thing, but rather *solely* to the relation between persons regarding the thing.<sup>9</sup> To, in other words, a social relation.<sup>10</sup>

As a legal institution, property always pertains to how two or more persons are related with respect to a resource: Can one use the resource without another’s interference? Can one exclude another’s use of it? Can one remain secure against another’s removal of one’s use and exclusion entitlements? And so forth.<sup>11</sup> There is no such thing as property on a desert island with one person.<sup>12</sup> Similarly, contrary to a misunderstanding persisting to the present, “possession” is simply not an entitlement of property—it denotes a relation between a person and a thing, not

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<sup>6</sup> This applies even with respect to the pioneering understanding of the discrete claims to which we are most heavily indebted, that advanced by Professor Joseph Singer. See *infra* notes 8 and 19, and accompanying text.

<sup>7</sup> In this respect, the differences between the view we develop here and that advanced by Professor Singer may be somewhat greater. See *infra* notes 16, 17, and 91, and accompanying text.

<sup>8</sup> The singular content and centrality of this claim to Hohfeldian analysis merits emphasizing its distinction from formulations of the point that suggest that property is *both* a relation between a person and a thing *and* one between persons with respect to a thing. See, e.g., SINGER, *supra* note 3 at 6, 10; Carol Rose, *Storytelling about Property*, 2 YALE J. L. & HUMANITIES 37, 40 (1990). For further discussion, see note 20, *supra* and accompanying text.

<sup>9</sup> See Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16, 20-28 (1913) (devoting eight pages “[a]t the very outset ... to emphasize the importance of differentiating purely legal relations from the physical and mental facts that call such relations into being.”) Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L. J. 710, 720-33 (1917) (devoting twelve pages to establish his first point, namely that “a right *in rem* is not a ‘right against a thing.’”).

<sup>10</sup> This is not to say that all interpersonal relations are, as such, properly considered “social,” where that term is taken to impute a “public” rather than “private” character to such relations. However, the relations in question here are clearly “social” in the requisite sense, for at least two distinct reasons: (a) they are clearly “public” rather than “private,” in the sense of obtaining between persons who may be perfect strangers, without any prior acquaintance; and (b) they are “public” in the sense of involving decisions by the state.

<sup>11</sup> As Professor Schlag rightly emphasizes, it is *not* “so much that rights ‘imply’ or ‘give rise’ to duties,” as it is that “to say that *B* has a duty towards *A*” is “exactly what it means to say that *A* has a right.” Pierre Schlag, *How To Do Things With Hohfeld*, 78 LAW & CONTEMP. PROB. 185, 201 (2015).

<sup>12</sup> There are, in fact, no legal rights at all in such a situation, but we leave that aside here.

between persons regarding a thing (that relation is denoted by exclusion).<sup>13</sup>

The basic import of this claim is of course to guard against the false naturalization of normative social judgements, by checking against attempts to move straight from descriptions of physical facts and relations to substantive conclusions of “justice and policy.”<sup>14</sup> Other powerful implications will be elaborated momentarily. Presently, however, the central point we wish to underline pertains not to its further implications as a stand-alone claim, but to its special status and role within Hohfeldian analysis—namely, its conceptual character and foundational role.<sup>15</sup> It is *not* a normative claim about how property rights *should* be shaped, but rather a positive claim about what property, as a legal concept and institution, simply *is*.<sup>16</sup> And it lies at the basis of the

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<sup>13</sup> See, e.g., A.M. Honore, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107, (A.G. Guest, ed. 1961) (referring to “the right to possess” as involving “exclusive physical control” over an object); JESSE DUKEMINIER ET. AL, PROPERTY 81 n.2 (6<sup>th</sup> ed. 2006) (property consists of “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.”). Ours is not a terminological quibble. In other words, we recognize of course that in speaking of a “right to possess” one *might* have clearly in mind that this is not a matter of “control over” an “object”—i.e., a person-thing relation—but rather precisely about “exclusion of” a person—i.e., a person-person relation—and hence be making no conceptual error, only using words loosely. But to speak of a right to “exclusive physical control” over an object is surely to slide into the sorts of conceptual confusions and normative elisions that Hohfeld was at pains to dispel. And even more clearly: to list a “right to possess” as part of the “bundle” of property rights *alongside* rights “to use” and “to exclude” can only evince faulty conceptualization—robbed of its role as a hazy substitute for the more precise “right to exclude,” the phrase can only plausibly be taken to mean the flawed notion of a “right of control” over/against a thing, or simply be empty of meaning (a third possibility—that it is serving as a substitute coverall term for the misleading “right to own” is foreclosed by the fact that it is precisely “ownership” that is being unbundled by the enumerated rights). See also Burke Shartel, *Meanings of Possession*, 16 MINN. L. REV. 611 (1932) (in seeking to disambiguate different legal usages of the term “possession,” focusing primarily on distinguishing between different aspects of person-thing relations and legal consequences therefrom, while viewing its use to refer to person-person relations in property as tertiary and irretrievably confused). We thank Henry Smith for drawing our attention to this article.

<sup>14</sup> Hohfeld (1913), *supra* note 9 at 36.

<sup>15</sup> It is these—the conceptual character and foundational role of the social-relational claim—that we are at pains to underline here. In other words our argument is less concerned with what express *verbal* formulations are used by scholars when articulating the character of property rights—although some examples of formulations uncertain in their formal recognition of the social-relational point are given in notes 6, 10, 13 and 14. Rather our concern is with whether, as a *substantive* matter, the core lessons of the social-relational claim, its central thrust and powerful implications, have been fully registered in property theory—and reasons for doubt on this score are given at text accompanying notes 21 to 29, where we also seek to bring out and drive home these lessons in a systematic way. This applies even more so to the claim’s foundational role in the overall architectonic of Hohfeldian analysis, the way it serves as a platform for all other claims, something also not been fully appreciated by either defenders or critics of the Hohfeldian view as we discuss below. Finally, however, even with respect to its purely verbal recognition, some scholars do seem expressly to reject the person-person conception of property rights in favor of a person-thing one, and indeed take this as an important divide internal to the critics of the Hohfeldian conception. See Adam Mossoff, *The False Promise of the Right to Exclude*, 8 ECON. J. WATCH 255 (2011) (“Among scholars who reject the bundle conception of property, there have been two different and opposing positions. On the one hand, I and others have sought to recover the earlier concept of property that was buried by the realists, recognizing that it refers to a specific relationship between someone and something in the world. Thus, the right to property secures a use-right in, agenda-setting control over, or a sphere of liberty in using this thing (Mossoff 2003; Katz 2008; Claeys 2009). . . . On the other hand, Tom Merrill and Henry Smith advance an alternative approach to recovering the right to property. They accept the legal realists’ social conception of rights.”) We thank Oren Bracha for this reference.

<sup>16</sup> This is contrast to those who treat the “social relations” claim as a purely normative position—see JOSEPH SINGER ET. AL, PROPERTY LAW: RULES, POLICIES, AND PRACTICES xlix-1 (2006)—and ever more so to those who, in a reversal of conceptual priority, see it as building upon the bundle of rights claim rather than *vice versa*. See Claeys, *supra* note 1 at 620.

Hohfeldian analysis, being the platform upon which all subsequent claims are developed.<sup>17</sup>

(2) *Correlativity: The competing-interests structure of the social relation*

The social relations at issue in property are structured by correlative entitlement-disentitlement pairs, whereby an advantage for one person means a disadvantage for another. One cannot identify an entitlement or benefit for X without a correlative disentanglement or burden on Y.<sup>18</sup> Thus, the social relations of property involve—*always and necessarily*—pairs of competing interests.<sup>19</sup>

Among the implications that follow from this pair of claims, three are central.

“*Absolute*” ownership is a misnomer, not just normatively contestable. It is commonplace among those following in Hohfeld’s footsteps to inveigh against an “absolutist” Blackstonian conception of property on the grounds that it is either undesirable or not descriptive of our present arrangements—and hence that the entitlements of property ought to be “relative” or subject to varying limits. However, once we fully internalize the point the property is a social relation, with correlative/competing entitlements, then the claim that its entitlements *ought to be* “qualified” or “relative” is somewhat curious—since there is really no coherent sense to the notion of “unqualified” or “absolute” entitlements once we understand their relational/correlative character.<sup>20</sup> Once, that is, we fully internalize the social-relational character of property, it is simply either empty or unclear or incoherent to speak of “absolute” entitlements—the term either has no or vague meaning or it means “unfettered,” which would involve a case that no jurist has ever had in mind.<sup>21</sup> The point, then, is not really a normative, but rather an elemental, conceptual one. To challenge absolutist conceptions on normative grounds is to presuppose their analytical tenability, and to do that is to reinforce unilateral, person-thing, conceptions of property. And the

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<sup>17</sup> This is in contrast to treatments of the point that fuse it with the bundle of rights claim. *See, e.g.,* Hanoch Dagan, *Doctrinal Categories, Legal Realism and the Rule of Law*, 163 PENN. L. REV. 1889, 1912 (2015). Or that treat it as simply one of a series of discrete points, and seemingly a secondary one at that, in comparison to the bundle of rights claim. *See* SINGER, *supra* note 3 at 6

<sup>18</sup> This point is a distinct further development of the preceding social-relational claim because of course not all social relations need be so structured around correlative-claims/competing-interests. For instance the teacher-student relation is an institutionalized, or social, relation that does not have this inherently competing-claims structure.

<sup>19</sup> See discussion below, *infra* Part III at note 95 and accompanying text, of the “Cook/Corbin puzzle” regarding whether or not the power-liability pair may (sometimes) be an exception to this.

<sup>20</sup> To underline this point as clearly as we can, we would go even farther than Professor Singer’s important statement that “[t]he recognition and exercise of a property right in one person *often* affects and *may* even conflict with the personal or property rights of others,” by dropping his qualifiers. SINGER ET. AL, *supra* note 16 at x (emphasis added). This is related to our emphasis above, at note 8 *supra*, on the distinction between our formulation that property is *always and only* a social relation and Professor Singer’s formulation of property as *both* a relation between a person and a thing *and* one between persons with respect to a thing. *See* SINGER, *supra* note 3 at 6; and SINGER ET. AL, *supra* note 16 *supra* at x.

<sup>21</sup> For X to have unfettered entitlements against all persons with respect to a thing or good would mean that not only that (a) others had no legitimate interests in that thing or good meriting legal protection, (b) but also that they had no legitimate interests in other things or goods meriting legal protection, the exercise of which may in some cases come into conflict with X’s exercise of entitlements pertaining to their thing or good, and (c) finally, that others also had no *other* legitimate interests—for instance, in their person—meriting legal protection, which may in some cases come into conflict with X’s exercise of entitlements in their thing or good. The only actual imaginable case of “absolute” entitlements, then, is of a person living alone on an island – but in that case they have *no* property or, for that matter, *any other legal entitlements* since *all legal entitlements always and only* pertain to social relations.

same holds so for any discussion that emphasizes the “relative” character of property as being a somehow controversial or “modern” move.<sup>22</sup> The only thing modern about it is the explicit recognition of something that was always inescapable.<sup>23</sup>

This neatly resolves, then, a long-standing puzzle of contemporary property scholarship: “was Blackstone was really a Blackstonian?” As a number of scholars including Carol Rose and Daniel Schorr have argued, in his detailed discussions of the contours of specific property rights Blackstone did not, in fact, hold to the “absolutism” for which his name has become a by-word and his “sole and despotic dominion” a catch-phrase.<sup>24</sup> On the present analysis not only is this unsurprising, it is hardly avoidable: since absolutism is simply a misnomer, conceptually not on the cards, it is hardly surprising that when he turned from abstract declarations to the concrete specifics of the system, Blackstone simply *had to* cast aside a view that, whatever its normative appeal, is simply conceptually untenable—namely, that property is a person-thing relation, conferring a set of rights that may be enjoyed absolutely—and to register, however implicitly, the unavoidable reality brought home by any detailed acquaintance with the specifics of property rights, namely that property is a social relation in which unfettered rights are simply a chimera.<sup>25</sup>

Property is *not* a form of “negative liberty.” Both defenders and critics of traditional or Blackstonian conceptions often accept the premise that these constitute species of “negative liberty”—with defenders embracing that position and critics urging that in many circumstances we should normatively go beyond it.<sup>26</sup> But this, again, betrays a failure fully to internalize the relational character of property rights. Negative liberty means the “freedom from” or “absence of” coercive interference, either of the state or other private individuals. While “positive liberty” means the “freedom to” effectively pursue one’s ends, via the “presence of” necessary means, including by way of positive state provision of resources or other assistance.<sup>27</sup> In the case of property, unless we hew merely to use-privileges—which no participant of this debate has in mind—then all other entitlements necessarily involve the intervention of the state to burden one person’s negative liberty for the sake of enforcing another’s entitlements. Moreover, such enforcement results, directly, in the deprivation of resources. And although the absence of

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<sup>22</sup> See Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1979); ALEXANDER AND DAGAN, *supra* note 2 at 255.

<sup>23</sup> As a striking illustration of this point, think of Roman property. Property scholars and historians long presented it as the most perfect example of “absolute property,” and only in “modern” times did they admit its relational and qualified nature. On the view that Roman property was absolute, see PIETRO BONFANTE, *LA PROPRIETA’ CORSO DI DIRITTO ROMANO*, vol II, Milano, (1968) p. 327. For the modern view see Eva Jakab, *Land, Law and Exploitation of Natural Resources. Property Rights in Ancient Rome*, in LAND AND NATURAL RESOURCES IN THE ROMAN WORLD, (P. ERDKAMP, K. VERBOVEN AND A. ZUIDERHOEK eds, Oxford University Press 2015).

<sup>24</sup> See Rose, *supra* note 2; Schorr, *supra* note 2.

<sup>25</sup> Does this mean, then, that the contrast between “Blackstonian” and “Hohfeldian conceptions of property can simply evaporate, like so much hot air? Not at all. What it *does* mean is that we have to be more precise in specifying what we might mean by “Blackstonian” in contrast to Hohfeldian views. A central aim of this article is to establish that this contrast is most usefully understood as operating along three possible axes, as discussed in Part I.C below.

<sup>26</sup> See PENNER, *supra* note 4 at 50; HANOCH DAGAN, *The Craft of Property*, 91 CALIF. L. REV. 1517, 1560 (2003).

<sup>27</sup> To be more accurate, these are the common meanings attributed to the terms in contemporary political theory. Yet it bears noting that in the foundational modern discussion of the terms, Isaiah Berlin himself oscillates between this contrast and a fundamentally different one, in which “negative liberty” denotes the freedom to pursue one’s own ends—via *both* the absence of coercive interference *and* the presence of positive means—while “positive liberty” denotes the freedom to ensure that one’s ends are truly one’s own, what might be better called self-determination, along with perhaps that one’s ends are “objectively” valuable. See ISAIAH BERLIN, *Two Concepts of Liberty* (1958), reprinted in LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY, at 166, 170-72 (Henry Hardy ed., 2d ed. 2002)



resources is typically thought to be a deficit only in “positive” rather than “negative” liberty, the point is that such deficits in positive liberty may stem directly from state action and not, as is commonly thought, only from state *inaction*.<sup>28</sup> The persistent assimilation of “the right to property” as among the species of “negative” rights/liberty is another tell-tale sign of the failure fully to absorb the relational character of property.

We hasten to add—to forestall a third misunderstanding—that the *conceptual* point that property is a social relation does not by itself settle any *normative* questions. In particular, it does not automatically issue in the normative claim that property must have a “social function” or serve the “social interest,” where these are taken to mean a “public interest” in contrast to private ones.<sup>29</sup> Or, in a related vein, in the conclusion that we have somehow ruled out justifications for property entitlements based on “natural rights” arguments of for instance labor/desert, autonomy or personhood. What the social relational claim does do, however, is press upon such—indeed, all—normative justifications the need for an explicit shift in frame: away from a unilateral focus on a given person and their activities and interests and toward forthrightly taking up the bilateral character of the question, involving as it always does contending claims.<sup>30</sup>

It bears emphasis that to this point nothing has been said of property as a bundle of rights.

### *(B) Property is a bundle of rights*

From the first two foundational claims, that (a) property is a social relation (b) having a correlative/competing-interests structure, flow out the next two claims, subsumable under the distinct heading of “property is a bundle of rights.”

#### *(1) Divisibility: Distinct Pairs of Competing Interests = Distinct Entitlements*

Precisely because any given entitlement of property entails a disentitlement for someone else, and hence implicates competing interests, we must be careful not to conflate distinct pairs of competing interests under the cover of some single umbrella term (be it “property” or “right” or “ownership”). Thus: (a) It is one thing to protect Jill’s interest in the use of a space by not conferring on Jack any entitlement to exclude Jill from accessing the space. (b) It is another thing entirely also to entitle Jill to prevent Jack from using the space as well, by conferring upon Jill the entitlement to exclude access. (c) And it is a third thing altogether to confer upon Jill the entitlement to prevent Jack from engaging in a noisy activity outside, in a neighboring space, that interferes with Jill’s “quiet enjoyment” of the first space. Each of these cases implicates distinct kinds of competing interests. And, so, the entitlements of property are best understood not as

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<sup>28</sup> Indeed, in what is commonly seen as the touchstone essay on this topic—and the one serving Professor Penner as the source for his claim at *supra* note 26—Isaiah Berlin in fact recognized a version of this Hohfeldian/legal-realist point. Namely that, once we register the pervasive role of the state in structuring the “background conditions” of the private sphere, the realm of “negative liberty” infringements expands dramatically—attenuating the conceptual and normative significance of the contrast between “freedom from” and “freedom to,” to the point of replacing it with an alternative distinction, between a freedom of means and a freedom of ends, or freedom as voluntariness and effective agency versus freedom as self-determination. See BERLIN, *supra* note 27 at 170-72..

<sup>29</sup> For examples of this blurring, see note 72, *infra* and accompanying text.

<sup>30</sup> For an illustrative example of the extent and depth of the difficulties meeting this requirement can pose for natural rights arguments, in this case of Lockean stripe, see G.A. Cohen, *Nozick on Appropriation*, I/150 NEW LEFT REV. 89 (1985).

consisting of only one or a necessarily unified aggregate, but, rather, a divisible “bundle.”

This “divisibility” of ownership into discrete sets of entitlement-disentitlement pairs is of course the most familiar, indeed well-worn, theme of Hohfeldian analysis, going by the name of “disaggregation.” Less well appreciated, however, is the difference between a formal versus a *purposive* approach to the drawing of Hohfeldian distinctions. Illustrative of the former is an example commonly used—across a century of Hohfeld reception—to convey the distinction between a privilege and a claim-right: the case of having merely an “exclusion-privilege” with respect to a piece of land, without an “exclusion-right” regarding the same.<sup>31</sup> Yet conferral of an *exclusion-privilege* without the corresponding right, while certainly a formal possibility, is, we suggest, also *merely* a formal one, one having little sense or purpose in most real-world contexts we might be interested in. And the upshot of drawing up such formally possible, but practically inert, options is, we believe, a tendency for the meaning and point of Hohfeldian analysis to become lost in the mists of the ad-hoc proliferation of logical variations without end.<sup>32</sup>

A purposive approach, by contrast, provides a controlling orientation to the elaboration of the distinctions, showing clearly their point by grounding them in real-world issues involving policy-relevant distinctions between competing interests.<sup>33</sup> Take for example the distinctions elucidated in the previous paragraph: Our first distinction, between a *use-privilege* and an *exclusion-right*, is of signal importance in the context of resources susceptible to nonrival uses. Meanwhile the latter distinction, between a *use-privilege* and a *use-right* is of course central to the historical development of nuisance law,<sup>34</sup> in which context the latter claim—being applied to neighboring or conflicting uses—is in fact better understood as converting a *use-privilege* over one’s own resource into a distinct *exclusion-right*, now over a neighbor’s (use of their) resource. Purposively grounding the analysis of divisibility in this way provides, we believe, an important first safeguard against the slide of disaggregation into “disintegration.”<sup>35</sup>

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<sup>31</sup> See Arthur Corbin, *Foreword*, in WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 8 (Walter Wheeler Cook, ed. 1919); and Pierre Schlag, *How To Do Things With Hohfeld*, 78 *LAW & CONTEMP. PROB.* 185, 202-03 (2015).

<sup>32</sup> We should emphasize that neither Professors Corbin nor Schlag endorse such a formalistic approach to Hohfeld—indeed, both go to pains explicitly to underline the practical or policy significance of his analysis, which we build upon here. See Corbin, *id.* at xi; Schlag, *id.* at 189, 191-92. Our point however is that the use of examples such as exclusion-privilege versus exclusion-right to illustrate Hohfeldian distinctions partially undermines their own pioneering insistence on a practical or purposive, as opposed to a pure or formalist, approach to Hohfeldian analysis.

<sup>33</sup> This is one of two ways in which the view we are advancing here differs from the standard understanding of the Hohfeldian analysis of “the bundle of rights” as a “purely analytic” approach. On this view, Hohfeld’s analysis is taken to be both “pure” in the sense of “formal,” and “analytic” in the sense of “atomistic.” By contrast, we take the method underlying Hohfeld’s analysis to be *purposive* rather than “formal”—as discussed here—and in contrast to “atomistic,” *relational*, as discussed in notes 91-94, *infra* and accompanying text.

<sup>34</sup> See, e.g., Robert Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850-1920*, 59 *S. CAL. L. REV.* 1101 (1986).

<sup>35</sup> To be sure, simply grounding the analysis of divisibility in purposes is hardly an elixir against the perils of disintegration. Indeed, Professor Smith has argued that it is precisely a purposivity run amuck that leads the “bundle of rights” approach to an untenable ad-hocery. Smith, *supra* note at 1719-20. But as we discuss below, Professor Smith’s argument here runs together what for present purposes we seek to keep importantly distinct, namely: the case for conceptual parsimony in devising a theory of property versus the case for institutional parsimony in devising or evaluating real-world property arrangements. See notes 88 and 89, *infra* and accompanying text. Bearing that in mind, our argument here is simply that a purposive approach to the analysis of disaggregation—i.e., of divisibility and, discussed next, of variability—is an important *first* step in checking against *conceptual* ad-hocery (not, to be sure, the last step, as we elaborate below). This leaves open, as a matter for further *substantive* inquiry, the question of “how much” divisibility we should actually countenance in real-world property architectures—that

(2) *Variability: Distinct Contexts = Distinct Shapes for a Given Entitlement*

An extension of the preceding point—one meriting singling out—is that not only may the conferral of discrete entitlements upon distinct persons sensibly vary by purpose and context (divisibility), but so may the *shape of each discrete entitlement*—in terms of its existence (should it be conferred at all?), content (which activities should it cover?), holders (who and how many should enjoy it?) and enforcement (what remedy for its violation?). Highlighting this serves to guard against a tendency to take the content of the distinct entitlements as fixed, and thus to limit our understanding of the malleability of the bundle of rights to sub-dividing and reshuffling fixed sticks among different holders, as opposed also to including re-shaping of the sticks themselves.

The content of these claims about the “disaggregation”—or divisibility and variability—of the entitlements of property are, again, the most familiar components of Hohfeldian analysis, squarely falling within the “bundle of rights” rubric. What is less well recognized is an important point about their *status*. The “bundle of rights” claim is *not* merely a descriptive assertion about the shape taken by existing legal arrangements (i.e., that they often do unbundle or disaggregate “ownership”) *nor* just a normative exhortation about what shape they should take. Rather, it is a *conclusion* drawn out of the social-relational claim: once we register that each entitlement is a social relation involving a pair of competing interests, then when distinct pairs of interests are involved it would simply be a mistake of logic and practical reason—in terms of transparency in the process of reasoning and cogency in its substance—to treat a decision on one pair of interests as the same as, or controlling, a decision on a distinct pair. In a word, then, the bundle of rights claim is *neither* a descriptive *nor* a normative claim regarding the specific content of existing or desirable legal arrangements; rather, it is a *conceptual* claim about what the analysis of property must involve in *any* legal system.

When, however, the claim of disaggregation is advanced in isolation of its underlying basis in the social-relational claim and in a manner delinked from its driving purpose—to ensure careful consideration of meaningfully significant distinctions in interests—it threatens to spin out into an endless proliferation of formally possible (even if practically inert) entitlement options, or devolve into a laundry-list taxonomy of the fine-grained details of various and sundry existing arrangements. To threaten, in a word, disintegration.

(C) *Dereification ≠ “Disintegration”*

Does Hohfeldian analysis tend toward the disintegration of property—emptying it of any distinguishing features as a concept or field of law—as declaimed by some and decried by others?<sup>36</sup> On our view it need not: with the foregoing understanding of its content and structure in place, Hohfeldian analysis both *can and should* avoid the fate of disintegrating property. But to do so requires, first, disentangling a series of intricate conceptual wrangles that frequently

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will no doubt depend on our sense of the balance of considerations such as the pursuit of substantive policy purposes versus administrability, information costs, and so forth, as these play out in the context of different sorts of resources (with the drawing of distinctions between resources being subject to a parallel set of conceptual and substantive considerations, as discussed in Part III.A below). Whatever the outcome of such specific substantive inquiries, we remain steadfast in our view that, as an analysis of property’s general form, “divisibility” as expounded here is (along with variability, discussed next) the proper *conceptual* upshot of Hohfeldian “disaggregation” analysis.

<sup>36</sup> See Vandeveld, *supra* note 22; Thomas C. Grey, *The Disintegration of Property*, in NOMOS XXII: PROPERTY 69 (J. Roland Pennock & John W. Chapman eds., 1980); Penner, *supra* note 1; Smith, *supra* note 4.

obstruct received understandings of the central dimensions of Hohfeldian analysis and of what is at stake in its disintegration. Unpacking these is the task of the present section. Its upshot is the need to supplement Hohfeldian analysis with two constructive developments—absent in the original scheme but true to its spirit—which we sketch in Part III.

(1) *Dereification = Dephysicalization + Disaggregation + Dematerialization*

To the core components of Hohfeldian analysis just elucidated may be added a third pair of *distinct* points, concerning the *dematerialization* of both the objects and the interests of property, as follows:

*Social relations*: (a) property denotes neither a thing nor a relation between a person and a thing, but a relation between persons with respect to a thing; (b) the social relation consists of legal entitlement-disentitlement pairs that simultaneously benefit the interests of some and burden the interests of others with respect to the thing; and (c) *dematerialization of objects*: finally, the things themselves, that are the object of the social relations, needn't be tangible but may take intangible form, such as with inventive practical ideas or creative forms of expression.

*Bundle of Rights*: the entitlements of property are multiple, divisible and variable: (a) not just a single one nor a necessarily unified package; (b) nor uniform or invariant in their discrete content; and (c) *dematerialization of interests*: the interests protected by the discrete entitlements needn't be concretely "physical" like "consumptive use," but may take increasingly "abstract" form, such as expected monetary value.

Two points are fundamental to establish with respect to how dematerialization relates to the core components of Hohfeldian analysis. First, as a long line of scholars has emphasized, as a matter of historical development the practices and insights associated with dematerialization likely proved crucial catalysts for the crystallization of the core social-relations and bundle-of-rights claims.<sup>37</sup> They did so by helping to "*dereify*" thinking about property, by making plainly unavailable—in the case of intangible objects or very abstract interests—reliance on any physical attributes, relations or activities as the sole basis of legal decisions.<sup>38</sup> However, and second, it must also be clearly borne in mind that notwithstanding its historical stimulus, dematerialization is not only distinct from the relational and bundle claims but of secondary significance in the Hohfeldian scheme. Indeed, the order of conceptual priority is the reverse of historical sequence: not only do the relational and bundle claims, once we've grasped them, not stand or fall with dematerialization, they are also more deeply secure, *conceptual*, claims. Dematerialization, by

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<sup>37</sup> See Vandeveld, *supra* note 22; Grey, *id*; Morton J. Horwitz, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960 (1992); Jane B. Barron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 UNIV. CINCI. L. REV. 57 (2014).

<sup>38</sup> Illustrative here is Fredrick Pollock's path-breaking treatment of these issues, lying at the center of the historical process of dematerialization. Pollock's argument that to be a "thing" in law, an object of property needn't have any physical properties, has precisely the upshot of underlining that legal conceptualizations and decisions pertaining to such "things" must explicitly advert to underlying human interests and social purposes—and that this also holds for *physical things*, with the line of reasoning forced upon us with special clarity by dematerialization now reaching back also to apply to material objects. See Frederick Pollock, *What Is a Thing?*, 10 L.Q. REV. 318, 320 (1894) ("At this point it may be worth considering, at the risk of an apparent paradox, whether corporeal things are themselves so corporeal as we think at first. For a material object is really nothing to law, whatever it may be to science or philosophy, save as an occasion of use or enjoyment to man, or as an instrument in human acts"). We thank Henry Smith for urging the significance of Pollock's analysis in this connection. For reliance on Pollock's argument as a basis for the "rethification" of the objects of property in a post-dematerialization world, see note 79 *infra*.

contrast, is more contingent in two respects: (a) its validity hinges upon specific historical developments in technology, culture and economic practices; and (b) even today, we could *choose not to* consider various intangible objects and abstract interests as adjacent conceptually or normatively to tangible and physical ones, for purposes of organizing fields of law or making substantive decisions. The relational and bundle claims, on the other hand, are bedrock.

Unfortunately, likely as a result of their historical intertwinement, the radically distinct character and content of these three dimensions of analysis has often been missed. Starting with Arthur Corbin at the onset of the reception of Hohfeld and continuing to the present, a persistent tendency for both defenders and critics of Hohfeldian analysis has been to blur these distinct lines of analysis: not only to conflate the dematerialization of interests with that of objects but also, more fundamentally, to lump in both with the relational claim (often under cover of the umbrella term “dephysicalization”), or even to drop the latter out of the picture altogether.<sup>39</sup> The problems created by such blurring are manifold: The fundamental content and character of the relational claim—as the platform for all Hohfeldian analysis—gets lost from view, robbing in turn the disaggregation claim of any underlying basis, setting it loose as a free-floating claim of uncertain provenance or status. The result—once we add in how the dematerialization of the objects and interests of property is conflated with its “dephysicalization” as wrought by the relational claim<sup>40</sup>—is to render entirely opaque the precise bases for neo-Hohfeldian claims of “disintegration” and the specific targets of the neo-Blackstonians’ critical fire.

In general, the distinctive power and components of Hohfeldian analysis, with its clear delineation of distinct lines of analysis, alongside their relations of conceptual priority—to form a tightly-integrated and generative structure—are displaced by a series of now laundry-listed, now jumbled together, claims. All either to herald or decry a hazy “disintegration” whose distinct sources and perils become harder and harder to specify or repair.

Specifically, talk of a single contrast between “right to a thing” versus “bundle of rights” views<sup>41</sup> obscures (when it doesn’t simply conflate) three distinct dimensions of the Hohfeldian view that neo-Blackstonian critics may mean to target and replace with a “rethingification” alternative: (a) the dephysicalization of property, meaning the account of property as a social relation; (b) the disaggregation of the entitlements of property into a divisible and variable set; or (c) the dematerialization of the objects and interests of property entitlements. Comprehensive exploration of which of these targets different critics have in mind—and of the cogency of their

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<sup>39</sup> In perhaps the leading discussion in this vein, Kenneth Vandeveld under the heading of the “dephysicalization” of property focuses exclusively on what we call here “dematerialization,” which he then couples with disaggregation to form the two central insights of Hohfeldian analysis—with the crucially distinct, and more foundational, social-relational point dropped out of sight entirely. Vandeveld *supra* note 22, at 334-40, 360-2. See similarly Grey, *supra* note 36; HORWITZ, *supra* note 37 at 145-156. For other receptions blurring together the claims—and, crucially, burying the relational claim and its foundational status—see Arthur Corbin, *Taxation of Seats on the Stock Exchange*, 31 YALE L. J. 429 (1922); Penner, *supra* note 1; Stephen Munzer, *A Bundle Theorist Hold On to His Collection of Sticks*, 8 ECON. J. WATCH 265 (2011); Henry E. Smith, *Property Is Not Just a Bundle of Rights*, 8 ECON. J. WATCH 279 (2011); ALEXANDER AND DAGAN, *supra* 2 (2012), and Barron, *supra* note 37.

<sup>40</sup> We hasten to add that it is *our* use of these terms that is idiosyncratic. Standardly, “dephysicalization” is used as synonymous with what we prefer to give the distinct label of the “dematerialization” of the objects and interests of property. See Vandeveld, *id.* and HORWITZ, *id.* “Dephysicalization” we prefer to reserve for the radically distinct, and more fundamental, idea of denoting a relational rather than thing or person-thing conception of property.

<sup>41</sup> See, e.g., Claeys, *supra* note 1 at (speaking of “*the* [...] contrast” between a “thing versus ad hoc bundle” views) (emphasis added).

criticisms and merits of their proposed alternatives—lies beyond our present scope.<sup>42</sup> Here, it suffices to emphasize that clarity about these distinct lines of analysis is simply the indispensable first step—both for specifying the precise concerns posed by disintegration and for developing constructive ways forward. In what follows, we focus on advancing our own views along these two fronts, while touching briefly in the margins on how these relate to *neo*-Hohfeldian disintegration views and the rethingification responses of neo-Blackstonian critics.<sup>43</sup>

(2) *Disintegration = Unmooring dematerialization + Unspooling disaggregation*

To begin at the end, so to speak, the way out of disintegration starts by breaking down the question—“what is property?”—into two distinct lines of inquiry: (a) What is property *about*? That is, what differentiates property, as a concept or field, from other areas of law in terms of its distinctive subject matter? and (b) What does property *consist of*? That is, what are the central legal entitlements that can provide the organizing focal points for positive, normative and institutional analysis of the field?<sup>44</sup>

With the questions so framed, does Hohfeldian analysis provide clear, non-disintegrative, answers? Yes and no. On the one hand, nothing in the social relations claim prevents us from offering a relatively clear and distinct answer to the first question: property is the field of law pertaining to “social relations with respect to things.” Of course this answer does face difficulties on a Hohfeldian view, but what is important to recognize is that these difficulties stem *not* from the social relations or “dephysicalization” claim, but, rather, from a set of further insights—those pertaining to the dematerialization of the objects and interests of property. These insights, by loosing property from the anchor of “things,” threatens to unmoor the field, robbing it of any firm grounding in a distinctive subject matter. The task, then, is how to avoid this “unmooring” of the field, while retaining the core insight that property is, indeed, a field of social relations about ... *what*? Our answer, developed in what follows, is: neither *everything and hence nothing in particular* (disintegration), nor a re-assertion of *things* (rethingification) but, rather, *resources*.

Concerning the second question—of what entitlements does property consist?—here the difficulty with the core of Hohfeldian analysis is greater. Under the heading of disaggregation,

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<sup>42</sup> One of us is presently engaged in such a comprehensive examination, as part a fuller treatment of many of the topics addressed in more abbreviated form in this essay. Talha Syed, *The Architecture of Property: Structure and Purpose in Hohfeldian Analysis* (draft manuscript on file with the authors).

<sup>43</sup> See notes 44, 77, 79, and 88-89, *infra* and accompanying text.

<sup>44</sup> These are not of course the only ways to frame the inquiry. Indeed, part of our argument concerns the advantages of this particular framing—one that flows directly out of our understanding of the structure and purpose of Hohfeld’s own enterprise—over alternatives. As an illustrative contrast, consider Professor Grey’s influential discussion of disintegration, framing the issue in terms of the following two questions: First, what does ownership consist of? Second, what can one have property rights “in”? Grey, *id.* at 69-70. (A similar frame is adopted in Vandeveld, *supra* note 22.) From our vantage, this way of approaching the issues bears two significant drawbacks. First, to consider the ownership question first—before and in isolation of the issue of “ownership of *what*”—is precisely to put the cart before the horse. On our—purpose—view of concept-formation, one cannot even begin to answer what ownership may, does, or should consist of unless we first have an idea of what property is *about* (and thus *what* may be “owned”). Second, to inquire into what one can have property rights “in” is a quite distinct matter from asking what property is about. The latter formulation directs our attention precisely to the task at hand: namely, to conceptualize an institution or field in light of some sense of our governing purposes, the cognitive and practical interests at stake. The former question, on the other hand, invites not only a purely descriptive inquiry into existing legal practices but also one that takes their surface terminology at conceptual face value—so that whenever the term “property” is invoked by legal professionals, we simply accept that the relevant underlying concept is in play. Thereby disabling us, right at the outset, from developing any theoretically powerful conceptualizations.

travel a pair of conceptual insights regarding the divisibility and variability of entitlements but little idea of what they mean going forward. Are there any “core” or central entitlements to serve as focal points of analysis, or does disaggregation simply “unspool” into a laundry list of discrete entitlements, devolving into ad-hoc analysis of piecemeal decisions taken up one at a time? The latter peril would seem to loom especially large where, as discussed above, the analysis of entitlements is not grounded in any controlling purposes. And one possible grounding—that the entitlements pertain to “things”—is, again, made unavailable by dematerialization. The first step, then, in avoiding unspooling is to anchor the analysis of property’s entitlements in an analysis of its distinctive subject matter, resources. A second step—equally necessary—is to structure the analysis of the entitlements themselves in a more conceptually integrated manner. We advance a way of doing so in Part III.B. below, by developing a picture of property as consisting neither of *anything* (disintegration), nor *one single thing* (a “core” or “essence”) but rather an *architecture* of elemental entitlements, the *fundamental building blocks* of all property forms.

## II. AN AUTONOMOUS TRADITION OF PROPERTY ANALYTICS IN EUROPE: RESOURCE-SPECIFIC PROPERTY DISAGGREGATION

The revised Hohfeldian analytical scheme that we have just outlined highlights the contextual and, as we will develop, resource-specific character of property. Property, we argue, is a legal relation between persons with respect to “things” (resources), a relation structured by correlative legal entitlement-disentitlement pairs, in which the conferral and shape of any particular entitlement depends on context and purpose—more precisely, we will argue, on the distinct interests and values implicated by distinct kinds of *resources*. The focus on the “thing” was marginal to Hohfeld himself and intentionally dropped in neo-Hohfeldian dematerialization accounts, in which property became unmoored, so as to no longer be anchored in *anything*. But the resource-specific character of property was central to an autonomous tradition of property disaggregation developed in Continental Europe. It is to this tradition that we now turn, with the aim of retrieving its fundamental insights and illustrating the main stages in its development.

### (A) *The Roman “Law of Things” and the contextualist focus on resources*

As is often the case when one seeks to understand continental European property law, we have to start with Roman law.<sup>45</sup> Our search for the European Hohfelds takes us back to the late Republic, a time of great juristic creativity, when the main features of Roman law as we know it today took shape.<sup>46</sup> Roman property has long struck the imagination not only of lawyers but also of historians, economists and philosophers because of its allegedly “absolute”, “individualistic”, “unitary”, “extremely concentrated” nature.<sup>47</sup> This idea of Roman *dominium* being absolute and

<sup>45</sup> For a relatively recent discussion of the importance of grounding the study of European property law in its Roman and medieval past see George L. Gretton, *Ownership and its Objects*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Bd. 71, H. 4 (Oktober 2007), pp. 802-851.

<sup>46</sup> H.F. JOLOWICZ & BARRY NICHOLAS, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* (3<sup>rd</sup> edition, Cambridge University Press, 1972, reprint 2008) at 5.

<sup>47</sup> A quick glance at Roman law textbooks reveals the ubiquitous presence of the idea that Roman property is absolute and unitary. See JOLOWICZ & NICHOLAS *supra*, at 140 (arguing that “The Roman law of classical times, -a leading textbook reads- is dominated by what is commonly called the absolute conception of ownership” defined as “the unrestricted right of control over a physical thing”); W. W. BUCKLAND & ARNOLD D. MCNAIR, *ROMAN LAW AND*

unitary is a pervasive one and its traces in the modern philosophical, economic and legal literature on property are ubiquitous. But, as Italian Roman law scholar Vittorio Scialoja put it, it is a legend.<sup>48</sup> This legend was concocted by the “Romano-Bourgeois” jurists, the liberal jurists who, in the nineteenth century, sought to construct a modern, individualistic property law for liberal, capitalist European nation states along the lines of Roman *dominium*. The truth is that Roman property law was less “absolute” and “individualistic” and “unitary” than the Romano-Bourgeois jurists would have us believe.<sup>49</sup> And, moreover, *dominium* was just one the many forms of ownership available in Roman law. It was the supreme form of ownership, reserved to Roman citizens, exempt from taxation and protected through the action known as *rei vindicatio*, which was a formal assertion of absolute title.<sup>50</sup> However, alongside *dominium*, there existed a large menu of more limited and differently shaped forms of “ownership” that were largely “resource-specific”, i.e. tailored on the specific characteristics of and interests implicated by different resources.

The contextual focus on resources is a critical feature of Roman property law that has attracted scant attention in contemporary property law literature. Roman jurists developed a highly sophisticated “law of things”, i.e. a classification of the various types of *res* that can be the object of property rights. Roman law, classified the various *res* according to their physical characteristics, the economic and social policy interests they involved and the moral and cultural values they implicated. In modern property law, the most familiar and fundamental distinctions are that between real property and personal property, and between private property and public property. But these two sets of categories were marginal to the Roman law of things. For the Romans, the critical distinction was that between *res in commercio* and *res extra commercium*.<sup>51</sup> The former were things that can be the object of private property, while the latter were things that, because of the social, moral or cultural values associated with them, cannot be the object of private property and of market transactions. The *res extra commercium* were further divided in *res (extra commercium) divini iuris* which could not be privately owned and exchanged because of their religious significance and *res (extra commercium) humani iuris* which were exempted from private property and commerce because they implicated important public interests. Among the things that were exempt from private property and market transactions because of the public interest they involved, particularly important were the *res communes*.<sup>52</sup> These were things like the sun, the air, the sea, the shores, that are given to all as an essential, innate gift and hence

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COMMON LAW (Cambridge University Press, 2<sup>nd</sup> edition 1952, reprint 2008) at 81-82 (arguing that the owner has very limited ability to parcel out to other individuals these three entitlements, in the way, in the Anglo-American common law and that this limited ability makes property a “unitary” or “concentrated” right).

<sup>48</sup> VITTORIO SCIALOJA, *LEZIONI DI DIRITTO ROMANO*, (1885) (The Roman theory of property has inspired the strangest legends not only among the populace but also, sometimes, among the educated).

<sup>49</sup> Eva Jakab, *Land, Law and Exploitation of Natural Resources. Property Rights in Ancient Rome*, in LAND AND NATURAL RESOURCES IN THE ROMAN WORLD, (P. ERDKAMP, K. VERBOVEN AND A. ZUIDERHOEK eds, Oxford University Press 2015).

<sup>50</sup> PIETRO BONFANTE, *LA PROPRIETA'*. CORSO DI DIRITTO ROMANO, vol II, Milano, (1968) p 327.

<sup>51</sup> See Yan Thomas, *Le Valeur des Choses. Le Droit Romain hors la Religion*, in ANNALES, HISTOIRE, SCIENCES SOCIALES 57 annee N6 nov-dec 2002 pp 1431-1462 (arguing that by classifying things into *res in commercio* and *res extra commercium*, the Romans marked off a separate realm, that of the sacred, the religious and the public, which are seen as contiguous and very close to each other).

<sup>52</sup> The list of *res communes* is in JUSTINIAN, *INSTITUTES*, (translated and with an introduction by Peter Birks and Grant McLeod, Cornell Univeristy Press, 1987), book II, 2.1 *de rerum divisione*; on the debate on the nature and significance of the concept or *res communes* see, Bonfante, *La Proprieta'*, *supra* note, p.55.



belong not to the state but to the public, who has a temporary and limited, but legally protected, right to access and use. Another critical category was that of *res mancipi*, things that had critical socio-economic value, the transfer of which required specific, highly ritualized modalities capable of ensuring certainty and publicity in economic transactions.<sup>53</sup> Yet another distinction, largely opaque to us because rooted in Stoic physics, was that between *res unitae* (single things, infused with one single breath of *pneuma*, the world soul), *res compositae* (composite things), and *universitates rerum* (totalities of things).

For each of these *res*, the owner's entitlements were shaped to reflect the special interests and values implicated by the resource. The characteristics of the resource determined (a) which entitlements were conferred to the owner (b) the scope of the owner's entitlements; (c) whether these entitlements were exclusive or shared with others. This contextualist focus on resources meant that, alongside *dominium*, the supreme and full (even if never "absolute") form of ownership, Roman law allowed for a wide menu of more limited forms of ownership for specific resources that were critical for the Empire's economic, military and political needs. For example, land situated in the provinces of the Empire was a critical resource for both economic and geo-political reasons. Accordingly, property entitlements were split between the Roman state and private "owners" or users and shaped to achieve a variety of goals. The vast literature on the Roman province of Egypt gives us a good sense of what some of these goals and policies were. By recognizing "ownership" bundles with different scope and shape, the Roman state sought to balance two, largely conflicting, goals: advancing the economic power and political influence of the Empire's landowning elite and securing significant stable state revenues in the long term.<sup>54</sup> Another reason for the state to retain control on provincial lands was the role it played as an economic actor, deciding what crops would be planted and, for example, subsidizing the production of wheat by leasing wheat land on favorable terms.<sup>55</sup> Another specially tailored form of ownership was ownership of "*ager publicus*", i.e., land situated in Italy, for which the state retained title while granting private users entitlements that, with time, came to resemble "ownership". The content and scope of users' entitlements were shaped to encourage the establishment of large-scale commercial farming at a time when a Mediterranean market economy was developing.<sup>56</sup>

### (B) The Medieval Concept of "*dominum divisum*"

While these more limited forms of resource-specific property were central to Rome's social and economic life, they were never explicitly theorized or conceptualized. Roman legal thought

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<sup>53</sup> PIETRO BONFANTE, *RES MANCIPI E RES NEC MANCIPI*, ROMA (1988).

<sup>54</sup> See Dennis P. Kehoe, *Property Rights over Land and Economic Growth in the Roman Empire*, in *OWNERSHIP AND EXPLOITATION OF LAND AND NATURAL RESOURCES IN THE ROMAN WORLD*, *supra* note, p. 88-106, at 90-91; *Id.*, *LAW AND RURAL ECONOMY IN THE ROMAN EMPIRE* (The University of Michigan Press, Ann Arbor, 2007); On the political significance of the imperial agrarian land policy in Egypt see ANDREW MONSON, *FROM THE PTOLEMIES TO THE ROMANS: POLITICAL AND ECONOMIC CHANGE IN EGYPT*, (Cambridge University Press, 2012).

<sup>55</sup> *Id.*, p. 101.

<sup>56</sup> SASKIA ROSELAAR, *PUBLIC LAND IN THE ROMAN REPUBLIC. A SOCIAL AND ECONOMIC HISTORY OF AGER PUBLICUS IN ITALY, 396-89 BC*, (Oxford University Press, 2010), pp. 3-4.

was eminently practical and disinclined to offer abstract definitions.<sup>57</sup> Modern jurists have painstakingly searched for *the* definition of the concept of property in the Roman sources, but none of the many supposed definitions they found can hardly be considered *the* definition. For a conceptualization of property able to accommodate these more limited forms of resource-specific ownership we have to wait for the 14<sup>th</sup> century, when the jurists known as the “Glossators” and the “Commentators” were busy developing a property law functionally suited to the socio-economic and political needs of their own world, medieval society, using Roman materials.<sup>58</sup> This task required conceptual creativity as well as pragmatic awareness of the problems and needs of the real, actual life of property law. It is to the creativity and pragmatism of one of the most prominent “Commentators”, Bartolus of Saxoferrato (1313-1357), that we owe *dominium divisum*, a new concept of property informed by two fundamental intuitions that today we associate with Hohfeld: (a) that property consists of analytically distinct entitlements and (b) that each entitlement in the bundle is variable, i.e., its very existence, scope and the number of its holders can vary without property losing its “propertiness”. The concept of *dominium divisum* describes a type of property in which the distinct entitlements that ownership comprises were split between two “owners”, who have respectively “*dominium directum*” and “*dominium utile*”. While, roughly, the former had formal title, the right to receive some form of rent and the right to transfer title and the latter had the right to use, to appropriate the revenue generated by the property and the duty to pay rent, the specific shape and scope of the two owners’ entitlements varied. In each of the property forms that Bartolus conceptualized as instances of *dominium divisum*, i.e. feudal tenure, *emphyteusis*, *superficies*, and the long term prescription (*longi temporis praescriptio*), the two owners’ bundles were differently shaped and yet they were still “*dominium*”, thereby emphasizing the malleability of property.<sup>59</sup>

Why Bartolus felt the need to finally formulate a concept of variable and divided ownership, the absence of which had not precluded the development of a sizable menu of forms of divided, resource-specific ownership in Roman times, is a fascinating question. The answer we suggest is that the structure and the daily lived experience of medieval society made medieval jurists uniquely aware of the fundamental insight in which any concept of variable and divided property is rooted, i.e., that property is a social relation, a relation between persons concerning a resource. Crafting a new concept of *dominium divisum*, consisting of analytically distinct entitlements each of which can be variously shaped, requires abandoning any abstract notion that property is a thing or a physical relation between a person and a thing and realizing that property, always and inevitably, involves relations between persons. The Roman political and cultural imaginary,

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<sup>57</sup> ALDO SCHIAVONE, *THE INVENTION OF LAW IN THE WEST*, (Belknap/Harvard University Press 2012) p. 76-80; FRITZ SCHULTZ, *ROMAN LEGAL SCIENCE* (Oxford University Press, 1946) pp 6-20; BRUCE W. FRIER, *THE RISE OF THE ROMAN JURISTS* (Princeton University Press, 1985) p 191.

<sup>58</sup> MANLIO BELLOMO, *THE COMMON LEGAL PAST OF EUROPE* (Lydia G. Cochrane transl. 1995).

<sup>59</sup> Andre Van der Walt and D.G. Kleyn, *Duplex Dominium: The History and Significance of the Concept of Divided Ownership*, in *ESSAYS ON THE HISTORY OF LAW* (D. P. Visser ed. ) p 213-260; Thomas Rufner, *The Roman Concept of Ownership and the Medieval Doctrine of Dominium Utile*, in *THE CREATION OF THE IUS COMMUNE. FROM CASUS TO REGULA*, John W. Cairns and Paul J. du Plessis eds, 2010) p 127-142; Ennio Cortese, *Controversie Medievali sul Dominio Utile: Bartolo e il QUIDAM DOCTOR DE AURELLANIS*, in *AMICITIAE Pignus, Studi in Ricordo di Adriano Cavanna*, Antonio Padoa Schioppa, Gigliola di Renzo Villata, Gian Paolo Massetto eds., 2003) p. 613-635; Robert Feenstra, *Les Origines du Dominium Utile Chez les Glossateurs* (avec un Appendice concernant l’opinion des ultramontanes), in *FATA IURIS ROMANI ETUDES D’HISTOIRE DU DROIT* par Robert Feenstra, 1974) p. 21-259; PAOLO GROSSI, *LE SITUAZIONI REALI NELL’ESPERIENZA GIURIDICA MEDIEVALE. CORSO DI STORIA DEL DIRITTO* (1968) p. 144-208.

largely shaped by Roman “Classical Law”, obscured the web of social relations regarding resources; instead it spotlighted the relation between two poles of power, strong private property, conceived in very abstract terms, and a well-developed central state.<sup>60</sup> The disintegration of the Roman state ushered in a feudal structure in which everyone, feudal lords, vassals and serfs, is tied up in hierarchical relations regarding access to land. Feudalism forced medieval jurists to abandon abstractions and to realize that property is about hierarchies and complex webs of social relations.<sup>61</sup> Of course it would be anachronistic to expect medieval jurists explicitly to crystallize their intuitions into an articulate conceptualization of property as a social relation. However, in avoiding the anachronism, we should also not fail to see how, in retrospect, their development of the concept of *dominium divisum* was, indeed, rooted in glimmers of this realization.

*Dominium divisum* was the general conceptual category to describe the many, feudal and non-feudal, property forms that involved a relation between a “superior” owner and an “inferior” owner regarding access to a parcel of land. In each of the many property forms that belonged to the larger category of *dominium divisum*, ownership entitlements were differently shaped so as to structure different types of relations between the two owners with regards to the land. In some forms, the relation between the two owners was social and political, with the superior owner entitled to receive homage, military aid and to exercise a variety of jurisdictional rights and recreational privileges.<sup>62</sup> Other forms of *dominium divisum* were largely economic in character and resembled today’s lease, with entitlements shaped to give the parties different degrees of control over the management and profits of the land.<sup>63</sup> In other words, medieval jurists felt the need to develop the concept of *dominium divisum* when faced with the new reality of feudal society, in which people were immersed in a complex web of political, social and economic relations with regards to land. The new concept of property as *dominium divisum* allowed the jurists to describe the new reality and to acknowledge and embrace their role as the technicians who shaped ownership entitlements to achieve a variety of political, social and economic goals. Practically, articulating the new concept required overcoming a number of major conceptual difficulties, such as the Roman rule that explicitly rules out the possibility of two owners for the same thing.<sup>64</sup> But Bartolus and his contemporaries were ready to bend and twist the Roman rules

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<sup>60</sup> Of course, our modern understanding of the Roman law is largely based on what generations of modern Roman law scholars regarded as “classical law”, the layer of juristic writing they believed to be “original”, see SCHIAVONE, *supra* note 44, at 26-28; see also BRUCE FRIER, *THE RISE OF THE ROMAN JURISTS* (Princeton University Press 1985) at 252-268.

<sup>61</sup> See ELLEN M. WOOD, *FROM LIBERTY TO PROPERTY: A SOCIAL HISTORY OF WESTERN POLITICAL THOUGHT FROM THE RENAISSANCE TO ENLIGHTENMENT* (2012).

<sup>62</sup> For a detailed discussion of the many forms of *dominium divisum* in medieval and early modern France see MARCEL GARAUD, *LA REVOLUTION ET LA PROPRIETE FONCIERE* 15-51 (Sirey, Paris, 1959).

<sup>63</sup> This was the case for forms such as *emphyteusis* and *bail a rente*, see GARAUD, *supra* note 48, at 39 and 122-124.

<sup>64</sup> The road towards *dominium divisum* was not a smooth one. The most significant obstacle was that, while in both feudal property and non-feudal forms of split ownership, there appeared to be two owners, the superior owner and the inferior owner, Roman law explicitly ruled out the possibility of two owners of the same thing. A passage of the Digest (D13.6.5.15) made it clear that “*duo non possunt habere dominium eiusdem rei in solidum.*” What this rule meant is that there can very well be two or more co-owners of one thing, each owning a “share,” but no two persons can own the entirety of the same thing at the same time. This raised a crucial question, clearly stated in a passage from the collection of Roman definitions known as *Excerpta Codicis Vaticani*: are the inferior parties in the relationship (the *emphytearius*, the *superficiarius*, the *colonus*) actual owners or mere holders of *iura in re aliena*? Bartolus confidently declares that *both* are owners because there are two types of ownership, *dominium directum* and *dominium utile*. “A German doctor who yesterday held a class (*repetitio*) here” – Bartolus explains – “reports that there is only one type of ownership. But there are two.” Bartolus then proceeds to support his statement with

because the abstraction of Roman absolute *dominium* had lost its descriptive power. The new feudal world required a new property methodology that married the need for conceptual systematization with close sociological attention to the variety of relations between individuals regarding land.

(C) *The Concept of Property as a Tree*

The Roman “law of things” and the concept of *dominium divisum* introduced into European property thought the awareness that property, rather than being a monolithic right, involves a number of distinct and limited entitlements, each of which may be shaped and divided to best promote the values and interests implicated by the different resources that are the object of property. *Dominium divisum* continued to be an accurate description of landownership in continental Europe throughout the early modern era. However, starting in the 18<sup>th</sup> century, as feudal property relations transformed and economic and political modernity started taking shape, *dominium divisum* and the focus on the resource lost their descriptive usefulness and their appeal. By the 18<sup>th</sup> century, landholding relations throughout Europe had fundamentally transformed, with a gradual but steady shift in the socio-economic and legal status of “superior” and “inferior” “owners”.<sup>65</sup> The bond between the “superior” owner and the land became increasingly tenuous while the bond between the “inferior” owner and the land grew stronger. One of the fundamental ideas of political and economic modernity was to transform medieval, limited “inferior” ownership into full-blown ownership.<sup>66</sup> Jurists, economists and philosophers embarked in the project of crafting “Roman-Bourgeois” property, a new concept of unitary and full property for modern, liberal, capitalist European nation states, modeled along the lines of Roman *dominium*. The jurists did the conceptual groundwork, while the economists developed a new political economy that praised the economic and civic-republican benefits of absolute property<sup>67</sup>, and political theorists proposed a new constitutional vision of equal citizenship based on the demarcation between absolute private property and public sovereignty.<sup>68</sup> At the dawn of the 19<sup>th</sup> century, absolute and unitary property was enshrined in the *Code Napoleon*.<sup>69</sup> And, in the decades between the Bourgeois Monarchy of Louis Philippe and the end of the 19<sup>th</sup> century, French jurists completed the work, interpreting the *Code*’s property in light of the mandates of liberal individualism,

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Roman texts. The *Lex Possessores* (C.11, 62,12), a late constitution included in Justinian’s compilation, described the holders of a right of *emphyteusis* as “owners of the land” (*fundorum domini*). And yet, according to another text, (C 4.66.1-2) Bartolus explains, someone else remains the owner *vis-a-vis* the lessor. If there are two owners, Bartolus concludes, then the types of ownership must be different, because the same ownership cannot belong to two persons as stated in the Digest (D 13.6.5.15). See Rufner, *supra* note 46 at 131 and 139-141.

<sup>65</sup> MARCEL GARAUD, *LA REVOLUTION ET LA PROPRIETE FONCIERE*, (Sirey, Paris, 1959) at 2.

<sup>66</sup> See RAFF BLAUFARB, *THE GREAT DEMARCATION. THE FRENCH REVOLUTION AND THE INVENTION OF MODERN PROPERTY* (Oxford University Press 2016) at 48-57. Of course, the other parallel transformation was the enclosure of common lands and the abolition of rights over communal lands. See JOHN MARKOFF, *THE ABOLITION OF FEUDALISM. PEASANTS, LORDS AND LEGISLATORS IN THE FRENCH REVOLUTION* (Pennsylvania State University Press 1996) at 485.

<sup>67</sup> JOHN SHLOVIN, *THE POLITICAL ECONOMY OF VIRTUE. LUXURY, PATRIOTISM AND THE ORIGINS OF THE FRENCH REVOLUTION* (2006).

<sup>68</sup> RAFF BLAUFARB, *THE GREAT DEMARCATION. THE FRENCH REVOLUTION AND THE INVENTION OF MODERN PROPERTY* (2016) p 48-80.

<sup>69</sup> Andre-Jean Arnaud, *Les Origines Doctrinales du Code Civil Francais* (Librairie Generale de Droit et de Jurisprudence 1969) at 179 ff.

effectively transforming it into full blown Roman Bourgeois property.<sup>70</sup> Charles Bonaventure Marie Touiller, the author of one of the most influential “commentaries” on the *Code Napoleon*, captured the essence of Roman-Bourgeois property in one brief sentence that seems a direct refutation of any Hohfeldian insight: “property is the relation between a person and a thing irrespectively of all others”.<sup>71</sup>

Roman Bourgeois property was the dominant conceptualization of property throughout the 19<sup>th</sup> century. Classical liberal jurists and their social critics engaged in a close debate over its conceptual accuracy, its policy implications and its moral foundations. The latter exposed the unrealistic assumptions behind Roman Bourgeois property, sought to mitigate its most obvious distributive inequities and questioned its moral foundations. However, they did not provide an alternative conceptualization of property. It is only in the first half of the 20<sup>th</sup> century that a new generation of French and Italian jurists developed a new conception of property that rested on some intuitions having affinity with the ideas underlying Hohfeld’s approach. A recent and radical transformation in the actual life of property law, these jurists argued, demanded a new concept of property. The decades between 1850 and 1920 witnessed momentous economic, social, and political changes: the rapid industrialization of late-blooming economies such as France and Italy, the agrarian crisis of the 1880s, World War I, the crisis of liberalism, and the rise of Fascism. Under the pressure of these events, property was transformed, becoming more limited and “specialized” or “pluralistic.” Special legislation limited the use rights and transfer rights of owners of things of historical and artistic interest, imposed duties on owners to improve and to cultivate their land, subjected owners of utilities or industries of critical importance for the national economy, such as textile or manufacturing, to duties and limits. Emergency legislation passed during World War I further limited the rights of owners of resources critical to national security and the inventory of resources subtracted from private property and held by the state in trust for the public was expanded to include water, forests, and mines. The protection of the owner’s absolute rights was no longer the paramount concern and equal access to property and the public interest became part of the vocabulary of property. These changes in the legal regime of property were the catalysts that helped this new generation of jurists come to see the concept of property in a new light, revealing what more than a century of Roman-Bourgeois emphasis on the individual owner’s absolute right had obscured: that property rights have significant effects on social relations among individuals regarding access and use of resources. Articulated in the guise of the “social function” of property, this new concept closely interwove the empirical registry of increasing social interdependence with a normative emphasis on the need for property to serve a “public interest.”<sup>72</sup>

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<sup>70</sup> Michel Vidal, *La Propriete dans l’Ecole de l’Exegese in France*, QUADERNI FIORENTINI, 5-6 (1976-1977).

<sup>71</sup> CHARLES BONAVENTURE MARIE TOUILLER, DROIT CIVIL FRANÇAIS SUIVANT L’ORDRE DU CODE NAPOLEON (Paris, 1811-1831), t.3, n. 84, p70.

<sup>72</sup> In two respects, then, this process paralleled the one we described above concerning dematerialization: (a) just as dematerialization of the objects and interests of property proved a crucial historical stimulus to the conceptual crystallization, by Hohfeld, of property as a social relation, so increasing industrialization and socio-economic interdependence catalyzed a conceptual focus, by Josseland and Pugliatti, toward property’s “social function”; and (b) just as Hohfeld’s social relations insight was often buried under, being entangled with, a mass of dematerialization points, so here the conceptual aspect of property’s “social function” was often directly assimilated to normative claims regarding the “public interest.” Indeed, the conceptual claim of property *as a social relation* – as distinct from its empirical (property *affecting* social relations) and normative (property *erving* social interests) dimensions – seems not to have been explicitly recognized, or at least articulated, by the “social function” theorists.

The two jurists who made the greatest contribution to the reconceptualization of property were the French Louis Josserand (1868-1941) and the Italian Salvatore Pugliatti (1903-1976). The concept of property Josserand and Pugliatti developed sought to mediate two conflicting impulses: disaggregating property into a plurality of resource-specific regimes, to reflect the changes they were witnessing in property law, and preserving a robust core for property rights in a Europe threatened by totalitarianism. In Pugliatti and Josserand's new conceptualization, property resembles a tree with a unitary trunk and many branches.<sup>73</sup>

The trunk is the essence of property, the core entitlement or entitlements necessary for a right over a thing to be property. For Josserand and Pugliatti, the trunk is the owner's right to control the use of the resource.<sup>74</sup> However, the theorists of the tree concept realized that protecting the owner's sphere of autonomous control was not enough and that a modern, liberal concept of property had to acknowledge that property also implicates the public interest. The rise of Fascism, they realized, was the consequence of liberals' insensibility to new ideas about the proper balance between individual rights and the interest of the collectivity. The tree-concept jurists' solution was to argue that owners should exercise their use-control entitlements, while remaining mindful of property's "social function."<sup>75</sup> The "social function" of property is part of the trunk of the tree. Property, Josserand and Pugliatti suggested, had always included social elements. At no point in history, not even in Roman law, was property absolute and the idea of a social interest, parallel to the interest of the individual owner, had always been there.

The problem with the notion of social function was that it was hopelessly indeterminate. Its content and the precise extent of the duties it imposed on owners were highly contested. The tree-concept theorists' response to indeterminacy of social function was captured in the image of the branches of the tree. Josserand and Pugliatti drew inspiration from the Roman "law of things" and argued that the social function concept alludes to the multiple values and interests implicated by different resources. The branches of the property tree are many resource-specific agglomerates of entitlements: agrarian property, family property, affordable urban residential property, entrepreneurial property, and intellectual property. The content of the social function of property is different for each of the branches. Because of the differences in its object, Josserand argued, "property takes on different shapes depending on the type of resource involved. Property is no longer uniform, rather it is multiform, infinitely diverse and varied. There is no longer one property but many properties subject each with its own specialized regime."<sup>76</sup> No longer "one" but "infinitely ... varied," property, it would seem, had again disintegrated.

### III. WHAT IS PROPERTY? TWO MODEST WAYS FORWARD

As we have seen, the specter of disintegration haunts both U.S. and European debates on post-formalist conceptions of property, making clear the need for better answers to "what is property." An initial step in the right direction, we have suggested, is to break that question down

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<sup>73</sup> SALVATORE PUGLIATTI, *LA PROPRIETÀ NEL NUOVO DIRITTO* 149 (Dott. A. Giuffrè ed., 1964).

<sup>74</sup> The conceptualization of this "right" involved eliding precisely what Hohfeldian analysis would insist on keeping sharply distinct, namely interests in use protected by use-privileges vs. interests in use protected by exclusion-rights.

<sup>75</sup> PUGLIATTI, *supra* note 8, at 281 (starting his discussion on the social function of property by saying that "the core of property is now open to transformations").

<sup>76</sup> Louis Josserand, *Configuration du Droit de Propriete Dans L'ordre Juridique Nouveau*, in *MELANGES SUGIYAMA* 101-03 (1940), at 100.

into two distinct parts: (a) what is property *about*—as a distinct concept or field of law?<sup>77</sup> and (b) what does property *consist of*—in terms of its central, identifying forms of legal entitlements? And answers to each of these can only be evaluated in light of our reasons for wanting an answer—in light of, that is, our sense of precisely what is wrong with the forms of disintegration corresponding to each question: unmooring dematerialization and unspooling disaggregation.

(A) *What is property about? Resource-specific analysis of the objects of property*

On the disintegration view, the dematerialization of the objects and interests of property is taken to issue in the conclusion that since property rights needn't relate to tangible "things," they can obtain in "anything and everything." But if property is about everything it is also about nothing in particular, emptying the field of any distinguishing features. And what's wrong with *that* is two-fold. First, such an intellectual move disarms us in the face of real-world cognitive and institutional practices, where "property law" is still taught in law schools, understood as a field of legal scholarship and its concepts regularly invoked in real-world legal disputes and policy decisions. If these practices really are about nothing in particular, then we should at least explain why their distinguishing boundaries nevertheless persist and, preferably, also offer some prescriptions for reforming our conceptualization and organization of fields and practices.

But, and second, in any case they are not about nothing in particular. Rather, as is made clear by both long-standing social practices and "external" social and political theory, they are about the legal regulation of resources. The anchoring of property in resources may well be the single most enduring theme in the history of European practices and theory around property law—as we showed in Part II. And even today, no matter how loud the disintegration cry of "there's nothing (distinctive) there," historical, economic, and philosophical works continue to provide descriptive, explanatory and normative accounts of "property." Why? Because there really is "something" there, something of distinct significance to humans in society. And that is how we structure social relations with respect to *resources*, to form persons and satisfy interests through the allocation, production and distribution of "goods."

By "resources" we do not mean simply some intuitive, straightforward or pre-theoretical, notion. Rather, we mean precisely to invoke a notion requiring explicit conceptualization, one that can be made sense of only within *external* frames of positive (e.g., economic) and normative (e.g., political philosophical) analysis, those lying to a considerable extent outside of law.<sup>78</sup>

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<sup>77</sup> For discussion of the differences between this formulation and an alternative often used by both disintegration and neo-Blackstonian theorists (namely, "in what may one have property?") see *supra* note 44.

<sup>78</sup> Central to our point here, then, is to emphasize a contrast with more traditional "inside out" approaches, whereby the salient features of resources, if specified at all, are perceived through a glass darkly, through the filter of existing lay usages and legal doctrines. By contrast, we wish to underline the importance of starting "outside in," so as to conceive resources, at least initially, independently of their existing legal-property treatment, by foregrounding, as the initial drivers of the analysis, a conceptualization of what resources and their distinctive features are that draws systematically on external frames of positive and normative analysis. For illustrative analyses along these lines, see Yochai Benkler, *Intellectual Property and the Organization of Information Production* (1999); Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production* 114 *YALE L. J.* 273 (2004); BRETT FRISCHMANN, *INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES* (2012); and Lee Anne Fennell, *The Problem of Resource Access*, 126 *HARV. L. REV.* 1471 (2013). An alternative way forward beyond Blackstonian and disintegration views has been articulated in important recent work by Hanoch Dagan. HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* (2011). Space limitations prevent us from exploring here possible points of convergence and contrast between Professor Dagan's value-centered approach and

Frames of analysis for issues such as the static allocation and dynamic production of “goods-types” varying in rivalry and excludability, or the constitutive effects of different goods on interests in freedom, personhood, or flourishing, or their strategic implications for values such as distributive justice or democracy. Although developing a full account of resources along these lines lies beyond our present scope, two important implications of having such a conception serve as the anchor for property merit emphasis here.

First, resources so conceived are not synonymous with “things.” Not only may resources be immaterial, but not all material objects need be resources.<sup>79</sup> A signal example in this latter respect are the tangible insignia subject to trademark protection. As a distinguished line of analysis has insisted from the origins of trademark law through to the present, there is a sharp distinction to be drawn between “misrepresentation” and “misappropriation” bases for “unfair competition,” just as there is between “consumer confusion” and confusion-independent “dilution” claim in trademark.<sup>80</sup> Underlying these, we suggest, is a fundamental distinction to be

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our resource-anchored view. And similarly so for points of convergence and contrast between our emphasis on *external frames of analysis* of “resources” and, what we very much build on here, an emphasis on *external institutional regimes to private property* for governing resources, as advanced in an important line of (principally intellectual) property scholarship. See, e.g., William W. Fisher, *Intellectual Property and Innovation: Theoretical, Empirical and Historical Perspectives* (2001), available at <https://cyber.harvard.edu/people/ffisher/Innovation.pdf>; Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657 (2010); and Amy Kapczynski, *The Cost of Price: How and Why to Get Beyond IP Internalism*, 59 UCLA L. REV. 970 (2012).

<sup>79</sup> It may be objected that, with respect to the first two points we have just made demarcating “resources” as distinct from “things”—namely, first, that resources as an object require explicit conceptualization, rather than simply registering a pre-theoretical perception or intuition of a pre-given (likely tangible) “thing,” and, second, that resources so conceived need not be tangible at all—that these may also be shared by those offering a revised account of “things,” fit for a post-dematerialization world. Indeed, an important such account, by Fredrick Pollock, serves as a touchstone for both Professors Penner’s and Smith’s views that, dematerialization notwithstanding, the objects of property remain “things.” PENNER, *supra* 4 note at 111; and Henry E. Smith, *The Thing About Exclusion*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 94, 117ff (2014). At the center of Pollock’s account is the idea that a “thing,” for purposes of legal analysis, is simply any individuated matter of discrete rights and duties. Pollock, *supra* note 318 (“A thing is, in law, some possible matter of rights and duties conceived as a whole and apart from all others, just as, in the world of common experience, whatever can be separately perceived is a thing.”) However illuminating in other respects Pollock’s quite brilliant treatment of this topic may be, as the basis for an account of the objects of property, it faces a strong—we think insuperable—objection: so conceived, “things” are so general as to run precisely the risk that one may now have “property” in “anything.” Thus, for instance, among the “things” in which we may have property-like rights, Pollock lists the “exclusive right to ferry passengers across a river for hire at a certain place.” *Id.* at 319. But this would seem precisely to usher in the disintegration of property as a distinct field of law, very much along the lines heralded by Professor Grey. Grey, *supra* note 26. And, thus, to serve as an unpromising basis upon which to re-integrate, post-dematerialization, property as a distinct field of law.

Needless to say, this is far from the last word on different proposals and bases for the “rethinking” of the objects of property in a post-dematerialization world—including those that would simply reject dematerialization and insist on retaining a sharp distinction between “property” in tangible things as the heart of the field, with any legal rights in intangible things, such as those commonly referred to as “intellectual property,” as lying outside the scope of “property” strictly speaking. Space limitations prevent us from undertaking here a fuller exploration of the potential points of difference or convergence between two these views—(a) of “things” as the objects of property; and (b) “resources” as the distinctive subject matter of property, as what it is about—and hence for present purposes we will limit ourselves to simply delineating the central outlines of our contrasting “resource” view. For such a fuller exploration, see Syed, *Architecture of Property*, *supra* note 42.

<sup>80</sup> On misrepresentation versus misappropriation in unfair competition law, see, e.g., Felix Cohen, *Transcendental Nonsense and the Functional Approach*, COLUM. L. REV. (1935); Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L. J. 1165 (1948); Richard Posner, *Misappropriation: A*



drawn between treating commercial insignia as “communicative” vehicles, for the sake of regulating the integrity of market information for consumers, and treating them as “resources,” for the sake of protecting firms’ investments in goodwill.<sup>81</sup>

Second, once we start down this road—of anchoring property in a purposive analysis of what matters, requiring external positive and normative analysis of the object of significance rather than simply registering lay and legal usages—there is likely to be little reason to stop at “resources” as a crude monolith. Rather, we will likely need to break our analysis down into resource-specific units, as suggested by categories and implications of positive and normative analysis. Consider three illustrations. First, as revealed by positive economic analysis of goods-types, the purpose, feasibility and desirability both of conferring exclusionary rights over resources *and* of organizing their production on the basis of markets or commons or the state vary dramatically for private, common-pool, club, toll and public goods. The virtual absence of such elementary analytics in our current property law curriculum is disconcerting.<sup>82</sup> Or to take a second, more normative, frame of analysis: are there resources of such fundamental significance for self-determination or the development of personhood—housing being a prime candidate—that equitable access to them should be understood as imperative as a matter of “right,” and not

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*Dirge*, 40 HOUSTON L. REV. 641 (2003). On consumer confusion versus confusion-independent “dilution” claims within trademark, *see, e.g.*, Glyn Lunney, *Trademark Monopolies*, 48 EMORY L. J. 367 (1999); *and* Mark Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L. J. 1687 (1999).

<sup>81</sup> Such a distinction would serve as the conceptual marker for drawing two sharp substantive lines in this area: First, *between* trademark and other regimes of “intellectual property” proper, such as copyright, patent and trade secret protection. *See, e.g.*, Peter Menell & Suzanne Scotchmer, *Intellectual Property*, in 2 HANDBOOK OF LAW & ECON. 1474 (A. Mitchel Polinsky & Steven Shavell, eds., 2007). Second, *within* trademark, between “consumer confusion” and “dilution” sources of concern. *See, e.g.*, Lunney, *id.*; *and* Lemley, *id.*

<sup>82</sup> To speak of a “virtual absence” may be thought to overstate matters, but for purposes of underlining both the precise content of our point and our sense of its import, we think it worthwhile to state it somewhat starkly. It is not only that a review of leading property casebooks reveals, as Julie Cohen observes, that they “are organized almost entirely around the intricacies that attend land use and land transactions.” Julie Cohen, *Property as Institutions for Resources: Lessons from and for IP*, 94 TEXAS L. REV. 1, 6 (2014) (citing in support: “*See, e.g.*, JESSE DUKEMINIER ET. AL, PROPERTY, AT XI-XXIV (8<sup>th</sup> ed. 2014); ERIC T. FREYFOGLE & BRADLEY C. KARKKAINEN, PROPERTY LAW: POWER, GOVERNANCES, AND THE COMMON GOOD, at vii-xv (2012); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES, at xix-xxx (2d ed. 2012); JOSEPH W. SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES, at xiii-xxviii (6<sup>th</sup> ed. 2014); JOHN G. SPRANKLING & RAYMOND R. COLLETTA, PROPERTY: A CONTEMPORARY APPROACH, at xi-xx (2d ed. 2012)”). But it is also that, even with respect to land, there is little by way of external positive and normative analysis of it as a resource (indeed, as a set of distinct resources, as such external analysis would likely conclude). Moreover, the absence of such external analytics can be felt even in the one exceptional casebook, which explicitly seeks to remedy the “lack” of “theoretical and structural coherence” of the “traditional” property syllabus of “a disparate set of doctrinal areas loosely tied together by their relationship to land” – and does so by “address[ing] not only issues regard land, but also the many other resources, including natural resources and intellectual property, that are increasingly important in our society.” JOHN P. DWYER & PETER MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE, at v (1998). Here also, however, the distinctive positive and normative features of resources are not explicitly developed, but perceived primarily through the prism of existing legal doctrines and categories. *Id.* at xix-xxix. Indeed, telling in this respect is the reference to intangible resources as “intellectual property.” Not because it necessarily portends the hazards of a by-gone era, where the use of “property” to refer both to the good and potential rights regarding it would tend to smuggle normative conclusions into one’s descriptive premises. But rather because use of the same label for two distinct notions is illustrative, we believe, of the lack of explicit conceptualization of the second notion, i.e., of the underlying goods protected by IP rights, as *resources* of, e.g., “information, knowledge and culture” or “expressive forms” and “functional ideas,” which merit being expressly conceived and analyzed as such, independently of their existing legal treatment, and thus also require a distinctive label from the one appended to the legal rights.

“merely” to promote social welfare or even general distributive justice?<sup>83</sup> If so, can such goods be classed into sufficiently coarse-grained units as to provide distinct foci of analysis from other, more “generic” resources subject merely to the imperatives of efficiency and distribution?<sup>84</sup> Or, to shift lenses again, do certain resources—say, financial assets—have such strategic social significance, impacting not only concentrations of wealth but also of power, as to merit special attention from the vantage of democratic commitments?<sup>85</sup> Analysis proceeding along such lines would, we suggest, remain sensitive to important “delineation cost” concerns raised against ad-hoc disaggregation, while simultaneously attending to similarly significant “uniformity costs” concerns in the other direction.<sup>86</sup>

(B) *What does property consist of? Architectural analysis of the entitlements of property*

On the disintegration view, the disaggregation of the entitlements of ownership is taken to issue in the conclusion that since property rights needn't take any one form—i.e., since the “right” of ownership is neither a single entitlement nor any necessarily unified package of entitlements—then property rights can take *any* form. And seemingly counseling in favor of this view is an argument from flexibility: “Well at least here,” says the disintegrationist, “there can be no complaint. Once we accept that property law, policy and theory is about the structuring of social relations regarding resources through legal entitlements, it can only be a boon to be maximally open-ended about the relevant entitlement options, no?”

No. The unspooling of disaggregation into an ad-hoc laundry list of entitlements is not about analytic or institutional flexibility. Rather it is a counsel of intellectual and programmatic disorientation. Real-world thinking and institutional design need focal points for normative and positive analysis. A telling illustration in this respect is the fact that virtually all philosophical treatments of property, no matter how much they initially genuflect before the “bundle of rights” view, revert precisely to some strong “ownership” model to provide a focal point, some possible legal content of entitlement, for purposes of positive, normative and institutional analysis.<sup>87</sup> Thus we agree here with the insistence of Professor Henry Smith that we need a theoretically powerful analysis of the “architecture” of property.<sup>88</sup> On our view, however, it should be one that does not

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<sup>83</sup> See, e.g., Nestor Davidson, *Property and Identity: Vulnerability and Identity in the Housing Crisis*, 47 HARV. C.R.-C.L. L. REV. 119 (2012); Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511 (2007).

<sup>84</sup> For an example of another set of goods deemed amenable to analysis as a demarcated sub-domain, on account of their distinctive normative salience, see Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75 (2004).

<sup>85</sup> For an analysis of how agricultural land may have been such a strategically significant resource in an earlier phase of the American economy, with design choices in the configuration of property entitlements having fundamental implications for the construction of individual freedom, see Yochai Benkler, *Distributive Liberty: A Relational Model of Freedom, Coercion, and Property Law*, 107 HARV. L. REV. 859 (1994).

<sup>86</sup> For “delineation costs,” see Smith, *supra* note 4 at 1698. For “uniformity costs” see Michael W. Carroll, *One for All: The Problem of Uniformity Cost in Intellectual Property Law*, 55 AM. U. L. REV. 845 (2006).

<sup>87</sup> See, e.g., JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988). SINGER, *supra* note 3 at 6ff (observing that the bundle of rights model has had little impact in displacing the “ownership” model even among legally sophisticated philosophical accounts).

<sup>88</sup> Smith, *supra* note 4 at 1692-97, 1700. We should note that, as discussed above and below, Professor Smith’s discussion of the “why and how” of an “architectural or modular theory of property” combine what we wish here to keep separate, namely: theoretical reasons for conceptual parsimony (e.g., simplicity and generative power) and substantive reasons for institutional parsimony (e.g., transaction costs). See note 35, *supra* and note 89, *infra* and

prejudge substantive questions of positive, normative and institutional analysis, regarding the existence, content and conferral of entitlements in any specific setting. Rather, its role should be limited to providing the conceptual focal points for such substantive analysis.<sup>89</sup>

We offer such an account here, of the fundamental building blocks of *all* property analysis, consisting of four elemental entitlements: use-privilege, exclusion-right, expropriation-immunity and transfer-power. Before elaborating on the *content* of these entitlements, a word about their *status* is in order: (a) they form a conceptually tightly integrated set, starting out from the most basic one, a use-privilege, to build out to the rest in a series of close conceptual steps of correlatives and opposites, primary and secondary entitlements, which in turn track core underlying interests in resources; (b) to result in a theoretically powerful, indeed, generative, architecture: yielding the four primitive building blocks for all property entitlement analysis, the ones necessary and sufficient for generating all possible permutations and combinations of property buildings; and (c) they are the *differentia specifica* of all property entitlements, distinguishing the field from other areas of law.

The most basic human interest in a resource is simply to “use” it in some direct, immediate way. It is the foundational interest upon which all others are built. Indeed, there are two distinct reasons why the use-privilege is the basic unit of analysis, the primitive building block for all the rest. One has been emphasized by both sides of the debate among neo-Blackstonians: namely the “substantive” or “external” point that, simply as a matter of human interests, the primary interest in resources is not to exclude others but to use ourselves.<sup>90</sup> But

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accompanying text. It is with the former that we are concerned here, in our effort conceptually to specify the focal points for any substantive—i.e., positive, normative and institutional—analysis of real-world property arrangements. We bracket here the latter, substantive issues, such as how to weigh, in evaluating and shaping such arrangements, considerations of administrative simplicity against fine-grained pursuit of social policy objectives.

<sup>89</sup> Thus our approach is less substantive and more conceptual than most alternatives to unspooled disaggregation that have been proposed by critics of the Hohfeldian view, taking the form of an “essence” or “core” of property. Many of these accounts base their views of a core entitlement or set of entitlements in a substantive normative conception of the central interests that ought to be protected by property rights as a general matter. See, e.g., Penner, *supra* note 1 at 742ff; PENNER, *supra* note 4 at 71ff; Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L. J. 275 (2008); and Claeys, *supra* note 1 at 631ff (defending a “core” or “essence” of “exclusive use,” centered on normative considerations of autonomy). Or, alternatively, in substantive positive-cum-normative suppositions concerning the relative merits of facilitating market-based private ordering versus directly pursuing social policy objectives. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000) (arguing for a limited menu of property forms based on “information” and “frustration” cost concerns). By contrast, our aim is simply to specify, as a conceptual matter, the elemental building blocks that are the necessary and sufficient focal points for *any* substantive account of what matters in terms of the positive, normative and institutional analysis of the design of property rights. Much closer to our focus on conceptual, over substantive, considerations is Professor Smith’s more recent emphasis on formal criteria such as simplicity and generative power in devising and evaluating theories of property’s architecture. Smith, *supra* note 4 at 1694-95. On our view, however, Professor Smith’s category of “delineation costs” straddles the divide between more formal and substantive criteria, in part being concerned with the theoretical costs of undue complexity, in giving up conceptual simplicity and generative power, and in part with more substantive costs of such complexity, in terms of real-world “information costs” in administering property rights. Smith, *id.* at 1698.

<sup>90</sup> Thus, even those advancing a “right to exclude” as the “core” or “essence” of property have typically recognized that, as a substantive normative matter, interests in use are prior to, indeed provide the basis for, those in exclusion. See Penner, *supra* note 1 at 743 (“use justifies the right, while exclusion frames the practical essence of the right”); PENNER, *supra* note 4 at 71 (“the right to property is a right to exclude others from things which is grounded by the interest we have in the use of things”); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731 (1998) (“the right to exclude others is a necessary and sufficient condition of identifying the existence of

there is also a tighter, more internal-conceptual reason: you simply cannot specify the content of (the concept of) Exclusion, without first already possessing the content of (the concept of) Use. But this is not so for Use. We cannot understand what it means for A to exclude B from Y unless we already possess some notion of exclude “from what”? But we can understand what it means for A to “use” Y without possessing any notion of “exclusion.”

If A has the legal entitlement to use resource Y, this means of course that B has no entitlement to exclude A from Y. And so we arrive at our first entitlement-disentitlement pair:

- (1) (a) Use-privilege of A  
which correlates with
- (b) no-right of Exclusion for B

What is our next step from here? For lawyers already familiar with various contingencies and options, any number of alternative next moves suggest themselves, including: What if B *did* have an exclusion-right? What if A had a use-right? What if A had an exclusion-right? While we could build out the analysis taking any of these steps, we suggest that in fact the most basic and obvious next step, conceptually, is simply to ask: can B still have a Use-privilege over Y as well? That is, not to introduce any new concepts/entitlements or persons or resources, but simply to transfer an existing known entitlement over a known resource to a known person. The answer, of course, is yes: alongside, simultaneously with, A’s use-privilege may co-exist B’s use-privilege.

At this point, the next question virtually forces itself upon us: What would it mean for only one of them to have the use-privilege? Suppose the uses in question are rivalrous of the resource and we wish only to let either A or B to use it. We would then need to confer upon one of them the *opposite* of what correlates with a use-privilege: i.e., not a no-right of exclusion but an exclusion-right. Which of course in turn correlates with a no-privilege to use, or a duty to refrain from using. To result in the following two pairs of entitlements:

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|---|--------------------------|---|
| (1) (a) Use-privilege of A<br>which correlates with | which is the opposite of | (2) (a) Exclusion-right of B<br>which correlates with |
| (b) no-right of Exclusion for B                     |                          | (b) no-privilege to Use for A                         |

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property”); Thomas W. Merrill, *Property and the Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1, 3 (2014) (agreeing with PENNER, *supra* note 4 that interests in use are a precondition for the right to exclude, while maintaining that exclusion-entitlements, not use-entitlements, are the “defining feature” of property); Smith, *supra* note at 4 at 1693 (“There is no interest in exclusion per se. Instead, ... the right to exclude ... serve[s] the interest in use.”) (For a dissenting view, arguing that exclusion stands on its own bottom, see Arthur Ripstein, *Possession and Use*, in PHILOSOPHICAL FOUNDATION OF PROPERTY LAW 156 (James Penner & Henry E. Smith, eds. 2013).) Others, by contrast, insist that the normative priority of use-interests should issue in a conceptual priority of use-entitlements, so that the core or essence of property is conceived in terms of “exclusive use”—i.e., a bundling together (or, less charitably, a muddling as one) the distinct Hohfeldian entitlements of a use-privilege and exclusion-right (although with less than crystalline clarity on whether the core or essential use-entitlement is to be understood in terms of a “privilege” or a “right”). See Claeys, *supra* note 1 at 631ff; Katz, *supra* note 89. (We should note that Professor Smith has also underlined the incompleteness of “the right to exclude” as a “linchpin” or “core” for property law, and emphasized the need to supplement it with an account of “things” as the object of property. Smith, *supra* note 79. From our vantage however, that goes to a distinct issue, concerning not what property *consists of*, but rather what property *is about*—and our reasons for preferring, in that latter respect, “resources” over “things” are briefly given in note 79, *infra*.)

It is worth dwelling for a moment on the conceptual inter-relations between entitlements and how they unfold. We began with a concept of an entitlement and then moved to understand what its jural *correlative* was. At that point, we had no idea—or even the need for an idea—of something called its “opposite.” The move to develop a concept of the opposite of an entitlement only happens at a subsequent stage of the analysis, when we go on either (a) to ask, as a kind of formal matter, what if B did have what they do not have here? or (b) more substantively, to inquire into a distinct new interest (what if we needed to enable B not only to use but prevent A from using)? This point, seemingly elementary, is quite fundamental: the failure to appreciate the conceptual centrality and priority of correlatives *over* opposites is precisely to fail to grasp the relational method of Hohfeldian analysis.<sup>91</sup> Foregrounding, as is often done, jural “opposites” as central to the analysis<sup>92</sup>—rather than understanding them as *entirely* derivative of a correlative-then-distinct-interest structure of the analysis<sup>93</sup>—is precisely to invite the (on our view) misleading understanding of Hohfeldian analysis as “atomistic.”<sup>94</sup>

Returning back from method to substance, we now have before us the basic quartet of Hohfeldian entitlement-disentitlements concerning resources. This quartet pertains of course solely to “primary” entitlements-disentitlements, meaning here entitlements (that structure relations) pertaining directly to the object or resource itself. We now continue to the second quartet, of “secondary” entitlements, or entitlements about entitlements.

Suppose we have conferred upon A both a use-privilege and exclusion-right relating to a house, which is now their “home.” What secondary entitlement might make sense as the next step? We suggest that it is immunity from expropriation of their primary use and exclusion entitlements, to protect their interest in “security” in holding said entitlements over their home. What good is it to enjoy use and exclusion over one’s home on Monday without any security that these entitlements cannot simply be “taken” on Tuesday, by either a private person or the state? This brings us to our third entitlement-disentitlement pair:

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<sup>91</sup> For important discussions of Hohfeldian analysis in a somewhat distinct “structuralist” vein, see Jack Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 119 (1990); and Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991). Our analysis here places greater emphasis than these authors on the purposive and concretely relational—as opposed to self-contained and generally “structuralist”—character of Hohfeldian analysis, i.e., on grounding the relevant conceptual distinctions, between discrete entitlements, in substantive judgments concerning important differences in underlying interests-in-resources, and grounding the relevant conceptual inter-relations, between correlatives, in the underlying social relations they track.

<sup>92</sup> See, e.g., Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?* 8 HOFSTRA L. REV. 711, 752-53, 759 (1980); and Joseph Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, WISC. L. REV. 975, 986-87 (1982). We should note that the foregrounding of opposites in these pioneering articles runs against the grain of their animating aim in recovering Hohfeldian analysis—namely, to retrieve it from the sawdust of formal taxonomies—an aim that we share and are indebted to.

<sup>93</sup> To underline the point as clearly as we can, in contrast to a long-standing tradition of foregrounding opposites such as “right/no-right” as the center of the analysis, on our view the central relations and contrasts of significance are privilege/no-right and privilege-right—with “right/no-right” simply having no real significance at all on its own. In other words, it is not only that jural correlatives such as privilege/no-right or right/duty are conceptually prior and the central drivers of the analysis. But also that jural opposites are not even of secondary significance on their own: they are merely the connective tissue between two distinct pairs of jural correlatives, as shown in our basic quartet of primary entitlement-disentitlements above. The important relations or contrasts are: (a) first, the inter-relations between jural correlatives (privilege/no-right, right/duty); and (b) next, the distinctions between different pairs of correlatives (privilege vs. right). Jural opposites such as right/no-right are of unclear import standing alone.

<sup>94</sup> See Smith, *supra* note 39 (treating Hohfeldian analysis as “atomistic”); Schlag, *supra* note 31 at 218-233 (accepting characterization of Hohfeldian analysis as atomistic, but defending it against some perils associated with atomism).

- (3) (a) Expropriation-immunity (of A)  
which correlates with  
(b) No-power/disability to transfer (of other private persons or state)

And again we face the ineluctable question: what if A did not have this entitlement, or at least not against all parties? What if, for instance, we conferred upon A this entitlement only against private persons, but not the state? We would then we arrive at a fourth pair:

- (4) (a) Transfer-power (of the state)  
which correlates with  
(b) Liability (vulnerability-to-loss) (of A)

An interesting feature of this analysis is that it resolves, at least for this pair, the puzzle raised long ago by Walter Wheeler Cook and Arthur Corbin as to whether a Hohfeldian “liability” or exposure of B, correlating with the transfer power of A, is really a “disadvantage”—since often B is the one in a position to receive the entitlement.<sup>95</sup> Here, however, the liability correlating to the state’s transfer power is that of A, who is vulnerable to having their primary entitlements transferred away. This, clearly, is a disadvantage to, or burdening of, A’s interests. Hence at least for this correlative pair, the Cook-Corbin puzzled is solved.

This completes our analysis of the four fundamental building block entitlement-disentitlement pairs of property, those necessary and sufficient for generating all permutations and combinations of property structures—the *differentia specifica* of property as a legal form.<sup>96</sup>

## Conclusion

Imagine a property law casebook organized around the interaction of two levels of analysis: (1) the “stuff of the world,” as broken down into resource-specific categories conceived in terms of their (im)material characteristics, human interests and social significance; and (2) the “building blocks of society” conceived in terms of the fundamental entitlement options necessary and sufficient for constructing all the legal architectures of social relations regarding resources.

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<sup>95</sup> See Walter Wheeler Cook, *Introduction: Hohfeld’s Contribution to the Science of Law*, in WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 8 (Walter Wheeler Cook, ed. 1919); and Arthur Corbin, *Legal Analysis and Terminology*, 29 *YALE L. J.* 163, 169 (1921).

<sup>96</sup> To be sure, this is only the barest sketch both of the content of the elemental entitlements and of their architectural status. Regarding their content, what is important to underline is that our analysis does *not* provide any argument in favor or against the existence, shape or conferral of any of these entitlements, either singly or in their combined configuration, in any specific setting. That of course is the work of concrete legal analysis and institutional design, ideally sensitive to the distinct contexts and purposes implicated by different resources, in terms of the positive, normative and strategic concerns they raise. And it is indeed precisely our aim here *not* to pre-judge such substantive analysis, but rather simply to furnish the focal points indispensable for organizing the inquiry. Regarding their architectural status, a further step of institutional analysis, not undertaken here, would be to specify not only how these elements may be used as fundamental building blocks in the configuration of all specific ensembles of property rights, but also how such ensembles may then usefully be conceived and labeled as belonging to larger families of, e.g., “private,” versus “commons” versus “public” property regimes. Or, to move even farther afield, to specify when an institutional regime for structuring the allocation, production and distribution of resources may be said to leave “property” altogether (as it might be said, for instance, of “prize” system alternatives to patent rights). These are matters for another day. See Syed, *Architecture of Property*, forthcoming.

That such a curriculum is even now only a glimmer on the horizon—a full century after Hohfeld—is one measure of the distance by which this pioneer’s thoughts outstripped his world. To honor his legacy would be to bridge that gap.