

THE (PRACTICAL) MEANING OF PROPERTY

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Property, like liberty, security and resistance to oppression is one of the “natural and imprescriptible rights of Man and of the Citizen.”¹ Property is the means by which the will acquires existence through the characteristic of being mine.² “... Their lives, liberties, and estates, which I call by the general name property.”³ Property is “something owned or possessed.”⁴ “Property is robbery.”⁵

Property appears such a malleable concept one must wonder whether it means anything at all.⁶ Establishing that it does requires taming the tendency of an unchanneled definitional quest to meander between the grand ontological and the pedestrian look-it-up-in-the-dictionary approaches to meaning. As the title indicates my focus is resolutely practical – specifically finding a meaning for property which frames our myriad related public policy debates in a way which improves our understanding of the issues and facilitates decision-making.⁷

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¹ Karl Marx and Friedrich Engels, *THE COMMUNIST MANIFESTO*, INTRODUCTION AND NOTES BY GARETH STEDMAN JONES 149 (Penguin Classics 2002) (referring to the Declaration of the Rights of Man and of the Citizen) (hereafter “Marx and Engels”).

² *Id.*, at 74 and 151 (citing to G.W.F. Hegel, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* (ed., A.W. Wood, 1991) 76-8).

³ See John Locke, *TWO TREATISES OF GOVERNMENT*, *The Second Treatise: An Essay Concerning the True Original, Extent, and End of Civil Government*, Sec. 123 at 155 (Yale University Press, Ian Shapiro ed., 2003).

⁴ Merriam-Webster Dictionary Online at <http://www.m-w.com/dictionary/property>.

⁵ Pierre Joseph Proudhon, *WHAT IS PROPERTY? AN INQUIRY INTO THE PRINCIPLE OF RIGHT AND OF GOVERNMENT* CHAPTER 1, located online at: <http://etext.virginia.edu/etcbin/toccer-new2?id=ProProp.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=1&division=div2>.

⁶ Most succinctly captured by Professor Thomas Grey’s blunt assertion that as property has no coherence it could effectively be declared “dead.” Thomas C. Grey, *The Disintegration of Property* in *PROPERTY: NOMOS XXII* 69 (J. Roland Pennock & John W. Chapman eds., 1980). See also, Abraham Bell and Gideon Parchomovsky, *A Theory of Property*, 90 *CORNELL L. REV.* 531, 533 (2005) (stating that “the field seems to be in insoluble theoretic disarray ...”).

⁷ Focusing the practical rather than musing on the “big truths” does not, of course, diminish the importance or value of the latter to property debate as is discussed at length below. It merely reflects my view of the

That fingerpost points away from the futile search for “the one true property law”⁸ and towards treating the regime as an enormously flexible tool for allocating control over society’s resources.⁹ Defining property as functional rather than inherently definitive means it responds rather than dictates. Each of the opening statements is transformed from an imperative into a possibility. Nothing beyond societal will determines when and how property will be deployed. Nothing but our imagination limits the reasons for which, nor the finesse and nuance with which, it can be applied. Thus functionally approached, “property” refers to society’s legal rules establishing who has the ultimate right to control its resources, regardless of what those rules or resources may be and however those rules may be normatively justified.¹⁰

appropriate priorities in a heterogeneous society. Cf. Charles Van Doren, A HISTORY OF KNOWLEDGE (Ballantine, 1991) 66-67 (discussing how the practical Roman approach helped their society to endure).

⁸ To avoid consternation among philosophers, theologians and others so inclined, I should emphasize my argument does not depend on (or assert) the non-existence of absolute truth nor does it preclude making individual or group decisions firmly rooted in moral views. The crucial point is that regardless of our individual certainty, the identification of a single absolute and universal truth continues to evade us as a *society*. Consequently, defining property in terms of the “right” is a *practically* unproductive exercise. See *infra* Parts II and III. My position, therefore, is neither relativist nor formally positivist. Although others may feel compelled to label it as such, they risk missing the point.

⁹ There are indications (some very strong) that the dialog is coming around to this view. See, e.g., Peter K. Yu, *Intellectual Property and the Information Ecosystem*, 2005 MICH. ST. L. REV. 1 (providing a very insightful analysis along these lines regarding the intellectual property debate). See also, Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L. J. 1 (2004), Anupam Chander, *The New, New Property*, TEXAS L. REV. 715 (2003); Hanoach Dagan, *Property and the Public Domain*, 17 YALE J. L. & HUMANITIES xx (2006); Carol M. Rose, *Property in All the Wrong Places*, 114 YALE L. J. 991 (2005) (all arguing, in various ways, for a flexible view of property law). That property is variable rather than having a single “true” substantive definition is also supported by history as noted by the promulgators of the Doctrine of Saint-Simon: “this great word ‘property’ has represented something different at every epoch of history.” Marx and Engels, *supra* note 1, at 173. See also, Francesco Parisi, *The Rise and Fall of Functional Property*, xx (working paper on SSRN); Rose, *supra*, at 616 (noting the supposition that property rights are unchanging is ahistorical).

¹⁰ The definition is refined in Part II to include varying kinds and degrees of control, obligations as well as rights and status-based (membership in society) rather than transactional applicability. For those hungering for immediate detail the relevant material is found *infra* at notes xx-yy and accompanying text. I chose the word “functional” to emphasize the practical/instrumental, however, my objective should not be confused with Professor Felix Cohen’s and others of his persuasions use of the term. See Felix Cohen, *Transcendental Nonsense and the Functional Approach* (35 COLUM. L. REV. 809 (1935)). Whereas Professor Cohen was primarily interested in how the law is judicially applied (*see id.*, at 824), or perhaps

The effect on public policy debate is dramatic. Extricating property from our various personal narratives regarding the right answer¹¹ reveals the fundamental issue is not “right or wrong,” good or bad” or even “yes or no.” Property encompasses all normative justifications and all rules establishing whose, what kind and how much control. Revering or fearing property, therefore, confuses personal preference with the regime itself. It is not the hammer but our divergent views regarding its just use which should be the focus of our debate.¹² Sweeping assertions, paeans and vilifications of the regime should be ignored in favor of understanding the underlying motivations: the beliefs, desires, needs, concerns and fears they reflect. That shift will force us to confront our many conflicting but equally strongly held views of the “right” which, deriving from individual intuitions and beliefs, will stubbornly refuse to yield to our post-enlightenment faith in reason. We must, therefore, recognize that in a heterogeneous society inevitably one person’s over-propertization will be another’s under-propertization and no just right exists which can fully satisfy all points of view.

Responding that resolving these irreducible differences can be safely left to the workings of the political process (and most particularly to the majority’s will) ignores property’s

more broadly how that activity defines “what it is” (*see id.*, at 828-829), I am not particular interested in what the courts do but in the more formative public policy debate. The latter not only includes a large role for the conceptual which Professor Cohen dismisses, but it would be reasonably to say that our conceptual differences *are* my point. So I suppose I should add “not a legal realist” to my disclaimer regarding relativism and positivism in *supra* note 10.

¹¹ See Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J. L. HUMAN. 37 (1990) (making the point that how we tell the property story based on our value perspectives affects how we come out).

¹² Mechanical issues (whose, what kind, how much) will generate controversy but those differences can be largely resolved by expert fine-tuning of the tool. *See infra* notes xx-yy and accompanying text.

practical consequences.¹³ The regime determines which of society's members control its resources when there is not "enough and good enough" for all.¹⁴ Consequently, unless property delivers on the promise of a reciprocally beneficial common enterprise by affording each member sufficient control to pursue a rational life plan, the society will not endure.¹⁵ The unraveling likely will only occur slowly in barely perceptible increments rather than as a dramatic rupture. It may or may not be a good thing. But when it happens, as it must, the property discussion will no longer be governed by politics even in its best sense. In fact, it is unlikely to be a discussion at all.¹⁶

The functional approach not only identifies the core property issue, it also offers an alternative. By framing property as decision-making in face of equally strongly held and equally unprovable conflicting truths it clarifies that, as a practical matter at least, "right" in property is manufactured not revealed. Consequently, public policy debate need not be viewed as a forum for educating blockheads, converting pagans and exposing villains

¹³ Despite property's explicit focus on contested resources the analysis still can usefully inform other public policy decisions. Any debate which has insupportable effects because it deprives the losers of something required to pursue a rational life plan is likely to generate similar consequences. That connection has led some to view "life or liberty" interests as being appropriate subjects of property. *See supra* note 3 (John Locke's definition of property as including "lives and liberties"); Van Doren, *supra* note 7, at 226-228 (discussing property in opinions, beliefs and rights).

¹⁴ John Locke's famous caveat to his labor theory. *See Locke, supra* note 3, Sec. 27 at 112.

¹⁵ Sufficient control is not limited to accessing resources needed to exist. It also includes the ability to realize one's entire rational life plan including its less tangible aspects. That may require the ability to limit or even prevent the use of resources by others even when not needed for the property owner's physical well-being or comfort. *See infra* notes xx-yy and accompanying text. The statement in the text echoes John Rawls's Difference Principle (and clearly the measuring concept of a rational life plan comes directly from Rawls). *See John Rawls, A THEORY OF JUSTICE*, 266 (Belknap Harvard Revised Edition, 1999). Its rests, however, only on the practical consequences, not any claim that it is a morally "just" outcome. As noted below in text, *see infra* note 19 and accompanying text, the practical approach explicitly does not make a value judgment regarding the failure to willingly compromise personal values and beliefs. It merely points out that the practical consequences of failing to do so should be a significant consideration. Finally, regarding dissolution of society, certainly the government must change. More likely, however, society will itself dissolve. *See Locke, supra* note 3, Sec. 211 at 193 (distinguishing between the two forms of dissolution).

¹⁶ *See infra* notes xx-yy and accompanying text.

to ensure one's view of the one true path prevails.¹⁷ It can instead be treated as the search for a practical solution which sufficiency delivers the goods to permit the continuation of cooperative society.¹⁸ The alternative, however, is neither simple nor mandated. There is no guarantee that such a solution exists or, that if it does and we manage to find it, it will be adopted. That would require substantial number of us decide to compromise or perhaps even abandon our personal beliefs. And whether we "should" place fidelity to "the greater good" above adherence to our personal view of the right has no definitive answer. The functional alternative cannot claim the status of meta-norm demanding such subservience. In a world devoid of provable absolutes no precept can (or should) make that claim.¹⁹ True to its pragmatic roots the approach only delivers on its objective of clarifying property debate by identifying the actual issue. Deciding to make a principled stand on our view of the right despite the consequences to the social enterprise, therefore, remains up to each of us, but at least the practical definition ensures we will do so understanding what property and our decision is about.

This article develops the above thesis in three parts. The first provides a very brief introduction to the definitional issue, identifies some of the basic philosophical positions and discusses how property pervades current public policy debate. The second explains in Subpart A why property is most usefully defined functionally - as a legal means to

¹⁷ See Yu, *supra* note 9, at 9-11.

¹⁸ See *infra* Part III.

¹⁹ This is a problem with John Rawl's Theory of Justice. See *supra* note 15. The powerful and I believe convincing argument that his two principles of justice logically follow from the veil of ignorance assumes away individual belief in normative trumps regardless of their consequences. For those that believe there is an absolute right his argument collapses. Although I personally believe that cooperative heterogeneous society is key to meaningful human existence, a fact undoubtedly apparent despite my efforts to avoid editorial comment, I have explicitly labeled the functional approach "practical" not "just" to preserve others' right to disagree and chose differently.

normative ends rather than as a particular end to be embraced or rejected. Subpart B explains why the word “property” can and should be retained as the genus label despite concerns that its popular association with a relatively absolute subspecies will distort debate. The third part demonstrates how the futility of identifying (or even agreeing on) the “right” answer makes persistent normative disagreement inevitable in heterogeneous society. It concludes by explaining that because property outcomes which tangibly deliver the goods are essential to survival of cooperative, mutually beneficial society, seriously considering yielding normative ground is a worthwhile, albeit not obligatory, exercise.

PART I: Definitional Precision and the Prevalence of Property

For many years only academics and philosophers (assuming they may not be the same) seemed particularly interested in exactly what “property” means.²⁰ Their efforts, while hardly resolving the matter, have generated an impressive body of work. It includes definitions ranging from the powerfully blunt and uncompromising “sole and despotic dominion”²¹ to the enormously refined “bundle of sticks”²² as well as an extremely

²⁰ Those efforts are, however, prodigious. See Bell and Parchomosvsky, *supra* note 6, at 533-551 (providing a good summary and concluding by proposing a unified theory of property “organized around creating and defending the value inherent in stable ownership”). I would add the non- or contra-property philosophies of, for example the “socialist/communists,” (for lack of a better label) to that array for completeness. See generally, Marx and Engels, *supra* note 1. See also, <http://en.wikipedia.org/wiki/Property> (setting out a good overview of the numerous and varying conceptions of property).

²¹ From William Blackstone 2 COMMENTARIES ON THE LAWS OF ENGLAND 2 (facsimile ed. 1979), available on line at: <http://www.yale.edu/lawweb/avalon/blackstone/bk2ch1.htm>. But see Carol M. Rose, *Canons of Property Talk, or Blackstone’s Anxiety*, 108 YALE L. J. 601 (1998) for an interesting discussion of the fact that Blackstone was less defining property than starting a discussion.

²² Professor Wesley Hohfeld’s contribution. See Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L. J. 710 (1917) and FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 67 (Walter W. Cook ed., 1923). For an

creative and diverse collection of justifications including labor,²³ individual self-definition and autonomy,²⁴ first possession,²⁵ divine right,²⁶ utility²⁷ collective good²⁸ and need.²⁹ Policy-makers and the public may have lacked interest in that rarified debate because plenty of unclaimed Lockean common³⁰ or Marxist abundance³¹ permitted or at least seemed to promise sufficiently uncompetitive exploitation of resources to make theoretical precision largely irrelevant. That has changed. We now frequently find ourselves reaching with numerous others for the same resources while making and facing claims of remarkable complexity and nuance. As a result many highly energized public policy debates now turn on precisely what having a property interest entails. In fact, and amazingly (to me anyway), recent polls show that “private property rights” are at the very

detailed analysis and ultimate rejection of the “bundle of rights” approach as “little more than a slogan” see J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711 (1996).

²³ Credit goes to John Locke, see *supra* note 3, Chapter V.

²⁴ See *supra* note 2 and accompany text for a brief paraphrase of G.W.F. Hegel’s point of view. Professor Margaret Jane Radin offers an interesting elaboration and clarification of that argument in the context of intellectual property in *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

²⁵ Whether accomplished and justified by discovery or otherwise. See, e.g., Richard A. Epstein, SIMPLE RULES FOR A COMPLEX WORLD 59 (1995); Chander, *supra* note 9, at 723-741 (2003) (explaining and criticizing the approach).

²⁶ See Marx and Engels, *supra* note 1, at 167 (noting the argument that “God had given the earth to Adam – one man and his legitimate heirs).

²⁷ The Smith-Bentham-Mills market model made very popular in contemporary legal analysis by “Chicago School” efficiency theory and currently a preeminent theoretical justification for United States property law. For its connection to property law see, e.g., Bell & Parchomovsky, *supra* note 6, 546-550; Carrier, *supra* note 9, at 26-30; Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967); Mark A. Lemley *Property, Intellectual Property, and Free Riding*, 83 TEXAS L. REV. 1031, 1037-1040 (2005); Rose, *supra* note 21, at 618-623.

²⁸ There are a number of examples, culminating (perhaps) with the communist view that although private property should be eliminated resources would still be “owned in common” for the common good. See Marx and Engels, *supra*, at 154 (discussing the view as found in Roman law), 157, 167, 169 and The Communist Manifesto, at 243. See also, Menell and Dwyer, *Reunifying Property*, 46 ST. LOUIS U. L. J. 599, 604-605 (2002) (discussing various native and early American common ownership schemas).

²⁹ Even Marx, hardly a property enthusiast, must be seen as at least grudgingly acknowledging specific allocations to individuals “according to their needs.” Marx & Engels, *supra* note 1, at 169. An alternative “need” position grants current users only a usufruct right in trust to a resource making the satisfaction of their need subject to consideration of past and future members’ interests. See, e.g., David Hurlbut, *Fixing the Biodiversity Convention: Toward a Special Protocol for Related Intellectual Property*, 34 NAT. RESOURCES J. 379, at 385 (discussing such a position in the intellectual property field).

³⁰ See Locke, *supra* note 3, Sec 27 at 33.

³¹ See Marx and Engels, *supra* note 1, at 174-5.

top of the American citizenry's concerns.³² The meaning of property suddenly seems to be of very serious concern to virtually everyone.

Briefly considering a few specific examples illustrates just how prevalent and relevant property is in today's public affairs. The following discussion also sketches, without assessing, a few of the conflicting positions to provide foundational grist for the definitional discussion in Part II.

An obvious starting point is the passionate debate which has erupted in "Takings" jurisprudence as a result of the United States Supreme Court's recent decision in *Kelo v. City of New London*³³ and a lesser known but more legally dramatic voter-passed initiative in Oregon.³⁴ The Court's 5 to 4 *Kelo* decision (over, to put it tactfully, vigorous dissent³⁵) essentially permits a governmental agency to condemn one person's private property into other private hands.³⁶ Whether or not that decision actually created new law³⁷ it clearly found private real property ownership constitutionally subservient to fairly expansive views of the public interest as defined and pursued by governmental actors. The case triggered substantial adverse reaction from a significant segment of the public who expressed considerable outrage at the decision's (and Court's) lack of respect

³² See New York Times, Sat. July 30, 2005, Front page (story continued and citation on page A10).

³³ xx U.S. xx; 125 S.Ct. 2655 (2005). See, e.g., Martin Lasden, *The Great Property Rights Revival*, Feb. 2006 CAL. LAWYER, 22 (2005); John Gibeaut, *Taking Control*, DEC. 2005 ABA 45 (2005); New York Times, *supra* note 32.

³⁴ Oregon Measure 37 was passed in the 2004 General Election and is codified at ORS 197.352. For discussion of the measure see Sara C. Galvan, *Gone Too Far: Measure 37 and the Perils of Over-Regulating Land Use*, 23 YALE L. & POL. REV. 587 (2005); The Oregonian, June 12, 2005, Metro/Northwest A1.

³⁵ *Kelo*, 125 S.Ct., at 2671, 2677 (O'Connor, J. dissenting, characterizing the result as "perverse").

³⁶ *Id.*, at 2675 (characterizing the majority opinion).

³⁷ Gibeaut, *supra* note 33, at 46.

for private ownership.³⁸ Those groups are presently seeking to energize both Congressional and Statelegislative action to recalibrate the property rights scales, or as they would more likely describe it to fix the egregious existing error.³⁹

The Oregon initiative's, Measure 37, reversal of supporters and dissenters provides a nice second bookend on the Takings debate. Generally stated, the initiative establishes that any governmental action which reduces the value of privately held property, including regulatory limitations imposed on use, requires compensation.⁴⁰ When that initiative was temporarily overturned by the trial court on various state and federal constitutional grounds⁴¹ some individuals were so offended that they initiated a recall effort against the judge.⁴² The recall supporters summed up their complaint as follows: "[The judge] has undercut the fundamental, God-given right of Oregonians to truly own their property."⁴³ Although many Oregonians undoubtedly would temper that articulation, there can be little doubt that at least a majority of the voters (who passed similar initiatives twice⁴⁴) believe that private property interests are close to, if not are, sole and despotic absolutes. The voices in opposition have pointed with equal concern and passion to the initiative's

³⁸ See Lasden, *supra* note 33, at 30; New York Times, *supra* note 32.

³⁹ See Lasden, *supra* note 33, at 30; The Oregonian, *supra* note 34, at A8.

⁴⁰ See *Macpherson v. Dept. of Administrative Services*, xx P.3d xx, 2006 WL 433953 (Or. 2006) (finding the Measure constitutional and reversing the trial court's decision invalidating the statute); The Oregonian, Jan. 11, 2006, Front Page.

⁴¹ See General Judgment and Order dated October 24, 2005, filed in Marion County Circuit Court, Mary Mertens James, Judge.

⁴² See The Oregonian, Dec. 4, 2005, Metro/Northwest at B4. The petition was subsequently dropped based on technical issues (missing petition numbers). See The Oregonian Jan. 12, 2006 online at: <http://www.oregonlive.com/news/oregonian/index.ssf?/base/news/113703632525250.xml&coll=7>

⁴³ *Id.*

⁴⁴ A previous initiative, Measure 7, was passed in the November 2000 General Election and subsequently overturned on technical grounds (failure to vote separately on its multiple changes to the Oregon Constitution) by the Oregon Supreme Court in 2002 in *League of Oregon Cities et al. v. State of Oregon*, 334 Or. 645, 56 P.3d 892. Measure 37 passed with 61 percent of the vote, carrying all but one Oregon county. See The Oregonian, Jan. 9, 2006, Metro at B1.

adverse effect on Oregon’s long history of land use planning, arguing that private real property rights must reflect not only individual but public interests.⁴⁵

Intellectual property law has taken property beyond its historical roots in the tangible. No longer confined to dirt and other things we literally hold dear, legions of academics through many hundreds of articles now fervently debate the appropriateness of property rights in ideas and their expression.⁴⁶ From the fine arts to the technological the burning issue is whether increasing “propertization” reflects an improved understanding of appropriate (and even just) levels of individual ownership or the building of Blackstonian castles run amok. Examples can be found across the full gamut of intellectual property regimes. Patent law’s subject matter continues to expand – now encompassing business methods⁴⁷ and the “stuff of life”⁴⁸ – thus putting greater areas of the formerly public domain behind private fences. Proponents depending on their normative persuasions, laud the related encouragement of innovation⁴⁹ or the recognition of the inventors’ rights.⁵⁰ Opponents agonize over the efficiency consequences such as impairment of

⁴⁵ See *id.*; The Oregonian, Jan. 11, 2006, Front page..

⁴⁶ For a partial but impressive listing of those defined by Professor Mark Lemley as for and against see Lemley, *supra* note 26, at 1035 n. 8. There are many others but I would specifically add Professor Glynn Lunney’s early identification of the issue. See, e.g., Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367 (1999)

⁴⁷ See *State Street Bank & Trust v. Signature Financial Group*, 149 F.3d 1368 (Fed. Cir. 1998) (widely interpreted as authorizing patents on business methods). See also Vincent Chiappetta, *Defining the Proper Scope of Internet Patents: If We Don’t Know Where We Want to Go, We’re Unlikely to Get There*, 7 MICH. TELE. & TECH. L. REV. 289, 298-314 (2000-2001) (hereafter “Chiappetta Internet”) (discussing the case and related articles).

⁴⁸ See, e.g., Rebecca S. Eisenberg, *Re-examining the Role of Patents in Appropriating the Value of DNA Sequences*, 49 EMORY L. J. 783 (2000) and Rebecca S. Eisenberg, *Patenting the Human Genome*, 39 EMORY L. J. 721 (1990).

⁴⁹ See Chiappetta Internet, *supra* note 47, at 306-307 (discussing the market public goods justification for United States patent law).

⁵⁰ The position may reflect, among other justifications, a Lockean labor view or a Hegelian personhood approach. See *supra* notes xx-yy and accompanying text.

future innovation and the effects of trolls, thickets and mandatory injunctions⁵¹ on efficient exploitation.⁵² Trademark law expansion is praised by some as avoiding incipient confusion⁵³ and limiting free rides on another's creativity or investment⁵⁴ while being simultaneously denounced by others as a clog on competition⁵⁵ and a muzzle on free-speech.⁵⁶ The public epicenter, however, lies in copyright law. The rise and fall of Napster and its peer-to-peer progeny⁵⁷ have not only garnered considerable attention in the general press but become a topic of water-cooler conversation. Many members of the public have formed strong individual opinions, frequently based on direct personal experience,⁵⁸ about whether music down-loaders are digital age Robin Hoods doing heroic battle against corporate greed or scurrilous naves undermining society. Other disputes over where the copyright ownership lines should be drawn includes the justice (or not) of the 20 year extension of the term;⁵⁹ the fairness (or not) of technology

⁵¹ See, e.g., eBay Inc. v. MercExchange LLC, 401 F.3d 1323 (Fed. Cir. 2005), *cert granted*, 16 S.Ct. 733 (2005). The issue was recently very much in the general public eye as a result of the Blackberry case. See, e.g., Roy Mark, RIM and NPT both Win in Settlement, Internetnews.com (March 6, 2006) at <http://www.internetnews.com/wireless/article.php/3589506>.

⁵² See, e.g., *Perception Issue Hindering Efforts to Improve Patent System Dudas Says*, 71 BNA PATENT, COPYRIGHT AND TRADEMARK J. 374 (Feb. 10 2006) (briefly outlining the issue and reporting on Patent Commissioner Dudas' argument that the problem is overblown).

⁵³ Specifically, in the form of anti-dilution remedies. See, e.g., The Federal Trademark Dilution Act, Pub. L. No. 104-198, 109 Stat. 985 (codified at 15 U.S.C. Secs. 1125(c), 1127 (2000)). For a general discussion of the issues see Vincent Chiappetta, *Trademarks: More than Meets the Eye*, 2003 U. ILL. J. OF LAW, TECH. AND POL. 35, 71-74. (2003) (hereafter "Chiappetta Trademarks").

⁵⁴ See generally, *id.* (arguing for expanding the justifications for trademark law to include carefully calibrated "incentives" to invest in their creation).

⁵⁵ See, e.g., Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777 (2004).

⁵⁶ See, e.g., Chiappetta Trademarks, *supra* note 53, at 78-83.

⁵⁷ See, e.g., Julie Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 359-360 (2005); James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167 (2005).

⁵⁸ See, e.g., Allen Bauer, *RIAA Lawsuits Hit Close to Home*, Oracle at Delphi Blog (Jan 24, 2006) at <http://blogs.borland.com/abauer/archive/2006/01/24/22891.aspx>; *RIAA Gives the Gift of Lawsuits*, MP3/MIDI Music Blog (Dec. 16, 2005) at <http://mp3.about.com/b/a/227916.htm>; *How Not to Get Sued by the RIAA for File-Sharing*, Electronic Frontier Foundation at <http://www.eff.org/IP/P2P/howto-notgetsued.php>.

⁵⁹ Discussed in detail *infra* notes xx-yy and accompanying text.

protection mechanisms and anti-circumvention laws;⁶⁰ and the Supreme Court's recent adjustment to the real or perceived *Sony*⁶¹ deference to innovation with the addition of inducement-based secondary liability in *MGM v. Grokster*.⁶²

Property's role in public policy is not, however, limited to issues traditionally articulated as ownership questions. The regime has become an increasingly significant presence in debates previously framed in distinctly different terms; in particular those involving personal autonomy privacy and other forms of rights analysis. Takings jurisprudence has moved well beyond realty to treat government entitlements as owned rather than matters of individual right.⁶³ Human organs and DNA hardly have long traditions as personalty; however, as technology has made them exploitable resources there has been a notable shift to property as the basis for related legal claims.⁶⁴ Similarly, cyberspace disputes over domain names,⁶⁵ consumer profiling, unwanted email,⁶⁶ scanning a website for information or the planting of spyware⁶⁷ find plaintiffs eagerly assuming the mantle of property-owner complaining of a trespass rather than objecting to personal references or observations against their will.

⁶⁰ See, e.g., R. Polk Wagner, *The Perfect Storm: Intellectual Property and Public Values*, 74 Fordham L. Rev. 243 (2005).

⁶¹ *Sony Corporation of America v. Universal Studios, Inc.*, 464 U.S. 417 (1984).

⁶² 125 S.Ct. 2764 (2005).

⁶³ See, e.g., Charles A. Reich, *The New Property*, 73 YALE L. J. 733 (1964).

⁶⁴ See, e.g., the (in)famous spleen case, *Moore v. Regents of the Univ. of California*, 793 P.2d 479 (Cal. 1990)). See Penner, *supra* note 22, at 718-723 (discussing the court's efforts to deal with the property assertion); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66-SPG LAW & CONTEMP. PROBS. 33, 37-38 (2003) (discussing the enclosure through proprietization of the human genome). See also, Robin Cooper Feldman, *Rethinking Rights in Biospace*, 79 S. CAL. L. REV. 1 (2005) (discussing patenting of genetic inventions and how their nature conflicts with the rules for mechanical products).

⁶⁵ See, e.g., Chander, *supra* note 9 (discussing application of the property paradigm in cyberspace, particularly to domain names).

⁶⁶ See, e.g., *Intel Corporation v. Hamidi*, 30 Cal.4th 1342, 71 P.3d 296, 1 Cal.Rptr.3d 32 (2003).

⁶⁷ See, e.g., *Kerrins v. Intermix Media Inc.*, xx F.Supp.3d ___ (C.D. Cal. 2006); *Sotelo v. Direct Revenue LLC*, 384 F.Supp.2d 1219 (N.D. Ill. 2005).

Even a wide variety of current public policy issues explicitly articulated as *not* about property turn on property considerations. Campaign finance law, real-property-free speech conflicts and the inheritance tax debate are three examples. Campaign finance reform restrictions are generally treated as raising 1st Amendment concerns.⁶⁸ That positioning obviously implicates property, requiring the courts to determine whether the owner's right to use their property (in this case the great proxy money) can be constitutionally limited. However, on closer examination property's involvement goes well beyond being affected by the 1st Amendment outcome; it determines whether a 1st Amendment issue exists. Rather than starting from the unexamined assumption that property involves unfettered rights to use we could instead view property as being built up purposefully from zero. From that starting point the initial question is not the permissibility of interference but *whether* a conflicting right exists at all. If it does not, the 1st Amendment concern never arises.

The same analysis applies to whether speech can be prevented when the desired forum involves someone else's realty.⁶⁹ The traditional positioning pits the owner's property right to exclude against the speaker's 1st Amendment rights. However, that conflict only exists because we assume that property ownership includes the right to prevent third parties from using an owned resource to speak their minds. If it does not, there is no conflict and no free speech concern.

⁶⁸ *Cf.*, *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) (treating restrictions on campaign contributions as a 1st Amendment issue).

⁶⁹ *Cf.*, *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Hudgens v. National Labor Relations Board*, 444 U.S. 507 (1976).

The inheritance tax is generally described as about fairness.⁷⁰ Proponents point to destruction of personal legacy⁷¹ and the related evocation of lost family farms and destroyed small businesses⁷² while opponents focus on the rich versus the poor (the tax acting as a Reverse Robin Hood⁷³ or embodying a moral obligation to “give back” based on success⁷⁴) and the social-political concerns arising from increasingly concentrated wealth.⁷⁵ These fairness arguments, both against and for the tax, however, all assume that directing assignment on death is an integral part of property ownership. As a result taxation (inheritance or otherwise⁷⁶) is treated as taking something away and therefore requiring justification, including on fairness grounds. President Bush reflected that position by stating in the 2000 election campaign that the tax surplus should be given back to the taxpayers because “it’s the people’s money.”⁷⁷ If, however, property ownership does not include the right to direct assignment on death, then neither the decedent nor the heirs have any claim in the first instance. Not only does the discussion

⁷⁰ See, e.g., Tax Policy Blog at <http://www.taxfoundation.org/blog/show/991.html>;

⁷¹ *Id.*

⁷² See, e.g., House Passes Estate Tax Ban, USAToday, Managing Your Money (Apr. 13, 2005) at http://www.usatoday.com/money/perfi/taxes/2005-04-13-estatetax_x.htm; <http://www.deathtax.com/deathtax/efcfamily.html>.

⁷³ See House Passes Permanent Estate Tax Repeal, Washington Post, April 14, 2005 p. A4 at: http://www.usatoday.com/money/perfi/taxes/2005-04-13-estatetax_x.htm (quoting House Minority Leader Nancy Pelosi (D-Calif.)).

⁷⁴ See Forum on Estate Tax (statements of William Gates, Sr.) at <http://www.taxpolicycenter.org/publications/template.cfm?PubID=900584>

⁷⁵ Alexis De Tocqueville’s predicted that inheritance taxation would rise in importance as the issue became the inheritability of a market economy’s new aristocratic titles - those of accumulated wealth. See Alexis De Tocqueville, DEMOCRACY IN AMERICA, xx (Chicago Press, Translated by Harvey C. Mansfield and Delba Winthrop 2000).

⁷⁶ Cf. James Penner, *Misled by “Property”*, CANADIAN J. OF L. AND JURISPRUDENCE, 75 (2005) (noting that the property question pervades tax issues).

⁷⁷ See *Bush and Gore Return to Campaign Trail*, CNN.com (Mar. 23, 2000) at <http://archives.cnn.com/2000/ALLPOLITICS/stories/03/23/campaign.wrap/> (“The surplus isn’t the government’s money, it’s the people’s money. When I become president, I’m going to say, ‘Let’s send some of it back to the people paying the bills. Let’s let people keep more and more of their money.’”).

of whether the tax-taking is fair disappear but the “zero up” view makes the issue whether anything should be inherited at all.

PART II: Property Functionally Defined

The above abbreviated review reveals that although property pervades United States public policy discussion, those debates contain a surprisingly simple common theme. Each involves disputes regarding “ownership” of a resource (land, intellectual product, body part, personal information, website server or money). Equating property with ownership does not, of course, resolve the definitional question. It merely shifts the problem to determining what it means for someone to own something in the property sense.

One possibility lies in our instincts which offer a straight-forward ownership proposition.⁷⁸ Although characterized in a variety of ways, the intuitive gist that ownership means “it’s mine (and not yours)” is not far off the substantive mark.⁷⁹ Close may be good enough when stiff competition for the resource does not exist, but as the examples in Part I reveal it no longer suffices. So, although those intuitions serve as a useful starting point we must develop a more precise definition to guide society’s increasing important and complex property-ownership debates.

⁷⁸ The article generally assumes a Western and, specifically, United States, normative framework. Quite clearly instincts vary and what is said in the text hardly applies universally. See, e.g., Vincent Chiappetta, *The Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion and a Few Other Things*, 21 MICH. J. INTER. L. 333, 375-381 (2000) (hereafter “Chiappetta WTO”)(noting the wide variety of normative views regarding intellectual property justifications); *infra* note xx.

⁷⁹ A large number of commentators have articulated this point albeit in a variety of ways. See, e.g., Lemley, *supra* note 26, at 1037.

Before turning to that task, one point should be explicitly put on the table to avoid distraction. A few scholars have argued that the same intuitions about property I am using as the point of entry into the definitional venture create such strong popular preconceptions that they must unavoidably capture and distort debate.⁸⁰ Certainly when a widely-held view conflicts with a proposal it must be addressed. I believe their concern substantially overstates the situation and to the extent problems exist they can and should be overcome. However, to make that argument requires first laying out why the functional approach most appropriately defines property. Indulgence is requested until Subpart B below.

A. The Functional Definition of Property. Blackstonian articulation of “sole and despotic dominion”⁸¹ more or less equates to the strongest version of the intuitive “it’s mine” and thus offers a good initial definitional candidate. Although appealing in its simplicity (which in part explains its intuitive appeal), it can be quickly dismissed as an unsuitable framework for public policy debate. If sole and despotic dominion properly defines property then there are no intermediate possibilities - either one is or one is not an owner.⁸² The all-or-nothing positioning makes property a conflict between those advocating rights and those resisting them, giving the related debates the appearance of epic battles between right and wrong, good and evil.⁸³ That framing may be appealing as

⁸⁰ See generally, *id.*

⁸¹ See *supra* note xx for Professor Rose’s debunking of the Blackstonian mythology.

⁸² See Yu, *supra* note 9, at 6, 9-11 (characterizing the result in intellectual property as creating a “bipolar” debate between maximalists and minimalists while ignoring the vast array of possibilities in between).

⁸³ *Id.*, at 10-11. Both the positioning and the resulting polarizing effects obscure possible solutions. Not only is calling one’s opponents names hardly conducive to cooperative enterprise, either in seeking or accepting alternatives, but it can also lead to the name caller’s own rigidity.

a tactical matter (although the actual effects are more frequently counter-productive) and it certainly can be good rhetorical fun. However, such an obvious mischaracterization cannot be seriously defended on the merits.⁸⁴ The arguments and outcomes discussed in Part I make it readily apparent that property ownership is not a binary proposition.⁸⁵ Sole and despotic dominion only represents one endpoint⁸⁶ of an extremely rich continuum of successively less absolute ownership possibilities eventually reaching the other terminus of none. Adopting only the most extreme of the possible alternatives as *the* definition of property unjustifiably narrows the scope of public policy debate. It is time to stop maligning Blackstone⁸⁷ and treat sole and despotic dominion as the straw-man it is.

Moving along the continuum to the extremely strong but nonetheless limited rights reflecting real property ownership reveals that the above argument applies with equal force to every definition which casts property in pre-established and immutable terms. Every such effort suffers from the same fatal flaw: it confuses a possible outcome with the regime itself.⁸⁸ Specifically, realty law only represents society's present

⁸⁴ The distortion is so great one has to suspect that even most advocates of sole and despotic dominion would be shocked (and likely appalled) to discover the position had somehow carried the day and henceforth governed *every* property decision. As Professor Yu cogently points out, its practical desirability varies considerably depending on the specific circumstances. *See id.*, at 9. In fact, not even Blackstone was on board. *See* Rose, *supra* note 2, at 631-632 (explaining Blackstone intended his "definition" as a cartoon caricature or trope, not a literal definition). The response to the argument that those holding conflicting views are simply "wrong" is dealt with *infra* in Part III.

⁸⁵ The highly nuanced rules of intellectual property law provide a good example, although as Professors Carrier and Yu forcefully demonstrate even real property law is far from absolute. *See generally*, Carrier, *supra* note 9 and Yu, *supra* note 9, at 6.

⁸⁶ Moreover, a little reflection reveals there are no real-world examples of that mythical beast actually walking among us, so it is likely only a theoretical endpoint. *See supra* note 85 discussing real property law, the most likely candidate.

⁸⁷ *See* Rose, *supra* 21, at 632.

⁸⁸ In effect confusing a specific manifestation with the underlying conceptual essence. *Cf.* Plato, THE REPUBLIC, 187-189 (Hackett, Translated by G.M.A. Grube, Revised C.D.C. Reeve 1992)(those in the cave mistaking the reflection for the underlying truth); Rawls, *supra* note 15, at 5 ("The concept of justice as distinct from the various conceptions of justice"); Van Doren, *supra* note 7, at 30-32 (discussing the Greek

determination regarding the ownership of land. As the examples in Part I again demonstrate those rules do not reflect even the many other existing (to say nothing of possible) forms of resource ownership. Moreover, real property itself changes in response to new circumstances.⁸⁹ Therefore, *a* property question certainly is whether to apply a particular set of ownership rules, but that is not *the* property question. A useful definition must permit spirited discussion of the full range of ownership possibilities, including existing paradigms, modifications and entirely new creations. Anyfixed definition willfully ignores the “action” and has little, if anything, to recommend it as a framework for public policy debate.

Almost a century ago Professor Wesley Hohfeld proposed an alternative definitional approach⁹⁰ based on extremely flexible method of conceptualization ownership. By defining property as a cluster of attributes his system not only acknowledges but expects enormously varied ownership arrangements, each to be defined by constructing a related “bundles of sticks.” Professor Hohfeld’s model certainly improves ownership discourse compared to the limited and unproductive “yes – no” formulation of fixed characterizations. However, it still fails to provide a useful public policy analytical framework. Professors Menell and Dwyer aptly capture the gist of the problem. The Hohfeldian approach to property lacks a “central organizing theme” which unifies “the

philosopher/scientist’s quest to differentiate between changeable characteristics (implementations) and underlying essence).

⁸⁹ The original “ad coelum” rule in realty was forced to give way in face of the development of air travel. *See* U.S. v. Causby, 328 U.S. 256, 261 (1946) (“[The] doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.”). *See also*, Parisi, *supra*, note 9 (tying changes in property law to changes in the economic model).

⁹⁰ *See supra* note 22 (Professor Hohfeld’s work dates from between 1915-1925).

many elements of the field in a deep and intuitive way.”⁹¹ The same intricate definitional web which captures the richness of possible outcomes provides no straightforward synthesizing conceptualization for understanding the genesis and purpose of those outcomes.⁹² So, although application of the model’s highly refined analytical framework can *describe* a myriad of property results with awesome precision, the lack of a common connective theme leaves public policy debate regarding how and why we might select among them incoherent.⁹³ The related confusion has to lead some to ask, quite reasonably, whether the property concept serves any useful role in public policy discourse.⁹⁴

That vital missing piece in the definitional puzzle is put in place by combining A.M. Honore’s insight that generalizing the Hohfeldian ownership attributes makes them more useful in decision-making with Professors Menell and Dwyer’s “social governance of resources” conceptualization of the regime as a whole. Honore distills and abbreviates Hohfeld’s attribute list into a far more accessible and practically relevant list of “incidents of ownership” which focus on describing how property actually affects the real world (such as the right to possess, right to use, right to capital, power to alienate and the right to exclude).⁹⁵ Taking that generalizing approach a step further reveals that all of Honore’s “incidents” can in turn be understood to implement a single practically relevant

⁹¹ See Menell and John P. Dwyer, *supra* note 28, at 600.

⁹² See Penner, *supra* note 22, at 714-175 and 768-798.

⁹³ See *id.*, at 770 and 777.

⁹⁴ See Grey, *supra* note 6. See also, Bell & Parchomovsky, *supra* note 6, at 533; John E. Cribbitt, *Property Lost: Property Regained*, 23 PAC. L.J. 93, 97-99; Penner, *supra* note 22, at 714-715; Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 372 (2003) all of whom note the problem, then propose solutions.

⁹⁵ See A. M. Honore, OWNERSHIP, OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest ed., 1961). For a helpful (but ultimately critical) examination of the full set of rights, see Penner, *supra* note 22, at 754-766.

unifying theme.⁹⁶ Taken as a whole Honore's list of incidents define property as the owner's right to exercise some kind and degree of *control*⁹⁷ over the subject matter in question.

Although recognizing that control lies at the core of property considerably advances the enterprise, it does not fully define the regime. It does not explain what kind or how much control must be present to label a group of attributes or incidents "property" ownership. Nor does it identify the proper objects of property – that is *what* can be owned. These critical gaps can be filled through refining Professors Menell's and Dwyer's characterization of property as a society's *decisions* regarding the governance of its *resources*.⁹⁸

⁹⁶ I agree with Professor Mossoff that property cannot be described by one particular incident but requires a more expansive yet unified group of attributes. See Mossoff, *supra* note 84, at 376 ("the concept of property is explained best as an integrated unity of the exclusive rights to acquisition, use and disposal") and 418 (finding in the trade secret context "the essence of the concept of property consist[s] of the fundamental possessory rights – the rights to acquire, use and dispose of things one has created through one's own efforts" – a discussion I naturally believe would have been significantly enhanced by considering my earlier 1999 article on the subject which if nothing else proves not all twentieth century commentators (albeit in my case by only one year – perhaps two depending on how one counts the millennium) "seem to agree on one thing about trade secret law: it is not a doctrine of property" *id.*, at 416). I cannot, however, identify the essential single "common organizing theme" unifying the expanded list of attributes in a "deep and intuitive way," which is supplied by control. See *supra* note xx (defining knowledge as the search for something's essential unchanging aspect).

⁹⁷ If the full scope of Hohfeld's and Honore's attributes and incidents is not considered "control" may appear to involve only affirmative rights, not obligations. I have, therefore, explicitly called out conditions and obligations as part of "kind and degree" in my later elaboration of the concept. See, e.g. *infra* notes xx-yy and accompanying text.

⁹⁸ See Menell and Dwyer, *supra* note 28, at 601-602. Their explicit focus on teaching Property Law leads them quite appropriately to articulate their thesis in inter-society, institutional comparative terms. I hopefully have not done them or their ideas injustice with my descriptions in the text. If I unwittingly put false words in their mouths I apologize. I do not, however, recant my substantive position, whether or not they agree.

The flexible term *resources* appropriately reflects the constantly changing subject matter of society's ownership dialogue.⁹⁹ Property is not limited to a pre-defined type of resources (e.g., land, things, but not ideas). It concerns *any* resource which might be usefully exploited and may, therefore, be disputed making determining ownership control practically important.¹⁰⁰ In pre-industrial society the agricultural and artisan nature of the economy made the crucial (if not only) resource issue who controlled the land (hence the strong historical associations between real property law and property as a whole) and, to a lesser extent, productive personalty – work implements, seeds, cows, crops and the like. However, as changes in social and economic activity give rise to conflicts over other types of resources the scope of property must likewise change.¹⁰¹ Although we may chose to label the various resource specific outcomes as individual species – real,

⁹⁹ *Id.*, at 601.

¹⁰⁰ Theoretically in a “state of nature” with ample common obtaining needed resources for immediate personal use only involves “harvesting” what has not already been claimed. See Locke, *supra* note 3, at Sec. 33, 36 and 37. Consequently, property is only required when there no longer is “still enough, and as good left.” *Id.* That idyllic picture, however, changed with gradual individual accumulations and the invention of commerce, and most particularly the preservative power of money. *Id.*, at 36 and 45-50. See also, Bethany Berger, *It's Not About the Fox: The Untold Story of Pierson v. Post*, (xx –SSRN working paper) (arguing that the case was in part about the conflict between agricultural traditions and new commercial wealth over governance of common resources); Neal Stephenson, CONFUSION 650 (Harper 2004) (discussing the economic shift from land to commerce). It may also not adequately take into account other human characteristics which may generate conflict for reasons other than need (desire to assert power or superiority, greed). In all events, it is only when more than one individual stakes a claim that the question of who controls the resource comes into play. See, e.g. Rose, *supra* note 21, at 632.

¹⁰¹ See Menell and Dwyer, *supra* note 28, at 601-602; Reich, *supra* note 63 (commercially valuable government entitlements as property). Cf. Penner, *supra* note 22, at 717-719 (noting the point in his commentary on *International News Service v. Associated Press*, 248 U.S. 215 (1918) but disagreeing with the Court's apparent willingness to treat property as “a particular legal device that protects the owner's relation to something of value ... and as such may in principle be applied to *anything* whatsoever”). See also Tocqueville, *supra* note 74, at 3-6 (noting the transition from the importance of land to other forms of commercial wealth); Marx and Engels, *supra* note 1, at xx (focus on all “means of production”).

personal, intellectual and otherwise – they remain part of a single control genus¹⁰² which operates without constraint on the kinds of resources to which it applies.¹⁰³

Second, the Professors' focus on a society's *decisions* focuses on choice among the full range of governance alternatives (everything, a lot, some, a little, to none). Doing so helpfully clarifies that property involves determinations that some ownership-control should be granted, not a specific kind or degree nor because the decision is based on a particular justification.¹⁰⁴ All of the difficult and unproductive efforts to identify the “core” elements of property or tie the regime to accomplishment of a particular objective can and should be abandoned. It is sufficient for an interest to be property that it assign *some* right of control over the resource to some owner regardless of why, in whom (individual, entity, groups or government), its kind (some or all of possession, use, exclusion, transfer, etc) or its degree (absolute or subject to limitations, requirements and/or affirmative obligations).

Despite these substantial virtues, the Professors use of *governance* decisions casts the property net too broadly, implicating every action or circumstance resulting in allocation of control. As they properly point out, a myriad of factors influence (and are influenced

¹⁰² Not unlike Plato's classification schema for appetites and knowledge, property has an essence plus “particular sorts.” See Plato, *supra* note 88, at 113-114. See also, *supra* note xx.

¹⁰³ The Lockean and Marxist focus on labor raises the interesting and important question of whether labor constitutes a resource governable by property law. See *supra* notes xx and yy and accompanying text. Defining property functionally rather than normatively provides a clearly affirmative response albeit that propertizing labor means granting control over its source, meaning human-beings. The result reinforces the crucial point that the functional approach clearly separates identifying the possibility of control from its normative desirability. By doing so it clarifies that it is not the abstract concept of property which generates the result, but society's values whatever their source which control. The approach also allows us to treat life and liberty interests as subjects of property if we so desire. See *supra* notes xx and yy (Locke's and others inclusion of rights in property).

¹⁰⁴ See Menell and Dwyer, *supra* note 28, at 601-603.

by), help understand and affect property.¹⁰⁵ For example, contract law governs agreements which create or resolve control over resources. Non-binding social norms of behavior powerfully affect an owner's actual use of a resource (fast-food restaurants do not mix well with rendering plants regardless of the zoning; it's a good idea to ask the neighbors before building a fence even on one's own side of the property line). Although their point is well taken and certainly essential to fully understanding the regime's implementation,¹⁰⁶ such an expansive view risks making property everything thereby turning it into nothing.¹⁰⁷

The solution lies in holding true to the practical objective – helpfully framing the issues in public policy debate regarding control over society's resources.¹⁰⁸ Accomplishing that goal calls for distinguishing between the myriad inputs, influences and interactions affecting those decisions and the decisions themselves. The central function of property, and therefore the focus of the related debate, is determining which member(s) of society ultimately prevail in contests over social resources when all other avenues fail. That points the definition toward property *law* – again approached from the practical rather than the metaphysical, so meaning those rights and obligations enforced by the official

¹⁰⁵ Menell and Dwyer, *supra* note 28, at 606 (explaining that one leg of their triadic relation includes a wide range of governing institutions including “social, background legal (default rules), market (contract), and political (legislation or administrative control, meaning zoning)” which all control the resource.

¹⁰⁶ This is particularly important for law professionals charged with its implementation, thus clearly supporting their argument for covering these matters in a property law course. The specific question I raise is whether they “are” property” or, as I argue, merely part of the environment in which property exists.

¹⁰⁷ See Penner, *supra* note 22, 722-723.

¹⁰⁸ See *supra* notes xx-yy and accompanying text (establishing the practical focus of this definitional inquiry).

machinery of the state.¹⁰⁹ That limitation does not prevent other considerations from influencing the creation or implementation of the legal rules. Influences such as informal social norms may lead us to decide the content of a rule, that no rule is required, that a rule is inapplicable to particular circumstances or that an informal accommodation is preferable to enforcement. However, as the rules which have the final say over who wins serve as the crucial central theme of our public policy debates over property, those rules should also constrain the definition.¹¹⁰

Limiting property to law still leaves open the question of which law qualifies. As so far defined, property consists of society's decisions regarding who ultimately wins against all others in resource-control conflicts. The distinguishing characteristics of property law therefore are its resource-control focus and the classic, albeit somewhat confusing, "in rem" view that the related rights and obligations are valid and binding "against the world." Once again although the general is close to the mark precision requires a more circumspect articulation. Rather than literally good "against the world" property law resource-control rights and obligations apply on their terms to all members of society merely because they are members of society, not because a special relationship exists between the particular disputants (the membership trigger is referred to as "status-based" below).¹¹¹ In short, although property law involves control over a resource, that is not sufficient. The ability to exercise that control must also be status-based.

¹⁰⁹ Professors Menell and Dwyer do explicitly note the "background legal (default rules)" component of property. *See* Menell and Dwyer, *supra* note 28, at 606. I believe, however, given the purpose of property, those rules forms the core for purposes of public policy debate.

¹¹⁰ *See* Rose, *supra* note 9, at 994 ("in their most general form, property rights identify which person's claims count against which resources").

¹¹¹ *See, e.g.*, Chander, *supra* note 9, at 774 (identifying against whom the right can be asserted as a key characteristic of a property right); Robert P. Merges, *Essay: A Transactional View of Property Rights*, 20

Applying the test to a contract for the purchase of realty demonstrates the crucial distinction between laws which affect, operate on or influence property and property law itself¹¹² Contract law only governs the rights and obligations between the owner and the buyer as well as those claiming based on a relationship with one of those parties (e.g., assignees, third party beneficiaries). Although contract law involves control over a resource (the land), it does not satisfy the status-based requirement and, therefore, is not property law.¹¹³ In contrast, the rules defining the seller's rights prior to closing and the

Berkeley Tech. L. J. 1477, 1495-1496 (2005). As property rights can vary in kind and degree, it is entirely possible that a property right may actually affect only some third party "strangers" rather than all members of society. For example, property rights might not affect a bona fide purchaser for value or a duty may only be owed to specific kinds of "trespassers." Additionally, in a legally divided world legal jurisdiction generally extends only to members of the society and, in some instances, those present in or making claims regarding resources located within that society. The functional approach also clarifies the confusion as to whether property is merely relational as between parties or defines rights "in something." As property is only relevant when needed to resolve contested claims to resources it clearly defines the relationships between the rival claimants with regard to the thing. Cf. Marx and Engels, *supra* note 1, at 168-169 (discussing the evolution from person-to-resource relationships when conflict is absent to person-to-person when disputes arose and noting that in the former there was no need for property); *supra* note xx. However, because that relationship is triggered only because of competing claims to a specific resource it is reasonable to consider property as abstractly attached to (or in) the resource itself.

¹¹² Most analyses will be as straight-forward as that following in the text, turning on the dual requirements of (i) status-based (ii) control over a resource. That formulation will, however, require some adjustments in existing standard legal taxonomies. For example, "contract law" applied to agreements creating property rights, such as contracts for easements, rental agreements for a term of years or licenses of intellectual property assets must be bifurcated. The rules governing the relationship between the parties under the agreement (for example, an action to effect creation of the right) are not property law whereas any rules defining the related rights of control applicable to all based on their membership in society (for example, what and when the resulting rights in the asset – easement, licensed right to use can be assigned, who can hold them and whether the easement holder, renter or licensee can bring a claim for invasion of their resulting interest) are. Or, regarding torts those rules regulating negligent injury or battery to persons are not property law whereas actions such as trespass are. Takings law raises a particularly interesting question. On one hand it defines what constitute relevant property interests. On the other those rights only technically operate between the specific (the government and the individual whose property is being taken) Whatever the technical outcome (which turns on whether the government is a "party" or "all members of society), I would treat it as property law (undoubtedly to the disappointment of Constitutional scholars) on the practical basis that the related debates would profit significantly from the functional resource-control framework. See *infra* notes xx-yy and accompanying text (discussing how Takings law issues would be analyzed).

¹¹³ Disputes over "ownership" of the contract rights themselves involve a resource control contest thus satisfying the first requirement but would only implicate property law if the claim is also status-based. A contract law based ownership claim (as opposed to a right to assign, see *supra* note xx) involving parties having no relationship to each other, the original parties or the underlying transaction is hard to envision

buyer's rights after closing to control the land against each other *and* other members of society¹¹⁴ even though they are strangers to the transaction is property law.¹¹⁵

The now complete functional definition can be summarized as follows: Property consists of society's decisions granting state enforced, status-based control (including rights, duties and obligations but regardless of their kind and degree) over its resources (regardless of their nature). Applying the definition to the examples outlined in Part I demonstrates how conceptualizing property functionally rather than in terms of a specific set of rights, specific resources and/or predefined goals significantly improves our understanding of the essential issue in public policy debate, thus advancing the practical objectives of this exercise.

Regarding government Takings the functional approach replaces the amorphous inquiry into whether the claimant holds a property right and, if so, whether it was taken, with a straight-forward analytical framework. The "existence" question is resolved by determining whether the claimant holds *any* legally enforceable status-based right of control over the resource in question (regardless of the nature of the resource). If so, a property right exists and we then determine how the challenged government action affects that control. If control has been diminished, in whole or in part, property has been taken. This simplified analysis reveals why quick and easy Takings answers are so difficult to come by. The issue is rarely, if ever, whether Takings claimants have a

(suggestions are welcome). Consequently, the property claims would generally, if not exclusively, arise under other legal regimes (for example, fraud or tortious interference).

¹¹⁴ The "rights" need not be absolute but may vary in kind and degree. *See supra* note xx.

¹¹⁵ *See generally*, Merges, *supra* note 111, for an interesting discussion of the relationship between contract and property law.

property interest in the resource; they invariably do.¹¹⁶ The disagreement is over their appropriate kind and degree. What drives that disagreement (and explains why situations like *Kelo* and Measure 37¹¹⁷ generate such passion) is not incorrect technical determination of *existing* control rights but persistent disagreement over what those rights *should* be.¹¹⁸ That understanding substantially clarifies the path to productive discourse. Existing conflicts over resources must of course be decided by reference to what is and many words are (and should be) lavished on the conformity (or not) of those particular outcomes with current law. However, those expert debates and determinations should be viewed as essentially procedural with respect to public policy debate – identifying which members of society properly bear the burden of seeking change.¹¹⁹ They contribute nothing substantive to,¹²⁰ and may affirmatively impair, public policy discussion because they do not address the actual issue and proper focus of debate – dealing with the effects of our conflicting views of the normative “right.”¹²¹ Consequently, productive Takings

¹¹⁶ Because the V and XIV Amendment issue is defined in terms of “property” its application is extremely far-reaching under the functional resource-control approach. Whether that outcome reflects the “original intent” can be left to Constitutional law scholars and Supreme Court Justices. Whatever that outcome, Takings law public policy debate stands to benefit from the functional framework for the reasons described in the text.

¹¹⁷ See *supra* notes xx-yy and accompanying text.

¹¹⁸ The use of “existing-should” clearly trigger David Hume and the “is-ought” relationship. However, he and it are better discussed later in connection with the underlying normative differences. See *infra* notes xx yy and accompanying text.

¹¹⁹ We do not always get the technical interpretation correct making such debates do have important consequences and related value. However, rectifying those errors only identifies the happy and the unhappy under the status quo. It does nothing to resolve the normative differences which cause the disagreement dividing us into happy and unhappy.

¹²⁰ If a firm goal is in place implementation is largely a technical exercise and could be resolved by expert debate and determination; an impressively developed skill in most industrialized nations. See *infra* notes xx yy and accompanying text (discussing the relatively straight-forward process of legal implementation absent normative disagreement).

¹²¹ Cf. Joseph William Singer, *The Ownership Society & Regulatory Takings: Castles, Investments & Just Obligations*, xx HARV. ENVTL. L. R. __ (2006) (discussing how different views of ownership affect the analysis in Takings law).

debate requires avoiding entanglement with distracting disputes over what the law is¹²² and focusing directly on our varying opinions regarding what it should be. The details of how the functional approach to property helps society address that issue are taken up in Part III below.

Applying the functional approach to the remaining examples produces the same clarification and understanding: that normative conflict, not interpretation or implementation of existing rights, lays at the core of our property debates. The intellectual property debate generally does not concern whether the grant *any* control over intangible and nonrivalrous resources is appropriate. Like the Takings debate, the disagreement arises from differences regarding the appropriate kind and degree. And like that debate that disagreement stems from our conflicting views of the “right,” not intellectual property law’s failure to conform to a commonly agreed goal.

The debates over property rights in human organs, personal information, a website, or money (as well as the extreme intellectual property position that “information wants to be free”¹²³) confirm the consistently normative source of our property problems. In these instances the debate starts earlier in the functional progression – that is, whether *any* property rights should be granted. That baseline decision does not escape normative conflict; the difficulty being that some normative views support while others reject

¹²² In public policy debate existing law should only be viewed as a temporary acquiescence open to revisitation and revision, not a final absolute determination. *See infra* notes xx-yy.

¹²³ John Perry Barlow who has gotten good mileage out of this quote. *See his The Economy of Ideas*, 2.03 Wired 84 (Mar. 1994). It is not, however, entirely theoretical. For example that argument that business methods or DNA related discoveries should be excluded from patent law could be viewed as “no rights” positions. *See supra* notes xx and yy.

allocating individual control over the resource.¹²⁴ Ironically, that normative issue may be more easily resolved, as many otherwise conflicting value positions will all support granting *some* property rights. Beyond that agreement, however, the divergent reasons favoring the grant will leave us to confront the resulting and unavoidable conflicts over kind and degree.

The case for the functional approach completed, it is time to return to the deferred issue of whether it can be successfully implemented despite the contrary popular view that property means “its mine.” Following that discussion, found in Subpart B immediately below, the remaining issue – how the functional framework helps us understand the effects of our normative differences on public policy debate– is taken up in Part III.

B. The “Conversational” Property Problem. When used in its conversational¹²⁵ sense the word “property” undeniably connotes rights lying far toward, if not at, the sole and despotic dominion end of the control spectrum. Others have extensively chronicled such usage, including by academics, lawyers and judges¹²⁶ Calabresi and Melamed’s off-cited use of “property rules” to describe injunctive remedies entitling a resource owner

¹²⁴ At this level it is easy to see why “whether” debates are articulated in terms of the evils of property law. Rejection of an opponent’s normative position in favor of granting control is a rejection of propertization. That does not, however, make property evil or wrong; it merely reflects normative disagreement over whether its use under the circumstances is appropriate. The functional approach helps clarify by identifying the issue arises from the parties’ differences, not property law itself.

¹²⁵ See Stephen L. Carter, *Does it Matter Whether Intellectual Property is Property?*, 68 CHI.-KENT L. REV. 715 (1993) (aptly defining the common usage and understanding of “its mine” as “conversational property”). Professor Rose uses the term “conventional” property which offers an attractive alternative, although she appears to intend that term to cover richer views than the more extreme form discussed in the text. See Rose, *supra* note 9, at 993.

¹²⁶ The concern is particularly prevalent these days in intellectual property. The most recent offering is from Professor Lemley, *supra* note 26. See also, Carrier, *supra* note 9; Yu, *supra* note 9, at 4-5 (discussing the issue and referencing both Professor Lemley and Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connection Between Land and Copyright*, 83 Wash. U. L. Q. 417 (2005)).

unilaterally to prevent use by others¹²⁷ provides an especially powerful example. Their label clearly implies (if not asserts) that extremely strong perhaps even unlimited, exclusionary rights constitute an essential and central characteristic of every property interest. Some believe that our conversational predisposition leads us to adopt and accept such mischaracterizations¹²⁸ without examination thus distorting ownership discourse.¹²⁹

The validity of the conversational property concern must be measured both by its potential adverse substantive effects on public policy dialog and the likelihood those effects will actually occur. The reason conversational capture causes substantive harm is fully discussed in Subpart A and requires only brief recapitulation. A useful definition must properly frame debate by acknowledging the existence of alternatives. As the conversational characterization only describes a single outcome,¹³⁰ it inappropriately limits debate (1) to considering whether virtually absolute rights should exist (property – yes or no?) and (2) if (and whenever) “property” exists to determining whether an interference or restriction can be convincingly justified. Consequently, if conversational property captures the debate its serious mischaracterization of the issues would cause significant substantive harm.

¹²⁷ See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

¹²⁸ The mischaracterization is generally an overstatement of degree, not merely asserting the existence of a right to exclude. See Mossoff, *supra* note 84, at 377-378 (noting that although the right to exclude does not define property, some right to exclude (broadly defined) constitutes an essential characteristic of property albeit insufficient to define property as an integrated whole).

¹²⁹ See, e.g., Lemley, *supra* note 26, at 1037.

¹³⁰ The issue is stated in a variety of ways, generally that conversational property involves too strong a claim of right, but they are all derivative of the fact that it rejects the rest of the possibilities. Interestingly, even if no alternatives existed the conversational definition would still not be up to the framing task. Its inherent ambiguity only indicates that a proponent or possessor of a property interest is entitled to “a lot.” Public policy dialog requires something more precise.

The key question, therefore, is whether using the term “property” unavoidably causes (or permits) the conversational view to capture and control debate. Some commentators’ so strongly believe that is the case, they have despaired of repair and instead seek solutions (or, perhaps more accurately, solace) in mitigation.¹³¹ One such approach argues for using a different label for debates regarding resource control questions not yet fully captured, in particular those concerning intellectual “property.”¹³² Another accepts the inevitability of at least some conversational proprietization, even in intellectual property, but seeks to limit the damage by emphasizing its qualified nature.¹³³

To summarize my basic counter-argument, then elaborate: I believe the inevitable capture argument does not stand up under scrutiny.¹³⁴ Participants in public dialog, both its users and opponents, readily recognize conversational property rhetoric as advocacy for one possible normative outcome among many. Those who agree with that outcome adopt the rhetoric, those who do not rail against it. Successful conversational characterization, therefore, arises from normative agreement rather than the other way around. Moreover, even when circumstances risk capture through inappropriate proxy

¹³¹ See, .e.g., Carrier, *supra* note 9, at 5; Lemley, *supra* note 26, at 1032 and 1069-1075; Sterk, *supra* note 126, at 103.

¹³² See, e.g., Lemley, *supra* note 26, at 1075 (suggesting “IP”); Yu, *supra* note 9, at 5-6 (offering an excellent survey of those efforts, but ultimately disagreeing with adopting a new label).

¹³³ See generally, Carrier, *supra* note 9. Although couched in terms of reluctant “acceptance” (*id.*, at 4) his approach is at most a very short step from taking on the more general issue. I, therefore, suggest it may actually serve as part of an incremental strategy for overall change rather than merely a mitigation of unavoidable harm. See *infra* notes xx-yy and accompanying text.

¹³⁴ That certainly does not mean the attempt is not made, frequently, as Alice discovered in speaking with Humpty Dumpty, by usurping the role of definitional master in the hopes that the underlying premises remain unexamined. See Lewis Carroll, ALICE IN WONDERLAND 268-269 (THE ANNOTATED ALICE (Meridian 1960)). Those holding “non-conversational” property views are hardly immune from the attractions of characterization by label as evidenced by some of the suggested (perhaps tongue-in-cheek, perhaps not) alternatives in the intellectual property context. See Yu, *supra* note 9, at 5 (noting the suggestions of GOLEM and IMPS). Making the effort is not, however, the same as succeeding – Alice did call Humpty into account by demanding an explanation. See Carroll, *supra*, at 269; *infra* notes xx-yy and accompanying text.

reliance, strong arguments exist that we should and can take on and eradicate the problem rather than accepting it and limiting our efforts to mitigation.

Capture and distortion require some significant number of people exist who are or can be misled into believing that conversational property accurately frames public policy debate. The question is who might they be? The “are/can be misled” description is inapplicable (as well as uncharitable) with regard to legal professionals (lawyers, judges, politicians and academics), if not individually certainly as a group. Scholars are not bamboozled by linguistic labels; they offer and demand detailed support before advocating or adopting conversational property positions.¹³⁵ Similarly, courts or legislatures articulating outcomes in conversational property terms do so only after having first considered the alternatives and determined that linguistic vehicle conveys their view of the proper substantive outcome.¹³⁶ Expert use of “property” in its conversational sense, therefore, generally reflects knowing and intentional invocation of its connotations and consequences, not the result of error arising from, or manipulation through, linguistic mischaracterization.¹³⁷ In those few instances when experts are led into error or

¹³⁵ The eminent scholars Professor Lemley identifies as arguing that conversational property (or something like it) ought to apply to intellectual property are certainly able to deal with linguistic nuance. See Lemley, *supra* note 26, at 1035 n. 8. If that is their position (something on which I express no opinion here – he clearly had significant difficulties determining my own clearly articulated non-conversational views; compare *id.*, at 1044 n. 55 with Chiappetta Trademarks, *supra* note 53, at 51), the use of the conversational connotation does not reflect capture but the belief that on the merits the appropriate approach to intellectual property law should be more “conversational” than those “lamenting the rise of property rhetoric.”

¹³⁶ *Contrast infra* notes xx-yy and accompanying text discussing Congressional extension of copyright term based on strongly held views supporting that outcome with Lemley, *supra* note 26, at 1041-1042. Similarly, courts use conversational terminology (including the pursuit of free-riding) when judges believe that is what existing law directs, hardly an outrageously activist view given the acknowledged legislative expansion of intellectual property rights. *Contrast* Lemley, *supra* note 26, at 1042 (noting legislative expansion to eliminate free-riding) with *id.*, at 1042-44 (criticizing the courts for doing the same).

¹³⁷ Bluntly put, when one expert’s property analysis is deemed astoundingly stupid by another it generally reflects fundamental differences on the normative merits not that the first expert was demonstrably unable to get past the conversational property connotations. The issue of conflicting normative views and their

otherwise misuse conversational rhetoric other experts stand ready to identify and reject the resulting faulty assumptions or conclusory analysis,¹³⁸ as the robust intellectual property debate amply demonstrates.¹³⁹ Among experts improper vocabulary may be an occasional inconvenience (and source of outrage), but no more.

The mischaracterization problem, therefore, must lie with non-experts. One possibility is that their lack of training does not allow them to follow complex and technical public policy discussion thus leaving them prone to error and prey to linguistic artifice. Many, however, are aware of that possibility (experts as well as others¹⁴⁰) and will give warning and offer corrective criticism, commentary and alternatives. Consequently, to be

effect on logical argument are discussed *infra* in Part III. Whether professional debate using conversational property may inadvertently or intentionally confuse non-experts is discussed immediately below in the text.

¹³⁸ Experts, both the greats and the not-so-greats, do not always get it right. I can hardly disagree with Professor Lemley on that score, having myself criticized what at least I perceived to be erroneous use of conversational logic. See Vincent Chiappetta, *Myth, Chameleon or Intellectual Property Olympian? A Normative Framework Supporting Trade Secret Law*, 8 GEO. MASON L. REV. 69, 152-154(1999) (hereafter “Chiappetta Trade Secrets”) (criticizing the Supreme Court’s trade secret property holding in *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1002-1003 (1984) for inappropriately filling the gaps based on a “walks like, talks like” conversational property analysis). However, the issue is not whether mistakes have been (or will be) made, but the appropriate reaction. The relatively few actual errors (distinguished from differences in normative views regarding the conversational *outcome*) hardly seem a matter of systemic concern, particularly when they are so readily identified and challenged by other experts. Even if they were a significant problem, as experts have the ability to deal with complexity it seems far more useful to address the problem directly as part of an overall clarification of the analytical framework (such as implementation of the functional approach) than to go after the problem indirectly via vocabulary. A disingenuous expert is, of course, not making an error, but that distinction has no effect on other experts’ ability to identify and challenge the misuse. The issue of the effects of mistaken or intentional misuse on non-experts, including specifically whether the existing vocabulary facilitates capture) follows in the text.

¹³⁹ See Lemley, *supra* note 26, at 1035 n.6 (listing a long and influential list of scholars publicly and eloquently criticizing the conversational property approach). Ironically, opponents of intellectual “property” occasionally affirmatively contribute to the problem they allege exists by articulating their concern as over “proPERTIZATION.” See, e.g., Carrier, *supra* note 9, at 4; Lemley, *supra* note 26, at 1035. That characterization sets up the very false choice between conversational property and no property they are attacking, instead of addressing the actual differences regarding kind or degree. See Chiappetta Trademarks, *supra* note 53, at 39. As most if not all professionals are fully aware others will call them to account, one must suspect that in expert circles employing unadorned conversational property terminology – either by proponents or dissenters - is more rhetorical flourish than substance.

¹⁴⁰ Although experts are generally the first responders, they have no monopoly on the ability to identify mischaracterization. A little distance from the expert flame frequently helps keep the heat from obscuring the light.

captured an individual must both fail to see the initial mischaracterization and be unable to process subsequent warnings and information – making them very slow indeed. Furthermore, for there to be any significant effect on public policy dialog that group must be sufficiently large to influence debate on the merits. It is unlikely such a legion of hopeless individuals actually exists. Each of us will vigorously affirm we are not included in that number.¹⁴¹ At a minimum that reflects sufficient awareness to make significant capture improbable. However, research supports our confidence, confirming that the vast majority of individuals recognize the existence of choice and can avoid the trap of simplifying mischaracterization.¹⁴² On property questions that means most clearly understand that a range of control alternatives exist, that some foster their interests while others do not and they should, therefore, both avoid making assumptions and remain skeptical of another’s labeling¹⁴³ (which, not incidentally, is not restricted to conversational property advocates but other normative positions as well¹⁴⁴). That means they can identify conversational property as an option and perform such substantive assessment as they deem appropriate to determine whether it corresponds to their own views of the desirable outcome.¹⁴⁵ If it does they will not only accept and support, but

¹⁴¹ My thanks to Professor Debra Ringold of the Atkinson School of Management at Willamette University who made this cogent observation in our Business Lawyering course when discussing the fact that policy-makers rush to protect the helpless “others” but rarely pause to consider who they might actually be.

¹⁴² Business scholarship regarding advertising demonstrates that advertisers cannot successfully mislead individual decision-makers. *See, e.g.*, John E. Calfee, FEAR OF PERSUASION (1997); Chiappetta Trademarks, *supra* note 53, at 47. For similar reasons government propaganda efforts generally fail. *See* Calfee, *supra*, at 6-7. For a recent example, if naming the statute authorizing various forms of government inquiry into citizens’ behavior “The Patriot Act” was attempt to frame the debate it certainly failed to do so. *See, e.g.*, New York Times, Feb. 11, 2005, Editorial at A30

¹⁴³ *See* Calfee, *supra* note 142, at 37-41.

¹⁴⁴ *See supra* note xx (listing some of the equally non-neutral terms suggested by those seeking relatively weak property rights in the intellectual property debate).

¹⁴⁵ Clearly individual views of the “correct” outcome will frequently involve individual self-interest. That does not make them illegitimate; it merely reflects the normative decision to place value on how one individually fares. Those who disagree are no more demonstrably “right” for the same reasons discussed

engage in, conversational property rhetoric. If not, they will resist it in favor of a preferred alternative. In short, substantive agreement triggers conversational rhetoric, not vice versa.

Before addressing the more likely argument that circumstances cause individuals to replace analysis they could perform with shortcut proxies leading to capture, one profoundly troubling possibility should be noted. The above analysis demonstrates that most members of society are highly unlikely to error because they believe or have been misled into believing that conversational property accurately defines property ownership. However, avoiding capture only requires the capacity to recognize choice and the ability to select the outcome which reflects one's preferences. It does not logically follow that our preferences are not themselves seriously flawed. Viewed in that light, the widespread conscious adoption of conversational property norms may reflect a far more serious system failure than linguistic capture. The conversational views lack of nuance in face of obvious complexity and the related insouciance regarding predictable consequences may indicate a fundamental inability to understand or assess objective outcomes; in short lack of capacity to perform the necessary analytical tasks required by a participatory decision-making system.¹⁴⁶ If that is the case, the educational effects of debate clearly will be insufficient. The only effective response would be adopting a

infra in Part III. See *infra* note xx (distinguishing corruption based on external *quid pro quo* returns to the advocate).

¹⁴⁶ Cf. De Tocqueville, *supra* note 74, at 61 (noting that for democracy to work “each individual is ... supposed to be as enlightened, as virtuous, as strong as any other of those like him”) and 155 (“one is frightened, on the contrary, by the quantity of diverse knowledge and by the discernment that [the Constitution of the United States] supposes in those whom it must rule” responding to the notion that because “only simple conceptions take hold of the minds of the people” and, therefore, “a false idea, but one clear and precise, will always have more power in the world than a true, but complex idea” permitting capture by symbols and names).

decision-making process which reduces, if not eliminates, participation by those individuals – an extremely daunting, to say nothing of disturbingly elitist, prospect.¹⁴⁷ Although the possibility cannot be dismissed out of hand,¹⁴⁸ it makes proper framing of public policy property debates (linguistically or otherwise) a distinctly secondary problem. Therefore, it can legitimately be assumed away for the purposes of this endeavor’s far more modest objective.

Even if the majority has the capacity to avoid capture, it still may occur because substantial numbers of people lack the time, energy or motivation to perform independent analysis. As a result they will rely on short-cut proxies such as conversational property. Its strong intuitive appeal makes it a particularly comfortable framework for abbreviated decision-making regarding property questions, directly and especially when advocated by trustworthy sources.¹⁴⁹ The result is that those arguing for alternative views carry the burden not only to overcome the conversational mischaracterization, but to convince the proxy user to pay extra time and effort to pay attention to their argument. This does not mean proxy outcomes will always be inconsistent with individual normative preferences, but it certainly does substantially increase that possibility. The proxy argument,

¹⁴⁷ Cf. Plato, *supra* note 88, at 88-93 (412-414) (suggesting a ruling class of specially trained philosopher-kings).

¹⁴⁸ One interesting possibility is that our biology has turned out to be unsuitable for decision-making in the world we have created, for example, leading us to overly discount the future in favor of the here and now.

¹⁴⁹ Professor Lemley’s discussion includes the following statement: “The role of property theory is an important one because it provides intellectual heft to justify the expansion and because it offers an attractive label – ‘free rider’ – that they can use both to identify undesirable conduct and to justify its suppression.” See Lemley, *supra* note 26, at 1046. If Professor Lemley’s point is that conversational property provides a powerfully persuasive framework for articulating the speaker’s actual normative position on the merits (including benefits arising from that property outcome to themselves) the argument made in the text applies. If, however, he is saying that the “intellectual heft” and “attractive label” are being used by corrupt speakers to push an agenda based on unrelated *quid pro quo* benefits unrelated to the property outcome, the problem is not mischaracterization but corruption. Although conversational rhetoric may play a cover role in such situations they require a substantially more powerful response than vocabulary adjustments.

therefore, offers significant support to the conclusion that at least some conversational property capture is likely to occur.

The issue is whether to accept that capture and mitigate by controlling proxy creep or take the proxy problem on directly. Four counter arguments, two substantive and two practical, make a convincing case for strongly preferring the latter approach. The two substantive arguments involve the significant adverse effects of an acceptance and mitigation strategy on the property “big picture.” First, describing certain resource control debates as “not property” unavoidably reinforces the conversational property mischaracterization in the remaining contexts. The effect is to liberate some debates at the price of solidifying, and possibly increasing, the substantial harm proxy reliance causes in others. For example, calling intellectual property something else clearly implies (and could reasonably be viewed as explicitly confirming, especially by those not paying attention) that using “property” to describe control over real/personal resources indicates the conversational understanding is appropriate in that context.¹⁵⁰ As a result existing restrictions in those regimes will be increasingly narrowly construed and consideration of proposed limitations on such owners’ rights will start with a strong bias against them¹⁵¹ Although the intellectual property debates undoubtedly would benefit from their escape, the adverse effects of further entrenching a seriously flawed approach to tangible resource decisions makes acceptance-mitigation at least highly problematic but more likely disastrous.

¹⁵⁰ Cf. Carrier, *supra* note 9, 52-80 (pointing out the significant role limitations actually play in real property law).

¹⁵¹ The argument that labeling some debates as “not property” is an incremental step toward the larger goal is considered below. See *infra* notes xx-yy and accompanying text.

Second, separating property and non-property analysis fails to acknowledge that the effectiveness of our resource control decisions depends on viewing them as part of a single system.¹⁵² Specifically, separate treatment significantly interferes with understanding and assessing interactions. For example, treating allocations of control over ideas and tangible resources as unrelated issues could easily result in liberal access to copyrighted works for commentary and criticism under non-property analysis while simultaneously preventing access to the tangible resource vehicles and platforms essential to such uses under the conversational property paradigm. Additionally, separate treatment would substantially inhibit transferable learning, such as what kinds and quantities of control work (or don't), from our various debates and application experiences.¹⁵³ As it is highly improbable we will get either the normative decisions or technical implementation right the first time, treating different control regimes as distinct could cause us to repeat previous failed experiments.

The two practical arguments build off these substantive problems of abandonment and disaggregation. First, because the argument for limiting proxy creep and eliminating the more general proxy problem is the same, it makes no sense to limit the ultimate objective. The arguments in favor of acceptance and mitigation frequently obscure this congruence by intermingling attacks on capture with advocacy for entirely rejecting conversational

¹⁵² See John F. Duffy, *Intellectual Property Isolationism and the Average Cost Thesis*, 83 TEX. L. REV. 1077, 1090-1095 (2005); Adam Mossoff, *Is Copyright Property?*, 42 SAN DIEGO L. REV. 29, 39 (2005) (noting the difference between intellectual property and physical property rights are merely of degree not kind and that the same analytical framework applies to both). The problem is similar to the disaggregation which arises under Hohfeldian system which obscures the common theme connecting all of society's control decision-making. See *supra* notes xx-yy and accompanying text.

¹⁵³ Intellectual property has much to learn from and to teach real property. See, e.g., Carrier, *supra* note 9.

property on the merits.¹⁵⁴ The issues are distinct. Eliminating inappropriate proxy reliance only requires participants understand that alternatives merit inquiry before confirming their adoption of the proxy, not that they ultimately reject the normative position it reflects.¹⁵⁵ Addressing the proxy problem, therefore, only requires a convincing demonstration that the proper framing of property issues involves choice among alternatives, not that those supporting the conversational proxy are wrong. The logic of the former showing applies equally to all proxy situations, meaning successful argument can simultaneously address and resolve both the specific instance and the more general problem.

The actual argument for acceptance and mitigation, therefore, must be that the alternatives-choice point can be successfully communicated *only* when the conversational property paradigm has not yet become firmly entrenched. That argument, however, confuses the readily conceded proposition that the point is more easily made when the conversational property proxy is only weakly accepted with the non-sequitur conclusion that deep entrenchment makes it impossible to eventually generalize. The conceded proposition rests on the logical assumption that the time-pressed or energy-constrained will more likely pay *attention* when the proxy is tenuous. That argues for starting with those situations. It does not follow however that the effort must end there. Assuming their competence to understand and analyze complex issues,¹⁵⁶ and recognizing that

¹⁵⁴ See, e.g., Lemley, *supra* note 26, at 1075 (objecting to the use of land-conversational property paradigm to frame the intellectual property debate because it produces substantively undesirable outcomes).

¹⁵⁵ The proxy problem only involves a failure to analyze, not the ultimate normative outcome. See *supra* note xx-yy and accompanying text (noting the problem of confusing mischaracterization with substantive disagreement).

¹⁵⁶ See *supra* note xx-yy and accompanying text (discussing the much more serious institutional problem if this cannot be assumed).

success does not mean rejection of the proxy's substantive position,¹⁵⁷ people's understanding of the conversational proxy problem developed in the easy cases should be readily transferable to other more problematic situations and, over time, to all resource control discussions.¹⁵⁸

Second, successful mitigation not only cannot avoid making the general form of the argument but must eventually reach the understanding that all resource control decisions pose the same question. Mitigation's need to come up with new labels reveals why. The "property" label currently serves a dual role – it can refer to conversational property but it also serves as the *de facto* capstone reference for society's discussion of the aggregate body of interdependent resource control decisions. Successful mitigation's limitation of the term's definitional reach, therefore, requires generating new value-neutral,¹⁵⁹ appropriately descriptive and linguistically appealing¹⁶⁰ labels for the now distinct non-property regimes such as "the- regime-formerly-know-as-intellectual-

¹⁵⁷ Success only requires individuals understand that analysis is required, not that their analysis come out a particular way. As it is would be unsurprising to discover that when conversational property rhetoric is most deeply entrenched it reflects a strong normative preference for that outcome on the merits, eliminating proxy reliance may frequently not produce different substantive outcomes. *See supra* notes xx-yy and accompanying text (distinguishing between capture and normative disagreement regarding the outcome).

¹⁵⁸ I believe this is a logical extension of Professor Carrier's approach which emphasizes the existing limitations on real property rights in connection with their (inevitable) application to intellectual property. *See Carrier, supra* note 9. If that "not absolute" argument can be successfully made regarding intellectual property there seems little reason to stop at that point. Why not next make the more general point that the absolute real property proxy does not accurately define even real property debate? After all, the numerous exceptions arose in that context and certainly must point out property's inherent flexibility as a tool rather than a preordained outcome.

¹⁵⁹ Many of the existing new intellectual property label proposals reveal that those favoring conversational property proxies hardly have a lock on semantic gamesmanship, so finding suitable replacement terms will not be easy. *See supra* note xx (discussing some of the less than objective proposed replacements for intellectual property). Professor Lemley suggests the use of the more neutral "IP" in the (I believe unlikely) hope we will eventually forget its origins. *See Lemley, supra* note 26, at 1075. There appears to be little consideration of what we might use to replace "property" in its capstone sense.

¹⁶⁰ Public adoption requires new terms resonate with the target users. *Cf. Yu, supra* note 9, at 6 (noting problems in adopting new, unfamiliar terminology); Lemley, *supra* note 26, at 1075 (noting the unlikely adoption of the existing proposed intellectual property alternatives, presumably in part because users would find them unsatisfactory).

property” and for the general control topic “formerly-know-as-property.”¹⁶¹ That process requires understanding not merely the differences between “real-property-now-property” and “IP-whatever-it-is-to-be-called” but the common theme which defines “general-resource-control law-but-now-needing-a-new-name.”¹⁶² As inventing an entire new genus and species vocabulary and imbuing it with proper meanings requires the same fundamental substantive understanding as clarifies the existing terminology, there seems little practical point in engaging in the former exercise.¹⁶³

PART III: Persistent Normative Differences, Practical Consequences and the “Real” Property Question

The functional approach to property law provides a number of important practical benefits. By defining property as society’s decisions allocating varying kinds and degrees of control over contested resources it clarifies that public policy debate is fundamentally driven by, and should therefore focus on, our widely varying normative positions. Banished from the discussion are hyperbolic and polarizing “good/bad” and “yes or no” mischaracterizations as well as conversational property’s claim to preference along with its distorting assumptions. So too is the misunderstanding that property only

¹⁶¹ It might be argued that a new capstone term is neither desirable nor required. Cf. Richard M. Stallman, *Did You Say “Intellectual Property?” It’s a Seductive Mirage*, <http://www.fsf.org/licensing/essays/not-ipr.xhtml> (making the case for abandoning the capstone “intellectual property” as having no substantive content). That position ignores that avoiding abandonment and disaggregation generates a practical need for a common reference term. See *supra* note xx; Yu, *supra* note 9, at 5-6 (convincingly making the capstone argument regarding intellectual property based on both substantive inter-relationships, such as the channeling of subject matter from copyright or trademark toward patent law and real world transactional needs (assignment of all “x” rights) and practice requirements (something to call individuals who specializes in those regimes)). Cf., Lemley, *supra* note 26, at 1075 (noting that part of the power of intellectual property is that it “captures some of the similarities between the different fields it unites”).

¹⁶² Cf., Mossoff, *supra* note 84 (describing a unified view of property as essential); *supra* notes xx-yy and accompanying text (discussing the disaggregation problem).

¹⁶³ See *id.*

concerns things we can touch, thus permitting us to deal with every important resource and relevant circumstance while still viewing and treating each specific debate as part of an interrelated and interdependent whole.

The functional approach's most important benefit, however, is what it reveals about the decision-making process itself. A brief summary is in order before offering the detailed supporting discussion. By establishing that fundamental normative differences drive disagreement in property law the approach demonstrates that debate seeking absolute truth is a doomed enterprise. By focusing on the practical effects of property – control over contested resources – the approach clarifies that insistence on one's own view of the right may doom society. That same practical focus also offers an alternative. We could chose to treat public policy debate as a joint effort to find a practical solution which delivers the goods – that is a property regime which affords in the aggregate and over time each member of society sufficient control over resources to permit pursuit of a rational life plan. Deciding whether to pursue that alternative, like all values questions, does not have a demonstrably correct answer,¹⁶⁴ but will turn on individual normative predilections under the circumstances. Consequently, the functional approach does not conclusively resolve our property issues. It does, however, accomplish this effort's far more modest practical goal of better framing and thus improving our understanding of property debate.¹⁶⁵

¹⁶⁴ See *supra* note xx (describing my related difficulty with describing John Rawls' similar difference principle as "just").

¹⁶⁵ The functional approach also clarifies how courts should apply the regime. When dealing with existing law it reveals that merely asserting a property right, either as a party or in a holding, is meaningless. Invocation of property requires specification of precisely where on the control continuum of rights, conditions, limitations and obligations the ownership claim or confirmed right has been placed, including a careful description of what kind and how much. Consequently, neither an argument nor a judicial decision

The predicate assumption for my position is the existence and persistence of disagreement. If everyone agreed on a single guiding principle, property law would involve no more than its mechanical application to the particular facts at hand. Although that implementation process would present substantial data collection and interpretation difficulties, resolution of resulting disagreements would only depend on straight-forward (relatively speaking) technical expertise. Part I reveals the much more complicated reality.¹⁶⁶ It goes (almost) without saying those debates reflect significant differences of opinion. In a heterogeneous society one should not expect otherwise.¹⁶⁷ And the thousands of years those differences have endured despite constant social wrangling over the “true” meaning of property¹⁶⁸ indicates we should not expect a group epiphany anytime soon.¹⁶⁹ Until (or rather, unless) that occurs three central questions merit attention: What is the nature of our differences, why do those differences persist and,

should ever conclude “and therefore plaintiff has a property right.” Rather they should start with “the plaintiff has the following property right.” Additionally, whatever one’s views regarding judicial “activism” in other contexts, the fundamental role of normative conflict in resource control determinations counsels for at least considerable circumspection in judicial creation of new property rights. *See, e.g., Intel Corporation v. Hamidi*, 30 Cal.4th 1342, 1360-1364, 71 P.3d 296, 308-311, 1 Cal.Rptr.3d 32, 47-50 (2003) (struggling with the complex policy considerations and ultimately declining to create a property right). *Cf. Penner, supra* note 22, at 715-724 (discussing the problematic outcomes in the *International News* and *Moore* cases, albeit based primarily on his concern that clear guidance is lacking rather than the court’s fundamental institutional unsuitability to making the required normative decision).

¹⁶⁶ *See supra* notes xx-yy and accompanying text (identifying a range of normative views) and xx-yy (discussing a variety of examples).

¹⁶⁷ *See Locke, supra* note 3, Sec. 98 p. 143 (“the variety of opinions, and contrariety of interest which unavoidable happen in all collections of men”).

¹⁶⁸ The Romans hardly started the property inquiry, but that ready reference gives us a few thousand years of effort. *See e.g., Marx & Engels, supra* note 1, at 167; Carol M. Rose, *Roman, Road and Romantic Creators: Traditions of Public Property in the Information Age*, 66 L. AND CONTEMP. PROBS. 89 (2003) (discussing various Roman views of non-exclusive property). For yet earlier societies’ attention to the issue *see, e.g., Richard C. Ellickson & Charles Dia. Thorland, Ancient Land Law: Mesopotamia, Egypt and Israel*, 71 CHI.-KENT L. REV 321 (1995).

¹⁶⁹ Conflicting interpretations of the Biblical sources justifying property law make it unlikely that our differences will be resolved by external or higher authority. *See, e.g., Marx & Engels, supra* note 1, at 167; Locke, *supra* note 3, at Sec 25 p. 111.

finally, how do those persistent differences affect our property law decision-making when viewed through the functional lens?

One relatively recent example – the intellectual property debate over extending the term of copyright protection – provides a useful vehicle for the inquiry. The 1998 passage of the Sonny Bono Copyright Term Extension Act added 20 years to the terms of United States copyrights.¹⁷⁰ Framed in functional terms, the property law dispute is whether the resulting increased control is “correct” in degree. Those who believe that property rights in intellectual products should be guided by market efficiency principles arrive at the answer by assessing whether the economic benefits generated (*i.e.*, the increase or acceleration of economic output resulting from the additional encouragement of supplemental internalized returns) offset the related costs (in economic rents and deadweight loss or supra-optimal investment).¹⁷¹ The resoundingly “no” answer is best exemplified by Justice Breyer’s well-articulated dissent in the Supreme Court’s consideration of the matter in *Eldred*.¹⁷² The Justice’s case for over-propertization (too much control) demonstrates that the extension offers very little, if any, economic benefit in compensation for the substantial costs arising from the additional foreclosure of use by others.¹⁷³

¹⁷⁰ Pub.L. 105-298, Secs. 102(b) and (d), 112 Stat. 2827-2828 (amending 17 U.S.C. Secs. 302, 304).

¹⁷¹ See *supra* note xx (discussing the efficiency-utility approach).

¹⁷² *Eldred v. Ashcroft*, 537 U.S. 186, 242 (2000) (Justice Breyer dissenting). The Court only considered the extension of existing copyrights under the Copyright Clause and the extension of existing and future copyrights under the First Amendment. *Id.*, at 198. The majority objected that Justice Breyer’s policy arguments ignored these limitations. *Id.*, at 193 n. 1 and 199 n. 4. For the very different purposes of this article, however, it is the normative view not the technical merits which are important.

¹⁷³ *Id.*, at 254-257 (Justice Breyer dissenting).

The Act's namesake's view provides a good normative counter-point.¹⁷⁴ That analysis starts from the substantially different proposition that a work should be owned by its creator (almost) absolutely and (probably) forever.¹⁷⁵ Although varying philosophical justifications for such a "natural rights" approach affect its particulars,¹⁷⁶ it is sufficient here to recognize that they all establish a significantly different evaluative framework leading to a substantially different control outcome. Rather than the state creating rights to achieve economic efficiency, copyright law's function is to recognize and perfect a pre-existing right owed to the creator.¹⁷⁷ From that perspective Justice Breyer's argument is hardly determinative; it is barely relevant. The natural rights believer does not seek to justify the 20-year term extension against efficiency challenges. As best, therefore, those efficiency consequences are an unfortunate but necessary by-product of

¹⁷⁴ There are, of course, numerous possible normative positions, however, the point can be made (and more clearly) by focusing on the two addressed in the text. *See supra* notes xx-yy and accompanying text (discussing various normative justifications for property law). It merits mention that even when parties are in abstract philosophical accord conflict can arise from practical concerns. For example, one might consider the economic efficiency approach theoretically preferable but resist its actual use in favor of another approach because of concerns regarding our ability to quantify benefits and costs or the applicability of the related theoretical assumptions in the real world. *See* Chander, *supra* note 9, at 781-791;

¹⁷⁵ Eldred, 537 U.S., at 256 (Justice Breyer dissenting: "After all, the statute was named after a Member of Congress [Sonny Bono], who, the legislative history records, "wanted the term of copyright protection to last forever." 144 Cong. Rec. H9952 (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono). *See also* Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989 et al. before the Subcommittee on Courts and Intellectual Property of the House Judiciary Committee, 104th Cong., 1st Sess., 94 (1995) (hereinafter House Hearings) (statement of Rep. Sonny Bono) (questioning why copyrights should ever expire); *ibid.* (statement of Rep. Berman) ("I guess we could ... just make a permanent moratorium on the expiration of copyrights"); *id.*, at 230 (statement of Rep. Hoke) ("Why 70 years? Why not forever? Why not 150 years?"); *cf. ibid.* (statement of the Register of Copyrights) (In Copyright Office proceedings, "[t]he Songwriters Guild suggested a perpetual term"); *id.*, at 234 (statement of Quincy Jones) ("I'm particularly fascinated with Representative Hoke's statement... [W]hy not forever?"); *id.*, at 277 (statement of Quincy Jones) ("If we can start with 70, add 20, it would be a good start"))).

¹⁷⁶ Although they all part with efficiency, there are important differences between a Lockean, Hegelian or divine justification of natural rights. *See supra* notes xx-yy and accompanying text (discussing the various sources for "natural rights" views).

¹⁷⁷ *See, e.g.,* Shubha Ghosh, *Exclusivity – The Roadblock to Democracy?*, Buffalo Legal Studies Research Paper Series, paper No. 2006-002, 8-9 available online at: <http://ssrn.com/abstract=876471>.

achieving the “right” outcome. The truly committed may simply ignore them, their concern being that the extension still fails to grant sufficient creator dominion.¹⁷⁸

The above example reveals the essential cause and nature of our disagreements. They do not arise from failing to perceive, misunderstanding or miscalculating a position’s objective consequences. Typically the parties can come to substantial accord on such matters. Our disagreements are based on conflicting normative views regarding the relative importance of those consequences – in the above example, very different beliefs regarding whether maximized economic output or creators’ control over their creations represents the preeminent, if not only, value.¹⁷⁹

Identifying our disagreements as normative helps answer the second question – why those disagreements persist. Partly it is because normative differences cause us to talk past one another.¹⁸⁰ Utilitarians appeal to economic efficiency while natural rights advocates hear lack of respect for creators’ rights. Natural rights proponents use the imagery of theft while utilitarians see deadweight loss.¹⁸¹ Unsurprisingly, therefore, much public policy dialog involves public characterizations of opponents as blockheads failing to see the light, heathens needing conversion or villains driven by evil in their

¹⁷⁸ See *supra* note xx (noting that a number of extension proponents saw 20 years as not enough).

¹⁷⁹ Of course, we might seek a compromise providing for some of each. That would merely shift the normative disagreement from either-or to how much of each, still forcing us to deal with our different normative priorities. Actual willingness to yield normative ground and its practical justification are considered *infra* at notes xx-yy and accompanying text.

¹⁸⁰ See Yu, *supra* note 9, 9-11. These differences can also permit us to talk past each other, deliberately avoiding the inconvenient need to actually recognize our fundamental differences as discussed below in the text. The result is to make talking to each other even more difficult, so I have focused on the more easily resolved unintentional situation.

¹⁸¹ *Id.*

hearts (if not souls).¹⁸² Disagreement persists not only because epithets tend to divide rather than join, but because we fail to perceive that our opponents' insistence on irrelevancies neither reflects an inability to see nor a devious refusal to acknowledge the obvious path to common goals, but rather their belief in and pursuit of fundamentally different goals.

Although talking with each other would improve the situation it cannot resolve our differences. Reaching normative agreement requires change at the most fundamental level – altering the beliefs on which conflicting lexical ordering of consequences rests. The mechanisms necessary for that conversion do not exist. Appeals to reason are manifestly inadequate. Reason applies logic to objective facts. Although such analyses can be extremely helpful – every set of beliefs produces practical effects and it is useful to understand what they are likely to be¹⁸³ – they do not address the root cause of the problem. Because all logic builds from foundational assumptions, when those assumptions are rejected even the most flawlessly reasoned argument utterly collapses.¹⁸⁴ That is the case with the values we assign to the consequences of implementing our respective property norms.¹⁸⁵ For example, Justice Breyer's efficiency argument that extending copyright's term will reduce aggregate social wealth in terms of net goods and

¹⁸² *Id.*

¹⁸³ A normative view's objective consequences serve as important inputs particularly when new data or assessment mechanisms become available. Although such information is relevant, it cannot resolve the underlying value dispute about how much those consequences matter.

¹⁸⁴ Descartes "method" defines a method which fails completely when divergent beliefs preclude agreeing on the requisite foundational axioms of "indubitable certainty." See Van Doren, *supra* note 7, at 204-205 (describing the method's starting point and noting the difficulty of application when debate moves from the material to the spiritual); Rawls, *supra* note 15, at 36-37 (discussing the priority problem; Rawls uses intuitions to describe what I refer to as beliefs.). See also *infra* note xx (Godel).

¹⁸⁵ See, e.g., Rawls, *supra* note 15, at 36-37 (discussing the priority problem; Rawls using intuitions to describe what I refer to as beliefs).

services produced must be taken very seriously.¹⁸⁶ However, it cannot and will not convince those who believe that accepting those consequences are not merely justified but required by the need to recognize the creator's superior natural claim of right.¹⁸⁷ Similarly, the tragedy of the commons and related return-internalization and stability arguments commonly presented as the basis for existing real property law are only conclusive when one starts from the assumption that efficient outcomes are the pertinent measure of "right."¹⁸⁸ For those holding communitarian values those same arguments are worse than irrelevant; they constitute the very reason for rejecting private property.¹⁸⁹ By talking with each other we may come to understand and acknowledge the internal logic of each other's arguments and even respect the related passion, but having rejected the predicate assumptions we will remain unmoved.¹⁹⁰

¹⁸⁶ See *supra* note xx (discussing Justice Breyer's convincing efficiency analysis in *Eldred*).

¹⁸⁷ That conflict hardly exhausts the basis for normative dismissal of efficiency arguments (or supporting them). Another compelling argument against efficiency-based intellectual property arguments, at least standing alone, involves their distributional effects. See, e.g., Chander, *supra* note 9, at 3 and 30; Rawls, *supra* note 15, at 69 and 242-246. The *Eldridge* decision itself, of course, provides an interesting example demonstrating clearly that where one starts determines the importance ascribed to an argument. The majority does not dispute Justice Breyer's "calculator"-based efficiency determines, they simply deem them irrelevant because in their view the "right" answer depends on the "calendar." See *Eldridge*, 537 U.S., at 209 n. 16.

¹⁸⁸ See, e.g., Bell & Parchomovsky, *supra* note 6, at 537-539 ("a focus on stable ownership value is necessary to solve Coase's open puzzle of arranging legal entitlements in order to maximize economic efficiency); Lemley, *supra* note 26, at 1037-1040 (outlining the internalization of returns-avoidance of free-riding argument supporting real property law prior to arguing its inapplicability to intellectual property law).

¹⁸⁹ The proto-communists and the communists argued against private tangible property precisely because in their view of a just society internalized personal returns on capital investments were a bad not a good thing. See generally, Marx and Engels, *supra* note 1 (in particular Part 2 of the Communist Manifesto summarizes the basic argument).

¹⁹⁰ An interesting example is the tendency in intellectual property debate to assume a utility-efficiency framework and then offer the consumer surplus transfer, rent-seeking and dead-weight loss effects of over-propertyization as though they were dispositive. See, e.g., Lemley, *supra* note 26, at 1058-1065. Such arguments although flawless within their own paradigm are entirely unconvincing to those who apply different normative standards. See *infra* notes xx-yy and accompanying text (discussing how different normative views of copyright term extension affect concerns over the resulting limitation of the public domain).

The reason for persistent disagreement is now apparent: Having carved away reason all that remains are the obviously circular argument that one's position is preferable because it produces more desirable outcomes or the naked and wholly unconvincing assertion that particular predicate values are self-evidently or intuitively "right."¹⁹¹ It is hardly surprising that we all emerge from normative debate more than occasionally irritated but never shaken in our fervently held conviction that our values define "just" property law.

The short answer to the second question, therefore, is that normative differences persist because there are many perceived "truths"¹⁹² each irrefutable and dear to those adopting the related foundational values and beliefs and unsupported rubbish to those who reject them.¹⁹³ To be clear, that statement is only intended to reflect our circumstances not some meta-physical insight. I am not arguing no absolute truths exist, that values and

¹⁹¹ Lacking external verification such an assertion comes down to "because that is what I believe" which readily translates into simply "because." See Charles Van Doren, *supra* note 7, at xxi-xxii (discussing the faith that one's views are correct); Rawls, *supra* note 15, at 37 (stating that in the absence of external criteria "rational discussion [comes] to an end"); Ian Shapiro, *John Locke's Democratic Theory*, in Locke, *supra* note 3, at 320-322 (discussing John Locke's argument concerning the meaning of the Scriptures).

¹⁹² An interesting analogy is the mathematical effort to define space demonstrating that where one starts affects how one concludes. Van Doren explains that as space is described and controlled by our assumptions "there is no such thing as space. Instead there are as many spaces as there are mathematicians and nonmathematicians." See Van Doren, *supra* note 7, at 272. Normative disagreements, like those in property law, start at the beginning – the unprovability of our varying baseline assumptions. See *infra* notes xx-yy and accompanying text; Chiappetta Trademarks, *supra* note 53, at 39 n. 30 (I normally wouldn't shout myself out here (if that can be done via a footnote no one reads) but it gives me the opportunity to clarify and correct a past error in my reference to Kurt Godel in my articulation of the point. Professor Dennis Karjala has helpfully explained that Godel's Incompleteness Theorem concerns unprovability within a formal system, not the unprovability of the assumptions on which that system is based. He is, of course, right. My point about the unprovability of normative assumptions stands, but as I have insisted regarding Blackstone and absolute property, dialog is improved by eliminating non-existent arguments. That resolved, Godel's theorem remains relevant but in a different way. For an interesting consideration of how the theorem affects the "truth" of every formal definitional system, including normative views regarding property (mine not excepted), see Roger Penrose, *THE EMPEROR'S NEW MIND*, 138-154 (Oxford, New Preface Edition, 1999). Charles Van Doren also offers a similar albeit brief explanation of how Godel's proof demonstrates the uncertainty of all "knowledge." See Van Doren, *supra* note 7, at 340. In short, even if we are certain that our assumptions are correct we should be circumspect that our worldview is complete. For a wonderful articulation of the need to maintain substantial humility in that regard see Richard Dawkins, *THE BLIND WATCHMAKER* 38-39 (Norton 1996).

¹⁹³ Cf. Locke, *supra* note 3, LETTER CONCERNING TOLERATION 225 ("For every church is orthodox to itself; to others, erroneous or heretical.").

morality are only relative, or even that we are mistaken to follow our intuitions or beliefs regarding what is “right.” The argument is only that for the present we lack the means to convince others truth has been discovered and we possess it.¹⁹⁴ Consequently, the very best public policy debate aimed at convincing others they are “wrong” can produce is a grudging acknowledgment that every position is reasonable provided its assumptions are accepted. Learning to argue with rather than past each other about who is right may, therefore, help us better understand the sincerity with which we each hold to our differing values and beliefs, but it will not make those differences disappear.¹⁹⁵

The last and crucial step involves assessing what the irreducible nature of our normative differences tells us about public policy debate when framed by the functional approach. The basic message is, of course, that property decisions made despite persistent normative disagreement must produce winners and losers. The central question, therefore, is how those winners and losers are determined and with what attendant consequences.

Treating existing law as determinative can be quickly dismissed as confusing legal enforceability with normative accord.¹⁹⁶ For example, the Court’s determination in

¹⁹⁴ Although the statement in the text may sound “normative” to someone who is certain such truth exists, it does not refute that position it merely asserts that over the many years humankind has debated truth (regarding property and otherwise) we have never actually agreed on the answer.

¹⁹⁵ The point here is only that normative differences will persist, not that they make any resolution impossible. *See infra* notes xx-yy and accompanying text (discussing compromise and the related decision to cede normative ground despite continued conflict). *Cf.* Rawls, *supra* note 15, at 196.

¹⁹⁶ Now is the appropriate time for the obligatory, but exceedingly apt, reference to David Hume’s observation that merely because something “is” does not resolve whether it “should” be. *See* David Hume, A TREATISE OF HUMAN NATURE, Book III, Part I, Section 1, final paragraph, available online at http://en.wikisource.org/wiki/Treatise_of_Human_Nature/Book_3:_Of_morals#Sect._I:_Moral_distinctions_not_derived_from_reason

*Kelo*¹⁹⁷ that property law permits a Taking into private hands determines the rights not only of the particular parties involved but affects the legal outcome of all such disputes. Similarly, the Court's *Eldred*¹⁹⁸ holding that Congress acted within its power in extending the term of copyright law on existing works defines creators' existing rights of control, the reduces the public domain and with it the ability of others to create derivative works. Equally clearly neither decision finally resolved the underlying normative conflicts. Lively debate continues over whether each reflects the "right" social outcome.¹⁹⁹

A related and equally erroneous position would be to treat property as solely derivative of more "foundational" public policy decisions, thus making those antecedent determinations determinative. For example, it could be argued that the adoption of a market economy makes efficiency norms the primary measure of "good" property law.²⁰⁰ Although logically coherent internally,²⁰¹ the problem is that the existence of a market economy only demonstrates efficiency values have (so far) prevailed, not that all have

¹⁹⁷ ___ U.S. __ (2005). See *supra* notes xx-yy (briefly discussing the case).

¹⁹⁸ 537 U.S. 186 (2003). See *supra* notes xx-yy (briefly discussing the case).

¹⁹⁹ See *supra* notes xx-yy (discussing the continuing attempts to deal with *Kelo*) and Mossoff, *supra* note 152, 31 n. 12 (noting continued criticism of the outcome in *Eldred* and citing a variety of sources). Even in the most activist view of the judiciary it is at best (even to themselves) only a government decision-making institution, not a priesthood capable of divining absolute right. See Wikipedia, Supreme Court of the United States, at http://en.wikipedia.org/wiki/Supreme_Court_of_the_United_States ("as Justice Robert H. Jackson once famously remarked, 'We are not final because we are infallible, but we are infallible only because we are final.'").

²⁰⁰ Property literature offers numerous examples of arguments starting from the premise that the goal of the property regime is efficiency and moving seamlessly on to dismissing those proposals which fail to advance that objective. See, e.g., Lemley, *supra* note 26, at 1031. Even well established conceptualizations such as the tragedy of the commons analysis of real property law assumes rather than demonstrates that because ownership internalizes returns thus increasing investment that approach is normatively desirable. See *supra* note xx (discussing the rejection of that premise by communitarians).

²⁰¹ If we agree to use market exchange to generate economically efficient allocation of resources that system's assumptions undeniably require particular property outcomes. For example, individuals must privately control the resources that are to be exchanged and appropriate balances must be struck regarding the kind and degree of that control used to resolve the public goods problem.

accepted that they should.²⁰² Those who believe natural rights justify compensating a real property owner for every regulatory Taking²⁰³ or who reject the market's distributional effects²⁰⁴ would readily concede that such views fit poorly within the existing market economy's general efficiency paradigm. That is not the same, however, as agreeing that poor fit conclusively demonstrates that their views should be abandoned in favor of market-based determination of property winners and losers.²⁰⁵ Rather they would argue, have argued and actually prevailed with the position that the market should be abandoned.

The better approach recognizes that existing law and the adoption (or rejection) of a market economy are specific outputs of a social meta-agreement used to resolve the unavoidable normative disagreements in a heterogeneous society.²⁰⁶ As such they do not represent a final determination immutably controlling property debate. Instead they are operational decisions required for the on-going functioning of a mutually beneficial cooperative enterprise and, as such, remain subject to challenge, reexamination and alteration. Such tie-breaking systems (for convenience I refer to them as "political") may, of course, take many forms. However, as only participatory politics explicitly acknowledges that usefully addressing conflicts between individual normative

²⁰² Mr. Hume is again irresistible. *See supra* note xx.

²⁰³ *See supra* note xx (quoting supporters of Oregon's Measure 37).

²⁰⁴ *See supra* note xx (discussing the distributional concerns).

²⁰⁵ John Rawls observation is apt: "They are designed to achieve different ends, the [ideal market process] leading to efficiency, [the ideal legislative process] if possible to justice. *See Rawls, supra* note 15, at 316.

²⁰⁶ The following analysis is concerned with the practical not the just. Consequently, although it clearly implicates social contract theory, it is the practical desirability of cooperative action despite disagreement not its philosophical justifications which matter. Thus, beyond that fundamental point of agreement my analysis need not address, much less resolve, the debate among the likes of Rousseau, Locke, Hobbes and Rawls over the moral justifications for forming and abandoning the social contract. *See Rawls, supra* note 15, at 10; Shapiro, *supra* note 191, at 323-325 (discussing the conflicting views of Rousseau, Locke, Hobbes and others).

preferences requires broad-based involvement,²⁰⁷ its examination best furthers my purposes.²⁰⁸ In such political systems individual members (directly, but more likely through representatives) advocate vigorously for adoption of their preferred outcome.²⁰⁹ However, provided the meta-system's rules are followed, win or lose all society's members accept (and agree that the state should compel others to accept) the decision regardless of whether it conforms to their personal values.²¹⁰ The basis for such compliance is not that the participants are convinced the process produces normatively correct decisions but the practical recognition that binding decisions are essential to continued mutually beneficial coexistence.²¹¹

²⁰⁷ See, e.g. Rawls, *supra* note 15, at 439 (noting Mill's acknowledgement of the principle as well); Shapiro, *supra* note 191, at 323.

²⁰⁸ The actual level of participation - decision-making by unanimity, majority rule or something else - does not affect the argument and thus need not be resolved for this purpose. Additionally, the consequences for social cohesion discussed below apply to less and even non-participatory systems, although the methods of dealing with them in such systems will differ. The philosophical question of which system best handles the described concerns can, thankfully, be left for other efforts.

²⁰⁹ This understanding reveals the inappropriate nature of the increasingly popular use of the epithet form of the word "politics" – used to accuse those who disagree of "just being political" or "playing politics." Vigorous advocacy for conflicting positions is the very essence of political decision-making, not egregious misuse of the system. See De Tocqueville, *supra* note 74, at 245 (the "majority lives in perpetual adoration of itself"); Rawls, *supra* note 15, at 195-196 (discussing the importance of acknowledging the loyal opposition).

²¹⁰ The point is only that as a practical matter members generally will acquiesce, not why they should. See Shapiro, *supra* note 191, at 323-325 (discussing the differing views of Locke and Hobbes of the basis for the social contract and the related question of when acquiescence ceases to be required); Rawls, *supra* note 15, at 308-312.

²¹¹ See, e.g., Jared Diamond, GUNS, GERMS AND STEEL 283-288 (noting the mutual benefit theory but also arguing for other factors as playing an important role in the early stages of the development of human society); Rawls, *supra* note 15, at 456 (the social enterprise as "a cooperative venture for mutual advantage" pursued despite our disagreements). Rawls goes on to describe participatory majority rule as "not a contest between interests, but as an attempt to find the best policy as defined by the principles of justice" (*id.*, at 314) and asserts that "we normally assume that an ideally conducted discussion among many persons is more likely to arrive at the correct conclusion (by a vote if necessary) than the deliberations of any one of them by himself" (*id.*, at 315). Those statements risk confusing the kind of objective truth science might generate with truths which cannot be verified. See, e.g., Ken Alder, THE MEASURE OF THINGS 315-319 (Abacus 2004) (discussing accuracy in science, the convergence on scientific truth through cooperative effort and the problems created when the "right answer" is unknown); Van Doren, *supra* note 7, at 254-255 (science telling us more about what everything is while telling us less and less why). I, therefore, prefer the more practical view of the "use of the procedure of majority rule as a way of achieving political settlement" (*id.*, at 318), which applies independently of adherence to Rawl's or any other principle of justice and Alexis de Tocqueville's explanation that "the people ... understand that to profit from society's benefits, one must submit to its burdens" and "obeys society ... because he knows that

The crucial question is how that model fares when used to determine property winners and losers. The short answer is that if property politics is treated as a system of pure “competitive” justice,²¹² the practical effects of resource control decisions are more likely to break the social than the normative ties.²¹³ Avoiding that outcome requires property debate include a perfect justice independent criterion.²¹⁴ Specifically, unless property decisions actually afford each of its members sufficient control over resources to pursue a rational life plan the meta-agreement will not hold and the society will dissolve.²¹⁵ Or stated in normative terms, because our value differences will inevitably persist, sustaining heterogeneous cooperative society over the long run requires shifting the focus of our property debate from seeking rules consistent with our individual preferences to rules which deliver the goods, even if we could “win” under a strict application of the political process.

The argument starts from the functional definition: that property allocates control over contested resources – meaning its rules resolve disputes when there is not “enough, and

... union [with others] cannot exist without a regulating power.”). De Tocqueville, *supra* note 74, at 9 and 61. It is also interesting to reflect on De Tocqueville’s assertion that part of what makes democracy work in America is that we are very similar. *Id.*, at 158-159. It would appear that the passage of time has either made us less able or willing to ignore our differences or, perhaps, as we have tangibly prospered we are better positioned (for better or worse) to focus on our philosophical differences.

²¹² “Pure” justice defines the correct result as whatever results from following the systems rules. That allows, if not induces, parties to compete against one another rather than engage in cooperative problem-solving. See Rawls, *supra* note 15, at 75 (using the example of gambling).

²¹³ Although I argue below that the property law’s resource control effects makes it a special case, clearly when any normative differences are strongly enough held the same consequence can result. See *supra* note xx.

²¹⁴ *Id.*, at 74.

²¹⁵ John Locke differentiates between destruction of government and society. Certainly the effects described will bring about the fall of the former, but most likely will also undo the bonds of the latter as well. See *supra* note xx.

as good, left in common.”²¹⁶ As property winners are pleased, it is the consequences of losing which require inspection. Property decisions invariably have a practical effect on individual ability to accomplish personal goals.²¹⁷ They not only restrict an individual’s roles and level of participation in society,²¹⁸ they tangibly affect the ability to pursue one’s personal life plan (including providing or denying access to the necessary resources and restricting the ability to self-define²¹⁹), the conditions of existence and at the margin existence itself.²²⁰ The difficulty will generally emerge over time. Property rules which concern only one or a small group of individuals, such as government Takings, the misuse of economic or biological data and direct free speech conflicts, will require multiple events before they have an appreciable impact on society as a whole. Others will be systemic, such as the gradual eroding of individual circumstances through the distributional consequences of taxation policies or the basic operation of a market economy²²¹ In all events, if society’s property decisions do not deliver adequate control to permit the majority of society to pursue a rational life plan, not only their desire but

²¹⁶ Locke, *supra* note 3, at Sec. 27 on 112.

²¹⁷ Obviously, all normative debates carry significant consequences. The “special” property law characteristic is that the political outcome virtually always restricts or eliminates freedom of individual action. John Rawls view of this result as adversely affecting one’s ability to achieve “happiness” through accomplishment of a reasonable life plan is obviously central to the following analysis. See Rawls, *supra* note 15, at 480-482. When other debates have this result, they likely carry the same consequences. .

²¹⁸ This can occur because lack of resources locks them into a particular social “class” or because it practically forecloses opportunities. See Van Doren, *supra* note 7, at 6-7 (describing the Indian caste system) and Rawls, *supra* note 15, at 62-64.

²¹⁹ See *supra* notes xx-yy and accompanying text (unsurprisingly, many of the normative justifications reflect one or more of the effects of control on an individual’s life plan).

²²⁰ The lack of food and shelter are obvious, however, they only reflect one of many possibilities. For example, patent limitations on access to pharmaceuticals is no less devastating than having nothing to eat. See, e.g., Frederick M. Abbot, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 99 AM. J. INT’L L.317 (2005) (discussing the on-going issues regarding access to medicines protected under patent law).

²²¹ See *supra* note xx.

their ability to adhere to the political meta-agreement will disappear²²² and with it the society it sustains.²²³

It might be argued that despite the tangible consequences social cohesion will be maintained if the losers believe they had been treated fairly. For example, it might be argued that being given equal opportunity to succeed should suffice whatever the actual outcome. There are significant practical problems with clinging to that hope. If in application a society's rules impose actual and substantial hardship on some members while others benefit sometimes considerably, the basic premise of acquiescence for reciprocal beneficial is undelivered, if not an outright deception. Additionally, frequently theoretical equality of opportunity translates into the status of actual loser in ways not easily attributed (if at all) to personal failures (*e.g.*, the effects of the market on those skills are not in demand²²⁴ or the fact that we start market race from unequal positions²²⁵), many outcomes are unlikely to be viewed by those adversely affected as

²²² Cf. Singer, *supra* note 121, at (3) (discussing the “precarious position of non-owners”).

²²³ I make no pretense to historical expertise and recognize that causes of historical events are hard to identify with certainty. There are, however, numerous examples where property disputes have been an important, if not a determinative, factor in social disintegration – the French (“let them eat cake”) and Russian (the Marxist attack on bourgeois property – *see generally* Marx and Engels, *supra* note 1) come to mind. Additionally, looking at the United States experience the two great social “adjustments” both have significant property issues at their core: no taxation (taking my property) without representation (considering my views and needs) in the revolution (*see, e.g.*, Van Doren, *supra* note 7, at 223) and the prominent role of slavery (destruction of Southerner’s property) in the United States Civil War (*see id.* at 275-278). Shortfalls affecting only small groups of individuals will be treated as law enforcement problems. However, although they will not trigger dramatic change they still constitute avoidable disruptions in society caused by a failure to acknowledge those individuals needs.

²²⁴ Given the frequency with which actual outcomes fail to projected results of theoretical programs, one must wonder whether some fundamental human character trait makes us fundamentally ill-suited to dealing with the issues we face. *See generally*, Barbara W. Tuchman, THE MARCH OF FOLLY (Knoff 1984); *supra* note xx.

²²⁵ A market enthusiast might argue that because its dispassionate operation offers equality of access losers should view resource shortcomings as the consequence of their own actions – in effect they bear the blame, not society. This article is not the place to address the difficulties with that argument (most notably that we start “in the middle” rather than on a level playing field – see William Gates, Sr. interesting observations in this regard concerning his support for the inheritance tax, *supra* note xx). John Rawls

“just.” Therefore, far from assuaging the pain of control shortfalls, “fairness” generally aligns with actual *outcomes* further undermining loyalty and commitment to the society.²²⁶

Nor can appeal to fidelity to principle avoid the problem. Those who disagree with the principle embodied in the rules will not be converted merely because it has been adopted by others, even a majority of their political peers. And even those who strive to put fidelity to either that incorporated principle or more generally to the social meta-accord first, will generally find the practical consequences of property law overwhelming. When a society’s property decisions do not deliver sufficient resource control continued allegiance would require, in Rawl’s words, such an astounding degree of altruism²²⁷ that all but the most fervently committed will find the social bargain is one they simply cannot keep.²²⁸

A functional assessment reveals that treating the political meta-system solely as a set of procedural rules umpiring a contest over which of our beliefs will prevail may be at odds with the continuation of the very cooperative enterprise that system is designed to foster. However, the prospect of social dissolution cannot command we abandon politics as the pursuit of “right,” absolute or personal. Whether social dissolution is a good or bad thing is itself a normative proposition which cannot be definitively resolved. In

provides an interesting response. Although he includes “fair equality of opportunity” as part of his second principle of justice he finds it insufficient to provide justice. He, therefore, specifically adds the outcome constraining “difference principle.” See Rawls, *supra* note 15, at 263-267.

²²⁶ One need not be directly affected to join the dissent. Even winners whose values make them unwilling to accept the negative consequences for losers will share and support these views.

²²⁷ See Rawls, *supra* note 15, at 155 and 164-165 (explaining that individuals are highly unlikely to forgo individual reciprocal benefits merely for the benefit of others).

²²⁸ See *id.*, at 88-89 and 153.

particular, many believe that holding to one's personal principles is itself a core, if not the preeminent, value. All the functional approach tells us is that as doing so may deliver property outcomes which fail to deliver the goods with consequences certainly meriting serious consideration. That consideration would do well to reflect on the additional fact that when discussion ends and other means of conflict resolution are employed it is unclear who will leave, on what terms and, perhaps most critically, what will be left for those who remain.²²⁹

The functional definition's emphasis on practical consequences not only identifies the problem, but provides an alternative. The effects on social cohesion replaces the problematic "finding the one true property law" and "a competition among truths with winners and losers" characterizations with a substantially different property question – is fidelity to continued reciprocally beneficial cooperation among those who in hold different views of the truth the superior "good." The correct response, of course, is no more demonstrable than any other normative proposition. Whether the "greater good" trumps individual beliefs turns on one's individual intuitions and beliefs applied to the particular circumstances. Most likely many will discover the answer is not absolute – sometimes it will be yes and sometimes it will be no.

Moreover, even a yes answer does not guarantee easy or even successful resolution. Adding substantive outcome constraints creates significant normative stresses and poses substantial practical difficulties. Returning to our earlier example, copyright extension

²²⁹ Revolutions are unpredictable things, rarely turning out the way their instigators envision. *See supra* notes xx and yy.

ceases to be framed as a contest between efficiency and natural rights (to pick but two normative positions) but in terms of ensuring the control over expression permits both creators and subsequent users to pursue rational life plans.²³⁰ Such a copyright law will undoubtedly deliver less control than natural rights advocates view as just and more than will please those seeking efficiency.²³¹ That practical solution will, therefore, require acquiescence in outcomes which do not fully (if at all) correspond to one's personal view of others just desserts. Conversely, it will limit members resource expectations, meaning outcomes will routinely fall short of what many view as their just entitlement.

In all probability, therefore, no one will be pleased with most of society's functionally derived property law. Some will view resulting real property rights as incorporating ridiculously over-broad Taking powers, copyright terms as treating creators with unbearably shabby disregard, personal information as scandalously abused and limitations on spending one's "own" money as an outrageous impairment of free speech. Others will equally strongly believe precisely the contrary – that the same Takings law painfully disregards vital public interests, the same copyright term is fabulously overly solicitous to authors at unmerited loss of efficiency, the same use of personal information fails to adequately provide access vital to wealth creation and that the same limitations on

²³⁰ Expressive works being unlikely to affect existence itself, life plans become the relevant consideration – although one should never say never.

²³¹ For those curious (and reasonably so) about whether the functional approach can be pragmatically translated into actual law, present day copyright offers a real world example. Although not articulated in functional terms, its existing hybrid nature cannot be coherently explained on normative grounds largely because it reflects the approaches output constraints. What might be described as natural rights/self-realization based rights, such as those found in the long-term and moral rights (less obviously so in the United States but those considerations are clearly influential) look to creator's need for access to resources from exploitation and self-definition through control over other's use. The "efficiency" considerations provide access to others through the independent creation exclusion and doctrines such as fair use. Explicit reliance on the functional approach would likely redraw the lines, but the basic output focus is readily apparent.

use of personal resources are egregiously insufficient to prevent capture of the political process.

Additionally, even a good faith willingness to accept personally unsatisfactory results is not sufficient to overcome the practical difficulties.²³² An output focus will require fundamental and sometimes painfully difficult changes in our approach to public policy debate.²³³ We must cease framing our arguments within the structure of our own logic and instead learn to state our positions transparently in terms of our motivating values, desires, needs, concerns and fears so we can understand what the practical solution must deliver. We must scrupulously acknowledge, respect and understand others equally strongly held views regardless of how impossibly absurd or irrelevant they may sound to us so we will understand that they too are yielding. And, finally, we must recognize that even good faith and diligent effort does not mean a workable solution will actually be found. Large numbers of us may ultimately decide they cannot accept any of the identified options or there may simply not be enough to go around.²³⁴

The functional alternative hardly offers an encouraging picture. It will result in inelegant hybrids frequently lacking internal consistency and reflecting no more than a temporary

²³² Lincoln's unsuccessful willingness to bend on the slavery issue offers a particularly good example: "My paramount object in this struggle is to save the Union, and it is not either to save or to destroy slavery. If I could save the Union without freeing any slave, I would do it; and if I could save it by freeing all the slaves, I would do it; and if I could save it by freeing some and leaving others alone, I would do that also." See Von Doren, *supra* note 7, at 275 (quoting Lincoln's letter to Horace Greeley).

²³³ See Chiappetta WTO, *supra* note 78, at 382-383 (discussing the requirement in the context of international resolution of the intellectual property exhaustion issue).

²³⁴ This problem obviously casts a significant shadow over property. Because no allocation can deliver the goods, property becomes the means for distinguishing between the have-enoughs and have-inadequates. The ultimate outcome of that use of property cannot be doubted. See *supra* notes xx-yy and accompanying text. That possibility becomes distressingly more likely when property is considered in its international application (as it eventually must be). See *infra* note xx.

and grudging outcome enabling us to continue living cooperatively together at significant cost to our individual values and beliefs. The argument, however, is not that we must accept these results only that their shortcomings should be realistically compared with the alternative of insisting otherwise. And permitting myself one unabashedly normative concluding observation – it may be that by actually listening to and trying to understand each other we might learn something and by working together despite our differences we might actually find ways which let us live and thrive together peacefully.²³⁵

CONCLUSION

Defining property functionally – as the tool implementing society’s decisions allocating varying kinds and degrees of legal control over its resources – delivers on the practical goal of clarifying related public policy debate and decision-making. It explains why we should reject the unproductive conceptualization of property as a right-or-wrong/yes-or-no proposition to which we react as well as the assumption that those who disagree with us are fools or worse. Both characterizations distract us from the central issue in property law – our persistent normative disagreements regarding what constitutes its just application. Discussing property as a matter of choice will reveal we believe in a wide variety of “truths,” thus helping us talk with rather than past each other, but also

²³⁵ The international ramifications deserve at least passing mention. Practical solutions depend both on our ability and willingness to act cooperatively. Accomplishing that task domestically is greatly facilitated by a shared culture and modes of expression, familiarity with the conflicting norms and the established the political process, and confidence that ultimately we are linked in our pursuit of a mutually and reciprocally beneficial common enterprise. Dealing with “outsiders” changes the situation dramatically. Norms will be unfamiliar and incomprehensible and cultural differences, including modes of expression and methods of debate increases the likelihood of mistaken assumptions and miscommunication. Most critically, however, the justifiable lack of confidence that we are actually engaged in a common enterprise poses very serious risks of unyielding insistence on implementation of one’s own values. *See generally*, Chiappetta WTO, *supra* note 78.

clarifying that neither reason nor passion can ensure our view prevails. Finally, by focusing us on property's practical effects, the functional approach reveals that the essential issue framing public debate in heterogeneous society is not how to ensure society's adoption and implementation of our personal views but determining which we value more under the circumstances – our way or the continuation of society. If we chose the latter, then the pursuit of normative victory should give way to a search for a practical solution which delivers the goods. Although how we chose to answer the property question is up to us as individuals, the functional framework permits us to fully understand the alternatives and their consequences. Not bad work for a definition.