Nebraska Law Review

Volume 77 | Issue 4 Article 7

1998

Property and the Right to Exclude

Thomas W. Merrill
Columbia Law School, tmerri@law.columbia.edu

Thomas W. Merrill*

Property and the Right to Exclude

TABLE OF CONTENTS

I. INTRODUCTION

The Supreme Court is fond of saying that "the right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[1] I shall argue in this Essay that the right to exclude others is more than just "one of the most essential" constituents of property—it is the *sine qua non*. Give someone the right to exclude others from a valued resource, i.e., a resource that is scarce relative to the human demand for it, and you give them property. Deny someone the exclusion right and they do not have property.

Of course, those who are given the right to exclude others from a valued resource typically also are given other rights with respect to the resource—such as the rights to consume it, to transfigure it, to transfer it, to bequeath or devise it, to pledge it as collateral, to subdivide it into smaller interests, and so forth. These other rights are obviously valuable and important, and it is not improper to speak of

* John Paul Stevens Professor of Law, Northwestern University. The author would like to thank Jim Speta, Henry Smith, and David Van Zandt for helpful discussions and comments.

1. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). These words have been quoted in numerous subsequent decisions. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 384 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1044 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987).

them as part of the standard package of legal rights enjoyed by property owners in most contexts. My claim is simply that in demarcating the line between "property" and "nonproperty"—or "unowned things" (like the air in the upper atmosphere or the resources of the ocean beyond a certain distance from shore)—the right to exclude others is a necessary and sufficient condition of identifying the existence of property. Whatever other sticks may exist in a property owner's bundle of rights in any given context, these other rights are purely contingent in terms of whether we speak of the bundle as property. The right to exclude is in this sense fundamental to the concept of property.

Understanding the role the right to exclude plays in defining property is important for several reasons. First, having a better grasp of the critical features of property may promote a clearer understanding of the often-arcane legal doctrine that surrounds this institution. Second, understanding the domain of property is an important preliminary step in developing a justification or critique of property from the perspective of distributive justice. Third, formulating a more precise conception of property may be necessary in order to offer a complete account of constitutional provisions like the Due Process Clause and the Takings Clause that protect "property." In any event, for those who have devoted themselves to teaching the law of property, the question is one of intrinsic interest, whether or not it has any payoff in resolving more immediate concerns.

In Part II of the Essay, I will locate the role that the right to exclude others plays in the larger debate about the meaning of property. In Part III, I will offer three arguments why the right to exclude—what I will sometimes call the "gatekeeper right"—should be given primary place in defining property. In Part IV, I offer some qualifications to my thesis.

II. THE RIGHT TO EXCLUDE AND THE CONCEPT OF PROPERTY

Within the existing literature about the institution of property, there is a broad consensus about several propositions. This consensus does not extend, however, to the precise role that the right to exclude plays in defining that institution. I will briefly enumerate the principal points of consensus, and then turn to the disagreement over how to characterize the role of the right to exclude.

A. Points of Consensus

First, nearly everyone agrees that the institution of property is not concerned with scarce resources themselves ("things"), but rather with

the rights of persons with respect to such resources.[2] A copy of Tom Wolfe's latest novel sitting in a bookshop is a scarce resource. But considered solely as an object, it is not property. The book can be characterized as property only by invoking certain rights that persons have with respect to it. For example, the book might be said to be the property of the bookshop, meaning that the bookshop has certain rights with respect to the control and disposition of it. Or the book might be said to be the property of a customer who has purchased it from the bookshop, in which case the customer would have certain rights with respect to the control and disposition of it.

Similarly, there is a consensus that the concept of property includes the rights of persons with respect to both tangible and intangible resources. Most people understand, at least in some dim fashion, that Tom Wolfe has something called a "copyright" in the contents of the book he has written, and that this copyright is Wolfe's property. They understand this to mean that Wolfe has certain rights with respect to reproduction of the book, and that these rights are separate and distinct from the rights that exist with respect to particular physical copies of the book.

There is also a consensus that property means something different than mere possession. In both lay and legal understanding, to speak of possession of scarce resources is to make a statement of fact about which persons are in control of particular resources.[3] Property, in contrast, refers not to a statement of fact but to a norm (or norms). Thus, if I pick up a copy of Tom Wolfe's book in the bookstore and start to read it, I can be said to be in possession of the book. But I cannot be said to own it; it is the property of the bookshop until I pay for it. Moreover, it is understood that property rights generally trump possessory rights.[4] After reading the Tom Wolfe novel in the bookshop for 15 minutes, the shopkeeper may ask me either to buy it or put it

2. This is not to deny that in common parlance "property" is sometimes used to refer to things, as in the sentence: "The real estate agent agreed to show us the property." It is also true that "property" is sometimes used as a synonym for wealth or net worth, as in the sentence: "She is a woman of property." My concern here, however, is with explicating the concept of property as a social institution, i.e., with the institution of ownership, as in the sentence: "I'm sorry, but I think that umbrella you are taking is my property."

3. This is not to deny that there will be disputes over who is in possession of a resource, and that the actions that signify possession will vary according to social convention. *See* Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985). Nor is it to deny that legally significant distinctions will attach to different types of possession, such as good faith possession (thinking that one is the owner of a resource or that it is unowned) or bad faith possession (knowing that one is not the owner of a resource). *See* Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122 (1984-1985).

4. There are important exceptions to this generalization, such as adverse possession.

down. The shopkeeper is entitled to make this demand, since the bookshop has a property right in the book superior to my possession of it.

Given that property is a norm, there is also a consensus that property cannot exist without some institutional structure that stands ready to enforce it. The usual assumption is that this institution is the state. But it is also possible that it is meaningful to speak of property rights in contexts governed by less formal enforcement mechanisms, such as social ostracism. Thus, it may be possible to speak of property rights in library carrels, or in particular bedrooms in homes, where it is understood that certain persons have normative claims to these scarce resources and that these claims will be enforced by the common consent of those who participate in a particular social unit.[5] With respect to most controversies of concern to lawyers, however, property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[6]

Finally, there is a consensus that the concept of property is not limited to private property, but includes also what may be called common property and public property.[7] Private property may be said to exist where one person or a small number of persons (including corporations and not-for-profit organizations) have certain rights with respect to valuable resources. Common property may be said to exist where all qualified members of a particular group or community have equal rights to valuable resources. An example would be a common pasture open to all members of a particular village for the grazing of livestock. Public property may be said to exist where governmental entities have certain rights with respect to valuable resources, analogous to the rights of private property owners. An example would be a municipal airport.

In sum, there is a general consensus that property refers to particular rights of persons or entities with respect to scarce tangible and intangible resources; that property is distinct from and superior to the mere possession of resources; that the rights associated with property require some institutional structure that stands ready to enforce these rights; and that property may be private, common, or public.

---

5. *See* Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1372, 1394-95 (1993).

6. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

7. *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV., May 1967, at 347, 354 (Papers and Proceedings of the Seventy-ninth Annual Meeting of the American Economic Association); C.B. Macpherson, *The Meaning of Property*, *in* PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 1, 9-11 (C.B. Macpherson ed., 1978).

B. Three Schools of Thought Regarding the Right to Exclude

There is, however, much less consensus regarding the nature and content of the particular rights that persons have when they are said to have property. In particular, although it is widely agreed that someone who has property in a resource typically will have at least some right to exclude others from using or interfering with that resource, there is disagreement about how central this right is to the understanding of property. Generally speaking, it is possible to identify three different intellectual traditions regarding the role of the right to exclude. These may be called "single-variable essentialism," "multiple-variable essentialism," and "nominalism."

Probably the oldest continuing tradition in attempts to define property is essentialism—the search for the critical element or elements that make up the irreducible core of property in all its manifestations. The patron saint of property essentialism is William Blackstone, the first full-time law professor at an English-speaking university. In fact, Blackstone endorsed not one but two essentialist definitions of property, corresponding to what I call the single-variable and the multiple-variable versions.

The first or single-variable version of essentialism posits that the right to exclude others is the irreducible core attribute of property. Thus, Blackstone I:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.[8]

Under this conception, the right to exclude ("sole and despotic dominion") is both a necessary and sufficient condition of property. Many other scholars in succeeding generations, including Jeremy Bentham,[9] have also appeared to endorse some such notion.[10] Per-

8. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *2.

9. *See* JEREMY BENTHAM, *Idea of a Complete Law*, *in* OF LAWS IN GENERAL 156, 177 (H.L.A. Hart ed., 1970).

10. Two recent and excellent philosophical monographs give primacy to the right to exclude in explicating the concept of property. *See* J.W. HARRIS, PROPERTY AND JUSTICE (1996); J.E. PENNER, THE IDEA OF PROPERTY IN LAW (1997). I cannot do full justice to the subtle and sophisticated arguments these authors present. Roughly speaking, however, Penner argues that "the right to property is a right to exclude others from things which is grounded by the interest we have in the use of things," adding nevertheless that "the law of property is driven by an analysis which takes the perspective of exclusion, rather than one which elaborates a right to use." *Id.* at 71. Thus, with qualifications, Penner seems to fall more within the single-variable essentialism camp than in any other. For his part, Harris argues that "for general theoretical purposes, 'property' should be conceived of as comprising items which are either the subject of direct trespassory protection or separately assignable as parts of private wealth." HARRIS, *supra*, at

haps the best-known exposition of this perspective was provided by the philosopher and New Deal lawyer Felix Cohen. His posthumously-published Socratic dialogue on the nature of private property[11] considers a number of attributes commonly associated with property, and through the positing of examples and counterexamples concludes that only the right to exclude is invariably connected with all forms of property. Cohen vividly summarizes his discussion in a manner suitable for memorialization on the blackboard:

> [T]hat is property to which the following label can be attached:
>
> To the world: Keep off X unless you have my permission, which I may grant or withhold.
>
> | | |
> |---|---|
> | Signed: | Private citizen |
> | Endorsed: | The state.[12] |

Single-variable essentialism also finds extensive if somewhat qualified support in the decisions of the contemporary U.S. Supreme Court. The Court has said of the right to exclude that it is "universally held to be a fundamental element of the property right;"[13] that it is "one of the most essential rights" of property;[14] and that it is "one of the most treasured" rights of property.[15] Although all these statements imply that the right to exclude is not the only right associated with property, no other right has been singled out for such extravagant endorsement by the Court. Moreover, the Court's decisions suggest that governmental interference with the right to exclude is more likely to be considered a taking of property without compensation under the Fifth Amendment than are interferences with other traditional elements of property.[16]

---

13. Since he regards trespassory protection of scarce resources as foundational to the understanding of property, Harris also would appear to be a qualified proponent of what I call single-variable essentialism.

11. *See* Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954)[hereinafter Cohen, *Dialogue on Private Property*]. Cohen's conclusion that property has an essential core of meaning is particularly striking in light of the fact that Cohen was also the author of a famous plea for functional rather than formalistic reasoning in law. *See* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

12. Cohen, *Dialogue on Private Property*, *supra* note 11, at 374.

13. Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979).

14. *See* sources cited *supra* note 1.

15. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).

16. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 384 (1994); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 (1984); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. at 435; Kaiser Aetna v. United States, 444 U.S. at 179-80. In certain circumstances, the Court has held that interference with the right to exclude does not constitute a taking. For example, the Court has upheld a state constitutional rule prohibiting owners of shopping centers from excluding individuals who seek to exercise free speech rights on shopping center property. *See*

The second version of essentialism, also found in Blackstone, posits that the essence of property lies not just in the right to exclude others, but in a larger set of attributes or incidents, of which the right to exclude is just one. Thus, Blackstone II: "The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."[17] This version of essentialism holds that property is defined by multiple attributes or incidents. Blackstone describes these multiple attributes as the rights of "free use, enjoyment, and disposal." Curiously, the right to exclude others—which as we have seen is elsewhere deemed by Blackstone to be the defining element of property—fails to make an appearance on this list. Moreover, it would seem that the rights of "free use" and "enjoyment" are arguably redundant, or at least largely overlapping. But these anomalies have been overlooked in subsequent accounts, which have translated the Blackstonian trilogy as the rights of "possession, use, and disposition,"[18] or alternatively, the rights to exclude, to use or enjoy, and to transfer.

Under the multiple-variable version of essentialism, the right to exclude is a necessary but not a sufficient condition of property. Without the right to exclude, there is no property. But more than the right to exclude is needed in order to create a package of rights sufficiently impressive to be called property.

This multiple-variable essentialism has also been defended by later generations of commentators.[19] The most elaborate of these efforts is that of Tony Honore, an Oxford legal scholar, who sought to identify the "standard incidents of ownership" that are present when an individual is the "full owner" in a mature, liberal legal system.[20] He concluded that there are eleven such incidents: (1) the right to possess; (2) the right to use; (3) the right to manage; (4) the right to the

---

PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980). But it has explained this result on the ground that "the owner had not exhibited an interest in excluding all persons from his property." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. at 434. So explained, it would appear that the Court regards such cases more as regulations of the use of property than as restrictions on the right to exclude. In other words, the regulation is seen as mediating a conflict over the use of the property that arises between the owner and the entrant after the owner has agreed to waive the right to exclude. *See also* Yee v. City of Escondido, 503 U.S. 519 (1992); FCC v. Florida Power Corp., 480 U.S. 245 (1987).

17. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *138.

18. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 58-59 (1985).

19. Including Professor Epstein. *See id.* at 165.

20. *See* TONY HONORÉ, *Ownership*, *in* MAKING LAW BIND 161, 161-192 (1987). The essay originally appeared in OXFORD ESSAYS IN JURISPRUDENCE 107-47 (A.G. Guest ed., 1961). *See also* Frank Snare, *The Concept of Property*, 9 AM. PHIL. Q. 200 (1972).

income of the thing; (5) the right to the capital; (6) the right to security; (7) the incident of transmissibility; (8) the incident of absence of term; (9) the duty to prevent harm; (10) liability to execution; and (11) the incident of residuarity. Honore conceded that not all of these incidents are present in all cases in which we speak of property. But they represent the paradigm of full ownership, against which various types of incomplete or partial ownership must be understood.

Multiple-variable essentialism also finds some support in the Supreme Court's decisions. On several occasions, the Court has stated that "[p]roperty rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'"[21] This of course is the modern variant on Blackstone's original trilogy of rights.

The third school, which I call nominalism, views property as a purely conventional concept with no fixed meaning—an empty vessel that can be filled by each legal system in accordance with its peculiar values and beliefs. On this view, the right to exclude is neither a sufficient nor a necessary condition of property. It may be a feature commonly associated with property, but its presence is not essential; it is entirely optional. A legal system can label as property anything it wants to.

Although traces of the nominalist conception can be found in the Nineteenth Century,[22] it is basically a product of the Legal Realist movement of the Twentieth. For the Realists, property was not defined by a single right or definitive trilogy of rights. Rather it is a "bundle of rights." Moreover, this bundle has no fixed core or constituent elements. It is susceptible of an infinite number of variations, as different "sticks" or "strands" are expanded or diminished, added to or removed from the bundle altogether. Thus, the Realists understood that the universe of things called property is purely a matter of social convention. Perhaps the most influential figure in the development of the nominalist perspective was Wesley Hohfeld.[23] Although Hohfeld apparently never used the bundle of rights metaphor,[24] his analysis of legal concepts as a series of bipolar "jural relations" laid the ground-

21. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982)(quoting United States v. General Motors Corp., 323 U.S. 373, 378 (1945)); *see also* Phillips v. Washington Legal Found., 118 S. Ct. 1925, 1933 (1998); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003 (1984).

22. Thus, Henry Clay once said: "That is property which the law declares to be property." 8 THE WORKS OF HENRY CLAY 152 (Calvin Colton ed., 1904), *quoted in* J. GORDON HYLTON ET AL., PROPERTY LAW AND THE PUBLIC INTEREST 68 (1998).

23. *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 746-47 (1917).

24. *See* GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970, at 319, 322 & 455 n.40 (1997). Alexander reports that the first use of the metaphor was in a treatise on eminent domain published in 1888. *See id.* at 455 n.40 (citing JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 43 (1888)).

work for a conception of property as a collection of socially-contingent entitlements.

Subsequent Legal Realist scholars took Hohfeld's jural relations and derived from it an extreme form of nominalism. As one Realist writer, Walter Hamilton, stated in an entry on "Property" in the 1937 edition of the *Encyclopedia of the Social Sciences*, property is nothing more than "a euphonious collection of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth."[25] The American Law Institute's *Restatement of Property*, published in 1936, adopted a similarly open-ended definition of property.[26]

This sort of extreme nominalism continues to be found in contemporary writing about property. For example, in an influential essay, Thomas Grey has argued that the concept of property has so many variations and specialized uses that its meaning has "disintegrated."[27] He concludes, in keeping with the skeptical position of the Realists, that "the specialists who design and manipulate the legal structures of the advanced capitalist economies could easily do without using the term 'property' at all."[28]

Today, the nominalist conception is more-or-less the orthodox understanding of property within the American legal community. Law students have been instructed for years that the bundle of rights metaphor accurately captures the nature of the institution of property.[29] The Supreme Court has also jumped on the nominalist bandwagon, and has on many occasions itself described property in terms of the bundle of rights metaphor[30] (albeit often in a context where the Court

25. 11 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 528 (1937), *quoted in* HYLTON, *supra* note 22, at 68.

26. RESTATEMENT OF PROPERTY § 10 (1936)("The word 'owner,' as it is used in this Restatement, means the person who has one or more interests.").

27. *See* Thomas C. Grey, *The Disintegration of Property*, *in* PROPERTY: NOMOS XXII 69 (J. Roland Pennock & John W. Chapman eds., 1980).

28. *Id.* at 73.

29. *See* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 26-29 (1977). Ackerman reports that the consensus is so pervasive "even the dimmest law student can be counted upon to parrot the ritual phrases on command." *Id.* at 26.

30. The clearest example where the "bundle" metaphor served to justify uncompensated regulation of property occurred in *Andrus v. Allard*, 444 U.S. 51 (1979), where the Court rejected a takings challenge to a federal statute that prohibited the sale of bald eagle feathers. The Court stated: "[T]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 65-66.

also says that the right to exclude is "among the most essential" of the bundled rights[31]).

These three schools of thought—single-variable essentialism, multiple-variable essentialism, and nominalism—do not exhaust the possibilities with respect to understanding of the nature of property. One of the most sophisticated modern expositions of property by a philosopher is that of Jeremy Waldron.[32] Borrowing a distinction developed by Ronald Dworkin, Waldron argues that private property is best understood as a general "concept," of which the various incidents or elements catalogued by Honore and others embody different "conceptions." He defines the general concept of private property as the understanding that, "in the case of each object, the individual person whose name is attached to that object is to determine how the object shall be used and by whom. His decision is to be upheld by the society as final."[33] This general concept, Waldron argues, takes on different conceptions in different contexts, depending on the type of resource involved, the traditions of the legal system, whether ownership is unified or divided, and so forth. For example, agricultural land may be subject to different types of restrictions on use than is personal property.

From the vantage point of this essay, Waldron's account can be seen as a combination of single-variable essentialism and nominalism. His definition of the core concept of private property—giving a named individual "final" authority to determine how resources "shall be used and by whom"—bears a strong family resemblance to Blackstone's sole and despotic right to exclude. Waldron would not define property solely in terms of this feature, however, but depicts property as morphing into a variety of conceptions in a manner consistent with the bundle of rights metaphor associated with nominalism. For example, he argues that the right of inheritance is entirely contingent and that one could have a system of private property with or without inheritance, without affecting the conclusion that the system was still one of private property.[34]

---

31. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 384 (1994); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

32. *See* Jeremy Waldron, *What is Private Property?*, 5 OXFORD J. LEGAL STUD. 313 (1985)[hereinafter Waldron, *What is Private Property?*]. A condensed version of this essay appears in JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 26-61 (1988).

33. Waldron, *What is Private Property?, supra* note 32, at 327. Waldron develops this concept by contrasting private property to collective (i.e., state-owned) property and common property (which he equates to unowned things). Thus, his core concept does not generalize to all forms of property.

34. *See id.* at 337-40. Waldron hints at one point that the right to transfer has a "tightness of connection" to the core concept that distinguishes it from other incidents like inheritance. *See id.* at 341. This concession points arguably toward a

III. THE PRIMACY OF THE RIGHT TO EXCLUDE

Single-variable essentialism—the view that the right to exclude others from valued resources is both a necessary and sufficient condition of property—has few defenders in today's American legal community.[35] Nevertheless, I think that three different types of argument can be advanced in support of this understanding. These are (1) a logical or conceptual argument, (2) an historical argument, and (3) an argument from existing legal usage and practice.

A. The Logical Primacy of the Right to Exclude

The first argument in support of an essentialist definition of property centered on the right to exclude is basically a logical one. It goes like this: if one starts with the right to exclude, it is possible to derive most of the other attributes commonly associated with property through the addition of relatively minor clarifications about the domain of the exclusion right. On the other hand, if one starts with any other attribute of property, one cannot derive the right to exclude by extending the domain of that other attribute; rather, one must add the right to exclude as an additional premise. This mental exercise strongly suggests that the right to exclude is fundamental to our understanding of property.

To illustrate, consider resources in land—the proverbial Blackacre. Let us start with the understanding that A has the right to exclude others from Blackacre. This means, in effect, that A has the power to act as the gatekeeper of Blackacre.[36] A can forbid other persons from entering onto Blackacre or from causing structures or objects to encroach on Blackacre; alternatively, A can consent to other persons entering onto or encroaching on Blackacre. As Blackacre's gatekeeper, A has the power to determine who has access to Blackacre and on what terms.[37]

---

partial embrace of what I have called multiple variable essentialism. So perhaps Waldron's account can be seen as a blending or merging of all three schools I have identified.

35. Outside that community, it is possible that a revival of single-variable essentialism may be afoot. *See supra* note 10 (noting recent works by Penner and Harris which are primarily philosophical and are written from the perspective of the English and Commonwealth legal systems rather than the American).

36. J.E. Penner adopts a similar metaphor:

> The right to property is like a gate, not a wall. The right to property permits the owner not only to make solitary use of his property, by excluding all others, but also permits him to make a social use of his property, by selectively excluding others, which is to say by selectively allowing some to enter.

PENNER, *supra* note 10, at 74.

37. The law has conventionally spoken of this as a right of exclusive "possession." I will avoid this locution because "possession" is a slippery term. We can be more

If we start by giving A the right to exclude with respect to Blackacre, then the other attributes conventionally associated with property can be derived simply by adding some minor qualifications about the domain of this right. Let us consider four of the most important attributes commonly associated with property besides the right to exclude: the right to use, the right to transfigure (i.e., develop), the right to transfer during life, and the right to devise upon death.

1. The right to use. If A has the right to exclude with respect to Blackacre, it would seem but a very small step from this to conclude that A also has the right to determine the use of Blackacre. If A can exclude B,C,D, . . . N from Blackacre, then A is in a position to determine that no one other than A or those given permission by A may enter onto Blackacre or encroach on Blackacre. A's power as gatekeeper thus allows A to determine who may remain on Blackacre and what activities they may engage in there. In short, A's right to exclude with respect to Blackacre leads directly to A's right to dictate the uses of Blackacre, because no one else will be in a position to interfere with the particular uses designated by A.

It does not follow from this that the right to use is coterminous with the right to exclude. The two rights can be severed. Thus A, while retaining the right to exclude, may contractually assign the right to use to another, as by entering into a negative easement or covenant promising not to engage in particular uses on Blackacre. An example would be a covenant promising to use Blackacre for single family residential purposes only. Or the state may adopt a law that preserves the right to exclude but takes away the right to use. Zoning and other types of land use controls are familiar examples.

These examples of severance, however, only suggest that in special circumstances the right to exclude does not entail the right to engage in particular uses.[38] They do not detract from the basic point that in the ordinary course of events, giving A the right to exclude with respect to Blackacre leads directly to the conclusion that A has the right to use Blackacre. In other words, one need not add a new power to A to get from the right to exclude to the right to use; one need only show that some special servitude or police power regulation does not exist that takes away a particular right to use that otherwise would flow from the right to exclude.

---

precise by thinking of the right to exclude simply as a gatekeeper power—the right to determine who has access to particular resources and on what terms.

38. As Felix Cohen pointed out, there are also circumstances where a corporation may be able to exercise the exclusion right, but cannot in any realistic sense use the resources itself. The example he gave was a song: a corporation can own the copyright to a song, and hence can exclude others from performing or copying it; but the corporation cannot itself sing the song. *See* Cohen, *Dialogue on Private Property, supra* note 11, at 369.

2. The Right to Transfigure. Essentially the same analysis applies to the right to transfigure, i.e., A's right to clear the land, till the soil, plant and harvest crops, construct new structures, tear down old ones, and so forth on Blackacre. A's power to act as gatekeeper to Blackacre allows A to prevent others from interfering with A's efforts to transfigure Blackacre in these and other ways. The power to exclude thus leads inexorably to the power to transfigure.

Again as in the case of the right to use, it is possible to sever the right to exclude from the right to transfigure. Negative easements and covenants are one way in which this can be done. An extreme example would be a conservation servitude, permitted by statute in most states,[39] that would prohibit any development of Blackacre. But the major source of severance here is undoubtedly local building codes, zoning ordinances, historical preservation measures, and the like. In the famous *Penn Central* case,[40] for example, the City of New York ruled that the owners of the Penn Central Station could not develop the air rights above the station.[41] Under this order, the owners presumably still had the right to exclude others from encroaching on their air rights. But they could not use the air rights for new development. Indeed, the legislative severance of the right to transfigure can become quite extreme, as in the British statute of 1947 that effectively transferred all development rights from private property owners to the State, requiring each property owner to obtain special permission from local authorities before engaging in any construction.[42]

As in the case of restrictions on uses, however, these legislative restrictions on the right to transfigure should be seen as exceptions to the rule that would otherwise obtain. Even in the extreme form of Britain's nationalization of development rights, the changed understanding applies only to a subset of transfigurations—the construction of new structures. It does not extend to decisions about agricultural or horticultural uses. And even such an extreme severance does not challenge the proposition that absent some such governmental intervention, the right to exclude would ordinarily lead directly to a right to transfigure.

3. The right to transfer during life. Once A has the right to exclude with respect to Blackacre, A also has the right to transfer Blackacre during his natural life, if we add one relatively modest clarification about the domain of the right to exclude. That clarification is that the

39. *See* Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 437 (1984).

40. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

41. *See id.* at 116.

42. *See* ROBERT E. MEGARRY & H.W.R. WADE, THE LAW OF REAL PROPERTY 1065, 1074 (5th ed. 1984).

right to exclude must encompass not only the owner's right to include others, but also to *exclude* him or herself.[43] A transfer of property is simply an irrevocable agreement to give permanent access to the resource to another combined with an irrevocable agreement to exclude oneself from access to the resource. Thus, as long as the gatekeeper power is understood to include putting oneself outside the gate and installing someone else as the gatekeeper, the right to exclude leads directly to the right to transfer.

Once again, severance of the right to exclude and the right to transfer is possible. Under the common law, direct restraints on the power of alienation of a fee simple are strongly disfavored. But lesser property interests, such as leaseholds, can be made inalienable if the landlord expressly so provides in the lease. Legislative restrictions on transfer are relatively rare, but the Supreme Court has upheld a federal statute prohibiting persons from selling—but not from possessing or using—bald eagle feathers.[44] These examples show that in exceptional circumstances the right to transfer can be severed from the right to exclude. But they also show that the ordinary understanding is that a person who has the right to exclude also is presumed to have the right to transfer. It takes some special conveyance or legislation to defeat the expectation that the right to exclude entails a right to transfer.

4. The right to devise upon death. The analysis of transfers upon death closely tracks that of transfers during life. In order to derive such a right from the right to exclude, we need to add only the clarification that the domain of the owner's right to exclude encompasses the right to direct who shall be included and excluded upon the death of the owner. This is a clarification of the temporal domain of the right to exclude, rather than (as in the case of *inter vivos* transfers) a clarification about the universe of persons who may be excluded. In order to show that the right to exclude entails the right to devise upon death, it is necessary to specify that the owner's directions regarding who is to be included and excluded will be respected beyond the instant of the owner's death up to time of the probate of the owner's last will and testament (or the equivalent event). This clarification, like the previous one, entails at most a very modest extension of the domain of the right to exclude.

As we have seen with respect to the other incidents of ownership, the right to devise upon death can be severed from the right to ex-

43. PENNER, *supra* note 10, at 80-97, makes a similar and much more elaborate argument. Interestingly, he concludes that the right to make gifts of property can be deduced from the right to exclude; but he argues that the right to sell property requires the conjunction of two rights: the right of property, i.e., the right to exclude, and the right to contract.

44. *See* Andrus v. Allard, 444 U.S. 51 (1979).

clude. The state can impose restrictions on inheritance, such as the formal requirements of the Wills Act, forced spousal share statutes, and the rule against perpetuities. On rare occasions, we also find legislation seeking to abrogate the right to inherit outright. The most prominent example is the Indian Land Consolidation Act,[45] which seeks to forbid the inheritance of very small interests in Indian Tribal lands in an effort to promote the consolidation of these lands into more economically viable parcels. The Supreme Court has twice held this statute unconstitutional,[46] underscoring that these efforts at severance, although conceptually possible, are clearly exceptional. The ordinary understanding is that the right to exclude encompasses also the right to transfer upon death.

In short, if we start with the right to exclude, it is possible with very minor clarifications to derive deductively the other major incidents that have been associated with property. However, the converse is not true: we cannot start with any of the other incidents, and reason backwards to derive the right to exclude. In each case, it is necessary to posit independently that the right to exclude exists with respect to the resources in question.

Consider, first, the right to use. There is no question that this right is an important attribute of property closely associated with the right to exclude. At its core, the gatekeeper right is the right to determine the use of resources, by exercising the power of exclusion and inclusion. But the right to exclude cannot be derived from the right to use. This can be shown by the example of nonpossessory property rights, such as easements, profits, and real covenants. Nonpossessory property rights are rights to engage in enumerated uses of resources, such as crossing the land of another or gathering timber on the land of another. Yet one can engage in most of these uses without having a property right to do so. A use-right that does not rise to the dignity of a property right is called a license. And what is the defining difference between use-rights in the form of licenses and use-rights that are considered nonpossessory property rights? The difference is that the holder of a nonpossessory property right can exclude others (including but not limited to the grantor) from interfering with the exercise of the use-right, whereas the holder of a license lacks such a right. In other words, the feature that makes nonpossessory property rights property is the right to exclude others, and the right to exclude cannot be derived from the right to use.

Compare in this regard the difference between my use of the office I occupy at the law school and my use of the office in my house. I engage in similar uses of both resources—reading, typing at a word

45. 25 U.S.C.A. §§ 2201-2211 (1998).

46. *See* Babbitt v. Youpee, 519 U.S. 234 (1997); Hodel v. Irving, 481 U.S. 704 (1987).

processor, talking on the telephone. But the former use-right is based on a license derived from my employment, while the latter is based on my ownership of the house. Because it is only a license, my right to use the office at the law school can be terminated by the university at any time. However ill-advised such a move might be from an employee-relations perspective, I would have no legal grounds for blocking the decision. In contrast, neither the university nor any one else can put me out of the office at my house. Any attempt to oust me in this context could be countered with a panoply of potent legal remedies. Thus, we cannot deduce my right to exclude from the fact of my right of use, whereas, as we have seen, it is easy to move in the opposite direction.

Similar points can be made about the right to transfer. Fiduciaries of various sorts have the right to transfer resources, without any attendant right to use the resources themselves or to exclude at their discretion others from using them. Examples include the officers of business corporations, the trustees of foundations, and politicians having the power to tax and spend. To determine whether or not someone who has the right to transfer resources also has a general right to exclude others from the resources, we need to know additional information about the scope of their powers, specifically, whether they are owners. The right to transfer, by itself, cannot lead us to this further information about which incidents of property the transferor enjoys.

I will not belabor the analysis further, since the general point should be clear: start with the right to exclude, and it is easy to derive with minor clarifications most of the other incidents of ownership commonly listed as being part of the concept of "full ownership." Start with any other incident, and one cannot reason back to the right to exclude, without introducing the right to exclude as an independent premise.

B. The Historical Primacy of the Right to Exclude

The second argument in support of the primacy of the right to exclude is historical in nature. There is strong evidence that, with respect to interests in land, the right to exclude is the first right to emerge in primitive property rights systems. Only as property systems evolve in complexity and sophistication do other rights, such as the rights of transfer, inheritance, pledging as collateral, subdivision, and so forth, develop. The fact that the right to exclude can be found in even the most primitive land-rights systems provides further support for the conclusion that the gatekeeper right provides the key to understanding the nature of property.

It is commonly believed that the most elementary form of property right in land is the usufruct, an exclusive right to engage in particular

uses of the land that is nontransferable and that terminates when the owner dies or ceases the use.[47] What distinguishes usufructuary rights from unowned resources is not the right to use the resource, but rather the right to exclude others from engaging in particular uses of the resource.

Whether usufructs were in fact the first form of property rights is something which cannot be known with complete certainty. However, Robert Ellickson, who has conducted a wide-ranging comparative study of property rights in land, concludes that the usufruct is most likely the first form of property in land:

> Anthropological evidence suggests that during the first 300,000 years of the evolution of our species (*homo sapiens*), people lived in hunter-gatherer bands that moved nomadically as local food sources became exhausted. Then, about 10,000 years ago, prehistoric civilization achieved a great breakthrough. In the Fertile Crescent of the Near East, human groups, which had shortly before begun operating out of permanent settlements, mastered the skills of cultivating crops and domesticating animals. This breakthrough required innovations not only in husbandry, but also in property rights. A prehistoric community had to develop a set of land rules that provided incentives for its members to engage in the small events involved in raising crops and animals. The Promethean invention was likely the classic usufruct.[48]

William Cronon, who has published an influential account of the property rights recognized by the Native Americans in colonial New England,[49] reaches a similar conclusion:

> Southern New England Indian families enjoyed exclusive use of their planting fields and of the land on which their wigwams stood, and so might be said to have "owned" them. But neither of these were permanent possessions. Wigwams were moved every few months, and planting fields were abandoned after a number of years. Once abandoned, a field returned to brush until it was recleared by someone else, and no effort was made to set permanent boundaries around it that would hold it indefinitely for a single person. What families possessed in their fields was the use of them, the crops that were produced by a woman's labor upon them. When lands were traded or sold . . . what were exchanged were usufruct rights, acknowledgments by one group that another might use an area for planting or hunting or gathering. Such rights were limited to the period of use, and they did not include many of the privileges Europeans commonly associated with ownership: a user could not (and saw no need to) prevent other village members from trespassing or gathering nonagricultural food on such lands, and had no conception of deriving rent from them.[50]

If we assume that the earliest form of property in land was the usufruct, this provides additional support for the claim that the right to exclude is foundational to the understanding of property. The usufruct, as both Ellickson and Cronon emphasize, is essentially a time-

47. *See* Ellickson, *supra* note 5, at 1364.
48. *Id.* at 1365 (footnotes omitted).
49. *See* WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND (1983).
50. *Id.* at 62.

limited right to exclude others from interfering with particular uses of resources (such as growing crops or placing wigwams on land). Insofar as these sorts of usufructuary rights are acknowledged to be a rudimentary form of property rights, this suggests that giving an individual or small group the right to exclude others from particular uses of land is sufficient to create something identifiable as property. Certainly, it suggests that other attributes associated with "full ownership" in mature property systems—such as the rights to transfer during life and upon death and to borrow against property—are not necessary conditions of property.

Perhaps more significantly, this historical evidence suggests that the right to exclude, because it was the first right to evolve in time, is more basic to the institution of property than are other incidents of property recognized in mature property systems. It appears the first step in the evolution of property rights in land was the recognition of the right to exclude; once this was established, then and only then was it possible to add other rights to the bundle.

C. The Ubiquity of the Right to Exclude

The third argument looks to existing legal practices in a mature legal system to discern whether the right to exclude is invariably associated with those interests identified as property rights. Here too we find that, by and large, where the law recognizes a right to property, it confers a right to exclude. The same cannot be said for the other incidents or attributes of property identified by Honore and others as part of the standard bundle of rights. As befits an inductive argument, we find some possible exceptions to the foregoing generalizations. Nevertheless, the pattern is sufficiently widespread that it supports the conclusion that property and the exclusion right go hand-in-hand.

Consider first the various common law estates in land short of the fee simple absolute (full ownership). All other present possessory estates—the fee tail, the fee simple determinable, the life estate, the tenancy for years, the periodic tenancy, and even the tenancy at will—include the right to exclude others so long as the estate remains possessory. Each of these estates is protected by rules of civil and criminal trespass, which give the holder of the present possessory estate the right to call upon the state to exclude others from unwanted invasions or intrusions.[51]

Future interests arguably present a more questionable case, because the holder of a future interest typically does not have a right to exclude with respect to the present uses of the property. A landlord, for example, cannot tell a tenant (unless this power is reserved in the

51. *See* HARRIS, *supra* note 10, at 25; Thomas W. Merrill, *Trespass and Nuisance*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 617, 617-22 (1998).

lease) whom the tenant may exclude from the property or invite on to the property.[52] But this "exception" for future interests is not really an exception at all, because the holder of a future interest by definition only has a property right that takes effect in the future. With respect to the interest that the future interest holder in fact has, the right to exclude remains fully applicable. For instance, the landlord has the right to exclude with respect to his or her reversionary interest. If the tenant holds over, or transfers possession to someone else who remains in possession after the end of the lease, the landlord can bring an unlawful detainer action and have the tenant or the third party evicted. Similarly, the holder of a remainder following a life estate, or the holder of a possibility of reverter or right of entry following a fee simple determinable, has the right to exclude others from interfering with the vesting of the remainder, reverter, or right of entry, as the case may be.

Thus, if we attend carefully to the nature of the common law property estate, we find that the right to exclude seems always to accompany the right to property when and if the right becomes possessory. Indeed, the scope of the right to exclude defines the perimeter of the right. The same cannot be said of the other incidents. Indeed, some future interests may never entail any rights of use (because they never become possessory), and some historically have not been alienable.

Present but nonpossessory property interests in material resources are amenable to a similar analysis. Examples include easements, real covenants, water rights, profits, and so forth. Here too, we find that although the holder of the interest does not have a general right to exclude others from defined metes and bounds, such a person is given a full panoply of legal rights to protect the limited interest that they have from interference by others.

For example, if the holder of an easement of way is blocked by the owner of the servient estate (or others) from using the easement, the easement holder may obtain an injunction against such interference. The easement holder thus is given a gatekeeper power with respect to the exercise of his or her limited interest—essentially a right of access. Other incidents of property, such as the rights to consume, transfigure, or transfer (at least to transfer in gross, i.e., separately from the dominant estate) are often lacking with respect to easements. In a similar fashion, the holder of riparian water rights has the right to enjoin others from diverting water from the basin or from consuming more water than permitted, i.e., to enjoin others from interfering with the natural flow in a natural flow state or from violating norms of

52. In contrast, the landlord does have some control over the tenant's use of the property, insofar as the landlord can bring an action for waste if the tenant engages in uses that jeopardize the landlord's reversionary interest.

reasonable use in a reasonable use jurisdiction. The right to prohibit interferences by others constitutes a gatekeeper right that in turn defines the perimeter of the riparian right. Other incidents of property, such as the right to consume, transfigure, or transfer (apart from transfer of the riparian land), are often lacking in riparian water rights systems.

The law with respect to intangible rights in intellectual property is, if anything, even more striking in the degree to which the property right and the right to exclude go hand-in-hand. Copyrights, patents, trademarks, and trade secrets are all recognized as intangible forms of property. In each case, the core of the property right is the right to exclude others from interfering with or using the right in specified ways:

> [I]n the case of all intellectual property some ideational abstraction or other is made the reference point for trespassory rules which ban some kind of uses of the abstract entity to all except a privileged proprietor. As with other property, the outer perimeter of ownership interests in intellectual property is fixed by the relevant trespassory rules.[53]

Focusing on the right to exclude also explains how it is that we recognize not only private property in scarce resources but also public property and, in some contexts, common or communal property. Public property is simply property in which the right to exclude is exercised by a designated governmental entity. Take a national park such as Yellowstone. The National Park Service, a division of the Department of the Interior, administers Yellowstone. It determines who may enter and on what terms (there is a modest admission fee). It also has the right to condition entry on certain conduct ("Do Not Feed the Bears"). In the event of a major fire or other disaster, it may close the park down altogether. Thus, it is easy to see that the National Park Service exercises what is in effect a gatekeeper right with respect to the park. Significantly, however, most of the other incidents associated with private property in land are either severely restricted or missing. The Park Service is extremely restricted in the uses to which it may put the land (no clearing the land for crops); it is severely limited in how it transfigures the land (no condos at Old Faithful); it cannot transfer the land; it cannot borrow against the land, etc.

The single strong point of linkage between public property and private property is the fact that in both cases some designated person or entity exercises a gatekeeper right with respect to the property. This point of linkage justifies us in calling something like a national park

53. HARRIS, *supra* note 10, at 45. The Supreme Court has recognized this point with respect to trade secrets. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 (1984)("With respect to a trade secret, the right to exclude others is central to the very definition of the property interest. Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data.").

public property. All other incidents of private property under conditions of full ownership are either severely restricted or are missing altogether.

Common property or communal property is trickier, because it is often confused with unowned resources. Unowned resources are things like the upper atmosphere and the aquatic life found in the deep seas. They are unclaimed and uncontrolled by any community and hence are open to appropriation by any and all. Common property or communal property, in contrast, is best viewed as resources which are open to appropriation by any qualified member of a designated community. Joint tenancies and tenancies in common can be seen as a form of small-scale common property. Larger-scale examples would include fishing rights open to any member of a given community or common pasture rights open to all farming families in a village.

The distinguishing characteristic of common property is that there is no right to exclude as among the members of the community, but the community or some designated entity within it exercises a right to exclude persons outside the community from gaining access to the resource. Thus, the cotenants in a tenancy in common or joint tenancy cannot exclude each other from full use and enjoyment of the property, but as to the rest of the world they manage the resource as private property. In larger-scale forms of common property, the exclusion of outsiders may be exercised through a formal governance structure, or it may be manifested only through more informal social norms.[54]

From an economic perspective, large-scale common or community property will often be subject to a dynamic (called the "tragedy of the commons"[55]) that is indistinguishable from unowned resources. But the critical point for present purposes is that there is a justification for referring to such common or communal property as property which does not exist in the case of unowned resources. Common or community property is not truly unowned, because there is a designated entity—the community—that exercises the right to exclude outsiders with respect to these resources. The existence of this right to exclude is the one significant linkage between private property and common or community property. The other incidences, as in the case of public property, may exist only in a highly attenuated form or not at all.

Another potential challenge to the primacy of the right to exclude comes from some of the most quintessential interests of the modern capitalist state—bank accounts, bonds, commercial paper, common stock, and the like. These interests, which legally are sometimes

54. *See generally* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990)(discussing various examples of self-organizing and self-governing common property regimes).

55. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

called choses in action, are obviously regarded as property. Indeed, from the perspective of the dominant nominalist theory, these interests seem to have "enough" of the attributes of property to qualify for consideration as property: they are transferable during life and on death, they can be pledged as collateral, they are protected against state expropriation, and so forth.

In one sense, it is difficult to say that bank accounts, bonds, etc. represent resources as to which the owner has the right to exclude others. These interests are not really rights in specific resources at all. Rather, they are abstract claims that can be converted ("cashed") into specific resources. At one time, such interests were always embodied in some kind of chattel such as a piece of minted metal or a certificate, in which case one could point to a physical thing with respect to which the interest holder could exercise a right to exclude others. But today, often as not these interests exist only on the hard drive of some computer, and the person deemed to be the holder of these interests has no direct access to that computer. Thus, it may seem that the holder of these interests does not exercise any kind of gatekeeper function with respect to these interests.

But the paradox here is apparent only. The holders of bank accounts, bonds, and stocks may not be able to exercise any managerial control over these resources, but that does not matter, because there is nothing here to manage. These interests have no intrinsic value as resources. The only value reflected in these interests is their exchange value—the fact that they can be converted into resources which do have intrinsic value.[56] And their exchange value is fully protected by the law against interference by others. These interests are protected by criminal rules against theft and by civil actions for misappropriation, fraud, etc. These legal rules function in a manner directly parallel to the laws against trespass that protect land and the actions for theft and replevin that protect chattels. In effect, therefore, the law of theft (together with its cognate civil actions) gives the holders of interests in choses in action the right to exclude others from interfering with the exchange value of these interests, and that is all one needs to give them the status of property.

A more problematic set of interests are the so-called "new property" rights recognized in due process cases like *Goldberg v. Kelly*.[57] The Supreme Court has ruled in these cases that a number of interests traditionally regarded as government privileges are in fact "property" for purposes of the procedural guarantees of due process. Among the interests deemed to be constitutionally-protected property for

56. *See* HARRIS, *supra* note 10, at 50-51 (discussing choses in action as "cashable rights").

57. 397 U.S. 254 (1970).

these purposes are welfare benefits, social security disability benefits, government employment, and professional licenses.

Like choses in action, the interests protected as new property are abstract claims on resources. In other respects, however, they have almost none of the incidents traditionally associated with property rights. Unlike choses in action, they are not transferable. Moreover, the holder of such an interest has no right to transfigure it or to pledge it as collateral. Indeed, the Court has held that the entitlements protected as new property may be abolished outright by the government, and that this gives rise to no claim for compensation.[58] In terms of traditional estates, the closest analogy to new property would seem to be a beneficial interest in a revocable spendthrift trust.

Nevertheless, with a little tweaking it may be possible to reconcile the idea of new property with the fundamental notion that property rests on the right to exclude others. Although *Goldberg* was quite vague about what it is about welfare benefits that allows them to be characterized as property, subsequent cases have ruled that "[t]he hallmark of property [for procedural due process purposes] is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'"[59] Although at first blush this seems like an odd definition of property, it can be read as reflecting a version of the core insight that property means the right to exclude others from something of value. Here, the relevant "other" is the government (the donor). The Court is perhaps saying that if an individual has an entitlement to government benefits which may not be taken away by the government without a finding of cause, then, as long the entitlement program continues to exist, the individual has the right to block ("exclude") the government from taking the entitlement unless and until this condition precedent (the finding of cause) has been satisfied.

Of course, this is a bit of stretch, and it may be more honest simply to admit that the new property cases are outliers. *Goldberg* and its progeny are clearly decisions designed to expand the scope of due process protection for instrumental ends. Perhaps in this context we should just admit that the concept of property has been fudged, and not try too strenuously to assimilate the resulting anomaly to the larger pattern discernible in the jurisprudence. That pattern, as should be evident, is an impressive one, and provides substantial inductive support for the proposition that the right to exclude is the *sine qua non* of property.

58. *See* Bowen v. Gilliard, 483 U.S. 587 (1987); Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41 (1986).

59. Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982); *see also* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978).

IV. SOME QUALIFICATIONS AND IMPLICATIONS

In closing, let me note a few qualifications of the thesis propounded in this Essay, together with some implications.

First, in arguing that the right to exclude others is essential to the institution of property, I am not suggesting anything about how extensive or unqualified this right must or should be. It is often observed, on behalf of the majority of property law scholars who are resolute nominalists, that the right to exclude is "not absolute."[60] Blackstone's stirring talk of the "sole and despotic dominion" of the property owner is ridiculed as a caricature of reality.[61] And indeed, there is no question but that Blackstone's statement is hyperbolic. But the thesis here is not that property requires a certain quantum of exclusion rights. It is simply that to the extent one has the right to exclude, then one has property; conversely, to the extent one does not have exclusion rights, one does not have property.

This qualification has some important implications for our understanding of the institution of property. It suggests that although property has a certain essential characteristic, the institution of property itself is not an either-or proposition. The world does not consist of islands property, in the sense of large bundles of "full ownership" rights, surrounded by a sea of unclaimed resources. Rather, it is a complex tapestry of property rights of different sorts (private, public, common) with different types and degrees of exclusion rights being exercised by different sorts of entities in different contexts. Once we assimilate this perspective, even the fee simple absolute in land can be seen as a qualified complex of exclusion rights, in which owners exercise relatively full exclusion rights with respect to certain kinds of intrusion (e.g., by strangers) but highly qualified or even nonexistent exclusion rights with respect to other kinds of intrusions (e.g., low-level nuisances).[62] This perspective does not mean that property as an institution has "disintegrated;"[63] it simply means it has been brought into sharper focus.

---

60. *See, e.g.*, C.B. Macpherson, *Liberal-Democracy and Property, in* PROPERTY: MAINSTREAM AND CRITICAL POSITIONS, *supra* note 7, at 199, 201; Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 622 (1988).

61. *See, e.g.*, MARY ANN GLENDON, RIGHTS TALK: IMPOVERISHMENT OF POLITICAL DISCOURSE 23 (1991); Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 280-83 (1998). Carol Rose has recently analyzed Blackstone's "exclusivity axiom" as "a rhetorical figure describing an extreme or ideal type rather than reality." Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 604 (1998). For a persuasive argument that Blackstone's himself did not view property as an absolute right, see Robert P. Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 U. CIN. L. REV. 67 (1985).

62. *See* Merrill, *supra* note 51, at 618.

63. *Cf.* Grey, *supra* note 27, at 74 (arguing that "[t]he concept of property and the institution of property have disintegrated").

Second, the understanding that the right to exclude others is essential to the institution of property, in and of itself, has very few implications for questions of distributive justice. For one thing, property, as I have defined it, is not coterminous with private property; it includes also public and common property. It may be true that the greater the fraction of private property to total property in any society, the more unequal the distribution of wealth will tend to be (although the total wealth, the size of the pie, will also likely be larger). But nothing I have said requires any particular ratio of private to total property. For another thing, the institution of property, as I have defined it, is not coterminous with wealth. Wealth includes many things, such as *in personam* contract rights and public goods, which may not fall within the definition of property, because these things do not confer on anyone the right to exclude others from particular resources. Any analysis of distributive justice should take as its subject wealth, not property.

The fact that property is not coterminous with contract or with wealth also has important implications for certain public law controversies. Five Justices of the Supreme Court recently concluded that the Takings Clause of the Fifth Amendment applies only to rights in specific assets—roughly speaking, what I have defined as property—and not to government action that imposes a general liability on someone, thereby reducing their wealth.[64] If the Court follows through on this understanding, it could result in a more compact domain for the Takings Clause than many academics, preoccupied with questions of distributive justice, have hoped (or feared).[65] On the other hand, the Court has sometimes assumed rather facilely that contract rights and property rights are subject to equivalent protection under either the Contract Clause or the Due Process Clause.[66] A more precise understanding of property may call this into question too.

V. CONCLUSION

I have argued in this essay that property means the right to exclude others from valued resources, no more and no less. This is not a novel idea. It can be found in Blackstone and Bentham, was reasserted by Felix Cohen, and has recently been discovered again by a

64. *See* Eastern Enters. v. Apfel, 118 S. Ct. 2131 (1998). The five include Justice Kennedy, who concurred in the judgment and dissented in part, *see id.* at 2154-58; and four Justices in dissent, speaking through Justice Breyer. *See id.* at 2161-64.

65. *See* Thomas W. Merrill, *Compensation and the Interconnectedness of Property*, 25 ECOLOGY L.Q. 327, 346-49 (1998).

66. *See, e.g.*, United States v. Winstar Corp., 518 U.S. 839, 873-88 (1996)(discussing interchangeably, in context of breach of contract action, precedents under Contract Clause and Due Process Clause).

new generation of philosopher-lawyers operating in the English tradition.[67] But this truth was obscured by the Legal Realists, with their metaphor of the bundle of rights.

The objective of the Realists, no doubt, was to deconstruct and dethrone property in order to facilitate the substitution of public for private property. The Realist project of denigrating private property has ebbed considerably in recent years. But the befogging metaphor of the bundle of rights lives on in American law schools. It is time to return to a clearer understanding of property, if only to facilitate moving on to a new set of issues regarding this ancient and ubiquitous institution.

67. *See supra* note 10.