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RESCUING THE BUNDLE-OF-RIGHTS METAPHOR IN PROPERTY LAW

Jane B. Baron*

For much of the twentieth century, legal academics conceptualized property as a bundle of rights. But property theory today is deeply divided between theorists who focus on property's ends, i.e., its reflection of values such as democracy or human flourishing, and those who focus on property's means, i.e., its use of qualities such as modularity and exclusion to manage complexity in a cost-effective way. The bundle-of-rights conceptualization has been swept up into the controversy, becoming the particular target of means-focused theorists, who argue that the bundle conceptualization obscures critical features of the property system, most notably its use of strategies of exclusion, in rem rights, and indirectness. These theorists assert that, twentieth century wisdom notwithstanding, property is not a bundle of rights but rather is a law of things.

Contrary to these theorists, this Article argues that the bundle-of-rights conceptualization remains useful both descriptively and normatively. First, the bundle-of-rights conceptualization produces more precise specification of the legal relations of parties in both simple and complex property arrangements. Second, it clarifies the normative choices that underlie decisions about property. Third, it focuses attention on the quality of the relationships that property constructs. Finally, bundle-of-rights analysis generally forces information forward. Because the information produced by the granular analysis of property bundles is useful, the bundle-of-rights metaphor should not be displaced or abandoned. Indeed, the complexity of contemporary property issues—and in particular their growing connection to the alternative legal fields of privacy and intellectual property—makes the bundle-of-rights conceptualization all the more fruitful.

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I. INTRODUCTION

For much of the twentieth century, legal academics conceptualized property as a bundle of rights.¹ The bundle-of-rights metaphor captures well the way in which ownership interests can be divided over time, as in the case of present and future interests, and among different people, as in the case of concurrent interests (e.g., joint tenancies) and common interest communities (e.g., condominiums). The bundle-of-rights view also counterbalances an older absolutist picture derived from Blackstone's description of property as "despotic dominion" exercised by "one man" over "external things."² The Blackstonian view posits nearly limitless rights consolidated in a single owner, who can exclude all others. In contrast, the bundle-of-rights metaphor emphasizes that property is not "sole dominion," but involves, in many cases, only relatively better rights. The bundle metaphor also highlights that property involves not just "one man" and his "external things," but multiple parties tied together in relationships that are social as well as legal.³ Seen as a bundle of rights, property is not monolithic but is composed of pieces (sometimes called "sticks") that are combined

1. See, e.g., GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY* 319 (1997) ("No expression better captures the modern legal understanding of ownership than the metaphor of property as a 'bundle of rights.'"); J. E. Penner, *The "Bundle of Rights" Picture of Property*, 43 *UCLA L. REV.* 711, 712 (1966) ("The currently prevailing understanding of property in what might be called mainstream Anglo-American legal philosophy is that property is best understood as a 'bundle of rights.'").

2. The full quote describes property as "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." 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *2. Scholars have questioned whether Blackstone himself held the absolutist views attributed to him. Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 *YALE L.J.* 601 (1998); David B. Schorr, *How Blackstone Became a Blackstonian*, 10 *THEORETICAL INQUIRIES L.* 103 (2009).

3. See, e.g., ALEXANDER, *supra* note 1, at 319 ("the metaphor of property as a 'bundle of rights' . . . was intended to signify three insights. First, it indicates that ownership is a complex legal relationship. Second, the metaphor illuminates the fact that the constitutive elements of that relationship are legal rights. Third, and most important, it underscores the social character of that relationship.").

together but can be disentangled. Property is not about the connection between people and things, but about the connections between and among people.

Today, however, property theory is deeply divided, and the bundle-of-rights conceptualization has been swept up into the controversy.⁴ One influential strand of contemporary theory focuses on the mechanics of *how* property operates, its use of qualities such as “modularity,”⁵ or “boundaries,”⁶ or “residual managerial authority”⁷ to solve problems of social organization and information economy. These means-focused theories square off against theories that focus more on the *outcomes* or *ends* the property system produces, asking whether these outcomes reflect values such as democracy,⁸ freedom,⁹ or human flourishing.¹⁰

While ends theorists have sometimes questioned the bundle-of-rights metaphor,¹¹ it has become a particular target for means theorists, who argue that the bundle conceptualization obscures critical features of the property system, such as its use of strategies of exclusion, in rem rights, and indirectness.¹² Means theorists have argued that the bundle-of-

4. Lee Ann Fennell, *The Problem of Resource Access*, 126 HARV. L. REV. 1471, 1477 (2013) (“Property theory today is alive with debate on core questions of entitlement design: whether property rules or liability rules should dominate, whether an exclusion—or thing—based vision of property should trump the bundle of rights metaphor, whether fixed menus of tenure forms aid or impede efficiency, and so on.”).

5. See, e.g., Henry E. Smith, *Institutions and Indirectness in Intellectual Property*, 157 U. PA. L. REV. 2083 (2009) [hereinafter Smith, *Institutions*]; Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PA. L. REV. 2097, 2098 (2012).

6. Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1703 (2012) [hereinafter Smith, *Things*].

7. Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061 (2012). Merrill pairs residual managerial authority with “residual accessionary rights.” *Id.* at 2067.

8. Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009 (2009).

9. Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237 (2005).

10. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009).

11. See, e.g., JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 207 (2000) (arguing that the bundle-of-rights approach does not displace the “ownership model” in which owners are understood to have nearly unlimited powers and state regulation is seen as antithetical to freedom); Alexander, *supra* note 10, at 801 (suggesting that, at least in the context of takings, the metaphor ought to be abandoned).

12. These features are explored *infra* text accompanying notes 61–66, 76–81, 131–139, 213–219. Not all scholars who oppose the bundle of rights conceptualization of property do so entirely or even primarily on means grounds. For example, one of the most influential critics of the bundle-of-rights picture, J.E. Penner, presents “conceptual” objections to the bundle metaphor. See Penner, *supra* note 1, at 767–99. Other critics of the bundle of rights model argue that bundle analysis does not lead to results all that different from alternative conceptions. See, e.g., Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239, 243 (1994); Adam Mossoff, *The False Promise of the Right to Exclude*, 8(3) ECON JOURNAL WATCH 255, 256 (2011).

rights conception metaphor fails to be a theory of property,¹³ fails to answer difficult property questions,¹⁴ and fails to apprehend that “property is a holistic system made up of interactive components, not a system in which anything can in principle relate to anything else.”¹⁵ They assert that, twentieth century wisdom notwithstanding, property “is not a bundle of rights”¹⁶ but rather a “law of things.”¹⁷

Contrary to the means theorists’ critique, this Article argues that the bundle-of-rights conceptualization remains useful both descriptively and normatively. Bundle-of-rights analysis helps to specify the legal relations of parties in both simple and complex property arrangements, to identify explicitly the normative choices implicit in those arrangements, to assess the quality of the human relationships that property entails, and to force the production of information pertinent to those issues. Because the information produced by the granular analysis of property bundles is useful, the bundle-of-rights metaphor should not be displaced or abandoned. Indeed, the complexity of contemporary property issues—in particular, their growing connection to the alternative legal fields of “privacy” and “intellectual property”—makes the bundle conceptualization all the more fruitful.

As Part II explains, critiques of the bundle-of-rights conceptualization begin with an intellectual history of how the metaphor came to dominance. From this historical narrative, means-focused property theorists have distilled three stories of dystopian dysfunction. The first is a tale of ad hocery, in which the bundles are assembled and disassembled without regard to social costs or potential anticommons

But while not all antibundle scholars focus as intently on means as Henry Smith, who is probably the most passionate contemporary detractor of the bundle metaphor, many of these other scholars share to some significant degree Smith’s commitments to the primacy of exclusion, things, and *in rem* rights in property. Many also share Smith’s view that property is not primarily about ends. See, e.g., Larissa Katz, *The Regulative Function of Property Rights*, 8(3) ECON JOURNAL WATCH 236, 240–41 (2011) (distinguishing between, on the one hand, “bundle-of-rights approaches,” which focus on “the substantive outcomes that owners should produce,” and, on the other hand, a view of private property “as a strategy for managing resources” that provides “an alternative to collective deliberation about how a thing ought to be used”).

Those whom I characterize as ends theorists are not entirely indifferent to means questions, and as I explain, *infra* notes 59–69 and accompanying text, those whom I characterize as means theorists are not entirely indifferent to ends. Thus, the distinction between ends and means theorists should not be overdrawn. I use “ends theorists” and “means theorists” as terminological shorthands, not to flatten divergences among theorists’ views, nor to perpetuate a caricatured distinction.

13. Smith, *Things*, *supra* note 6, at 1700.

14. Thomas W. Merrill, *The Property Prism*, 8(3) ECON JOURNAL WATCH 247 (2011) [hereinafter Merrill, *Prism*] (“the bundle metaphor . . . has been more successful in framing questions than in answering them”).

15. Smith, *Things*, *supra* note 6, at 1700.

16. Yun-chien Chang & Henry E. Smith, *An Economic Analysis of Civil Versus Common Law Property*, 88 NOTRE DAME L. REV. 1 (2012).

17. Smith, *Things*, *supra* note 6, at 1691.

problems. The second is a story of elitism, in which academics disdainfully mock lay understandings of property. The third is a story of politicization, in which Legal Realists and their descendants seek to hijack property for purposes of an overtly regulatory agenda. The stories of ad hocery, elitism, and political extremism are caricatures that could be constructed quite differently. Contrary to the stories' claims, we have nothing to fear from the bundle-of-rights conceptualization.

Part III makes the affirmative case for the bundle-of-rights view of property. First, the bundle-of-rights conceptualization produces more precise specification of the legal relations of parties, especially in the case of intangible property. Second, it clarifies the normative choices that underlie decisions about property. Third, it focuses attention on the quality of the relationships property constructs. Finally, bundle-of-rights analysis generally forces information forward. While the bundle-of-rights view cannot and will not determine what kind of property system we should have, it can force us to be more transparent about the choices we make in our decisions about property. If, as means-focused theories suggest, property's architecture produces normatively good results in the ordinary run of cases, then the granular analysis produced by the bundle-of-rights conceptualization will confirm that fact. If property's architecture is not producing such results, we are better off knowing.

Part IV seeks to illustrate the bundle-of-rights metaphor's potential through brief case studies of two contemporary information-based assets: electronic health records and commercial databases. The property disputes of our future will involve just these sorts of assets, which lie in a kind of netherworld between property, privacy, and intellectual property. Property rights in these assets—if indeed we decide to classify these assets as property at all—will look more like bundled rights than the modular packages that are paradigmatic of the law of things. And constructing the bundle will require hard choices about who should be able to extract “value” from assets that require contributions from multiple participants. The bundle-of-rights view of property will force us to make these choices explicitly and transparently.

II. A HISTORY AND THREE STORIES

Subpart A of this section describes, in broad strokes, a compressed intellectual history of the development of the bundle-of-rights metaphor and of the metaphor's influence over time. While different versions of this account vary in their particulars, there is remarkable agreement on the main points of this history across the spectrum of property scholarship. The larger narrative of the rise of the bundle-of-rights

conceptualization contains the seeds of three stories about the bundle metaphor, stories that are particularly salient—and particularly troubling—for means-focused property scholars. The first is that the bundle-of-rights metaphor permits the sticks of property rights to be combined ad hoc, in any old way, without regard to information costs or anticommons problems. The second is that the bundle-of-rights conceptualization is elitist and at odds with lay understandings of property. The third is that the bundle view provides the groundwork for increased state intervention in and regulation of property. Subparts B through D describe these stories, in each case suggesting alternative ways in which the stories might be told.

A. An Intellectual History of the Bundle-of-Rights Metaphor

Property scholars' histories of the bundle-of-rights metaphor all begin with Wesley Newcomb Hohfeld.¹⁸ Despite acknowledging that he did not originate the metaphor¹⁹ or even use the term “bundle of rights,”²⁰ property scholars assert that his unpacking of legal rights into component jural correlatives and opposites provided both the “intellectual justification”²¹ and the “analytic vocabulary”²² for the bundle-of-rights conception.²³ Hohfeld's conceptual analysis of rights in terms of jural relations led to the development of the notions that property consists not of things, but of legal relationships. It similarly led to the rise of the view that those relationships are not relationships between persons and things, but instead relationships among persons.²⁴ These notions present a non-Blackstonian picture in which property is

18. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) [hereinafter *Fundamental Legal Conceptions I*]; Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter *Fundamental Legal Conceptions II*].

19. ALEXANDER, *supra* note 1, at 319–20 (Hohfeld did not introduce the bundle of rights concept into American legal discourse).

20. Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1191 (1999) (Hohfeld “never mentions a ‘bundle of rights’”).

21. Thomas W. Merrill and Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 365 (2001).

22. STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 18 (1990).

23. Adam Mossoff, *The Use and Abuse of IP at the Birth of the Administrative State*, 157 U. PA. L. REV. 2001, 2007, 2010 (2009) (describing Hohfeld as the “progenitor” of the bundle metaphor); Hanoch Dagan, *The Craft of Property*, 91 CALIF. L. REV. 1517, 1532 (2003) (describing Hohfeld as “closely associated” with the bundle of rights concept).

24. Heller, *supra* note 20, at 1191–92; Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Conception of Property*, 29 BUFF. L. REV. 325, 360 (1980); ALEXANDER, *supra* note 1, at 321; Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 327 (2002).

no longer centered on things²⁵ and is no longer seen to involve absolute dominion.²⁶

The next step in the history of the rise of the bundle conceptualization involves the Legal Realists. Some scholars assert that the Realists “popularized” Hohfeld’s concept of the social conception of ownership,²⁷ others assert that they “embraced” the bundle of rights metaphor,²⁸ and still others assert that they “co-opted”²⁹ or “appropriated”³⁰ Hohfeld’s conceptual work. Some theorists see the Realists’ warm reception of Hohfeld as a response to late-nineteenth and early-twentieth century changes in the kind of assets protected under the “property” rubric, as “de-physicalized” forms of wealth, such as business goodwill or intellectual property, challenged existing land-based property categories.³¹

Other scholars, in contrast, see the Realists’ embrace of Hohfeld as a strategic political move, in which the Realists “sought to undermine the notion that property is a natural right, and thereby smooth the way for activist state intervention in regulating and redistributing property.”³² The bundle-of-rights picture of property enables such a state because “if property has no fixed core of meaning, but is just a variable collection of interests established by social convention, then there is no good reason why the state should not freely expand or, better yet, contract the lists of interests in the name of the general welfare.”³³

This historical account largely elides jurisprudential disputes over what truly counts as legal realism³⁴ or who really counts as a Legal Realist³⁵—though most agree that Hohfeld was not one himself.³⁶ The account also largely elides exactly how the Realists managed to imbue

25. Penner, *supra* note 1, at 731 (Hohfeld’s refusal to see property as a right to a thing provides the basis for the bundle of rights picture, following which “property is free to float free from any anchorage to the concept of a ‘right to a thing.’”).

26. Vandeveld, *supra* note 24, at 360–61.

27. ALEXANDER, *supra* note 1, at 319.

28. Merrill, *Prism*, *supra* note 14, at 248.

29. Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617, 635 (2009).

30. *Id.* at 636.

31. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960*, at 145–65 (1992); Vandeveld, *supra* note 24, at 328–30; Arnold, *supra* note 24, at 288.

32. Merrill & Smith, *supra* note 21, at 365. *See also* Mossoff, *supra* note 23, at 2007 (the bundle of rights reconceptualization of property was helpful to Progressives “because it made it possible for the modern administrative state to control and restrict various property uses without implicating the constitutional protections of the Takings or Due Process Clauses”).

33. Merrill & Smith, *supra* note 21, at 365.

34. On this point, *see* Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731 (2009); Brian Leiter, *Legal Realisms, Old and New*, 47 VAL. U. L. REV. 949 (2013).

35. ALEXANDER, *supra* note 1, at 311–12; HORWITZ, *supra* note 31, at 169–70.

36. Claeys, *supra* note 29, at 635.

Hohfeld's insights with the force they came to have.³⁷ Certain Realist figures and articles do make repeated cameo appearances. Morris Cohen's *Property and Sovereignty*³⁸ is high on the list because—emphasizing the social nature of property rights—he claimed that “a property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things,”³⁹ and that, because owners' privileges, powers, and immunities correlate with nonowners' duties, disabilities, and liabilities, “dominion over things is also *imperium* over our fellow man.”⁴⁰ Robert Hale's writings—emphasizing owners' powers to free nonowners from the duties, disabilities, and liabilities to which their nonownership subjects them by offering them disagreeable wage labor—also get occasional mention.⁴¹ The definition of property in Restatement (First) of Property as “legal relations between persons with respect to a thing”⁴² is sometimes offered as conclusive evidence of the influence of the Realists' interpretation of Hohfeld.⁴³

Three figures come next in property scholars' intellectual history of the development of the bundle of rights. The first is A.M. Honoré, whose influential essay, *Ownership*, further disaggregated property into eleven “incidents.”⁴⁴ These incidents could then (and now) be

37. Merrill and Smith attribute the influence of the Realist conception to Coase, who popularized a “hyper-realist conception of property” that encouraged economists to adopt the view that “property consists of nothing more than the authoritative list of permitted uses of a resource—posted, as it were, by the state for each object of scarcity.” Merrill & Smith, *supra* note 21, at 366. See also *infra* text accompanying note 51 (further discussing Coase). Alexander traces the popularization of Hohfeld's ideas among Legal Realists to Arthur Corbin and Walter Wheeler Cook. See ALEXANDER, *supra* note 1, at 319–21.

38. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927). Cohen is also sometimes cited for having treated property as an example of transcendental nonsense in his *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

39. Cohen, *Property and Sovereignty*, *supra* note 38, at 12. As developed *infra* note 194, Cohen also emphasized the importance of owners' powers to exclude. Adam Mossoff argues that this aspect of Realist writing has been largely unappreciated. Mossoff, *supra* note 23, at 2011–12.

40. Cohen, *Property and Sovereignty*, *supra* note 38, at 13.

41. Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923), discussed in ALEXANDER, *supra* note 1, at 335. On Hale's thoughts more generally, see BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998).

42. RESTATEMENT (FIRST) OF PROPERTY ch. 1, Introductory cmt. (1936), cited in Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 395 n.93 (2003).

43. See Henry E. Smith, *Property Is Not Just a Bundle of Rights*, 8(3) ECON. J. WATCH 279, 280 (2011). See also Vandeveld, *supra* note 24, at 361–62 (citing Restatement's use of the Hohfeldian vocabulary). To the same effect, bundle critics often cite a 1936 definition of property as just “a euphonious collocation of letters which serves as a general term for a miscellany of equities that persons hold in the commonwealth.” Walter H. Hamilton & Irene Till, *Property*, in 12 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 528, 528 (1937), cited in Merrill & Smith, *supra* note 21, at n.36.

44. A.M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE, FIRST SERIES 107–47 (A.G. Guest ed., 1961).

conceptualized as components—or “sticks”—in the property bundle.⁴⁵ Whether any of Honoré’s enumerated incidents was essential, was, and continues to be, debated—a debate that, in the eyes of some, only reinforces the idea that property is a bundle and that its composition is contingent. The other major figure emerging at almost the same time is Felix Cohen, whose *Dialogue on Private Property*⁴⁶ further entrenched the bundle-of-rights picture. While Cohen attacked the extreme Realist position that property was a mere “euphonious collection of letters,”⁴⁷ he nonetheless described as a “confusion” the idea of property “as a dyadic . . . relation between a person and a thing,”⁴⁸ emphasizing that in many cases “there may be no thing in a property relationship” and that “property essentially involves relations between people.”⁴⁹ Cohen further emphasized the role of government in “private” property. In his famous summary of property as a missive to the world to “Keep off X unless you have my permission, which I may grant or withhold,” it was essential not just that the communication be signed by “Private Citizen” but that it be endorsed by “The State.”⁵⁰ The final figure to reinforce the bundle-of-rights metaphor in almost hyper-realist terms is Ronald Coase, who (however improbably)⁵¹ inspired a generation of law and economics scholars to conceptualize property as just a “cluster of in personam rights,”⁵² nothing more than “the authoritative list of permitted use of a resource—posted, as it were, by the state for each object of scarcity.”⁵³

The scholarly history of the bundle-of-rights metaphor tends to end with Thomas Grey’s essay, *The Disintegration of Property*.⁵⁴ Writing in 1980, Grey canvassed the variety of ways in which the term “property” had come to be employed and found that “discourse about property has

45. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 663 (1998) (“Honoré’s list is now commonly accepted by property theorists as a starting point for describing the core bundle of private property rights . . . , although some theorists challenge the inclusion of one incident or another.”).

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

47. *Id.* at 359, 378.

48. *Id.* at 378.

49. *Id.*

50. *Id.* at 374.

51. Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 J.L. & ECON. S77, 83 (2011) (“Coase had little sympathy with the Legal Realist agenda of enhancing collective control or redistribution of property.”).

52. Merrill & Smith, *supra* note 21, at 360. See also Merrill & Smith, *supra* note 51, at 80 (“Coase presupposed a particular picture of property—that of property as a bundle of rights, or more precisely, as a collection of use rights authoritatively prescribed for each resource by the state.”).

53. Merrill & Smith, *supra* note 21, at 366.

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

fragmented into a set of discontinuous usages” that “depart drastically from one another and from common speech.”⁵⁵ Property, Grey wrote, “is no longer a coherent or crucial category in our conceptual scheme. The concept of property and the institution of property have disintegrated.”⁵⁶ Grey left no doubt of the cause of this phenomenon: “The substitution of a bundle-of-rights for a thing-ownership conception of property has the ultimate consequence that property ceases to be an important category in legal and political thought.”⁵⁷ Putting the point another way, property as a legal category died no natural death, but was effectively murdered by the bundle-of-rights conceptualization.⁵⁸

To summarize: property scholars’ history of the rise in influence of the bundle-of-rights metaphor begins with Hohfeld’s conceptualization of “jural relations” as connections between persons and other persons rather than between persons and things. It then moves to the Legal Realists, who fitted this new conceptualization to emerging forms of intangible property, to the functioning of property as power (sometimes called “coercion”) in labor and other markets, and to their view of the state. In the mid-1950s, Honoré’s enumeration of property’s incidents enhanced the seeming suitability of the bundle-of-rights metaphor, providing a list of potential sticks for the bundle, while Felix Cohen, as his father before him, continued to attack the logic of connecting property with things. Coase gave these views further traction by predicating his analysis on a view of property rights as fundamentally in personam relationships. By the end of the twentieth century, the bundle-of-rights metaphor had robbed property of viability as an independent, meaningful legal category.

To understand why this broad narrative is important to scholars conceptualizing property in terms of things, it is useful to summarize their larger project to theorize property in terms of means rather than ends.⁵⁹ In the view of these theorists, property begins with a problem, complexity, and its rules are designed to “manage” that complexity in a cost-effective way.⁶⁰ The precise mechanisms by which that complexity

55. *Id.* at 72.

56. *Id.* at 74.

57. *Id.* at 81.

58. On Grey as the endpoint, see Mossoff, *supra* note 42, at 373; Mossoff, *supra* note 23, at 2010–11; Jonathan Remy Nash, *Packaging Property: The Effect of Paradigmatic Framing of Property Rights*, 83 TUL. L. REV. 691, 694–707 (2009); Arnold, *supra* note 24, at 291.

59. See Katz, *supra* note 12, at 237 (while property theory cannot tell us what our substantive priorities should be, “it can tell us quite a lot about how a system of property rights can function as a *strategy* for regulating our conduct with respect to the things of the world”) (emphasis added). On divisions within means theory itself, see *supra* note 12.

60. See, e.g., Smith, *Institutions*, *supra* note 5, at 2096 (“Property law manages much complexity through modularity.”); Smith, *Things*, *supra* note 6, at 1703 (property employs “limited interfaces to manage complexity”).

is managed—the employment of modularity,⁶¹ boundaries,⁶² and exclusion⁶³—are of substantial interest. This is so because the goal of these theories is to describe how property works at a structural, architectural level⁶⁴ and to highlight the specific features of property, such as the employment of in rem rights,⁶⁵ that make it different from other fields of law.⁶⁶ This approach is not indifferent to ends. The argument is, rather, that if the means are sensible, good ends will result.⁶⁷ The aim is to uncover and foster the “institutional design” that is most likely to have this effect.⁶⁸ In the eyes of these theorists, the larger narrative of the development of the bundle-of-rights view of property embeds three separate dangers, each of which gives rise to its own story critical of the bundle-of-rights conceptualization.⁶⁹

B. A Story of Ad Hocery

The story:

If property is not a thing, or a right to a thing, but rather a bundle of rights, immediately the question arises: what rights are in the bundle? The ad hocery story teaches that once the bundle-of-rights metaphor became entrenched, the bundle could consist of pretty much any agglomeration of the incidents enumerated by Honoré. This is a story of

61. See, e.g., Smith, *Things*, *supra* note 6, at 1725 (“Property law is a modular system.”); Smith, *Institutions*, *supra* note 5, at 2096 (“Property law manages much complexity through modularity.”).

62. See, e.g., Smith, *Things*, *supra* note 6, at 1703 (“Boundaries carve up the world into semiautonomous components” that permit the management of highly complex interactions among private parties.).

63. See, e.g., *id.* at 1704 (“The right to exclude is part of *how* property works.”); Smith, *Institutions*, *supra* note 5, at 2115 (“exclusion is a starting point; it employs rough proxies that serve as a first cut at protecting a wide and indefinite set of uses”). See also Lee Ann Fennell, *Lumpy Property*, 160 U. PA. L. REV. 1955 (2012) (describing property’s “lumpiness”).

64. Smith, *Things*, *supra* note 6, at 1692 (arguing for “an architectural approach to property”); Smith, *Institutions*, *supra* note 5, at 2101 (“the architecture of property law in terms of exclusion and governance implements a modular structure that helps to manage the complexity of actors’ interactions with respect to resources”). See also Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 976 (2009) [hereinafter Smith, *Gap*] (“ends-focused theories tend to overlook the richness of the *mechanism* by which ends are achieved”) (emphasis added).

65. On the importance of in rem rights, see Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 852 (2001); Chang & Smith, *supra* note 16, at 33–34.

66. See Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917, 933–53 (2010) (describing the importance of property’s exceptionalism to means-focused information theories).

67. Smith, *Gap*, *supra* note 64, at 970.

68. *Id.*

69. On the connection between narrative and stories, see Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141, 147–48 (1997).

“nominalism,”⁷⁰ in which property means nothing and becomes but “a ‘laundry list’ of substantive rights with limitless permutations,”⁷¹ an “arbitrary assemblage with no inner coherence.”⁷² As one leading critic puts it, “different combinations of the bundle in different circumstances may all count as ‘property,’ and no particular right or set of rights in the bundle is determinative.”⁷³ Property “could include all legal relations,”⁷⁴ and “the bundle picture puts no particular constraints on the contents of bundles,” which are “totally malleable.”⁷⁵

Those who think of property in terms of means find the ad hocery of bundled rights troubling. They argue that it occludes understanding of how property solves coordination problems. First, it dangerously obscures the “in rem feature of property.”⁷⁶ Viewed as a bundle, property is but “an elaborate catalogue of in personam rights” that can be configured by the state in any old way.⁷⁷ This conceptualization denies property’s uniqueness as a legal category.⁷⁸ Contracts, torts, and every area of law involve relations between and among persons; “if property [is] defined tautologically as a collection of legal relationships, then there [is] nothing to distinguish ‘property’ as a species within the genus of law.”⁷⁹ More importantly, ad hocery misconceives a distinctive mechanism by which property operates, in the eyes of means theorists, to solve coordination problems in the real world: the use, in most cases, of standardized rights that send easy-to-understand messages to dutyholders to keep off what they do not own.⁸⁰ “If

70. See Cohen, *supra* note 46, at 378; Merrill, *Prism*, *supra* note 14, at 248; Mossoff, *supra* note 42, at 372.

71. Dagan, *supra* note 23, at 1534.

72. Richard A. Epstein, *Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property*, 8(3) ECON. J. WATCH 223, 225 (2011).

73. Penner, *supra* note 1, at 723.

74. Vandeveld, *supra* note 24, at 362.

75. Smith, *Things*, *supra* note 6, at 1697.

76. Merrill & Smith, *supra* note 51, at 82 (“the bundle of rights picture had a side effect . . . in that it obscured the in rem character of property rights”). On the notion that property rights are ordinarily in rem exclusion rights, see, e.g., Henry E. Smith, *Self-Help and the Nature of Property*, 1 J.L. ECON. & POL’Y 69, 79 (2005) [hereinafter Smith, *Self-Help*] (“because of positive transaction costs . . . we think in terms of things and especially in terms of *in rem* rights to exclude others from them”); Merrill & Smith, *supra* note 21, at 360 (“property rights attach to persons insofar as they have a particular relationship to some thing and confer on those persons the right to exclude a large and indefinite class of persons (‘the world’) from the thing”).

77. Merrill & Smith, *supra* note 51, at 82.

78. See Baron, *supra* note 66.

79. Mossoff, *supra* note 23, at 2011. See also Arnold, *supra* note 24, at 291 (“Property rights, if no longer defined by the things owned . . . , are not different than human rights, civil rights, contract rights, or the like.”). Some ends-focused theorists have made the same point. See Singer, *supra* note 8, at 1032 (“Taken to its extreme, the bundle-of-rights idea could suggest that property has no meaning whatsoever as a legal category . . .”).

80. On the importance of standardization in property law, see Thomas W. Merrill & Henry E.

property rights can be adjusted along countless margins, often in the course of the rendering of specific judgments by courts, then it becomes natural to start to think of property as a kind of master list of rights and duties set forth by some authoritative state institution for each type of property—or indeed, for each particular parcel of property.”⁸¹ But, means theorists assert, this kind of adjustment or customization is *not* characteristic of property. Thus, in their eyes, the notion that rights can be bundled in limitless ways is dangerously misleading.

Means-focused theorists also argue that ad hocery deprives property of any principled basis on which to decide disputes. If all bundles are contingent collections of unrelated rights (or powers, privileges, and immunities, to use Hohfeld’s vocabulary), then what tells us how to evaluate any given bundle? Should we just add up the number of rights, powers, etc., without evaluating how these components connect to normative goals?⁸² Should we privilege one stick in the bundle as essential, and if so, how would we recognize that stick?⁸³ How can we tell whether any given restriction on land use, such as a total restraint on future alienation, is permissible?⁸⁴ The bundle-of-rights metaphor makes all of these questions salient, but cannot itself answer them.

A final reason that ad hocery is troubling to means-focused property scholars derives from the potential of the bundle-of-rights metaphor to make every interest its own property right, raising problems of over-fragmentation and over-propertyization. This concern, it should be noted, is shared by others across the spectrum of property scholarship.⁸⁵ The bundle-of-rights metaphor builds property out of component “sticks,” but each such stick can be conceptualized as its own independent property right.⁸⁶ For Fifth Amendment purposes, for example, any asset—such as the development rights over Grand Central Station at

Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000) [hereinafter Merrill & Smith, *Optimal Standardization*]. On the importance of *in rem* rights, see Merrill & Smith, *supra* note 65; Merrill & Smith, *supra* note 21, at 357–65. Not all property theorists share the view that property operates primarily *in rem*. See, e.g., Gregory S. Alexander, *Governance Property*, 160 U. PA. L. REV. 1853 (2012).

81. Merrill & Smith, *supra* note 51, at 82.

82. See Dagan, *supra* note 23, at 1534, 1563 (suggesting that the bundles must be evaluated through a normative lens, and criticizing the dissent in *U.S. v. Craft*, 535 U.S. 274 (2002), for failing to engage in a normative analysis).

83. Merrill, *Prism*, *supra* note 14.

84. Eric R. Claeys, *Bundle-of-Sticks Notions in Legal and Economic Scholarship*, 8(3) ECON. J. WATCH 205, 211 (2011).

85. It has been the particular focus of Michael Heller. See *infra* note 91. See also MICHAEL HELLER, *THE GRIDLOCK ECONOMY* (2008).

86. Penner, *supra* note 1, at 734 (describing how, under the “disaggregative” version of the bundle of rights, each use is “itself a property right if it can form the subject of a transaction”); Leif Wenar, *The Concept of Property and the Takings Clause*, 97 COLUM. L. REV. 1923, 1928 (1997) (inferring from the Hohfeldian view that “each property right is property”).

issue in *Penn Central*⁸⁷ or the right to mine subsurface minerals at issue in *Keystone*⁸⁸—could be regarded as a separate property interest, such that a regulation substantially reducing or eliminating the value of this isolated asset would constitute a taking, regardless of the larger value of the property to which it is connected.⁸⁹ The bundle-of-rights metaphor provides no way to determine the proper unit of analysis in takings cases.⁹⁰ Moreover, the disaggregation of property bundles into smaller-but-distinct property rights raises the spectre of multiple component rights owned by independent parties who cannot, or will not, agree to coordinate their interests. In such cases, the fragmentation of the rights in the bundle into independent property rights leads to anticommons tragedies of underuse.⁹¹ As in so many contexts, the bundle-of-rights metaphor raises the question of how to understand the connection of the component rights to the whole bundle, but it cannot answer that question.⁹²

Another telling:

The ad hocery story's "moral" about property's instability as a legal category, its futility in solving disputed issues, and its incoherence in defining actual property interests, depends almost entirely on the radical contingency of the bundling of particular rights, i.e., on the notion that the bundles are assembled willy-nilly and can be reassembled at will. But this vision of total contingency has been challenged from at least two directions.

On one side, Merrill and Smith's influential work on the *numerus clausus* undermines the ad hocery story's picture of almost complete contingency.⁹³ The *numerus clausus* principle posits that the universe of

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

88. *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470 (1987).

89. See, e.g., HORWITZ, *supra* note 31, at 160; Alexander, *supra* note 10, at 801; Wenar, *supra* note 86, at 1928 ("if each stick is property, then removing a stick from someone's bundle must be a taking regardless of what other sticks remain in the person's bundle (if any)"). This is the problem of "conceptual severance," a term coined in Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1674–79 (1998).

90. As the U.S. Supreme Court has stated the problem, "because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to determine the denominator of the fraction.'" *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 497 (1987).

91. *Heller*, *supra* note 45, at 670; *Heller*, *supra* note 20, at 1202–03.

92. This point is often made with other metaphors. See, e.g., Claeys, *supra* note 29, at 632 (pizza metaphor); Mossoff, *supra* note 42, at 374 (shopping bag metaphor); Penner, *supra* note 1, at 754 (cake metaphor).

93. See Merrill & Smith, *Optimal Standardization*, *supra* note 80.

property forms is closed and should remain so because of the high information costs that would be imposed if parties were free to create just any kind of property interest they might desire. If property rights were infinitely adjustable in the way the ad hocery story proposes, then nonowners—dutyholders who must avoid violating others’ property rights—would have to acquire and process more information whenever they encountered a property taking a new form; “if in rem [property] rights were freely customizable—in the way in personam contract rights are—then the information–cost burden would quickly become intolerable.”⁹⁴ As it turns out, in rem rights are *not* in fact customizable; the law limits owners’ ability to create new estates or ownership forms, i.e., “fancies.”⁹⁵ Thus, property forms are “standardized” in order “to reduce the widespread information-gathering and processing costs imposed on third parties.”⁹⁶ It is important to note that the *numerus clausus* is not primarily a prescription about how property should be, but is largely a description of how property is, “a fact about the way in which the system of property operates.”⁹⁷ In other words, the ad hocery story notwithstanding, property bundles have not, in actuality, changed a great deal over time.⁹⁸

The story of the bundle’s radical contingency has been challenged from a very different perspective by the ends theorist Joseph Singer, who has claimed that a commitment to democratic values restricts owners’ freedom to do anything they want with respect to their property. “In a free and democratic society,” Singer writes, “some relationships are out of bounds; this means that some contract terms are off the table.”⁹⁹ Singer understands the estates system not in terms of information costs, as Merrill and Smith do, but in terms of substantive values: “While the particular rules embodied in the estates system may be outmoded historical leftovers rather than embodiments of contemporary values, the idea of the estates system reflects a persisting norm that defines certain property arrangements as incompatible with our way of life.”¹⁰⁰ Thus, property law bars owners from creating

94. Merrill & Smith, *supra* note 21, at 387. See also Merrill & Smith, *supra* note 51, at 90 (“If every property right was described by a customizable list of permitted uses . . . and these rights had to be understood and respected by all the world, the resulting information costs would be staggering.”).

95. Merrill & Smith, *Optimal Standardization*, *supra* note 80, at 27–34.

96. Merrill & Smith, *supra* note 21, at 387. See also Merrill & Smith, *Optimal Standardization*, *supra* note 80, at 8 (on standardization of property as a means of reducing third party measurement costs that are true externalities to those creating unusual property rights).

97. Merrill & Smith, *Optimal Standardization*, *supra* note 80, at 24.

98. *Id.* at 23–24.

99. Singer, *supra* note 8, at 1048. See also *id.* at 1049 (“Property law is part of the way we define a legitimate social order. This means that certain property arrangements are defined as out of bounds.”).

100. *Id.* at 1049–50.

property rights that would enact “prohibited social and political relationships” such as feudalism or slavery.¹⁰¹ This is not only a normative claim about what property should do, but a descriptive claim about the way in which property operates in the present: “The estates system . . . outlaw[s] particular packages of legal rights with respect to property [in order to] shape social life in a manner consistent with the normative commitments of a democratic society composed of free and equal individuals who treat each other respectfully.”¹⁰²

Perhaps in theory the bundle of rights that constitute property could be changed in uncountable ways and at will. But the relevant point here is that means and ends scholars agree that owners’ freedom to combine or recombine sticks in the property bundle *is* indeed limited. Obviously, Merrill and Smith, on one side, and Singer, on the other, have very different understandings of the reasons why owners’ freedom to bundle property in an infinite number of ways must be limited. That does not change the fact that, under either account, the bundles are not infinitely malleable. The story of ad hocery is a story of possible, but not actual, danger.

C. A Story of Elitism

The story:

Although the bundle-of-rights metaphor teaches that property is actually about relationships rather than things, nonlawyers often do think of property as things. Thus, there is a gap between “ordinary” and “scientific” views of property¹⁰³ or, to use a slightly different vocabulary, between “popular” and “sophisticated” views.¹⁰⁴ Having two slightly different conceptions of property is not necessarily problematic,¹⁰⁵ but at some point the ordinary, popular conception of property came to be seen as “benighted”¹⁰⁶ and deluded. Only well-trained professionals, specialists, truly understood property.¹⁰⁷ The elitism story about the bundle-of-rights conceptualization of property is about the way in which the bundle-of-rights view is overtly dismissive

101. *Id.* at 1051.

102. *Id.* at 1051–52.

103. BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 27 (1977).

104. MUNZER, *supra* note 22, at 16.

105. *Id.* at 17 (arguing that the two conceptualizations can coexist “provided that the context makes clear which conception is meant”).

106. Penner, *supra* note 1, at 733.

107. Jonathan Remy Nash argues that this depiction is inaccurate on numerous grounds, but nonetheless describes it as the “metanarrative” of property paradigms and thus accepts that it operates as an important story of the development of differing views about property. Nash, *supra* note 58, at 694.

of the lay understanding of property-as-things.¹⁰⁸

Like the ad hocery story, the elitism story is troubling for a number of reasons. For those who take the position that property *is* about things,¹⁰⁹ uses of things,¹¹⁰ or setting the agenda for the use of things,¹¹¹ the elitism story is a tale of how a false vision of property's operation can undermine or obfuscate the truth.¹¹² Moreover, if property as things is indeed "the natural frame through which people view property,"¹¹³ then the gap between the "natural" and "learned" views of property will be a source of frustration on both sides. Those untrained in the law will not understand how academic lawyers talk about property, while academics grow ever more impatient with lay conceptualizations that they regard as naïve. In concrete contexts such as takings, this frustration is not trivial; it is unsettling when "influential academic legal approaches to the Takings Clause are far removed from any ordinary understanding of what is at issue in the Clause and the kinds of reasoning appropriately used in settling cases."¹¹⁴ As one scholar argues, "there should be . . . good reason to *begin* interpretation by construing key terms as people commonly do. For then citizens who are legal specialists, and citizens who are not, are more likely to have similar views of the fundamental laws under which they all, after all, must live."¹¹⁵ To the extent that the bundle-of-rights metaphor has crowded out lay views, it erodes the possibility of consensus on fundamentals.

Another telling:

108. The understanding of property-as-things is not identical to what has been called the "castle" view of ownership. See Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309 (2006). The latter emphasizes an owner's freedom to do exactly as he pleases with owned property, while the former emphasizes whether things are essential or even important to our definition of property.

109. See, e.g., Penner, *supra* note 1, at 805 ("The essential feature distinguishing property is that it consists of a right to a thing which is only contingently connected to any particular person.").

110. Claey's, *supra* note 84, at 208 (arguing that property is about the power to determine the uses of things).

111. Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275 (2008) (agenda setting over things).

112. See Penner, *supra* note 1, at 714 (arguing that the bundle of rights metaphor is a "slogan" that "rhetorically assuages the unease that results from our knowing there are real problems which, if plainly articulated, would demand serious consideration"). See also Merrill & Smith, *supra* note 21, at 388 (arguing that "as long as property is regarded as simply a cluster of in personam rights" critical features of property such as "legal standardization of property forms, or the numerus clausus" will be obscured).

113. Nash, *supra* note 58, at 726–27 (presenting data supporting this assertion, but arguing that "framing can affect one's view of property rights").

114. Wenar, *supra* note 86, at 1934.

115. *Id.* at 1946.

Scholarly work studying the effects of “framing” on perceptions of ownership suggests that views of property rights are not nearly as fixed as the elitism story suggests and, therefore, that it is by no means inevitable that the ordinary, lay conceptualization and the sophisticated, scientific conceptualization will diverge. This work argues that the lay, thing-centered, “discrete asset” paradigm and the “bundle” paradigm are both simply “frames through which one views and conceives of property rights.”¹¹⁶ But framing has an impact: “the precise way in which a problem or choice is presented—i.e., its frame—may affect the decisionmaker’s perception of the problem or choice, and ultimately the decisionmaker’s preference.”¹¹⁷ Thus, “it might be possible to reframe property rights and thus change people’s conception of what it means to own property.”¹¹⁸

Empirical studies show that framing matters, and that, for example, “subjects who received surveys that presented property rights under the bundle paradigm were more accepting of [legal] interference [with the exercise of their ownership “rights”] than those whose surveys presented the rights under a discrete asset paradigm.”¹¹⁹ Additional studies confirmed that “the use of the bundle paradigm to frame property rights attenuates ownership perceptions and reactions to subsequent rights restrictions.”¹²⁰ The studies appear to show that “framing alone—with no other substantive legal intervention—changes expectations regarding the strength of property rights and reactions to subsequent regulation.”¹²¹ Thus, what were seen as fixed “things” can come to be seen as more malleable “bundles.” So even if the elitism story is correct in its assertion that the discrete asset, thing-focused, paradigm is more “natural,”¹²² those without legal training can still be “educated” to the bundle paradigm.¹²³

More importantly, if “property rights are subject to a paradigmatic framing effect,”¹²⁴ then presumably the reverse is also true: allegedly-sophisticated actors who are well-trained in the bundle paradigm can come to see property through a discrete asset, thing-centered, frame.

116. Nash, *supra* note 58, at 708.

117. *Id.* at 709.

118. *Id.* at 710.

119. *Id.* at 721.

120. Jonathan Remy Nash & Stephanie M. Stern, *Property Frames*, 87 WASH. U. L. REV. 449, 470 (2010). These studies might appear to confirm the worst suspicions of those who see the bundle-of-rights metaphor as a means for the enhancement of state regulatory power, as is asserted by the political opportunism story, discussed *infra* text accompanying notes 126–130.

121. Nash & Stern, *supra* note 120, at 456.

122. Nash, *supra* note 58, at 723.

123. *Id.* at 723–24.

124. *Id.* at 723.

Indeed, the resurgence of thing-based theories of ownership at the highest academic reaches of property scholarship proves the point. At least some of the elites within the academy hold firmly to the lay, thing-based conception of property even though they were taught the bundle view in law school. Thus, the story of lay vs. sophisticated, ordinary vs. scientific, understandings of property could be told quite differently. Perhaps it is a story of oscillation—of shifting and reshifting perceptions. Or perhaps it is a story of the enduring power of both the “thing” and “bundle” views, neither of which can totally displace the other. Perhaps it is a story of alternations in focus, where sometimes we “see” property as a whole and other times see it as the sum of parts.¹²⁵ All of these stories may be told just as plausibly as the story of elitist dismissal of ordinary citizens’ views. And under almost all of these retellings, a view of increasing or consequential divergence between lay and academic views seems unfounded.

D. A Story of Political Opportunism

The story:

The third story emerging out the bundle-of-rights’ intellectual history is a tale of political opportunism. It is parasitic on the ad hocery story’s message that, under the bundle-of-rights conceptualization, no core of essential rights is necessary to the concept of property and that, therefore, the arrangement or composition of the sticks in any property bundle is almost completely contingent. This contingency has implications for property’s stability: “if property is just a bundle of rights . . . then adding or subtracting sticks from the bundle is an expected feature of social life and no particular configuration of rights should be privileged against inevitable change.”¹²⁶ In the story of political opportunism, the contingency of property rights bundles effectively forced courts to turn to public policy to decide property disputes: “By 1925, it was abundantly clear that the definition and application of the concept of property could not be done by logical deduction. The courts avoided paralysis by deciding cases according to public policy.”¹²⁷ Moreover, the story continues, Legal Realists could use the bundle-of-rights metaphor to justify a conscious program of “enlightened social engineering.”¹²⁸ As one scholar argues, the work of

125. CAROL M. ROSE, *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP* 278–65 (1994).

126. Merrill, *Prism*, *supra* note 14, at 248.

127. Vandeveld, *supra* note 24, at 366.

128. Smith, *Things*, *supra* note 6, at 1697. See also Merrill & Smith, *supra* note 51, at 82 (“The

the Legal Realists “was part and parcel of a broader political program that sought to direct the use, development, and disposal of land and chattels through regulatory rules crafted by experts staffing the newly created federal and state administrative agencies.”¹²⁹ Putting this point another way, “the ‘bundle of rights’ formulation enables its adherents to avoid the implication that the regulatory state is a tide of wholesale incursions on ownership.”¹³⁰

The political opportunism story is not just a tale about New Deal legislation and its aftermath. It is a story about how policy became essential in creating and applying property rules. For means-focused property theorists, who are concerned about the information costs of delineating property rights, direct inquiry into the public policies implicated by property disputes is problematic.¹³¹ The idea that property bundles do or should “respond to policy concerns in a fairly direct fashion”¹³² ignores the transaction costs of a “relation by relation, party by party” construction of property rights.¹³³ In the eyes of these theorists, “property is a shortcut over the ‘complete’ property system that would, in limitlessly tailored fashion, specify all the rights, duties, privileges, and so forth, holding between persons with respect to the most fine-grained uses of the most articulated attributes of resources.”¹³⁴

Means theorists assert that because we do not live in a zero-transaction-cost world, property delineates rights by employing modular baselines, “lumpy packages of legal relations—legal things.”¹³⁵ Property then uses an in rem exclusion strategy in the ordinary case¹³⁶ to achieve ends such as “stability, promotion of investment, autonomy,

Legal Realists’ motivation for advancing the bundle of rights picture was political. The Realists sought to ‘de-privilege’ property . . . [in order to] facilitate more extensive collective control over property, especially through programs of redistribution.”).

129. Mossoff, *supra* note 23, at 2018.

130. Daniel B. Klein & John Robinson, *Property: A Bundle of Rights? Prologue to the Property Symposium*, 8(3) *ECON. J. WATCH* 193, 195 (2011).

131. See Smith, *Gap*, *supra* note 64, at 970, and Smith, *Things*, *supra* note 6, at 1716–19, both arguing against direct resort to ends rather than means in property theory.

132. Smith, *Things*, *supra* note 6, at 1697.

133. *Id.* at 1696.

134. *Id.* at 1693.

135. *Id.* at 1693.

136. In some cases, the “exclusion” strategy described here will not work: “spillovers and scale problems call for more specific rules to deal with problems like odors and lateral support, and to facilitate coordination (for example, covenants, common interest communities, and trusts). These governance strategies focus more closely on narrower classes of use and sometimes make more specific reference to their purposes, and so they are more contextual.” Smith, *Things*, *supra* note 6, at 1703. On the exclusion and governance strategies more generally, see Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 *J. LEGAL STUD.* S453 (2002) [hereinafter Smith, *Exclusion*].

efficiency, [and] fairness.”¹³⁷ But these ends cannot be pulled out one by one and used as the basis for decisions. To the contrary, “[r]equiring that each piece of the system and each stick in the bundle transparently reflect or promote our purposes”¹³⁸ is neither necessary nor wise because, in our system of property, values are served collectively, i.e., “results emerge from the system as a whole rather than its specific parts.”¹³⁹ If this is indeed how property promotes social order, then the story of political opportunism, which requires overt resort to public policy to decide every dispute, is another troubling—and misleading—tale.

Another telling:

Even on the libertarian side of the ideological spectrum within property theory, scholars disagree that the political opportunism story is troubling. Recall that the bundle-of-rights metaphor fragments property into component sticks, each of which can be characterized as a separate property interest in its own right.¹⁴⁰ For scholars opposed to “the top-down view of property that treats all property as being granted by the state and therefore subject to whatever terms and conditions that state wishes to impose,”¹⁴¹ the bundle’s fragmentation could sometimes operate against the expansion of state power, in that interference with any incident of property could be deemed a taking.¹⁴² Indeed, for libertarians such as Richard Epstein, who note that “the protection of each incident in the standard bundle of rights from state regulation reduces state power,” it is the “unitary conception of property rights that is in fact vulnerable to creeping statism.”¹⁴³ In this view, the bundle-of-rights picture of property enhances individuals’ power against the state rather than reducing it, as other versions of the political opportunism story suggest.

And not all property theorists are libertarians. To the extent the political opportunism story is about the triumph of the regulatory state, it

137. Smith, *Things*, *supra* note 6, at 1693.

138. *Id.* at 1719.

139. *Id.* at 1717.

140. *See supra* text accompanying notes 85–91.

141. Epstein, *supra* note 72, at 227–28.

142. *Id.* at 228. Libertarians are not the only group to have perceived the problem of enhanced propertization posed by the bundle theory. *See, e.g.*, HORWITZ, *supra* note 31, at 145–52 (on propertization of everything); Heller, *supra* note 45, at 663 (on decomposition of property rights). For the latter scholars, however, the enhanced propertization of fragmented bundles is seen as problematic because such propertization, if truly carried into the realm of takings, would prevent all change, HORWITZ, *supra* note 31, at 151, or might proliferate unproductive anticommons, Heller, *supra* note 45, at 670.

143. Epstein, *supra* note 72, at 233.

is entirely congenial to ends theorists. These scholars are committed to the idea that property requires state regulation because, in their view, property rights are not self-enforcing and because, they assert, in the absence of state intervention to impose limits on the exercise of property rights, property owners would be vulnerable to depredations by thoughtless neighbors.¹⁴⁴ In this view, the Realists' emphasis on the role of "public" power in "private" property simply made explicit an aspect of property ownership that was always true, but which had been suppressed by the absolutist rhetoric of the nineteenth century. In the eyes of many contemporary property theorists, property remains suffused by regulation; the common law estate system has been pervasively supplemented by statutes governing zoning, fair housing, mortgages, marital property, and nearly every other aspect of property ownership.¹⁴⁵ For antilibertarians, this *is* our property system, and these regulations exist because we would not want a society without the kind of protections they provide.¹⁴⁶

To the extent that the political opportunism story is a story about the central role of social policy in property law, it is especially congenial to ends-focused contemporary property progressives,¹⁴⁷ who have argued that property should directly serve values such as human flourishing,¹⁴⁸ virtue,¹⁴⁹ or democracy.¹⁵⁰ Direct conversations about public policies that currently do or eventually should guide property decisions are, in these theorists' eyes, a very good thing indeed.¹⁵¹ To the extent that the bundle-of-rights conceptualization in fact forces open consideration of the public policies operative in property law,¹⁵² the story of political opportunism is a fairly happy one.

144. See, e.g., SINGER, *supra* note 11, at 68 ("Property seems to require regulation."). For an extensive examination of this argument, see Jane B. Baron, *The Expressive Transparency of Property*, 102 COLUM. L. REV. 208, 216–18 (2002).

145. Singer, *supra* note 8, at 1052–53.

146. *Id.* at 1051–52.

147. I use their own descriptive term. See Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009). In addition to Alexander, the *Statement* is signed by Eduardo M. Peñalver, Joseph William Singer, and Laura S. Underkuffler. For an argument that these scholars are not progressive enough because they do not sufficiently focus on issues of acquisition and distribution, see Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107 (2013).

148. Alexander, *supra* note 10.

149. Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009).

150. Singer, *supra* note 8.

151. For a detailed development of this point with examples, see Baron, *supra* note 66, at 945–52, 964–66.

152. See, e.g., Dagan, *supra* note 23, at 1533 ("If property is a bundle, it means that it has no canonical composition, that a reference to the concept of property is an invitation to a normative inquiry rather than to a menu of inevitable packages of incidents."). Dagan warns, however, that sometimes courts seek to avoid the necessary normative inquiry. See *id.* at 1534, 1561.

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From the larger narrative about the rising influence of the bundle-of-rights metaphor for property, means-focused theorists crafted the ad hocery, elitism, and political opportunity stories. These stories may not be false, but they are not entirely true either. They are clearly meant to portray the bundle-of-rights conceptualization as analytically, socially, and politically dangerous, but it is by no means clear that the bundle-of-rights metaphor functions in the negative ways the stories depict.

III. THE CASE FOR THE BUNDLE-OF-RIGHTS METAPHOR

This Part argues that the bundle-of-rights metaphor for property can be helpful. A bundle-of-rights analysis will help to specify the legal relations of parties in both simple and complex property arrangements, to identify explicitly the normative choices implicit in those arrangements, to assess the quality of the human relationships that property creates, and to force the production of information pertinent to those issues. Bundle-of-rights analysis can address property's means as well as its ends.

A. Specification of Legal Relationships

As we have seen,¹⁵³ one thread within property scholars' history of the bundle-of-rights metaphor attributes part of the metaphor's rise in popularity to the de-physicalization of forms of wealth toward the end of the nineteenth century. But of course property was divided between tangibles and intangibles much earlier. Future interests, easements, profits, mortgages, and copyrights are all examples of intangibles that were recognized as property interests long before the start of the twentieth century. Indeed, estates in land, the very bedrock of the feudal as well as modern property system for categorizing rights in realty, are not themselves tangible.

One can speak of intangible property interests as if they were material objects. Kenneth Vandeveld asserts, for example, that "the courts of Blackstone's era claimed to be protecting the possession of things," and "if no physical thing was possessed, as with incorporeal hereditaments or a chose in action, one was fictionalized."¹⁵⁴ But it is not just Blackstonian era courts who speak of intangibles as if they were objects capable of physical possession. In common contemporary parlance, one "holds" a mortgage on Whiteacre, and one "has" an easement

153. See *supra* note 31.

154. Vandeveld, *supra* note 24, at 333.

appurtenant over Blackacre.

But when we try to explain what is “held”—what a mortgage or an easement *is*—we quickly move to a different sort of terminology. We talk about partial rights, rights involving other people. An easement appurtenant is a right to pass over land owned by another¹⁵⁵; a vested remainder is a present right to future possession of property currently possessed by another.¹⁵⁶ Specifically, an easement holder may freely enter upon land he does not own where that entry would otherwise be a clear instance of trespass, while a remainderman may prevent the current occupant from making certain uses of the land (waste) that the latter would otherwise be free to undertake. The easement holder, however, does not have unlimited freedom with respect to the servient estate, but has only limited use rights. The same is true of the remainderman, who can control only a limited range of the current occupant’s behaviors.

The bundle-of-rights metaphor is quite useful in these sorts of cases because it allows us to describe with great particularity and specificity who has what rights against whom. In this way, the bundle-of-rights metaphor supplies a vocabulary that is “useful because it provides a language specifying what legal rights and obligations a particular property doctrine creates in terms of the precise obligations and parties.”¹⁵⁷ This vocabulary is all the more helpful with respect to complex governance arrangements such as common interest communities or residential owners associations.¹⁵⁸ The bundle-of-rights metaphor permits teasing out the different facets of ownership in these complex arrangements; in a condominium, for example, an owner might have one set of rights to his dwelling (a fee simple), but a different set of rights to his space in a parking lot (an easement) or to the common areas of the development, such as the swimming pool (joint tenancy).¹⁵⁹ The owner might have one set of legal relationships with respect to those living within the condominium and a quite different set of relationships with respect to those who are not condominium members.¹⁶⁰ Specifying

155. JOSEPH WILLIAM SINGER, *PROPERTY* 176 (3d ed. 2010) (“Rights to do specific acts on land owned by someone else are called easements.”).

156. *Id.* at 300 (explaining division of present and future interests). For present purposes, I will use the term “right” to include Hohfeldian powers, privileges, and immunities.

157. Claeys, *supra* note 29, at 622.

158. Heller, *supra* note 20, at 1191 (asserting that the “thing-ownership metaphor . . . does not help identify boundaries of complex governance arrangements and modern intangible property”); *id.* at 1193 (“the modern bundle-of-legal relations metaphor reflects well the possibility of complex relational fragmentation”). Heller believes, however, that the metaphor gives a “weak sense of the ‘thingness’ of private property.” *Id.*

159. The particular example is drawn from ROSE, *supra* note 125, at 280.

160. Condominium declarations and by-laws, for example, may limit members’ rights among each other in ways that would not be true for fee owners. *See, e.g., O’Buck v. Cottonwood Village*

each set of property interests, and the parties against whom they might apply, can sometimes be clarifying.¹⁶¹

To be sure, understanding that property interests consist of specific rights, powers, privileges, and immunities that may vary depending on the parties involved (neighbors, trespassers, creditors, etc.) does not imply that an owner *ought* to have a specific power or *ought* to be able to fragment property interests in any particular fashion.¹⁶² Nor can the vocabulary alone tell us whether or how some rights *ought* to fit together into interconnected and interdependent groupings.¹⁶³ But the fact that the vocabulary of bundled rights cannot itself answer these normative questions about the limits of fragmentation is not, alone, a critique of the metaphor. If the bundle vocabulary enables clearer specification of the powers and interests involved in property fragmentation, or of the interests that could or should be grouped together, then at the very least it sharpens the framing of the normative issues that will have to be resolved. There is something to be said for clarifying the issues on the table.

To the extent it provides greater specificity, the bundle-of-rights metaphor is quite consistent with means-focused property theory. Means scholars concede that many property rights do not actually operate as in rem rights governed by exclusion, but instead require “governance rules,” which “allow society to control resources in nonstandard ways that entail greater precision or complexity in delineating use rights than is possible using exclusion.”¹⁶⁴ For these rights, which require more fine-tuning than the exclusion strategy permits, the bundle-of-rights metaphor should be particularly helpful in specifying precisely the rights and relationships that the fine-tuning governance strategy might entail.¹⁶⁵

Condo. Ass’n., Inc., 750 P.2d 813 (Alaska 1988).

161. See Robert C. Ellickson, *Two Cheers for the Bundle-of-Sticks Metaphor, Three Cheers for Merrill and Smith*, 8(3) ECON. J. WATCH 215, 217 (2011) (suggesting that a student confused by the fragmentation of ownership into particular privileges of use, or by temporal limitations on ownership, might find the notion that the owner has broken his property into separate sticks “clarifying”).

162. Claeys, *supra* note 29, at 622 (arguing that the bundle vocabulary “cannot do justificatory work”). See also Heller, *supra* note 20, at 1193–94 (arguing that the bundle metaphor does not determine how “to distinguish things from fragments, bundles from rights, and private from nonprivate property”).

163. ROSE, *supra* note 125, at 280 (noting that the bundle metaphor “weakens the sense that groupings of property rights might be interconnected and interdependent”). See also Smith, *Things*, *supra* note 6, at 1700 (“[P]roperty law provides for actual bundles of rights (or legal relations) that exhibit features relating to their completeness not captured as the sum of their parts.”).

164. Merrill & Smith, *supra* note 65, at 797. On the general distinction between exclusion and governance strategies, see Smith, *Exclusion*, *supra* note 136.

165. Since the question of where to draw the line between exclusion and governance is an “empirical question,” Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1024–25 (2004), there is no way to know whether governance is truly exceptional, but in

B. Flexibility and Choice

The bundle-of-rights metaphor captures a fluid conception of property as something that must be created rather than something that is already fixed. The Blackstonian conception of ownership as despotic dominion produced an apparently simple algorithm for deciding cases, one that seemed to make choice unnecessary. “Under the old Blackstonian conception, the key questions in any legal dispute were, who is the owner and was that person’s ownership unlawfully injured in some way.”¹⁶⁶ When the Blackstonian conception broke down, it became increasingly difficult to deduce consequences from anything in property’s “nature.”¹⁶⁷ If property rights are not absolute, then they can be limited. Exactly whether and how they are limited involves choices about what rights ownership entails. Moreover, these choices can change over time.

As a bundle of rights, “property is malleable and adaptable. New rights in property can be conceived. New sets of rights can be bundled.”¹⁶⁸ As Hanoach Dagan puts it, “the bundle metaphor captures the truism that property is an artifact, a human creation that can be, and has been, modified in accordance with human needs and values.”¹⁶⁹

The choices that underlie limitations on, or modifications of, property rights, require normative analysis. As Dagan explains, “the whole point of the bundle metaphor . . . is to trigger such an analysis.”¹⁷⁰

Rather than resorting to internal deductive reasoning, decision makers must ask whether it is justified that a certain category of people (i.e., owners) will enjoy a particular right, privilege, power, or immunity over a category of resources (land, chattels, copyrights, patents, and so on) as against another category of people (spouses, neighbors, strangers, community members, and so on).¹⁷¹

The answers to these questions will be neither obvious nor uncontroversial, but asking what is in (or out) of the bundle—for example, whether an owner’s rights against a neighbor should be the

Smith’s other work he makes it clear that property begins with exclusion. *See, e.g.,* Smith, *Things*, *supra* note 6, at 1705 (describing exclusion as a “first cut” at serving the purposes of property law). For an argument that “exclusion property” is not the dominant mode of ownership today, *see* Alexander, *supra* note 80.

166. ALEXANDER, *supra* note 1, at 381.

167. Vandeveld, *supra* note 24, at 328–330 (describing the erosion of the Blackstonian conception over the 19th century and concluding that “[t]his century long evolution resulted in an inability of property concepts to settle controversies and to legitimate the results”).

168. Arnold, *supra* note 24, at 289 (emphasis omitted).

169. Dagan, *supra* note 23, at 1532.

170. *Id.* at 1534.

171. *Id.* at 1533.

same as the owner's rights against a complete stranger—forces transparency about the decisions being made.¹⁷²

Consider the law of landlord/tenant. At one time, the law subscribed to the following axioms: a landlord was legally obliged to offer a tenant only the bare right of possession rather than actual possession;¹⁷³ the landlord had no duty to mitigate damages on the tenant's default;¹⁷⁴ the landlord could deny consent to assignment or sublease for any or no reason;¹⁷⁵ and the landlord had no duty to maintain the premises.¹⁷⁶ The landlord's bundle of rights did not require the landlord, in making decisions about the property, to take the tenant's interest into account. Today, virtually every one of these old legal axioms has been reversed.¹⁷⁷ The landlord's bundle of rights under contemporary law does require consideration of the tenant's interests throughout the leasehold relationship. Unpacking the parties' specific rights, powers, duties, etc. before and after the landlord/tenant "revolution" enables clarity about the choices—and values—pertaining under both the old and new legal regimes. That unpacking also demonstrates that normative choices about property can and do change. There is no consensus on whether the new regime is superior to the old.¹⁷⁸ Nonetheless, the bundle-of-rights formulation fosters clarity about what the disagreement is about and encourages explicit debate about the substantive issues.

Clear identification of the parties, rights, powers, privileges, immunities, and values involved in a property dispute puts the issues on the table. As with the limits of fragmentation, the bundle-of-rights metaphor alone cannot resolve them. It does not follow, however, that all resolutions will be equally acceptable, or that there will be no principled basis on which to make judgments about possible outcomes.¹⁷⁹ For example, we might, as one theorist has suggested,

172. *See id.* ("If property is a bundle, it means that it has no canonical composition, that a reference to the concept of property is an invitation to a normative inquiry rather than to a menu of inevitable packages of incidents.").

173. *Hannan v. Dusch*, 153 S.E. 824 (Va. 1930) (describing and following this rule).

174. *Sommer v. Kridel*, 378 A.2d 767 (N.J. 1977) (describing this rule, but declining to follow it).

175. *Kendall v. Ernest Pestana, Inc.*, 709 P.2d 837 (Cal. 1985) (describing this rule, but declining to follow it).

176. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970) (describing this rule, but declining to follow it).

177. *See, e.g.*, cases cited *supra* notes 173–176.

178. *See, e.g.*, Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361 (1991) (examining the possibility that the implied warranty of habitability will make tenants worse off).

179. *See* Dagan, *supra* note 23, at 1534 ("[T]he bundle metaphor should not mislead us into thinking that property can be conceived of as a 'laundry list' of substantive rights with limitless permutations.").

think of different property estates, such as the landlord/tenant relationship or the tenancy by the entirety, as “default frameworks of interpersonal interaction,”¹⁸⁰ each promoting different values, some more atomistic and others more communitarian.¹⁸¹ Under this theory, we would evaluate the “sticks” in each estate’s bundle by reference to whether they consolidated expectations or expressed ideals appropriate to the estate in question.¹⁸² Alternatively, we might evaluate whether, in a given context, the precise organization of property rights, duties, and so forth “promote relations of domination and subordination” or, alternatively, whether they “promote reciprocity” in the process of social coordination.¹⁸³ There may be real disagreement over what principle—freedom, virtue, or efficiency—should be used to evaluate any configuration of property sticks,¹⁸⁴ but the notion of malleability and flexibility implicit in the bundle concept does not mean that decisions will be unprincipled or random. Decisions will not have the automatic, algorithmic quality of the Blackstonian conception, but this does not mean the decisions cannot be rational.

Consideration of individual property sticks and their bundling need not undermine the possibility of in rem rights. Means-focused theorists highlight the transaction costs of delineating property rights and note repeatedly that in the real world, in which such costs pertain, it is unrealistic to construct property rights one by one, individual by individual, parcel by parcel.¹⁸⁵ But the bundle-of-rights metaphor does not require consideration of every possible combination of parties, rights, and objects in dyadic combination. We can ask, using the bundle-of-rights metaphor, whether an individual *ought* to have a use right that is good “against all the world.” If in fact most property rights are truly rights in rem, accompanied by a correlative duty of respect that “has an impersonality and generality that is qualitatively different” from

180. *Id.* at 1558.

181. *Id.* at 1560.

182. *Id.* at 1562. Reasonable persons might disagree about the values that *are* appropriate or whether a given outcome in fact furthers those values. Dagan does not explain how we know what “set of human values” connects with any given “property institution.” *Id.* For present purposes, this problem is not critical; what is important is that under his theory property does not collapse into a list of substantively independent sticks.

183. Purdy, *supra* note 9, at 1244–45.

184. See Katz, *supra* note 59, at 237 (“Property theory cannot tell us very much about what our priorities should be, e.g., efficient markets, a healthy environment, stable communities, or individual freedom.”).

185. See Chang & Smith, *supra* note 16, at 4 (In a zero transaction cost world, “we could serve each individual’s interest in use vis-à-vis every other individual’s potential use interest by specifying the rights and duties . . . that hold pair-wise between all members of society with respect to the most articulated uses of the smallest fragments of things. This is intractable in our world.”). See also Smith, *Things*, *supra* note 6, at 1696–98 (making this same point).

other, non-property-based duties,¹⁸⁶ then the specification of interests under the bundle-of-rights model should only make that clearer.¹⁸⁷ The “negative duties of abstention”¹⁸⁸ entailed by rights in rem—duties not to enter upon, take, or use property owned by another—can be elaborated under the bundle-of-rights model even if, as property-as-things theorists assert, “these universal duties are broadcast to the world from [a] thing itself.”¹⁸⁹

Nor does the bundle-of-rights metaphor require us to start from scratch, ignoring the existing system of estates or other property doctrines that have developed over time. At the end of the day, in response to hard questions, we may decide to modify some of our current rules—as we did in the context of landlord/tenant relationships. But that does not require us recklessly to abandon or modify or recreate our entire estates system. If proposed modifications would unduly disrupt the standardization of the *numerus clausus*, this disruption would be an argument against change. The bundle conceptualization does not require us to choose to change existing property rules. Rather, it challenges us to acknowledge the choices property entails.

C. Property Rights as Relations Among Persons

The bundle-of-rights conceptualization directs attention toward the effects of property rights (powers/privileges/immunities) on other people, be they other owners or nonowners, and this attention enables assessment of whether the relationships property constructs are morally and socially acceptable. As we have seen, there is consensus that the

186. Merrill & Smith, *supra* note 65, at 787.

187. Some of the information theorists’ skepticism about the bundle of rights metaphor may derive from their view of what it means for a right to be *in rem*: “in rem property rights are qualitatively different” from *in personam* rights, they assert, “in that they attach to persons insofar as they have a certain relationship to some thing.” Merrill & Smith, *supra* note 21, at 364. In addition, “in rem rights apply to a large and indefinite class of dutyholders.” Merrill & Smith, *supra* note 65, at 789. Merrill & Smith argue that Hohfeld misconstrued *in rem* rights, seeing them as differing from *in personam* rights “only in the indefiniteness and the number of the persons who are bound by these relations.” Merrill & Smith, *supra* note 21, at 364.

If the bundle metaphor is incapable of dealing with rights that are good against indefinite numbers of persons, then it would follow that it is not appropriate for *in rem* rights, as Merrill & Smith define such rights. But there is no reason to assume that the bundle metaphor cannot define rights that are, to use Merrill & Smith’s terms, impersonal and general. Indeed, in recent work Merrill & Smith concede that “the bundle of rights picture is not logically incompatible with understanding that property rights are rights in rem.” Merrill & Smith, *supra* note 51, at 82. It is true, as developed *infra* text accompanying notes 192–202, that the bundle often highlights the social, relational dimension of property rights, but the sociality described need not be constructed on a relationship-by-relationship basis or, as Smith puts it, “pairwise.” Smith, *Things*, *supra* note 6, at 1704.

188. Merrill & Smith, *supra* note 21, at 359.

189. *Id.*

bundle-of-rights metaphor originates in Hohfeld's analysis of fundamental jural relations.¹⁹⁰ While Hohfeld's primary justification for his scheme was "accurate thought and precise expression,"¹⁹¹ scholars have consistently noted that his pairings highlight the social dimension of property—that these relations pertain between people.¹⁹² Hohfeld was certainly aware of this dimension of his analysis, writing that "since the purpose of the law is to regulate the conduct of human beings, all jural relations must, in order to be clear and direct in their meaning, be predicated of such human beings."¹⁹³

Why should it matter that jural relations are "predicated of . . . human beings"? Hohfeld did not directly pursue this question, but it seems clear that at a minimum it can be said that every exercise of a right, power, privilege, or immunity will affect another person. An owner can, for example, keep his neighbor off his land and require her to obtain his permission if she wishes to enter.¹⁹⁴ There is nothing inherently problematic or troubling about this social relationship in the abstract. If the neighbor, for example, owned the parcel next door, she could keep the adjacent owner off her land and similarly require him to obtain her permission to enter. Their relationship would be entirely reciprocal and balanced.

Of course, not all persons are similarly situated with respect to property. If the owner and the neighbor are not in roughly equal positions, in terms of ownership, and the neighbor is in need of

190. See *supra* notes 18–26 and accompanying text. In Hohfeld's scheme, "claim rights" come paired with opposite "no-rights" as well as correlative "duties," and similar pairings exist for "privileges" (duties/no-rights), "powers" (disabilities/liabilities), and "immunities" (liabilities/disabilities). *Fundamental Legal Conceptions II*, *supra* note 18, at 710.

191. *Id.*

192. See, e.g., ALEXANDER, *supra* note 1, at 321 ("Hohfeld's analysis illuminated the complex and relational character of ownership" and revealed that ownership is "fundamentally social."); Cohen, *supra* note 46, at 363 ("[T]his institution of property that we are trying to understand may or may not involve physical objects, but always does involve relations between people."); MUNZER, *supra* note 22, at 26 ("[T]he Hohfeld-Honoré analysis starts from the central truth that property involves relations among persons and with respect to things.").

193. *Fundamental Legal Conceptions II*, *supra* note 18, at 721.

194. To use Hohfeld's words, "if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty to X to stay off the place." *Fundamental Legal Conceptions I*, *supra* note 18, at 32. The legal relation between X as owner of a particular parcel and of Y as the nonowner of that parcel is also a social relation, in which X can exclude Y and Y is not free to enter X's land without obtaining X's permission.

I do not mean to suggest here that all property rights have exclusion at their core, though many scholars do believe that is true. See, e.g., Cohen, *supra* note 38, at 12 ("[T]he essence of private property is always the right to exclude others."); Cohen, *supra* note 46, at 371 ("Private property . . . must at least involve a right to exclude others from doing something."); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998) (arguing that exclusion is central). My point here is that property in Hohfeld's example constructs a relationship between X and Y in which X has certain legal capacities—in this case, the capacity to exclude—that Y may lack.

something that the owner owns, then the social relationship property constructs involves a vulnerability of the neighbor to the owner. This was Morris Cohen's point about property and sovereignty:

If . . . someone else wants to use the food, the house, the land, or the plow which the law calls mine, he has to get my consent. To the extent that these things are necessary to the life of my neighbor, the law thus confers on me a power, limited but real, to make him do what I want.¹⁹⁵

To recognize that property is a form of sovereignty, Cohen asserted, "is not itself an argument against it," for "some form of government we must always have."¹⁹⁶ But not all forms of government—and not all legal relationships—are of equal value. Cohen suggested that "it is necessary to apply to the law of property all those considerations of social ethics and enlightened public policy which ought to be brought to the discussion of any just form of government."¹⁹⁷

We may find that many relationships exhibit rough equality, but we may find that many relationships do not. The homeless, to take a vivid example, experience only duties, no-rights, liabilities, and disabilities. This cumulation of the less desirable aspects of property consigns the homeless to a status in which it becomes possible for them to be seen as, effectively, objects rather than as subjects.¹⁹⁸ In many important respects, property may connect to identity; lack of property may injure one's sense of belonging or of citizenship.¹⁹⁹ To the extent that deep disparities in status are troubling,²⁰⁰ we may find disturbing property relationships that construct serious, nonreciprocal vulnerabilities.

The point is that focusing on the relational effects of property in turn forces consideration of the kind of relationships that, to recur to Cohen's words, are acceptable to us as a matter of "social ethics and enlightened public policy." As with the specification aspect of the bundle-of-rights metaphor, there is nothing like consensus on what "enlightened social policy" requires or on what kinds of relationships it might condemn. Social obligation theory, to take one example, posits that "a property system should seek to nurture social relationships of equal respect and dignity, relationships of fairness and nondomination."²⁰¹ Even if scholars were in widespread agreement that property should further such

195. Cohen, *supra* note 38, at 12.

196. *Id.* at 14.

197. *Id.*

198. Jane B. Baron, *Property and "No Property"*, 42 HOUS. L. REV. 1425, 1448 (2006).

199. See Nestor R. Davidson, *Property and Identity: Vulnerability and Insecurity in the Housing Crisis*, 47 HARV. C.R.-C.L. L. REV. 119, 140 (2012).

200. Cf. Nestor R. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757 (2009) (discussing how status anxieties can fuel dysfunctionality in the acquisition and use of property).

201. Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1017, 1023–24 (2011).

relationships—and they are not²⁰²—“respect,” “dignity,” “fairness,” and “nondomination” are all qualities that can be defined in quite different ways. The argument for the bundle-of-rights conceptualization of property is not that it will define these terms, but that it will force more open confrontation both of the kinds of relationships property ought to promote (or tolerate) and of the extent to which any particular relationship actually instantiates the qualities sought to be furthered.

Means-focused theories argue that the bundle-of-rights conceptualization’s inquiries into the quality of property relationships potentially confuse means and ends.²⁰³ As recent work by Henry Smith puts it, the purposes of property are one thing (“our interest in using things”),²⁰⁴ but our “strategies” for serving those purposes (a baseline of exclusion, supplemented by governance)²⁰⁵ are different.²⁰⁶ A relationship-by-relationship analysis such as is promoted by the bundle-of-rights idea ignores the ways in which property produces results indirectly, as a system.²⁰⁷ Smith asserts that the relational inquiries made as part of a bundle-of-rights analysis promote “the promiscuous employment of contextual information in property.”²⁰⁸ The answer to this objection depends on the word “promiscuous,” but if Smith’s concern about context is that its use denies that sometimes “results emerge from the system as a whole rather than its specific parts,”²⁰⁹ there is no reason to fear the sort of particularized inquiry the bundle-of-rights conceptualization contemplates. A bundle-of-rights analysis is

202. See, e.g., Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889, 890 (2009) (“In its commonsensical understanding, after all, property consists of dominion—a domain of freedom to decide how to apply the object of ownership to his own life plans, independent of direction from philosopher-kings or anyone else.”); Penner, *supra* note 1, at 742 (“The right to property is the right to determine the use or disposition of an alienable thing in so far as that can be achieved or aided by others excluding themselves from it.”).

203. Smith, *Things*, *supra* note 6, at 1692 (“[T]o get anywhere, we have to be clear about the difference between means and ends in property.”). See also Smith, *Gap*, *supra* note 64, at 963 (describing a “gap” between property law and the end of human flourishing, but arguing that “[p]roperty is an area of law that has gappiness at its core”).

204. Smith, *Things*, *supra* note 6, at 1693.

205. *Id.*

206. *Id.* (“Once we recognize the distinction between our interest in using things and the institutions that property law sets up to serve those interests, the role of property baselines as a means for achieving property’s ends becomes clearer.”).

207. *Id.* at 1717 (asserting “results emerge from the system as a whole rather than the sum of its specific parts”). The concern is that the bundle inquiry will involve “all governance all the time.” *Id.* at 1704. While there is a rule for governance in means-focused theories of property, see *supra* notes 36, 164–165 and accompanying text, it is a limited role, applicable only for “certain important potential use conflicts” such as nuisance. Smith, *Institutions*, *supra* note 5, at 2096 (“Only in specific contexts does the law inquire into uses more directly, such as when one landowner produces odors that annoy a neighbor.”).

208. Smith, *Things*, *supra* note 6, at 1717.

209. *Id.*

capable of recognizing both that property rights can be disaggregated and that, disaggregation notwithstanding, property's whole may sometimes be distinct from the sum of its parts. Similarly, a bundle-of-rights analysis is capable of assessing whether a particular exercise of a power that looks "nasty and selfish" is, in fact, "efficient, fair, just, or virtue promoting . . . in the context of the system as a whole,"²¹⁰ and whether the system is serving some values collectively even if it is not doing so "individually and separably."²¹¹ It is possible to accept that property operates as a system and yet examine the operation of that system in a granular manner, focusing on outcomes (the relationships the system produces) as well as architecture (how the system produces outcomes).

D. Forcing Information

The bundle-of-rights conceptualization of property is designed to elicit information. Specifying who has what rights against whom, especially in complex property arrangements, requires examination of exactly how legal rights have been fragmented both physically and temporally and how they have been allocated among the parties.²¹² Focusing on the system's choices in granting rights, powers, privileges and so forth to some, while denying them (in whole or part) to others, requires clarity about the values, actual and ideal, served by property law. Recognizing that property is social in character, that it affects that quality of interactions between situated individuals, invites consideration of what kinds of relationships we will accept or want to foster; equally, it invites consideration of what kinds of power individuals may acceptably exercise over other individuals.

The bundle-of-rights metaphor has been criticized repeatedly for failing to provide a formula for answering these questions. This criticism misses the point. The metaphor's function is to produce information that will make it possible to apprehend these questions, to make them salient. Once we apprehend these—and appreciate that they *are* questions—we can discuss potential answers to them. There is likely to be serious disagreement about the values property should promote—freedom, efficiency, equality, human flourishing, democracy, etc.—and about the particular rules to be used to further any one of these values. It is true that the bundle-of-rights conceptualization cannot

210. *Id.* at 1718.

211. *Id.* at 1719.

212. See, e.g., Ellickson, *supra* note 161, at 216–17 (describing five dimensions in which rights in property can be fragmented); Heller, *supra* note 45, at 662–64 (describing ways of "decomposing" ownership rights).

resolve these disagreements. But it can help make apparent exactly what the stakes are in the disputes, by providing a clear picture of the contexts in which they arise, the nature of disputes, and the concrete effects of exercises of property rights.

Duties provide a helpful window on the information-forcing aspects of the bundle-of-rights conceptualization, especially by comparison to the information-hiding aspects of the theory of property as things. Summarizing very broadly, property as a law of things protects owners' use rights through an exclusion strategy.²¹³ That strategy, means theorists assert, solves a "massive coordination problem"²¹⁴ created by the fact that "a large and indefinite class of dutyholders must know" what to do (or not do) in order "to avoid violating property rights."²¹⁵ In the eyes of means theorists, customized rights imposing particularized duties would pose an "intolerable" information-cost burden on nonowners.²¹⁶ But, means theorists argue, "in rem rights offer standardized packages of negative duties of abstention that apply automatically to all persons . . . when they encounter resources that are marked in the conventional manner as being 'owned.'"²¹⁷ Thus, without knowledge of who owns property, for what purpose that owner intends to use it, or any other fact other than that they do not themselves own the thing in question, nonowners can fulfill their duties to owners by keeping off what is not theirs.²¹⁸ And this makes individuals better off, as they will not unwittingly violate someone else's idiosyncratically-created right.²¹⁹

It is surely not surprising that the theory of property as a law of things, with its emphasis on the transaction costs of delineating property rights, highlights how much information is hidden by property's

213. On the notion that property rights are ordinarily *in rem* exclusion rights, see, e.g., Smith, *Self-Help*, *supra* note 76, at 79 ("because of positive transaction costs . . . we think in terms of things and especially in terms of *in rem* rights to exclude others from them"); Merrill & Smith, *supra* note 21, at 360 ("[P]roperty rights attach to persons insofar as they have a particular relationship to some thing and confer on those persons the right to exclude a large and indefinite class of persons ('the world') from the thing.").

214. Merrill & Smith, *supra* note 21, at 387.

215. *Id.*

216. *Id.*

217. Merrill & Smith, *supra* note 65, at 794. See also Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (2007) ("Property is a device for coordinating both personal and impersonal interactions over things. Consequently, property rights must be communicated to a wide and disparate group of potential violators; these rights are *in rem*. Because property rights need to coordinate the behavior of large numbers of unconnected people, they must be easily comprehended and must resist possible misinterpretation.").

218. See *infra* note 222 (on the duty to "keep off").

219. On the costs of idiosyncratically-created property rights, or "fancies," see Merrill & Smith, *Optimal Standardization*, *supra* note 80, at 26–35.

modular architecture.²²⁰ Exclusion, for example, delegates to owners decisions about the use of their property, without anyone needing to know the purposes for which the owner intends to use the property.²²¹ Duty holders—those who must respect owners’ rights by keeping themselves off the latter’s property²²²—need not know anything about those owners or their intended uses.²²³ And since property acts in rem, the identity of duty holders also need not be known.²²⁴ In the theory of property as things, the impersonality of the rights and duties created by in rem exclusion rights is a positive: “Delineating the right based on the thing makes the right impersonal in the sense that contextual information about the owner and the duty bearers is generally not relevant to the nature of the right (duty).”²²⁵

A far wider range of facts would generally be pertinent to a bundle-of-rights inquiry. The relationship of the owner to the dutyholder—legal and factual—would be a starting point, for specifying the legal relations between parties is critical to a bundle-of-rights analysis. From there, the analysis might move to the normative issue of whether the

220. Smith, *Institutions*, *supra* note 5, at 2096 (“the exclusion strategy allows the system of resource usage to manage complexity with modularity, with much information hidden in property modules”); Smith, *Things*, *supra* note 6, at 1703 (Property “employs information-hiding and limited interfaces to manage complexity.”).

221. See, e.g., Smith, *Self-Help*, *supra* note 76, at 78 (the right to exclude all the world protects the owner’s interests in a wide range of uses without anyone needing to know anything about those uses); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1728 (2004) [hereinafter Smith, *Property Rules*] (“The right to exclude . . . protects a reservoir of uses to the owner without officials needing to know what those might be.”); Chang & Smith, *supra* note 16, at 11 (“[t]he law of trespass studiously avoids making reference to particular uses”); *id.* at 32 (“the basic way that property is set up obviates the need to spell out uses”).

222. Smith, *Property Rules*, *supra* note 221, 1728 (“Property gives the right to exclude from a ‘thing’ On the dutyholder side, the message is a simple one—to ‘keep out.’”); Smith, *Things*, *supra* note 6, at 1717 (“trespass and conversion send a simple message of ‘keep off’ and ‘don’t take’ (without permission)”).

223. Smith, *Institutions*, *supra* note 5, at 2096 (“from the dutyholder’s perspective, property is like a black box—a module—in that much information about uses and users is simply irrelevant to the dutyholder’s duty of abstention”); Smith, *Self-Help*, *supra* note 76, at 78 (dutyholders need not know anything about an owner’s intended uses or about the owner).

224. Merrill & Smith, *supra* note 21, at 360 (property rights confer on owners “the right to exclude a large and indefinite class of other persons (‘the world’) from [a] thing.”).

225. Chang & Smith, *supra* note 16, at 33. See also Merrill & Smith, *supra* note 65, at 787 (“[T]he duty to respect the property of others . . . has an impersonality and generality that is qualitatively different from duties that derive from specific promises or relationships.”); Smith, *Institutions*, *supra* note 5, at 2100 (interactions mediated by a thing can be “relatively anonymous”).

Thus:

[I]f a car is not mine, I do not need to know who owns it, whether it is subject to a security interest or lease, and so forth, in order to know not to take or damage it. When A sells the car to B, many features of A and B are irrelevant to each other, and most are irrelevant to in rem duty holders, who only need to know not to steal the car. Many details about A and B are irrelevant to their successors in interest.

Smith, *Things*, *supra* note 6, at 1703.

owner under the precise circumstances ought to be able to exert the exact exclusionary right in question—an analysis that might involve, to use earlier examples, an assessment of the quality of the interaction among the parties, the property institution in which the interaction was situated,²²⁶ and its capacity to promote reciprocity or domination.²²⁷ As a next step, the analysis could move to the effects of the owner's assertion of exclusion rights on the nonowner and the kind of legal and social relationship exclusion constructs, examining (again using this Article's earlier examples) whether the parties are symmetrically or asymmetrically vulnerable to one another²²⁸ or whether they stand in positions of equal (or unequal) respect and dignity.²²⁹ These questions beg for development of information as a basis for assessing the consequences of exercises of property rights and for making choices about whether those consequences are morally, socially, and politically acceptable.

Means-focused property theorists argue that it is not “wise” to engage in “issue-by-issue balancing of values like community, autonomy, efficiency, personhood, labor, and distributive justice.”²³⁰ These may all be important values, but the bundle-of-rights picture “creates the expectation that the pieces of the system will serve these values individually and separably.”²³¹ Means theories assert that, in contrast, the values are served “collectively,” and the “specialization of the parts” achieves “the goals of the whole.”²³²

In the end, the means-focused objections to the bundle-of-rights analysis appear to focus on its potential inefficiency, the possibility that each and every case or dispute over property will require an intricate and elaborate inquiry involving multiple complex judgments of both fact and value. For the moment, let us put to one side the question of whether bundle-of-rights analyses truly require the kind of extraordinary, time-consuming effort this objection seems to posit; lawyers and legal scholars are fairly proficient at developing information quickly when needed. The real question is whether a bundle-of-rights analysis will

226. See *supra* note 23 and accompanying text.

227. See *supra* note 9 and accompanying text.

228. See *supra* notes 198–200 and accompanying text.

229. See *supra* note 201 and accompanying text.

230. Smith, *Things*, *supra* note 6, at 1719.

231. *Id.*

232. *Id.* See also Smith, *Gap*, *supra* note 64, at 970 (“It is fallacious to expect any given decision or rule or feature of the property system to partake of the desirable feature of the whole. . . . [P]roperty may promote human flourishing even if not every rule or decision on the part of courts or parties . . . directly (or best) promotes human flourishing.”). See also *id.* at 974 (suggesting that property’s “infrastructure” promotes human flourishing “by making some decisions up front and across the board”).

constantly disrupt the ordinary operation of property, i.e., whether it will make every property case a hard case requiring specification, information forcing, and so forth.

The framing of this question itself assumes that the ordinary operation of property is largely mechanical and uncomplicated. But this assumption is questionable. Many of property's older crystalline rules have turned into standards; reasonableness tests are now ubiquitous in property law.²³³ Thus, the rules themselves may already effectively require exactly the sort of finely grained inquiries that bundle-of-rights analyses would involve. As noted earlier, even those who argue that simple rules of exclusion lie at property's core see a role for more complex governance strategies in some cases, and governance requires both "precision and complexity."²³⁴ Whether governance cases are the exception or the rule is a matter of some debate,²³⁵ but the point is that at least some cases already involve much of the specification that the bundle-of-rights analysis entails.²³⁶

Finally, even if most property cases, most of the time, were indeed simple and uncomplicated, it is also true that at times previously-uncomplicated sets of rules—such as those involving landlord and tenant—come under stress. A comprehensive theory of legal change is well beyond the scope of this Article, but one can predict at least some factors that force change. When, for example, development puts pressure on once-plentiful resources, "anything-goes" approaches to land, reflected in rules emphasizing owners' freedom, will work less well. In such circumstances, the system is pushed to redefine owners' rights.²³⁷ Ordinary rules of property work tolerably well in ordinary times; it is changed circumstances that require rethinking those rules. Because circumstances do not change constantly or dramatically, however, we are unlikely to want or need to rethink whole rule sets frequently.

233. Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1375 (2013).

234. Merrill & Smith, *supra* note 65, at 797.

235. *See supra* note 165.

236. This point might be put another way. It is surely true that from what might be called an "external" point of view—the view of dutyholders, for example—standardization minimizes costs. However, from what might be called an "internal" perspective, i.e., when we come to specify what each *in rem* package of rights consists of, we find there is considerable variation among the features of existing property rights. Merrill and Smith have themselves explored some of that variation. *See* Merrill & Smith, *supra* note 65, at 809–49. *See also* Gregory S. Alexander, *The Complex Core of Property*, 94 CORNELL L. REV. 1063, 1070 (2009) (arguing that not all property rights have exclusion at their core).

237. Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577, 591–92 (1990).

* * *

Property constructs complicated legal and social relationships. These relationships reflect difficult normative choices. Analyzing property as a bundle of rights sharpens understanding of those relationships and those choices. In addition, it produces information essential to evaluating their quality. The granular inquiries encouraged by a bundle-of-rights analysis need not preclude attention to structural or architectural features of the system. Yet by the same token, consideration of the mechanics of the property system should not preclude consideration of whether, in fact, the bundles being produced are morally, socially, or politically acceptable. These are all important questions. The bundle-of-rights conceptualization can, and should, focus on both means and ends.

IV. THE BUNDLE-OF-RIGHTS IN CONTEXT

This Part examines two controversial information-based assets: electronic health records and commercial databases. Whether these assets should be treated as property is the subject of broad debates. Although these assets are in one sense unusual, they may be typical of the kinds of goods that will raise property problems in the future, for they fit awkwardly into existing legal categories such as property, privacy, and intellectual property. This Part argues that property rights in these assets, if they are property at all, will look more like bundled rights than like exclusionary powers over things. Further, analyzing these goods through a bundle-of-rights lens will illuminate some of the hard choices these assets pose about who should obtain value from assets that are created by multiple actors.

A. Electronic Health Records (EHRs)

An EHR comprises “electronic documentation of providers’ notes, electronic viewing of laboratory and radiological results, e-prescribing, and an interoperable connection via a health information exchange with all other providers and hospitals in a community.”²³⁸ The information

238. Cong. Budget Off., Evidence on the Costs and Benefits of Health Information Technology, Pub. No. 2976, at 5 (2008), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/91xx/doc9168/05-20-healthit.pdf>. The Health Information Management Systems Society defines an EHR as follows:

The Electronic Health Record (EHR) is a longitudinal electronic record of patient health information generated by one or more encounters in any care delivery setting. Included in this information are patient demographics, progress notes, problems, medications, vital signs, past medical history, immunizations, laboratory data, and radiology reports.

assembled in an EHR is of considerable value to medical service providers, who can use it to improve care, and to patients, who stand to benefit from those improvements.²³⁹ EHRs are also valuable to other entities, such as insurance companies, potential or actual employers of the patient in question, and marketing firms seeking to sell medical equipment or drugs.²⁴⁰ Unfortunately, the very same network effects that enhance EHRs' utility to patients heighten the danger of unauthorized disclosure because more information could be released and distributed to more people.²⁴¹ Although the Health Insurance Portability and Accountability Act of 1996 (HIPPA)²⁴² addresses some issues related to the security of the information in EHRs, it is widely agreed that the statute has many deficiencies that leave patient information vulnerable to unwanted disclosure.²⁴³ Thus, some scholars have suggested that, for purposes of control, patients should have a property right to the information in the EHRs pertaining to them.²⁴⁴

Proposals for propertizing health information vary widely on a number of dimensions, from cloud-based records that would grant patients primary control²⁴⁵ to integrated networks created and accessed primarily by physicians and hospitals.²⁴⁶ Despite differences in these proposals' detail, several common features appear. One is a concern about the alienability of health information. For ordinary property, such

Electronic Health Record, Health Info. & Mgmt. Sys. Soc'y (2006), http://www.himss.org/ASP/topics_ehr.asp.

239. For a summary of the benefits of EHRs to the medical community and patients, see Jane B. Baron, *Property as Control: The Case of Information*, 18 MICH. TELECOMM. & TECH. L. REV. 367, 374–75 (2012).

240. Sharona Hoffman & Andy Podgurski, *In Sickness, Health, and Cyberspace: Protecting the Security of Electronic Private Health Information*, 48 B.C. L. REV. 331, 334–35 (2007) (describing the range of entities that would find health information useful).

241. See, e.g., Mark A. Hall, *Property, Privacy, and the Pursuit of Interconnected Electronic Medical Records*, 95 IOWA L. REV. 631 (2010) (describing network effects); Nicolas P. Terry, *What's Wrong with Health Privacy?*, 5 J. HEALTH & BIOMEDICAL L. 1, 23 (2009) (describing the potential for abuse of patient data in modern longitudinal systems).

242. Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29, 42 U.S.C.).

243. For a summary of the arguments about HIPPA's deficiencies, see Baron, *supra* note 239, at 377.

244. See, e.g., Hall, *supra* note 241 (suggesting that patients be allowed to license rights to medical information for purposes of stimulating market development of EHRs); Edward J. Janger, *Privacy Property, Information Costs, and the Anticommons*, 54 HASTINGS L.J. 899 (2003) (exploring costs and benefits of a possible regime of "muddy property rules" for personal information); Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2056 (2004) (proposing a five-element model for propertized personal information).

245. Google proposed such a system, though it ultimately abandoned the project. See Leena Rao, *Google Shuts Down Medical Records and Health Data Platform*, TECHCRUNCH (June 24, 2011), <http://techcrunch.com/2011/06/24/google-shuts-down-medical-records-and-health-data-platform/>.

246. For descriptions, see Hall, *supra* note 241.

as real estate or laptop computers, alienability is almost always seen as a plus, allowing resources to reach the persons who value them most highly.²⁴⁷ But the alienability of medical information is more problematic; patients may give or sell health information to an initial acquirer without understanding the many subsequent uses to which the initial buyer may put that information—uses of which the patient may disapprove.²⁴⁸ Desire to limit these risks has given rise to proposals to adjust the alienability of rights in health information. Paul Schwartz, for example, has offered a “hybrid alienability” model of property rights in personal information that would “permit the *transfer* for an initial category of *use* in personal data, but only if the customer is granted an opportunity to block further transfer or use by unaffected entities.”²⁴⁹

Proposals such as Schwartz’s contemplate a property right that would *not* accord to a single, identifiable owner a set of consolidated rights that grant near-absolute control, nor operate in rem, nor be highly standardized.²⁵⁰ EHRs involve multiple potential owners—reflecting inputs from patients, physicians, laboratories, insurance companies, and so forth. The rights of these parties between and among each other are likely to vary; the patient’s right of access to information in the EHR may, for instance, differ from that of the patient’s insurance company. The bundle-of-rights metaphor seems suited to the complexity and asymmetry of the various parties’ interests in the information in EHRs. It captures the fact that ownership of information is divided. It also helps show that the rights, powers, privileges, etc. of any one party with respect to another will not necessarily be the same as another’s with respect to that same other party.

Analyzing property interests in EHRs as a bundle of rights facilitates the specification of who the different owners are, as well as variations in their powers with respect to health information. That specification, in turn, will reveal differences and perhaps dispiriting imbalances. Revealing these imbalances enables consideration of whether patients have enough, or too much, power to control the information in their health records. That judgment requires attention to how each party’s exercise of control affects others. Perhaps, for example, physicians’ attempts to limit patients’ access to certain information in their charts—information that doctors deem potentially dangerous to patients’ emotional or psychological well-being²⁵¹—constructs a relationship of

247. See SINGER, *supra* note 155, at 278–80.

248. Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1299–1300 (2000); Pamela Samuelson, *Privacy as Intellectual Property*, 52 STAN. L. REV. 1125, 1138 (2000).

249. Schwartz, *supra* note 244, at 2098.

250. See Baron, *supra* note 239, at 383.

251. Many states have statutes speaking to this issue. See, e.g., ARK. CODE ANN. § 16-46-106;

paternalist power that bears rethinking.

Bundle-of-rights analysis requires the development of a wide variety of facts about how the flow of information in EHRs affects the multiple parties to the medical record. Those facts will not obviate the need to make judgments about which parties should exercise full or partial control over the record. Instead, the revealed complexity of the divided interests in EHRs might suggest that such records should not be governed by a “property” frame at all.²⁵² Perhaps “privacy” might better capture what is at stake. But perhaps not. The information produced by the bundle-of-rights analysis focuses attention on the many contributions that are required for an EHR to exist at all. Once these different contributions become evident, legislatures or courts might decide that property rights are exactly the right way to reward different parties. Bundle-of-rights analysis can facilitate this decision.

B. Commercial Databases

Commercial entities routinely mine and collect the information available about individuals in cyberspace and assemble that information into databases. That information, often collected secretly, is sold, *inter alia*, to advertisers who can use the information to more directly target messages to their customers or to other entities that can profit from the information.²⁵³ Because the information in databases can be quite sensitive, and because its disclosure can be quite harmful (think of negative credit scores), the ownership of the data in databases can be important.²⁵⁴ Because the effort to collect and compile information can be substantial and costly, the question of the ownership of the compilations themselves is also of notable interest.²⁵⁵

As with EHRs, proposals for propertizing databases or of the information therein are problematic. The United States Supreme Court has held that facts and compilations of facts lack originality and,

N.Y. PUB. HEALTH LAW § 18(2).

252. I do not mean to suggest that where a bundle analysis reveals complexity, property interests cannot be recognized. The point is only that the granular analysis that the bundle conceptualization produces may lead to the identification of facts or values better encompassed by other areas of law.

253. Vivid accounts of the general process of data collection can be found in DANIEL SOLOVE, *THE DIGITAL PERSON* 13–26 (2004) and Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1198–99 (1998).

254. See Schwartz, *supra* note 244, at 2057 (“[A] strong conception of personal data as a commodity is emerging in the United States, and individual Americans are already participating in the commodification of their personal data.”).

255. See J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51 (1997) (tracing legal protections for noncopyrightable databases and examining alternative regimes to protect investors in information goods).

therefore, are not copyrightable.²⁵⁶ Since databases require no invention and are not business secrets, the other two major categories of intellectual property law—patents and trade secrets—also seem inapposite. While the European Union has enacted a statute that comprehensively regulates databases,²⁵⁷ the US Congress has consistently declined to pass legislation that would protect databases as a new or *sui generis* form of intellectual property.²⁵⁸

Without attempting full discussion of the law of databases, it is possible to identify some common features relevant to databases' potential propertization. For one thing, multiple parties contribute to the creation of a database asset. Consider, for example, data aggregators who create detailed profiles of individuals by following individuals' traffic on the Internet, use of ATMs, EZ Pass tolls, and the like.²⁵⁹ The individual being "dataveilled" produces the pieces of information of interest (mouse clicks, bank withdrawals, credit card purchases), but the data collector, who aggregates the data, produces a profile that pulls those pieces together. It is the combined contributions of the individual and the aggregator that make the information a commodifiable asset, but the parties do not work in concert. Indeed, as privacy advocates note, in many cases the individual is unaware that his or her information is being collected at all.²⁶⁰

In this situation, we could give to one or the other party the sole right to deal with the compiled information; such a right would look like the classic consolidated right to exclude. Some scholars argue that the current legal regime already gives aggregators this power to exclusively control the commodity value of collected information.²⁶¹ But it is possible to imagine a system that would recognize the independent contributions of the parties by giving both individuals and aggregators rights with respect to compilations of personal information. In other words, we might give individuals some "sticks" in the property bundle—perhaps the right to be notified of data collection, the power to

256. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

257. Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L77/20, 27 March 1996. For a description of the Directive and comparisons to other regimes of legal protection, see ESTELLE DERCLAYE, *THE LEGAL PROTECTION OF DATABASES: A COMPARATIVE ANALYSIS* (2008), and MARK J. DAVISON, *THE LEGAL PROTECTION OF DATABASES* (2003).

258. See Daniel J. Gervais, *The Protection of Databases*, 82 CHI.-KENT L. REV. 1109, 1139–40 (2007).

259. See SOLOVE, *supra* note 253, at 13–26.

260. *Id.*

261. Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1391 (2000) ("Thus far, whether deliberately or by oversight, we have constructed data processing systems that do not involve the individual in decision-making about the uses of data collected by the system.").

withhold information, or the right to be paid a fee for the use of that information—while giving other “sticks” to the data aggregator.

The bundle-of-rights metaphor is helpful in this context precisely because it heightens attention to the possibility of divided, but shared, rights. It invites specification of exactly how those rights should be shared, a question that will require a variety of judgments about, *inter alia*, the quality of the relationship between individuals and those who collect data about them, as well as the circumstances under, and the degree to which, it is appropriate to commodify personal information at all.²⁶² Lifting the secrecy relating to data collection and forcing facts forward will help inform these judgments. Perhaps when all the facts are in, the conclusion will be that it is not feasible to give individuals effective rights in the personal information collected about them. If so, then they should not be given any property “sticks” at all and, as now, aggregators will retain exclusive control rights. Bundle-of-rights analysis does not mandate that, in every instance, rights should be shared, only that the possibility of division and sharing be considered.

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Neither of the assets examined in this Part necessarily qualifies as “property,” if what we mean by property is in rem exclusion rights consolidated in a single owner and good against the world. The examples raise the question *whether* property rights necessarily have those qualities under all circumstances. In both of the examined assets, it is possible to imagine giving individuals some, but not unlimited, powers over their health information and their data. Bundle-of-rights analysis can help highlight these divisions and limitations and, in so doing, force more clarity about what it means to assign the label “property” to an asset or to the control of that asset.

It is possible to imagine many other assets similar to the two examined here that also involve unconsolidated, divided, and shared rights. One example involves the rights of celebrities to their “personae.”²⁶³ Another involves the rights of individuals to patented cell lines and other products derived from the individuals’ tissues, a problem famously discussed in *Moore v. Regents of the University of California*.²⁶⁴ The work of the bundle-of-rights analysis in these cases, in which multiple parties contribute to the creation of the asset, is to help us work out the limits of each party’s powers by specifying more clearly

262. On the commodification of personal information, see Baron, *supra* note 239, at 390–409.

263. On the right of publicity as a property right, see J. THOMAS MCCARTHY, 1 THE RIGHTS OF PUBLICITY AND PRIVACY 12 (2d ed. 2011).

264. *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990).

the variety of actors who might have or be affected by the powers in question, the relationships those powers might foster or construct, and the alternative possibilities available. Where we are unsatisfied with our ability to construct workable limits, we may decide that a property frame is inappropriate. Bundle-of-rights analysis does not commit us either to propertization or nonpropertization of these difficult-to-categorize assets. It commits us only to clarity about the choices that must be made.

V. CONCLUSION

For a very long time, property has been conceptualized as a bundle of rights. This Article argues that the current revolt against this conceptualization rests on contestable stories of the origin, development, and political valence of the idea that property is a bundle of rights. Thinking about property as a bundle of rights, this Article argues, can be helpful across a variety of dimensions: forcing specification of interconnected rights, powers, privileges, and liabilities; highlighting the choices implicit in any given configuration of property rights; focusing on the relationships property entails; and forcing factual information forward.

Recognizing the utility of the bundle-of-rights conceptualization does not preclude thinking about property as a “law of things,” especially if “things” are defined broadly—to include intangibles, for example, as well as tangibles. Sometimes it is helpful—and perhaps intuitive—to focus on the “thingness” of property.²⁶⁵ We experience property in terms of things in some instances. But there are aspects of property ownership that the “thing” metaphor does not adequately describe: the way in which interests can be divided and shared, and the way in which property constructs relationships between persons. The bundle-of-rights metaphor has been useful in capturing these aspects of property, and is likely to remain so, especially with respect to emerging forms of assets that are not easily assimilated into the model of single-person ownership protected by in rem exclusion rights.

It is worth considering, especially in light of the development of these new asset forms, whether property will remain a viable legal category, whether it will “disintegrate,” as Grey suggested, or whether it will be swallowed up by the law of privacy or of intellectual property. But the viability of property will not be determined by the metaphors in which we describe it. We have nothing to fear—and much to gain—from the

265. Heller, *supra* note 20, at 1193. See also Michael J. Madison, *Law as Design: Objects, Concepts, and Visual Things*, 56 CASE W. RES. L. REV. 381 (2005) (arguing that, although human relationships matter to the design of law, things matter also).

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bundle-of-rights conceptualization.