

2017

# The Essential Structure of Property Law

James Y. Stern

*William & Mary Law School*, [jystern@wm.edu](mailto:jystern@wm.edu)

---

## Repository Citation

Stern, James Y., "The Essential Structure of Property Law" (2017). *Faculty Publications*. 1844.  
<http://scholarship.law.wm.edu/facpubs/1844>

## THE ESSENTIAL STRUCTURE OF PROPERTY LAW

James Y. Stern\*

*This Article examines a characteristic of property entitlements fundamental to the structure of property systems that has received scant academic attention, a characteristic referred to as the mutual exclusivity principle. According to this principle, a property system does not allow for the existence of incompatible rights. Two people cannot separately be the owners of the same resource, for instance. By contrast, two people can each hold valid but contradictory contract rights to the resource. Although the existing property literature has stressed the “exclusive” nature of property, the various ways in which property is imagined to be exclusive, such as by conferring “rights to exclude,” fail to capture the essence of property as a distinct legal institution. Unlike these alternative conceptions of exclusiveness, the mutual exclusivity principle holds true across the range of different types of property entitlements, including not just fee simple ownership but also security interests and servitudes, and across the range of assets subject to property law, including not just land and physical objects but also intangibles like intellectual property and corporate shares.*

*Recognizing the role of the mutual exclusivity principle yields a number of practical insights. It helps explain various institutional features of property law, such as the system of future interests, the use of possession-based rules, the role of recording systems, and the negative, thing-based structure of property entitlements. It illuminates connections between property and other fields like corporations law and it calls into question aspects of existing doctrine, such as the preferred status of exclusion rights under the U.S. Constitution’s Takings Clause. It also modifies the influential theory that property law is heavily shaped by problems of high information costs: while existing accounts seem to suppose that property law entails relatively high information costs because it imposes a relatively broad set of duties on others, many of the information cost problems identified in the literature actually result from the mutual exclusivity problem, rather than from the breadth of property duties.*

*At a more general level, understanding the centrality of the mutual exclusivity principle suggests some change in direction is called for within the wider property literature. American property scholarship has been preoccupied with questions about the scope and strength of property rights, overlooking the separate problem of ascertaining who happens to hold a given right, a problem distinctive to property law. Property, this Article argues, is at least as much about title chains, patent searches, and creditor priorities as it is about trespass, remedies, and eminent domain.*

---

\* Associate Professor, William & Mary Law School. For their helpful comments, I am grateful to Vladimir Atanasov, Will Baude, Lynda Butler, Jud Campbell, Nate Chapman, Chris Essert, Michael Green, Andrew Gold, Tara Grove, Dmitry Karshtedt, Greg Keating, Brian Lee, Hal Lloyd, Irina Manta, Robert Miller, Chris Newman, Tom McSweeney, Tom Merrill, Nate Oman, Henry Smith, Jay Thomas, Andrew Verstein, Katrina Wyman, and participants in the faculty workshop at Wake Forest and the Association for Law, Property, and Society 2014

## TABLE OF CONTENTS

INTRODUCTION .....	1169
I. THE SENSE OF EXCLUSIVITY .....	1174
A. <i>Prevailing Notions</i> .....	1174
B. <i>The Mutual Exclusivity Principle</i> .....	1178
II. THE PRIMACY OF MUTUAL EXCLUSIVITY .....	1184
A. <i>Standard Property Paradigms</i> .....	1184
1. Security Interests .....	1185
2. Future Interests .....	1186
3. Servitudes and Easements .....	1188
4. IP and Other Intangibles .....	1189
B. <i>The Reality of Property: Trespass Versus Title</i> .....	1192
C. <i>Objections</i> .....	1196
III. UNDERSTANDING PROPERTY .....	1200
A. <i>Identifying Property</i> .....	1201
B. <i>Mechanics and Doctrine</i> .....	1204
1. Possession, Delivery, and Certification .....	1204
2. Recording and Registration .....	1205
3. Things and Negative Rights .....	1206
C. <i>The Information Cost Thesis</i> .....	1208
CONCLUSION .....	1212

## INTRODUCTION

Two people cannot both be complete owners of the same thing: if Amy owns Blackacre, then Bob does not, and vice versa. This statement requires some clarification. Amy and Bob can certainly be co-owners, with each holding what is effectively a 50 percent share of the property. Such divisions are sometimes described by saying that each co-owner holds an “undivided” interest in the property, but that is just a way of expressing the notion that both owners have equal rights in the asset they jointly own.<sup>1</sup> It does not mean that each holds a separate ownership, unencumbered by the other’s interest. It simply isn’t possible for Amy and Bob both to own 100 percent of Blackacre individually, independent of one another. That would be absurd.

It may take a moment to absorb this idea—precisely because it is so obvious—but it is fundamental to the structure of property law. Suppose, for instance, that Blackacre was originally owned by Olivia and that Olivia made separate contracts to sell Blackacre, one with Amy and one with Bob. As far as contract law is concerned, it is altogether possible that both contracts are valid and binding.<sup>2</sup> If Olivia then conveys the property to Amy, she

---

annual meeting. Additional thanks go to the William & Mary deanery for supporting the William & Mary Private Law Theory Workshop. Any errors are mine exclusively.

1. See JESSE DUKEMINIER ET AL., PROPERTY 343 (8th ed. 2014); Note, *Creation of Joint Tenancies*, 23 HARV. L. REV. 214, 214–15 (1910). It may also be a way of describing rights of survivorship.

2. See *infra* notes 52–54.

will be liable to a suit by Bob for breach of contract; if she conveys to Bob, she will be liable to a suit by Amy. In contract law, rights to Blackacre can be multiplied. In property law, however, they cannot. It simply isn't possible for Olivia to convey separate and independent ownerships to both Amy and Bob. Why not? Because that's just how the concept of property works.

The example just given illustrates what this Article will call the *mutual exclusivity principle* in property law, a core attribute of property that to date has received little attention, or even recognition, from scholars. The mutual exclusivity principle holds that if one person's property right is legally valid, no one else can hold valid a property right that contradicts it. The concept of a property system does not allow for the coexistence of rights with mutually exclusive content. It is structured as a kind of zero-sum game, in which the validity of one right necessarily means other incompatible property rights cannot also be valid.<sup>3</sup> This is true not only for ownership rights but for all rights classified as property.

Appreciating the mutual exclusivity principle helps reshape debates about the idea of property and the role that property plays within a larger legal system. The last decade has seen a proliferation of interest in the theoretical underpinnings of private law, and especially of property.<sup>4</sup> In particular, scholars have sought to understand the formal structure of property and the features that distinguish property from other branches of law, like contract—what are referred to as questions of “essentialism” in property law. Without a doubt, the overwhelming focus of attention in this sometimes-contentious debate has been the supposedly exclusive character of property.<sup>5</sup>

---

3. Sometimes this means a claim will receive no legal recognition whatever. If *O* purports to sell the same sculpture to *A* and to *B*, only one will get an enforceable right. Supposing the right goes to *A* and *A* then dies intestate and without heirs, for instance, the sculpture will escheat to the state, rather than shift to *B*. *B* has no trace of a legal right. In other situations, however, the losing claim will simply be reconfigured so as not to conflict with the winning one, as when one security interest is subordinated to a prior, recorded interest. The right is recognized, but only to the extent it does not conflict with the superior interest. Actual conflict is disallowed. *See, e.g.*, U.C.C. § 9-322(a)(1) (AM LAW INST. & UNIF. LAW COMM'N 2014).

4. *See, e.g.*, Symposium, *New Dimensions in Property Theory*, 160 U. PA. L. REV. 1853 (2012); Symposium, *The New Private Law*, 125 HARV. L. REV. 1640 (2012).

5. *See, e.g.*, HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* (2011); J.W. HARRIS, *PROPERTY AND JUSTICE* (1996); BEN MCFARLANE, *THE STRUCTURE OF PROPERTY LAW* 132–204 (2008); J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* (1997); LAURA S. UNDERKUFELER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 89–90 (2003); Shyamkrishna Balganes, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593 (2008); Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 597–600 (2005); Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 873 (2013); Christopher Essert, *Property in Licences and the Law of Things*, 59 MCGILL L.J. 559 (2014); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275 (2008); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 740–52 (1998); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 789–99 (2001) [hereinafter Merrill & Smith, *The Property/Contract Interface*]; Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 379–403 (2003); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1704–05 (2012); Eric R. Claeys, *Property 101: Is Property a*

It is widely thought that property often has something to do with exclusiveness, and the question is just how important exclusiveness is to its structure and operation.

Commentators understand this exclusivity quite differently, however,<sup>6</sup> and differences between competing understandings are often overlooked.<sup>7</sup> Sometimes exclusivity is thought of as a matter of absolute control over an individual resource,<sup>8</sup> sometimes as a matter of rights to exclude others,<sup>9</sup> sometimes as a private domain of independent decisionmaking.<sup>10</sup> These competing versions of exclusivity ultimately give rise to different understandings of what property is and does, which can have important practical

---

*Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617 (2009) (book review); Francisco J. Morales, Comment, *The Property Matrix: An Analytical Tool to Answer the Question, "Is This Property?"*, 161 U. PA. L. REV. 1125, 1129 (2013).

6. The exclusive character of property is described in a variety of different linguistic formulations. See, e.g., *Dickman v. Comm'r*, 465 U.S. 330, 336 (1984) ("the right to use [a] physical thing to the exclusion of others" (quoting *Passailaigue v. United States*, 224 F. Supp. 682, 686 (M.D. Ga. 1963))); *Property*, BLACK'S LAW DICTIONARY (6th ed. 1990) ("exclusive right"); 1 F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY* 107 (1973) (a form of control from which "all others are excluded"); JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* 218 (W.J. Ashley ed., Longman, Green & Co. 1929) (1848) (a right of "exclusive disposal"); PENNER, *supra* note 5, at 103 (a "right of exclusive use"); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 39 (9th ed. 2014) ("rights to the exclusive use of valuable resources"); Armen A. Alchian, *Property Rights*, in *THE CONCISE ENCYCLOPEDIA OF ECONOMICS* 422 (David R. Henderson ed., 2008) ("exclusive authority").

7. For an example of the three notions of exclusivity identified in this Article running together, see Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 604 (1998) (remarking that Blackstone's unqualified depiction of ownership has proven powerful because rights to exclude suggest a "property owner has a small domain of complete mastery, complete self-direction, and complete protection from the whims of others").

8. This view is associated with Blackstone's famous description of property as "sole and despotic dominion." 2 WILLIAM BLACKSTONE, *COMMENTARIES* \*2.

9. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994) ("[T]he right to exclude others[is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979))); *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("An essential element of individual property is the legal right to exclude others from enjoying it."); JOSEPH WILLIAM SINGER ET AL., *PROPERTY LAW: RULES, POLICIES, AND PRACTICES*, at xxxiii (6th ed. 2014) ("It is often said that the most fundamental right associated with property ownership is the right to exclude non-owners from the property."); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (PAPERS & PROC.) 347, 354 (1967) ("Private ownership implies that the community recognizes the right of the owner to exclude others from exercising the owner's private rights."); Merrill, *supra* note 5, at 730 ("[T]he right to exclude others is more than just 'one of the most essential' constituents of property—it is the *sine qua non*." (quoting *Kaiser Aetna*, 444 U.S. at 176)).

10. Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379, 1422 (2010) ("[T]he landowner enjoys a domain of free use and enjoyment exclusive of outside interference."); see also Eric R. Claeys, *Exclusion and Private Law Theory: A Comment on Property as the Law of Things*, 125 HARV. L. REV. F. 133, 143 (2012) [hereinafter Claeys, *Exclusion and Private Law Theory*], [http://harvardlawreview.org/wp-content/uploads/pdfs/forvol125\\_claeys.pdf](http://harvardlawreview.org/wp-content/uploads/pdfs/forvol125_claeys.pdf) [<https://perma.cc/6XFQ-Q5U7>].

implications. To give one example, federal copyright law, echoing the language of the Constitution's "Intellectual Property Clause,"<sup>11</sup> grants copyright holders various "exclusive rights" in their creations,<sup>12</sup> while patent law grants patent holders the "right to exclude."<sup>13</sup> Are these the same thing?<sup>14</sup> And do these forms of exclusivity mean copyrights and patents should be treated as property rights?<sup>15</sup>

Despite its importance and the attention it has received from scholars, exclusivity in property law remains poorly understood. The prevailing understandings of its exclusive character all overlook the most fundamental element of exclusivity in property law, the mutual exclusivity principle—though the principle seems to be an assumption that they each depend upon and take for granted. This Article argues that the mutual exclusivity principle is one of the critical conceptual lynchpins that hold the institution of property together and reflects the most basic functional concerns that animate it. In contrast to the sorts of exclusivity discussed in the existing literature, the mutual exclusivity principle holds true for property entitlements of all kinds, not just fee simple ownership, and it effectively describes the boundary that distinguishes property rights from rights not considered to be property. Other exclusivity-based accounts of property are generally unable to explain what is exclusive about entitlements like a security interest or ownership of an assignable debt claim, much less why these are classified as property entitlements.

The thesis of this Article is not normative but descriptive and conceptual. It seeks to understand property from the inside, partly because this is a valuable perspective in its own right but also because a richer understanding

---

11. U.S. CONST. art. I, § 8, cl. 8; *see also* Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1068 (2001) (expressing regret that "[t]he 'exclusive rights' clause has become the 'intellectual property' clause").

12. 17 U.S.C. § 106 (2012).

13. 35 U.S.C. § 154(a)(1) (2012).

14. No, according to Judge Giles Rich, a major figure in the development of modern American patent law: "[T]he Patent Act of 1952—enacted 47 years ago—changed the wording of the grant from 'exclusive right' to 'right to exclude others.' Your readers may think the distinction unimportant, but it *is* important because it often affects legal reasoning." Janice M. Mueller, *An Interview with Judge Giles S. Rich*, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 9 FED. CIR. B.J. 75, 77 (1999); *cf.* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 392 (2006) ("Like a patent owner, a copyright holder possesses 'the right to exclude others from using his property.'" (quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932))).

15. *Compare* Bloomer v. McQuewan, 55 U.S. 539, 549 (1852) ("The franchise which the patent grants, consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee. This is all that he obtains by the patent."), *and* ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, PATENT LAW AND POLICY: CASES AND MATERIALS 49 (6th ed. 2013) ("Unlike other forms of property, however, a patent includes only the right to exclude and nothing else." (emphasis omitted)), *with* Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 112 (1990) ("[A] right to exclude in intellectual property is no different in principle from the right to exclude in physical property.").

of the formal architecture of property is necessary for any sophisticated analysis of the institution, whether functional or normative. Before we can evaluate property in its various manifestations, we must first understand how it works, and in many ways its conceptual structure remains hidden in plain sight.

Recognizing the mutually exclusive structure of property rights gives us a better grasp of property in a number of ways. It sheds light on the origin of a variety of distinctive doctrinal and institutional features in property law, such as the system of future estates, titling mechanisms and recording procedures, reliance on possession, and the use of rights in individual “things” to organize property law. The mutual exclusivity principle also provides guidance in areas of law in which a test to distinguish between property and other legal relationships is needed; it also calls into question the apparent premises behind various doctrines affecting property, such as the rules concerning “per se” takings under the Takings Clause.

A clearer appreciation of the mutual exclusivity principle also suggests shifts in the wider landscape of property theory. In particular, it offers a friendly corrective to accounts of property that stress the role of information costs. The information cost perspective, which has dominated much recent scholarship on property, starts from the premise that it is generally harder to communicate the content of property entitlements than other kinds of legal rights because property entitlements bind a relatively large set of people; in consequence, the argument goes, property is often formalistic and rigid because relatively blunt rules can make it easier for individuals to determine how the system requires them to behave.<sup>16</sup> Yet the most serious information costs faced in property law often stem not from difficulties in ascertaining the content of the duties property imposes on strangers but from difficulties in figuring out who holds a given property entitlement—the problem of determining which of two asserted claims will prevail since their contradictory content means one of them must fail. For the most part, it is these sorts of issues that many of the relatively formal features of property law identified in information cost accounts—most famously the tendency to standardize property rights—can be said to address.<sup>17</sup>

---

16. The classic account is given in Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 31–34 (2000) [hereinafter Merrill & Smith, *Optimal Standardization*]. See also Smith, *supra* note 5, at 1706–07; Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1160 (2003).

The role of informational burdens faced by property institutions has been explored by others, both before and after Merrill and Smith began their collaboration. See, e.g., Clarisa Long, *Information Costs in Patent and Copyright*, 90 VA. L. REV. 465, 476–82 (2004); Peter S. Menell & Michael J. Meurer, *Notice Failure and Notice Externalities*, 5 J. LEGAL ANALYSIS 1, 26–29 (2013); Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 893–900 (2008). See generally Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83 (1989); Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985).

17. See, e.g., Merrill & Smith, *Optimal Standardization*, *supra* note 16 (discussing standardization of property forms).

The mutual exclusivity principle is at once obvious and hard to see, but neither of these excuses lack of attention to it. Property scholarship today gives inordinate attention to questions concerning the scope of rights against outsiders—questions like the proper limits of an owner’s right to exclude, the choice between injunctive and damages remedies, and the appropriateness of Takings Clause protection, to give a few examples.<sup>18</sup> But much of property law is concerned not with the strength of a given entitlement but with determining who happens to hold it. This is not to deny questions about access and exclusion a central role in the story of property law. But it is to recover at least equally central problems like title contests and priority disputes. When we picture property, we should have these kinds of proceedings in mind no less than trespass or nuisance suits. Titling issues reflect the core task that property law performs in determining who has claims on external things bearing no intrinsic connection to any person in particular. And they arise from the fact that property rights are governed by the mutual exclusivity principle, which makes it impossible for two people with otherwise compelling claims upon an asset each to receive property rights to it when those rights are incompatible.

The Article proceeds as follows: Part I first surveys three principal ways in which exclusivity is understood within current debates about property and then introduces the mutual exclusivity principle. Part II demonstrates the primacy of mutual exclusivity, showing how it is crucial to distinguishing a variety of different types of property holding from other types of legal relationships, in contrast to rival accounts of exclusivity in property. Part III identifies a number of implications for scholarship of property law, calling attention to its effect in shaping property doctrines and suggesting ways in which recognition of its role alters understandings of property more broadly.

## I. THE SENSE OF EXCLUSIVITY

### A. *Prevailing Notions*

To understand the significance of the mutual exclusivity principle, it is useful to begin with a brief sketch of the different accounts commentators have given of property, with special emphasis on the way in which they have understood property to be “exclusive.”<sup>19</sup> While many theorists accept that there is an important sense in which property involves some sort of exclusivity, discussions of property invoke rather different notions of what this exclusivity entails, often without realizing it.

The first and simplest of these imagines that a property entitlement gives a single person undivided control over a given resource, concentrating

---

18. See *infra* notes 55–59 and accompanying text.

19. Cf. Balganesch, *supra* note 5, at 596 (“The idea of exclusion, in one form or the other, tends to inform almost *any* understanding of property . . . .”)



authority “in a one-person, one-resource fashion.”<sup>20</sup> We may call this the *Blackstonian conception*, consistent with Blackstone’s famous reference to property as “sole and despotic dominion which *one man* claims and exercises.”<sup>21</sup> While this view does appear to ground a good deal of thinking about property law,<sup>22</sup> the Blackstonian conception is exaggerated at best, as those who invoke it undoubtedly understand.<sup>23</sup> Rights to resources can be jointly held by multiple people or divided in all sorts of different ways. Think of leaseholds, bailments, security interests, and trusts, to name just a few. As a kind of ideal type, the Blackstonian conception may be useful in understanding ownership, but it has little to say about the variety of ways in which rights in resources are commonly divided among a variety of different stakeholders.<sup>24</sup>

A second view of property centers on the “right to exclude,” said by the U.S. Supreme Court to be “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”<sup>25</sup> In contrast to the Blackstonian understanding, which centers on the concentration and scope of property rights, this *exclusion conception* locates the exclusive character of property in the way the duties imposed by those rights are defined.<sup>26</sup> The conduct that a property right regulates is described in terms of an objective boundary, such as a plane of space, that duty bearers are forbidden to cross. Those boundaries originate in some external “thing” from which the person

---

20. Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061, 2095 (2012); see also *Dow v. Gould & Curry Silver Mining Co.*, 31 Cal. 629, 637–38 (1867) (endorsing the view that property gives the owner “the right to enjoy and dispose of certain things in the most absolute manner, as he pleases, provided he makes no use of them prohibited by law” (quoting 2 JOHN BOUVIER, A LAW DICTIONARY 394 (Philadelphia, George W. Childs 1864))); *Salt Lake City v. E. Jordan Irr. Co.*, 121 P. 592, 604 (Utah 1911) (Straup, J., dissenting) (“[Any proprietor] has the right to an exclusive possession of its property, to the sole right to use, to enjoy, to control, and to dispose of it.”).

21. 2 BLACKSTONE, *supra* note 8, at \*2 (emphasis added).

22. See, e.g., Demsetz, *supra* note 9, at 355–57; Merrill, *supra* note 20, at 2095; cf. Richard A. Epstein, *Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase*, 36 J.L. & ECON. 553, 557 (1993).

23. See Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 361 (2001) [hereinafter Merrill & Smith, *What Happened*]; see also David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQUIRIES L. 103, 106–17 (2009).

24. See Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1002 (2004) (arguing that Blackstone’s depiction of property “does describe the strong default package of rights emerging from the exclusion strategy,” which helps to save “much delineation cost”).

25. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); see also Balganesch, *supra* note 5, at 628; Merrill, *supra* note 5, at 730 (calling the right to exclude property’s “*sine qua non*”).

26. See Balganesch, *supra* note 5, at 628 (“[The right to exclude] ought to be understood as doing little more than stipulating that *others* are placed under a correlative duty to exclude themselves from performing those activities in relation to the identified resource.”).

subject to such a duty can be said to be excluded.<sup>27</sup> The right to exclude, in short, is the right to deny someone else access to a thing.<sup>28</sup> To be clear, this doesn't mean all access by all people. It is true that discussions of the exclusion conception often combine it with a Blackstonian sensibility, implicitly assuming that the right to exclude is relatively unqualified both in the range of people it entitles the right holder to exclude and in the circumstances in which they may be excluded.<sup>29</sup> But the two notions of exclusion are conceptually distinct. A right to exclude does not have to be at all absolute.<sup>30</sup> As Thomas Merrill, perhaps the leading proponent of the exclusion conception puts it, "[T]o the extent one has the right to exclude, then one has property," but property does not "require[ ] a certain quantum of exclusion rights."<sup>31</sup> Property entitlements can be bigger or smaller, stronger or weaker. The right to exclude simply provides the measure of their size and strength.

The third major understanding of exclusivity downplays the notion of trespass and boundary crossing central to the exclusion conception and instead looks at property rights as a matter of protection against interference. This view, which I will refer to as the *shielding conception*,<sup>32</sup> imagines that

---

27. See Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1862 (2007) ("The right to exclude directs us to very simple signals of boundary crossing, in a nonreciprocal fashion.").

28. Gideon Parchomovsky & Alex Stein, *Reconceptualizing Trespass*, 103 NW. U. L. REV. 1823, 1828–29 (2009) ("[The right to exclude] empowers the owner to prevent others from using, occupying, or taking her property.").

29. There is also a tendency to conflate the right to exclude with strong "property rule" remedies. See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). While the two may reinforce each other or serve a common purpose, see Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1754–74 (2004), they are nevertheless conceptually distinct, see Balganes, *supra* note 5, at 599–600, 607–09; see also eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 392 (2006).

30. See, e.g., John F. Duffy, *Rethinking the Prospect Theory of Patents*, 71 U. CHI. L. REV. 439, 458 (2004) ("A patent confers 'exclusive' rights in the sense that it confers the right to exclude, but it does not give the sole right to exclude." (emphasis omitted)). There may nevertheless be some connection between the right to exclude and its scope. When the right is made more fine-grained, some of the advantages of exclusion (i.e., of using thing-boundaries to define rights) may be undermined. See Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S454–55 (2002). The right to exclude will always be subject to limitations, however, which is to say that reliance on boundary-crossings alone is not realistic. See *id.* at S454–55, S470. From the standpoint of information costs, the real issue isn't how substantial limits on the right are but how easily they are communicated.

31. Merrill, *supra* note 5, at 753.

32. The term is meant to draw a parallel with the so-called shielding thesis about legal rights more generally. See H.L.A. HART, *Legal Rights*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 162, 171 (1982); Matthew H. Kramer, *Rights Without Trimmings*, in *A DEBATE OVER RIGHTS: PHILOSOPHICAL ENQUIRIES* 7, 11–13 (Matthew H. Kramer et al. eds., 1998).

property begins with individual entitlements to use a resource, which property law then protects by requiring others to refrain from wrongfully interfering with that use.<sup>33</sup> If the core example of the exclusion conception is protection against trespass, the core example of the shielding view is protection against nuisance.<sup>34</sup>

There is some ambiguity about just what role exclusivity plays in the shielding conception. Broadly speaking, the shielding conception views property as exclusive because it elevates the position of those who hold property entitlements over those who do not.<sup>35</sup> In part, the shielding conception sees exclusivity in the simple fact that a property right<sup>36</sup> differentiates some people from others by conferring a special legal status upon them, quite apart from any consequences following from that status.<sup>37</sup> But the actual legal consequences often seem to be part of the story as well. The effect of property holding is that the law gives special normative weight to property holders in a variety of interrelated ways.<sup>38</sup> It grants a domain of authority, allowing the right holder to act according to her own designs and obliging others to conform to her decisions.<sup>39</sup> Exclusivity on this reading seems to have to do with the supremacy of those who hold rights in a particular item of property over those who do not. The interests and actions of the property holders take precedence and must be accommodated by nonholders.

---

33. See Larissa Katz, *The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law*, 55 MCGILL L.J. 47, 77 (2010) [hereinafter Katz, *The Moral Paradox*]. Proponents of the shielding conception tend to resist a purely formal characterization of property, arguing it leaves out important features. In particular, it is suggested that the use-right that property law seeks to protect through rights against outside interference is limited in ways internal to the law of property, such as productive activity or appropriately social behavior. See Larissa Katz, *Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right*, 122 YALE L.J. 1444, 1448–51 (2013) [hereinafter Katz, *Spite and Extortion*].

34. To be sure, proponents of the shielding view acknowledge that the law often relies on boundary-crossings to define rights, but they view this only as a matter of convenience, rather than a reflection of anything intrinsic to property as an institution. By the same token, exclusion theorists may see the protection of interests in use as the underlying purpose behind the right to exclude, but they view the use of boundaries as more central to what makes property “property.” See Smith, *supra* note 24, at 981; Henry E. Smith, Response, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 964 (2009).

35. More than the other two understandings of exclusivity, the shielding conception is a collection of different ideas, not a monolith, and grouping various accounts of property under this heading necessarily smooths over nuances and subtleties. See Katz, *supra* note 5, at 277–78.

36. Shielding accounts are often explicitly limited to ownership, rather than property holding more generally, but the basic concept can be borrowed for wider extension. See, e.g., *id.*

37. *Id.*

38. See, e.g., Mossoff, *supra* note 5, at 372–76 (discussing the “integrated unity” of the property rights of use and disposal).

39. See Claey's, *Exclusion and Private Law Theory*, *supra* note 10, at 143; Katz, *supra* note 5, at 290.

The Blackstonian, exclusion, and shielding conceptions thus describe the exclusive nature of property, and property itself, quite differently. The Blackstonian view stresses the concentration and breadth of rights over resources, the exclusion view focuses on the use of boundary-crossings to define duties on others, and the shielding view stresses the way in which property law distinguishes those who hold a property right from those who do not.

### B. *The Mutual Exclusivity Principle*

While each of these perspectives has its uses—and abuses—none of them captures the form of exclusivity most fundamental to the basic structure of property as a distinct legal concept. A property system generates “exclusive rights” in the sense that a valid property right precludes the possibility of any other property right that contradicts it. In this way, property law is organized according to what may be called the *mutual exclusivity principle*. The mutual exclusivity principle holds that a property system disallows the existence of multiple valid entitlements with mutually exclusive content.<sup>40</sup> This is a statement about property, not a definition of it, but any definition omitting this characteristic would miss something essential.<sup>41</sup>

The mutual exclusivity principle applies to other types of property entitlements besides ownership rights, but ownership offers a clear example and a useful starting point. Suppose, for instance, Jolyon draws up a will in which he seeks to dispose of a house he owns called Robin Hill. In the will, however, Jolyon inadvertently includes two separate provisions, one leaving the property to his wife Irene and another to his son Jon. A court tasked with interpreting the will can side with Irene or it could side with Jon. It can even divide rights in the property among them, though in practice it is unlikely to do so. What the court cannot do, however, consistent with the internal logic of property law, is make Irene and Jon each the complete owner of the entire property in the sense that Jolyon was.<sup>42</sup> It cannot create two separate and complete ownerships. Title to the property can be divided and subdivided, but it cannot be multiplied.<sup>43</sup>

Hints of this idea abound in discussions of property but are easy to overlook amid talk about property as a right to exclude or a right of exclusive use.<sup>44</sup> As one nineteenth-century attorney emphasized in a successful

---

40. I am tempted to say that property entitlements are compossible, except that I want to avoid any suggestion that the argument here rests on acceptance of one position in the so-called specification debate among rights theorists, on which see *infra* note 62.

41. I would say that it is a necessary but not a sufficient condition, but I do not want to give the impression that it operates like a law of physics or an axiom of deductive logic.

42. *E.g.*, *Bacon v. Nichols*, 105 P. 1082, 1082–83 (Colo. 1909) (finding that estate should be split between two parties rather than making both parties complete owners); *Covert v. Sebern*, 35 N.W. 636, 637 (Iowa 1887) (finding that estate should be split in face of conflicting clauses); *Estate of Blount v. Papps*, 611 So. 2d 862, 863 (Miss. 1992) (finding in favor of one party in an ambiguous will instead of making both parties complete owners).

43. See *McFarlane*, *supra* note 5, at 16–23.

44. *Cf.* *Posner*, *supra* note 6, at 40 (stating that private property creates proper incentives “by parceling out mutually exclusive rights to the use of particular resources”).

argument before the Mississippi Supreme Court, “There cannot be two independent owners of the same property,” for to multiply property rights in the same asset “would be inconsistent with the idea of property: property being the *exclusive* right of possessing, enjoying, and disposing of a thing.”<sup>45</sup> It is easy to misread such statements as expressions of the kind of hyperbolic, Blackstonian view of property described earlier.<sup>46</sup> But the remark wasn’t meant to suggest that it is impossible for a property right to be held jointly by two people or for two people to hold different rights in a single asset. Such arrangements effectively divide the larger right or collection of rights between the joint right holders.<sup>47</sup> What the statement meant is that there cannot be two *separate ownerships* of Blackacre.<sup>48</sup> The proposition is so fundamental that it usually goes without saying, but it pervades the judicial business of property law. As the Louisiana Supreme Court explained nearly two centuries ago, “[T]here cannot be two owners for the same thing[.] Joint ownership indeed, when several persons have a right to claim portions of a thing the law recognises, and the mind readily conceives, but the moment one person is made entire owner, no other person can be held such.”<sup>49</sup>

Perhaps this seems self-evident. In a sense, it ought to be. Property is an everyday institution and this principle is written into its DNA. The idea should be second nature.<sup>50</sup> But it is not the only arrangement we can imagine, or indeed, the only arrangement the law ever adopts. Most obviously,

45. *Olive v. Walton*, 33 Miss. 103, 109 (1857) (emphasis added).

46. See *supra* notes 21–24 and accompanying text. In fact, Blackstone himself may be somewhat misunderstood. When Blackstone described property as dominion claimed over external things “in total exclusion of the right of any other individual in the universe,” 2 BLACKSTONE, *supra* note 8, at \*2 (emphasis added), he may also have had in mind not simply the caricatured view of property as absolute dominion described earlier but the way one property right rules out contradictory ones. There may be a hint of this idea as well in Locke’s influential account of property. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 27, at 288 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (arguing that when a thing is removed by an individual from the “common state Nature placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other Men”).

47. Confusingly, this is spoken of as an “undivided” right in some contexts. See, e.g., *DUKEMINIER ET AL.*, *supra* note 1, at 343. Nevertheless, cotenancy is necessarily different from sole ownership. See *Foster v. Boch Indus., Inc.*, Civil No. 08–5093, 2009 WL 485407, at \*2 (W.D. Ark. Feb. 26, 2009) (“Full ownership and co-ownership are mutually exclusive . . .”).

48. *Olive*, 33 Miss. at 109.

49. *Hewes v. Pierce*, 1 Mart. (n.s.) 357, 362–63 (La. 1823); see also *Utah ex rel. Div. of Forestry, Fire & State Lands v. United States*, No. 2:97CV927K, 2005 WL 2087869, at \*4 (D. Utah Aug. 24, 2005), *aff’d*, 528 F.3d 712 (10th Cir. 2008); *Webster v. Foster*, 81 Mass. (15 Gray) 31, 34 (1860); *Boylan v. Kelly*, 36 N.J. Eq. 331, 335 (1882); cf. John Minor Wisdom, *A Trust Code in the Civil Law, Based on the Restatement and Uniform Acts: The Louisiana Trust Estates Act*, 13 TUL. L. REV. 70, 70 (1938) (discussing civil law resistance to the idea of separate legal and equitable ownership given principle that the same property cannot have two separate owners).

50. Cf. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 384 (1995) (“The most fundamental ‘super-schemas’ in the culture, by whatever name, are so pervasive and intrinsic to the conventions of thought that we are quite unaware of them.”).

the mutual exclusivity principle does not apply in contract law.<sup>51</sup> So, for example, if Jolyon had made separate contracts to sell Robin Hill to Irene and to Jon respectively, it is entirely possible both contracts would be legally valid.<sup>52</sup> Of course, Jolyon cannot transfer 100 percent property ownership to both of his promisees, given the mutual exclusivity principle that governs property entitlements. But so far as contract principles are concerned, Jolyon can create binding obligations to both Jon and Irene, giving rise to a suit for damages by either or both of them, even if they cannot both be awarded specific performance.<sup>53</sup> The conceptual structure of property is thus markedly different from contract.<sup>54</sup> Property establishes what contract rights themselves ordinarily cannot: priority of rights against third parties.

One way to understand this idea is in terms of traditional statements that property is an “in rem” right or a right that is “good against the world.”<sup>55</sup> This is commonly taken to mean that property imposes duties on all other legal actors—most obviously, a duty not to trespass.<sup>56</sup> In this sense, it is said that rights of bodily security are also “in rem” insofar as everyone owes a particular person certain duties not to cause that person physical harm by, say, punching the person in the nose.<sup>57</sup> But there is an altogether different sense in which property rights are good against the world or in rem. A right that imposes duties on only one person or that consists only of

---

51. In principle, tort law might be thought to be committed to the mutual exclusivity principle as well, but because tort rights tend to be personal to their holders, there is usually no dispute about the identity of the person whose rights are violated if a tort has indeed occurred, making it easier to ensure that the mutual exclusivity principle is satisfied, and as a result, it need not be taken as seriously and does not appear to exert as pronounced an effect on tort law’s institutional structure. See discussion *infra* notes 99–100.

52. See, e.g., *Energy Labs, Inc. v. Edwards Eng’g, Inc.*, No. 14 C 7444, 2015 WL 3504974, at \*4 (N.D. Ill. June 2, 2015) (defendant’s conflicting contractual obligations to third party do not excuse performance); see also RESTATEMENT OF CONTRACTS § 464(2) (AM. LAW INST. 1932) (“The right to damages of a promisee in a bargain who has been given ground by the promisor at the time of its formation to believe that the promisor has neither already made other bargains nor will make later bargains limiting his possibility of performing all his promises, is not diminished by such other bargains.”); RESTATEMENT (SECOND) OF TORTS § 773 (AM. LAW INST. 1979) (no tort action for interference with contract where one party seeks to compel performance of its contract even if this will result in breach of separate contract between promisor and a third party).

53. Much as if Jolyon had promised to sell an asset he didn’t own or that didn’t even exist. On the enforceability of such contracts, however, see RESTATEMENT (SECOND) OF CONTRACTS § 266 cmt. b, illus. 9 (AM. LAW INST. 1981).

54. See Michael B. Dorff, *Selling the Same Asset Twice: Towards a New Exception to Corporate Successor Liability Rules*, 73 TEMP. L. REV. 717, 719 (2000) (discussing conflicts involving noncompete clauses).

55. For now, I will treat these as synonymous, although the phrase “in rem” literally refers to a thing (res) as the focal point of the right, which “good against the world” does not.

56. See, e.g., PENNER, *supra* note 5, at 27–28.

57. See *id.* at 28.

the absence of any duty<sup>58</sup> can still be good against the world insofar as it defeats everyone else's contrary claims.<sup>59</sup> The right is in rem because it is legally applicable to everyone else, even if it does not purport to regulate their conduct.

It should be fairly apparent how the mutual exclusivity principle differs from the Blackstonian and exclusion conceptions discussed above. The mutual exclusivity principle is not a matter of entitlements being either broad in scope or imposing duties defined in terms of boundary-crossing. It may be harder to appreciate the difference between mutual exclusivity and the shielding conception, but the difference is important. The shielding view generally describes the nature of a property entitlement in terms of the relationship between owners and nonowners.<sup>60</sup> Nonowners are differentiated from and subordinated to owners in various ways, and nonowners can thus be said to be excluded from some normative status or power that owners enjoy.<sup>61</sup> But this understanding of exclusivity as a matter of legal have and have-nots doesn't speak to the possibility of rival, competing have: the notion at the heart of the shielding conception that nonowners must defer to owners leaves open the possibility that there are other owners with totally separate ownerships of their own. It is easy to take the absence of such rights for granted, precisely because it is so basic and universal a feature of property. But it is quite a different thing conceptually from exclusivity in the shielding sense and it reflects a different set of concerns. The paradigmatic problem from the standpoint of the shielding conception is nuisance—actions by one person that interfere with a property holder's plans for her property. The paradigmatic problem from the standpoint of the mutual exclusivity perspective is a title defect—someone else's rival claim to the same resource.

The argument that property rights are exclusive in this way isn't meant to suggest that property law consists in a kind of perfect and pure deductive logic.<sup>62</sup> Nor is it meant to imply that other branches of law are oblivious to

---

58. A privilege, rather than a claim-right, in the Hohfeldian framework. See Wesley Newcomb Hohfeld, *Some Fundamental Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32–33 (1914).

59. So, for example, there can be in rem privileges, not just in rem claim-rights. See *id.*

60. See Katz, *Spite and Extortion*, *supra* note 33, at 1450; Katz, *The Moral Paradox*, *supra* note 33, at 77.

61. See Katz, *supra* note 5, at 278; see also Katz, *Spite and Extortion*, *supra* note 33, at 1450 (describing the shielding conception with more generality); Katz, *The Moral Paradox*, *supra* note 33, at 77.

62. See Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1734 (1991); see also Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 604–05 (1988); cf. RONALD DWORKIN, *Is There Really No Right Answer in Hard Cases?*, in A MATTER OF PRINCIPLE 119 (1985) (articulating a version of the right-answer thesis). I also want to distinguish the claims here from those advanced in the so-called specification debate among theorists of rights. Compare Hillel Steiner, *The Structure of a Set of Compossible Rights*, 74 J. PHIL. 767 (1977), with JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS*, 79–104 (1990). Insofar as those theories pertain to the entire enterprise of rights holding and therefore suppose that what is

what has been called the law's "eternal triangles"—the problem of conflicting legal claims.<sup>63</sup> The mutual exclusivity principle is a general ordering precept in property, not a mathematical axiom or scientific law. It is one of the ideas that shapes the basic concept of property, but that does not mean that every question arising in property law raises interesting questions about the priority of rights (although priority questions often play an underappreciated background role, even when they aren't the center of attention).<sup>64</sup>

It also bears noting that while mutual exclusivity may generally make rule-like, bright-line legal doctrines more attractive, the concept of mutual exclusivity does not logically require them—that is, the mutual exclusivity principle is not a function of the ex ante clarity of the law in establishing which of two competing rights prevails. The idea is internal to the law and it is minimally present even if priorities are somewhat uncertain, so long as it is understood that contradictory property rights are out of order.<sup>65</sup> It may be unclear whether *A* or *B* is the true owner, but what is critical is that the concept of property still instructs that only one of them can be the true owner. The practical benefit of structuring entitlements according to the mutual exclusivity model may be undermined if rules to resolve the conflict are vague and uncertain, but the structure itself doesn't depend on their predictability.

Another cluster of related ideas that should not be confused with the mutual exclusivity principle has to do with rules governing the alienation of property. These include the notion that one person cannot sell or give away what belongs to another without the other's consent; that property rights "run with" an asset in the sense that the package of property rights in an asset does not grow or diminish when the package is transferred from one person to another;<sup>66</sup> and that contests between two or more people claiming rights in the same resource are resolved on the basis of a first-in-time rule (first to possess, first to record, first to file, first to the courthouse, etc.). All of these are symptoms of the mutual exclusivity principle but are nevertheless conceptually distinct, and though they tend to track it, the correlation is contingent and subject to exceptions.

---

true for property law is equally true for contract law, they necessarily mean something quite different from the idea about property advanced here.

63. See A. JAMES CASNER & W. BARTON LEACH, *CASES AND TEXT ON PROPERTY* 179 (1950); see also Menachem Mautner, "The Eternal Triangles of the Law": *Toward a Theory of Priorities in Conflicts Involving Remote Parties*, 90 MICH. L. REV. 95 (1991). Thus, for instance, the Federal Rules of Civil Procedure include various devices intended to address problems in which a party may owe conflicting duties to different parties. See James Y. Stern, *Property, Exclusivity, and Jurisdiction*, 100 VA. L. REV. 111, 174–75 (2014).

64. See *infra* Section III.C (discussing *numerus clausus* idea).

65. There are limits, of course, as there would be for almost any claim about how legal doctrine operates if the law were entirely indeterminate.

66. In other words, successive holders of property acquire the same rights their predecessors held, no more and no less.



Thus, for example, if one person separately sells the same painting to two purchasers, the basic rule is that the first purchaser wins. This is associated with the notion that, having transferred property rights to the first purchaser, the seller has nothing left to give to the second, an idea known as the “*nemo dat*” principle.<sup>67</sup> It also reflects the view that the first purchaser’s rights, having been validly transferred and thus “vested,” cannot be terminated without her consent. Yet although this is the law’s default position, the rule is frequently modified so that the second purchaser prevails over the first if, say, the second is a purchaser in good faith or the first has failed to record the transfer to her. From the standpoint of mutual exclusivity, it doesn’t matter whether the first or the second purchaser wins, only that they do not *both* win in the sense of being considered an undivided owner or holder of complete title to the property. That said, the first-in-time principle has an especially close connection with mutual exclusivity because of the *nemo dat* conceptualization lying in back of it.<sup>68</sup> The idea that what has been given away cannot also be retained not only generates priority rules, but paints a picture of property that makes mutual exclusivity a central feature.

Before turning to some more particular instances of the mutual exclusivity principle, it may be helpful to round out the discussion that has developed thus far with a metaphor. In recent years, property scholars have been debating the appropriateness of describing property as a “bundle of sticks” or “bundle of rights.”<sup>69</sup> Without meaning to take sides in that dispute, let me offer another metaphor and suggest that property can be thought of in terms of a pie.<sup>70</sup> The law of property divides the world into discrete things, delineated in terms of geographic location, physical material, or some other set of differentiating characteristics. Those things operate as a kind of shorthand for a cluster of activities in which human beings might engage; “Black-acre,” we may say, is really a way of describing a set of actions, defined as those occurring within a particular segment of three-dimensional space. What property law then does is to assign control over those activities to individuals or groups, conceiving of those actions first and foremost in terms of the resources whose use they involve. In this way, we can imagine that for each resource, there is a kind of pie representing 100 percent of the

---

67. “*Nemo dat quod non habet*,” meaning no one can sell what he does not have. See Jeanne L. Schroeder, *Is Article 8 Finally Ready This Time? The Radical Reform of Secured Lending on Wall Street*, 1994 COLUM. BUS. L. REV. 291, 296. See generally Donald J. Kochan, *Dealing with Dirty Deeds: Matching Nemo dat Preferences with Property Law Pragmatism*, 64 U. KAN. L. REV. 1 (2015).

68. Cf. Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PA. L. REV. 2097, 2120–25 (2012) (discussing advantages of treating *nemo dat* as a general baseline rather than as an exception).

69. See Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57 (2013); Claeys, *supra* note 5, at 621–29; J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711 (1996). See generally Symposium, *Property: A Bundle of Rights?*, 8 ECON J. WATCH 193 (2011).

70. I am not alone in seeking to sidestep the bundle debate. See Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 283 (2002); Robilant, *supra* note 5, at 873.

authority to decide how the resource will be used—the complete set of actions that count as “uses” of the resource. One person might be assigned the entire pie, in keeping with the Blackstonian archetype, or the pie might instead be divided in a slew of intricate ways. What is useful about the pie metaphor is that it makes clear there is a kind of zero-sum model that governs the distribution of rights—if half the pie is given to *A*, then *B* cannot hold two-thirds of it. That is what the mutual exclusivity principle means.

## II. THE PRIMACY OF MUTUAL EXCLUSIVITY

This Part will provide some additional examples of the mutual exclusivity principle to help make what has thus far been a fairly abstract discussion more concrete. It will do so, however, in the course of laying out the principal thesis of this Article: that the disallowance of mutually exclusive rights is not only a characteristic of property law but an essential aspect of property as a legal institution. The thesis rests upon several interrelated claims. First, the mutual exclusivity principle holds true for property rights generally. It applies just as much to property forms like security interests and servitudes as it does to ownership rights and just as much to property entitlements in esoteric assets like accounts receivable and corporate shares as to land, foxes, or diamonds. By contrast, the sorts of exclusivity imagined by the Blackstonian, exclusion, and shielding accounts generally struggle to assimilate these other forms of property holding. Second, the mutual exclusivity principle effectively captures the difference between property rights and otherwise similar legal rights not considered to be property. It is the special sauce that turns nonproperty entitlements into property ones.<sup>71</sup> Finally, mutual exclusivity accounts for much of where the action is in property law. In real life, questions about title to property occupy lawyers as much, if not more, than questions about the scope of the rights an acknowledged property holder may assert against strangers.

### A. *Standard Property Paradigms*

A review of some of the classic forms of property shows the ubiquity of the mutual exclusivity principle and its role in distinguishing property rights from otherwise similar legal entitlements. It also shows the comparative deficiencies in both respects of the standard accounts of exclusivity in property. To be clear, these three alternative notions of exclusivity are pure forms, and the arguments here treat them with analytical strictness that may not be fully consistent with the way they are thought of by those who adopt them. It may be possible in some cases to bend these rival conceptions so that they reach a wider range of property paradigms. My contention, however, is that those efforts are strained and that at their core, their purpose is to speak to

---

71. Cf. STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 24 (1990) (“[T]he idea of property is indeterminate at the margin. No litmus test can separate rights of property from, say, those of contract in all cases.”).

other features of property law than those that the mutual exclusivity principle highlights.

### 1. Security Interests

Take a simple mortgage. In conventional property talk, creating a mortgage is described as moving one of the sticks in the owner's bundle to the mortgagee. The mortgagee acquires a sort of contingent interest in the property, redeemable in the event the owner-mortgagor defaults on her loan. Consistent with the mutual exclusivity principle, property law reconciles the mortgagee's right to the owner-mortgagor's property with the claims of both other would-be security holders and of other owners in the event the owner-mortgagor attempts to transfer the property. In general, the mortgagee's claim will typically preclude the claims of subsequent mortgagees and of new owners who acquire the property from the original one. The real point, though, is that regardless of how it resolves the conflict, the law of property will supply a resolution. The one result property rules out is the mortgagee holding a valid mortgage and the new owner holding an unencumbered fee simple interest. The two are mutually exclusive.<sup>72</sup> And it isn't hard to see what the functional payoff here is. A security interest is meant to provide security.<sup>73</sup> By offering assurances of priority, the security interest enables the owner-mortgagor to reduce the risk of nonrepayment that might otherwise discourage a lender from lending money.<sup>74</sup> Mutual exclusivity is important to security interests not simply in some conceptual sense but in carrying out their core function.

Mutual exclusivity is not only an important attribute of security interests but one that largely explains why they are classified as property rights. It is tempting to assume that the proprietary hallmark of a security interest is simply that it provides rights to a resource—a claim on a parcel of land in the case of a real estate mortgage—but this is too imprecise. It isn't enough that the right provided implicates an asset owned by the borrower. Suppose, for example, that the effort to create a security interest in a given instance fails because some formality is not observed. Nevertheless, suppose also that the contract between lender and borrower expressly provides that the lender can repossess the borrower's property if the borrower defaults and that this right is valid as a matter of contract law. In short, it creates a repossession

---

72. See Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 WM. & MARY L. REV. 111, 115 (2011) (“[I]f a mortgagee fails to record its mortgage properly and then someone subsequently buys or lends against the home and records its interest, the subsequent purchaser or lender often can take priority over the first mortgagee.”).

73. See Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143, 1143 (1979) (“One of the principal advantages of a secured transaction is the protection it provides against the claims of competing creditors.”).

74. The wisdom of allowing such assurances has been questioned. See, e.g., Alan Schwartz, *The Continuing Puzzle of Secured Debt*, 37 VAND. L. REV. 1051 (1984). That is beside the point made here, however.

right for contract purposes only, rather than a property-based security interest. What is the difference? The difference lies in the effect on third parties: would-be transferees claiming to have acquired the collateral property from the borrower, those with valid security interests in it, and unsecured creditors generally, including anyone else with a similar contractual right to repossess.<sup>75</sup> On each of these scores, a true security interest will generally confer more robust rights than its purely contractual analogue.

By contrast, it is difficult to see much of a role in this arrangement for the other forms of exclusivity described earlier. The Blackstonian view does not fit in at all, given that the transaction itself speaks of dividing rights in an asset among multiple parties. But the right to exclude fares no better. One might say that it entails an inchoate or potential right to exclude in the event of default, but that would be true of the purely contractual right to repossess. In fact, the security interest might not even amount to that, since the mortgagor will in many instances be entitled only to the proceeds from the sale of the mortgaged property, rather than to ownership of the property itself. And the shielding conception seems equally beside the point. A security interest cannot easily be described as creating any kind of exclusive domain of action, at least in a way that distinguishes it from any other legal right.

## 2. Future Interests

Much of what has been said about security interests can be extended to future interests, though the set of seemingly arcane rules governing future interests has a different emphasis. Rather than casting matters in terms of priority, the system of “estates”<sup>76</sup> hardwires the mutual exclusivity principle into the doctrines that define different claims on a resource across time, carving the total package of rights in a resource into distinct temporal portions. The law of future interests supplies a menu of different cookie cutters that divides the sum total of rights to control a given resource over time. Thus, if *A* receives a contingent remainder in Blackacre, then *B* cannot hold a fee simple absolute in it. Since the rights a contingent remainder confers overlap with those a fee simple confers, if one of these claims is valid, the other is not.<sup>77</sup> The whole point of the system of estates is that if one person

---

75. Cf. Jeanne L. Schroeder, *Three's a Crowd: A Feminist Critique of Calabresi and Melamed's One View of the Cathedral*, 84 CORNELL L. REV. 394, 492 (1999) (“[T]he universe of property is *never* two party in nature.”).

76. What is known as the system of estates in land is a bit of a misnomer, for it now primarily does business as a way of dividing beneficial interests in trusts, which can hold a wide range of different types of assets, including intangibles. See Bernard Rudden, *Things as Thing and Things as Wealth*, 14 OXFORD J. LEGAL STUD. 81 (1994).

77. Cf. *In re Estate of Del Guercio*, 501 A.2d 1072, 1074 (N.J. Sup. Ct. Law Div. 1985) (stating that if a husband's death “vests the fee in his wife under a tenancy by the entireties, [it] cannot, on rational analysis, also vest a dower interest in the same property,” since the two estates are “mutually exclusive”). Though the focus here is on intertemporal divisions, it is true for other aspects of the estate system as well. See, e.g., *Mitchell v. Mitchell (In re Estate of Mitchell)*, 91 Cal. Rptr. 2d 192, 196–97 (Ct. App. 1999) (“Property cannot be held both as

or group receives rights obtaining during a particular slice of time, that slice is not available for others to hold. This is reflected in what has aptly been called the doctrine of “conservation of estates,”<sup>78</sup> according to which all present and future interests “must at all times add up to the whole bundle, a fee simple.”<sup>79</sup> There can be no holes and no overlaps.<sup>80</sup>

Mutual exclusivity again helps distinguish these rights from their closest contractual analogues. The owner of Blackacre can enter into valid contracts with two different people, promising to convey to each of them the same future interest in the property, just as the owner of Blackacre can enter contradictory contracts to sell a present ownership interest to them. The conflict will be resolved, damages will have to be paid, and the “true” property right will be awarded to one party or the other. The point is that it is only when one right invalidates another that we think we are talking about a property entitlement, rather than a merely contractual entitlement concerning property.

As with security interests, other notions of exclusivity fail to account for future interests. The very existence of future interests is in tension with the Blackstonian view of property. The exclusion conception fares little better. A future interest is not a matter of rights to prevent others from using a resource. It is a matter of title—of allocating rights—as of particular points in time. A future interest may eventually entitle its holders to ownership, which will indeed entail rights to exclude, but this eventual right does not describe what is distinctly property-like about a future interest before it has matured into a present possessory one. The content of the legal right is largely irrelevant to the nature of future interests and the problem that the system of future interests attempts to solve. One could have a right taking effect next Thursday to exclude people from Blackacre, but one could equally have a right to call oneself the Emperor of Moldavia, to perform one hundred jumping jacks, or to sing the Marseillaise. The salient proprietary feature of the future interest arises from mutual exclusivity and the way that one person’s future interest rules out a contradictory one held by someone else, not the right to exclude others from a resource. The shielding conception is equally ill-suited to explaining future interests. A future interest itself cannot be described as any kind of special normative domain or relationship in which others must defer to the interest holders’ plans to use a resource. At the margins, the law of waste may provide something like the nuisance-like protection from interference central to the shielding conception, but this is

---

community property and in either a joint tenancy or a tenancy in common at the same time.”).

78. SANDRA H. JOHNSON ET AL., *PROPERTY LAW: CASES, MATERIALS AND PROBLEMS* 141 (3d ed. 2006); THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 518 (3d ed. 2016).

79. Myrl L. Duncan, *Reconceiving the Bundle of Sticks: Land as a Community-Based Resource*, 32 ENVTL. L. 773, 775 (2002).

80. Cf. James C. Robertson, *Recent Development, Abandonment of Mineral Rights*, 21 STAN. L. REV. 1227, 1228 (1969) (noting the “seldom-articulated but ancient policy disfavoring voids or gaps in the chain of title to land”).

surely tangential to the main story. The system of future interests—all those rules about contingent remainders, executory interests, and the like—would itself continue to play out just the way it does now if the law of waste were abolished entirely.

### 3. Servitudes and Easements

Next, consider servitudes. I use the term broadly to refer to rights either to use an asset belonging to another or to limit the way someone else can use something that belongs to them. Suppose *B* receives a right from *A*, a neighbor, to cross *A*'s land in order to reach a lake on the other side (an affirmative easement). The right does not purport to prevent other neighbors from receiving similar access rights of their own, so it isn't exclusive in that sense. Yet the principle of mutual exclusivity is at work because property law will not recognize property rights held by others that contradict it. Imagine, for instance, that at some point *A* has also attempted to give another neighbor, *C*, a property entitlement—a conservation easement, let's say—that gives *C* the right that no one will cut across *A*'s land. If *B* holds a valid property right, *C* does not, at least so far as it pertains to *B*. By contrast, if *B*'s right-of-way were purely contractual and *C* indeed received the conservation easement, *B*'s right would be defeated by *C*'s property right. And if both *B*'s and *C*'s rights were considered purely contractual rights, the only result that can be predicted with confidence is litigation.

Once again, the various understandings of exclusivity described in Part I have little to say about such arrangements. The Blackstonian conception does not seem to leave room for easements and servitudes.<sup>81</sup> The exclusion conception faces similar difficulties. It is difficult to see how one person's right to use the property of another can itself be characterized as a right to exclude or deny access. An affirmative easement is principally a matter of *eliminating* *A*'s right to exclude *B*. In his defense of the exclusion conception, Thomas Merrill argues that the right to exclude is still at work in such a situation because other people are forbidden to interfere with *B*'s exercise of her rights.<sup>82</sup> But if the point of speaking of a right "to exclude" is to refer not simply to any sort of negative right against others, but to a right whose duties are defined in terms of duties defined in terms of boundary crossings, generic rights against interference don't qualify.<sup>83</sup> Furthermore, even if a right to be free from interference in the exercise of an easement were counted as an instance of the right to exclude, the role of that protection is clearly peripheral and secondary. The heart of the right-of-way is the simple freedom to cross *A*'s land—the lifting of a prohibition so that *B* can do

---

81. See discussion *supra* Section I.A. This analysis points to the confusion in cases like *Members of the Peanut Quota Holders Ass'n v. United States*, 421 F.3d 1323 (Fed. Cir. 2005), which concluded that a nonexclusive licensee had no property interest without inquiring into protection from others who might seek to exclude the licensee, *id.* at 1334.

82. See Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 972 (2000).

83. See *supra* Section I.A.

something that would otherwise be a trespass—rather any additional rights against others that they not impede *B* in doing so. After all, there can be no rights against interfering with a right-of-way unless there is a right-of-way in the first place.

The shielding conception equally fails to capture the essence of such rights. While the shielding conception accommodates the idea of protection against interference, it goes beyond that, presupposing a domain of normative decisionmaking as the object of such protection. The foundation of the shielding view is the ability to “set an agenda” for a resource, as Larissa Katz puts it, which others must then respect.<sup>84</sup> A mere right-of-way falls short of this robust vision. Not only is the right to traverse a particular piece of land fairly narrow, leaving little room for imagination and discretion, but the right is itself likely to be qualified in terms of how it is exercised—what speeds *B* may drive (if the easement even confers the right to drive), what times of day, how frequently, and so forth.

Attempts to salvage either the exclusion or shielding conceptions in the easement example by relying on protection against interference in the exercise of the rights it confers are subject to two general objections. First, rights against interfering with the exercise of other, primary rights are ubiquitous and in no sense special to property. In various ways, for example, the right to vote is protected against outside interference with its exercise, but that hardly transforms it into a property right. Second, and conversely, property rights are not always accompanied by rights against interference by others.<sup>85</sup> In some circumstances, all that the law provides is a naked property right to use property of another,<sup>86</sup> without any further rights against others requiring them to refrain from impeding the exercise of that freedom. For example, *O*, a landowner, can convey a servitude to *H* entitling *H* to hunt or fish on *O*'s land. Some courts have held that *H* acquires no rights against interference with the enjoyment of those rights, as by cutting down the trees in which game live.<sup>87</sup> In short, the mere fact that the right-of-way includes a right that others not interfere with it is insufficient to show any meaningful connection to exclusivity.

#### 4. IP and Other Intangibles

The foregoing discussion of mortgages, future interests, and servitudes may give the impression that the mutual exclusivity principle is somehow special to property rights in land, or maybe physical objects. But it applies

---

84. See Katz, *supra* note 5, at 290.

85. This does not include background protections like criminal and tort prohibitions on the infliction of physical harm, which are not themselves creations of property law and would obtain even if the law of property vanished altogether.

86. A “privilege,” in Hohfeldian terminology. See *supra* note 58 and accompanying text.

87. See, e.g., *Matera Inv'rs, Inc. v. Sunset Lake Fishing & Hunting Club*, 696 F. Supp. 1510, 1515–17 (M.D. Ga. 1988); *Mikesh v. Peters*, 284 N.W.2d 215, 216–19 (Iowa 1979); *Gearns v. Baker* [1875] 10 Ch D 355 at 355–57 (Eng.).

with equal force to rights in intangible goods. This is true both for intangibles like assignable contractual rights and for intellectual property. Mutual exclusivity is a crucial part of what drives the classification of these rights as property rights.

While the idea of property rights in intangible “things” has never been free from controversy, the idea is generally accepted today, and indeed has been for centuries.<sup>88</sup> Consider property claims in legal relationships like debts (known to specialists as “choses-in-action”) or in shares of corporate stock. The role of mutual exclusivity is central to these. If *A* is owed a debt and assigns it to *B*, then *A* cannot also assign the same debt to *C*. If *A* holds 50 percent stake in Acme Corp., then it is impossible for *B* to hold a 60 percent stake. The structure of property governs here and disallows mutually exclusive claims. It is again difficult to see how either the exclusion or shielding understandings fits in. The right to exclude doesn’t seem to have much to do with these scenarios. What would it mean to trespass on a share of stock? Neither an assignable debt nor a corporate share speaks in terms of duties in any way analogous to a duty not to trespass. As for the shielding conception, it is even more difficult to see how such entitlements involve an interest protected from interference by others, analogous to, say, a farmer’s interest in tilling the soil.

Mutual exclusivity is also an essential aspect of intellectual property rights. Priority questions are a central part of both patent and trademark law.<sup>89</sup> Indeed, the recent change in priority rules for patents effected by the

---

88. See STUART BANNER, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* 7–10, 13 (2011) (discussing historical understanding of property in intangibles, such as advowsons).

89. See Mark A. Lemley & Colleen V. Chien, *Are the U.S. Patent Priority Rules Really Necessary?*, 54 *HASTINGS L.J.* 1299, 1307–08 (2003); Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 *EMORY L.J.* 367, 392 n.85 (1999); see also, e.g., 15 U.S.C. § 1060(a)(4) (2012) (providing that a trademark assignment is void against any subsequent purchaser for valuable consideration without notice unless timely recorded—and, implicitly, that a subsequent assignment is void when the first assignment has been recorded properly). It bears emphasis that mutual exclusivity should not be confused with exclusive rights of use. Trademark rights, for instance, generally confer the sole right to use a particular trademark in a given market, but mutual exclusivity does not require this. Consider certification marks involving geographic origins. Anyone who produces Roquefort cheese—that is, sheep’s milk blue-mold cheese produced in Roquefort, France—is entitled to designate their product using a particular symbol, the word “Roquefort.” See 15 U.S.C. § 1064(5)(D); *Cmty. of Roquefort v. William Faehndrich, Inc.*, 198 F. Supp. 291, 293–94 (S.D.N.Y. 1961), *aff’d*, 303 F.2d 494 (2d Cir. 1962). Though a given Roquefort producer does not have the sole right to use the mark, the right that the producer holds to use it is still subject to the mutual exclusivity principle insofar as no other Roquefort maker can acquire a trademark right that would prevent that use. See 15 U.S.C. § 1052(e)(2). In this respect, it confers an in rem privilege. See Hohfeld, *supra* note 58, at 32–33; *supra* notes 58–59 and accompanying text.

This multiple-user paradigm is less common in trademark law than the grant of rights of exclusive use, but that sort of exclusivity is qualified in any number of ways that mutual exclusivity is not, and it is important to keep the distinction between the two in mind. A trademark holder generally does not have rights against firms making unrelated products, for instance, or against a competitor’s nominative uses. See, e.g., *Checkpoint Sys., Inc. v. Check Point Software Techs., Inc.*, 269 F.3d 270, 288 (3d Cir. 2001); *Playboy Enters., Inc. v. Welles*, 279 F.3d 796,



America Invents Act was heralded as the biggest change in American patent law in at least half a century.<sup>90</sup> And even in copyright law, where two different people can have rights in the same intellectual good if they each independently conceived of it and fixed it in tangible form,<sup>91</sup> their rights in their respective creations are still exclusive of the claims of others, including one other.<sup>92</sup> If Keats and Shelley by coincidence happen to write identical poems and Tennyson then copies from Keats, Keats can recover from Tennyson for copyright infringement but Shelley cannot.<sup>93</sup> More importantly still, if Keats transfers his copyright to Shelley, he cannot then transfer it to Tennyson, at least without destroying or diminishing Shelley's rights. Rights to control the intangible goods of intellectual property law, whether inventions, creative works, or brands, are subject to the same mutual exclusivity principle that governs entitlements in more traditional physical property assets.<sup>94</sup>

By contrast, the competing understandings of exclusivity we have seen struggle with intellectual property. The exclusion conception misses some important features of intellectual property rights. Under U.S. copyright law, for instance, joint authors of a copyrighted work are generally treated as tenants in common and are each entitled to use and license the work to others without obtaining the consent of other cotenants.<sup>95</sup> These are significant rights and differ from the approach that some other countries have adopted in their own copyright laws.<sup>96</sup> The exclusion perspective implies that the unilateral licensing policy of U.S. law results in weaker copyrights than exist in some foreign systems, but that characterization is questionable. While each copyright holder loses the ability to prevent the other from licensing the work, each also gains the right to license without the other's consent. Unless there is some reason to suppose that the power to license is less important than the power to block licensing by someone else, it seems like a wash analytically. And as a practical matter, the ability to license without getting others to sign off may be more useful than the ability to block

---

800–02 (9th Cir. 2002). Mutual exclusivity, by contrast, is in principle present even for goods in the public domain—that is, when a good is part of an open-access commons.

90. See David S. Abrams & R. Polk Wagner, *Poisoning the Next Apple? The America Invents Act and Individual Inventors*, 65 STAN. L. REV. 517, 519 (2013).

91. 17 U.S.C. § 102(a) (2012).

92. *Id.* § 106.

93. In principle, in fact, if Shelley makes copies from Keats's copies, Shelley still commits infringement, even though Shelley also independently creates the same work.

94. See Easterbrook, *supra* note 15, at 109. Indeed, a principal criticism of intellectual property rights is that they unnecessarily create what might be described as rivalrous rights in non-rivalrous goods. See Thomas B. Nachbar, *The Comedy of the Market*, 30 COLUM. J.L. & ARTS 453, 455 (2007).

95. See H.R. REP. NO. 94-1476, at 121 (1976). An exclusive license may not be granted without the consent of copyright co-owners. See *Davis v. Blige*, 505 F.3d 90, 101 (2d Cir. 2007).

96. See William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383, 427 (2000) (observing that in the United Kingdom, one joint author “may not license the work or sue without the other’s permission”).

licenses by others. A similar problem concerns conflicts between licensees. Imagine, for instance, that a patent holder grants a nonexclusive license to one manufacturer to produce a patented invention and later attempts to grant an exclusive license to a second manufacturer. If the second grant is invalid because of the first, it is the first that can lay a credible claim to being some kind of property right. Yet it is only the second grant—the purportedly exclusive license—that entails any sort of right to exclude.<sup>97</sup>

The shielding conception faces still more serious difficulties in accounting for intellectual property. The goods to which intellectual property rights attach are said to be nonrivalrous: one person's use or consumption of a particular IP good doesn't diminish the ability of others to do the same.<sup>98</sup> So, for instance, the fact that Wolfgang is singing a particular song doesn't prevent Ludwig from singing it too. And if a given person's interest in using an invention or creative work does not interfere with another's ability to do so, the ordinary theory of property as protection from interference does not, on its face, come into play.<sup>99</sup>

#### B. *The Reality of Property: Trespass Versus Title*

Beyond the ins and outs of doctrine governing these areas of property law, the centrality of the mutual exclusivity principle can be seen by looking at property more widely. Much of the academic and theoretical literature on property is preoccupied with defining the proper limits of the prerogatives of property owners. To what extent should the owner of a given thing be able to deny others access to it?<sup>100</sup> How strong should the remedies for unauthorized access be?<sup>101</sup> What protection, if any, should an owner be given

---

97. It is conceivable that the nonexclusive licensee would be able to prevent an entity that had no license at all from practicing the patent, but the claim that the licensee's right is property-like does not depend on the existence of rights against the unlicensed.

98. See Nachbar, *supra* note 94, at 454.

99. This isn't to say that shielding theorists deny any basis for intellectual property rights, only that the basic conception of property as protection from interference in using something cannot be carried over without substantial modification. See Larissa Katz, *A Powers-Based Approach to the Protection of Ideas*, 23 *CARDOZO ARTS & ENT. L.J.* 687, 720 (2006) (discussing intentional creation of noninterference duty to protect intellectual property); cf. Eric R. Claeys, *On Cowbells in Rock Anthems (and Property in IP): A Review of Justifying Intellectual Property*, 49 *SAN DIEGO L. REV.* 1033, 1044–45 (2012) (applying labor theory to intellectual property); Mossoff, *supra* note 5, at 376 (advancing an “integrated theory of property” to modernize the concept of property).

100. See, e.g., Ben Depoorter, *Fair Trespass*, 111 *COLUM. L. REV.* 1090, 1092–93, 1099–113 (2011); Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 *U. PA. L. REV.* 1095, 1097–98 (2007); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 *U. CHI. L. REV.* 711, 711–13, 748 (1986); Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 *CALIF. L. REV.* 107, 111–12 (2013); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 *NW. U. L. REV.* 1283, 1303, 1466 (1996).

101. See, e.g., Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 *YALE L.J.* 703, 705 (1996); Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 *YALE L.J.* 1027, 1027

against governmental restrictions on property?<sup>102</sup> In a broad sense, we can think of these as questions about the rightful scope of trespassory protection. The exclusion and shielding conceptions plug into that matrix of issues quite neatly, particularly as ways of understanding ownership.

But a large part of the life of property law is dominated not by concerns of that sort but by a distinct, if not wholly separate, set of issues. Rather than *trespass*, these might broadly be considered issues of *title*.<sup>103</sup> On this view, property law is centrally about title investigations, patent searches, registration, recordation, financing statements, bona fide purchaser and negotiability rules, adverse possession, first possession, finders, and the powers of bailees—issues having to do with the creation, transfer, and division of rights in assets.<sup>104</sup> The questions here are less about the limits of property holders' rights against outsiders than about *who* the rightful property holder is.

This cluster of problems is fundamental to the role property plays. Unlike rights of personal security—the right not to be punched in the nose, for instance—rights in external objects raise questions not only about the scope of the right against the wider world but also about the identity of the right holder. There certainly are questions in tort law about whether a particular injury constitutes a violation of the injured person's legal rights, but there is usually no dispute about whose rights have been violated if it is agreed that a violation has indeed occurred.<sup>105</sup> If my negligent act causes *A* to suffer a broken arm, it is highly unlikely the law will treat *G*, rather than *A*, as the

---

(1995); Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1, 79 (2002); Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399, 1401 (2005); Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 832–33 (2007).

102. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 263–82 (1985); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 746 (2009); Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1430–31 (2006); Brian Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593, 595 (2013); David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1776 (2013).

103. Interestingly, these terms may, in some sense, misdescribe the divide. Historically, remedies like trespass and ejectment morphed from mechanisms to repel intruders and hold-overs into vehicles for determining title to land. See 7 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 4–23 (2d ed. 1937). A similar story can be told about trover and conversion as methods to determine title to chattels. See *id.* at 402–47.

104. See, e.g., Douglas Baird & Thomas Jackson, *Information, Uncertainty, and the Transfer of Property*, 13 J. LEGAL STUD. 299 (1984).

105. Cf. PENNER, *supra* note 5, at 28. This should not be confused with the more philosophical question, famously confronted in *Palsgraf v. Long Island Railroad*, 162 N.E. 99 (N.Y. 1928), whether an actor owes a duty to one person not to injure that person by virtue of conduct that unreasonably risks injury only to someone else. Whatever other disagreements there may be about *Palsgraf*, no one supposes that the passenger whose package was dislodged should have been able to sue the railroad for damages over the injuries sustained by Mrs. Palsgraf.

victim.<sup>106</sup> The same cannot be said for property. Because there is no intrinsic connection between individual persons and external things—that is what makes them “external” in the first place—property law is in some sense engaged in a highly artificial enterprise.<sup>107</sup> It seeks to attach things to people, so to speak, not physically but as a matter of abstract legal relationship, thereby making those things a feature or “property” of those to whom they are connected.<sup>108</sup> That additional task is a conceptual hallmark of property, and the mutual exclusivity principle is the basic ground rule dictating the way it is carried out.

This theoretical observation packs a potent practical punch. Mutual exclusivity is an essential part of the everyday life of property in the sense that it concerns a major part of what lawyers actually do. While litigation about the relative strength of an owner’s rights against strangers or the government is certainly important, the typical working of property law is often a matter of boundary and title questions—rather than a matter of the implications that general concept of ownership holds when it comes to determining what rights an owner may assert against outsiders. This is as true for modern types of property as it is for old-fashioned land law. Quite apart from priority disputes, for instance, problems tracing chains of title for IP rights are a significant issue for lawyers involved in the context of both IP transactional work and of corporate mergers and acquisitions, as transfers of IP rights are often improperly executed or recorded.<sup>109</sup>

It isn’t simply that these sorts of questions absorb a major part of people’s energy and time, moreover. They are essential to the functions property

---

106. Tort law sometimes allows recovery by those who suffer injuries by virtue of harm inflicted upon a primary victim, as with loss of consortium or pain and suffering occasioned by having been the witness to someone else’s physical injury, though these situations are not the most common tort paradigm. *Cf.* *S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918) (Holmes, J.) (“The general tendency of the law, in regard to damages at least, is not to go beyond the first step.”). Even when recovery is allowed for derivative injuries, it is usually confined to someone having a fairly close relationship to the person who has been harmed, such as a spouse or other family member. *See* *Thing v. La Chusa*, 771 P.2d 814, 835 (Cal. 1989). In some, and perhaps many, instances of derivative injury, moreover, recovery may also be thought of as a way of indirectly vindicating the interests of the primary victim, and to the extent that is so, there isn’t really any disconnect at all between the person injured and the person whose rights have been violated. It is true that the right to sue in tort for an injury that has been inflicted often can be assigned, but that simply reflects the fact that the right to sue can itself be treated as an alienable property asset. *Cf.* James Y. Stern, *Property’s Constitution*, 101 CALIF. L. REV. 277, 303–04 (2013).

107. *See* PENNER, *supra* note 5, at 111–12.

108. *See* Stern, *supra* note 106, at 294 (“Property law affixes a sort of invisible tag to every object in the world, naming the person authorized to decide how to use the object.”).

109. *See* Steve Behnken, *Sale of a Business: The Forgotten Intangible Assets*, 22 DCBA BRIEF, May 2010, at 28, 28–29 (“All too often a company believes it has clear title to an asset, only to find out that its predecessor failed to obtain an assignment or failed to properly record title . . . . [A thorough examination of titling documents, including any recorded claims,] is particularly important with regard to copyrights and patents.”).

law serves and the way it works. Titling systems are rightly considered fundamental to the institutions of modern economic life.<sup>110</sup> Indeed, one influential thesis holds that they are key to alleviating poverty in the developing world.<sup>111</sup> At the opposite end of the spectrum, failure to maintain accurate accounts of claims on assets is cited as an important cause of the global financial crisis.<sup>112</sup> And in a still different context, inventing a method to coordinate claims so as to avoid what is termed the “double spending” problem lies at the heart of potentially transformative financial innovations like Bitcoin.<sup>113</sup>

Single-minded preoccupation with trespassory questions, important though they are, threatens to distort our understanding of property by neglecting the crucial and conceptually distinct enterprise of determining title, a problem directly linked to the mutual exclusivity principle. The titling issue isn’t merely downplayed; often it is viewed as simply another way of describing trespass issues, rather than a separate conceptual dimension of property.<sup>114</sup> To be sure, the line between the two types of problems isn’t airtight. In many cases, it’s at least possible to redescribe a titling problem as a trespass issue, since title to assets ultimately bears upon who is a trespasser and who is not. But whatever room there may be for recharacterization at the margins, there is generally an obvious difference between uncertainty about just how big the proverbial bundle of rights is and uncertainty about who holds the bundle.<sup>115</sup> Two rival claimants to a resource, whether a piece of land or a patent, may well agree on whether a particular act would constitute a wrongful invasion, once it is determined whom the resource belongs to, but disagree entirely about whose resource it is. And the rules, facts, and

---

110. See BENITO ARRUÑADA, INSTITUTIONAL FOUNDATIONS OF IMPERSONAL EXCHANGE: THEORY AND POLICY OF CONTRACTUAL REGISTRIES 7 (2012).

111. See HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000); see also Edward Robbins, *Formalisation of Land and Housing Tenure to Empower the Poor: Simple Nostrum or Complex Challenge?*, in RIGHTS AND LEGAL EMPOWERMENT IN ERADICATING POVERTY 175, 175–76 (Dan Banik ed., 2008).

112. See Peterson, *supra* note 72, at 126.

113. See Kelsey L. Penrose, *Banking on Bitcoin: Applying Anti-Money Laundering and Money Transmitter Laws*, 18 N.C. BANKING INST. 529, 532–33 (2014). Indeed, much of what makes Bitcoin so innovative is its decentralized mechanism to resolve conflicting claims. See Jerry Brito et al., *Bitcoin Financial Regulation: Securities, Derivatives, Prediction Markets, and Gambling*, 16 COLUM. SCI. & TECH. L. REV. 144, 149 (2014).

114. A thoughtful exception acknowledging the difference is Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 29 ARIZ. ST. L.J. 1075, 1076 (1997). I do not mean to imply, however, that title problems themselves have escaped scholarly attention. See, e.g., Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1126–27 (1985); Robbins, *supra* note 111. Rather, the significance of titling to both general mechanics and the overall concept of property law has been insufficiently appreciated. Cf. Matthew Baker et al., *Optimal Title Search*, 31 J. LEGAL STUD. 139, 139 (2002) (“An often neglected but nonetheless important aspect of market exchange is the question of whether the seller of a good is the true owner.”).

115. The difference has important practical consequences, which are explored in Part III.

legal proceedings used to determine what counts as a trespass or patent infringement will often be very different from those used to determine who owns the land or holds the patent.<sup>116</sup>

Problems related to title have certainly received thoughtful, if sporadic attention,<sup>117</sup> but neither the nature of the basic title concept nor its true significance to property as a legal institution are widely appreciated in the academic literature. Titling problems are in many ways more technical than trespassory ones and have less obvious connections to public law-ish themes like the strength of state power, the scope of public rights, and the distribution of wealth.<sup>118</sup> This may help account for some of the legal academy's emphasis on the trespassory side of property. The result, at any rate, is an incomplete and somewhat skewed conception of what drives property law. Seeing property as a matter of "exclusive rights" in the sense that it precludes mutually exclusive entitlements recognizes an essential aspect of its formal structure and a vital part of how property works as a practical institution.

### C. *Objections*

At this point, it is useful to pause to consider a few objections that might be lodged against the general argument advanced thus far. The first has to do with the idea of "relative title" in Anglo-American property law, which a skeptic might claim is inconsistent with the mutual exclusivity principle. In the simplest terms, it is usually wrong for a stranger to steal from a thief, and, more generally, a court whose jurisdiction is in personam is only authorized to decide which of the parties before it has the superior claim to a particular thing, leaving open the possibility someone else has a still

---

116. A derivation or interference proceeding in patent law, for instance, is distinct from a suit for patent infringement. *Compare* 35 U.S.C. § 135(a) (2012) (describing derivation proceedings as determining who, among multiple inventors claiming the same invention, is entitled to apply for a patent on the invention), *with id.* § 271(a) ("[W]hoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.").

117. *See, e.g.,* Benito Arruñada, *Institutional Support of the Firm: A Theory of Business Registries*, 2 J. LEGAL ANALYSIS 525, 526 (2010); Baird & Jackson, *supra* note 104; Abraham Bell & Gideon Parchomovsky, *Of Property and Information*, 116 COLUM. L. REV. 237 (2016); Thomas J. Miceli et al., *Title Systems and Land Values*, 45 J.L. & ECON. 565 (2002); Carol M. Rose, *What Government Can Do for Property (and Vice Versa)*, in *THE FUNDAMENTAL INTERRELATIONSHIPS BETWEEN GOVERNMENT AND PROPERTY* 209, 213 (Nicholas Mercuro & Warren J. Samuels eds., 1999); Rose, *supra* note 62.

118. There is obviously an important distributive dimension to the problem of titling in its broadest sense. In this respect, Laura Underkuffler has perhaps gone the furthest in bringing out the mutually exclusive quality of property in her writings about the conflicts and trade-offs property presents, at least for "physical, finite, nonsharable resources." *See* Laura S. Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 TEX. L. REV. 2015, 2029 (2013); *see also* Laura S. Underkuffler-Freund, Response, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1038 (1996) ("Property involves *allocation*; with regard to property, *the giving to one person necessarily denies or takes from another.*").

stronger claim.<sup>119</sup> In contrast to the conception of property in Roman law and the modern legal systems derived from it in continental Europe, the view of property taken by the English common law system lacks true *in rem* absoluteness.<sup>120</sup> How can there be mutual exclusivity if the thief and the true owner both have rights in the asset?

Very easily. Even if the legal protection enjoyed by a thief or *in personam*–judgment holder is viewed as a true property right, the mutual exclusivity principle has ample room to operate.<sup>121</sup> The conceptual organization of property is still centered on the “true owner,” the person whose claims are superior to those of the thief or other lesser claimant, even if no proceeding is provided in which the identity of the true owner can be conclusively established once and for all. So long as there is still thought to be a true owner (or other property holder) around whom all other claims are oriented, mutual exclusivity remains.<sup>122</sup> A hierarchical, nested structure of rights (*A* defeats *B* and *C*; *B* defeats *C*) is no less compatible with the mutual exclusivity principle than a binary structure (*A* defeats *B* and *C*; *B* and *C* are of equal rank). Either way, the position of the true owner is the same.<sup>123</sup>

---

119. See David Fox, *Relativity of Title at Law and in Equity*, 65 CAMBRIDGE L.J. 330, 336–38 (2006).

120. See *id.* at 334–36.

121. These doctrines can be conceptually harmonized with property law in a number of ways other than as property rights: as a general rule, grounded in the need to avoid vigilantism, against dispossessing others that nevertheless denies them any true primary rights, or as a limitation on standing to raise the rights of third parties.

122. In a less well-known portion of his essay on the concept of ownership (usually cited for its catalog of the “incidents” of ownership), Honoré distinguishes between what he calls unititular and multititular systems, the latter being those in which independent titles can be formed without being hived off from some previous chain of title, as with adverse possession. See A.M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107, 138–41 (A.G. Guest ed., 1961). Even in such a system, however, there must be “rules for enabling the holders of titles to recover possession and for regulating priorities between the holders of competing titles.” *Id.* at 140. Why must there be such rules? Honoré does not say, taking it as self-evident, but the reason is mutual exclusivity. He then points out that it is not necessary to have an *in rem*-type proceeding because the holder of “the best title” can always make use of the remedies for those with “a title.” *Id.* at 140–41. Most importantly, for these purposes, he observes that “of course, if priorities are regulated someone must have top priority.” *Id.* at 141.

123. In this sense, the otherwise-formidable J.W. Harris has it backwards. In explaining why relativity of title does not undermine the idea of ownership, he argues that relativity of title in effect only concerns the ownership of rights, rather than ownership of things themselves. See HARRIS, *supra* note 5, at 81. His argument is that the difference between the true and provisional (i.e., false) owner lies in the circumstances in which they may claim ownership, not the legal consequences of ownership when it can be claimed, and that therefore the concept of ownership is unaffected by introduction of relative title. This misses the point of relativity. It is not the similarity between the provisional and the true owner but the difference that accounts for property’s distinct form. It would not transform the concept of property to confer greater rights on the true owner of a thing than on a merely provisional one; it would transform property entirely to abolish the very concept of the true owner, so that every holder of rights in property was a free agent and no ordering system to determine whose claims defeat whose.

A second objection comes from the opposite direction. Rather than disputing that mutual exclusivity governs property entitlements, a skeptic might argue that all entitlements are subject to the mutual exclusivity principle because any conflicts between rights must eventually be resolved. Yes, a person might enter into conflicting contracts, but at the end of the day, only one of them will get specific performance; contradictory rights will have to be reconciled when the conflict becomes real.<sup>124</sup> Indeed, a particularly ambitious critic in this vein might argue that noncontradiction is a hallmark of any legal system and is associated with the idea of the rule of law.<sup>125</sup> That's why we have rules to resolve conflicts between statutes—a later statute that clearly contradicts an earlier one repeals the earlier one, for instance.<sup>126</sup>

This argument misunderstands how mutual exclusivity works. For a start, the mutual exclusivity principle describes the conceptual structure of property entitlements, not the form of remedy provided when a violation occurs. Mutual exclusivity does not mean property entails a right to injunctions or other remedies classified as “property-rule” protection within the well-known Calabresi-Melamed framework.<sup>127</sup> Property rights would still be governed by the mutual exclusivity principle—there could not be two independent ownerships of the same asset—in a world in which everyone was perfectly law-abiding and incapable of making a legal error.<sup>128</sup> In such a world, the owner of an asset who sold it to one person would simply decline to sell to a subsequent purchaser. No remedy of any kind would be needed, but mutual exclusivity would remain as a fundamental characteristic of the concept of property just the same.

What is critical to understand is that when a person enters into conflicting contracts, both counterparties are entitled to complete remedies, even if this means at least one of them must receive substitutionary rather than specific relief (money damages rather than specific performance). The fact that remedies are provided to both parties testifies to the view that both hold underlying substantive rights. By contrast, when one person purports to

---

124. Cf. Claire Oakes Finkelstein, *Introduction to the Symposium on Conflicts of Rights*, 7 LEGAL THEORY 235, 235 (2001) (“[C]ontemporary rights theorists have generally assumed that rights cannot conflict.”); Phillip Montague, *When Rights Conflict*, 7 LEGAL THEORY 257, 275–77 (2001) (discussing view in which conflict among rights exists at a “prima facie” level but may be resolved at an “all-things-considered” level).

125. See LON L. FULLER, *THE MORALITY OF LAW* 65–70 (rev. ed. 1969); see also Steiner, *supra* note 62, at 767–68.

126. E.g., *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936) (“[W]here provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one . . .”).

127. Calabresi & Melamed, *supra* note 29, at 1127; see also *supra* note 29 and accompanying text.

128. Conversely, a grant of injunctive relief does not imply that the mutual exclusivity principle is at work. In a title dispute, a court might grant both contenders the injunctions they seek, such that each was excluded from the property by the other. Nevertheless, there is a strong connection between injunctive relief and mutual exclusivity since it is impossible both to issue an injunction, vindicating one side's claim to exclude, and not to issue it, vindicating the other's freedom to use.



convey the same property to two different people, only one of those recipients will receive any property rights as a result. Often this fact is obscured because there will be a parallel contractual relationship operating alongside. But if there is no contractual arrangement to fall back on, as when the attempted conveyances are gifts, the disappointed party doesn't just fail to get title to the property. The disappointed party doesn't get anything else either—no damages, no nothing—because there are no property rights for the party to receive that would give rise to a claim against anyone else.<sup>129</sup>

Finally, a critic who accepted that mutual exclusivity is a distinctive feature of the concept of property might nevertheless dispute that mutual exclusivity tells us anything we didn't already know, viewing it as simply an automatic consequence of more basic features of property that are well understood. For example, one might say that if ownership of Blackacre confers rights against the whole world, it seems obvious that one person's ownership would preclude another's: What good is a right that binds everybody if each person bound by it might also hold some other right unbinding them?

There is certainly something to this. Property is a form of authority,<sup>130</sup> and it seems inherent in the notion of authority itself that it precludes contrary authority.<sup>131</sup> But matters aren't so simple. Consider an analogy to judicial jurisdiction, the authority of a court to resolve a dispute between two adverse parties. For the most part, these grants of power do overlap. Courts with exclusive jurisdiction are rare; concurrency is the rule.<sup>132</sup> The same dispute can be brought in the courts of two different U.S. states or two different nations, which can each produce their own potentially contradictory judgments. Not surprisingly, there is a strong impulse to resolve the conflict between these dueling resolutions, which is why preclusion and judgment-recognition rules have been developed.<sup>133</sup> But there is much that the rules do not cover even when it comes to final judgments, and they generally do nothing to restrict each court's initial authority to adjudicate the dispute.<sup>134</sup> Overlap is a basic feature of the system, and conflict is the obvious result.

---

129. The point still stands in the more complex situation where the disappointed party receives a subordinate, contingent claim to the property.

130. Alchian, *supra* note 6.

131. See SARAH WORTHINGTON, EQUITY 3–5 (2d ed. 2006) (“Imagine what would happen if our five-year-olds were to have two sets of umpires monitoring their game, one applying red rules and red practices and delivering red responses to the events, the other applying green rules and green practices and delivering green responses to the events. The game would descend into chaos.”).

132. Indeed, one of the few areas it is common is jurisdiction to determine title to property. See Stern, *supra* note 63, at 120–23, 166–68 (describing unusual jurisdictional exclusivity rules for property and arguing for a connection based on the conceptual structure of property).

133. See generally George Rutherglen & James Y. Stern, *Sovereignty, Territoriality, and the Enforcement of Foreign Judgments*, in FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM 13 (Paul B. Stephan ed., 2014).

134. See *id.*

The point is that property could conceivably be structured like this, with concurrent, equally valid authority over the same asset. But it isn't.

Even more importantly, as we have seen, not all property rights do impose duties on everyone else. Mutual exclusivity helps us see how rights that impose duties on only a single person could still be "good against the world," as in the case of a negative easement.<sup>135</sup> So even if it were inevitable that rights imposing duties on the whole world negate anyone else in the world's contradictory rights, that only accounts for part of property law. Some entitlements impose narrower duties or no duties at all, and when they are thought of as property, they are subjected to the mutual exclusivity principle.

A final variation on this line of argument focuses more on the subject matter of property law than the form of property entitlements: Isn't mutual exclusivity simply a reflection of the fact that property is about rights in scarce or rivalrous goods? A good is rivalrous when consumption by one person and consumption by another are mutually exclusive as a matter of practical fact (two people cannot eat the same apple, for instance), and it stands to reason that rights in such mutually exclusive resources are themselves mutually exclusive of one another.

But few if any propertizable assets are perfectly rivalrous in this way, and some goods—such as ideas protected by IP law—are thought to be basically nonrivalrous. Conversely, there are plenty of rights involving undeniably rivalrous goods that are not subjected to the mutual exclusivity principle. Two people cannot eat the same apple, but two people can enter separate contracts purporting to give them the right to eat it. Entitlements structured on the property model can be used for nonrivalrous goods and entitlements structured on the contractual model can be used for rivalrous ones. The form of the right is not dictated by the nature of the asset it concerns.

### III. UNDERSTANDING PROPERTY

Why does all this matter? To be sure, the basic architecture of an institution as fundamental to social existence as property might be thought to be intrinsically interesting, at least to scholars of law. But the importance of understanding the structure of property is much more than a matter of purely academic curiosity. As discussed, mutual exclusivity helps us to recognize how titling problems differ in kind from trespassory ones and, in doing so, it strongly implies that renewed attention should be given to the titling side of the equation.

The remainder of this Part will explore some additional implications of the general argument advanced in this Article. It will first show how mutual exclusivity helps explain a number of significant doctrinal and institutional features of property law. It will then suggest some ways in which the mutual exclusivity principle amends theoretical accounts of property focused on information costs.

---

135. And this is so even if the right does not bind successors in interest.

A. *Identifying Property*

We have already seen how the mutual exclusivity principle provides one of the critical tests to differentiate between different forms of legal right. Mutual exclusivity—in contrast to other exclusivity-based understandings of property—tells us what is property-like about a mortgage and a chose-in-action and what distinguishes a contract right involving a particular asset from a true property entitlement in it. This isn't just about taxonomy for its own sake. A variety of different legal fields—including bankruptcy law,<sup>136</sup> tax law,<sup>137</sup> conflict of laws,<sup>138</sup> and constitutional law<sup>139</sup>—apply special rules to “property,” making it important to be able to identify what does and does not count as property.<sup>140</sup> While the mutual exclusivity principle does not provide a comprehensive definition of property, it helps make clear what is at stake in these determinations. To the extent, for instance, that priority in bankruptcy law depends on whether a person holds a right of property, it is important to realize that priority itself—the practical face of the mutual exclusivity principle—lies at the heart of the concept of property.<sup>141</sup> To determine whether a particular claim has priority by asking whether it is a property entitlement can leave a court chasing its own tail.<sup>142</sup>

Properly understanding the structure of property can also affect how doctrines applicable to property operate. In the context of Takings Clause doctrine, for instance, the Supreme Court has given much greater protection against diminutions of property owners' rights to exclude others than against diminutions of their rights to use their property. At least where land is concerned, any permanent abridgement of the right to exclude is said to be an automatic taking, even in the case of the most “minute” invasions.<sup>143</sup> By contrast, regulations that restrict the way property can be used are only treated as per se takings if they deny “all economically beneficial or productive use of land.”<sup>144</sup> Takings protection for the right to exclude is hair-trigger sensitive while protection for the right to use property is anything but.

---

136. See, e.g., 11 U.S.C. § 541 (2012).

137. See, e.g., I.R.C. §§ 64, 6321 (2012).

138. See Stern, *supra* note 63, at 120–23.

139. See generally Merrill, *supra* note 82.

140. See Stern, *supra* note 106, at 279 n.8 (giving further examples).

141. Cf. Barry E. Adler, *Bankruptcy as Property Law*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 206, 206 (Kenneth Ayotte & Henry E. Smith eds., 2011) (“There is exactly one function bankruptcy law must serve. It must govern mutually insupportable obligations. . . . [B]ankruptcy law is property law.”).

142. Cf. *In re Mississippi Valley Livestock, Inc.*, 745 F.3d 299 (7th Cir. 2014).

143. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992); see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435–40 (1982) (holding that allowing a cable company to install a wire on the outside of an apartment building was a per se taking).

144. *Lucas*, 505 U.S. at 1015. *Loretto* remarked that loss of the right to exclude affects the ability to use property as well, 458 U.S. at 436, though as *Loretto* itself demonstrates, this is hardly always true in any meaningful sense. It is hard to see much additional injury in terms of lost use of the portion of space taken up by the cable television wires and equipment, which all told amounted to slightly more than one and one-half cubic feet. *Id.* at 438 n.16.

What accounts for the difference? Primarily, it seems to reside in the Supreme Court's conviction that the right to exclude is among the "most treasured strands"<sup>145</sup> and "most essential sticks"<sup>146</sup> in a property owner's bundle of rights, and indeed the "hallmark of a protected property interest."<sup>147</sup> But while an owner's right to prevent use by others is doubtless an important aspect of private property, so too is an owner's right to use what her or she owns, and it is a mistake to conclude that curtailing the right to exclude comes closer to the heart of property than a use restriction.<sup>148</sup> Although it is conceivable that some degree of differential treatment might be justified on prudential grounds,<sup>149</sup> the idea that exclusion is "essential" to property law in a way that the ability to use property isn't misunderstands the source of property's exclusive foundation.

And recognizing the mutual exclusivity principle can also help draw connections across law, helping to reveal the patterns that run through different fields. Henry Hansmann and Reinier Kraakman, for example, have powerfully argued that the critical function of organizational law lies in "asset partitioning."<sup>150</sup> Devices like the corporate form allow certain assets associated with a firm's activities to be protected from the creditors of the firm's shareholders, thereby benefitting the firm's creditors. And for entities endowed with "limited liability," other assets belonging to individual shareholders are protected from firm creditors. Given this, Hansmann and Kraakman conclude, "At its essential core, organizational law is property

145. *Loretto*, 458 U.S. at 435.

146. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

147. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999).

148. Indeed, the position cannot be taken entirely seriously, given the commitment to upholding antidiscrimination provisions. See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 82–84 (1980); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (alternative holding) (rejecting such arguments out of hand). *Loretto* sought to distinguish *Pruneyard* on the ground that it involved a temporary, rather than a permanent, invasion. *Loretto*, 458 U.S. at 435 n.12. This is quite artificial. Any human occupation is likely to be temporary since individual people are unlikely to want to remain in the same location forever. Although the acts of occupation were temporary, the loss of the right to prevent such occupation was effectively permanent. So while any given occupant can be expected eventually to vacate the property, there is no reason to suppose either that person or someone else won't return to occupy it later.

149. Even small curtailments of the right to exclude can interfere substantially with a wide range of activities, particularly those involving personal privacy, in a way that may not be true for rights of use. Restrictions on the right to use property in certain defined ways will generally leave many other alternatives open. If an owner cannot use property as a gas station, she may still be able to use it as an apartment building. If an owner must allow someone else access to the interior of her factory or her home, by contrast, informational privacy and personal security are substantially diminished, and a large set of likely uses is affected. A rough categorical generalization along these lines, combined with a preference for relatively clear-cut doctrinal rules, might conceivably support some difference in treatment between loss of the right to exclude others from property and loss of the right to use property.

150. Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 *YALE L.J.* 387, 440 (2000).

law, not contract law.”<sup>151</sup> Just so—and the reason is mutual exclusivity. Intuitively, Hansmann and Kraakman recognize that a system of entitlements establishing priorities between competing claims is the hallmark of the property form. Their insight is that primitive notions about the corporation as property turns out to have substantial analytic truth to it.

This isn’t to say corporate law as a field doesn’t have contractarian dimensions. It is a mix of many different legal building blocks.<sup>152</sup> But a special contribution of corporate law lies in establishing the priority of certain claimants to a separately identified set of resources. Once it is understood that property is about the allocation of a finite set of rights in a defined subject matter so that one person’s valid entitlement defeats the competing claims of others, it is possible to see how the property concept is used to construct more sophisticated legal institutions. This in turn makes it possible to draw upon insights developed in the context of one property problem in order to understand another. Insofar as corporate law is about asset partitioning, for instance, the extensive body of writing on the foundations of secured transactions law can shed light on the ways in which corporate law does or does not serve a valuable social purpose.<sup>153</sup> At the most general level, we might hypothesize that the connection between security interests and the structure of property suggested by the mutual exclusivity principle underscores the driving concern of property law to provide some form of security, helping bring in philosophical as well as efficiency-based accounts of property.<sup>154</sup>

---

151. *Id.*

152. See Kenneth Ayotte & Henry Hansmann, *Legal Entities as Transferable Bundles of Contracts*, 111 MICH. L. REV. 715, 717–18 (2013). On the long-standing debate over whether a corporation should be regarded as a “nexus of contracts,” see, for example, Melvin A. Eisenberg, *The Conception That the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819 (1998).

153. See, e.g., Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857, 859 (1996); Claire A. Hill, *Is Secured Debt Efficient?*, 80 TEX. L. REV. 1117 (2002); Jackson & Kronman, *supra* note 73; Lynn M. LoPucki, *The Unsecured Creditor’s Bargain*, 80 VA. L. REV. 1887, 1892 (1994); Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L. REV. 625, 628 (1997); Steven L. Schwarcz, *The Easy Case for the Priority of Secured Claims in Bankruptcy*, 47 DUKE L.J. 425, 425–27 (1997); Alan Schwartz, *The Continuing Puzzle of Secured Debt*, 37 VAND. L. REV. 1051, 1060 (1984); Robert E. Scott, *A Relational Theory of Secured Financing*, 86 COLUM. L. REV. 901 (1986); see also Franco Modigliani & Merton H. Miller, *The Cost of Capital, Corporation Finance and the Theory of Investment*, 48 AM. ECON. REV. 261 (1958).

154. See, e.g., JEREMY BENTHAM, THE THEORY OF LEGISLATION 70 (Richard Hildreth trans., Oceana Publ’ns 1975) (1802); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1218 (1967); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982) (developing a Hegel-inspired view of property in objects that are “part of the way we constitute ourselves as continuing personal entities in the world”).

## B. Mechanics and Doctrine

The impact of the mutual exclusivity principle on property law can be seen in a number of recurring doctrinal and institutional features of property.

### 1. Possession, Delivery, and Certification

One clear example of how mutual exclusivity shapes the way property law plays out is the extensive use property law makes of “possession” as a basis of entitlement, ranging from the classification of security interests to rules for the original acquisition of property.<sup>155</sup> A number of attempts to explain the significance of possession-based rules have argued such rules are adopted because they tend to promote the efficient use of resources.<sup>156</sup> In *Pierson v. Post*, for example, the famous fox-hunting case studied in many first-year property classes, the dispute centered on whether “hot pursuit” was enough to establish a claim to a wild animal or whether instead it was necessary actually to capture the animal being pursued.<sup>157</sup> The majority in *Pierson* opted for capture, a result typically justified on the ground that, in addition to being less ambiguous than a hot-pursuit rule, insisting on capture rewards actual success in completing the chase.<sup>158</sup>

Focusing on mutual exclusivity, however, suggests a different set of reasons to look to possession. Physical possession tends to identify a person or group exclusively—that is, in a way that precludes simultaneous possession by rival claimants—and it thereby sets the stage for the award of mutually exclusive rights.<sup>159</sup> Whatever other benefits follow from possession-based rules, an important but easily overlooked advantage is that they generate unique, noncontradictory answers of the form property law requires (and which the efficiency arguments more commonly advanced presuppose).

---

155. See D. Benjamin Barros, *The Biology of Possession*, 20 WIDENER L.J. 291, 292 (2011); Daniel Fitzpatrick & Susana Barnes, *Rules of Possession Revisited: Property and the Problem of Social Order*, 39 LAW & SOC. INQUIRY 127, 129 (2014); James Gordley & Ugo Mattei, *Protecting Possession*, 44 AM. J. COMP. L. 293, 293 (1996); Odelia Minnes, *Redefining Possessory Liens in Bankruptcy: Property, Contract, and What It All Means*, 11 DEPAUL BUS. & COM. L.J. 75, 76–77 (2012); Arun S. Subramanian, *Assessing the Rights of IRU Holders in Uncertain Times*, 103 COLUM. L. REV. 2094, 2103–04 (2003). See generally FREDERICK POLLOCK & ROBERT SAMUEL WRIGHT, AN ESSAY ON POSSESSION IN THE COMMON LAW 1 (photo. reprint 1985) (1888) (“Possession is a term of common occurrence and no mean significance in the law.”).

156. See, e.g., Ellickson, *supra* note 16; see also Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 J.L. & ECON. 393, 399–403 (1995) (suggesting the virtue of declaring a clear winner and thereby avoiding wasteful competition); Rose, *supra* note 16, at 75–82 (describing notice function).

157. 3 Cai. 175 (N.Y. Sup. Ct. 1805).

158. See Josh Blackman, *OutFoxed Pierson v. Post and the Natural Law*, 51 AM. J. LEGAL HIST. 417, 457–59 (2011); Andrea McDowell, *Legal Fictions in Pierson v. Post*, 105 MICH. L. REV. 735, 736–37 (2007).

159. The use of *first* possession rules, moreover, makes even clearer the importance of priority by using an absolute ordinal to mediate between successive possessors.

While commentators have certainly echoed the *Pierson* court's idea that possession helps establish clear titles to individual resources, their accounts tend to focus on the rule-like or intuitive character of possession rules—that is, to the ways possession-based rules are relatively easy to administer—rather than on the zero-sum quality of possession.<sup>160</sup>

This isn't simply an observation about doctrines formally denominated as possession rules. For example, under traditional doctrine a gift is incomplete until "delivery," which makes it much harder for someone to make a gift of the same physical object to two different people.<sup>161</sup> Having delivered it once, nothing is left to deliver to someone else. Something similar might be said about the concept of "seisin," so important in the medieval development of property law.<sup>162</sup> Like the idea of possession at issue in *Pierson v. Post*, these devices ensure that the quantum of property rights in circulation remains keyed to the quantum of property.

It is also worth noting that when possession of the property itself isn't feasible, as with intangible goods, property rights may be represented by physical tokens, ranging from stock certificates to membership cards to number slips at the deli counter.<sup>163</sup> The use of paper records has been said to have the benefit of enabling more complex forms of property rights, since the alternative of using physical possession as evidence of right holding doesn't easily accommodate arrangements in which rights in an asset are divided.<sup>164</sup> While this is undoubtedly true in many contexts, it isn't documentation alone that matters. The system of stockholding wouldn't work if a company with a fixed limit of 100,000 shares of stock circulated an indefinite number of stock certificates. Physical embodiments work only when it is understood that their number must be pegged to the number of property rights at issue—one right, one embodiment. Only when this is the case are they effective because only when this is the case do they subject legal rights to the mutual exclusivity principle.

## 2. Recording and Registration

Mutual exclusivity helps explain the heavy reliance on recording and registration devices across the range of property situations, including real

---

160. See, e.g., Ellickson, *supra* note 16, at 94; Rose, *supra* note 16, at 76–77.

161. See Chad A. McGowan, *Special Delivery: Does the Postman Have to Ring at All—The Current State of the Delivery Requirement for Valid Gifts*, 31 REAL PROP., PROB. & TR. J. 357 (1996).

162. See Ronald W. Polston, *Mineral Ownership Theory: Doctrine in Disarray*, 70 N.D. L. REV. 541, 561–62 (1994) (“[T]itle, being a physical thing, had to have a continuous existence. There could be no gap in seisin. Title had to be somewhere in someone at all times.” (footnote omitted)).

163. See, e.g., Jeanne L. Schroeder & David Gray Carlson, *Security Interests Under Article 8 of the Uniform Commercial Code*, 12 CARDOZO L. REV. 557, 579 (1990).

164. See ARRUAÑADA, *supra* note 110, at 18–24.

property, cars, boats, airplanes, water rights, mining claims, security interests, and intellectual property rights.<sup>165</sup> A recordation system refers to a central depository in which evidence of previous transactions is collected and made available for inspection. A registration system, such as the Torrens titling system for land, goes a step further, setting up a centralized clearinghouse that actually makes a definitive determination of rights holding. Recordation and registration are both responses to the problems that mutual exclusivity creates. They make it easier to ascertain who has valid claims on any given resource—recordation by providing the materials that enable parties to solve title chain problems more easily and registration by solving the problems for them. The purpose of these systems is to prevent the award of conflicting rights in the same asset.

These sorts of devices are ubiquitous in the world of property, but they are basically unheard of in other areas of law like contract and tort. Indeed, the point at which they enter the picture in the contractual context—secured transactions and bankruptcy—is the point at which contract claims are converted into actual property entitlements in specific assets. Although the cost of borrowing is substantially affected by the ease with which a creditor can monitor the activities of a borrowing firm, there are no central registries wherein one can investigate all of a corporation's contractual rights and obligations akin to the registries that determine ownership of each share of its stock.

We take for granted that these mechanisms exist in the property context. For valuable assets, they seem like an obviously sensible improvement over a world dependent on tests like physical possession to provide assurance of clear title. But the question is why these devices are so sensible—why are they needed and why only for property? The answer is that they are responses to the very real problem of competing third-party claims with which property is centrally concerned.

### 3. Things and Negative Rights

The previous literature on property has drawn attention to two basic features of property entitlements: they are defined in important part with reference to discrete “things,”<sup>166</sup> and they impose duties that are almost always negative in character in the sense that they require that someone

---

165. A particularly interesting example is the recordation of stockholding in a share registry, with sub-claims maintained by intermediaries in the elaborate system of indirect holding set up by the UCC. See Steven L. Schwarcz, *Intermediary Risk in a Global Economy*, 50 *DUKE L.J.* 1541, 1547–48 (2001).

166. See Smith, *supra* note 5, at 1691–92. The idea that property entails a right to a “thing” is sometimes controversial, though for reasons that are not relevant to this discussion (namely, that a right to a thing is often taken to suggest that the right is absolute in the Blackstonian sense). The point here is simply that it is not sensible to talk about an individual property entitlement without talking about the specific resource it concerns.



refrain from doing something, rather than perform some particular action.<sup>167</sup> The mutual exclusivity principle helps account for both of these. The two work in tandem to simplify the process of ensuring that rights do not conflict.

First, the individual things that are used as the starting point in delineating particular property entitlements are constituted so as to be mutually exclusive of one another. If one looks at a map of the plots of land in a particular neighborhood—any neighborhood anywhere—the parcels within it are drawn so as not to cover the same ground; Whiteacre does not start until Blackacre ends.<sup>168</sup> This is equally true for common and public spaces. Each parcel is distinct from every other.<sup>169</sup>

The use of negative rights completes this arrangement.<sup>170</sup> It is generally much harder to bound rights to positive performance than rights to have someone refrain from doing something because rights to positive performance have no natural stopping point. In consequence, positive obligations (“You must do *X*” and “You must do *Y*”) are more likely to conflict with one another than negative obligations (“You must not do *X*” and “You must not do *Y*”). I have a negative duty to *A*, to *B*, to *C*, and to millions of others not to trespass on their property, and those duties can be satisfied at once through the same course of action. Just now, while I was typing the previous sentence, I managed to discharge all of them. If, however, I have an obligation to help *A*, *B*, and *C* develop their respective properties, helping *A* will at

---

167. PENNER, *supra* note 5, at 71; see also Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12–13 (1927) (“[T]he essence of private property is always the right to exclude others. The law does not guarantee me the physical or social ability of actually using what it calls mine.”).

168. See Gary D. Libecap & Dean Lueck, *Land Demarcation Systems*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW, *supra* note 141, at 257, 292.

169. In the intellectual property literature, significant attention has been given to the issue of overlapping legal protection, as, for example, where one inventor develops an improvement to an earlier patented invention. The earlier inventor is said to hold a “blocking patent” in the follow-on invention, since the follow-on cannot be used without using the underlying technology in the original invention it improves upon. See generally Robert Merges, *Intellectual Property Rights and Bargaining Breakdown: The Case of Blocking Patents*, 62 TENN. L. REV. 75 (1994). Even so, the notional *res* used to structure and define the follow-on patent is distinct from the *res* used to structure the earlier one, much as the second floor of a building is distinct from the first, even if it cannot be used without passing through the first. The point is that complementary goods can still constitute conceptually separate things. If one person owns a hammer and another owns a nail, they will need to come to an agreement in order to make use of their respective things, but it is still the case that the two things are regarded as distinct objects. To analogize to another system of legal domains, we would not say that Kansas overlaps with Nebraska because someone straddling the border between them is subject to both states’ laws.

170. Assertions about purely “negative” rights are a source of considerable controversy in the context of rights against the government. See generally David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986). However, so far as I am aware, the idea that property holders are not ordinarily entitled to compel others to help them use their property is not a matter of particular disagreement. Indeed, it is taken for granted and seldom even recognized. To be clear, this is true only for claim-rights against others, not privileges of use, which may indeed be positive. See Hohfeld, *supra* note 58, at 30.

some point come at the expense of helping *B* and *C*. It is one thing not to impede *A*'s plans to construct a house on her land, but quite another to have to help her build it. After all, there are only so many hours in the day. The initially separate dominions delineated in terms of distinct things are no longer separate once positive rights enter the picture. Allowing entitlements to impose only duties of abstention on others thus makes it much easier to delineate rights in a way that avoids overlap and conflict.<sup>171</sup> In short, mutual exclusivity helps explain other fundamental aspects of how property entitlements are structured.

### C. The Information Cost Thesis

One of the most important developments in the literature on property in recent years is the emergence of the view that property law confronts and responds to high information costs, a view most closely associated with the work of Thomas Merrill and Henry Smith.<sup>172</sup> These accounts, however, have in important respects given a misleading view of the source of the information costs in property law, associating them with trespassory issues when they often stem from titling questions.<sup>173</sup> Titling problems, a product of property law's mutually exclusive structure, are particularly informationally taxing, and many of the features of property law that Merrill, Smith, and others have sought to explain as strategies to reduce information costs are in fact directed to issues pertaining to title. At the same time, however, mutual exclusivity also provides some independent justification for some of these features of property law, without needing to bring information costs into the picture.

Merrill and Smith first set out their information cost thesis in a trio of articles, beginning with an exploration of the *numerus clausus* principle in property law.<sup>174</sup> The *numerus clausus* refers to a general tendency to limit the types of property arrangements that can be established to a set menu of legal forms, the effect of which is to make property entitlements less customizable

---

171. Cf. *Bartlett v. Pullen*, 586 A.2d 1263, 1265 (Me. 1991) (finding no danger that conflicting claims to the same central asset would implicate recording act policies where parties' respective claims derive from separate deeds to "two separate and mutually exclusive parcels").

172. See Robert C. Ellickson, *Two Cheers for the Bundle-of-Sticks Metaphor, Three Cheers for Merrill and Smith*, 8 *ECON J. WATCH* 215, 218 (2011) ("Merrill and Smith's writings have permanently altered legal academic thinking about the nature of private property."); Lee Anne Fennell, *Property and Precaution*, 4 *J. TORT L.*, no. 2, art. 3, 54 <https://www.degruyter.com/downloadpdf/j/jtl.2011.4.2/jtl.2011.4.2.1114/jtl.2011.4.2.1114.pdf> [<https://perma.cc/TU3E-J372>] (stating that Merrill and Smith's "approach has increasingly set the terms of property theory discourse"); see also Abraham Bell & Gideon Parchomovsky, *Reinventing Copyright and Patent*, 113 *MICH. L. REV.* 231, 249 (2014); Christina Mulligan, *A Numerus Clausus Principle for Intellectual Property*, 80 *TENN. L. REV.* 235, 265–85 (2013); Meredith M. Render, *Complexity in Property*, 81 *TENN. L. REV.* 79, 96 (2013); Van Houweling, *supra* note 16, at 897.

173. See, e.g., Merrill & Smith, *Optimal Standardization*, *supra* note 16, at 55.

174. *Id.*; Merrill & Smith, *The Property/Contract Interface*, *supra* note 5; Merrill & Smith, *What Happened*, *supra* note 23.

than contractual ones.<sup>175</sup> For example, Merrill and Smith observed, it has been held that a leasehold can be created for a defined period of time like a year or a month but not for “the duration of the war.”<sup>176</sup> Merrill and Smith hypothesized that this limitation reflected a perceived need to standardize property entitlements. Although standardization diminishes the ability to tailor rights to fit individual needs, it can lower the cost of acquiring information by reducing everyone else’s need to watch out for and to interpret unusual legal arrangements. In their influential account, Merrill and Smith argued that there is more standardization in property than in contract law because “property rights are in rem[ and] all those who might violate property rights, accidentally or not, must know what they are supposed to respect.”<sup>177</sup> In other words, because property imposes duties on the whole world, it is harder to communicate their content and therefore the message has to be kept simple and uniform from one right to the next.<sup>178</sup>

The wide set of people who are subjected to the duties a property right imposes does offer a reason to use relatively coarse and acontextual rules in delimiting the scope of those duties. But that principle isn’t just true for property; it holds for any private law rule of general application, like the law of battery or doctrines governing the formation of contracts (as opposed to

---

175. See Merrill & Smith, *Optimal Standardization*, *supra* note 16, at 4. *But see* Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449, 1484 (2004) (challenging Merrill and Smith’s account).

176. Merrill & Smith, *Optimal Standardization*, *supra* note 16, at 11–12; *see, e.g.*, *Nat’l Bellas Hess, Inc. v. Kalis*, 191 F.2d 739, 741 (8th Cir. 1951).

177. Merrill & Smith, *Optimal Standardization*, *supra* note 16, at 32 (“An indefinite set of types of rights will raise the cost of preventing violations through investigation of rights.”).

178. See Merrill & Smith, *What Happened*, *supra* note 23, at 387. As examples of the *numerus clausus*, Merrill and Smith gave the system of estates in land, various forms of concurrent interests, nonpossessory interests (easements and servitudes), interests in personal property, and types of intellectual property rights. See Merrill & Smith, *Optimal Standardization*, *supra* note 16, at 12–20. Of these, only the last seems primarily to concern the existence of any private rights and thus the duties applicable to strangers, as opposed to the manner in which the rights are carved up among various right holders. Merrill and Smith occasionally referred to information costs associated with acquiring property rights, in addition to those associated with the need to avoid violating the rights of others. *See, e.g., id.* at 27; Thomas W. Merrill, *The Property Prism*, 8 ECON J. WATCH 247, 250 (2011). But the focus of their argument about property focused on its “in rem” character, understood to refer to the large and indefinite group of duty holders a property right entails. *See, e.g., Merrill & Smith, What Happened*, *supra* note 23, at 386–87; Merrill & Smith, *The Property/Contract Interface*, *supra* note 5, at 789. Merrill and Smith originally distinguished contract law by arguing that property involves higher information costs because “the adoption of idiosyncratic property rights has an impact not only on the originating parties and potential successors in interest, but also on other market participants.” Merrill & Smith, *Optimal Standardization*, *supra* note 16, at 44. But idiosyncratic contracts also have an impact on others seeking to form contracts of their own. If all contracts meant the same thing, it would be much easier to draft them, though such a regime would obviously entail other, greater costs. The immediate problem of information costs arises not simply because customization allows for an information cost externality, but because that externality magnifies the significantly higher information costs that arise from allowing the transfer of assets, with their attendant notice difficulties.

the content of individual contractual obligations, which are generally customizable). More to the point, the claim has little to do with the class of people whose informational burden might be lightened by the legal practices they associate with *numerus clausus*. As many, including Merrill and Smith, have observed, part of the genius of property law is that the content of property duties imposed on “the whole world” is unaffected by the identity or characteristics of the people who hold the rights. A stranger does not need to know whether a car parked on the street is rented or owned, much less who the renter or owner is, to know not to take or damage it.<sup>179</sup> Yet it is information about the identity of the right holder, not the substantive content of the rights, that is addressed by the doctrines Merrill and Smith use to illustrate the *numerus clausus*. The term of a lease (“for the duration of the war”) determines the point in time when rights revert from one property holder to another. It has no bearing on the duties that the wider world must respect. As articulated, the argument that the *numerus clausus* makes it easier for strangers to figure out the content of their obligations does not add up.<sup>180</sup>

An explanation of the *numerus clausus* grounded in information costs is still quite plausible, but on somewhat different terms.<sup>181</sup> An idiosyncratic property right like a lease with an unusual term doesn’t make it any harder for strangers to know what counts as a trespass, but it does make it harder for those implicated by titling issues to determine whose claim prevails over whose. Would-be purchasers of an apartment building, for instance, may find it harder to determine just what sorts of encumbrances they might encounter in evaluating any given property if leaseholds come in an elaborate set of different configurations. The problem is rooted in mutual exclusivity: because the current owner of a building cannot convey the building to a purchaser free of any leases beyond a certain date while at the same time creating leases of indefinite duration, there is a conflict. The lessee’s and the

---

179. Merrill & Smith, *supra* note 27, at 1853–54.

180. This is not to deny that other aspects of property law, such as the use of thing-boundaries to define property duties, do reduce information costs in the way Merrill and Smith claim, and information costs would certainly be expected to increase the more that scope of protection against outside interference is allowed to vary for different resources.

181. Henry Hansmann and Reinier Kraakman have challenged Merrill and Smith’s account of the *numerus clausus*, arguing that it serves as a way “to facilitate verification of ownership of the rights offered for conveyance,” rather than “communication among persons who transact in rights.” Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 3373, 3374 (2002). While they are right to focus on problems concerning the enforcement of property rights against subsequent transferees, in their account, the *numerus clausus* simply serves as the starting point for a set of rules about the sort of notice that must be given when complete ownership of an asset is divided. It is not about reducing uncertainty generally—that is, for other potential transactors interested in other, unrelated properties—by either reducing the likelihood of encountering an idiosyncratic property arrangement or formalizing the language used to construct more elaborate property interests. My point, by contrast, is that the information cost thesis must be modified to recognize that titling problems are its principal source, but it remains plausible nevertheless.

purchaser's rights are incompatible as property rights. Stated differently, to the extent the *numerus clausus* reflects a desire to standardize property entitlements in order to make it easier to assess, measure, and communicate them, the explanation has to do with the way property rights necessarily preclude competing claims. By ensuring that mutually exclusive rights come in a limited set of packages, the *numerus clausus* reduces the cost of investigating the risks associated with a right that might be invalid because of someone else's superior claim.

The more general argument that property law has to deal with particularly acute information cost problems and is pervaded by strategies to reduce those costs does make sense when the special problem of titling is considered. Titling questions present systematically heavy and intractable informational burdens. In part, the issues are more case specific, less easily resolved by general rule. Even if the law of trespass were more flexible and standard-like than it typically is,<sup>182</sup> it would still be amenable to *some* generalization. If a given act under a given set of circumstances bearing a given relationship to Blackacre is a trespass to Blackacre, then in principle the same act under the same circumstances bearing the same relationship to Whiteacre should be a trespass to Whiteacre. Title questions, by contrast, are intrinsically factual. Ordinarily, knowing who owns Blackacre tells you literally nothing about who owns Whiteacre.<sup>183</sup> To be sure, there are questions of law that must be worked out to maintain a title system, but in most cases, ascertaining whose claims to a given asset are valid will be less a matter of legal uncertainty than of ascertaining the raw facts to which that law is to be applied. To put the point more concretely, the question that will come up again and again won't be whether a security interest *must be* recorded to defeat a subsequent purchaser's claim but whether an interest *has been* recorded.

Besides being property-specific, the title issue increases information costs in at least one and often two other respects. In circumstances where one person can acquire property from another who is not supposed to be able to transfer the entitlement—for example, in cases where a good faith purchaser prevails over an earlier transferee—information costs are high because the current holder of an entitlement has to monitor the conduct of others, such as prior owners, trustees, or bailees, to ensure that the entitlement isn't lost. In situations where the opposite approach is followed and the earlier transferee prevails over the later one, a similar problem arises since a would-be transferee's rights also depend on the actions of strangers, though now the strangers are prior purchasers rather than subsequent ones. Here, however, there is the added problem that the inquiry is historical, requiring an investigation into the "chain of title," a series of transactions among strangers stretching into the past. If *C*'s transfer to *D* depends on whether *B*'s transfer to *C* was valid, which in turn depends on whether *A*'s

---

182. See Depoorter, *supra* note 100, at 1092–93.

183. For an important exception, see Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEGAL ANALYSIS 459 (2009).

transfer to *B* was valid, the costs of uncovering the necessary information will be potentially very high—and not just in a few instances but across the board. These costs can be reduced through devices like recordation, marketable title acts, and rules based on physical possession, but they cannot be avoided.<sup>184</sup>

In short, it is mutual exclusivity and the problem of titling that accounts for much of the high information costs that property law confronts. As a closing thought, however, it should also be noted that the mutual exclusivity principle supplies an independent justification for some of the features the information cost thesis has sought to explain. The formalistic system of estates in land might be justified as a way to reduce information costs, but it can certainly be quite bewildering and in some cases undoubtedly acts as a trap for the unwary. The idea that the system makes the law *easier* to understand might come as a surprise to many first-year law students charged with mastering its intricate technicalities (a reversion, not a reverter?!), to say nothing of the nonspecialist public. By contrast, a straightforward case can be made that the standardization of estates helps implement the mutual exclusivity principle because it ensures that different temporal pieces will fit together without overlap, even if it is more than a little complicated. The system is consistent with the general conception of property that sees it as a system for allocating portions of a fixed sum of legal authority. Similar arguments could be made about other property doctrines and features that have been said to be designed to reduce information costs. Indeed, such an argument has already been made about one such set of features, the negative, thing-based structure of property entitlements. In short, some of property's superficial formalism may simply be a reflection of its underlying conceptual form.<sup>185</sup>

#### CONCLUSION

Property is a basic building block in any comprehensive normative system. Superficially, its structure seems quite simple, which is altogether fitting given the work it is called upon to do, but its surface appearance masks a more complex story about its underlying mechanisms of operation. Exclusivity is one of the core features of property invoked by an array of theorists to describe the way property operates. But it turns out property is exclusive in multiple senses and to differing extents. And it further turns out that the most significant form of exclusivity from the standpoint of how property is

---

184. See Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1355–57 (1982).

185. Moreover, the root causes of property's adherence to that form may help explain the relatively formal characteristics of property without needing information costs as a middle step in the argument. Information cost analysis tends to take the in rem structure of property as a given. But it may well be that property isn't simply made more formal because it is in rem but that it is made more formal and it is in rem for the same underlying reason—to give property holders confidence, or security, in their legal position.

constituted isn't any of the versions of exclusivity generally assumed in debates about property, but the mutual exclusivity principle discussed here.

Understanding property as a system of mutually exclusive rights describes property most universally and captures the difference between property entitlements and their closest legal analogues. Mutual exclusivity is able to describe what is property-like about entitlements like mortgages, easements, and ownership of bank accounts. It helps explain the origin of so many of the peculiar institutional features that surround property law, like recording mechanisms and possession doctrines. It gives a better understanding of the origins of information cost problems in property law, drawing a critical distinction between trespass and title issues. This final distinction is vital to understanding the multiple facets of property. The tendency to conflate questions about the strength of property rights and questions about the identity of the person who holds them tends not only to confuse our understanding of property but to distort it, since the consequence is often to view everything through the lens of trespass, with its themes of public against private. The life of property consists as much in titling problems as trespass ones, and it is only by recognizing the complications associated with a system designed to disallow conflicting entitlements that this other aspect of property law can be fully appreciated.