

PROPERTY'S STRUCTURAL PLURALISM:
ON AUTONOMY, THE RULE OF LAW, AND
THE ROLE OF BLACKSTONIAN OWNERSHIP

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It is a real privilege for me to participate in the celebration of Thomas Merrill's enormous contribution to the scholarship and jurisprudence on property, which has enhanced our understanding of property in numerous ways. His work has elucidated the rationale of seemingly puzzling doctrines,¹ illuminated the significance of hitherto marginalized ones,² and introduced a new theoretical perspective—the focus on information costs—that by now dominates much of property theory.³ At the center of the first panel of the Tenth Brigham-Kanner Property Rights Conference, to which this Essay belongs, is yet another of Tom's seminal contributions: his challenge to our understanding of the essence of property.

After the bundle-of-sticks picture of property endorsed by the Restatement of Property had been regarded for decades as conventional wisdom,⁴ Tom was one of the first scholars to forcefully insist that the right to exclude—in line with Blackstone's conception of property as “sole and despotic dominion”⁵—is the most defining feature of property.⁶ While property does not always and necessarily entail unqualified dominion, “the right of the owner to act as the exclusive gatekeeper of the owned thing” is, in this view, “the differentiating feature of a system of property.”⁷

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1. See, e.g., Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986).

2. In addition to his well-known discussion of *numerus clausus* principle, see also, e.g., Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEGAL ANALYSIS 459 (2009).

3. See, e.g., Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

4. RESTATEMENT (FIRST) OF PROPERTY ch. 1, §§ 1–5 (1936).

5. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *2 (Univ. of Chi. ed. 1979) (1765–69).

6. See Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998). See also, e.g., J.E. PENNER, THE IDEA OF PROPERTY IN LAW (1997).

7. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (2007).

This short Essay is part of my ongoing conversation with Tom on these matters. I was asked to present to this panel a structurally pluralistic perspective on property, different from both the view of property as a singular right and from its conception as a bundle of rights, and I will devote most of my efforts to this task. But I will also seek to allude to some points of (perhaps surprising) convergence between this view and at least some aspects of the way Tom conceptualizes property.

The structurally pluralistic account of property I have developed in recent years⁸ begins with a straightforward descriptive observation. Rather than a uniform bulwark of independence, property manifests itself in law in a much more nuanced, contextualized, and multifaceted fashion. Property law, as both lawyers and citizens experience it, is rather complex, and this complexity is at odds with the attempt to formulate broad and unified theories suggesting that one animating principle, such as exclusion, shapes the entire terrain or at least the core of property.

Indeed, property law tends to set up distinct institutions, each of which covers a specific category of human situations and is governed by a distinct set of rules expressing differing underlying normative commitments. Thus, we can find side-by-side doctrines that, by and large, comply with a libertarian commitment to independence (for example, fee simple absolute) alongside other doctrines in which ownership is a locus of communitarian sharing (such as marital property) or of utilitarian welfare maximization (as with patents), as well as many other doctrines vindicating various types of balances among these (and other) property values (for example, copyright or common interest communities).

Structural pluralism takes this heterogeneity of our existing property doctrines seriously. While conceding that there is some value in looking for a rather thin common denominator in the wide terrain of legal doctrine covered by wholesale legal categories such as property, it insists that such a common denominator is not robust enough to illuminate the existing doctrines or determinative enough

8. See HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS (2011).

to provide significant guidance as per their evaluation or development. Thus, as Felix Cohen demonstrated, every property right involves *some* power to exclude others from doing something.⁹ But as Cohen further emphasized, this is a rather modest truism, which hardly yields any practical implications.¹⁰ Private property is also always subject to limitations and obligations, and “the real problems we have to deal with are problems of degree, problems too infinitely intricate for simple panacea solutions.”¹¹

Conceptualizing the right to exclude as the core of property marginalizes or possibly even undermines two significant constitutive characteristics of property: governance and inclusion. The internal life of property law is often structured by a wide range of sophisticated governance regimes aiming to facilitate various forms of interpersonal relationships (consider, for example, the law of waste, landlord-tenant law, trust law, and the law of common-interest communities). Moreover, examining the more precise scope of owners’ right to exclude shows that inclusion is sometimes inherent in property; non-owners’ rights to entry in important categories of property cases (think, for example, about the law of public accommodations; the copyright doctrine of fair use; and the law of fair housing, notably in the contexts of common-interest communities law and landlord-tenant law) are indispensable characteristics of the property institution under examination.¹²

Accordingly, a structurally pluralistic conception of property understands it as an umbrella for a limited and standardized set of property institutions that serve as important default frameworks of interpersonal interaction. All these property institutions mediate the relationship between owners and non-owners regarding a resource, and, in all property institutions, owners have some rights to exclude others. This common denominator derives from the role of property in vindicating people’s independence. Alongside this important property value, however, other values also play crucial roles in shaping property institutions. Property also can and does serve our commitments to personhood, desert, aggregate welfare, social responsibility, and distributive justice. Different property institutions

9. Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 370–71 (1954).

10. *Id.*

11. *Id.* at 357, 362, 370–74, 379.

12. See Hanoch Dagan, *Inside Property*, 63 U. TORONTO L.J. 1 (2013).

offer differing configurations of entitlements that constitute the contents of an owner's rights vis-à-vis others, or a certain type of others, with respect to a given resource.

The particular configuration of these entitlements is by no means arbitrary or random. Rather, it is (at least at its best) determined by the character of the property institution at issue: namely, by the unique balance of property values characterizing it. These values both construct and reflect the ideal ways in which people interact in a given category of social contexts, such as market, community, and family, and with respect to a given category of resources, such as land, chattels, copyright, and patents. The ongoing process of reshaping property as institutions is often rule-based and usually addressed with an appropriate degree of caution. And yet, the possibility of repackaging, highlighted by Hohfeld,¹³ makes it (at least potentially) an exercise in legal optimism, with lawyers and judges attempting to explicate and develop existing property forms by accentuating their normative desirability while remaining attuned to their social context.

Some property institutions are structured along the lines of the Blackstonian view of property as sole despotic dominion. These market-oriented property institutions are atomistic and competitive. They constitute a "sphere of freedom from personal ties and obligations,"¹⁴ thus vindicating people's independence (or negative liberty). But property law does not allow these norms to override those of the other spheres of society. Property relations mediate some of our most cooperative human interactions as spouses, partners, members of local communities, and so forth. Rather than imposing the impersonal norms of the market governing the fee simple absolute on these divergent spheres, property law, at least at its best, facilitates their flourishing by supplying robust default mechanisms (particularly anti-opportunistic devices) befitting their animating underlying principles.

Property institutions vary not only according to the social context but also according to the nature of the resource at stake. The resource is significant because its physical characteristics crucially

13. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 710, 720, 733–34, 746–47 (1917). By invoking Hohfeld, I do not imply to invoke, let alone endorse, the dubious conception of property as bundles.

14. ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 145 (1993).

affect its productive use. Thus, for example, the fact that information consumption is generally non-rivalrous implies that, when the resource at hand is information, use may not always necessitate exclusion. The nature of the resource is also significant in that society approaches different resources as variously constitutive of their possessors' identity. Accordingly, resources are subject to different property configurations; whereas the law vigorously vindicates people's control of their constitutive resources, the more fungible an interest, the less emphasis property law will need to place on its owner's control.

Indeed, unlike the Blackstonian view, the structurally pluralistic construct recognizes the significant role that our social values play in our conception of property. Each of our property institutions, as noted, targets a specific set of values to be promoted by its constitutive rules in one subset of social life. Both the existing categories and their underlying animating principles are always subject to debate and reform, so that some institutions may fade away while new ones emerge and yet others change their character or split.¹⁵ But at any given moment, each such institution consolidates people's expectations regarding a core type of human relationships so that they can anticipate developments when entering, for instance, a common interest community, or marriage, or invading other people's rights in a specific form of intellectual property. Thus, a set of fairly precise rules governs each of these types of property institutions, enabling people to predict the consequences of future contingencies and to plan and structure their lives accordingly. Furthermore, our property institutions also serve as means for expressing normative ideals of law for these types of human interaction.

Both roles—consolidating expectations and expressing law's ideals—require some measure of stability. To form effective frameworks of social interaction and cooperation, law can recognize a necessarily limited and relatively stable number of categories whose content must be relatively standardized. The standardization prescription is particularly stringent regarding the expressive role, which mandates limiting the number of legal categories since law

15. This dynamic feature of property assures that understanding property as encapsulating ideals of interpersonal interaction is a source of critical engagement and reform.

can effectively express only a given number of ideal types of interpersonal relationships. Indeed, the structurally pluralistic conception of property justifies property's standardization by reference to the role of our property institutions as default frameworks of interpersonal interaction, frameworks that serve to consolidate expectations and to express law's normative ideals for core types of human relationships. This justification of the *numerus clausus* principle coexists with a rather broad realm of freedom of contract regarding property rules (subject, of course, to the legitimate verification interest of third parties insofar as they are affected by such opt-outs).¹⁶

On its face, such a pluralistic understanding of property may seem problematic, both normatively and jurisprudentially. Normatively, one may wonder whether it pays sufficient attention to personal autonomy, the value with which property is often (rightly) associated.¹⁷ Jurisprudentially, one may question whether structural pluralism is sufficiently attentive to the rule of law prescriptions that, again, are particularly important to property.¹⁸ These are significant concerns, but neither undermines property's structural pluralism. In fact, they help to clarify the normative and jurisprudential underpinnings of structural pluralism and to demonstrate that, properly interpreted and refined, structural pluralism ends up superior to any alternative position on property on *both* fronts.

Consider first the normative virtue of property's structural pluralism. I argue that the multiplicity typical of property's landscape is indispensable for people's autonomy, at least insofar as autonomy stands for our right to self-determination: our right to be to some degree the authors of our lives, choosing among worthwhile life plans and being able to pursue our own choices.

16. See DAGAN, *supra* note 8, at ch. 1.

17. This concern seems to explain Tom's (mis)characterization of my position as one of "forced sharing." See Thomas W. Merrill, *Property and the Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1, 22–24 & n.44 (2014).

18. This concern seems to underline Henry Smith's claim that my pluralist conception of property can hardly be distinguished from the bundle understanding of property. See Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1705–06 (2012).

As Joseph Raz explains, autonomy requires not only appropriate mental abilities and independence but also “an adequate range of options.”¹⁹ While a wide range of valuable sets of social forms is available to societies pursuing the ideal of autonomy, autonomy “cannot be obtained within societies which support social forms which do not leave enough room for individual choice.”²⁰ For choice to be effective, for autonomy to be meaningful, there must be, other things being equal, “more valuable options than can be chosen, and they must be significantly different,” so that choices involve “tradeoffs, which require relinquishing one good for the sake of another.”²¹ Indeed, given the diversity of acceptable human goods from which autonomous people should be able to choose and their distinct constitutive values, the state must recognize a sufficiently diverse set of robust frameworks for people to organize their life.

Ostensibly, this commitment does not require the elaborate apparatus of property's structural pluralism. As long as property is understood as “sole and despotic dominion” and contracts are conceptualized around people's consent, so the argument goes, free individuals can use these fundamental building blocks of private law and tailor their interpersonal arrangements so that they best serve their own utilitarian, communitarian, or other purposes.²² In fact, however, many of these frameworks cannot be realistically actualized without the active support of viable legal institutions (or law-like social conventions). To see why this is the case, we need to appreciate the insights of both lawyer economists and critical scholars.²³

Economic analysis of private law, which investigates its incentive effects, forcefully demonstrates how many of our existing practices rely on legal devices serving to overcome numerous types of transaction costs—information costs (symmetric and asymmetric), bilateral monopolies, cognitive biases, and heightened risks of opportunistic behavior that generate participants' endemic vulnerabilities in most

19. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 373 (1986).

20. See *id.* at 406.

21. See *id.* at 372, 395, 398. Cf. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 309–12 (1974).

22. See Thomas W. Merrill, *Property as Modularity*, 125 HARV. L. REV. F. 151, 157–58 (2012).

23. For more a detailed analysis on which the following paragraphs draw, see Hanoch Dagan & Michael A. Heller, *Freedom of Contracts* Pt. III.A (Columbia Law & Econ. Working Paper No. 458, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2325254.

cooperative interpersonal interactions.²⁴ Merely enforcing the parties' expressed intentions would not be sufficient to overcome the inherent risks of such endeavors. If many (most?) of them are to become or remain viable alternatives, law must provide the background reassurances that help to catalyze the trust so crucial for success. Even where parties are guided by their own social norms, law often plays an important role in providing them background safeguards, a safety net for a rainy day that can help to establish trust in their routine, happier interactions.²⁵

But law's effects are not only material. Because our private law tends to blend into our natural environment, its categories play a crucial role in structuring our daily interactions.²⁶ Thus, alongside these material effects, many of our conventions—including many social practices we take for granted—become available to us only due to cultural conventions that often, especially in modern times, are legally constructed.²⁷ Hence, even before we consider the transaction costs of constructing these arrangements from scratch, people in a society where these notions have not been legally coined would have faced “obstacles of the imagination” that might have precluded these options. Indeed, our private law institutions play an important cultural role; like other social conventions, they serve a crucial function in consolidating people's expectations and in expressing normative ideals regarding the core categories of interpersonal relationships they participate in constructing.²⁸

Both the material and the expressive functions of property imply that freedom of contract, though significant, cannot possibly replace active legal facilitation. Lack of legal support is often tantamount to undermining—maybe even obliterating—many cooperative types of interpersonal relationships and thus people's ability to seek their conception of the good. Therefore, a commitment to personal autonomy by fostering diversity and multiplicity cannot be properly

24. See, e.g., Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000).

25. Cf. Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 578–79 (2001).

26. See, e.g., Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 212–14 (1987).

27. See, e.g., Ian Ayres, *Menus Matter*, 73 U. CHI. L. REV. 3, 8 (2006).

28. See generally DAGAN, *supra* note 8, at chs. 1 & 4.

accomplished through a hands-off policy and a hospitable attitude to freedom of contract. The liberal state should “enable individuals to pursue valid conceptions of the good” by proactively *providing* “a multiplicity of valuable options.”²⁹

Accordingly, a structurally pluralistic property law—the conception of property which best accounts for the property law we actually have—follows this prescription by including diverse types of property institutions, each incorporating a different value or different balance of values. This variety is rich, both between and within contexts: it provides more than one option for people who want, for example, to become homeowners, engage in business, or enter into intimate relationships. The boundaries between these property institutions are open, enabling people to freely choose their own ends, principles, forms of life, and associations by navigating their way among them. While at a certain point the marginal value of adding another distinct institution is likely to be nominal in terms of autonomy, pluralism implies that property law’s supply of these multiple institutions should not be guided only by demand. Demand for certain institutions generally justifies their legal facilitation, but absence of demand should not necessarily foreclose it insofar as these institutions add valuable options for human flourishing that significantly broaden people’s choices. Only in this way can law recognize and promote the individuality-enhancing role of multiplicity.

Because only the conception of property as institutions—alongside its attendant commitment to a broad realm of freedom of contract regarding property rules—follows these prescriptions, this is the only truly autonomy-enhancing conception of property. Indeed, as long as the boundaries between the multiple property institutions are open, the liberal commitment to autonomy neither necessitates the hegemony of the Blackstonian form of property—otherwise known as the fee simple absolute—nor undermines the value of other, more communitarian or utilitarian property institutions. On the contrary, the availability of several different but equally valuable and obtainable frameworks of interpersonal interaction makes autonomy more meaningful by facilitating people’s ability to choose and revise their

29. Cf. RAZ, *supra* note 19, at 133, 162, 265.

forms of interaction with other individuals respecting diverse types of resources.³⁰

Consider now the rule of law, which I understand to stand for two important prescriptions: that law provides effective guidance to its addressees, and that it does not confer on officials the right to exercise unconstrained power.

The first aspect starts with the proposition that the law should provide people effective guidance. Though seemingly thin, this conception of the rule of law is intimately connected with people's autonomy (understood as self-authorship). By requiring that "government in all its actions [be] bound by rules fixed and announced beforehand," the rule of law enables people "to foresee with fair certainty how the authority will use its coercive power in given circumstances, and to plan [their] affairs on the basis of this knowledge."³¹ Only a relatively stable and predictable law can serve as a "safe basis for individual planning," which is a prerequisite of people's ability to "form definite expectations" and plan for the future.³² Law's participation in securing stable "frameworks for one's life and action" increases "[p]redictability in one's environment," and therefore "one's power of action," thus facilitating people's "ability to choose styles and forms of life, to fix long-term goals, and effectively direct one's life towards them."³³

The second aspect of the rule of law perceives it as the other side of the rule of man. The rule of law stands here for "the absence of arbitrary power on part of the government,"³⁴ through the imposition of "effective inhibitions upon power and the defense of the citizen from power's all-intrusive claims."³⁵ Unrestrained power is

30. See generally Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409 (2012).

31. F.A. HAYEK, *THE ROAD TO SERFDOM* 54 (1944).

32. JOSEPH RAZ, *The Rule of Law and Its Virtues*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 220 (1979).

33. *Id.* at 210, 220, 222.

34. A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 188, 196 (10th ed. 1959).

35. E. P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 266 (1975).

objectionable, both because of its potential devastating burdens and because it renders us mere objects, dominated by the power-wielder.³⁶ The rule of law addresses these grave concerns by prescribing “a particular mode of the exercise of political power: governance through law.”³⁷ More specifically, the rule of law requires that “people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong.”³⁸

Both aspects of the rule of law imply the significance of predictability and stability, which property lawyers typically (and justifiably) embrace. Both aspects resist open-ended standards allowing judges to consult, for each individual case, the law’s underlying commitments, preferring instead clear rules that translate “the implications of normative values into concrete prescriptions,” “sufficiently determinate” to be followed by their appliers.³⁹ To be sure, the rule of law does not always prescribe the use of bright-line rules.⁴⁰ At times—especially where the alternative would be a complex set of technical and non-intuitive rules⁴¹—commitment to the rule of law implies allowing, or even preferring, that the social practice of a legal topic be formed around a vague but informative standard. The reason for this preference is that a standard which is guidance-friendly and constraining-friendly enables its addressees (or their lawyers) to figure out its intended content and thus to predict its future unfolding and realm of application, monitoring or modifying their behavior accordingly.⁴² Standards that refine the regulative principle governing

36. See Martin Krygier, *Four Puzzles About the Rule of Law: Why, What, Where? and Who Cares?*, in *NOMOS L: GETTING TO THE RULE OF LAW* 64, 79–80 (2011).

37. Jeremy Waldron, *The Concept and the Rule of Law*, 43 *GA. L. REV.* 1, 11 (2008).

38. *Id.* at 6, 31.

39. Emily Sherwin, *Rule-Oriented Realism*, 103 *MICH. L. REV.* 1578, 1589–91 (2005). See generally LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* (2001); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991).

40. *Contra* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 *U. CHI. L. REV.* 1175 (1989).

41. See Timothy Endicott, *The Value of Vagueness*, in *PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW* 14, 23, 28, 30 (Andrei Marmor & Scott Soames eds., 2011); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 48 (1990).

42. See Jeremy Waldron, *Vagueness and the Guidance of Action*, in *PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW*, *supra* note 41, at 58, 65–66, 69.

a specific area of law along these lines—informative standards, as I call them—are therefore generally unobjectionable.⁴³ By contrast, open-ended references to justice, fairness, good faith, or reasonableness, as these are interpreted by the presiding law applier given the specific circumstances of the case at hand, fail to ensure predictability or properly constrain law appliers. They should therefore be objected to as an invitation to ad hoc discretion, which affronts the rule of law.⁴⁴

Structural pluralism is not only following suit. Its adherence to the rule of law, just like its compatibility with our commitment to personal autonomy, is inherent in its most foundational features.⁴⁵

The first reason for this happy proposition is already implicit in my presentation of the main tenets of structural pluralism. For structural pluralism to perform its autonomy-enhancing role properly, it must be able to consolidate people's expectations regarding the various property institutions, conveying in credible terms the ideals of interpersonal relationships represented by each of them. Both requirements, as noted, imply some prescription of stability and predictability.⁴⁶

The second reason refers to types of cases (just noted) in which bright-line rules cannot adequately serve as a guide for action, requiring law to resort to informative standards. In these problematic contexts, structural pluralism is likely to be *more* predictable than its monistic counterpart due to its use of multiple and relatively small categories. These categories are sufficiently distinct from one another and internally coherent, meaning each one is generally guided by one animating principle, one value, or a balance of values. Only such small categories, in sharp contrast with the broad category of property used in monist theories, can rely on animating principles sufficiently determinate to function as informative standards. As long as these animating principles are properly articulated and not

43. See HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 208–10 (2013).

44. See HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 12–18 (2004). There may be one exception to this rule: when broad social agreement prevails on the pertinent matter. See also LON L. FULLER, THE MORALITY OF LAW 50, 92 (rev. ed. 1964). In contemporary societies, however, this condition applies to very few issues.

45. The following paragraphs draw on DAGAN, *supra* note 43, at ch.9.

46. See *supra* text accompanying note 16.

too frequently revised so that they are sufficiently stable,⁴⁷ legal subjects or their lawyers remain aware of the “character” of these property institutions and can form their expectations accordingly.

Finally, the commitment to multiplicity of the structurally pluralistic conception of property is particularly important for the rule of law prescription of constraining the power of lawmakers who, as fallible human beings, may make mistakes and, at times, even prefer their self-interest to the public good. I do not deny that, at moments of legal pathology—namely, litigation—the power over the litigants that a pluralistic regime assigns decision-makers is no different from that allocated by a monist system. But these endgame dramas should not obscure the significance of the *ex ante* choices available to people.⁴⁸ From this perspective, a structurally pluralistic property law is again superior to its monist counterpart, because it opens up options for choice rather than channeling everyone to the one possibility privileged by law.⁴⁹ It allows individuals to navigate their course so that they bypass certain legal prescriptions, avoiding their potential implications and hence the power of the people who have issued them.⁵⁰

I have discussed the commitments of property's structural pluralism to autonomy and to the rule of law partly because Merrill's scholarship appears to me to be largely driven by these two commitments. But recall that Tom is known for the proposition that, his many critics notwithstanding, Blackstone was essentially correct: the right to exclude *is* the core of property. So let me conclude with

47. Recall that “the rule of law does not require that law's guidance never change. It requires that the prospect of change should not make it impossible to use the existing law as a guide.” TIMOTHY A.O. ENDICOTT, *The Impossibility of the Rule of Law*, in VAGUENESS IN LAW 185, 193 (2000).

48. Cf. H.L.A. HART, *THE CONCEPT OF LAW* 79–88 (1961).

49. Cf. Richard A. Epstein, *Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property*, 8 *ECON. J. WATCH* 223, 233 (2011) (arguing “it is the unitary conception of property rights that is in fact vulnerable to creeping statism”).

50. This is why I believe that Nozick's inspiring account of utopia as a “framework for utopias” implies the endorsement of a structurally pluralistic conception of private law. See Hanoch Dagan, *The Utopian Promise of Private Law* (Feb. 17, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2397395.

some observations on the role of Blackstonian ownership within the structurally pluralist conception of property.

To begin with, my claim on the significance of multiplicity for self-authorship implies rejecting the proposition that exclusion is the essence of property. An autonomy-based understanding of property should not privilege the fee simple absolute by treating its characteristics as fundamental features of property as a whole, thus suppressing other property institutions as variations on a common theme or marginalizing them as peripheral exceptions to a robust core. Blackstonian ownership should not be conceptualized as the “core” or the “default” of our understanding of property.⁵¹

Objecting to these excesses, however, does not mean that Blackstonian ownership has no significant role. Quite the contrary: the inclusion of Blackstonian ownership in the repertoire of property law adds a crucial option, which contributes to self-authorship. Moreover, Blackstonian ownership is singular among property institutions in its zealous protection of our independence. By shielding individuals from the claims of others and from the power of the public authority, unqualified ownership guarantees the untouchable private sphere that is a prerequisite of personal development and autonomy.⁵²

Though independence is not our ultimate value, since real autonomy requires self-authorship rather than merely independence, it is still a constitutive component of self-authorship and thus intrinsically, rather than merely instrumentally, valuable.⁵³ Independence, then, explains the unique place of Blackstonian ownership, implying that a liberal polity *must* offer its members the realm of solitude that such unqualified ownership represents. This is, I argue, what makes Blackstonian ownership a particularly important property institution.

Three conclusions follow from the unique role of Blackstonian ownership. The first conclusion is that although indeed singular in its

51. *Contra* Merrill & Smith, *supra* note 7, at 1851–52, 1891–92; Smith, *supra* note 18, at 1705. Indeed, even Merrill’s concession that property entails exclusion only vis-à-vis “strangers”—as opposed to “potential transactors,” “persons within the zone of privacy,” and “neighbors”—does not go far enough. See Thomas W. Merrill, *The Property Prism*, 8 *ECON. J. WATCH* 247, 250 (2011).

52. See, e.g., BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 71–76 (1977); JOHN RAWLS, *POLITICAL LIBERALISM* 298 (1993).

53. See Hanoch Dagan, *Liberalism and the Private Law of Property*, 1(2) *CRIT. ANALYSIS L.* (forthcoming 2014).

indispensability, Blackstonian ownership should not aspire to exclusivity. Indeed, it functions best as part of a liberal repertoire of property institutions conducive to self-authorship. A second, related conclusion touches on the legitimate scope of Blackstonian ownership. Insofar as the role of this property institution is to ensure individuals private sovereignty over the external resources necessary for their independence and self-determination, it can cover only the type and scope of resources needed to secure that purpose. Beyond such property-for-safe-haven rights—think about property law's privilege of homeownership, for example⁵⁴—other (notably utilitarian) justifications are obviously adduced for property rights. But property rights that rely on those justifications need not, and often should not, be absolute. In these cases, and especially where the claim of non-owners to access the resource at hand is important for *their* own self-authorship, owners' dominion should be subject, as it often is, to other people's right to entry or to inclusion.⁵⁵ Finally, grounding Blackstonian ownership on personal autonomy means that the legitimacy of this property institution does not rely on a specific event (as in Locke's claims of labor or Hegel's claims of occupation), but on its importance as such. This general right-based justification implies that every human being is entitled to some such property rights or, more precisely, entitled to as much Blackstonian ownership as needed to sustain human dignity. The enforcement of Blackstonian owners' rights in property law, then, cannot be justified if the law does not simultaneously guarantee similar resources to non-owners.⁵⁶

54. For this privilege and the academic controversy over its justification, see generally GREGORY S. ALEXANDER & HANOCH DAGAN, PROPERTIES OF PROPERTY 309–20 (2012).

55. See DAGAN, *supra* note 8, at ch. 2.

56. See JEREMY WALDRON, *Homelessness and the Issue of Freedom*, in LIBERAL RIGHTS 309 (1993); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 115–17, 423, 425–27, 430–39, 444–45 (1988); Joseph William Singer & Jack M. Beermann, *The Social Origins of Property*, 6 CAN. J.L. & JURISP. 217, 228, 242–45 (1993). See also Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061, 2094 (2012) (arguing “the tendency toward inequality should be disturbing to the friends of property,” because “[e]xtreme inequality in the distribution of property undermines all the [sources of] strength of the property strategy,” namely: “tapping into dispersed local knowledge[,] incentives to be productive[,] reduction in external transaction costs[, and] checks and balances against concentrated power”).