

THE THING ABOUT EXCLUSION

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INTRODUCTION

The right to exclude is a *sine qua non* of debates over property. No one has been more persistent than Tom Merrill in promoting the idea that the right to exclude is “the *sine qua non*” of property itself.¹ As reflected by the contributions to this conference in honor of the many achievements of his in the area of property, few positions provoke such strong and varied reactions as the placement of the right to exclude at the center of property.

As someone who is often considered to be an “exclusion theorist”—whatever that means—I will take this occasion to offer an account of what the right to exclude does—and does not—offer to property theories, especially those, like Merrill’s, that aim for description and explanation. Merrill is right that the bundle of rights picture is ultimately unsatisfying because it offers no account of any the unifying threads in property law. For Merrill, the right to exclude serves the unifying role not just by being present wherever there is property, but by serving as the source out of which other features typically flow. In this Article, I will show that these derivations of the features of property from the right to exclude are not really derivations but symptoms: although the right to exclude plays an important (if not omnipresent) role in property, it does not have the ontological status attributed to it by Merrill. Even drawing out the implications of the right to exclude, there is still a hole in property where the connective tissue should be. Quite simply, the missing thing in Merrill’s account, as in most current accounts, is the *thing* of property.

Property is the law of things.² This proposition, accepted throughout most of recorded history, in most of the world’s legal systems,

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1. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998).

2. This Article builds on the analysis in Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012).

and by lawyers and laypeople alike, is precisely what American commentators on property deny. As Merrill correctly notes, the contrary proposition, that property is not about things, is the one point of consensus among American commentators, despite their diversity of views on other matters—like the importance to property of the right to exclude.

I will argue that the right to exclude is important in property—even if it is not quite a *sine qua non*—precisely because of its association with the definition of the legal things over which property rights are delineated. Trespass and other doctrines that track the boundaries of land or the outer contours of objects loom large in property because of the central role that thing-definition plays in property. Property relies on legal things when it defines what counts as a violation of a right and how duty bearers are expected to respect property rights. While rights in property, like all other rights, avail between right holders and duty bearers, in property they are typically mediated by the thing. The nature of that thing goes a long way toward determining what kinds of rights one can have and how they work. Land, cars, water, and inventions all may be things subject to property rights, but their very different qualities determine what it means to have property in them.

In this Article, I will show how an account of property as the law of things completes the picture of property, putting the right to exclude in proper perspective. I will argue that Merrill is right to search for a unifying theme in property and that the right to exclude is in the ballpark. Nevertheless, as a candidate for the role of linchpin in property it does not quite fit, and the strain shows. Instead, at the heart of property is the thing. Private law deals with the complex interactions of members of society, and a first cut at managing potential conflict is to carve the world into modular things and associate them with people. The *things* that property law sets up gather together attributes that “belong” together and allow them to interact intensely, while keeping the interface between these legal things and the outside world relatively less intense. They are modules.³ The innards of the thing are semi-opaque to those outside, most

3. See, e.g., 1 CARLISS Y. BALDWIN & KIM B. CLARK, DESIGN RULES: THE POWER OF MODULARITY 58–59, 236–37, 257 (2000); HERBERT A. SIMON, THE SCIENCES OF THE ARTIFICIAL 210 (2d ed. 1981).

prototypically in rem duty holders. The proverbial pedestrian in the parking lot need know nothing about the owner of any car he doesn't own—whether it is leased, whether the owner is virtuous, and whether the car is borrowed from the driver's sister-in-law, or even stolen.⁴ The duties are simple: don't take, keep out, don't damage. The thing and its boundary make it easy to use exclusion strategies and to enrich the interface with governance strategies when needed: those contracting over a car know what the subject matter is.

In Part I, I show that the right to exclude on Merrill's account is of unclear ontological status. Perhaps this lack of clarity can be attributed to the outsized role it has to play in Merrill's account. He attempts to derive other important rights, like the right to transfer, from the right to exclude. These derivations do not work on their terms, but they do point to the need for thing definition. Part II explores some of the limits of the right to exclude when it is taken to be the *sine qua non* of property. Intangible property is an uncomfortable fit, and we can find examples of property that do not feature the classic right to exclude. These include powers of appointment and (to some extent) even familiar interests like easements. The right to exclude is either absent or highly attenuated here, or we have to water down the notion of the right to exclude in order to accommodate them. By the same token, isolating the right to exclude threatens to atomize property along the lines of the bundle of rights in a fashion that Merrill rightly wants to avoid. Part III shows how possession is indeed, as Merrill's more recent work shows, associated in important ways with exclusion, but possession too requires crucially the definition of a thing that can be possessed, which makes exclusion less than the central player even here. In Part IV, I show that many of the advantages of focusing on the right to exclude follow from a theory of property based on the need to define modular things in order to obtain the benefits from—and manage the costs of—complexity of the interactions among private parties, as well as their property relations with the state. Property as a law of things suggests why exclusion is important but not fully a *sine qua non* of property. The article concludes with some thoughts on why thinghood helps us understand the attractions of the right to exclude and yet points to a spectrum of property-ness that captures a fuller picture.

4. J.E. PENNER, THE IDEA OF PROPERTY IN LAW 75–76 (1997).

I. THE STATUS OF THE RIGHT TO EXCLUDE

The right to exclude sounds reassuringly concrete, but is it? In his writings on the right to exclude, Merrill uses a range of metaphysical and logical terminology of unclear import. In this Part, I first consider the plausibility of the right to exclude as a leitmotif for property. To follow through on making the right to exclude the thread that keeps all of property together, Merrill's analysis casts the right to exclude in metaphysical and logical sounding terms, even though the theory is primarily a functional one. The unclear status of terms like "*sine qua non*," "essence," and "derive" are, I will argue, a symptom of the problem—asking the right to exclude to do too much work, including work that the "thing" of property could do better.

At the outset, let's start with the phrase "right to exclude." Exclude from what? Merrill endorses the "consensus" that property is not about things. In this, he joins many other exclusion theorists in not foregrounding the thing of property.⁵ In the Nebraska essay,

5. This was certainly true of the exclusion theorists from the Realist era. See *infra* notes 49–53, 77–92, and accompanying text. More recently, exclusion theory in North America includes strands emphasizing Kantian mutual freedom and owner control. Arthur Ripstein argues that exclusion is not just crucial to the working of property but is normatively central—that exclusion is normatively prior to use. Arthur Ripstein, *Possession and Use*, in PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 156 (James Penner & Henry E. Smith eds. 2013). Things play a role here but the emphasis is on the "authority structure." Theorists who emphasize exclusive control over things tend not to let the thing play a large role in the theory; control does most of the work. See, e.g., JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 31 (1988) (stating that "[t]he concept of property is the concept of a system of rules governing access to and control of material resources."); *id.* at 32 ("The concept of property does not cover all rules governing the use of material resources, only those concerned with their allocation"); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 289–90 (2008) (distinguishing exclusivity of control from the right to exclude). See also Shyamkrishna Balganes, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593, 593 (2008) (arguing that the right to exclude is not to be identified with the availability of injunctive relief, which points to the primacy of the right to exclude in property). English exclusion theorists emphasize things in property to a greater degree. For example, Harris takes the role of a thing more seriously than do most American theorists. J.W. HARRIS, PROPERTY AND JUSTICE 30–32, 119–61 (1996). For Harris, the "essentials of a property institution are the twin notions of trespassory rules and the ownership spectrum." These trespassory rules make reference to things, *id.* at 5, or "a resource," *id.* at 25, and "purport to impose obligations on all members of society, other than an individual or group who is taken to have some open-ended relationship to a thing, not to make use of that thing without the consent of that individual or group," *id.* at 5. James Penner is thought of as an exclusion theorist, but for him things are central and he emphasizes the importance to property of his Separation Thesis just as much as the Exclusion Thesis. PENNER, *supra*

Merrill notes with apparent approval under a heading titled “Points of Consensus” that “[f]irst, nearly everyone agrees that the institution of property is not concerned with scarce resources themselves (‘things’), but rather with the rights of persons with respect to such resources.”⁶ In his follow-up article in this Volume, he notes the necessity of the “triad” of a “an owner, a thing, and the right of the owner to exclude others from the thing.”⁷ What is a thing? For the updated Merrill, “[t]he ‘things’ to which property attaches are scarce resources that humans find valuable, and they are valuable because they are things people want.”⁸ Not much content there. So as before, resources are the assumed backdrop of property, with the right to exclude doing the interesting work.

There is a great deal of plausibility in a focus on the right to exclude as the *sine qua non* of property. But I will argue that this plausibility derives not from the right to exclude itself being the “*sine qua non*” or “essence” of property, but rather from the “thing” that the consensus would have us downplay.

Before turning to the positive role of things, let us diagnose the problem with the relatively free-floating right to exclude as a *sine qua non*. The Nebraska essay adopts a philosophical-sounding terminology. The article starts with a conceptual analysis, as reflected in the term “*sine qua non*” and “necessary and sufficient condition,”⁹ and that

note 4, at 68–127 (devoting one chapter each to “The Right of Property: the Exclusion Thesis” and “The Objects of Property: The Separability Thesis”). Recently, Simon Douglas and Ben McFarlane have shown how in a Hohfeldian framework one can in a sense derive the right to exclude from the non-owner’s duty to refrain from deliberately or carelessly interfering with the owner’s physical thing. Simon Douglas & Ben McFarlane, *Defining Property Rights*, in *PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW* 219 (James Penner & Henry E. Smith eds. 2013).

6. Merrill, *supra* note 1, at 731–32.

7. Thomas W. Merrill, *Property and the Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1 (2014). Merrill takes a similar “triadic” approach in other recent work. Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061, 2061 (2012). After discussing the wide variation in what counts as a thing in different societies and difficulties with marginal cases like bank accounts, he goes on to claim that the “crux of the property strategy lies in the concept of ownership,” which is identified with the “nature” of the prerogatives of the owner; these prerogatives, he says, are “often . . . described in terms of the right to exclude others.” *Id.* at 2066. Merrill then reaffirms that “[a]s I have previously written, the owner’s right to exclude is a necessary condition of identifying something as being property.” *Id.* at 2066–67 (citing Merrill, *supra* note 1, at 731).

8. Merrill, *supra* note 7, at 4.

9. Merrill, *supra* note 1, at 731, 734, 740.

the right to exclude is the “essence”¹⁰ of property and “essential” or “central” to “our understanding of property.”¹¹ He heads up his discussion with the heading “The Logical Primacy of the Right to Exclude,”¹² and the discussion is replete with invocations of logic. More substantively, Merrill claims to be able to “derive”¹³ other rights and attributes of property from the “core” right to exclude.¹⁴

There is a category mistake here. Whatever the right to exclude might have in the way of importance to property, logic has nothing to do with it. One could argue, as have Kantians like Arthur Ripstein, that the right to exclude is central to property because the very nature of the property relationship is based on an authority relation that relies on location and exclusion.¹⁵ For Ripstein, exclusion has normative value that inheres in the nature of the relationship. This is not Merrill’s claim, and in his Article for this volume, he endorses the view that the right to exclude is the means to the end.¹⁶ In this Merrill accords with Penner, for whom exclusion is “the formal essence of the right” and the interest in use serves to justify it.¹⁷ Indeed, Merrill endorses Penner’s “exclusion thesis: the right to property is a right to exclude others from things which is grounded by the interest we have in the use of things.”¹⁸ For Merrill, it is not exclusion all the way down.

If so, we should be skeptical of Merrill’s a priori approach that derives one aspect of property from another. These derivations do not work. Take the derivation of the right to use from the right to exclude. Merrill claims that, in general, the right to exclude “entail[s]” or “leads directly” to the right to use.¹⁹ But a true right to use cannot be derived in this way. With the right to exclude and the background

10. *Id.* at 736.

11. *Id.* at 734.

12. *Id.* at 740.

13. The word “derive” is used in this sense nine times in this Part of Merrill’s essay. *Id.* at 740–45.

14. Indeed the term “core,” *id.* at 749, and its variants—“irreducible core,” *id.* at 734, “fixed core,” *id.* at 737, “essential core,” *id.* at 735 n.11—pop up all over, leading, as Merrill notes in his more recent Article to a lot of misunderstanding: “core” here does not mean morally more important or anything like that. See Merrill, *supra* note 7, at 1–3.

15. Ripstein, *supra* note 5, 161–78.

16. Merrill, *supra* note 7, at 9.

17. PENNER, *supra* note 4, at 71 (emphasis omitted).

18. *Id.*

19. Merrill, *supra* note 1, at 741.

liberty in everyone to use, the owner can exercise that (general) liberty without interference from others who would, but for the right to exclude, act on their similar liberty. These background liberties or privileges of use need no separate delineation because they are indirectly protected—and bolstered in their exercise—by the right to exclude. This is a subtle distinction, much emphasized by Hohfeld,²⁰ and in many situations we speak, sometimes correctly and sometimes incorrectly, of a right to use. And courts will sometimes afford an injunction or damages against one interfering with an owner's use, as in the law of nuisance. Easements, to which I return shortly, would be a more explicit example of a true right to use. But there is no “derivation” here. It is true, as I and others have argued, that the law of nuisance is more based on boundaries and invasions than in the usual characterization of nuisance law as a formless jumble.²¹ But note well: any robust right to use here tracks the boundaries and invasions that are keyed to the land as a thing. Even here, the right to exclude shines with the borrowed light of the thing.

We can also see that the notion of “derivation” here is slippery, because it is not the one-way road Merrill portrays it as. The theorists of “exclusive use” make a move that is in some sense the opposite of Merrill's. That is, an owner's rights to use a resource require robust protection that leads to something like a right to exclude, as implemented in the law of trespass and the like.²² For many uses of tangible things we need robust protection, which the right to exclude affords. In particular, if the law protects a wide (and open) set of uses, the uses in some loose (non-logical) sense “add up to” a right to exclude. What's really going on here is that the very fact that the right to exclude does not make direct reference to use or particular uses

20. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913).

21. Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979); J.E. Penner, *Nuisance and the Character of the Neighbourhood*, 5 J. ENVTL. L. 1, 14–25 (1993); Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1023–24 (2004).

22. See, e.g., Eric R. Claeys, *Exclusion and Exclusivity in Gridlock*, 53 ARIZ. L. REV. 9, 17–28 (2011) (reviewing MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATIONS, AND COSTS LIVES* (2008)); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 394 (2003); see also Richard A. Epstein, *Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property*, 8 ECON J. WATCH 223, 230–31 (2011).

is what makes it a strong device for protecting those uses. If trespass, for example, does not require a showing of interference with use, it is all the more attractive to an owner as a potential plaintiff.

So much for the right to use. How about the right to transfer, either during life or upon death? Here Merrill admits the need for a “relatively modest clarification about the domain of the right to exclude.”²³ Here’s how the derivation is supposed to work. For transfer during life to be a right, the owner must have the right to include others and “also to *exclude* him or herself.”²⁴ So if A exercises the right to include B, B has a panoply of use rights, and if A excludes himself (whatever that means), A cannot enter. Transfer complete. Or is it? Why doesn’t A still have the gatekeeper role? The derivation is missing something: A must *also* give up the power to alter these relations. Moreover, as James Penner has shown, the transfer of a right is the transfer of the very right: When A transfers her property right to B, B has the very right A had.²⁵ It is true that the set of duty bearers is different (minus B, plus A), but that happens automatically in the transfer. Some have argued that for this shift in right holders and duty bearers to occur, we need an “office” of ownership: A leaves the office and hands it over to B, but the rights and duties avail between the officeholder (whoever that is) and the duty bearers.²⁶ I will suggest that the solution to the problem Merrill’s account faces does not require that much extra machinery. All we need is a relatively depersonalized thing in terms of which rights and duties can be couched. Then, a transfer of property rights from A to B involves the transfer of the legal thing and the automatic (because depersonalized) change in the set of rights and duties surrounding that legal thing.

Similarly for transfers upon death. Merrill says that “the right to exclude entails the right to devise upon death,”²⁷ with the mere specification that the owner’s directions about the disposition of property will be respected for a certain period after death. This “modest extension” is couched in terms of letting the owners decide “who shall be included

23. Merrill, *supra* note 1, at 743; *see also* Merrill, *supra* note 7, at 5–6.

24. Merrill, *supra* note 1, at 743.

25. James Penner, *On the Very Idea of Transmissible Rights*, in *PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW* 244 (James Penner & Henry E. Smith eds. 2013).

26. Christopher Essert, *The Office of Ownership*, 63 *U. TORONTO L.J.* 418 (2013); Katz, *supra* note 5, at 306–07; *see also* Avahi Dorfman, *Private Ownership*, 16 *LEGAL THEORY* 1 (2010).

27. Merrill, *supra* note 1, at 743–44.

and excluded upon the death of the owner.”²⁸ But as with other transfers, what we need is not just inclusion and exclusion but a shift in the powers and other incidents of ownership, which can be framed in terms of the legal relations surrounding the legal thing. There is no logical entailment here; it is simply that for legal systems that do respect testators’ wishes, owners can set in motion a transfer (of the very right to the thing) that occurs at or shortly after death (the executor may have temporary rights).

Even if logic does not get us very far here, Merrill is right that the various rights and duties (and, I would add powers, liabilities, immunities, and so forth) do hang together. The reason for this is not that the right to exclude is the basis for derivations or modest clarifications, but rather the thing of property—the depersonalized subject matter of the legal relations—provides the glue holding it all together.

II. THE RIGHT TO EXCLUDE AS A NON *SINE QUA NON*

The right to exclude is often present in property. And because exclusion is a low-cost strategy for protecting property rights, it is almost ubiquitous in some form or other, especially in modern property systems. It is, as I will argue, especially tied to things and possession. As resource conflicts become more important we should expect it to be modified more and more by detailed governance strategies.²⁹ These can take the form of contracts and servitudes, nuisance law, zoning, and other land-use regulation. Indeed, because much of the focus is on particular problems, it is easy to overlook the important role that exclusion and the right to exclude still play in property law and norms.

A *sine qua non* is something different. Can we find property without exclusion? The balance between exclusion and governance can be struck differently in different systems. Think of indigenous property systems, in which one person might have the right to pick berries in a given location and another the right to hunt birds.³⁰ What is the

28. *Id.* at 743.

29. Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002).

30. See Stuart Banner, *Two Properties, One Land: Law and Space in Nineteenth-Century New Zealand*, 24 LAW & SOC. INQUIRY 807, 807–08 (1999); see also WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 62 (1983), cited by Merrill, *supra* note 1, at 746.

exclusion and what is the thing here? Yes, the tribe or clan might be excluding other groups from the area. I think, though, that we are inclined to say that the individuals with the berry-picking or bird-hunting rights have a kind of property. It is basically a usufruct, and Merrill notes that Ellickson hypothesizes that this is the oldest type of property right.³¹ This may be, but in what sense is there a right to exclude as opposed to a right to use?

The same might be said about easements. They are, if anything is, robust rights to use. And yet along with the usufruct Merrill claims that an easement affords its holder a right to exclude simply because the use right can be enforced against the owner of the servient estate.³² The problem with the right to exclude, then, becomes one of dilution: any right is a right to exclude. For a right to exclude to have any content beyond that of a generic right, the “exclude” has to have some bite.

I would argue that usufructs and easements *are* property, but they are less property-like because their definition is more focused on use than on a thing. Nevertheless, the thing is not out of the picture altogether. With the traditional usufruct, the thing is the group’s land or the berries and birds, but individuals’ and families’ rights are not primarily delineated in these terms. Rather, the rights are indeed couched in terms of uses and use-oriented activities, which shade off into the law of torts or unfair competition.

The right to exclude as a *sine qua non* of property runs into further trouble when it comes to intangibles. Is there a right to exclude from intangibles? There is no question that intangibles present special challenges for theories of property that emphasize exclusion or things. Previously, I have argued that it makes sense to talk about exclusion strategies and things in the case of intangibles.³³ The violation

31. Merrill, *supra* note 1, at 746, citing Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1364 (1993).

32. Merrill, *supra* note 1, at 744. He states:

And what is the defining difference between use-rights in the form of licenses and use-rights that are considered nonpossessory property rights? The difference is that the holder of a nonpossessory property right can exclude others (including but not limited to the grantor) from interfering with the exercise of the use-right, whereas the holder of a license lacks such a right. In other words, the feature that makes nonpossessory property rights property is the right to exclude others, and the right to exclude cannot be derived from the right to use.

33. Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742 (2007).

of the right is framed in terms of an on/off signal that is not keyed to harm or uses. On this scale—and it is a scale—patent law is more property-like than is copyright.³⁴ Patent law defines inventions as things—although with great effort and less than ideal effectiveness—and one violates the right if one “without authority makes, uses, offers to sell, or sells” the patented invention.³⁵ “Use” is part of the formulation but in a generic, metaphorically boundary-crossing kind of way. By contrast, copyright law sets out a laundry list of use rights,³⁶ and spends very little effort defining the thing (the protected expression), compared to patent law.

When we come to choses in action, things are even more ethereal. In German law and among some commentators, such as Douglas and McFarlane, property is limited to rights in tangible things (excluding even IP),³⁷ but Merrill, rightly in my view, does not limit property in this way. So how does the right to exclude relate to intangibles? Penner analyzes them in terms of both his exclusion and separation theses.³⁸ It is important to note that separation plays an especially big role here because the things involved are quite artificial. Justice Holmes, sometime hero to the Realists and no friend of legal fictions for their own sake, gives a succinct account of how contracts are treated as things when it comes to assignability:

There is a logical difficulty in putting another man into the relation of the covenantee to the covenantor, because the facts that give rise to the obligation are true only of the covenantee—a difficulty that has been met by the fiction of identity of person and in other ways not material here. Of course, a covenantor is not to be held beyond his undertaking, and he may make that as narrow as he likes. *Arkansas Valley Smelting Co. v. Belden Mining*

34. *Id.* at 1799–1819.

35. 35 U.S.C. § 271 (2012). Importation into the United States is also covered. *Id.*

36. 17 U.S.C. § 106 (2012).

37. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] Aug. 18, 1896, BUNDESGESETZBLATT [BGBL.] I 1600, § 90 (Ger.), available at http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#BGBengl_000P90 (“Only corporeal objects are things as defined by law.”); BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 100, 106–07 (1962) (stating that Roman jurists regarded property as a relation of a person to a thing and that they regarded only corporeal objects as the objects of property rights); BEN MCFARLANE, THE STRUCTURE OF PROPERTY LAW 4 (2008); Douglas & McFarlane, *supra* note 5. Bentham and Austin were skeptical about talk of property in intangibles as “fictitious”, “figurative”, “improper”, and “loose and indefinite.” WALDRON, *supra* note 5, at 35 (quoting Bentham and citing Austin).

38. PENNER, *supra* note 4, at 115–22.

Co., 127 U.S. 379. But when he has incurred a debt, which is property in the hands of the creditor, it is a different thing to say that, as between the creditor and a third person, the debtor can restrain his alienation of that, although he could not forbid the sale or pledge of other chattels. When a man sells a horse, what he does, from the point of view of the law, is to transfer a right, and a right being regarded by the law as a thing, even though a *res incorporalis*, it is not illogical to apply the same rule to a debt that would be applied to a horse. It is not illogical to say that the debt is as liable to sale as it is to the acquisition of a lien. To be sure, the lien is allowed by a statute subject to which the contract was made, but the contract was made subject also to the common law, and if the common law applies the principle recognized by the statute of California that a debt *is to be regarded as a thing*, and therefore subjects it to the ordinary rules in determining the relative rights of an assignee and the claimant of a lien, it does nothing of which the debtor can complain. See further, Cal. Civ. Code, §§ 954, 711. The debtor does not complain, but stands indifferent, willing that the common law should take its course.³⁹

This is all the more remarkable because in contract in general, Holmes does not take a proprietary view but stresses the remedy of damages.⁴⁰ In *Portuguese-American Bank*, not only does Holmes see that conceiving of a contract right as a thing promotes alienability, he hints at why this is.⁴¹ Precisely because the debt is treated as a thing, general rules apply to it regardless of the personal identity of the debt holder, and therefore the debtor can regard much of it as a modular black box, “stand[ing] indifferent” to the identity of the debt holder. In general, as Merrill and I have argued, when contracts are treated as property, they tend to be more standardized; and when they become partway in rem on account of a large number of duty bearers (mass contracts), the law tends toward partway standardization.⁴² And to the extent that there is property-style protection of contract interests, they tend to be standardized.⁴³ None of this is to say that

39. *Portuguese-Am. Bank of S.F. v. Welles*, 242 U.S. 7, 11–12 (1916) (emphasis added).

40. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

41. 242 U.S. at 11–12.

42. Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001).

43. P.G. Turner, *Proprietary Modes of Protecting the Performance Interest in Contract*, LLOYD'S COM. & MAR. L.Q. 306 (2008); see also Thomas W. Merrill & Henry E. Smith, *Optimal*

depersonalization is always a good idea or that it always works, but Holmes here captures how it is supposed to work in the first place.

One could say that intangible property, along with nonpossessory rights like easements, do have the *sine qua non* of the right to exclude because the owner can sue someone else. But then the right to exclude again collapses into any old right. It is not at all clear that the right to *exclude* gets us very far with property in intangibles.

The lesson from property in intangibles, and for that matter in fugitive resources like water, is that property and ownership lie along a spectrum.⁴⁴ Resource conflicts can be dealt with using a wide variety of institutions. To the extent those institutions rely on the definition of relatively impersonal things to mediate rights and duties, the more we have property. The right to exclude often pops up here, but not in the sense of a *sine qua non*.

The danger is that the right to exclude, as it covers more territory, will become thin to the vanishing point. It is but a short step from there to the bundle of rights, which is Merrill's main foil and which he often calls "nominalism."⁴⁵ Nevertheless, and as Merrill recognizes, the right to exclude is often coupled with the bundle or nominalist view.⁴⁶ The Supreme Court, in its frequently (self-)cited formulation from *Kaiser Aetna v. United States*, avers that the "right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."⁴⁷ Critics of theories, like Merrill's, that give a central place to the right to exclude, argue that doing so treats the right to exclude as just another stick.⁴⁸ The

Standardization in the Law of Property: The Numerus Clausus Principle, 110 YALE L.J. 1, 55 (2000).

44. P.G. Turner, *Degrees of Property* (Univ. of Cambridge Faculty of Law Research Paper No. 01/2011, 2011), available at <http://ssrn.com/abstract=1735953>; see also HARRIS, *supra* note 5, at 5–6 (introducing the "ownership spectrum").

45. Merrill, *supra* note 1, at 737–39.

46. *Id.* at 736–37 (describing "multiple-variable essentialism"); see also *id.* at 735 (discussing Felix Cohen's views).

47. 444 U.S. 164, 176 (1979).

48. Claeys, *supra* note 22, at 24–25 (critiquing Merrill's theory); Mossoff, *supra* note 22, at 390 ("Linguistically, exclusion plays a role largely as an adjective of the rights of acquisition, use and disposal, and substantively, exclusion is, for the most part, only a corollary of the more fundamental premises that focus on the possessory rights."). Claeys sees notes that he "disagree[s] with Merrill and Smith that thing-ownership may be reduced to an owner's right to exclude others from his thing." Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617, 631 (2009) (reviewing THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* (2007)). I would argue that Claeys is reading too much from the Nebraska essay into our casebook.

Realists were fond of the bundle, because it led to the dethroning of property and removed a perceived obstacle to social engineering,⁴⁹ but as Adam Mossoff has argued, many of the Realists were quite fond of the right to exclude as a *sine qua non* of property.⁵⁰ Thus, Felix Cohen, whom Merrill invokes, emphasizes the right to exclude, but was in general no friend of traditional notions of property or received concepts in general.⁵¹ Thing ownership in particular was a prime example of “transcendental nonsense” for Cohen.⁵² The danger (or welcome feature, depending on your point of view) is that the right to exclude leads to the bundle picture and all of its inadequacies.

In contrast to the bundle picture, Merrill rightly seeks an account of the holism of property. What the owner owns is more than a bundle of sticks. As William Markby said, ownership “is no more conceived as an aggregate of distinct rights than a bucket of water is conceived as an aggregate of separate drops.”⁵³ Exclusion is an important cross-cutting theme in property, but it is not the glue that holds it together. That is why Felix Cohen and the Realists could adopt the right to exclude as a *sine qua non* of property without missing a beat. The glue we need, and the aspect of property the Realists really did deny, is the important role of the *thing* in property.

III. EXCLUSIVENESS AND POSSESSION

Before turning to the role that things play in property, consider one last aspect of property that is closely related both to exclusion and to things—the law and norms of possession. The right to exclude is closely associated with possession, as Merrill’s new article explores at length. Consistently with some of our joint work, he notes that possession is a low information cost method of establishing property claims.⁵⁴ This is true, although I will argue that like the right

49. See, e.g., Tom Grey, *The Disintegration of Property*, in NOMOS XXII: PROPERTY 69, 80 (J. Pennock & J. Chapman eds., 1980); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 357–58, 365 (2001).

50. Adam Mossoff, *The Use and Abuse of IP at the Birth of the Administrative State*, 157 U. PA. L. REV. 2001, 2009–20 (2009).

51. Merrill, *supra* note 1, at 735 (quoting Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954)).

52. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815 (1935) (“The circularity of legal reasoning in the whole field of unfair competition is veiled by the ‘thingification’ of *property*.”).

53. WILLIAM MARKBY, *ELEMENTS OF LAW* 158 (6th ed. 1905).

54. Merrill, *supra* note 7, at 17–18.

to exclude itself, much of the importance of possession to property is attributable to its role in defining the basic things of property.

Possession and accession—another interest of Merrill’s⁵⁵—help get the basic ontology of property law started.⁵⁶ Property may well have its origins, as Hume and Sugden would have it, in an emergent convention based on salience.⁵⁷ The basic ontology requires the definition of persons, things, and relations between persons and things. De facto possession is very intuitive, and possessory custom is quite close to everyday notions of possession. Custom tends to be simplified and formalized as it applies beyond its community of origin.⁵⁸ Thus, customs that need to apply to large and impersonal audiences of duty bearers (they are functionally in rem) cannot presuppose a lot of community-specific information. Title and ownership rules are layered on top of this stratum of possession. Custom, and especially this more generally applicable law of possession and ownership, is feasible because it relies on the thing. Possessors and duty bearers relate to each other through the thing. Exclusion strategies are closest to this: keep out of and keep off the thing, unless you have my permission. When title rules are layered on top of possession, they further work out what the thing is. Rules like good faith purchase get us further from possession. And a set of surveys and title records define the legal thing that parallels a physical plot of land in a more articulated fashion than do laws or norms of possession.

Instead of taking possession as a given, what we need is a bottom-up theory of possession in order to understand the role it plays in the architecture of property. Elsewhere I argue that a combination of the convention-based theories of David Hume, Robert Sugden, and David Friedman coupled with Barzel’s theory of property rights helps explain the most basic level of property.⁵⁹ Conventions are regularities

55. Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEGAL ANALYSIS 459 (2009).

56. The account of possession in this Part builds on Henry E. Smith, *The Elements of Possession*, in THE LAW AND ECONOMICS OF POSSESSION (Yun-chien Chang ed., forthcoming, Cambridge University Press). I am using “ontology” here as it is employed in information theory and computer science—to refer to the basic set-up of categories—without making metaphysical claims.

57. DAVID HUME, A TREATISE OF HUMAN NATURE 484–516 (L.A. Selby-Bigge, ed. 1896) (1739–40); ROBERT SUGDEN, THE ECONOMICS OF RIGHTS, CO-OPERATION, AND WELFARE 153–59 (1986).

58. Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES L. 5 (2009).

59. Smith, *supra* note 56; see also YORAM BARZEL, ECONOMIC ANALYSIS OF PROPERTY

in behavior that people adopt in preference to alternatives as long as others do the same.⁶⁰ The idea is that people will come to recognize that mutually respecting each other's possession will lead to peace. Such a convention can emerge out of pairwise interactions, based on what strikes actors as salient—such as proximity and potential control. As Friedman emphasizes, the norms of possession do not emerge because people conclude they are efficient overall, but rather they reflect an individually advantageous strategy in small-scale interactions.⁶¹ Whether the morality and efficiency scale up to the level of society as a whole is an open question, or rather the extent of yes relative to no is disputable. But one can see here how possession gets property going without ambitious assumptions or deep claims of justification.

To get anywhere with possession, we—and the members of society—have to know what goes with what. This is the same question as in accession, and it is no accident that Hume pays great attention to accession.⁶² Hume, Sugden, and Friedman emphasize the psychological aspect—that relations like closeness and attachment strike people as prominent and form noticeable patterns. More recently Sugden and co-authors have explored how salience can emerge from inductive reasoning (another concern of Hume's).⁶³ Part of this learning process can involve usefulness. This is where Barzel's theory of property rights is helpful. According to Barzel, we should expect an actor to have property over collections of attributes over which that actor has a special ability to affect its mean return.⁶⁴ Barzel disclaims any attempt to explain the origins of property, but his theory does dovetail with the convention-based accounts of Hume, Sugden, and Friedman: actors will perceive groups of attributes as things and assign them to possessors based in part on who can most effectively use them as such a unit. Salience and conventions may or may not be associated with "system 1" or instincts, as Merrill would have it,⁶⁵ but they are indeed

RIGHTS (2d ed. 1997); David D. Friedman, *A Positive Account of Property Rights*, 11 SOC. PHIL. & POL'Y 1 (Summer 1994); HUME, *supra* note 57; SUGDEN, *supra* note 57.

60. DAVID K. LEWIS, CONVENTION: A PHILOSOPHICAL STUDY (1969).

61. Friedman, *supra* note 59, at 3–4, 12, 14.

62. HUME, *supra* note 57, at 509.

63. Federica Alberti, Robert Sugden, & Kei Tsutsui, *Salience as an Emergent Property*, 82 J. ECON. BEHAV. & ORG. 379 (2012).

64. BARZEL, *supra* note 59.

65. Merrill, *supra* note 7, at 17; Thomas W. Merrill, *Possession and Ownership*, in THE LAW AND ECONOMICS OF POSSESSION (Yun-chien Chang ed., forthcoming, Cambridge University

easy to use and allow for quick on-the-spot judgments. Nevertheless, automatic judgments can incorporate acquired information and skills.⁶⁶ Thus, whether features of a resource are grouped into a thing is based on some combination of proximity, potential controllability, and usefulness. Thus accession also has a customary base upon which the law builds. Possession and accession go hand in hand and are closely involved in the delineation of the legal things of property.⁶⁷

A prime example of all these processes at work is the *pedis possessio* doctrine from mining law.⁶⁸ Originally it was a possessory custom among miners, which afforded a miner working a “spot” some protection against interference by other miners, as long as he worked that spot. When this custom was taken over into the law of mining, the spot was replaced by the claim, a legal thing that has clearer boundaries, especially for third parties. Whereas a “spot” was probably abundantly clear to miners in a given camp, the same cannot be said for outsiders, including purchasers and officials. Here, *contra* Merrill, prelegal possession needs to be stripped down in order to keep information costs manageable for larger groups of (in rem) duty bearers. The claim is a legal thing that serves this purpose better than the spot. More recently, the uranium mining industry, for which the standard size claim is too small for exploratory purposes, wanted to spread the work requirement (on pain of loss) over several claims, but courts have largely rebuffed them.⁶⁹ The legal thing associated with a mining claim (complete with designated boundaries) has a strong attraction in this context, for information cost reasons.

Merrill asserts that title rules cannot get too far from possession without raising information costs to intolerable levels.⁷⁰ There is some truth to this, but distance is not the main issue. As we just saw, possessory norms may need formalizing in order to apply in rem,

Press); James E. Krier & Christopher Serkin, *The Possession Heuristic*, in *THE LAW AND ECONOMICS OF POSSESSION* (Yun-chien Chang ed., forthcoming, Cambridge University Press); see also Smith, *supra* note 56.

66. *Id.*

67. Merrill builds on Hume and Sugden but treats accession as an acquisition principle. Merrill, *supra* note 55. For a treatment of accession more consistent with the argument in the text, see Christopher M. Newman, *Patent Infringement as Nuisance*, 59 *CATH. U. L. REV.* 61, 86–93 (2009).

68. *Union Oil v. Smith*, 249 U.S. 337 (1919); Smith, *supra* note 58, at 200–02.

69. *Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp.*, 601 P.2d 1339 (Ariz. 1979); Smith, *supra* note 58, at 201–02.

70. Merrill, *supra* note 7, at 19–21.

and thing definition is often part of that process. Whether title rules cannot get “too far” from possession is an empirical question, turning in part on the ease of defining legal things. As Merrill notes, technology has some role to play here. The increasing prevalence of smart phones may make more detailed information about title more readily available. For example, Richard Hynes proposes that posting laws should be modified so that the owner’s wishes are recorded and available over the Internet.⁷¹ Hunters planning a trip or even those on the spot could tell instantly where they are and are not allowed to go. The legal things defined in the land records can be used for more purposes now and in the future.

Let me end this discussion of possession on a comparative note. In the civil law, property is the law of things. Consistent with that notion, property in civil law is defined much more directly in terms of ownership (dominion) over a thing, and derogations from this unitary ownership are grudgingly permitted. By contrast, the common law system of estates grew out of possession and can be thought of as “possession plus,” which brings us toward ownership. As Yun-chien Chang and I have argued, ownership in the two types of system is structurally and functionally quite similar in terms of the rights and duties, liberties, and powers, etc. they afford, but the “style” of getting there differs.⁷² The common law style emphasizes the connection to possession much more than does the civil law. To be sure, possession plays an important role in civil law in terms of the architecture of the system,⁷³ and commentators on the civil law have noticed how possession as a social fact forms the foundation of property, upon which the law is layered.⁷⁴ But when it comes to defining the things of property, this can be done very explicitly as in the civil law, or more implicitly, with a lot of talk about possession at the same time. This should not be surprising because possession and accession are often ways of getting at thing definition, even if it is only implicit. Again, possession, accession, and the right to exclude are closely tied to prelegal and legal things, the objects of the rights.

71. Richard M. Hynes, *Posted: Notice and the Right to Exclude*, 45 ARIZ. ST. L.J. 949 (2013).

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

73. Yun-chien Chang, *The Economy of Concept and Possession*, in THE LAW AND ECONOMICS OF POSSESSION (Yun-chien Chang ed., forthcoming, Cambridge University Press).

74. See HEINRICH DERNBURG & JOHANNES BIERMAN, 1 PANDEKTEN, pt. 2, at 1–7 (6th ed. 1900); Philipp Heck, *Grundriß des Sachenrechts* §§ 1, 3 (1930).

IV. THE MISSING THING

The problem with focusing on the right to exclude as the *sine qua non* of property is that it does not sufficiently challenge the post-Realist de-emphasis of property as a law of things. Recall that Merrill cites with approval the “consensus” that the institution of property is not concerned with “things” themselves.⁷⁵ I say: not so fast. It is true that property is not just about things and that it does concern rights of one party against many other duty bearers (other persons), with respect to things. But these truisms don’t exhaust the role that things play in property. As I have argued before and will elaborate further in this Part in connection with the right to exclude, the thing plays a crucial role in property in mediating the rights (and other legal relations) availing between owners, possessors, and others with property interests on the one hand and duty bearers (and so on) at large on the other.⁷⁶ The legal thing defined over the actual thing serves an important function in the delineation of legal relations. In particular, the legal thing allows property rights to be simple enough and impersonal enough to reach an in rem set of duty bearers and to be more easily transferable from one party to another.

So it is not out of naiveté or lack of sophistication that courts and commentators in Commonwealth and civil law jurisdictions (and, it would seem, other legal systems untouched by American Legal Realism) characterize property as the law of things.⁷⁷ Property as being thing-based has been more or less true through large swaths of history throughout the world. Indeed in modern times, the American legal academy and its followers (to the extent it has followers) are the only ones denying the importance of things to property. People in everyday life, for whom Merrill has an appropriately high regard,⁷⁸

75. Merrill, *supra* note 1, at 731–32.

76. See, e.g., Smith, *supra* note 2.

77. See, e.g., NIGEL FOSTER & SATISH SULE, *GERMAN LEGAL SYSTEM AND LAWS* 493 (4th ed. 2010) (explaining *Sachenrecht* in accordance with its name as the law of things); 1 ISAAC HERZOG, *THE MAIN INSTITUTIONS OF JEWISH LAW (THE LAW OF PROPERTY)* 69–136 (2d ed. 1965) (analyzing the notion of a thing implicit in Jewish law and noting differences from civil and common law, including with respect to air space and to leaseholds); 2 A.N. YIANNPOULOS, *LOUISIANA CIVIL LAW TREATISE: PROPERTY* §§ 12, 15 (4th ed. 2011) (stating the role of the thing in the civil law of property in Louisiana); Chang & Smith, *supra* note 72, at 40–44 (discussing how property in civil law systems depends on the notion of a “thing”).

78. See Merrill, *supra* note 7; see also Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007).

see property as crucially involving things. I will show how lay intuition is even more important than Merrill acknowledges, and that we need not over-privilege “scientific policymaking.”⁷⁹

The downplaying of things is closely associated with Legal Realism, which Merrill is right to be dissatisfied with. The bundle of rights picture of property is one of Realism’s most enduring legacies. But it is no accident that the Realists downplayed things and embraced the bundle picture: the two fit neatly together. The Realists were intent on disparaging the role of things in property, not the right to exclude *per se*. (Indeed, as Merrill notes, arch-realist Felix Cohen was a fan of the right to exclude, and he was not alone.⁸⁰) The most famous modern formulation of the post-Realist position is Tom Grey’s:

In the English-speaking countries today, the conception of property held by the specialist (the lawyer or economist) is quite different from that held by the ordinary person. Most people, including most specialists in their unprofessional moments, conceive of property as *things* that are *owned* by *persons*. To own property is to have exclusive control of something—to be able to use it as one wishes, to sell it, give it away, leave it idle, or destroy it. Legal restraints on the free use of one’s property are conceived as departures from an ideal conception of full ownership.

By contrast, the theory of property rights held by the modern specialist tends both to dissolve the notion of ownership and to eliminate any necessary connection between property rights and things. Consider ownership first. The specialist fragments the robust unitary conception of ownership into a more shadowy “bundle of rights.”⁸¹

Grey takes square aim at the idea of property as being a right to a thing:

What, then, of the idea that property rights must be rights in things? Perhaps we no longer need a notion of ownership, but surely property rights are a distinct category from other legal

79. BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 26–31, 97–103 (1977) (contrasting the “scientific” perspective that views property as a bundle of rights with the “layman’s” perspective that persists in thinking of property as rights to things).

80. Cohen, *supra* note 51, at 374; Merrill, *supra* note 1, at 735; *see also* Mossoff, *supra* note 50.

81. Grey, *supra* note 49, at 69.

rights, in that they pertain to things. But this suggestion cannot withstand analysis either; most property in the modern capitalist economy is intangible.⁸²

Giving up on the centrality of things is what has wider significance:

The substitution of the bundle-of-rights for a thing-ownership conception of property has the ultimate consequence that property ceases to be an important category in legal and political theory. This in turn has political implications The legal realists who developed the bundle-of-rights notion were on the whole supportive of the regulatory and welfare state, and in the writings that develop the bundle-of-rights conception, a purpose to remove the sanctity that had traditionally attached to the rights of property can often be discerned.⁸³

He goes on to state his conviction that this process is not really ideological in any mystifying sense but is simply the inevitable development of capitalism. There is no talk here of the right to exclude.

In taking aim at things, rather than the right to exclude, Grey is following in the footsteps of the Realists themselves. Felix Cohen saw the right to exclude as the *sine qua non* of property, but he decried “the ‘thingification’ of property,” which made possible a pretense that “courts are not creating property, but are merely recognizing a pre-existent Something.”⁸⁴ Indeed, property as a right to thing was Exhibit A for Cohen of what he derided as “transcendental nonsense.”⁸⁵ Nor was Cohen alone among the Realists in downplaying the thing in property. Arthur Corbin famously stated that “[o]ur concept of property has shifted [P]roperty’ has ceased to describe any *res*, or object of sense, at all, and has become merely a bundle of legal relations—rights, powers, privileges, immunities.”⁸⁶ Morris Cohen sounded a similar theme when he stated that “a property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things. A right is always

82. *Id.* at 70.

83. *Id.* at 80.

84. Cohen, *supra* note 52, at 815.

85. *Id.* at 809. See Mossoff, *supra* note 50, at 2013–18; see also Smith, *supra* note 2.

86. Arthur L. Corbin, Comment, *Taxation of Seats on the Stock Exchange*, 31 YALE L.J. 429, 429 (1922).

against one or more individuals.”⁸⁷ For this very reason, he disclaims the traditional view of property as a right to a thing in favor of the (in his view) correct analysis in which the right to exclude is primary:

The classical view of property as a right over things resolves it into component rights such as the *jus utendi*, *jus disponendi*, etc. But the 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. By public regulations it may indirectly aid me by removing certain general hindrances to the enjoyment of property. But the law of property helps me directly only to exclude others from using the things which it assigns to me.⁸⁸

The contrast between the bundle of rights and the right to a thing goes all the way back to the first instance of the bundle picture in John Lewis’s treatise on eminent domain:

We must . . . look beyond the thing itself, beyond the mere corporeal object, for the true idea of property. Property may be defined as certain rights in things which pertain to persons and which are created and sanctioned by law. These rights are the right of user, the right of exclusion and the right of disposition.⁸⁹

Lewis then goes on to specify how these rights are limited and how they are supplemented in the case of real property by rights of lateral support, riparian rights and the like.⁹⁰ When it comes to the Constitution, Lewis acknowledges the unreflective identification of property with things but asserts that “[t]he dullest individual among the *people* knows and understands that his *property* in anything is a bundle of rights.”⁹¹ Like Merrill and the Realists, Lewis sets up two choices: identifying property with things or accepting that property is a bundle of rights, which in Lewis’s hands leads to an expansive

87. Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12–13 (1927).

88. *Id.* at 12. See also JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000).

89. JOHN LEWIS, TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 54, at 41 (1888).

90. *Id.* at 41–43.

91. *Id.* § 55, at 43.

version of takings law.⁹² Lewis and the others are right that property consists of rights in things—even a bundle, if you will—but what these discussions leave out is the key role of the thing itself in delineating the right and its consequent role in mediating between the owner and duty bearers.

In keeping with the consensus, Merrill in his first essay studiously avoided the word “thing,” preferring (starting with the passage quoted earlier) the more neutral and economic-sounding “resource.” Later, Merrill starts bringing the thing back into the picture when he says that property requires a triad of a person a thing and a right of the person to exclude from the thing. Still, the right to exclude takes center stage, and “[t]he ‘things’ to which property attaches are scarce resources that humans find valuable, and they are valuable because they are things people want.”⁹³ But again, the thing does no work other than to be scarce. Most importantly, the definition of the thing plays no crucial role in Merrill’s account—only the right to exclude does. Again, this is not wrong, but incomplete.

What’s missing is the thing. Frederick Pollock defines a legal “thing” as “some possible matter of rights and duties conceived as a whole and apart from all others, just as, in the world of common experience, whatever can be separately perceived is a thing.” This foreshadows Penner’s separation thesis. He then notes how central to holism in property a thing is:

[O]n the whole perhaps we have good ground for saying that the “thing” of legal contemplation, even when we have to do with a material object, is not precisely the object as we find it in common experience, but rather the entirety of its possible legal relations to persons. We say entirety, not sum, because the capacity of being conceived as a distinct whole is a necessary attribute of an individual thing. What the relations of a person to a thing can be must depend in fact on the nature of the thing as continuous or discontinuous, corporeal or incorporeal, and in law on the

92. *Id.* § 56, at 45 (“If property, then, consists, not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property, and hence, that his property may be taken in the constitutional sense, though his title and possession remain undisturbed.”). Reminiscent of this approach is Epstein’s pro-bundle argument. *See* Epstein, *supra* note 22. The Realists employed the bundle to minimize takings. Mossoff, *supra* note 50.

93. Merrill, *supra* note 7, at 4.

character and the extent of the powers of use and disposal which particular systems of law may recognize.⁹⁴

Although property is not a thing, the nature of the thing in the world helps determine what kind of legal thing it can correspond to.

In recent times, Penner has taken up the strands of theorizing about intangible property by Pollock and others at the end of the nineteenth century and has explored how central the objects of property—things—are to the concept of property. Thus, while Merrill focuses on Penner's exclusion thesis, equally important for Penner is his separability thesis, which is a theory of the "thinghood" of objects of property:

Only those "things" in the world which are contingently associated with any particular owner may be objects of property; as a function of the nature of this contingency, in theory nothing of normative consequence beyond the fact that the ownership has changed occurs when an object of property is alienated to another.⁹⁵

Separability is a necessary condition for legal thinghood in property.⁹⁶ Depersonalization is important for transfer. Separation and exclusion also go hand in hand: a non-personal thing can be the basis for sending a relatively simple signal of keep off or don't touch.

Thing definition is particularly tied to exclusion through boundaries. The thing ties together the separability and exclusion theses. By being a separate thing in the eyes of the law, it can be subject to the rights employing exclusion (and governance) strategies. Conversely, as the first cut at defining property, an exclusion strategy sometimes helps define the thing. Where the thing requires some delineation, the process of thingification is partly one of drawing boundaries. In the case of land, a parcel is not a separate thing until we draw a boundary, which is used to define trespassory rules.

94. Frederick Pollock, *What Is a Thing?*, 10 L.Q. REV. 318 (1894). See also FREDERICK POLLOCK, A FIRST BOOK OF JURISPRUDENCE 121 (1896) ("A thing is, in law, some possible matter of rights and duties conceived as a whole and apart from all others, just as, in the world of common experience, whatever can be separately perceived is a thing."); *id.* at 105 ("possible objects of common or conflicting interest").

95. PENNER, *supra* note 4, at 111.

96. Michael J. Madison, *Law as Design: Objects, Concepts, and Digital Things*, 56 CASE W. RES. L. REV. 381, 417–19 (2005); Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 29 ARIZ. ST. L.J. 1075, 1080–92 (1997).

Modular thinghood plays an important role in capturing many of the characteristic features of property, which I have elsewhere classified as basic, secondary, and higher-order.⁹⁷ None of these features can be derived logically from thinghood (or the right to exclude), but thinghood is a central part—a linchpin—of a theory that captures them. We have already seen how the basic features of property—in rem status, the right to exclude, and the residual claim—are associated with thinghood. By separating out and depersonalizing a chunk of the world, thinghood makes much easier the sending of an in rem message and the assertion of a right to exclude to that audience. Merrill is right that the residual claim is related to the right to exclude, but this happens through thing-definition: the outer boundary of the thing serves as the starting point from which specific rights and claims are subtracted. What's left over depends crucially on the definition of the extent of the thing.

As for secondary features—alienability, persistence, and compatibility—we have already seen how the depersonalization made possible by thingification promotes alienability. The same goes for the features of persistence and compatibility. Relatively simple interfaces between things and the rest of the world make it easy to trace rights to things through remote hands (persistence). And things with stripped down interfaces are more compatible. Just as in the rectangular survey, rectangular plots have the same features as they are divided and combined, so too when interests in property, from the estates to covenants, are defined in terms of modular things, they are more compatible as they interact and combine.

Finally high-level features of property—recursiveness, scalability, and resilience—receive an explanation based on the role of things in property. First, the things of property are recursive (nesting). The rules for forming things out of things can be applied over and over. For example, the process of breaking a life estate into another life estate and a reversion or remainder can iterate, as can the process for forming subsidiaries of nested business entities. This recursivity makes a system with a small set of basic thing types (*numerus clausus*) a highly generative one: complexity can be managed through the use of these modular things.⁹⁸ Second, the things of property are

97. Smith, *supra* note 2, at 1709–13.

98. Merrill & Smith, *supra* note 43, at 36 (recursiveness of estates); Smith, *supra* note 2, at 1713 (recursiveness and modularity).

scalable: larger parcels and aggregates of rights inherit many of the features, including the right to exclude, from their smaller constituents. Likewise, when property rights are divided, many of the features persist. Not only are smaller parcels like mini versions of the larger ones they are carved out of, from a legal point of view, but the possessory actions protecting a lesser possessory interest will be very similar to those protecting a full fee simple, and so on. Finally, modular things lend property a resilience it would not otherwise possess. Recall that the basic problem in private law is the complexity of the horizontal interactions among private actors. By organizing these interactions in a first cut through modular things, many of the interactions between pairs and small groups of these actors can be cabined and made irrelevant to others. Not every problem should be treated as affecting everyone. The distinction between *in rem* and *in personam* sorts problems into those that require a widespread but cruder treatment and the ones that need more intensive but less widespread attention.

Even within property, the definition of things is just the beginning. All sorts of contractual and off-the-rack governance regimes, from covenants to nuisance to zoning, extend and modify the basic set-up of modular legal things. The same can be said for equity, in its supply of the device of the trust and its set of safety valves keyed to bad faith and disproportionate hardship. Nevertheless, all this superstructure rests on thing definition: nuisance tracks invasions of boundaries to a remarkable degree, and even the mildest remedy for building encroachments kicks in when the boundary is violated. For problems that do not sort themselves in this way we have reason to question whether the employment of things really helps us deal with them. And indeed for the conflict between general activities we have the law of tort, which manages information in its own way.⁹⁹

Because the distinctness of a thing and the thing's importance in defining rights are both a matter of degree, property falls on a spectrum. As we get further from the thing of property and deeper into the overlapping realms of contract and tort, we can say that the regime is less property-like. This is not a criticism or a celebration but a description. I suspect that we do have intuitions about which aspects of law and social norms governing private interactions, with

99. Henry E. Smith, *Modularity and Morality in the Law of Torts*, J. TORT L., no. 2, art. 5, Oct. 2011.

respect to things, are more property-like and which are less. Thus, borderline cases like choses in action and equitable rights are borderline because they deal with legal objects that are thing-like but less thing-like—less separable and depersonalized—than legal things that correspond more straightforwardly to tangible objects. The thing of property is not a *sine qua non* but the strength of its presence is an indicator of whether we are deep in Propertyland, in its borderlands, or somewhere else altogether.¹⁰⁰

Looking beyond private law, the interface between property and public law can be understood better when things are brought back into the picture. This is reflected in Merrill's pathbreaking work on Constitutional property.¹⁰¹ Merrill argues that property under the Takings Clause, which is keyed to the common law, requires a right to exclude from a "discrete asset,"¹⁰² whereas property for substantive due process requires only a right to wealth. (Procedural due process is the broadest, and embraces any entitlement, with no requirement of a right to exclude, a discrete asset, or wealth.) As Merrill's review of the case law reveals, the "discrete asset" test helps limit the reach of the Takings Clause and allows for greater scope for due process.¹⁰³ Definitionally, he states, that

[b]y discrete asset, I mean a valued resource that (1) is held by the claimant in a legally recognized property form (for example, a fee simple, a lease, an easement, and so forth), and (2) is created, exchanged or enforced by economic actors with enough frequency to be recognized as a distinct asset in the relevant community.¹⁰⁴

Thus, the notion of "discrete asset" in turn rests on concepts like "resource," "property form," and "asset." Merrill notes the perils of defining property for substantive due process as a right to exclude without a discrete asset, which the Supreme Court has come close to doing.¹⁰⁵

100. I borrow the term "Propertyland" from Carol Rose. See, e.g., Carol M. Rose, *Rhetoric and Romance: A Comment on Spouses and Strangers*, 82 GEO. L.J. 2409, 2411 (1994), and note that the theory offered here can help locate the fuzzy border of Propertyland itself.

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

102. *Id.* at 964.

103. This is Merrill's reading of the Breyer/Kennedy position in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

104. Merrill, *supra* note 101, at 974.

105. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666 (1999); Merrill, *supra* note 101, at 983–87.

Let me suggest that “discrete asset” is getting closer to the notion “thinghood,” and that a theory of legal thinghood would flesh out what a discrete asset is. Although it goes beyond the scope of the present Article, let me propose that a return to the importance of the thing in property would help define “discrete asset” for Merrill’s purposes. Indeed, Leif Wenar has argued that the failures of the bundle theory in takings law should cause us to return to the importance of property as a law of things for takings.¹⁰⁶

Thus, organizing relations through things, as property does, is far from the only solution to private law problems, and does not exhaust the interface between private and public law. Focusing on thinghood does help us see what property is good at and where it runs out. None of the features captured on such a theory is derived logically from thinghood (or the right to exclude). Instead, a good theory of things serves as the core of a theory of property that explains these important features of property.

CONCLUSION

The right to exclude is an important feature of property, albeit not a *sine qua non*. Merrill has provided a real service and an important contribution with his promotion of the importance of the right to exclude.¹⁰⁷ Merrill is right to look for some connecting tissue or glue holding property together—indeed this is a quest I share and one that prompted us to write our casebook.¹⁰⁸ I would argue that one can understand the right to exclude better by asking: exclude from what? The answer to this question points to an aspect of property that explains how the right to exclude—and many other features of property—are important and when they’re not. Once the thing is in the picture, it is probably true that exclusion from a thing makes a package of entitlements more property-like, for many of reasons that dovetail with Merrill’s account. And it is also true that property

106. Leif Wenar, *The Concept of Property and the Takings Clause*, 97 COLUM. L. REV. 1923 (1997); see also James Y. Stern, *Property’s Constitution*, 101 CAL. L. REV. 277, 297–98 (2013).

107. And not, as he notes with characteristic wryness, as a foil for others who have not read the article. See Merrill, *supra* note 7.

108. See THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES (2d ed. 2012); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES (2007); see also THOMAS W. MERRILL & HENRY E. SMITH, THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY (2010).

is not to be *identified* with a thing. Nevertheless, the definition of a thing and its role in mediating private interactions lie at the heart of property. The thing of property is a linchpin in the overall architecture, and as we get away from tangible things, we get further from property and into adjacent areas—contract, tort, unjust enrichment—not that that’s a bad thing. Private law is a whole, and property is a crucial but incomplete part of that system. Property also furnishes a prominent interface between private and public law, notably in the law of takings. And at the heart of that part of private law we call property is the thing.