

## THE (PRACTICAL) MEANING OF PROPERTY

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*Property, alongside liberty, security and resistance to oppression, [is] one of the “natural and imprescriptible rights of Man[.]”<sup>1</sup>*

*Property [is] the means by which the “will” acquire[s] existence . . . [through] the characteristic “of being mine.”<sup>2</sup>*

*[T]heir lives, liberties, and estates, which I call by the general name property.<sup>3</sup>*

*What is Property? . . . Property is theft!<sup>4</sup>*

Property appears such a malleable concept one must wonder whether it means anything at all.<sup>5</sup> Engaging in related public policy debates, to say nothing of reaching decisions, requires at least a basic common understanding regarding the subject matter of the discussion.

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1. KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO 149 (Gareth Stedman Jones ed., Samuel Moore trans., Penguin Classics 2002) (1848) (referring to the Declaration of the Rights of Man and of the Citizen).

2. *Id.* at 74; *see id.* at 151 (citing G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 75–76 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821)).

3. JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 155 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

4. PIERRE JOSEPH PROUDHON, WHAT IS PROPERTY? AN INQUIRY INTO THE PRINCIPLE OF RIGHT AND OF GOVERNMENT 13 (Donald R. Kelley & Bonnie G. Smith eds., Cambridge Univ. Press 1993) (1876).

5. A possibility succinctly captured by Professor Thomas Grey’s blunt assertion that as property has so little coherence as a concept, it could effectively be declared “dead.” *See* Thomas C. Grey, *The Disintegration of Property*, in 2 LIBERTY, PROPERTY, AND THE LAW: A COLLECTION OF ESSAYS 291 (Richard A. Epstein ed., 2000); *see also* Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 533 (2005) (stating that “the field seems to be in insoluble theoretic disarray”).

Being resolutely practical—defining property by focusing on its real world effects—provides a solution.<sup>6</sup>

That fingerpost points away from a search for “the one true property law”<sup>7</sup> and towards approaching property functionally.<sup>8</sup> From that perspective, “property” denotes no more than society’s decisions<sup>9</sup> establishing who controls a resource when disputes arise over its use, regardless of how those decisions are normatively justified, the nature

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6. Focusing on the practical does not diminish the importance of other considerations, including “big truths,” in property debate. Rather it helps frame the discussion by clearly identifying the role such other considerations play.

7. There are indications that the definitional effort is coming around to this view. *See generally* Peter K. Yu, *Intellectual Property and the Information Ecosystem*, 2005 MICH. ST. L. REV. 1 (providing an insightful analysis along these lines regarding the intellectual property debate). A number of authors also argue, in various ways, for not treating “property” as having a static and immutable essence. *See generally* Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1 (2004); Anupam Chander, *The New, New Property*, 81 TEX. L. REV. 715 (2003); Hanoch Dagan, *Property and the Public Domain*, 18 YALE J.L. & HUMAN. 84 (2006); Carol M. Rose, *Property in All the Wrong Places?*, 114 YALE L.J. 991 (2005). History also supports a more flexible conceptualization of “property.” As the promulgators of the Doctrine of Saint-Simon stated: “this great word ‘property’ has represented something different at every epoch of history.” MARX & ENGELS, *supra* note 1, at 173. *See generally* Francesco Parisi, *The Fall and Rise of Functional Property* (George Mason Law & Economics Working Paper Series, Paper No. 05-38), available at [http://www.law.gmu.edu/assets/files/publications/working\\_papers/05-38.pdf](http://www.law.gmu.edu/assets/files/publications/working_papers/05-38.pdf); Rose, *supra* (noting the supposition that property rights are unchanging is ahistorical).

8. The word “functional” only emphasizes the real world effects of property. It should not be confused with Professor Felix Cohen’s use of the term. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821–34 (1935). Professor Cohen argued for focusing on how the law is judicially applied, or perhaps more broadly stated, how that application defines “what [the law] is.” *See id.* at 824, 828–29. I believe that although a “legal realist” approach to property may tell us much about the existing rules, it does not address, and therefore cannot help us resolve, the issues in public policy debate over what we want the law to be. *See infra* notes 130–34, 209–13 and accompanying text. That question requires we pay attention to the effects of “transcendental nonsense”—at least in terms of our normative views regarding what constitute appropriate property outcomes.

9. In anticipation of confusion (hopefully unjustified), I emphasize that the practical approach does *not* assert (nor does it depend on) the non-existence of universal truths. Nor does it assert that property is merely a socially constructed artifact rather than a “natural” right. It does not preclude making actual decisions on either basis. The only assertion is factual: that agreement on a single normative conceptualization of the regime continues to prove elusive and, therefore, defining property in terms of any *a priori* “truth” ignores that as a *practical* matter those assertions are no more than arguments in real world public policy debate. *See infra* Parts II.A, III. The “not legal realism” disclaimer in note 8 above must be extended to include the further caveat that the approach is neither “relativist” nor “positivist.” It is merely “practical”—focused on identifying real world problems and consequences that affect property debate.

of the resource, or what specific rights of control are granted.<sup>10</sup> In practical terms, property consists of a response, not the label for an a priori absolute. Similarly, each of the opening quotations reflects a possible basis for application (or non-application) of property, not its ontological essence.

Extricating “property” from our personal views of its “just” application reveals that property is intrinsically neither “good” nor “bad.” Nor is its application limited to “yes” or “no.” Revering or fearing, embracing or denying, “property” confuses personal views regarding its proper application with the regime itself. It is not the tool but our divergent views regarding its appropriate use that property-related public policy debate should address.

That understanding provides a number of practical insights into the problems and consequences inherent in property debate. It clarifies that the central difficulty involves reaching consensus on outcomes in the face of passionately held but conflicting individual beliefs about what is “right.” Because those beliefs reflect assumptions emanating from individual backgrounds and intuitions, the resulting differences remain impervious—practically speaking—to elimination through reasoned debate.<sup>11</sup> Even the most rigorous logic will fail to demonstrate their error to those starting from fundamentally different propositions about what “matters most.”<sup>12</sup>

Although many recognize the problem, a practical approach looks at actions. That focus reveals that if we treat those holding opposing normative views as blockheads requiring education, or villains requiring exposure in a righteous quest to ensure society’s adherence to the one “correct” path, we have utterly failed to deal

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10. See *infra* Part II.A refining the practical definition of “property” to include every kind and degree of control over all varieties of resources—tangible and intangible—which may be contested, provided only that the rights are status-based (based on membership in society) rather than transactional. For those hungering for immediate detail, the relevant material is found *infra* notes 106–27 and accompanying text.

11. See *infra* notes 184–202 (discussing why “reason” is insufficient to convince those holding conflicting normative views). Disagreements regarding implementation of an agreed normative approach pose fundamentally different problems and should be distinguished. Unlike normative differences, implementation conflicts can be resolved by objective, expert fine-tuning. See *infra* notes 130–31, 171 and accompanying text. When they cannot, that is an excellent indication that an underlying normative disagreement exists.

12. Cf. Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37 (1990) (arguing the perspective from which the property story is told affects how the narrative comes out).

with the actual problem of normative disconnect. The result is polarization, turning debates into shouting contests and worse.<sup>13</sup>

If reasoned argument cannot eliminate fundamental normative differences, something other than conversion must generate resolution. One possibility is, of course, power. Before pursuing that path, however, property's real world consequences merit consideration. A property regime resolves conflicts over resources when there is not "enough and good enough" for all.<sup>14</sup> At the individual level some consideration might profitably be given to one's realistic prospects of emerging a winner under the proposed arrangement. But even winners could usefully reflect on how the losers will react. Unless a society's property decisions afford its individual members sufficient control over the resources they deem necessary to pursue an acceptable life,<sup>15</sup> the existing social arrangements will be challenged. Without satisfactory adjustment, the losers will eventually ignore decisions made through the existing political mechanisms<sup>16</sup> in favor of other approaches, including, ultimately, seeking substantial change in society.

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13. See Yu, *supra* note 7, at 9–11. The current health reform debate provides a number of good examples of the ineffectiveness of such tactics as a means of conversion and the ultimate need to marginalize the dissenters to make a decision by those currently in power.

14. See LOCKE, *supra* note 3, at 112. This means property rights become most important and most contentious when Locke's caveat to his labor theory makes it inapplicable on its own terms. Locke's caveat explicitly recognizes that a normative position's practical effects merit consideration before insisting on its adoption, precisely what the functional approach suggests might usefully inform our approach to property debates. See *infra* Part III.B.

15. The "acceptable life" reference intentionally echoes John Rawls's Difference Principle and the related concept of a rational life plan. See JOHN RAWLS, A THEORY OF JUSTICE 65–70, 266–67, 347–72 (revised ed., Harvard Univ. Press 1999). However, the focus here remains exclusively on the practical consequences of inadequate control over resources, not Rawls's implication that such a situation may be normatively "unjust." The practical approach to property explicitly takes no normative position regarding allocation of sufficient control over society's resources. See *infra* notes 21, 243–44 and accompanying text. It merely indicates that practical consequences will follow from the failure to do so.

16. See *infra* notes 217–24 and accompanying text for a discussion of social "meta-systems" as the mechanism for resolving normative differences. Although the property focus is on "contested" resources, the practical approach usefully informs any public policy issue involving losers being deprived of something they deem essential to an acceptable life. That connection leads some to view "life and liberty" or other forms of human rights as constituting property interests. See LOCKE, *supra* note 3, at 155 (using a definition of property that includes "lives and liberties"); CHARLES VAN DOREN, A HISTORY OF KNOWLEDGE 226–28 (1991) (discussing property in opinions, beliefs and rights). I believe that distinguishing between external "resources" (whether tangible or intangible) and individual freedoms may permit (slightly) more coherent debate, despite the difficulty of drawing a clear line; consider, for example, the difference between a debate over property rights in human body parts and genetic material and over property rights in human labor and the related slavery issues. See

The unraveling of existing social arrangements may occur incrementally over time, manifested first as increasing apathy and reduced productivity, then turning into more active civil disobedience, increasing crime, and, eventually, more forceful disruptions of social order. Those actions may produce changes in form, moving from democratic-republican governance to oligarchy and eventually despotism rather than triggering a complete disintegration.<sup>17</sup> But regardless of how or when it occurs, when the property losers feel they can no longer tolerate their inability to access and deploy resources or to avoid unacceptable consequences of others' use of "their" property,<sup>18</sup> the discussion will no longer be governed by political debate as usual (even in its best sense). And, if long enough ignored, a society's property disagreements may eventually cease to be resolved by discussion at all.<sup>19</sup>

The practical focus on property outcomes also offers a mechanism for mitigating personal and social risks.<sup>20</sup> Specifically, property discussion could start by assessing how proposed control allocations will affect the losers' lives and their desire (and at the extreme, ability) to continue acquiescing in the existing social arrangements. In particular, significant social disruption should be anticipated when property outcomes fail to sufficiently "deliver the goods" in terms of resources directly and essentially connected to individual physical and emotional well-being. Only once that threshold issue has been resolved does the necessary surplus exist to permit giving free rein to uncompromising insistence on individual

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*infra* notes 75 and 111 (discussing these debates, respectively). In all events, obtaining the benefits of the practical approach only requires application of the methodology, not resolution of the ontological question.

17. See LOCKE, *supra* note 3, at 193 (distinguishing between the forms of social dissolution).

18. "Sufficient control" is not limited to accessing resources necessary to existence or even those affecting physical well-being. Although those problems are most likely to trigger challenges to the established order, any substantial interference with pursuit of an acceptable life, including the ability to limit or even prevent use of certain resources by others, may trigger the response. See *infra* notes 205–08 and accompanying text.

19. A number of revolutions have roots in property disagreements, particularly distributional consequences that have become insupportable over time. See *infra* note 232 and accompanying text.

20. Cf. VAN DOREN, *supra* note 16, at 66–67 (discussing how the Romans' practical approach to social organization helped their society endure). See *infra* notes 236–42 and accompanying text for a more extensive discussion of how the process described in the following text might be implemented.

normative preferences without jeopardizing the current social structures.

These practical insights are, of course, no more than that. They may produce individual normative adjustments or lead to less conscious “slippage” in adherence to principle in favor of imperfect but more practically tolerable outcomes. They cannot, however, produce normative consensus. They do not demand action based on the claim that they produce “just” or even “better” outcomes than other positions.<sup>21</sup> The argument that one’s personal beliefs must be abandoned to avoid polarization and coerced outcomes is no more demonstrably correct than any other normative position. Nor is advocating property control decisions that sufficiently deliver the goods to permit continuation of a particular social order, or for that matter to achieve any other end.

The functional approach to property only identifies the practical problem we face in the related debates, and the practical consequences, both individual and for existing social arrangements, of the related decisions. It does no more than provide information we might consider when deciding how we wish to proceed. But that’s not bad work for a definition.

This article develops the above thesis in three parts. The first part provides some very general background on the definitional issue, including identifying the continuum of possible resource control outcomes and a variety of normative positions regarding what constitutes a “just” property regime. It concludes with a number of examples demonstrating the pervasiveness of property “control” issues in contemporary public policy debate. Part II.A explains why defining property functionally provides a clarifying framework for normatively fueled public policy debates. Part II.B argues that

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21. The practical threshold of “delivering the goods” isn’t substantively different from Rawls’s basic principles other than in degree, so the latter could be viewed as offering a “practical” approach. The distinction is that Rawls labels his proposal a “theory of justice.” See RAWLS, *supra* note 15, at 52–53. For his principles to be “just” presupposes that decisions made behind the veil of ignorance are normatively superior outcomes. See *id.* at 10–19. Absent external proof, however, the supporting argument for that position does no more than logically develop the outcome from “given” foundational assumptions. Others remain free to disagree with those assumptions and, therefore, with the ultimate principles’ normative merit. The practical approach eschews any claim of preference, as well as to related labels such as “just” or even “desirable.” See *infra* notes 243–44 and accompanying text. It does no more than identify actual obstacles to decision-making and likely real-world consequences arising from particular approaches and control allocations for consideration as part of the decision-making process.

although the word “property” has strong associations with an almost Blackstonian conception of absolute control, insisting on its use as the genus term for all our resource control decisions will improve, not distort, our discussions. The third part elaborates on the insights a functional approach provides regarding property-related public policy debate. Part III.A discusses the core problem of persistent normative differences. Part III.B explains why considering the real-world consequences of property decisions when deciding how to deal with those differences at least merits attention.

### I. THE IMPORTANCE OF PROPERTY

Academics and philosophers (assuming they may not be the same) have always been particularly interested in determining exactly what “property” means. Their definitional efforts, while hardly resolving the matter, have generated an impressive set of options.<sup>22</sup> They cover a prodigious range stretching from the dramatically unnuanced “sole and despotic dominion”<sup>23</sup> to the highly refined “bundle of sticks.”<sup>24</sup> Those discussions have also generated a no less impressively diverse, and equally inconclusive, array of justifications for property rights, including labor,<sup>25</sup> its cousin first possession,<sup>26</sup>

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22. See Bell & Parchomovsky, *supra* note 5, at 533–51 (providing a good summary and concluding by proposing a unified theory of property “organized around creating and defending the value inherent in stable ownership”). For completeness, I would add the non- or contra-private property philosophies of, for example, the “socialist/communists” (for lack of a better label) to their listing. See generally MARX & ENGELS, *supra* note 1.

23. WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 2 (David S. Berkowitz & Samuel E. Thorne eds., Garland 1979) (1765). But see Carol M. Rose, *Canons of Property Talk, or, Blackstone’s Anxiety*, 108 YALE L.J. 601, 602 (1998) (asserting that Blackstone was less defining property than starting a discussion).

24. See generally Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter Hohfeld, *Fundamental Legal Conceptions*]; WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* (Walter W. Cook ed., Yale Univ. Press 1923). But see J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 714 (1996) (analyzing the “bundle of rights” approach and ultimately rejecting it as “little more than a slogan”).

25. See LOCKE, *supra* note 3, at 111–21.

26. See, e.g., RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 59–63 (1995); Chander, *supra* note 7, at 723–41 (2003) (explaining and criticizing the approach). Property students will fondly (or not) recall the New York Supreme Court case of *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

individual self-definition and autonomy,<sup>27</sup> stewardship,<sup>28</sup> divine right,<sup>29</sup> utility,<sup>30</sup> collective good,<sup>31</sup> need,<sup>32</sup> and power.<sup>33</sup>

When sufficient unclaimed Lockean common<sup>34</sup> or Marxist abundance<sup>35</sup> permit, or at least appear to promise, the ability to obtain and use desired resources, definitional precision is largely irrelevant as a practical matter. If that was ever the situation, it certainly is not the case today.<sup>36</sup> We frequently find ourselves in fierce competition

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27. See *supra* note 2 and accompany text (paraphrasing Hegel's point of view); see also Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957–62 (1982) (offering an elaboration of that argument in the context of intellectual property); Benjamin Barros, *Property and Freedom*, 4 N.Y.U. J.L. & LIB. 36, 37–40, 69 (2009) (discussing the link between property and freedom).

28. See Kristen A. Carpenter, Sonia Katyal & Angela Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1046–60 (2009) (expanding Radin's concept of personhood to "peoplehood" and arguing for a more expansive view of property ownership which accounts for multiple interests); cf. Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 614, 637–39, 652–54 (1988).

29. See MARX & ENGELS, *supra* note 1, at 167 (noting the argument that "God had given the earth to Adam—one man and his legitimate heirs").

30. This principle is central to the Smith-Bentham-Mills market efficiency model made popular in contemporary legal analysis by "Chicago School" theory and currently a preeminent theoretical justification for United States property law. For its connection to contemporary property law, see for example Bell & Parchomovsky, *supra* note 5, at 546–50; Carrier, *supra* note 7, at 26–30; Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1037–40 (2005); Rose, *supra* note 23, at 618–23.

31. There are a number of examples, culminating (perhaps) with the communist view that although private property should be eliminated, resources would still be "owned in common" for the common good. See MARX & ENGELS, *supra* note 1, at 154, 157, 167, 169, 243 (discussing, among other things, the view as found in Roman law); see also Peter S. Menell & John P. Dwyer, *Reunifying Property*, 46 ST. LOUIS U. L.J. 599, 604–05 (2002) (discussing various native and early American common ownership schemas).

32. Even Marx, hardly a private property enthusiast, must be seen as at least grudgingly acknowledging specific allocations to individuals "according to their needs." MARX & ENGELS, *supra* note 1, at 169 (quoting Karl Marx, *Critique of the Gotha Programme*, in 24 MARX/ENGELS COLLECTED WORKS 87 (Progress Publishers of the Soviet Union 1989) (1875)). An alternative "need" position grants current users only a usufruct right in trust over a resource making the satisfaction of their need subject to consideration of past and future members' interests. See, e.g., David Hurlbut, *Fixing the Biodiversity Convention: Toward a Special Protocol for Related Intellectual Property*, 34 NAT. RESOURCES J. 379, 385 (1994) (discussing such a position in the intellectual property field).

33. See *Johnson v. M'Intosh*, 21 U.S. 543, 571–92 (1823). Although couched nominally in discovery first-in-time predicates, the bottom line argument against Native American land titles came down pretty much to "we won." See generally *id.*

34. See LOCKE, *supra* note 3, at 111–12.

35. See MARX & ENGELS, *supra* note 1, at 174–75.

36. Some argue that the idyll of ample common disappeared with the invention of commerce, and most particularly the preservative power of money. See LOCKE, *supra* note 3,



for, and in conflict over, the use of resources. Those contests involve complex and creative claims of right, which in turn depend on determining precisely what having a property interest entails. The meaning of “property” now seems to be of very serious concern to virtually everyone.<sup>37</sup>

A few specific examples help illustrate how relevant and prevalent property is in today’s public affairs, as well as the intensity of our related disagreements. The exercise also provides specific context for concretizing the “functional” definitional discussion in Part II and its application in Part III.

The debate over the Takings Clause triggered by the U.S. Supreme Court’s decision in *Kelo v. City of New London* provides a useful starting point.<sup>38</sup> The Court’s 5–4 decision (over vigorous dissent, to put it tactfully)<sup>39</sup> essentially permits a governmental agency to condemn one person’s private property into other private hands provided the agency has (rationally) identified a related public purpose.<sup>40</sup> Whether or not the decision created new law,<sup>41</sup> the majority clearly found that the Constitution made private real property owners’ rights to retain their land subservient to the public interest as defined by governmental actors.<sup>42</sup>

The decision caused a furor among those who agreed with the *Kelo* dissenters that the majority’s position dramatically understated

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at 114–15, 119–121; see also Bethany R. Berger, *It’s Not About the Fox: The Untold History of Pierson v. Post*, 55 DUKE L.J. 1089, 1094–95 (2006) (arguing that *Pierson* was in part about the conflict between agricultural traditions and new commercial wealth over governance of common resources). Local accumulations of resources by those in power may have had the same effect much earlier, but those deprived would have lacked access to the social institutions necessary to engage in any related public policy debate.

37. With heightened anxieties over the economy, home foreclosures, and personal finances, this concern has undoubtedly increased significantly. Interestingly, one relatively recent poll in times of relative plenty before the current meltdown actually showed “private property rights” specifically listed at the very top of the American citizenry’s concerns. Timothy Egan, *Ruling Sets Off Tug of War over Private Property*, N.Y. TIMES, July 30, 2005, at A1.

38. 545 U.S. 469 (2005); see also Martin Lasden, *The Great Property Rights Revival*, CAL. LAW., Feb. 2006, at 22; John Gibeaut, *Taking Control: The Eminent Domain Controversy Finds a Battlefield in the Development of a Cincinnati Suburb*, 91 A.B.A. J. 45, 46 (2005); Egan, *supra* note 37, at A1.

39. *Kelo*, 545 U.S. at 505 (O’Connor, J., dissenting) (characterizing the result as “perverse”).

40. *Id.* at 501 (characterizing the majority opinion).

41. Gibeaut, *supra* note 38, at 46.

42. *Kelo*, 545 U.S. at 480–83.

the true nature of individual property rights.<sup>43</sup> Passions were sufficiently aroused that numerous efforts were made to energize congressional and state legislative action<sup>44</sup> to “secure[] to every man, whatever is his *own*.”<sup>45</sup> Clearly, a substantial segment of the public (or at least the politically active public) has a very different view of “property ownership” than the meaning the *Kelo* majority found in the Constitution.

The troubled history of Oregon’s Measure 37 initiative<sup>46</sup> provides another good view through the “takings” window of the conflicting views of property rights. The Measure (which was, in effect, passed twice<sup>47</sup>) required that real property owners receive “just compensation” for *any* new governmental action reducing the property’s value, including regulatory limitations imposed on use.<sup>48</sup> When the trial court temporarily overturned the initiative on various

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43. See Lasden, *supra* note 38, at 30; Egan, *supra* note 37, at A1; see also Janis Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. EMPIRICAL LEGAL STUD. 713, 742–47 (2008) (discussing the possible reasons for the strong negative response to *Kelo*).

44. See Laura Oppenheimer, *Foes of Land Takings Widen Aim*, OREGONIAN, Sept. 25, 2006, at B1. These efforts follow up on Justice Stevens’s statement in the majority opinion that “[w]e emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.” *Kelo*, 545 U.S. at 489. See Lasden, *supra* note 38, at 30; Andrew P. Morriss, *Symbol or Substance? An Empirical Assessment of State Responses to Kelo 4–5* (Ill. Law & Econ. Research Papers Series, Research Paper No. LE07-037, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1113582](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113582).

45. *Kelo*, 545 U.S. at 505 (O’Connor, J., dissenting) (citing James Madison, *Property*, NAT’L GAZETTE, Mar. 27, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 266 (R. Rutland et al. eds., 1983), available at <http://www.vem.duke.edu/POI/madison.pdf>).

46. See generally Sara C. Galvan, *Gone Too Far: Measure 37 and the Perils of Over-Regulating Land Use*, 23 YALE L. & POL’Y REV. 587 (2005); Laura Oppenheimer, *Measure 37 Proclaims: Subdivide and Conquer*, OREGONIAN, June 12, 2005, at A1. Oregon Measure 37 was passed in the 2004 general election and is codified in Oregon law. OR. REV. STAT. § 197.352 (2005). The Measure was subsequently modified in 2007 by passage of Measure 49, which dealt with some of the significant land use planning issues it raised. OR. REV. STAT. § 195.305 (2007); see Oregon Secretary of State Elections Division, November 6, 2007, Special Election, <http://oregonvotes.org/nov62007> (describing the Measure); Rob Manning, *Measure 49 Just Another Bend in a Long Land Use Road*, OPB NEWS, Nov. 7, 2007, <http://news.opb.org/article/712-measure-49-just-another-bend-long-land-use-road> (discussing the Measure’s passage and opinions about its effect).

47. The previous initiative, Measure 7, was passed in the November 2000 general election and subsequently overturned on technical grounds (failure to vote separately on its multiple changes to the Oregon Constitution) by the Oregon Supreme Court in 2002. *League of Or. Cities v. State*, 56 P.3d 892, 910–11 (Or. 2002).

48. Oregonvotes.org, Measure 37, Text of Measure, [http://oregonvotes.org/nov22004/guide/meas/m37\\_text.html](http://oregonvotes.org/nov22004/guide/meas/m37_text.html) (last visited Oct. 30, 2009).

state and federal constitutional grounds,<sup>49</sup> some individuals were sufficiently offended to initiate a recall effort against the judge.<sup>50</sup> The recall supporters summed up their complaint as follows: “[The judge] has undercut the fundamental, God-given right of Oregonians to truly own their property.”<sup>51</sup>

Mirroring those angered by the *Kelo* decision, the Oregon recall proponents (and, likely, many others)<sup>52</sup> believed that property ownership exists as a matter of expansive a priori natural rights. Consequently, any governmental interference with use and enjoyment of private property (including, apparently, judicial interference based on existing law) constitutes an impairment of “true” ownership. In contrast, Measure 37 opponents viewed the public’s strong interest in land use planning as justifying some *inherent* limitations on the scope of private property rights, much like the *Kelo* majority.<sup>53</sup> In that paradigm, society creates property law to do more than carry out its obligation to implement and protect the owner’s natural right to prevent interference by others. Society creates property law to *define* the scope of property ownership.<sup>54</sup> If society decides that a particular government action, say a zoning limitation, falls outside property ownership, then *by definition* no taking occurs and no compensation is due. Alternatively, society can define property ownership as only requiring compensation for interference<sup>55</sup> or as including the right to prevent the interference entirely.

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49. *MacPherson v. Dep’t of Admin. Servs.*, 130 P.3d 308, 312, 322 (Or. 2006) (finding the Measure constitutional and reversing the trial court’s decision invalidating the statute).

50. Julie Sullivan, *Firestorm over Measure 37 Clouds Judge’s Long-Held Dream*, OREGONIAN, Dec. 4, 2005, at B1. The recall drive subsequently failed for technical reasons (signature sheets missing petition numbers). Laura Oppenheimer, *Form Error Scuttles Judge Recall*, OREGONIAN, Jan. 12, 2006, at C1.

51. Sullivan, *supra* note 50, at B1.

52. Measure 37 passed with sixty-one percent of the vote, carrying all but one Oregon county. Ashbel S. Green & Laura Oppenheimer, *Land-Use Lawsuit Invokes Anti-Favoritism Clause*, OREGONIAN, Jan. 15, 2005, at A1; *see also* Laura Oppenheimer, *Land-Use Hearing Is a Hot Ticket*, OREGONIAN, Jan. 11, 2006, at A1.

53. *See* Laura Oppenheimer, *Justices Wade into Land-Use Quagmire*, OREGONIAN, Jan. 9, 2006, at B1; sources cited *supra* note 52.

54. *See* ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND (2007), *reprinted in* Eric T. Freyfogle, *Private Property: Correcting the Half Truths*, PLAN. & ENVTL. L., Oct. 2007, at 7 (“Property comes into existence . . . when people assemble and agree upon the rules of landowning. Once they’ve done that, they then incorporate their conclusions into some sort of law, backed by enforcement measures.”).

55. This socially constructed property right parallels the *Kelo* majority’s interpretation of the federal takings power. Under the Constitution, society has defined the scope of individual

Intellectual property law has taken property beyond its roots in the tangible—those things we literally hold dear. That extension has loosed legions of academics through many hundreds of articles to fervently debate the appropriate extent of property rights in ideas and their expression.<sup>56</sup> From the fine to the technological arts, the burning question is whether increasing “proPERTIZATION” of those intangibles reflects an improved understanding of the appropriate (and even just) reach of individual ownership or, alternatively, whether Blackstonian absolute domains run amok.

Examples can be found across the full gamut of intellectual property regimes. Patent law’s subject matter has been extended to cover business methods<sup>57</sup> and the “stuff of life,”<sup>58</sup> putting those areas of the formerly public domain behind private fences.<sup>59</sup> Proponents, depending on their normative persuasions, may laud the expansion as encouraging economically beneficial increases in innovation<sup>60</sup> or as just recognition of inventors’ natural rights.<sup>61</sup> Opponents agonize over the effects on future innovation, competition,<sup>62</sup> and impaired access.<sup>63</sup> Similarly, some praise trademark law’s expansion into

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property rights against the government as limited to just compensation for takings determined to be for public use (a public purpose) by society’s governmental delegates.

56. For a partial listing of those individuals, see Lemley, *supra* note 30, at 1035 n.8. There are, of course, many others.

57. See *State St. Bank & Trust Co. v. Signature Fin. Group*, 149 F.3d 1368, 1375–77 (Fed. Cir. 1998) (authorizing patents on business methods); see also Vincent Chiappetta, *Defining the Proper Scope of Internet Patents: If We Don’t Know Where We Want to Go, We’re Unlikely to Get There*, 7 MICH. TELECOMM. & TECH. L. REV. 289, 298–314 (2000–2001) [hereinafter Chiappetta, *Internet*] (discussing the case and related articles).

58. E.g., Rebecca S. Eisenberg, *Re-Examining the Role of Patents in Appropriating the Value of DNA Sequences*, 49 EMORY L.J. 783, 785–86 (2000); Rebecca S. Eisenberg, *Patenting the Human Genome*, 39 EMORY L.J. 721, 722–36 (1990).

59. The courts are currently giving the issue serious reconsideration. See *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008), *cert. granted sub nom.*, *Bilski v. Doll*, 129 S. Ct. 2735 (2009).

60. See, e.g., Chiappetta, *Internet*, *supra* note 57, at 306–07 (discussing the public goods justification for United States patent system, but criticizing its application to business methods).

61. The position might reflect, among other justifications, a Lockean labor view or a Hegelian personhood approach. See *supra* notes 25–27 and accompanying text.

62. The presence of trolls and thickets makes life difficult for both existing competitors and new entrants. But see Neil E. Graham, *Perception Gap Hindering Efforts to Improve Patent System, Dudas Says*, 71 PAT. TRADEMARK & COPYRIGHT J. 374, 374 (Feb. 10, 2006) (briefly outlining the “patent system perception gap” and reporting on Patent Commissioner Jonathan Dudas’s argument that the problem is overblown).

63. Beyond high prices, injunctive relief (the typical “property” remedy) can significantly limit exploitation by others. That issue has received increasing attention. See, e.g., *eBay, Inc. v. MercExchange, L.L.C.*, 401 F.3d 1323, 1338–40 (Fed. Cir. 2005), *cert.*

dilution and anti-cyber-squatting as avoiding incipient consumer confusion<sup>64</sup> or as limiting incentive-dampening free rides on others' investment.<sup>65</sup> Still others denounce those same expansions as clogs on competition<sup>66</sup> and muzzles on free speech.<sup>67</sup>

The epicenter of public interest in the intellectual property debate, however, is copyright law. The rise and fall of Napster and its peer-to-peer progeny<sup>68</sup> have not only garnered considerable attention in the general press, but have also become topics of water-cooler conversation. Individuals have formed strong opinions, frequently based on direct personal experience,<sup>69</sup> about whether music downloaders are digital age Robin Hoods doing heroic battle against corporate greed or scurrilous knaves undermining society's cultural advance or interfering with composers' and musicians' just due. Other copyright ownership disputes include the justice (or not) of the 20-year extension of the term of protection,<sup>70</sup> the fairness (or not) of technology protection mechanisms and anti-circumvention laws,<sup>71</sup> and the appropriateness (or not) of the Supreme Court's addition of

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*granted*, 546 U.S. 1029 (2005), *vacated*, 547 U.S. 388 (2006). The issue was very much put on the general public's radar as a result of the Blackberry case. See, Roy Mark, *RIM and NPT Both Win in Settlement*, INTERNETNEWS.COM, Mar. 6, 2006, <http://www.internetnews.com/wireless/article.php/3589506>.

64. Specifically, in the form of anti-dilution remedies. See, e.g., Federal Trademark Dilution Act of 1995, 15 U.S.C. §§ 1125(c), 1127 (2006). For a general discussion of the issues, see Vincent Chiappetta, *Trademarks: More than Meets the Eye*, 2003 U. ILL. J.L. TECH. & POL'Y 35, 71–74 (2003) [hereinafter Chiappetta, *Trademarks*].

65. See generally Chiappetta, *Trademarks*, *supra* note 64 (arguing for expanding the justifications for trademark protection to include carefully calibrated “incentives” to invest in the creation of powerful market signals).

66. See, e.g., Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 788 (2004).

67. See, e.g., Chiappetta, *Trademarks*, *supra* note 64, at 78–83.

68. See, e.g., Julie Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 359–60 (2005); James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167, 189 (2005).

69. See, e.g., Posting of Allen Bauer to Oracle at Delphi Blog, <http://blogs.embarcadero.com/abauer/archive/2006/01/24/22891.aspx> (Jan. 24, 2006); Electronic Frontier Foundation, *How to Not Get Sued for File Sharing*, <http://www.eff.org/wp/how-not-get-sued-file-sharing> (last visited Oct. 29, 2009).

70. Discussed in detail *infra* notes 175–82 and accompanying text.

71. See, e.g., R. Polk Wagner, *The Perfect Storm: Intellectual Property and Public Values*, 74 FORDHAM L. REV. 423, 428–29 (2005).

inducement-based secondary liability to copyright law,<sup>72</sup> particularly given the possible effects on innovation.<sup>73</sup>

Property is also playing an increasingly significant role regarding issues previously framed in distinctly different terms—in particular, as questions of personal autonomy, privacy, free speech, and other individual rights. Takings jurisprudence has moved well beyond realty to incorporate claims that government “entitlements” constitute the property of the claimants, not merely individual rights.<sup>74</sup> Human organs and DNA hardly have long-standing traditions as personalty. As technology turns them into exploitable resources, those seeking the related economic returns (or at least to prevent others from obtaining them) have shifted from emphasizing personal autonomy concerns to asserting property-based claims.<sup>75</sup> Similarly, value-capture and harm-avoidance considerations arising from online consumer data collection, unwanted e-mail,<sup>76</sup> the scanning of websites for information, the planting of spyware,<sup>77</sup> and domain name conflicts,<sup>78</sup> lead plaintiffs to assume the mantle of wronged property owners rather than persons whose privacy has been invaded or identities compromised.

Even a wide variety of public policy issues explicitly articulated as *not* about property turn on important (albeit largely unexamined) property assumptions. For example, the current campaign finance

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72. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 941 (2005).

73. See *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417, 431 (1984).

74. See, e.g., Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 787 (1964); cf. Illya Somin, *Taking Property Rights Seriously? The Supreme Court and the “Poor Relation” of Constitutional Law*, in THE UNITED STATES SUPREME COURT: CONTESTED CONSTITUTIONAL DOCTRINES (Steven Kautz et al. eds., forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1247854](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1247854) (reviewing, among other things, the evolution of Takings jurisprudence).

75. See, e.g., *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990) (the (in)famous spleen case); Penner, *supra* note 24, at 718–23 (discussing the *Moore* court’s efforts to deal with the property assertion); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 37–38 (2003) (discussing the enclosure through propertization of the human genome); see also Robin Cooper Feldman, *Rethinking Rights in Biospace*, 79 S. CAL. L. REV. 1, 5–7 (2005) (discussing patenting of genetic inventions and how their nature conflicts with the rules for mechanical products).

76. See, e.g., *Intel Corporation v. Hamidi*, 71 P.3d 296, 300 (Cal. 2003).

77. See, e.g., *Kerrins v. Intermix Media, Inc.*, 2005 WL 4056367, at \*1 (C.D. Cal. 2005); *Sotelo v. DirectRevenue, L.L.C.*, 384 F. Supp. 2d 1219, 1223 (N.D. Ill. 2005).

78. See, e.g., Chander, *supra* note 7, at 756–59 (discussing application of the property paradigm in cyberspace, particularly to domain names).

reform controversy has been framed in First Amendment terms.<sup>79</sup> That articulation assumes that campaign finance laws restrict the right of owners to use their property to speak.<sup>80</sup> Similarly, the debate over the inheritance tax is frequently viewed as a contest between interference with the personal right to determine legacy<sup>81</sup> and the social goal of redistribution—the tax either acting as a “reverse Robin Hood”<sup>82</sup> (a frequent metaphor for positive characterization of property redistribution) or embodying the individual’s moral obligation to “give back” based on success.<sup>83</sup> That framing of the issue, however, assumes that property ownership includes the right to direct assignment on death.<sup>84</sup>

In both situations, the property ownership assumption characterizes the proposed activity as an interference with the owner’s rights, thus requiring justification by the proponents of the restriction. That positioning, however, avoids the underlying public policy question: what justifies the property assumption/presumption in the first instance? The assumption’s practical consequences make

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79. See, e.g., *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 136 (2003) (treating restrictions on campaign contributions as a First Amendment issue).

80. The same analysis, of course, applies to owners seeking to prevent others from using their property as a forum for speech. Compare *Hudgens v. Nat’l Labor Relations Bd.*, 424 U.S. 507, 520–21 (1976) (holding that the First Amendment does not require private property owners to accommodate the speech of others), with *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980) (holding that state constitution’s requirement that private property owners accommodate others’ speech did not violate federally protected property rights). The conflict can be viewed as pitting the property owner’s right to exclude against the speaker’s First Amendment rights. However, the conflict only exists if we assume that property ownership includes the right to prevent third parties from using the resource as a forum for speaking their minds. If it does not, no conflict exists.

81. See, e.g., Posting of Scott A. Hodge to Tax Policy Blog, <http://www.taxfoundation.org/blog/show/991.html> (Aug. 1, 2005).

82. See Jonathan Weisman, *House Passes Permanent Estate Tax Repeal*, WASH. POST, Apr. 14, 2005, at A4 (quoting California Democrat and then-House Minority Leader Nancy Pelosi).

83. See William Gates, Sr., Remarks at Forum on Estate Tax (Jan. 14, 2003) (transcript available at <http://www.taxpolicycenter.org/publications/template.cfm?PubID=900584>).

84. The same assumption of property interference can be seen in all tax debates. As former President Bush stated in the 2000 election campaign, a tax surplus should be given back to the taxpayers because “it’s the people’s money.” *The NewsHour with Jim Lehrer* (PBS television broadcast Feb. 16, 2000) (transcript available at [http://www.pbs.org/newshour/bb/election/jan-june00/bush\\_2-16.html](http://www.pbs.org/newshour/bb/election/jan-june00/bush_2-16.html)); cf. James Penner, *Misled by “Property,”* 18 CAN. J.L. & JURIS. 75, 78 (2005) (noting that the property question pervades tax issues).

“because that is what ownership means” a wholly unsatisfactory answer to those who believe differently.<sup>85</sup>

The above examples identify three important characteristics of property-related public policy debate. First, property (and what it means) plays an important role in an increasingly resource-constrained world, with the related outcomes of considerable interest to everyone. Second, we have widely divergent and conflicting points of view on what property ownership entails. Finally, it is extraordinarily easy to make assumptions about property, in particular that it includes certain rights by definition. The failure to examine those assumptions and require their justification has important consequences for how we approach, and consequently resolve, not only issues we perceive as involving property, but many issues we frame as *not* about property.

## II. PROPERTY PRACTICALLY DEFINED

The abbreviated review above reveals that although “property” affects a wide range of public policy debates and involves a plethora of points of view, the discussions have a common theme. Each involves the assertion of “ownership” of a contested resource (land, ideas, body parts, personal information, or money). Equating property with ownership does not, of course, resolve the definitional question. It merely shifts the problem to determining what it means for someone to “own” something in the “property” sense.

Many instinctively feel<sup>86</sup> that defining property ownership as “it’s mine (and not yours)” is not far off the mark.<sup>87</sup> Close may be

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85. Merely asserting “because that is the law” does not advance the ball any further than simply asserting “because.” Although existing law resolves specific controversies brought to the courts, it does not resolve the property public policy debate. Existing law only reflects a public policy outcome, not an immutable final decision. The possibility of change makes it important to understand the related law-making process, including the nature of debate, the arguments, the effectiveness of the decision-making mechanisms, and the related consequences. See *infra* notes 130–34, 209–13 and accompanying text (discussing the relationship between existing law and public policy debate).

86. The article generally assumes a Western and, specifically, United States normative framework. Quite clearly instincts vary and what is said in the text hardly applies universally. See, e.g., Vincent Chiappetta, *The Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion and a Few Other Things*, 21 MICH. J. INT’L L. 333, 375–81 (2000) [hereinafter Chiappetta, *WTO*] (noting the wide variety of normative views regarding intellectual property justifications); *supra* notes 25–33 and accompanying text; *infra* notes 171–87 and accompanying text.

87. A number of commentators have noted this point of view albeit in a variety of ways. See, e.g., BLACKSTONE, *supra* note 23, at 8; Lemley, *supra* note 30, at 1037.



good enough when stiff competition for the resource does not exist or opinions do not vary, but as the examples in Part I reveal, the contests are numerous and the views of ownership diverse in today's property debates. Although "mine, not yours" provides a useful starting point for the definitional inquiry, something else is required to understand our increasingly important and complex property ownership debates.

Before turning to that task, it should be noted that some argue that the instinctive "mine, not yours" view of property creates such powerful biases and misconceptions regarding the nature of the related debates that any attempt to understand and deal with "property" in other terms is a futile enterprise.<sup>88</sup> If they are correct, then too few will hear, much less understand, the insights offered by a practical definition, rendering the effort to provide one meaningless. I believe the "capture" concern is not only unjustified, but also that addressing it directly is essential to improved understanding and debate. To make that case requires first explaining why a practical approach to defining property helps identify and understand the inherent nature of the related discussions. The capture issue is, therefore, deferred to Part II.B below.

#### *A. The Functional Definition of "Property"*

The Blackstonian articulation of property as "sole and despotic dominion"<sup>89</sup> is a well-known jurisprudential statement of the intuitive "it's mine, not yours" viewpoint, and thus offers a good place to start the definitional undertaking. Although appealing in its simplicity, it can be quickly dismissed as an unsuitable framework for public policy debate. If sole and despotic dominion properly defines property then there are no intermediate possibilities—either one is or one is not an owner.<sup>90</sup> The all-or-nothing positioning makes property debate exclusively a yes-or-no proposition where the only conflict is between those advocating ownership and those resisting it.

That framing of the debate may be appealing as a tactical matter (although the actual effects are more frequently counter-productive)<sup>91</sup>

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88. See *infra* notes 137–41 and accompanying text.

89. See *supra* note 23 for Professor Rose's debunking of the Blackstonian mythology.

90. See Yu, *supra* note 7, at 6, 9–11 (characterizing the result in intellectual property as creating a "bipolar" debate between maximalists and minimalists while ignoring the vast array of possibilities in between).

91. *Id.* at 10–11. Both the positioning and the resulting polarizing effects obscure possible solutions. Not only is calling one's opponents names hardly conducive to cooperative enterprise, either in seeking or accepting alternatives, but it can also lead to adverse responses

and it certainly can be good rhetorical fun. However, such an obvious mischaracterization cannot be seriously defended on the merits.<sup>92</sup> The arguments (and even the outcomes) discussed in Part I make it readily apparent that property is not an all-or-nothing proposition.<sup>93</sup> Sole and despotic dominion only represents one endpoint<sup>94</sup> of an extremely nuanced continuum of successively less absolute ownership possibilities eventually reaching the other terminus of “none.” Adopting only the most extreme of the possible alternatives as *the* definition of property unjustifiably narrows the scope of public policy debate. It is time to stop maligning Blackstone<sup>95</sup> and treat sole and despotic dominion as the straw man it is.

Moving along the continuum to the strong but limited rights currently embodied in real property law reveals that the above argument applies with equal force to every definition which defines property as a specific set of pre-established and immutable rights. Every such effort suffers from the same fatal flaw: it confuses a single possible outcome with the regime itself.<sup>96</sup> As the examples in Part I demonstrate, many kinds and degrees of ownership rights exist, to say nothing of the as yet untapped range of possibilities. In fact, even “current” real property law does not reflect a constant, but only one

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increasing the name-caller’s own rigidity. *See also infra* notes 184–87 (discussing the more general problem of framing arguments in terms of one’s own normative assumptions).

92. The distortion is so great that one has to suspect that even most advocates of sole and despotic dominion would be shocked (and likely appalled) to discover the position had somehow carried the day and henceforth governed *every* property decision. As Professor Yu cogently points out, its practical desirability varies considerably depending on the specific circumstances. *See id.* at 9. In fact, not even Blackstone was on board. *See Rose, supra* note 23, at 631–32 (explaining that Blackstone intended his “definition” as a cartoon caricature or trope, not a literal definition).

93. The highly nuanced rules of intellectual property law provide a good example. *See supra* notes 56–73 (discussing the debate over the regime’s various “ownership” allocations).

94. In fact, as there are no real-world examples of that mythical beast actually walking among us, it is likely only a theoretical endpoint. As Professors Carrier and Yu forcefully demonstrate, even real property law, the most likely candidate, is far from absolute. *See Yu, supra* note 7, at 6; *see generally* Carrier, *supra* note 7.

95. *See Rose, supra* note 23, at 632.

96. In effect confusing a visible manifestation with the underlying conceptual essence. *Cf. PLATO, THE REPUBLIC* 187–89 (G.M.A. Grube trans., Hackett Publishing 1992) (circa 380 B.C.E.) (those in the cave mistaking the reflection for the underlying truth); RAWLS, *supra* note 15, at 5 (“[T]he concept of justice as distinct from the various conceptions of justice . . . .”); VAN DOREN, *supra* note 16, at 30–32 (discussing Thales’ quest to differentiate between changeable characteristics (implementations) and underlying essence).

possibility among many regarding the ownership of land, which changes in response to new circumstances.<sup>97</sup>

Although *a* property question is whether to apply a particular set of ownership rules, that is not *the* property question. A useful definition must permit spirited discussion of the full range of ownership possibilities, including existing paradigms, modifications, and entirely new creations. Any fixed definition willfully ignores the “action” in property debate, and, consequently, is inappropriate as a practical framework for those discussions.

Almost a century ago Professor Wesley Hohfeld proposed an alternative definitional approach.<sup>98</sup> By conceptualizing property as a cluster of attributes, his system not only acknowledges but also expects enormously varied ownership propositions, with each outcome defined by a corresponding “bundle of sticks.” Professor Hohfeld’s model certainly improves ownership discourse compared to the limited and unproductive yes-or-no formulation of fixed characterizations. However, it fails to provide a useful framework for examining and understanding public policy debate.

Professors Menell and Dwyer point out that the attribute approach’s shortcoming lies in the absence of any “overarching conception”—something that unifies “the many elements of the field in a deep and intuitive way.”<sup>99</sup> The intricate definitional schema used to capture the richness of possible outcomes provides no synthesizing conceptualization for understanding the ultimate purpose of property discussion.<sup>100</sup> In sum, although application of the model’s highly refined analytical framework can *describe* a myriad of property results with awesome precision, the lack of a common connective theme leaves public policy debate regarding how and why we might

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97. For example, the original “ad coelum” rule was forced to give way in the face of the development of air travel. See *United States v. Causby*, 328 U.S. 256, 261 (1946) (“[The] doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.”); Parisi, *supra* note 7, at 1–2 (tying changes in property law to changes in the economic model).

98. See Hohfeld, *Fundamental Legal Conceptions*, *supra* note 24, at 717–18 (Hohfeld’s work dates from between 1913 and 1925).

99. See Menell & Dwyer, *supra* note 31, at 600.

100. See Penner, *supra* note 24, at 714–15, 768–98.

select among them incoherent.<sup>101</sup> The resulting confusion has led some to ask, quite reasonably, whether the property concept serves any useful role in public policy discourse.<sup>102</sup>

A.M. Honore's functional approach to the Hohfeldian ownership attributes (the "sticks") provides the first step toward the necessary coherence and focus. Honore distills Hohfeld's attribute list into a more accessible list of "incidents of ownership," e.g., the right to possess, the right to use, the power to alienate, and the right to exclude.<sup>103</sup> Those incidents describe property ownership in terms of its effects in the real world. Taking that distillation one step further, all of Honore's "incidents" reflect a single, practically relevant unifying functional theme<sup>104</sup>: the right of the property owner to exercise some kind and degree of *control* over the subject matter in question in response to conflicting claims.<sup>105</sup>

Although articulating property debate as about allocating control captures the essential nature of the public policy enterprise, some additional clarifications are required. Specifically, it is important to know what constitutes the proper object of property debate—*what* can be owned in the property sense. Additionally, the shift from attributes and incidents leaves open the question of whether particular kinds or amounts of control must be present to label a discussion as about "property."

Regarding subject matter, Professors Menell and Dwyer's use of the term "resources" serves admirably and should be retained without

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101. See *id.* at 770, 777.

102. Many scholars have noted this property problem and then proposed solutions. See Grey, *supra* note 5; Bell & Parchomovsky, *supra* note 5, at 533; John E. Cribbett, *Property Lost: Property Regained*, 23 PAC. L.J. 93, 97–99; Penner, *supra* note 24, at 714–15; Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 372 (2003).

103. See A.M. Honore, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107, 113–24 (A.G. Guest ed., 1961). But see Penner, *supra* note 24, at 754–66 (offering a helpful (but ultimately critical) examination of the full set of rights).

104. The objective of finding a common organizing theme is to articulate the *purpose* of property in a "deep and intuitive way." See *supra* note 99 and accompanying text. This may or may not have been the objective of Hohfeld's and Honore's systems, but by failing to go beyond identifying the attributes of property ownership those *descriptive* systems fall short of providing the unifying conceptual theme required for coherent public policy debate.

105. "Control" means more than affirmative rights to use; it also includes the ability to constrain use by others, including other owners. These refinements are elaborated below. See *infra* notes 112–14 and accompanying text.

further refinement.<sup>106</sup> As they point out, it allows the necessary evolution of the regime in response to changes in society.<sup>107</sup> Property control concerns are not limited to conflicts over particular classes of resources, e.g., land and things. They arise whenever multiple claims concerning any resource generate conflict.<sup>108</sup> In pre-industrial society the agricultural and artesian nature of the economy focused resource conflicts on land (generating the strong present-day associations between relatively absolute real property ownership and property as a whole) and, to a lesser extent, productive personality—work implements, seeds, cows, crops, and the like. However, as changes in social and economic activity generate conflicts over other types of resources, the scope of property should expand to address that new reality.<sup>109</sup> Although the various resource-specific determinations are frequently labeled as distinct species—real, personal, intellectual—they all remain parts of the single genus “property,”<sup>110</sup> which applies to the whole of a society’s resources.<sup>111</sup>

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106. See Menell & Dwyer, *supra* note 31, at 601–02 (articulating property as “society’s governance of its resources”).

107. *Id.* at 601.

108. Although absent multiple claims property control could be assigned, it would be an exercise without purpose. With the disappearance of unclaimed common, that situation arises very infrequently (if ever). See *supra* notes 34–37.

109. See Menell & Dwyer, *supra* note 31, at 601–02; Reich, *supra* note 74, at 785–86 (discussing commercially valuable government entitlements as property); Penner, *supra* note 24, at 717–19 (noting the point in his commentary on *Int’l News Serv. v. Associated Press*, 248 U.S. 215 (1918), but disagreeing with the Supreme Court’s apparent willingness to treat property as “a particular legal device that protects the owner’s relation to something of value . . . and as such may in principle be applied to *anything* whatsoever”) (emphasis added); see also ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 3–6 (Harvey C. Mansfield & Delba Winthrop trans., Chicago Press 2000) (1831) (noting the transition from the importance of land to other forms of commercial wealth); MARX & ENGELS, *supra* note 1, at 222–25 (focusing on the “means of production”).

110. Not unlike Plato’s classification schema for appetites and knowledge, property has an essence (control over resources) plus “particular sorts” (specific allocations in particular resource contexts). See PLATO, *supra* note 96, at 113–14.

111. The Lockean and Marxist focus on labor raises the interesting and important question of whether humans themselves constitute resources governable by property law. Defining property functionally rather than normatively leads to an affirmative response. However, far from being scandalous, that result merely reinforces the fundamental point that it is normative positions that drive our property outcomes, not *a priori* limitations stemming from an essential (and limited) nature of property itself. We can choose to treat any contested resource as property, even individual lives and liberty (as we have, in fact, done in the past). The crucial public policy question is whether we want to do so. See *supra* note 16 (discussing Locke’s and others’ inclusion of individual rights in property and arguing for separation of those discussions from other resource debates for improved coherence of normative discussion, not because they are inappropriate objects of property control).

Defining property as society's control decisions resolving conflicts over resources of any kind also clarifies that the regime extends to every kind and degree of control.<sup>112</sup> The effort to identify the "core" elements of property should be abandoned.<sup>113</sup> Property exists whenever some entity (whether an individual, group, or government) has been allocated some form of control over a resource in response to conflicting claims. The control may permit the owner to prevent all access by others (an absolute right to exclude). It may entitle the owner to compensation for access by others, but not to prevent the access itself (for example a compulsory copyright license). It may permit the owner to access a resource "owned" by someone else (for example, an easement). It may permit the owner to limit the use of a resource by another owner (for example, a restrictive covenant). But it is the control over the resource when conflict arises, not the kind or amount, that makes the right, and the related debate, about property.

The easement and restrictive covenant examples illustrate one further clarification offered by focusing on "control." Property rights in one owner can create corresponding obligations on other owners. Easements and restrictive covenants both grant their owners an affirmative right and restrict the owner of the servient estate's control by requiring conformance. Similarly, rights to be free of nuisances or pollution obligate the owners of the affected property to prevent those harms, thus restricting their use of their property. Focusing on control avoids the definitional distraction over whether the right should be viewed as affirmative control exercised by the owner of the right, as a

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112. See Menell & Dwyer, *supra* note 31, at 601–03.

113. A number of commentators assert that the essence of property is the right to exclude. See Bell & Parchomovsky, *supra* note 5, at 587–88; Thomas Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998). But see Eric Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617, 618 (2009) (reviewing Professors Merrill and Smith's casebook "conceiv[ing] of property . . . as a right to exclude others from a thing" and arguing that "a right exclusively to determine a thing's use" is a better conceptualization); Mossoff, *supra* note 102, at 377–78 (noting that although the right to exclude does not define property, some right to exclude (broadly defined) constitutes an essential characteristic of property, though it is insufficient to define property as an integrated whole). Although direct exclusion of others certainly lies at the root of many resource disputes, it is not the only source of conflict. Any ability to resist or insist regarding a resource, such as those listed in the text, will trigger disagreement with those affected. Although the argument can be made that all such rights are varying forms of "rights to exclude," a digression into whether they are/are not and, consequently, whether they can/cannot be legitimately classified as property will not advance the consideration of whether they are appropriate under the circumstances. The control formulation avoids the semantic distraction, permitting unimpaired consideration of the substantive issue.

negative obligation of the limited owner, or both.<sup>114</sup> It is sufficient to recognize that whenever a right of control over a resource is involved, the debate involves property and raises the related issues and concerns.

In order to help us understand those issues and concerns, the “control” definition does, however, require one important refinement. As Professors Menell and Dwyer properly point out, many factors affect the creation and enforcement of property rights.<sup>115</sup> For example, social norms of behavior and opinions of respected or personally important individuals affect a property owner’s actual use of a resource. Restaurants do not mix well with rendering plants regardless of what the zoning permits. It is usually a good idea to ask the neighbors before building a fence even on one’s own side of the property line. The authorized eviction of an aged, ill, and impoverished widower tenant from a rental unit may produce undesirable personal fallout. Although many factors unquestionably affect property, casting the definitional net too broadly risks muddying rather than clarifying property-related public policy debate.<sup>116</sup>

The solution lies in holding true to the functional focus—defining property debate as about deciding where *ultimate* control resides when conflicting claims to a resource are made—that is, identifying whom society will support when all other avenues of resolution fail.<sup>117</sup> Many factors influence those decisions, affecting both whether an ownership right is created, and if so, its scope. Numerous factors also will affect subsequent individual decisions regarding enforcement of granted rights.<sup>118</sup> However, those

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114. This is essentially Hohfeld’s concept of correlative rights. See Hohfeld, *Fundamental Legal Conceptions*, *supra* note 24, at 745–46. Although a more detailed taxonomy can assist in *describing* the effects of the grant of control, it is sufficient (and much less confusing) to recognize that it is the grant of control—the right to insist or resist—that drives the public policy debate, that is, what we are actually discussing.

115. Menell & Dwyer, *supra* note 31, at 606 (explaining that one leg of their triadic relation includes a wide range of institutions including “social, background legal (default rules), market (contract), and political (legislation or administrative control, meaning zoning),” which all form a part of the governance structure controlling a resource).

116. Too broad a definition becomes incoherent, making it useless. See *generally* Gray, *supra* note 5; Penner, *supra* note 24, at 722–23.

117. Public debate can, of course, be used to influence others, e.g., to begin to shift perceptions toward a particular outcome or to discredit opponents. The ultimate purpose remains, however, the formal adoption of a desired legal outcome.

118. Cf. Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES L. 5, 24–28 (2009) (discussing the role of custom in law).

influencers function either as inputs to, or operate against the backdrop of, the ultimate control decisions, i.e., whose position will be enforced by the official machinery of the state.<sup>119</sup> Focusing on those decisions—property *law*—helpfully clarifies the debate by distinguishing between its goal (assigning legally enforceable control rights) and the myriad influencers and justifications supporting the various alternative positions.<sup>120</sup>

Limiting property debate to legal outcomes still leaves open the question of which law qualifies; how do we know when we are debating a property law outcome? The baseline—that the decision must produce state-enforced control over a resource—needs additional refinement to avoid confusion. A commonly articulated additional requirement is that property law creates legal rights enforceable “against the world,” thus distinguishing the regime from those laws involving transaction-based rights.

Although close to the mark, “against the world” both overstates and understates the actual scope of our property discussions. More accurately defined, property law involves rights applicable to another based on that person’s status as a member of society (someone who is subject to its legal rules)<sup>121</sup> rather than a pre-existing relationship with the property owner. That refinement clarifies the subtle but important point that many property rights are only enforceable against certain individuals or groups of individuals. For example, trespass does not apply in some situations,<sup>122</sup> and a restrictive covenant only governs actions by current owners of the burdened property and may not apply even then to a bona fide purchaser for value. What makes rights

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119. See Rose, *supra* note 7, at 994 (“[I]n their most general form, property rights identify which person’s claims count against which resources . . .”).

120. I agree with Professors Menell and Dwyer that an understanding of all aspects of property implementation—inputs, decisions, limiters, and interactions—is essential for lawyers dealing with property issues and they should, therefore, be covered in a property course in law school. The question here is how far we should extend the concept of property when trying to understand public policy debate. That places the focus on what can properly be considered the goal of that debate as opposed to the environment in which those outputs are created and will operate.

121. See, e.g., Chander, *supra* note 7, at 774 (identifying against whom the right can be asserted as a key characteristic of a property right); Robert P. Merges, *A Transactional View of Property Rights*, 20 BERKELEY TECH. L.J. 1477, 1495–96 (2005). Additionally, in a legally divided world, legal jurisdiction generally extends only to members of the society creating the property law and to those present in or making claims regarding resources located within that society.

122. See, e.g., *State v. Shack*, 277 A.2d 369, 374–75 (N.J. 1971) (rejecting a trespass claim against certain government workers entering onto a farmer’s property).



“property rights” is not universal application, but rather that enforcement requires no transactional relationship with the property owner, only that the other party belongs to the relevant social group.<sup>123</sup>

Applying the above definition to a contract creating an easement for monetary consideration illustrates the distinctions between property and non-property debate and between control decisions and influencers that affect the creation and enforcement of those decisions.<sup>124</sup> Contract law creates and governs the rights and obligations between the grantor and grantee, for example the right to sue for non-payment or to require execution and delivery of the document creating the easement. Those rights are not property rights as they only arise from and apply to the parties’ transactional relationship.<sup>125</sup> Contract law also defines the terms of the easement (its scope and duration). However, once implemented, those rights become property rights as they bind others falling within their ambit based solely on their status as a member of the society, not whether they had any transactional relationship with either party.<sup>126</sup>

A variety of inputs will influence the decision to legally back the easement (whether the control right exists and its kind and degree), as well as its subsequent enforcement by the owner. For example, society may elect to enforce certain kinds of easements and not others based on prevailing social norms. Similarly, the grantee may elect to forego strict enforcement based on the effects on the grantee’s relationship with the grantor or others in the community. In both

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123. The definition also clarifies why property rights are frequently labeled “in rem.” As property is only relevant when needed to resolve contested claims to resources, it defines the legal relationship between the rival claimants with regard to the thing. Cf. MARX & ENGELS, *supra* note 1, at 168–69 (discussing the evolution from person-to-resource relationships when conflict was absent to person-to-person when disputes arose and noting that in the former there was no need for property). However, because that relationship is triggered only because of the claimants’ competing claims to the specific resource, it is reasonable to consider property rights as attached to (or as ownership of) the resource itself.

124. See generally Merges, *supra* note 121, for an interesting discussion of the relationship between contract and property law.

125. Enforcement by an assignee or third party beneficiary also only involves contract rights, as they arise exclusively from the transactional relationship. However, the “ownership” of the contract rights is a property right, permitting actions against interference by third parties whether or not they have any connection to the transaction.

126. The “rights” need not be absolute, but may vary in kind and degree. See *supra* notes 112–14.

cases, although the influencers affect the property rights, they are the grist for, not the outcome of, the public policy debate.<sup>127</sup>

The functional definition to be used to frame and understand related public policy debate can be summarized as follows: property consists of society's decisions granting rights of control (regardless of their kind or degree) over a resource (regardless of its nature) that will be enforced by the state in the event of conflict with other members of the society (those subject to its rules).

Applying the definition to the examples outlined in Part I demonstrates how a functional approach to property clearly identifies the core issue in related public policy debate. Regarding government takings, the approach replaces the current amorphous determination of whether a claimant holds a protected property right and, if so, whether it was taken, with a straightforward analytical framework. The property right question is resolved by determining whether the claimant holds *any* legally enforceable status-based right of control over the resource in question. If so, a property right exists. Regarding its taking, the only question is whether the challenged government action conflicts with that right of control. If not, no taking has occurred. If so, then the nature of the interference defines the scope and degree of the taking.

This simplified analysis does not, of course, resolve the takings public policy debate. What it does is point out the *reason* that takings answers are so difficult to come by; the obstacle to quick and easy resolution. The problem is rarely, if ever, determining whether the claimant's use and enjoyment of the resource has suffered some interference—if it had not, there would be no complaint. Nor does it arise because the court has improperly applied some universally accepted view of the claimant's ownership rights. The difficulty stems from our (both citizens' and judges') conflicting views over what rights *should* exist and how far they should extend in what circumstances,<sup>128</sup> and in particular our individual beliefs about what

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127. They may affect property rights. For example, the failure to strictly enforce the easement may be deemed a waiver or abandonment. However, the public policy debate concerns whether they should affect the legal right of control, not over the influencer itself.

128. See *supra* notes 38–55 and accompanying text (discussing the debates over *Kelo v. City of New London*, 545 U.S. 469 (2005), and Oregon's Ballot Measure 37); cf. Joseph William Singer, *The Ownership Society & Regulatory Takings: Castles, Investments & Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 316 (2006) (discussing how different views of ownership affect the analysis in takings law).

constitute relevant considerations and their relative importance in making that determination.<sup>129</sup>

That understanding provides an important insight into property-related public policy discourse. Specific conflicts will be decided by reference to existing law, and much energy and many words will (and should be) lavished on determining the proper interpretation and application of those rules. However, in normative public policy debate,<sup>130</sup> expert determinations do no more than identify the current “incumbent” winner.<sup>131</sup> The Supreme Court stating what the law is does not make that outcome any more satisfactory (or correct) to those holding differing normative views. Nor does reference to existing law, which only advocates retaining the status quo, something proponents of change have already rejected.<sup>132</sup> The key task in public policy debate is not identifying existing law, but is instead determining what to do about our differing beliefs about what the law should be.<sup>133</sup> How the functional approach to property helps clarify the problems and consequences of that determination are taken up in Part III below.

Applying the approach to the remaining Part I examples confirms that it is normative conflict, not faulty interpretation of existing rights or improper technical implementation of an agreed upon objective, that creates the difficulties in property debate. The disagreements in intellectual property trace back to the fundamental “values” differences between economic efficiency and natural rights proponents, or between those positions and those who believe

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129. The Measure 49 modification of Measure 37 exemplifies the rethinking of the scope of private property rights in the face of the very real economic consequences of Measure 37’s expansive rights. *See supra* note 46.

130. If consensus exists, implementation is largely a technical exercise and can be resolved by expert debate and determination; this is an impressively developed skill in most industrialized nations.

131. We need to understand what we are presently doing to have a useful discussion regarding change, so the expert effort serves an important purpose. However, as indicated in the text, that determination only identifies the happy and the unhappy under the status quo.

132. At best, resort to existing law merely is a proxy for “I already won.” At worst, it is tantamount to saying “because.” The latter is entirely unresponsive to those holding different values. *See infra* Part III.A. The former has consequences that deserve consideration. *See infra* Part III.B.

133. The use of “should” and “is” clearly trigger David Hume and the “is-ought” relationship. *See* DAVID HUME, A TREATISE OF HUMAN NATURE 469–70 (L.A. Selby-Bigge ed., Oxford Univ. Press 1896) (1740). However, he and it are better discussed later in connection with the underlying normative differences. *See infra* notes 209–16 and accompanying text.

distributional consequences or other cultural values should control or, at the extreme, those who believe that “information wants to be free.”<sup>134</sup> Those differing beliefs produce fundamentally different answers regarding the desirability of individual control over ideas and information. Those differences will certainly not be resolved by pointing to existing law or by patiently explaining how a particular normative view justifies that result.

Examining the debates over property rights in human organs, DNA, personal information, websites, or money under the functional microscope identifies the same core issue. In fact, in many of those debates the entanglement with fundamental beliefs never permits the debate to move past assertion of “right” to dialogue of any kind. For example, some reject property rights in human organs or personal information out of hand for “moral” reasons, making them unwilling to discuss questions of kind or degree.<sup>135</sup> Others may be unable to move beyond the view that property is “mine,” making it impossible to conceive that any legitimate limitations may exist, with the mere suggestion of such limitations constituting anathema unworthy of consideration.<sup>136</sup>

What the functional approach clearly reveals is that although we are reasonably good at legal implementation of agreed goals and downright terrific at determining what the law is, the central problem in property-related public policy debate is how to deal with our normative differences over what constitute appropriate control outcomes.

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134. John Perry Barlow, *The Economy of Ideas*, WIRED, Mar. 1994, at 84, available at <http://www.wired.com/wired/archive/2.03/economy.ideas.html>. Mr. Barlow has gotten good mileage out of this somewhat hyperbolic quote. It is not, however, entirely theoretical. For example, the argument that business methods or DNA related discoveries should be excluded from patent law could be viewed as “no rights” positions based on the view that such ideas should be “free” for use by all. See *supra* notes 58, 60.

135. See, e.g., *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 497 (Cal. 1990) (Arabian, J., concurring) (“Plaintiff has asked us to recognize and enforce the right to sell one’s own body tissue *for profit*. He entreats us to regard the human vessel—the single most venerated and protected subject in any civilized society—as equal with the basest commercial commodity. He urges us to commingle the sacred with the profane.”).

136. See *supra* notes 38–55 and accompanying text (discussing the debates over *Kelo v. City of New London*, 545 U.S. 469 (2005), and Oregon’s Ballot Measure 37); *supra* notes 79–85 and accompanying text (discussing campaign finance and inheritance taxes).

*B. The “Conversational” Property Problem*

The first step in addressing the normative problem involves determining whether “property” carries such powerful “its mine, not yours” connotations for such a substantial portion of the public that attempting to recast property debate as choosing among a rich field of alternatives is a futile exercise. In short, if too many people cannot move beyond property as an all-or-nothing proposition, then the insights provided by the functional approach will have no practical effect on public policy debate.

When used in its conversational sense,<sup>137</sup> the word “property” undeniably conjures rights lying far toward, if not at, the sole and despotic dominion end of the control spectrum. A substantial number of people talk about property this way—not just the lay public, but also academics, lawyers, and judges.<sup>138</sup> Calabresi and Melamed’s oft-cited use of “property rules” to describe injunctive remedies entitling a resource owner to prevent all use by others<sup>139</sup> provides a good example. Their use of the “property” label was clearly intended to imply that all property ownership involves an extremely strong (if not absolute) exclusionary right.<sup>140</sup> The concern is that this predisposition to articulate property rights as the right to say “no” to everyone else for any reason or no reason (the all-or-nothing view) inevitably mischaracterizes related public policy discourse as being about whether to interfere with owners’ rights rather than about choice regarding the proper scope of those rights. Even worse, it may result in the capture of the outcomes through a built-in bias favoring

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137. See Stephen L. Carter, *Does It Matter Whether Intellectual Property Is Property?*, 68 CHI.-KENT L. REV. 715, 717 (1993) (aptly defining the common usage and understanding of “its mine” as “conversational property”). Professor Rose uses the term “conventional” property, which offers an attractive alternative, although she appears to intend that term to cover richer views than the more extreme form discussed in the text. See Rose, *supra* note 7, at 993.

138. The issue is of particular concern these days in intellectual property law. See David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. (forthcoming 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1250642](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1250642); Lemley, *supra* note 30, at 1037; see also Carrier, *supra* note 7, at 145; Yu, *supra* note 7, at 4–5 (discussing the issue and referencing both Professor Lemley and Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connection Between Land and Copyright*, 83 WASH. U. L.Q. 417 (2005)).

139. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

140. See *supra* note 113 (discussing the position that the “right to exclude” is the essential characteristic of a property right).

absolute owners' rights, eliminating consideration of more nuanced control positions.<sup>141</sup>

The validity of this concern can be determined by assessing both its potential adverse substantive effects on public policy dialogue and the likelihood those effects will actually occur. The adverse effects of conversational capture of ownership dialogue are discussed in Part II.A above, and require only brief recapitulation. The practical consideration of property decisions requires a characterization that acknowledges the existence of alternatives. As the conversational property view only identifies a single possible outcome, it inappropriately limits the scope of the debate to whether virtually absolute rights should exist; it essentially makes the only question, "property: yes or no?" It also means that when a "property" right is found to exist, a powerful bias exists against permitting any interference contrary to the owner's desires.

With the harm readily apparent, the question is whether conversational views of "property" unavoidably distort or capture public policy debate. Some commentators so strongly believe that is the case that they have despaired of repair and instead seek solutions (or, perhaps more accurately, solace) in mitigation.<sup>142</sup> One such approach argues for abandoning the word "property" in debates regarding resource control questions not yet fully captured, in particular those concerning intellectual "property."<sup>143</sup> Another accepts the inevitability of at least some conversational capture (even regarding intellectual property) but would attempt to limit the harm

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141. See, e.g., Lemley, *supra* note 30, at 1037. See generally Carrier, *supra* note 7. But see generally Richard A. Epstein, *The Disintegration of Intellectual Property* (Univ. of Chi. Law School John M. Olin Law & Economics Working Paper No. 423, 2d. Series, Aug. 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1236273](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1236273) (arguing that physical (conversational property) can positively inform intellectual property law). See also Richard A. Epstein, *The Property Rights Movement and Intellectual Property*, REGULATION, Winter 2008, at 58, available at <http://www.cato.org/pubs/regulation/regv30n4/v30n4-7.pdf>; Peter S. Menell, *Intellectual Property and the Property Rights Movement*, REGULATION, Fall 2007, at 36, available at <http://www.cato.org/pubs/regulation/regv30n3/v30n3-6.pdf> (providing an interesting debate on the relationship between real and intellectual property).

142. See, e.g., Carrier, *supra* note 7, at 5; Lemley, *supra* note 30, at 1032, 1069–75; Sterk, *supra* note 138, at 469–70.

143. See, e.g., Lemley, *supra* note 30, at 1075 (suggesting "IP"); Yu, *supra* note 7, at 5–6 (offering an excellent survey of those efforts, but ultimately disagreeing with adopting a new label).

by emphasizing that even conversational property has legitimate limits.<sup>144</sup>

The mischaracterization/capture concern does not pose significant real-world risks.<sup>145</sup> For harms to occur, a significant number of people must believe that public policy debate is limited to determining whether a “conversational property” right to exclude should exist. The question is, who might they be? Not legal professionals (lawyers, judges, academics, and legislators). Despite occasional individual lapses, scholars as a group are certainly not confused or bamboozled by labels or trapped in a fixed misconception of property as “yes-or-no.” The profession demands detailed support and challenges undefended assumptions, including those reflecting conversational property beliefs.<sup>146</sup> Similarly, courts or legislatures articulating outcomes in conversational property terms have generally been convinced on the merits rather than by unexamined labels or assumptions, and believe the position reflects the proper substantive outcome under the circumstances.<sup>147</sup>

As a whole, expert use of “property” in its conversational sense reflects knowing and intentional invocation of its connotations and consequences, not error arising from faulty assumptions or sly linguistic mischaracterization by others. In those instances when

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144. See generally Carrier, *supra* note 7. Although couched in terms of reluctant “acceptance” his approach is only a very short step from taking on the more general issue. See *id.* at 4. I suggest it may actually better serve as part of an incremental strategy for overall change rather than merely seeking mitigation of unavoidable harm. See *infra* notes 162–69 and accompanying text.

145. That does not mean the attempt to capture is not frequently made. As Alice discovered in speaking with Humpty Dumpty, usurping the role of definitional master in the hopes that the underlying premises remain unexamined can be an alluring possibility. See LEWIS CARROLL, *Through the Looking-Glass and What Alice Found There*, in THE ANNOTATED ALICE 175, 268–69 (Martin Gardner ed., Clarkson N. Potter 1960). In fact, those holding “non-conversational” property views are hardly immune from its attractions as evidenced by some of the suggested (perhaps tongue-in-cheek, perhaps not) alternative labels proposed in the intellectual property context. See Yu, *supra* note 7, at 5 (noting the suggested acronyms of “GOLEM” and “IMPS”). Making the effort is not, however, the same as succeeding. Alice did call Humpty into account by demanding a substantive explanation. See CARROLL, *supra*, at 269; *infra* notes 148–50 and accompanying text (discussing the frequency of challenge in public policy debate).

146. The response to sending an email to the academic community baldly asserting that property means “mine, not yours” would be sufficient to convince any doubters.

147. For example, legislators and courts use conversational terminology in intellectual property cases. The former do so because they believe it represents the appropriate policy outcome. See *infra* notes 171–81. The latter deploy the rhetoric when they believe it is what existing law directs. In both instances the use will be identified and criticized by those who feel it is unsupported. See *infra* note 148 and accompanying text.

legal professionals err by using unexamined or improperly supported conversational rhetoric, other legal experts stand (more than) ready to identify and debate the assumptions or resulting analysis.<sup>148</sup> Among experts, improper vocabulary or a mistaken assumption about property may be an occasional disruption (and source of delighted outrage), but no more.<sup>149</sup>

The mischaracterization/capture problem must lie with non-experts. Their lack of legal training or practical experience may not permit them to follow complex and technical public policy discussion, leaving them to rely on their own misconceptions or to fall easy prey to linguistic artifice. Many experts and others are keenly aware of that possibility and give (seemingly incessant) corrective criticism, commentary, and alternatives whenever they feel conversational property mischaracterizations exist.<sup>150</sup> Consequently, for

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148. The robust intellectual property debate provides a good example. *See, e.g.*, Lemley, *supra* note 30, at 1042–44 (noting legislative expansion to eliminate free-riding and criticizing the courts for doing the same); Vincent Chiappetta, *Myth, Chameleon, or Intellectual Property Olympian? A Normative Framework Supporting Trade Secret Law*, 8 GEO. MASON L. REV. 69, 152–54 (1999) (criticizing the Supreme Court’s trade secret “property” holding in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002–03 (1984), for inappropriately filling the gaps based on a “walks like, talks like” conversational property analysis); *see also* Lemley, *supra* note 30, at 1035 n.6 (listing a long and influential list of scholars publicly and eloquently criticizing the conversational property approach). In fact, non-conversationalists’ sensitivity on the point ensures hyper-vigilance against unexamined or unsupported use, sometimes leading to seeing it when it does not exist. *Compare* Lemley, *supra* note 30, at 1044 n.55, with Chiappetta, *Trademarks*, *supra* note 64, at 51 (the former failing to note the explicit call for non-conversational limitations in the latter argument). In all events, the question is not whether mistakes or mischaracterizations are made, but whether they have any actual adverse effect on public policy debate. That hardly seems a real concern in professional circles. The question of whether mistaken or intentional misuse by experts adversely affects non-experts follows in the text.

149. When one expert’s conversational property analysis is deemed inappropriate by another it generally reflects differences on the normative merits and not that the “conversationalist” expert has suffered rhetorical capture. For example, Professor Menell’s disagreement with Richard Epstein’s position that conversational property (at least in its real property incarnation) should inform intellectual property law is not based on the latter’s inability to recognize the possibility of more nuanced rights. *See supra* note 141. Professor Epstein’s position clearly represents advocacy for applying quasi-conversational property concepts on the merits. The issue of conflicting normative views and their effect on public policy debate is discussed in Part III.

150. Although legal experts are generally the first responders, they have no monopoly on identifying mischaracterizations, particularly in the world of 24-hours-a-day, 7-days-a-week talk radio, cable news, and Internet bloggers. Although that participation can produce both incoherent and inaccurate “corrections,” it is not entirely a bad thing. A little distance from the expert flame frequently helps keep the heat from obscuring the light and, in all events, avoiding capture only requires awareness of alternatives, not substantive agreement with the conversationalist’s opponents.



conversational harm to occur, non-experts must both fail to identify the initial conversational property mischaracterization *and* be unable to process a torrent of subsequent explicit warnings and information about the alternatives. Additionally, for there to be any significant effect on public policy dialogue, that remarkably slow and inept group must be sufficiently large to influence the outcome.

It is extremely unlikely that such a legion of hapless individuals exists. Each of us will vigorously affirm we are not included in that number.<sup>151</sup> Although that statement alone reflects sufficient awareness to make significant mischaracterization/capture improbable, empirical research supports our self-confidence. Studies confirm that the vast majority of us do indeed recognize the existence of choice, are sufficiently cynical to avoid the trap of third-party mischaracterization, and, therefore, are able to arrive at our own conclusions about which of the available outcomes best aligns with our desires.<sup>152</sup>

On property questions that means most individuals understand that a range of control alternatives exist, producing different outcomes and furthering different interests. Most individuals also understand that they should be skeptical of others' potentially self-interested labeling,<sup>153</sup> and that they should decide on the outcome based on their own views and interests.<sup>154</sup>

As a result, many (if not most) of those engaging in conversational property rhetoric, expert and non-expert, understand alternatives exist, have assessed the particular issue, and have decided

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151. My thanks to Professor Debra Ringold of the Atkinson Graduate School of Management at Willamette University who made this cogent observation in our jointly taught Business Lawyering course when discussing the fact that policymakers rush to protect the helpless "others" but rarely pause to consider who they might actually be, much less whether they actually exist.

152. Business scholarship regarding advertising demonstrates that advertisers cannot successfully mislead individual decision-makers by linguistic artifice. *See, e.g.*, Chiappetta, *Trademarks*, *supra* note 64, at 47. *See generally* JOHN E. CALFEE, *FEAR OF PERSUASION* (1997). For similar reasons government propaganda efforts generally fail. *See id.* at 6–7. An example from political discourse is instructive. If naming the statute authorizing various forms of government inquiry into citizens' behavior "The Patriot Act" was an attempt to avoid debate on the merits through rhetorical capture, it most certainly failed to do so. *See, e.g.*, Editorial, *Another Cave-In on the Patriot Act*, N.Y. TIMES, Feb. 11, 2005, at A30.

153. *See* CALFEE, *supra* note 152, at 37–40.

154. Clearly individual views of the "correct" outcome can involve individual self-interest. That does not make the choice illegitimate; it merely reflects the normative decision to place a high value on how one fares individually. Those who disagree have different priorities. *See infra* Part III.

to support the conversational outcome on the merits. Those who do not support the conversational property view will easily resist both the rhetoric and the substantive outcome in favor of their preferred alternatives. Most complaints about conversational property views and rhetoric are no more than disagreements on the normative merits.

The possibility does exist, however, that even if people have the capacity to avoid unexamined mischaracterization or capture, the harm may still occur because they lack the time, energy, or motivation to perform the necessary analysis.<sup>155</sup> As a result they may rely on shortcut proxies such as conversational property. Its strong intuitive appeal makes conversational property a particularly comfortable default framework for abbreviated decision-making regarding property questions, especially when advocated by trustworthy sources.<sup>156</sup>

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155. Avoiding unexamined assumptions or capture and making a decision consistent with one's preferences only requires the capacity to recognize choice exists and the ability to select the outcome reflecting one's views of the "right" outcome. It does not, however, follow that those latter preferences reflect "competent" decision-making. For example, an accurately identified individual preference for conversational property may be predicated on faulty analysis of its likely real-world consequences. The difficulty may arise from inaccurate or incomplete information, a problem discussed in the text. It may, however, come from an inherent inability to identify, understand, or assess the relevant information even when it is at hand. Those skills are essential to, and a predicate assumption of, participatory decision-making. As de Tocqueville noted, for the United States federal system to work "requires of the governed a daily use of the enlightenment of their reason." DE TOCQUEVILLE, *supra* note 109, at 155. The problem is that as "[i]n general, only simple conceptions take hold of the minds of the people" and "[a] false idea, but one clear and precise, will always have more power in the world than a true, but complex, idea," one should be "frightened . . . by the quantity of diverse knowledge and by the discernment that [the Constitution of the United States] supposes in those whom it must rule." *Id.* De Tocqueville ultimately came down positively but with a strong reliance on favorable circumstances which likely no longer prevail. *Id.* at 158–61. Today that question requires reexamination. It is reasonable to attempt to resolve value differences by public debate and majority rule when the participants can deal with complexity, including understanding and assessing the likely real-world consequences of their normative positions under the circumstances. It is entirely another matter if they cannot. Whether the assessment problem is individual or more general (our biology may be unsuitable for decision-making in the world we have created, leading us to overly discount the future in favor of the here and now (climate change comes to mind)), the sobering evidence of historical experience should at least make us circumspect about the processes we use to decide how to act as a society and, in particular, whether something other than majority determinations based on individual normative preferences may be appropriate. See generally BARBARA W. TUCHMAN, *THE MARCH OF FOLLY* (1984). The issue provides useful additional context for the discussion in Part III.

156. Conversational property is a powerful advocacy tool. See Lemley, *supra* note 30, at 1046 ("[T]he role of property theory is an important one, [both] because it provides intellectual heft to justify the expansion [of rights] and because it offers [courts] an attractive label—'free rider'—that they can use both to identify undesirable conduct and to justify its suppression.").

Although proxy outcomes will not necessarily be inconsistent with individual normative preferences, they increase the possibility of error. In such cases, those arguing for alternative views must not only overcome the conversational mischaracterization/capture of the control decision, but must also convince the proxy users to pay attention so they hear the “choice” message. The proxy argument, therefore, offers support to the conclusion that at least some conversational property mischaracterization/capture will occur.<sup>157</sup>

Four counter arguments, two substantive and two practical, make a convincing case for taking on the proxy problem directly. The two substantive arguments involve the significant adverse effects of an acceptance and mitigation strategy on the big picture of property debates. First, describing certain resource control debates as being not about property (the mitigation solution) unavoidably reinforces the conversational property mischaracterization in any “captured” contexts. The effect is to liberate some debates at the price of solidifying, and possibly increasing, the substantial harm proxy reliance causes in others.

For example, calling intellectual property something else clearly implies (and could reasonably be viewed as explicitly confirming, especially by those not paying much attention) that the conversational understanding appropriately applies to tangible realty and personalty resources.<sup>158</sup> Future attempts to restrict ownership of real or personal property will be extremely difficult given the now “accepted” powerful bias against such interferences.<sup>159</sup> Although intellectual property debate may benefit from the escape, the adverse effects of further entrenching a seriously inadequate understanding of tangible resource decisions makes the acceptance and mitigation approach highly undesirable. Obtaining greater access to ideas in return for increasingly absolute control over our even more limited, rivalrous tangible resources is a poor exchange.

Second, separating our control debates fails to acknowledge that maximum effectiveness arises from treating them as a single system.<sup>160</sup> Separate assessment significantly interferes with creating

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157. See, e.g., Carrier, *supra* note 7, at 32–52.

158. Cf. *id.* at 52–80 (pointing out the significant role limitations in fact play in current real property law).

159. The argument that existing strong biases already produce this result and cannot be overcome is addressed below. See *infra* notes 160–69 and accompanying text.

160. See John F. Duffy, *Intellectual Property Isolationism and the Average Cost Thesis*, 83 TEX. L. REV. 1077, 1090–95 (2005); Adam Mossoff, *Is Copyright Property?*, 42 SAN

both good specific decisions and overall outcomes. Disaggregation would interfere with transferable learning, such as how to identify various points of view, how they can best be dealt with, and what kinds and degrees of control work (or don't) to accomplish particular goals.<sup>161</sup> Additionally, it would impair consistency across regimes. For example, treating allocations of control over ideas and tangible resources as unrelated issues might result in liberal access to copyrighted works for commentary and criticism under "non-property" analysis, while simultaneously preventing access to the tangible resource vehicles and platforms essential to such uses under the conversational property paradigm.

The two practical arguments build off of these substantive concerns. First, because the same understanding must exist to avoid proxy reliance in new areas as to eliminate existing proxy problems, there is no reason to limit the effort, particularly when understanding the point in one context is readily transferable to all others. Advocates of the acceptance/mitigation approach sometimes obscure this congruence and transferability by conflating concerns over proxy capture with advocacy for rejecting the conversational property view on the merits.<sup>162</sup> The issues are distinct. Eliminating inappropriate proxy reliance only requires that participants understand that alternatives merit inquiry before confirming their adoption of the proxy's position, not that they reject the position itself.<sup>163</sup> Addressing the proxy problem, therefore, only requires creating awareness that alternatives exist when discussing resource control, not proving that those supporting the conversational proxy are wrong. That understanding applies equally to all situations, meaning the effort only need be successful in some contexts. Given the pervasiveness

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DIEGO L. REV. 29, 39 (2005) (noting that the difference between intellectual property and physical property rights are merely of degree, not kind, and that the same analytical framework applies to both); *cf.* Mossoff, *supra* note 102, at 372–76 (describing a unified view of property as essential). The problem is similar to the disaggregation arising under the Hohfeldian definitional system, which obscures the common theme connecting all of society's resource control decision-making. *See supra* notes 102–05 and accompanying text.

161. For example, intellectual property can learn much from real property experience, and vice versa; this is very different than saying they should be substantively identical. *See, e.g.,* Carrier, *supra* note 7, at 4–8.

162. *See, e.g.,* Lemley, *supra* note 30, at 1075 (objecting to the use of the realty-conversational property paradigm to frame the intellectual property debate because it produces undesirable outcomes).

163. The proxy problem only involves a failure to analyze, and not the ultimate normative outcome. *See supra* notes 142–54 and accompanying text (noting the problem of confusing mischaracterization/capture with substantive agreement).

and vigor of our property debates, it will be only the exceptionally inattentive who will not eventually get the message.

It might be argued that the choice/alternative point can be successfully communicated *only* when the conversational property paradigm has not yet become firmly entrenched. That argument confuses the clearly correct proposition that listeners will more readily hear the message when the conversational property proxy is only weakly accepted with the non-sequitur conclusion that deep entrenchment of the paradigm makes it impossible to eventually generalize the understanding that alternatives exist. The first proposition rests on the logical assumption that the time-pressed or energy-constrained will more likely *pay attention* when the proxy has only a tenuous appeal. That impediment argues for starting with situations involving weak acceptance. It does not follow, however, that the effort must end there.<sup>164</sup> As success does not require abandonment of the proxy's substantive position, understanding the basic choice/alternative nature of property control debates developed in the less entrenched situations should be readily transferable to other more problematic situations and, over time, to all resource control discussions.<sup>165</sup>

Second, the alternative acceptance/mitigation approach requires that participants understand that all resource control decisions involve choice among a range of alternatives. The process of coming up with new labels essential to the mitigation effort illustrates the point. The word "property" currently serves as both the capstone reference for all of society's resource control decisions and describes conversational property outcomes. Successful mitigation requires generating new

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164. I believe this is a logical extension of Professor Carrier's mitigation approach to intellectual property, which focuses on emphasizing the existing limitations on real property rights in connection with their (inevitable) application to intellectual property. *See* Carrier, *supra* note 7, at 145. If that "not absolute" argument can be successfully made regarding intellectual property, there seems no reason to stop there. Why not make the same point that the absolute real property proxy does not accurately define even property debate over real estate? The numerous exceptions Carrier points to actually arose in that context and certainly demonstrate property's inherent general flexibility as a tool. *See id.*

165. It would be unsurprising to discover that when the conversational property proxy is most deeply entrenched, that is true, at least in part, because it reflects a strong normative preference for that outcome on the merits. Consequently, eliminating proxy reliance in those areas may only improve the analysis, not change the substantive outcome on the merits. *See supra* notes 157-54 and accompanying text (distinguishing between capture and normative disagreement regarding the outcome).

value-neutral,<sup>166</sup> appropriately descriptive, and linguistically appealing<sup>167</sup> terms for the now distinct non-property regimes, such as “the regime formerly known as intellectual property.”<sup>168</sup> That process requires that people understand what is included in “intellectual property-whatever-it-is-now-to-be-called” and what is excluded—for example, “real property”—as well as why the latter is “property” and the former is not. But making those distinctions unavoidably raises the fact that at their core, they both involve the same control-over-the-resource decision.<sup>169</sup> All will readily recognize that what distinguishes the categories of property and non-property is the nature of the resource itself and that a decision has been made to treat their ownership differently. It will also be clear that decision was one of degree and that putting them into distinct ownership categories involves a choice among alternatives. Inventing a new vocabulary and imbuing it with proper meanings requires that those involved have the same substantive understanding regarding the need to choose among kinds and degrees of “control” as is required to avoid capture. There seems little point in engaging in the semantic exercise or the related separation effort.

Close analysis reveals that concerns over conversational property mischaracterization/capture primarily involve disagreements on the

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166. The new intellectual property label proposals reveal that those favoring conversational property hardly have a lock on semantic gamesmanship, so finding suitable replacement terms will not be easy. See *supra* note 147 (discussing some of the less than objective proposed replacements for intellectual property). Professor Lemley suggests the use of the more neutral “IP” in the (I believe unlikely) hope we will eventually forget its origins. See Lemley, *supra* note 30, at 1075. There appears to be little consideration of what we might use to replace “property” in its capstone sense.

167. Public adoption requires that the new terms resonate with the target users. Cf. Yu, *supra* note 7, at 5–6 (noting problems in adopting new, unfamiliar terminology); Lemley, *supra* note 30, at 1075 (noting the unlikely adoption of the existing proposed intellectual property alternatives, presumably in part because users would find them unsatisfactory).

168. Some have argued that a replacement for “intellectual property” is neither desirable nor required, leaving us only to discuss “patents,” “copyrights,” and the like. Cf. Richard M. Stallman, *Did You Say “Intellectual Property?” It’s a Seductive Mirage*, FREE SOFTWARE FOUNDATION, Jan. 7, 2009, <http://www.fsf.org/licensing/essays/not-ipr.html> (making the case for abandoning “intellectual property” as having no substantive content). That position ignores the practical interrelationships that caused the creation of a common reference term in the first place. See Yu, *supra* note 7, at 5–6, 9–11 (making a convincing argument based on both substantive interrelationships, such as the channeling of subject matter from copyright or trademark toward patent law and real world transactional needs (assignment of all “x” rights), and practice requirements (something to call individuals who specialize in those regimes)); cf. Lemley, *supra* note 30, at 1075 (noting that part of the power of intellectual property is that it “[does] capture some of the similarities between the different fields it unites”).

169. See *supra* note 160.

substantive merits. Most conversational property advocates fully understand that alternatives exist, but have chosen to reject them. Problems arising from the over-reliance on conversational property proxies should be taken on directly. Because “success” only requires recognizing that a range of options beyond conversational property exist, overcoming the problem is far less difficult than those who also desire abandonment of the conversational outcome would have it. It only requires those using the proxy understand that the essence of property debate involves choice, something the wide range and intensity of our property debates ensures will happen.

### III. PRACTICAL INSIGHTS INTO PROPERTY DEBATE

The functional approach to property provides a number of practical insights regarding related public policy debate. Defining “property” as society’s decisions allocating status-based, legally enforced control over resources clarifies that the inquiry is limited neither to particular kinds or degrees of control afforded nor the justifications for the grant of control. It shifts the discussion of property rights from being about “good or bad,” or “yes or no,” to being about choosing among a wide range of options and rationales. Eliminated as well is the misconception that property debate only concerns things we can touch. Every decision allocating control to resolve conflicts over resources involves “property” and involves the related issues and consequences.

The approach also provides insight into the difficulties faced in making those decisions.<sup>170</sup> It reveals that the fundamental problem in property debate arises from conflicting normative views of the “right” outcome, not from the improper implementation of common goals. By focusing on and understanding the role those differences play in

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170. The functional approach also clarifies how courts should approach property law disputes. Merely asserting the existence of a property right, either as a party or in a holding, is meaningless. Invocation of “property” in either argument or a decision requires discussion of control on a continuum of rights, including a specific description of what kind and how much. Additionally, whatever one’s views regarding “judicial activism” in other contexts, the fundamental role of normative conflict in resource control determinations counsels for at least considerable circumspection in judicial creation of new property “control” rights. See, e.g., *Intel Corp. v. Hamidi*, 71 P.3d 296, 308–11 (Cal. 2003) (struggling with the complex policy considerations and ultimately declining to create a property right); cf. Penner, *supra* note 24, at 715–24 (discussing the problematic outcomes in *Int’l News Serv. v. Associated Press*, 248 U.S. 215 (1918), and *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990), albeit articulated primarily on a concern that clear guidance is lacking rather than on the court’s institutional unsuitability to making the required normative decision).

our property discussions we can better decide how we might deal with them.

Finally, the practical focus on the real-world consequences of property decisions emphasizes that allocating control to one person will negatively affect others. Paying attention to those effects can usefully inform our assessment of the alternatives produced by competing normative positions.

*A. Our Normative Differences: What Their Persistence Tells Us About Dealing with Them*

Clearly, if everyone agreed that a particular principle produced acceptable outcomes, property law would involve no more than mechanical application of that principle to the particular facts at hand. Although that implementation process would present substantial data-collection and interpretation difficulties, solutions would depend largely on relatively straightforward technical expertise. Parts I and II reveal the much more complicated reality.<sup>171</sup> It goes (almost) without saying that we hold significantly different opinions regarding the appropriate deployment of property rights. In a pluralistic society, one should not expect otherwise.<sup>172</sup>

The thousands of years those differences have endured, despite constant wrangling over the “true” meaning of property and “just” allocation of property rights,<sup>173</sup> indicates we should not expect a group epiphany any time soon.<sup>174</sup> Until (or rather, unless) that occurs,

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171. See *supra* notes 23–33 and accompanying text (identifying a range of normative views); *supra* notes 38–88 and accompanying text (discussing a variety of specific examples); *supra* notes 89–135 and accompanying text (discussing the continuum of possibilities).

172. See LOCKE, *supra* note 3, at 143 (“[T]he variety of opinions and contrariety of interest which unavoidably happen in all collections of men . . .”).

173. The Romans hardly started the property inquiry, but that ready reference alone gives us a few thousand years of effort. See, e.g., MARX & ENGELS, *supra* note 1, at 167. See generally Carol M. Rose, *The Public Domain: Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, 66 LAW & CONTEMP. PROBS. 89 (2003) (discussing various Roman views of non-exclusive property). For yet earlier societies’ attention to the issue, see for example Richard C. Ellickson & Charles Dia. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI.-KENT L. REV. 321 (1995).

174. Conflicting interpretations of the biblical sources justifying property law, to say nothing of disagreement over whether the Bible constitutes the authoritative source, make it unlikely that our differences will be resolved by external authority. See, e.g., MARX & ENGELS, *supra* note 1, at 167; LOCKE, *supra* note 3, at 111; THOMAS HOBBS, LEVIATHAN 149 (Kessinger 2004) (1651) (noting that “there have not been any universal laws so given, because God speaketh not in that manner but to particular persons, and to diverse men diverse things”).



three related issues merit attention: (1) what drives those differences; (2) why those differences persist despite reasoned advocacy; and (3) whether there is anything about property which might inform our decisions regarding how to deal with that problem.

The intellectual property debate over copyright term extension provides a useful context to focus the inquiry into these issues. The 1998 Sonny Bono Copyright Term Extension Act added 20 years to the existing term of United States copyrights.<sup>175</sup> In functional terms, the property dispute was over whether that constituted an appropriate expansion of copyright owners' control over the related expression resources. Those who believe market efficiency principles properly guide the decision arrive at their answer by assessing whether the related efficiency improvements—the increase in or acceleration of creative outputs resulting from the additional internalized returns—offset the associated costs—in economic rents, deadweight loss, reduced derivative creation, and excessive investment. Justice Breyer's well-articulated dissent in the Supreme Court's consideration of the matter in *Eldred v. Ashcroft* exemplifies the resoundingly negative answer.<sup>176</sup> The Justice's case for overprotection (too much control) rests on his calculation that the extension's efficiency gains were exceeded by the related costs.<sup>177</sup>

Representative Bono, the Act's namesake, came at the question from a different perspective.<sup>178</sup> His analysis started from the natural rights proposition that an expressive work should be owned by its creator almost absolutely and probably forever.<sup>179</sup> Although varying philosophical justifications for such an approach affect its

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175. Fairness in Musical Licensing Act of 1998, Pub. L. No. 105-298, §§ 102(b), 102(d), 112 Stat. 2827, 2827–28 (amending 17 U.S.C. §§ 302, 304).

176. 537 U.S. 186, 242 (2000) (Breyer, J., dissenting). The Court only considered the extension of existing copyrights under the Copyright Clause and the extension of existing and future copyrights under the First Amendment. *Id.* at 198 (majority opinion). The majority objected that Justice Breyer's policy arguments ignored those limitations. *Id.* at 193 n.1, 199 n.4. For the purposes of this article, however, it is the normative views and not the technical jurisdictional merits that matter.

177. *Id.* at 254–57 (Breyer, J., dissenting).

178. There are, of course, numerous possible normative positions, but the counterpoint between these two positions suffices to make the point. *See supra* notes 25–33 and accompanying text (discussing various normative justifications for property law).

179. *See Eldred*, 537 U.S. at 256 (Breyer, J., dissenting) (noting that “[a]fter all, the statute was named after a Member of Congress [Sonny Bono], who, the legislative history records, ‘wanted the term of copyright protection to last forever’” and citing congressional testimony of many who agreed).

particulars,<sup>180</sup> in any form it creates a different evaluative framework that leads to a different outcome. In the natural rights paradigm, copyright law (and property law generally) exists to perfect a pre-existing right owed by society to the creator as a matter of individual “justice.”<sup>181</sup> From that perspective, Justice Breyer’s closely reasoned and well-supported efficiency argument is barely relevant. At most, the identified net efficiency harms would be viewed as an unfortunate but necessary byproduct of doing what is “right.” The truly committed will simply ignore those harms, focusing instead on their primary concern: that even the 20-year extension fails to afford creators the full natural rights that are their due.<sup>182</sup>

The above example reveals the fundamental nature of our property disagreements. Practically speaking they arise over what we believe “matters most,” or in more philosophical terms, the varying lexical orderings produced by our normative differences.<sup>183</sup> In the copyright extension debate, proponents viewed creators’ natural right to control their creations as the preeminent, if not only, concern. Many opponents, such as Justice Breyer, find net economic efficiency effects controlling.

Identifying the nature of our property disagreements answers the second question: why do those disagreements persist? Partly it is because normative differences cause us to talk past one another.<sup>184</sup> When utilitarians appeal to ensuring net improvements in efficient market operation, natural rights advocates hear lack of respect for creators’ rights. Natural rights proponents use the imagery of theft while utilitarians see deadweight loss.<sup>185</sup> Unsurprisingly, therefore,

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180. Although they all part with efficiency, important differences exist between a Lockean, Hegelian or divine justification of natural rights. See *supra* notes 25, 27, 29 and accompanying text (discussing various sources for a “natural rights” view).

181. See, e.g., Shubha Ghosh, *Exclusivity—The Roadblock to Democracy?* 8–9 (Buffalo Legal Studies Research Paper Series, Paper No. 2006-002), available at <http://ssrn.com/abstract=876471>.

182. See *Eldred*, 537 U.S. at 256 (Breyer, J., dissenting) (noting that a number of extension proponents saw twenty years as not enough).

183. See, e.g., RAWLS, *supra* note 15, at 36–37 (discussing the priority problem). Rawls uses intuitions to describe what I refer to in the text as beliefs. *Id.* Even when parties agree in principle, conflict can arise from practical concerns. For example, even someone who believes that an economic efficiency approach is theoretically preferable may resist its use in favor of another approach because she also believes that we are insufficiently able to quantify benefits and costs or, more generally, the theory’s assumptions do not apply in the real world. See Chander, *supra* note 7, at 781–91.

184. See Yu, *supra* note 7, at 9–11.

185. *Id.*

much public policy dialogue devolves into characterizing opponents as blockheads failing to see the light or villains driven by evil in their hearts if not in their souls.<sup>186</sup> Disagreement persists not only because condescension and epithets tend to stifle rather than encourage discussion, but also because opponents fail to perceive that another's insistence on "irrelevancies" reflects neither an astounding inability to understand straightforward justification nor a devious refusal to acknowledge the obvious path to common goals, but rather a belief that we should pursue fundamentally different goals.<sup>187</sup>

Although talking with and listening to each other may improve the civility and even the substantive quality of the discussion, it will not resolve our fundamental differences. Opponents generally eventually come to understand what others are proposing and why (whether they acknowledge it is a different question). Reaching normative agreement, however, requires a further step: changing the underlying beliefs regarding what matters.

"Reasoned" public debate is manifestly insufficient for that purpose. Reason applies logic to objective facts. Such analyses can be extremely helpful. Every set of beliefs produces identifiable practical effects, and analyses providing information regarding likely consequences can improve understanding of alternative courses of action.<sup>188</sup>

They cannot, however, resolve the root cause of persistent disagreement. All logic builds from foundational assumptions.<sup>189</sup>

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186. *Id.*

187. Of course, we might seek a compromise providing for some of each. That would merely shift the normative disagreement from "either/or" to "how much" of each, still forcing us to deal with our different normative priorities.

188. The practical insights and alternatives provided by focusing on these consequences are discussed in Part III.B.

189. Normative disagreements, like those in property law, start at the beginning—with our varying baseline assumptions and beliefs. See Chiappetta, *Trademarks*, *supra* note 64, at 39 n.30. Rather than shouting myself out here I am taking the opportunity to clarify and correct an error in my earlier articulations of the point. Professor Dennis Karjala pointed out in our discussions that Kurt Godel's Incompleteness Theorem concerns unprovability within a formal system, not the unprovability of the assumptions on which that system is based, as I indicated in my earlier references. See *id.* He is, of course, correct. The insight is much appreciated, both because it prevents me from further distracting from my point about the unprovability of normative assumptions (which stands), and also because it clarifies how instructive Godel's theorem is regarding any assumption that our individual lexical orderings are "complete" and therefore reliably "certain" guides in decision-making (a topic relevant to related assertions of "right" as discussed *infra* notes 196–202 and accompanying text). For an interesting discussion of that application of the theorem and the problems that arise if we cannot identify (or at least agree upon) external truths, see ROGER PENROSE, THE EMPEROR'S

Those assumptions determine how specific outcomes are viewed and assessed when deciding what action should be taken. Any logical edifice built on assumptions we do not accept will be rejected, even when flawlessly reasoned in its own terms.<sup>190</sup> Consequently, when our individual ordering of what matters most in creating appropriate property outcomes does not match with the hierarchy of others, we will remain unconvinced, if not mystified, by what in their minds constitutes faultless logic. As will they remain unconvinced by our arguments.

The copyright extension debate illustrates the point. Justice Breyer's efficiency point is very well constructed within its own logical framework.<sup>191</sup> However, the argument would not have convinced Mr. Bono, and certainly did not convince others of similar views, who in fact prevailed.<sup>192</sup> Even understanding his argument and recognizing its internal coherence, the negative efficiency consequences Justice Breyer treated as determinative fell below the creator's natural claim of right in their lexical ordering and, consequently, provided no "reason" to change their position.<sup>193</sup>

The same problem of different normative orderings is clearly visible in other property debates. The tragedy of the commons and the related return-internalization and stability arguments used to

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NEW MIND 138–54 (1999). Charles Van Doren offers a similar, albeit much briefer, explanation regarding the uncertainty of all "knowledge." See VAN DOREN, *supra* note 16, at 340. In short, even if we are certain that our assumptions are correct, we should be circumspect about concluding that our worldview constructed on them is a complete and accurate explanation of "reality" (whatever that might be). For a wonderful articulation of the need to maintain substantial humility in that regard, see RICHARD DAWKINS, *THE BLIND WATCHMAKER* 38–39 (1996).

190. Even the Master's (Descartes') analytical "method" fails completely when divergent beliefs preclude agreeing on the requisite foundational self-evident axioms of "indubitable certainty." See VAN DOREN, *supra* note 16, at 204–05 (describing the method's starting point and noting the difficulty of application when debate moves from the material to the spiritual); see also RAWLS, *supra* note 15, at 36–37 (discussing the priority problem while using "intuitions" to describe what I refer to as beliefs).

191. See *Eldred v. Ashcroft*, 537 U.S. 186, 242–67 (2000) (Breyer, J., dissenting) (discussing efficiency analysis).

192. The unconvinced included the majority in the *Eldred* case. See *id.* at 222 (majority opinion). On its own terms, the case provides an interesting example of the proposition where one starts believing "what counts" determines the outcome. The majority did not dispute Justice Breyer's "calculator"-based efficiency determination; they simply deemed it irrelevant because in their view the "right" answer turned on the "calendar." See *id.* at 209 n.16.

193. That view hardly exhausts the normative bases for dismissing efficiency arguments (or supporting them). Another common basis for rejecting efficiency-based intellectual property law is its distributional effects. See, e.g., Chander, *supra* note 7, at 3, 30; RAWLS, *supra* note 15, at 69, 242–46.

justify current real property ownership rights appear unchallengeable to those who believe efficient outcomes are the key concern in formulating the “right” social response to conflicts over land use.<sup>194</sup> However, for those holding communitarian values, such arguments are worse than irrelevant. The focus on individual return rather than the common enterprise represents a powerful reason for rejecting private property in their hierarchy of values.<sup>195</sup>

The reason for persistent disagreement is now apparent. By talking with each other we may come to understand and acknowledge our different value hierarchies, the internal logic of each other’s arguments, and even respect the related passion. But having rejected the predicate assumptions, we will remain unmoved. When our priorities differ, all that remains of another’s tightly reasoned debate is the circular argument that a proposed outcome is preferable because it produces what the proponent values most,<sup>196</sup> or worse, the naked and wholly unconvincing assertion that those values must be pursued because they are self-evidently “right.”<sup>197</sup> In short, as a practical matter there are many perceived “truths,” each irrefutable to those

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194. See, e.g., Bell & Parchomovsky, *supra* note 5, at 537–39 (“A focus on stable ownership value is necessary to solve Coase’s open puzzle of arranging legal entitlements in order to maximize economic efficiency.”); Lemley, *supra* note 30, at 1037–40 (outlining the “internalization of returns/avoidance of free-riding” argument supporting real property law prior to arguing its inapplicability to intellectual property law).

195. The proto-communists and the communists argued against private tangible property precisely because, in their view of a just society, internalized personal returns on capital investments were a bad, not a good, thing. See generally MARX & ENGELS, *supra* note 1. Similarly, it is doubtful that Native Americans who took a “stewardship” view of the proper approach to control over natural resources were convinced by Chief Justice Marshall’s explanation that their failure to adequately exploit the land for private gain negated their claims of ownership. See *Johnson v. M’Intosh*, 21 U.S. 543, 588–90 (1823).

196. An interesting example is the tendency in intellectual property debate to assume utility-efficiency controls the decision-making and then offer the consumer surplus transfer, rent-seeking, and dead-weight loss effects of over-propertization as though they were dispositive. See, e.g., Lemley, *supra* note 30, at 1058–65. Such arguments, although flawless within their own paradigm, are entirely unconvincing to those who apply different normative standards.

197. Lacking external objective verification, such an assertion comes down to “because that is what I believe,” which readily translates into simply “because.” That clearly is not a convincing argument. See RAWLS, *supra* note 15, at 37 (stating that in the absence of external criteria “rational discussion [comes] to an end”); Ian Shapiro, *John Locke’s Democratic Theory*, in LOCKE, *supra* note 3, at 320–22 (discussing Locke’s argument concerning the meaning of the Scriptures); VAN DOREN, *supra* note 16, at xxi–xxii (discussing the faith that one’s views are correct).

adopting them, but unsupported rubbish to those rejecting them.<sup>198</sup> Logical reasoning can improve understanding but it cannot eliminate the underlying “values” conflict.<sup>199</sup> It is hardly surprising that we emerge from property debate more than occasionally irritated but unshaken in our fervently held conviction that our values define the “proper” outcome.

To be very clear, the above is only a practical observation, not an assertion of a universal metaphysical insight. It does not argue that no absolute truths exist, that values and morality are only relative, or that individuals are mistaken to adhere to their beliefs. The *only* point is that, at least for the present, no individual or group has the ability to convince everyone else that the normatively right lexical ordering of what matters has been determined and that they possess it.<sup>200</sup>

What the practical approach reveals is that public policy debate aimed solely at convincing those who know they are “right” that they are “wrong” can only produce the (grudging) acknowledgment that every fully thought-out normative position is “correct” within the framework of its predicate assumptions.<sup>201</sup> Learning to argue with, rather than past, each other about who is right may help us better understand the basis for, and sincerity with which others hold to, their differing values and beliefs, but it will not make those differences disappear.<sup>202</sup>

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198. See *supra* note 174. An interesting non-legal analogy is the mathematical effort to define space. As space is described and controlled by our assumptions, reaching consensus is all but impossible. See VAN DOREN, *supra* note 16, at 271–72 (“There is no such thing as space. Instead there are as many spaces as there are mathematicians and nonmathematicians.”).

199. The central problem is that Rawls’s “priority” (or lexical ordering) problem cannot be effectively resolved by convincing others to change their beliefs through arguments based on a lexical ordering they do not share. See RAWLS, *supra* note 15, at 36–40; cf. LOCKE, *supra* note 3, at 225 (“For every church is orthodox to itself; to others, erroneous or heretical.”).

200. It is historical predicate that over the many years humankind has debated truth (regarding property and otherwise), we have yet to agree on an answer. See *supra* notes 173–74.

201. That may overstate the mark. See *supra* note 189 (discussing the Godel Uncertainty Principle). The point here, however, is not the amazing power of debate to produce agreement, but its inability to do so, something reinforced by the likelihood that even reasoned analysis may fall short on its own terms. That said, the inability to fully change minds does not mean such debate is a useless enterprise, but merely that we should appropriately calibrate our expectations regarding what it can produce. See *infra* note 202.

202. The point is only that normative differences will persist, not that they make all resolution impossible. Rational debate over objective consequences will cause some, even many, to adjust their lexical orderings, moving society toward a greater consensus. Even those who continue to disagree may allow some “slippage” and accept imperfect solutions despite their continued adherence to their normative principles. See *infra* Part III.B.

*B. The Practical Consequences of Property Decisions*

Understanding that we will continue to disagree requires that we decide how to deal with that situation. The practical approach provides useful information in that regard as well. Focusing on property's function directs attention to the consequences of property decisions. Those decisions allocate control over resources when conflicts arise, most particularly when there is not "enough, and as good, left in common."<sup>203</sup> As the winners are at least relatively pleased, it is the consequences of losing that merit particular attention.<sup>204</sup>

Property allocations directly and concretely affect the losers' ability to pursue what they consider to be acceptable individual lives.<sup>205</sup> The allocations may prevent or interfere with access to resources required for pursuit and implementation of personal goals or satisfaction of needs. Or they may allow uses by others viewed as problematic to the losers' well-being.<sup>206</sup> The result may be an unsatisfactory restriction on their roles or participation in society,<sup>207</sup> interference with their individual autonomy or self-definition and personal dignity, diminution of the physical conditions of their lives,

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203. LOCKE, *supra* note 3, at 112.

204. Winners and losers are measured relative to individual goals. Someone to whom substantial control is allocated may not have received as much as she wished, and although a "winner" compared to those who received less, she may still consider herself a "loser." Although the following generally focuses on the more "absolute" form of losing, the same arguments also apply (perhaps with lesser force, but not necessarily) to winners viewing themselves as losers.

205. Property outcomes have at least two important characteristics. First, they always restrict the loser's individual freedom of action. Second, those restrictions frequently have direct consequences on physical well-being. John Rawls describes these restrictions as having an adverse effect on one's ability to achieve "happiness" through accomplishment of a reasonable life plan; a description central to the following analysis. See RAWLS, *supra* note 15, at 480–82. The point is not that property is unique, but merely that these consequences result from property decisions. Other normative debates can also produce these results and the functional analysis may help clarify discussion of those issues as well.

206. Direct examples include pollution of water or air, as well as traditional "nuisance" interferences from adjacent owners. Less obvious examples include use of resources to control social status or political participation by others, such as through use of superior financial resources to outbid others for scarce goods or to gain advantage in social decision-making through political lobbying.

207. For example, lack of resources may define losers as members of a particular inferior social "class," depriving them of meaningful participation or influence as well as foreclosing access to available opportunities for advancement/change, such as education. See VAN DOREN, *supra* note 16, at 6–7 (describing the Indian caste system); RAWLS, *supra* note 15, at 62–64.

and, at the margin, endangerment of their existence.<sup>208</sup> Therefore, as we engage in public policy debate, it is informative to consider how various possible approaches to resolving our property disagreements deal with the real-world consequences of the outcomes they produce.

Resolution through reference to existing law entirely misses the mark.<sup>209</sup> Although essential to individual dispute resolution, it addresses neither the continued existence of normative differences nor the effects of existing law on the losers. For example, the Supreme Court's determination in *Kelo v. City of New London* most certainly decided the Takings Clause control dispute against the complaining private landowners and for the state, enforcing the loss of the owners' homes in return for "just compensation."<sup>210</sup> Similarly, the Court's *Eldred v. Ashcroft* holding meant that copyright owners could rely on the state to prevent unauthorized copying of the related works by others during the extended term.<sup>211</sup> The reaction to those decisions equally clearly demonstrates that neither case accomplished anything beyond energizing those dissatisfied with the consequences of existing law.<sup>212</sup> Mere existence cannot alone convince those adversely affected that the outcome is "just," much less that they should accept the related consequences. Their response to "it's the law" is straightforward enough: "It's wrong; let's change it."<sup>213</sup>

A related and equally ineffective approach is to treat property decisions as merely derivative of antecedent "foundational" public

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208. The lack of food and shelter are the obvious examples, but there are many others, such as having insufficient funds to obtain necessary pharmaceuticals or other kinds of healthcare. See, e.g., Frederick M. Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 99 AM. J. INT'L L. 317, 319–23 (2005) (discussing the ongoing issues regarding access to medicines protected under patent law).

209. *But see supra* note 131 and accompanying text (discussing the usefulness of knowing what the current decisions are and being able to clearly identify what proponents of change want to adjust in the status quo).

210. 545 U.S. 469, 489 (2005); *see supra* notes 38–45 (briefly discussing the case).

211. 537 U.S. 186, 222 (2003); *see supra* notes 176–82 (briefly discussing the case).

212. *See supra* notes 43–45 (discussing the continuing attempts to deal with *Kelo*); Mossoff, *supra* note 102, at 31 n.12 (noting continued criticism of the outcome in *Eldred* and citing a variety of sources). Even in the most activist view of the judiciary, it is at best only a government decision-making institution, not the deliverer of universal norms. As Justice Robert H. Jackson once famously remarked, "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

213. Now is the time for the obligatory, but exceedingly apt, reference to David Hume's observation that merely because something "is" does not resolve whether it "should" be. *See HUME, supra* note 133, at 469–70.



policy decisions. For example, it can be logically argued that the adoption of a market economy makes efficiency norms the proper basis for allocating control over resources.<sup>214</sup> Although internally coherent,<sup>215</sup> the existence of a market economy only demonstrates that those values and related consequences have prevailed thus far. That does not mean the losers have accepted that they, or the resulting allocations of property control, are normatively just or acceptable.<sup>216</sup> All an appeal to antecedent decisions accomplishes is to move the normative debate back a step to the source of the disputed outcome.

A more responsive approach is to recognize that existing law and related foundational decisions are the outputs of a social “meta-system” adopted specifically to resolve otherwise intractable normative disagreements.<sup>217</sup> In that paradigm, disputed decisions remain subject to challenge, reexamination, and alteration. But an essential part of the meta-system is that when its processes are followed the losers must accept the consequences of those decisions while working within the system for change.

Meta-systems take many forms. For example, a representative democracy meta-system rests on a voluntary agreement that public policy debate and voting (of some form) will be used to resolve our normative differences.<sup>218</sup> As that system reflects the greatest involvement, least coercion, and the current United States system is

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214. Property literature offers numerous examples. *See supra* note 30.

215. Deciding to use market exchange to generate economically efficient allocation of resources undeniably drives specific property outcomes. For example, individuals must privately control the resources to be exchanged and something must be done to resolve the public goods problem.

216. Mr. Hume is again irresistible. *See HUME, supra* note 133, at 469–70. John Rawls’s observation is also apt: “They are designed to achieve different ends, the [ideal market process] leading to efficiency, [the ideal legislative process] if possible to justice.” RAWLS, *supra* note 15, at 316.

217. Again, the analysis in the text is concerned with the practical, not the normatively just. The term “meta-system” reflects that such arrangements may be consensual or imposed (democracy versus autocracy). Although the type of meta-system selected clearly implicates social contract theory, it is the practical effect of compliance despite normative disagreement, not the system’s “rightness or wrongness” normatively, which is crucial to the analysis. Thus, no attempt is made to enter, much less resolve, the debate among the likes of Rousseau, Locke, Hobbes, and Rawls over the moral justifications for forming or resisting a particular social contract. *See RAWLS, supra* note 15, at 10, 308–12; Shapiro, *supra* note 197, at 323–25 (discussing the conflicting views of Rousseau, Locke, Hobbes, and others).

218. *See, e.g., RAWLS, supra* note 15, at 439 (noting Mill’s acknowledgement of the principle as well); Shapiro, *supra* note 197, at 323.

based on that approach, its examination provides the best basis for the “effects” inquiry.<sup>219</sup>

In participatory/voting systems, individual members (sometimes directly, but more commonly through representatives) advocate vigorously for adoption of their preferred outcome. Provided the meta-system’s rules are followed—generally meaning outcomes are reached through a majority (or super-majority) vote—then win or lose, all of society’s members accept (and agree that the state should compel them to accept) the resulting decisions, regardless of whether they conform to their personal values.<sup>220</sup>

That compliance does not occur because the vote has convinced the losers they were wrong; in fact, generally they are not.<sup>221</sup> Rather,

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219. The effects and reactions discussed in the following text apply with perhaps greater force to systems that are less voluntary and participatory. In fact, many—but not all—of the more extreme historical examples arise from attacks on autocratic meta-agreements leading to a shift toward more voluntary and participatory systems. The U.S. Civil War, however, is a good example of even the inability of the latter type of system to stand the stresses. The specific examples are identified and briefly discussed *infra* note 232.

220. This understanding helps identify inappropriate epithetic use of the word “politics”—accusing opponents of “just being political” or “playing politics.” Vigorous advocacy for or against particular positions is, of course, the essence of political decision-making, not egregious misuse of the political system. Normative disagreement with an opponent’s position does not make their insistence on the correctness of their point of view and related outcomes or on the wrongness of opposing views and related outcomes *inappropriately* political. See DE TOCQUEVILLE, *supra* note 109, at 245 (observing that the “majority . . . lives in perpetual adoration of itself”); RAWLS, *supra* note 15, at 195–96 (discussing the importance of acknowledging the loyal opposition). Similarly, labeling an opponent’s use of the system’s legitimate levers in an effort to avoid failure on the merits as *improperly* political misses the essence of what abiding by a meta-agreement entails. See, e.g., H.W. BRANDS, *TRAITOR TO HIS CLASS: THE PRIVILEGED LIFE AND RADICAL PRESIDENCY OF FRANKLIN DELANO ROOSEVELT* 222–24 (2008) (describing the Republican majority’s use of the system’s rules to prevent then-New York Governor Roosevelt’s proposals from coming to a vote, a tactic visible in recent years at the federal level). When participants play by the rules, the outcome is appropriately political and must be accepted (although that may generate discussion over whether the rules should be changed). What is “politically” problematic is the use of false arguments to advance or undermine a position or the use of political levers to stymie a decision for ulterior motives, e.g., bribery or acquiring personal power. See *id.* When such behavior falls outside the meta-system rules, the opponent is not “playing politics”; the opponent is, in fact, doing just the opposite (violating the meta-system), and should be called to account for the prohibited behavior. The important point from the practical perspective is that such actions reflect a particular individual (or sub-group) ordering of “what counts most” (the ends justifying the means). Although opponents cannot prove such adherents demonstrably “wrong” in the normative sense, they can point to the logical consequences as a relevant consideration when deciding whether to act based on those values, including the social order effects addressed in the text.

221. John Rawls describes the participatory majority rule “not as a contest between interests, but as an attempt to find the best policy as defined by the principles of justice,” and asserts that “we normally assume that an ideally conducted discussion among many persons is

it follows from two related practical considerations.<sup>222</sup> The first is the straightforward proposition that binding decisions are essential to continued joint enterprise.<sup>223</sup> The second involves an individual determination that the personal benefits of continuing the joint enterprise on the existing terms (or the costs of disobedience) justify accepting the loss on a specific issue, particularly in light of the right to trigger reconsideration.<sup>224</sup>

The question is how the participatory meta-system model for dealing with normative differences fares in light of the practical consequences felt by property losers. The short answer is “not well,” so long as it operates as a system of pure justice.<sup>225</sup> When the property control allocations resulting from compliance with the meta-

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more likely to arrive at the correct conclusion (by a vote if necessary) than the deliberations of any one of them by himself.” RAWLS, *supra* note 15, at 314–15. Because so many public policy issues are resolved in ways people clearly do not find “correct,” but with which they comply anyway, I prefer the practical view that use of a meta-system (including majority rule) is no more than “a way of achieving a political settlement.” *Id.* at 318. It is interesting in this regard to reflect on de Tocqueville’s assertion closer to the nation’s founding that part of what makes democracy work in America is that we are (or at least were) very similar. See DE TOCQUEVILLE, *supra* note 109, at 158–59. That might explain original acceptance (albeit grudging) of the constitutional meta-system: the debates more frequently involved an effort to properly implement generally agreed core values and goals—a task more akin to the search for empirical truths. Cf. KEN ALDER, *THE MEASURE OF ALL THINGS* 315–25 (paperback ed., Abacus 2004) (2002) (discussing accuracy in science, the convergence on scientific truth through cooperative effort, and the problems created when the “right answer” is unknown). In all events, contemporary politics indicates that the passage of time has either made us less similar or less able/willing to ignore our differences (perhaps because it is impossible to get away from each other in the “west”).

222. The only point essential to the practical argument in the text is that significant numbers of members in fact acquiesce. There is no need to determine whether either the enterprise or the acquiescence is “good or bad,” either generally or in any particular circumstance. See *supra* note 220.

223. As Alexis de Tocqueville explained: “[T]he people . . . understand that to profit from society’s benefits, one must submit to its burdens” and “obey[] society . . . because [one] knows that . . . union [with others] cannot exist without a regulating power.” DE TOCQUEVILLE, *supra* note 109, at 9, 61.

224. See, e.g., JARED DIAMOND, *GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES* 283–88 (1997) (noting the mutual benefit theory but also arguing for other factors as playing an important role in the early stages of the development of human society); RAWLS, *supra* note 15, at 456 (describing the social enterprise as “a cooperative venture for mutual advantage” pursued despite our disagreements).

225. “Pure” justice defines a “correct” outcome as whatever results from following the system’s rules. See RAWLS, *supra* note 15, at 75 (using the example of gambling). That approach allows, and more likely affirmatively induces, a society’s members to compete against one another to “win” individually under the rules rather than considering effects on others and/or engaging in cooperative problem-solving for mutual advantage (it isn’t accidental that the classic exam of a pure justice system is a poker game).

process (voting) do not provide sufficient resource control for individuals to pursue what each considers an acceptable life,<sup>226</sup> those individuals will challenge the meta-system, including its central tenet of acquiescence to outcomes, win or lose. Moreover, if those challenges are not addressed, they may eventually break the meta-system accord and with it the social structures on which the related joint enterprise depends.<sup>227</sup>

The stresses and effects may only become visible over time. Some property outcomes, such as government takings, will initially affect only a small group of individuals. They will require multiple events before they have broader significance.<sup>228</sup> Others may have wider initial reach but more gradual adverse effects, such as the erosion of individual circumstances or social/political participation through the ongoing distributional effects of a market economy. The resistance may be correspondingly incremental. At first, those directly and most severely affected may raise their voices in protest. As the problem spreads to others or the individual effects become more severe, the challenge may become more vigorous, leading over time to increasingly significant breakdowns in public order.<sup>229</sup>

Responses may be similarly incremental. They may initially only produce subtle shifts in the social order, focusing on coercing individuals or groups of recalcitrant members into compliance. Over time, more extreme measures may be required, moving the system gradually away from participatory decision-making to a system in which those with property control focus on protecting the existing allocations, including by obtaining, retaining, and exercising

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226. See *supra* notes 202–08 and accompanying text (discussing examples).

227. Although the argument below focuses on property law resource control, the particular effects when any normative position is strongly enough held may cause the losers in the related debate to react in the same way. See *supra* note 205.

228. As the response to *Kelo v. City of New London*, 545 U.S. 469 (2005), demonstrates, one need not be directly affected to join the dissent. See *supra* notes 38–45. Those fearful of being next, and winners whose values make them unwilling to accept the negative consequences for losers, will share and support the losers' position.

229. The gradually more severe social disruptions in the Great Depression provide a useful example. Initial concerns focused on the "investor" class's reactions, then on the unemployed, and eventually on society as a whole. See BRANDS, *supra* note 220, at 225–28, 258–61, 285–89 (discussing, in Part II: The Soul of a Nation, the evolution of the Depression from the stock market crash through the "bonus army" and "Hooverilles," and ultimately the overall collapse of the economy). A similar pattern emerged in Germany during the same period (with substantially less happy end results). See generally PIERS BRENDON, *THE DARK VALLEY* (2000).

sufficient power to insist on those outcomes. Eventually, those responses may devolve into a contest over the power to decide.

However the situation arises and matures, if society's property decisions do not deliver adequate control to permit a substantial majority to pursue an acceptable life (and certainly a reasonable physical existence), then the losers' desire, and even their ability, to adhere to the political meta-system will disappear.<sup>230</sup> When a sufficient number of property losers can no longer tolerate their inability to access and deploy resources or to avoid unacceptable consequences of others' use of their property, the control debate will cease to be governed by the existing meta-system. If the problem becomes severe enough, it will cause significant changes in the political meta-structure and related social arrangements.<sup>231</sup> At the extreme, it will cause dissolution of the joint enterprise itself.<sup>232</sup>

It might be argued that the existing meta-system and related social structure will be maintained because the losers will feel

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230. When property law losers are not receiving adequate benefits to justify participation in the existing social arrangement, their reason to comply with its institutions and for desiring its continuation disappear. *See supra* notes 221–24 and accompanying text (discussing the basis for the meta-agreement); BRANDS, *supra* note 220, at 494 (discussing the problem in connection with the Great Depression); *cf.* Singer, *supra* note 128, at 311 n.9 (discussing the “precarious position of non-owners”).

231. John Locke differentiates between destruction of government and of society. *See* LOCKE, *supra* note 3, at 193; *supra* note 17 and accompanying text. Examples of the former (“regime change”) are numerous—for example, the Democratic political victories in response to the Great Depression and in response to the Great Recession. *See* BRANDS, *supra* note 220, at 251–65 (discussing Roosevelt’s election in response to the Hoover regime’s handling of the Depression). Such regime changes are generally in response to stresses on the meta-system and related social arrangements and may include adjustments to that system beyond a mere change in identity of the governors. *Id.* at chs. 21–33 (examining the New Deal, which involved significant changes in the relationship between executive, legislative, and judicial power, some of which were ultimately overturned as unconstitutional).

232. Causes of historical events are, of course, hard to identify with any certainty. There are, however, numerous examples of property disputes as an important, if not determinative, factor in the disintegration of an existing meta-system and related social structure. The French and Russian revolutions come to even the non-expert mind. *See generally* MARX & ENGELS, *supra* note 1. The dramatic changes in German, Italian, and Japanese social governance structures reflected significant property problems born in part from the Great Depression. *See generally* BRENDON, *supra* note 229. Additionally, the three great social adjustments in United States history had significant property issues at their core. The first—the Revolutionary War—involved, among other property issues, taxation without representation. *See, e.g.*, VAN DOREN, *supra* note 16, at 223–24. The second involved the destruction of the Native American culture based on conflicts over natural resources. *See, e.g.*, JOSEPH ELLIS, *AMERICAN CREATION* 127–64 (2007); Carol Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 76, 86 (1985). The third—the U.S. Civil War—involved control over human labor through the institution of slavery. *See* VAN DOREN, *supra* note 16, at 275–78.

compelled to honor their agreement to comply, especially if they have been treated “fairly” under its terms. For example, having been given an equal opportunity to succeed in competition with others in the marketplace, losers will acknowledge that the fault is their own and comply despite the personal consequences.

Property decisions’ practical effects point powerfully away from clinging to that expectation. If the application of a society’s property rules prevents members from accessing resources they deem essential to their well-being or avoiding harms from uses by others, that actuality will likely prove much stronger than the argument that they agreed to accept a fair opportunity to acquire those resources in competition with others. This will be particularly true when the status of “actual loser” comes about in ways not easily attributed to personal failure, e.g., the realization that the market does not sufficiently want or value those individuals’ inherent physical or mental skills, their race or their gender, or that the market competition race starts from unequal positions,<sup>233</sup> especially when others visibly prosper for the same “irrelevant” reasons. At the extreme, those deprived of resources essential to their physical well-being will likely have no interest in the winners’ argument that there was fairness of opportunity, and that because losers of property disputes agreed in advance to accept the outcome, they should continue to cooperate.

In practical terms, when a society’s property decisions deliver insufficient resource control, continued allegiance by the losers would require such an astounding degree of altruism that all but the most fervently committed will find the social bargain one they cannot keep.<sup>234</sup> In fact, those suffering unexpectedly severe adverse consequences<sup>235</sup> may on close examination of the initial “deal” and their purported acceptance, feel that they were duped by the former

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233. Market proponents point to its dispassionate operation as a promise of equality of opportunity while ignoring that the competition is never reset—individuals are born into it while in progress. See Gates, *supra* note 83 (discussing his notable support for the inheritance tax). John Rawls identifies the problem and offers a cogent response. Although he includes “fair equality of opportunity” as part of his second principle of justice, he finds it insufficient to provide justice, leading him to specifically add the outcome constraining “difference principle.” RAWLS, *supra* note 15, at 263–67.

234. See RAWLS, *supra* note 15, at 88–89, 153, 155, 164–65 (noting that individuals are highly unlikely to forgo individual benefits merely for the benefit of others).

235. Given the frequency with which actual outcomes fail to match the projected results of participants, one must wonder whether some human character trait makes us humans fundamentally ill-suited to dealing with the issues we face in contemporary society. See *supra* note 155.

and that their tacit compliance wasn't a commitment to the latter regardless of the personal consequences. That result will even further undermine their desire to abide by the meta-agreement and support the existing social structure.

The practical focus on consequences both identifies the problem with reliance on a social meta-accord and suggests an adjustment that may permit its continued operation. Specifically, the meta-system could expressly incorporate a "perfect" justice component.<sup>236</sup> It would assess property outcomes, both initially and on an ongoing basis, based on the effects on the losers, both individually and overall. Control decisions failing to provide sufficient resource control to support adequate continued participation on the existing terms would be adjusted.

The result would be a two-step property decision-making process. The first step would focus on the practical consequences. The second would give free rein to unabashed and uncompromising advocacy of specific outcomes based on normative preferences, with resolution coming from the meta-accord. Of course, even in the second step it would remain useful to talk with, rather than past, each other, and to realize that we are highly unlikely to show our opponents the error of their ways by dazzling them with reason. But in that paradigm, even the losers created by the political meta-process would likely remain willing to continue to play.

The focus on practical consequences also offers a useful insight into how a "threshold" assessment might be performed. For example, in the efficiency paradigm much is made of the distinction between rivalrous and non-rivalrous resources when assigning property control rights. The former category, such as tangible realty and personalty, are viewed as requiring more permanent property interests in order to resolve the practical single-user-only limitation and to protect returns on investments essential to ensuring optimum maintenance and exploitation. As a result, real and personal property law give owners

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236. RAWLS, *supra* note 15, at 74. The approach suggested in the text unsurprisingly mirrors Rawls's own solution. *See supra* note 233. However, unlike Rawls's normative "justice" argument, the suggestion in the text is only practical, considering it as a means for avoiding challenges to and withdrawal from the meta-system, not a mandatory "moral" requirement. For a discussion of another normative view supporting attention to distributional outcomes, see generally Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009).

an almost universal and perpetual right to exclude.<sup>237</sup> Because many parties can simultaneously use intangible ideas and information, the control justification instead focuses on the public goods/free-riding problems impairing optimum investment in their creation. As a result, patent law only grants control for a fixed term and copyright law only protects against specified uses of the owner's version of the copyrighted work.<sup>238</sup>

From the practical consequences "threshold" perspective, the disputed resource's relationship to acceptable individual life-plans becomes the crucial characteristic. On that basis society might conclude that control of certain rivalrous resources should incorporate significant limitations. For example, takings law might be expanded and the right to convey on death substantially scaled back in order to create greater re-distributional flexibility. The use of "owned" resources for political purposes might be subject to substantial limitations to avoid too close adherence to the maxim that "those with the gold make the rules," resulting in control allocations likely to impair the ability or desire of the losers to adhere to the meta-system.

Regarding intangible ideas, the focus would similarly shift from achieving net efficiency improvements focused on solving the public goods problem to the resources' relationship to physical well-being or individual autonomy, self-definition, or personal dignity. For example, patent rights might be curtailed to permit greater access to health care,<sup>239</sup> and copyright protection might apply differently to works of art reflecting an artist's essential self-definition than to works generally viewed as commodities.<sup>240</sup>

Implementation of such a baseline distributional outcome is, however, a daunting proposition. Finding outcomes that produce adequate individual control to maintain adherence to the meta-system is hardly a straightforward proposition. Giving to some involves taking from others, and each of us has an individual notion of "adequate" or even "necessary." Determining how much, of what, and to whom, and ensuring sufficient delivery, are enormously complex problems. Those decisions are likely to leave many

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237. See, e.g., *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 159–62 (Wis. 1997); *supra* note 140.

238. See, e.g., Chiappetta, *Trademarks*, *supra* note 64, at 52–54.

239. Such an exception already exists regarding surgical procedures under the Patent Act. 35 U.S.C. § 287(c) (2006).

240. The Visual Artists Rights Act of 1990 reflects such a decision. 17 U.S.C. § 106A (2006).



displeased—often passionately—with the outcomes, both practically and normatively. There is the distinct possibility that even our most dedicated efforts may not produce a workable solution.<sup>241</sup>

Moreover, the addition of a perfect justice component can only be offered as a practical response to property's practical consequences. It requires dramatic changes in application of the existing meta-system.<sup>242</sup> Participants, including majorities who would otherwise “win,” must agree to accept outcomes unsupported by their own normative frameworks, no matter how impossibly absurd, irrelevant, or “unjust” the consequences may appear. Nor can acceptance be demanded on normative grounds, say as a call for distributional justice or even for saving existing society.<sup>243</sup> No demonstrable normative imperative commands that any individual (or society as a whole) pay any attention to distributional effects on

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241. Lincoln's unsuccessful willingness to give ground on the slavery issue in the face of strongly held normative differences offers a good example:

My paramount object in this struggle is to save the Union, and it is not either to save or to destroy slavery. If I could save the Union without freeing any slave, I would do it; and if I could save it by freeing all the slaves, I would do it; and if I could save it by freeing some and leaving others alone, I would also do that. VAN DOREN, *supra* note 16, at 275 (quoting Lincoln's letter to Horace Greeley). Another distressing possibility is that the resource contest may be all too real, and there is not as good and enough to go around to support even tolerable threshold acceptable lives. When no allocation can deliver the goods, property becomes the means for distinguishing between the have-enoughs and have-inadequates. The ultimate outcome of that use of property cannot be doubted. *See supra* notes 226–35 and accompanying text. That possibility becomes yet more likely when property is considered in the international context (as it eventually must be). Practical solutions depend on our ability and willingness to act cooperatively. Accomplishing that task domestically is greatly facilitated by a shared culture and modes of expression, basic understanding of conflicting normative positions and their bases, the existence of an established and accepted political process, and a degree of confidence that we are linked in the pursuit of a mutually beneficial common enterprise. Dealing with “outsiders” changes that situation dramatically. Norms will be unfamiliar and even incomprehensible, and cultural differences, including modes of expression and methods of debate, will increase the likelihood of mistaken assumptions and miscommunication. Additionally, the necessary decision-making processes and institutions may not be up to the task, if they exist at all. Most critically, the clearly competitive nature of the allocations and the related us-versus-them positioning of the issue create a justifiable lack of confidence that there is a common enterprise, leading to unyielding insistence on implementation of one's own values in pursuit of one's own interests. *See generally* Chiappetta, *WTO*, *supra* note 86.

242. *See* Chiappetta, *WTO*, *supra* note 86, at 382–83 (discussing the requirement in the context of international resolution of the intellectual property exhaustion issue).

243. It certainly can be and has been positioned in these terms. *See supra* notes 221, 233 (discussing Rawls's theory of justice). But that overstates the practical case, which only suggests attention be paid to the likely real-world effects of property's distributional consequences as inputs to normative decision-making, not as determinative of the “right” outcome.

existing social arrangements, particularly when doing so may require abandoning the pursuit of what the individual or the majority believes to be “right.”

Focusing on practical consequences may cause changes in lexical orderings among those who have failed to consider either the likely personal or social consequences.<sup>244</sup> Assessing one’s own possible status as winner or loser, particularly given the tendency toward overly optimistic assumptions, can have a sobering effect. Even likely winners thinking about what relationships will replace those that exist, and ultimately who will leave the existing arrangement on what terms and what will be left for those who remain, may be given pause.<sup>245</sup> Those considerations may produce normative adjustments or permit some “slippage” in adherence to principle in favor of accepting imperfect but tolerable outcomes, moving the group toward a resolution under the existing meta-system.

However, we should not expect that merely identifying practical consequences will eliminate all our normative differences. Nor will making adjustments prevent negative responses or reactions from those perceiving themselves to be losers under whatever outcomes emerge, most particularly if they believe the resulting outcome is unjust.

In the end, the practical approach can deliver no more than what it promised: improved clarity regarding the essential difficulty in our property debates and identification of what real-world consequences

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244. Focusing public policy debate on practical consequences will help ensure that proponents must “come clean” regarding the real-world consequences to individuals and society if their position is adopted. For example, insisting on a private property system designed to drive market allocations should be understood to produce property winners and losers, which over time will eventually undermine the market’s continued ability to function. As recent economic circumstances reveal, when too much property is accumulated in too few hands, the demand side cannot support the supply side. Pundits then wring their hands over the failure of consumers to “do their part” when they do not control sufficient resources to do so and the necessary socially disruptive readjustments take place through government intervention. Worse yet, the current Great Recession is in the second round of such a “discovery” in living memory. See BRANDS, *supra* note 220, at 484–94 (discussing the same distributional lack of consumption problem in connection with the Great Depression). Explicit consideration of a proposed property law’s practical consequences may, if nothing else, help jog memories.

245. Focusing on past practical consequences of property decisions applies with even greater force to revolutions. They are uncontrollable and unpredictable things, rarely turning out the way their instigators envision. Those quick to assert “love it or leave it” might do well to consider that they may ultimately not be the ones who get to decide who stays and who leaves. See *supra* notes 232, 244.

we might reasonably expect from the various approaches taken to address that problem.

#### IV. CONCLUSION

Defining property functionally—as a flexible tool for implementing society’s decisions allocating enforceable legal control over its resources—delivers on the practical goal of clarifying related public policy debate and decision-making. It explains why we should reject both the framing of property debate as a good-versus-bad or yes-or-no proposition to which we react, and the assumption that those who disagree with us regarding its proper application merely need to bask in the light of our truths to be converted. Both distract us from the central practical property problem: dealing with our very real and “reason-resistant” normative differences regarding appropriate resource-control outcomes.

Finally, by focusing us on the consequences of our property decisions, the practical approach to property clarifies the downside of insisting too adamantly on adopting our most assuredly “correct” answer, even (or perhaps especially) when we have the power to do so. If that “right” answer fails sufficiently to deliver the goods, the losers—normative or substantive—will refuse to comply with society’s property decisions, and may ultimately abandon the joint enterprise entirely. Before relying too heavily on the existing meta-system’s ability to resolve our differences, we should consider the effects of the property decisions we use it to produce.

In short, defining property in practical terms, i.e., focusing on what it does, informs our decisions by identifying and helping us understand the central problem in the related debates and focusing us on the effects of the alternative approaches to its resolution. That, of course, falls short of providing the answer. But that would be asking a lot of a mere definition.

