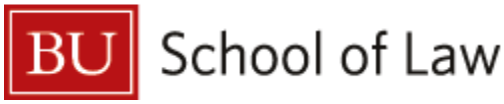
2018

The Fundamental Building Blocks of Social Relations Regarding Resources: Hohfeld in Europe and Beyond

anna di robilant
Boston University, robilant@bu.edu



The Fundamental Building Blocks of Social Relations Regarding Resources: Hohfeld in Europe and Beyond

Boston University School of Law
Property Law No. 18-07

Forthcoming, The Legacy of Wesley Hohfeld: Edited Major Works, Select Personal Papers, and Original Commentaries

Anna di Robilant & Talha Syed
Boston University School of Law

The Fundamental Building Blocks of Social Relations Regarding Resources: Hohfeld in Europe and Beyond

Anna di Robilant & Talha Syed*

Introduction

In the hundred years since Hohfeld published his two "Fundamental Legal Conceptions" articles, the "bundle-of-rights" view of property associated with his work has come to enjoy the status of conventional wisdom in American legal scholarship.[1] Seen as a corrective to lay conceptions and a predecessor "Blackstonian" view of property as the "sole and despotic dominion" of an "owner" over a thing,[2] the central insight of Hohfeldian analysis is standardly

* Boston University Law and UC Berkeley Law, respectively. Talha Syed is the principal author of Parts I and III of this article, and Anna di Robilant of Part II. We wish to thank Saki Bailey, Yochai Benkler, Oren Bracha and Henry Smith for invaluable feedback on an earlier draft of this article.

[1] *See* GREGORY S. ALEXANDER, COMMODITY & PROPRIETY 319 (1997) ("No expression better captures the modern legal understanding of ownership than the metaphor of property as a 'bundle of rights.'"). As Professor Alexander points out, the "bundle of rights" phrase precedes Hohfeld, who in fact never used it. Nevertheless, it has become the conventional moniker for his analysis of property as "a complex aggregate of jural relations." *Id.* at 319, 322. For a review of leading legal scholars and casebooks adopting the bundle of rights picture, see Eric Claeys, *Is Property a Thing or a Bundle?*, 32 SEA. U. L. REV. 617, 619-21 (2009). For a review of leading philosophical works doing the same, see J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 712-14 (1996).

[2] 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *2 (1979) (1765-1769). It is standard to refer to this view as "Blackstonian" since, as Professors Alexander and Dagan suggest, even if Blackstone himself "did not intend that phrase to be taken literally," nevertheless the "dictum … has become an icon of property theory." GREGORY S. ALEXANDER & HANOCH DAGAN, PROPERTIES OF PROPERTY 100-01 (2012). For doubts that this

taken to be that property is not a single "thing" but rather a "bundle of rights" with respect to things and persons.[3] In recent years, however, this Hohfeldian view has come under increasing attack by critics calling to replace the bundle-of-rights picture with a return to lay or neo-Blackstonian conceptions of property, as the "right to a thing," "thing-ownership" or, simply, "the law of things."[4] Yet what precisely is at stake in this dispute has remained somewhat nebulous. In the words of one of the critics, although all sides to the debate "agree that the thing versus ad hoc bundle contrast is significant, it is surprisingly difficult to specify what the contrast really means."[5] Do the critics really mean to claim that property, as a legal concept, should be taken to refer to the "thing" or object itself, rather than to legal rights pertaining to it? Or is it rather that the legal rights should be taken to pertain to a person-thing relation, rather than to one between persons? Or is it that the rights at issue should be seen as one or a few rather than many? Or, if many, then necessarily "unified" rather than disaggregated? Or, whether single or multiple, "absolute" rather than "qualified"? And, finally, is the dispute – with respect to any or all of these questions – a matter of conceptual or descriptive or normative disagreement?

The crux of the problem, we suggest, is a fundamental mischaracterization of the Hohfeldian analysis of property – by both critics *and* defenders. The "bundle of rights" label obscures from view a distinct, and more fundamental, dimension of Hohfeldian analysis, namely that property is a social relation. And as or even more important than getting right the precise *content* of these two sets of claims is understanding their *relation*: in particular, that the "social relations" claim is the fundamental platform of the analysis, generating in turn the "bundle of rights" claim as a conclusion. Indeed, if a short moniker were wanted for Hohfeldian analysis, much preferable to the "bundle of rights" would be the "relational" conception of property.

Moreover, each of these components of Hohfeldian analysis – social relations (SR) and bundle of rights (BR) – is fundamentally distinct from a *third* set of points with which they are commonly entangled, regarding the dematerialization of the objects and interests of property. It

---

was Blackstone's own considered view, *see* Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L. J. 601 (1998); David Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQ. L. 103 (2009). For doubts about the doubts, see Claeys, *id*. at 632-33.

[3] *See*, in addition to references cited in note 1, BRUCE ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 26-29, 97-100 (1977); STEPHEN MUNZER, A THEORY OF PROPERTY 15-31 (1990); JOSEPH SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 3-13 (2000). We hasten to add that a central thrust of our argument in Part I below is that the standard understanding of the Hohfeldian conception given in the text is, in significant respects, misleading, when not simply flawed. See especially notes 6, 12-14 *infra* and accompanying text.

[4] *See* Penner, *supra* note 1 at 799 ("despite the bundle of rights picture of property, property truly is a right to things"); J. E. PENNER, THE IDEA OF PROPERTY IN LAW (1997) (advocating, in place of the bundle of rights picture, the view "that property is what the average citizen … thinks it is: the right to a thing"); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES (2007) v, 1 (defending, in contrast to "an ad hoc 'bundle of rights'" view, a "traditional everyday view" of property as "a right to a thing good against the world"); Claeys, *supra* note 1 at 618, 631ff (advancing "a 'thing' or 'thing-ownership' conception of property" in opposition to "'the ad hoc bundle' conception"); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691(2012) (arguing that "property is, after all, a law of things" contrary to the "conventional wisdom" that "property is a bundle of rights"). *See generally* Symposium: *Property: A Bundle of Rights?* 8 ECON. J. WATCH (2011). We use "neo-Blackstonian" here as an umbrella term to group those critics of the Hohfeldian conception, such as the foregoing, who propose to replace it with a "thing"-based alternative of some sort. We do so while noting, again, that there remains debate on the extent to which Blackstone himself subscribed to what is called the "Blackstonian" conception – see discussion in note 2, *supra* – and, further, while also bearing in mind the need to attend to important differences amongst the critics themselves (*see, e.g.*, notes 12, 80 and 81, *infra* and accompanying text).

[5] Claeys, *supra* note 1 at 618.

is precisely the blurring together of what are three distinct lines of analysis – what we refer to here as (SR-)dethingification, (BR-)disaggregation and dematerialization – that has led many to the conclusion that Hohfeldian analysis results in the "disintegration" of property, rendering it no longer a distinct concept or field of law; an outcome embraced by some (neo-Hohfeldians) and decried by others (neo-Blackstonians).

This conclusion, we argue, is both too hasty and imprecise. It is imprecise because it fails to locate the contest between Hohfeldian and neo-Blackstonian conceptions of property as pivoting around not one, but at least two and perhaps even three, fundamental points of contrast, each tracking one of the central, but distinct, lines of Hohfeldian analysis, namely: SR-dethingification, dematerialization and disaggregation. It is too hasty because on our view, SR-dethingification poses no problems and while dematerialization and disaggregation may indeed, if left unchecked, lead to troubling – *albeit quite distinct* – forms of disintegration, the fault lies less with the specific content of Hohfeld's claims than with a failure, post-Hohfeld, to follow through on the underlying method and structure of his analysis in a constructive fashion. And so the solution to disintegration, we suggest, is not the "rethingification" of property but, rather, to carry forward the method of Hohfeldian analysis in two constructive directions: a resource-specific answer to the question of "what is property *about?*" and, in answer to "what does property *consist of?*", an architectural analysis of the elemental entitlements that serve as the fundamental building blocks for property forms.

Our aims in this article are three-fold. First, we seek to provide a somewhat novel distillation of the central insights of Hohfeldian analysis of property, and to use it to clarify the central fault lines and stakes of the contemporary debate in American property theory. Second, we set this analytical scheme into comparative-historical context, to draw from European traditions of property analysis insights about the resource-specific character of property entitlements that further enrich and develop our scheme. Finally, we seek to draw simultaneously on the tools of Hohfeldian analysis and the lessons of both the American and European debates, to chart two constructive ways forward for the legal-institutional analysis of property, as social relations regarding resources.

The article is structured in three parts. Part I sets out our distinct view of the fundamental components and structure of Hohfeldian analysis. Part II then examines what Hohfeld has to teach Europe and vice versa. Part III points to a way forward with two constructive lessons, which respond to the central perils of disintegration facing Hohfeldian analysis.

I. The Structure of Hohfeldian Analysis

The Hohfeldian analysis of property, on our view, consists of four distinct but inter-related conceptual claims, each one leading to the next in a tightly-integrated theoretical structure. Each discrete claim should, in its particulars, be somewhat familiar but this may also prove somewhat misleading in two respects. First, our analysis of the precise content and implications of each point, standing on its own, often differs from standard understandings among both defenders and critics (as we indicate in the margins) – in ways that may initially seem subtle but ultimately yield powerful implications. Second, in any case what merits special emphasis is our view of the inter-relation of the claims, specifically: their order of conceptual priority and the distinct structural role played by each in the analysis. The full-blown implications of the distinct content and structure of our analysis will only emerge at the end,

when we deploy it to pinpoint precisely where both defenders and critics of "disintegration" go awry in their understanding of the sources of the problem and potential ways forward.

(A) Property is a social relation ("Dethingification")

(1) Social-relationality: A relation between persons regarding things

The beginning of wisdom for Hohfeldian analysis, the foundational claim from which all others flow, is that property is – *always and only* – a social relation.[6] As Hohfeld goes to great pains and length to emphasize at the outset of both his 1913 and 1917 articles, property as a legal concept refers *neither* to the thing that may be the ultimate object of legal entitlements *nor* to the relation of a person to the thing, but rather *solely* to the relation between persons regarding the thing.[7] To, in other words, a social relation.[8]

As a legal institution, property always pertains to how two or more persons are related with respect to a resource: Can one use the resource without another's interference? Can one exclude another's use of it? Can one remain secure against another's removal of one's use and exclusion entitlements? And so forth. There is no such thing as property on a desert island with one person.[9] Similarly, contrary to a misunderstanding persisting to the present, "possession" is simply not an entitlement of property – it denotes a relation between a person and a thing, not between persons regarding a thing (that relation is denoted by exclusion).[10]

---

[6] The singular content and centrality of this claim to Hohfeldian analysis merits emphasizing its distinction from formulations of the point that suggest that property is *both* a relation between a person and a thing *and* one between persons with respect to a thing. *See, e.g.*, SINGER, *supra* note 3 at 10; Carol Rose, *Storytelling about Property*, 2 YALE J. L. & HUMANITIES 37, 40 (1990).

[7] *See* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16, 20-28 (1913) (devoting eight pages "[a]t the very outset … to emphasize the importance of differentiating purely legal relations from the physical and mental facts that call such relations into being.") Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L. J. 710, 720-33 (1917) (devoting twelve pages to establish his first point, namely that "a right *in rem* is not a 'right against a thing.'").

[8] This is not to say that all interpersonal relations are, as such, properly considered "social," where that term is taken to impute a "public" rather than "private" character to such relations. However, the relations in question here clearly are "social" in the requisite sense, for at least two distinct reasons: (a) they are clearly "public" rather than "private," in the sense of obtaining between persons who may be perfect strangers, without any prior acquaintance; and (b) they are "public" in the sense of involving decisions by the state.

[9] There are, in fact, no legal rights at all in such a situation, but we leave that aside here.

[10] *See, e.g.*, A.M. Honore, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107, (A.G. Guest, ed. 1961) (referring to "the right to possess" as involving "exclusive physical control" over an object); JESSE DURKEMINIER ET. AL, PROPERTY 81 n.2 (6th ed. 2006) (property consists of "a number of disparate rights, a 'bundle' of them: the right to possess, the right to use, the right to exclude, the right to transfer."). Ours is not a terminological quibble. That is, in speaking of a "right to possess" one might have clearly in mind that it is precisely not a matter of "control over" an "object" – i.e., a person-thing relation – but rather of "exclusion of" a person – i.e., a person-person relation – and hence be guilty of no conceptual error, only loose terminology. Yet to refer to a "right to exclude" (another person) as a "right to possess" (an object) does encourage precisely the clouds of conceptual confusion and normative elisions that Hohfeld was at pains to eliminate. Moreover, to list a "right to possess" as part of the "bundle" of property rights *alongside* rights "to use" and "to exclude" can only evince faulty conceptualization – robbed of its role as a hazy substitute for the more precise "right to exclude," the phrase can only plausibly be taken to mean the flawed notion of a "right of control" over/against a thing, or simply be empty of meaning (a third possibility – that it is serving a substitute coverall term for the misleading "right to own" is foreclosed by the point that it is precisely "ownership" that is being unbundled by the enumerated rights). *See also* Burtel Shartel, *Meanings of Possession*, 16

The basic import of this claim is, of course, to guard against the false naturalization of normative social judgements, by checking against attempts to move straight from descriptions of physical facts and relations to substantive conclusions of "justice and policy."[11] Other powerful implications will be elaborated momentarily. Presently, however, the central point we wish to underline pertains not to its further implications as a stand-alone assertion but rather to its conceptual character and foundational status.[12] It is *not* a normative claim about how property rights should be shaped, but rather a positive claim about what property, as a legal concept and institution, simply *is*.[13] And it lies at the basis of the Hohfeldian analysis, being the platform upon which all subsequent claims are developed.[14]

(2) Correlativity: The competing-interests structure of the social relation

The social relations at issue in property are structured by correlative entitlement-disentitlement pairs, whereby an advantage for one person means a disadvantage for another. One cannot identify an entitlement or benefit for X without a correlative disentitlement or burden for Y.[15] Thus, the social relations of property involve – *always and necessarily* – pairs of

---

MINN. L. REV. 611 (1932) (in seeking to disambiguate different legal usages of the term "possession," focusing primarily on distinguishing between different aspects of person-thing relations and legal consequences therefrom, while viewing its use to refer to person-person relations in property as tertiary and irretrievably confused). We thank Henry Smith for drawing our attention to this article.

[11] Hohfeld (1913), *supra* note at _.

[12] It is these – the conceptual status, content and implications of the social-relational claim – that we are at pains to underline here. In other words, our argument is less concerned with what express verbal formulations are used by scholars when articulating the character of property rights – although some examples of formulations uncertain in their formal recognition of the social-relational point are given in notes 6, 10, 13 and 14. Rather, what is of much greater importance for our purposes is that, as a conceptual matter, the core substantive content and powerful stand-alone implications of the social-relational claim, as well as its status a conceptual (not normative) claim and its foundational role in the overall architecture of Hohfeldian analysis, have not been properly appreciated by either defenders and critics of the Hohfeldian view. However, even with respect to purely formal recognition, we should note that some scholars do seem expressly to reject the person-person conception of property rights in favor of a person-thing one, and indeed take this as an important divide internal to the critics of the Hohfeldian conception. *See* Adam Mossoff, *The False Promise of the Right to Exclude*, 8 ECON. J. WATCH 255 (2011) ("Among scholars who reject the bundle conception of property, there have been two different and opposing positions. On the one hand, I and others have sought to recover the earlier concept of property that was buried by the realists, recognizing that it refers to a specific relationship between someone and something in the world. Thus, the right to property secures a use-right in, agenda-setting control over, or a sphere of liberty in using this thing (Mossoff 2003; Katz 2008; Claeys 2009). … On the other hand, Tom Merrill and Henry Smith advance an alternative approach to recovering the right to property. They accept the legal realists' social conception of rights.") We thank Oren Bracha for this reference.

[13] This is contrast to those who treat the "social relations" claim as a purely normative position – *see* JOSEPH SINGER, PROPERTY LAW: RULES, POLICIES, PRACTICES – and ever more so to those who, in a reversal of conceptual priority, see it as building upon the bundle of rights claim rather than *vice versa*. *See* Claeys, *supra* note 1 at 620.

[14] This is in contrast to treatments of the point that fuse it with the bundle of rights claim. *See, e.g.*, Hanoch Dagan, *Doctrinal Categories, Legal Realism and the Rule of Law*, 163 PENN. L. REV. 1889, 1912 (2015). Or that treat it as just one of a series of discrete points, and seemingly a secondary one in comparison to the bundle of rights claim. *See* SINGER, *supra* note 3 at __.

[15] This point is a distinct further development of the preceding social-relational claim, since, of course, not all social relations need be so structured around correlative-claims/competing-interests. For instance, the teacher-student relation is an institutionalized, or social, relation that does not have this inherently competing-claims structure.

competing interests.[16]

Among the implications that follow from this set of claims, three are central.

"*Absolute*" ownership is a misnomer, not just normatively contestable. It is commonplace among those following in Hohfeld's footsteps to inveigh against an "absolutist" Blackstonian conception of property on the grounds that it is either undesirable or not descriptive of our present arrangements – and hence that the entitlements of property ought to be "relative" or subject to varying limits. However, once we fully internalize the point the property is a social relation, with correlative/competing entitlements, then the claim that entitlements *should be* "relative" or "qualified" is somewhat bizarre – since there is really no coherent sense to the notion of "absolute" entitlements once we understand their relational/correlative character. Once, that is, we fully internalize the social-relational character of property, it is simply either empty or unclear or incoherent to speak of "absolute" entitlements – the term either has no or vague meaning or it means "unfettered," which would involve a case that no jurist has ever had in mind.[17] The point, then, is not really a normative, but rather an elemental, or foundational, conceptual one – something missed in any discussion that emphasizes the "relative" character of property as being a somehow controversial or "modern" move.[18] The only thing modern about it is the explicit recognition of something that was always inescapable.[19]

Property is *not* a form of "negative liberty." Both defenders and critics of traditional or Blackstonian conceptions accept the premise that these constitute species of "negative liberty" – with defenders embracing that position and critics urging that in many circumstances we should normatively go beyond it.[20] But this, again, betrays a failure to fully internalize the relational character of property rights. Negative liberty means the "freedom from" or "absence of" coercive interference, either of the state or other private individuals. While "positive liberty" means the "freedom to" effectively pursue one's ends, via the "presence of" the necessary means, including by way of positive state provision of resources or other assistance. In the case of property, unless we hew merely to use-privileges – which no participant of this debate has in mind – then all other entitlements necessarily involve the intervention of the state to burden one person's negative liberty for the sake of enforcing another's entitlements. Moreover, such enforcement results, directly, in the deprivation of resources. And while the absence of resources is typically

---

[16] See discussion below, *infra* Part III at note 85 and accompanying text, of the "Cook/Corbin puzzle" regarding whether or not the power-liability pair may (sometimes) be an exception to this.

[17] For X to have unfettered entitlements against all persons with respect to a thing or good would mean that not only that (a) others had no legitimate interests in that thing or good meriting legal protection, (b) but also that they had no legitimate interests in other things or goods meriting legal protection, the exercise of which may in some cases come into conflict with X's exercise of entitlements pertaining to their thing or good, and (c) finally, that others also had no *other* legitimate interests – for instance, in their person – meriting legal protection, which may in some cases come into conflict with X's exercise of entitlements in their thing or good. The only actual imaginable case of "absolute" entitlements, then, is of a person living alone on an island – but in that case they have *no* property or, for that matter, *any other legal entitlements* since *all legal entitlements always and only* pertain to social relations.

[18] *See* Kenneth Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1979); ALEXANDER AND DAGAN, *supra* note 2 at 255.

[19] As a striking illustration of this point, think of Roman property. Property scholars and historians long presented it as the most perfect example of "absolute property," and only in "modern" times did they admit its relational and qualified nature. On the view that Roman property was absolute, see PIETRO BONFANTE, LA PROPRIETA' CORSO DI DIRITTO ROMANO, vol II, Milano, (1968) p. 327. For the modern view see Eva Jakab, *Land, Law and Exploitation of Natural Resources. Property Rights in Ancient Rome*, in LAND AND NATURAL RESOURCES IN THE ROMAN WORLD, (P. ERDKAMP, K. VERBOVEN AND A. ZUIDERHOEK eds, Oxford University Press 2015).

[20] *See* PENNER, *supra* note 4 at 50; Hanoch Dagan, *The Craft of Property*, 91 CALIF. L. REV. 1517, 1560 (2003).

thought to be a deficit only in "positive" rather than "negative" liberty, the point is that such deficits in positive liberty can stem directly from state action and not, as is commonly thought, only be attributable to state *in*action.[21] The persistent assimilation of "the right to property" as among the species of "negative" rights/liberty is another tell-tale sign of the failure to assimilate the relational character of property.

We hasten to add that – contrary to another common misconception – the *conceptual* point that property is a social relation does not by itself settle any *normative* questions. In particular, it does not automatically issue in the normative claim that property must have a "social function" or serve the "social interest," where these are taken to mean a "public interest" in contrast to private ones.[22] Or, in a related vein, in the conclusion that we have somehow ruled out justifications for property entitlements based on "natural rights" arguments of, for instance, labor/desert, autonomy or personhood. What the social relational claim does do, however, is press upon such – indeed, all – normative justifications the need for an explicit shift in frame: away from a unilateral focus on a given person and their activities and interests and toward forthrightly taking up the bilateral character of the question, involving as it always does contending claims.[23]

It bears underlining that to this point nothing has been said of property as a bundle of rights.

(B) Property is a bundle of rights ("Disaggregation")

From the first two foundational claims, that (a) property is a social relation (b) having a correlative/competing-interests structure, flow out the next two claims, subsumable under the distinct heading of "property is a bundle of rights."

(1) Divisibility: Distinct Pairs of Competing Interests = Distinct Entitlements

Precisely because any given entitlement of property entails a disentitlement for someone else, and hence implicates competing interests, we must be careful not to conflate distinct pairs of competing interests under the cover of some single umbrella term (be it "property" or "ownership" or "right"). For example: (a) It is one thing to protect X's interest in the use of a space, by not conferring on Y any entitlement to exclude X from accessing the space. (b) It is another thing entirely also to entitle X to prevent Y from also using the space, by conferring upon X the entitlement to exclude access. (c) And it is a third thing altogether to confer on X the

[21] Indeed, in what is commonly seen as the touchstone essay on this topic – and the one serving as the source for Professor Penner's claim at *supra* note 20 – Isaiah Berlin in fact recognizes a version of this Hohfeldian/Legal-Realist point. Namely that, once we recognize the pervasive role of the state in structuring the "background conditions" of the private sphere, the realm of "negative liberty" infringements expands dramatically – attenuating the conceptual and normative significance of the distinction between "freedom from" and "freedom to" to the point of replacing it with an alternative distinction, between a freedom of means versus a freedom of ends, or freedom as voluntariness and effective agency versus freedom as self-determination. See ISAIAH BERLIN, *Two Concepts of Liberty* (1958), reprinted in LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY, at 166, 170-72 (Henry Hardy ed., 2d ed. 2002).

[22] For examples of this blurring, see note 63, *infra* and accompanying text.

[23] For an illustrative example of the extent and depth of the trouble that meeting this requirement can pose for natural rights arguments, in this case of Lockean stripe, see G.A. Cohen, *Nozick on Appropriation, in* G.A. COHEN, SELF-OWNERSHIP, FREEDOM AND EQUALITY (1995).

entitlement to prevent Y from engaging in a noisy activity outside, in a neighboring space, that interferes with X's "quiet enjoyment" of the first space. Each of these cases implicates distinct kinds of competing interests. And, so, the entitlements of property are best understood not as consisting of only one or a necessarily unified aggregate, but, rather, a divisible "bundle."

This "divisibility" of ownership into discrete sets of entitlement-disentitlement pairs is of course the most familiar, indeed well-worn, theme of Hohfeldian analysis, going under the name of "disaggregation." What has been less well appreciated, however, is the difference between a "formal" versus "purposive" approach to drawing the Hohfeldian distinctions.[24] An illustrative example of the former – one spanning across the century of Hohfeld's reception[25] – is the use, to convey the distinction between a privilege and a claim-right, of the case of having merely an "exclusion-privilege" with respect to a piece of land, without an "exclusion-right" regarding the same. Yet the conferral of an "*exclusion*-privilege" over a resource without the corresponding right, while certainly a formal possibility, is, we suggest, also *merely* a formal one, one having little sense or purpose in virtually any real-world context we might be interested in. And the upshot of drawing up such formally possible, but practically inert, options is, we believe, a tendency for the meaning and point of Hohfeldian analysis to become lost, in the mists of the ad-hoc proliferation of logical variations without end. A purposive approach, by contrast, provides a controlling orientation to the elaboration of the distinctions, by grounding them in real-world issues, of policy-relevant distinctions between competing interests. Take, for example, the distinctions adduced in the previous paragraph: our first distinction, between a *use*-privilege and an *exclusion*-right, is of signal importance in the context of resources susceptible to nonrival uses, while the latter distinction, between a use-privilege and a use-right is, of course, central to the historical development of nuisance law,[26] in which context the latter right – being applied against neighboring, conflicting uses – is better understood, in fact, as converting a use-privilege over one's own resource into a distinct *exclusion*-right, now over the neighbor's (use of their) resource. A purposive grounding, such as this, of the analysis of divisibility provides, we believe, an important first safeguard against the descent of "disaggregation" into "disintegration."[27]

---

[24] This is one of two ways in which the view we are advancing here differs from the common understanding of the Hohfeldian analysis of "the bundle of rights" as a "purely analytic" approach. On this view, Hohfeld's analysis is taken to be both "pure" in the sense of "formal," and "analytic" in the sense of "atomistic." By contrast, we take the method underlying Hohfeld's analysis to be "purposive" rather than "formal," as adduced here, and, in contrast to "atomistic," "relational," as discussed in notes **Error! Bookmark not defined.**-84, *infra* and accompanying text.

[25] *See* Arthur Corbin, *Foreword*, *in* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 8 (Walter Wheeler Cook, ed. 1919); *and* Pierre Schlag, *How To Do Things With Hohfeld*, 78 LAW & CONTEMP. PROB. 185, 202-03 (2015).

[26] *See, e.g.*, Robert Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850-1920*, 59 S. CAL. L. REV. 1101 (1986).

[27] To be sure, simply grounding the analysis of divisibility in purposes is hardly an elixir against the perils of disintegration. Indeed, Professor Smith has argued that it is precisely a purposivity run amuck that leads the "bundle of rights" approach to an untenable ad-hocery. Smith, *supra* note at 1719-20. But as we discuss below, Professor Smith's argument considers together what for present purposes we seek to keep importantly distinct, namely: the case for *conceptual* parsimony, in devising a theory of property, versus the case for *institutional* parsimony, in devising or evaluating real-world property arrangements. *See* notes 79 and 80, *infra* and accompanying text. Bearing this in mind, our argument here is simply that a purposive approach to the analysis of disaggregation – i.e., of divisibility and, discussed next, variability – is an important *first* step in checking against *conceptual* ad-hocery (not, to be sure, the last step, as we elaborate below). This leaves open, as a matter for further *substantive* inquiry, the question of "how much" divisibility we should actually countenance in real-world property architectures, something that will no doubt depend on our sense of the balance of considerations such as the pursuit of substantive policy

(2) Variability: Distinct Contexts = Distinct Shapes for a Given Entitlement

An extension of the preceding point – one meriting singling out – is that not only may the conferral of the discrete entitlements upon distinct persons sensibly vary by purpose and context (divisibility), but so may the *shape of each individual entitlement* – in terms of, e.g., its existence (should it be conferred at all?), content (which activities should it cover?), holders (who and how many should enjoy it?) and remedy (how enforced?). This merits highlighting simply to guard against a tendency to take the content of the distinct entitlements as fixed, and thus to limit our understanding of the "malleability" of the bundle of rights to sub-dividing and reshuffling fixed sticks among different holders, as opposed also to include re-shaping the sticks themselves.

The content of these claims about the "disaggregation" – or divisibility and variability – of the entitlements of property are, again, the most familiar components of Hohfeldian analysis, falling squarely within the "bundle of rights" rubric. Less well appreciated, however, is an important point about their *status*. The "bundle of rights" or disaggregation claim is *neither* merely a description of existing legal arrangements (*viz.*, simply that they often do unbundle or disaggregate "ownership") *nor* just a normative exhortation of what they should be. Rather, it is a *conclusion* drawn out from the social-relational claim: namely, once we recognize that each entitlement is a social relation involving pairs of competing interests, then when distinct pairs of interests are involved it would simply be (a) a logical mistake and (b) practically troubling – on grounds of both procedural transparency and substantive cogency – to treat a decision on one pair of competing interests as the same as, or as controlling, a decision on a distinct pair.

When, however, the claim of disaggregation is set loose from its basis in the social-relational claim and also then delinked from its driving purpose – ensuring careful consideration of meaningfully significant distinctions in interests – it threatens to spin out into an endless proliferation of formally possible (even if practically inert) entitlement options, or to devolve into a laundry-list taxonomy of the fine-grained complexities of various and sundry existing arrangements. To threaten, in a word, disintegration.

(C) Dereification ≠ "Disintegration"

Does Hohfeldian analysis tend toward the disintegration of property – emptying it of any distinguishing features as a concept or field of law – as declaimed by some and decried by others?[28] On our view it need not: with the foregoing understanding of its content and structure in place, Hohfeldian analysis both *can and should* avoid the fate of disintegrating property. But to do so requires, first, disentangling a series of intricate conceptual wrangles that frequently mar received understandings, both of the central dimensions of Hohfeldian analysis and of what is at stake in disintegration. Unpacking these is the task of the present section. Its upshot is the need

---

purposes versus administrability, information costs, and so forth, as these play out in the context of different sorts of resources (with the drawing of distinctions between resources itself being subject to a parallel set of conceptual and substantive considerations, as discussed in Part III.A below). Whatever the outcome of specific such substantive inquiries, we remain steadfast in our view that, as an analysis of property's general form, "divisibility" as expounded here is (along with variability, discussed next) the proper *conceptual* upshot of Hohfeldian "disaggregation."

[28] *See* Vandevelde, *supra* note 18; Thomas C. Grey, *The Disintegration of Property*, *in* NOMOS XXII: PROPERTY 69 (J. Roland Pennock & John W. Chapman eds., 1980); Penner, *supra* note 1 at _; Smith, *supra* note 4 at _.

to supplement Hohfeldian analysis with two constructive developments – absent in the original scheme but true to its spirit – which we sketch in Part III.

(1) Dereification = Dethingification + Disaggregation + Dematerialization

To the core components of Hohfeldian analysis just elucidated may be added a third set of *distinct* points, concerning the dematerialization of both the objects and the interests of property, as follows:

Social-relations(SR)-dethingification: (a) property pertains to neither a thing nor a relation between a person and a thing, but a relation between persons with respect to a thing; (b) the social relation consists of legal entitlement-disentitlement pairs that simultaneously benefit the interests of some and burden the interests of others with respect to the thing; and (c) *dematerialization of objects*: finally, the things themselves, that are the object of the social relations, needn't tangible but can take intangible form, such as with inventive practical ideas or expressive arrangements of form.

Bundle-of-Rights(BR)-disaggregation: the entitlements of property are multiple, divisible and variable: (a) not just a single one nor a necessarily unified package; (b) nor uniform or invariant in their individual content; and (c) *dematerialization of interests*: the interests protected by the discrete entitlements needn't be concretely "physical" like "consumptive use," but may take increasingly "abstract" form, such as monetary value.

Two points are crucial to underline with respect to the relation of dematerialization to the core components of Hohfeldian analysis. First, as a long line of scholars has emphasized, in terms of historical development, the practices and insights associated with dematerialization likely proved crucial catalysts for the crystallization of the core SR and BR insights.[29] They did so by helping to "dereify" thinking about property, by making plainly unavailable – in the case of intangible objects or very abstract interests – reliance on any physical attributes, relations or activities as the sole basis of legal decisions.[30] However, and second, it must also be clearly borne in mind that despite the historical stimulus it provided, dematerialization is not only distinct from the SR and BR claims but also of secondary significance in the theoretical structure of Hohfeldian analysis. Indeed, the order of conceptual priority is the reverse of historical development: not only do the SR and BR claims, once we conceptually grasp them, not stand or fall with dematerialization, they are also more deeply secure, conceptual, claims. By contrast,

---

[29] *See* Vandevelde, *supra* note 18; Grey, *id*; Morton J. Horwitz, THE TRANSFORMATION OF AMERICAN LAW II (1992); Jane B. Barron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 UNIV. CINCI. L. REV. 57 (2014).

[30] Consider, for instance, Fredrick Pollock's path-breaking treatment of these issues, lying at the center of the historical process of dematerialization. Pollock's argument that to be a "thing" in law, an object of property needn't have any physical properties, has precisely the upshot of underlining that legal conceptualizations and decisions pertaining to such "things" must explicitly advert to underlying human interests and social purposes – *and that this also holds for physical things*, with the line of reasoning forced upon us by dematerialization now reaching back also to apply to material objects. *See* Frederick Pollock, *What Is a Thing?*, 10 L.Q. REV. 318, 320 (1894) ("At this point it may be worth considering, at the risk of an apparent paradox, whether corporeal things are themselves so corporeal as we think at first. For a material object is really nothing to law, whatever it may be to science or philosophy, save as an occasion of use or enjoyment to man, or as an instrument in human acts"). We thank Henry Smith for urging the significance of Pollock's analysis in this connection. For reliance on Pollock's argument as a basis for the "rethingification" of the objects of property in a post-dematerialization world, see note **Error! Bookmark not defined.**, *infra*.

dematerialization is more contingent in two respects: (a) its validity hinges upon specific historical developments in technology, culture and economic practices; and (b) even today, we could *choose not to* consider various intangible objects and abstract interests as conceptually or normatively adjacent to tangible and physical ones, for purposes of organizing fields of law or making substantive normative evaluations. The SR and BR claims on the other hand are bedrock.

Unfortunately, likely as a result of their historical intertwinement, the distinct conceptual content and status of these points has often been missed. Indeed, starting with Arthur Corbin at the onset of the reception of Hohfeld and continuing to the present, a persistent tendency for both defenders and critics of Hohfeldian analysis has been to blur together these distinct lines of analysis: not only to conflate dematerialization of objects with dematerialization of interests but, more fundamentally, to lump both in with the SR claim (often under the umbrella of "dephysicalization"), or even to drop SR out of the picture completely.[31] The problems created by such blurring are manifold: The distinct content, implications and generative status of the SR claim are lost from view; partly as a result, BR-disaggregation becomes unhinged, now set loose as a free-floating claim of uncertain provenance or status; and the conflation of dematerialization with SR-dethingification renders obscure both the precise characters of "disintegration" claims and the specific targets of critics' fire. Most generally, the distinct components and power of Hohfeldian analysis, with its clear delineation of different lines of analysis, alongside their relations of conceptual priority – to form a tightly-integrated and generative structure – is replaced by a series of now laundry-listed, now jumbled together, claims. All either to herald or decry a nebulous "disintegration" whose distinct sources and perils become harder and harder to identify or repair.

Specifically, talk of a single contrast between "right to a thing" versus "bundle of rights" views[32] obscures, when it doesn't simply conflate, three distinct dimensions of the Hohfeldian view that critics may mean to target and replace with a "rethingification" alternative: (a) SR-dethingification, or the account of property as a social relation; (b) dematerialization of the objects and interests of property entitlements; or (c) disaggregation of the entitlements of property into a divisible and variable set. Comprehensive exploration of which of these distinct candidates different critics have in mind – and of their specific grounds of criticism and the merits of their proposed alternatives – is beyond our present scope.[33] For present purposes, it suffices to emphasize that clarity about these distinct lines of analysis is the indispensable first step, *both* for specifying what precise concerns disintegration is thought to pose, and for developing constructive ways forward. In what follows, we focus on advancing our own views along these two fronts – touching only briefly in the margins on how these relate to "neoHohfeldian" disintegration views and those of "neoBlackstonian" critics.[34]

---

[31] Corbin (1923), Vandevelde (1979), Grey (1980), Horwitz (1992), Penner (1996), Smith (2011); (2012); Munzer (2011); ALEXANDER AND DAGAN (2012), Barron (2014).

[32] *See, e.g.*, Claeys, *supra* note 1 at (speaking of "*the* […] contrast" between a "thing versus ad hoc bundle" views) (emphasis added).

[33] One of us is presently engaged in such a comprehensive examination, as part a fuller treatment of many of the topics addressed in more abbreviated form here. Talha Syed, *The Architecture of Property: Structure and Purpose in Hohfeldian Analysis* (draft manuscript on file with the authors).

[34] See notes 35, **Error! Bookmark not defined.**-70, 79-**Error! Bookmark not defined.**, *infra* and accompanying text.

(2) Disintegration = Unmooring SR-dethingification + Unspooling BR-disaggregation

To begin at the end, so to speak, the way out of disintegration starts by breaking down the question – "what is property?" – into two distinct lines of inquiry: (a) What is property *about*? That is, what differentiates property, as a concept or field of law, in terms of its distinctive subject matter? and (b) What does property *consist of*? That is, what are the central legal entitlements that can provide the organizing focal points for positive, normative and institutional analysis of the field?[35]

With the questions so framed, does Hohfeldian analysis provide clear, non-disintegrative, answers? Yes and no. On the one hand, nothing in the social relations claim prevents us from offering a relatively clear and distinct answer to the first question: property is the field of law pertaining to "social relations with respect to things." Of course this answer does face difficulties on a Hohfeldian view, but what is important to recognize is that these difficulties stem *not* from the social relations or "dethingification" claim, but, rather, from a further set of insights – those pertaining to the dematerialization of the objects and interests of property. These insights, by loosing property from the anchor of "things," threatens to unmoor the field, robbing it of any firm grounding in a distinctive subject matter. The task, then, is how to avoid this "unmooring" of the field, while retaining the core insight that property is, indeed, a field of social relations about … *what*? Our answer, developed in what follows, is: neither *everything and hence nothing in particular* (disintegration), nor a re-assertion of *things* (rethingification) but, rather, *resources*.

Concerning the second question – of what entitlements does property consist? – here the difficulty with the core of Hohfeldian analysis is greater. Under the heading of disaggregation, we have a pair of conceptual insights regarding the divisibility and variability of entitlements but little idea of what they mean going forward. Are there any "core" or central entitlements to serve as the focus of analysis, or does disaggregation simply "unspool" into a laundry list of discrete entitlements, devolving into an ad-hoc analysis of piecemeal entitlement-disentitlement decisions, taken up one at a time? The latter peril would seem to loom especially large where, as discussed above, the analysis of entitlements is not grounded in any controlling purposes. And one possible grounding – that the entitlements pertain to "things" – is, again, made unavailable by dematerialization. The first step, then, in avoiding unspooling is to anchor the analysis of property's entitlements in an analysis of its distinctive subject matter, resources. A second step,

[35] We acknowledge that these are not the only ways to frame the inquiry. Indeed, part of our argument concerns the advantages of this particular framing – one that flows directly out of our understanding of the structure and purpose of Hohfeld's own enterprise – over alternatives. As an illustrative contrast, consider Professor Grey's influential discussion of disintegration, framing the issue in terms of the following two questions: First, what does ownership consist of? Second, what can one have property rights "in"? Grey, *id.* at 69-70. (A similar frame is adopted in Vandevelde, *supra* note 18.) From our vantage, this way of approaching the issues bears two significant drawbacks. First, to consider the ownership question first – before and in isolation of the issue of "ownership of <u>what</u>" – is precisely to put the cart before the horse. On our – purposive – view of concept-formation, one cannot even begin to answer what ownership may, does, or should consist of unless we first have an idea of what property is *about* (and thus what may be "owned"). Second, to inquire into what one can have property rights "in" is a quite distinct matter from asking what property is about. The latter formulation directs our attention to precisely the task at hand: namely, to conceptualize an institution or field in light of some sense of our governing purposes, the cognitive and practical interests at stake. The former question, on the other hand, invites not only a purely descriptive inquiry into existing legal practices but also one that takes their surface terminology at conceptual face value – so that whenever the term "property" is invoked by legal professionals, we simply accept that the relevant underlying concept is in play. Thereby disabling us, right at the outset, from developing any theoretically powerful conceptualizations.

equally necessary, is to structure the analysis of entitlements themselves in a more conceptually integrated manner. We advance a way of doing so in Part III.B. below, to develop a picture of property as consisting neither of *anything* (disintegration), nor *one single thing* (a "core" or "essence") but rather an *architecture* of elemental entitlements, the *fundamental building blocks* for all property forms.

II. An Autonomous Tradition of Property Analytics in Europe: Resource-specific Property Disaggregation

The revised Hohfeldian analytical scheme that we have just outlined highlights the contextual and, as we will develop, resource-specific character of property. Property, we argue, is a legal relation between persons with respect to "things" (resources), a relation structured by correlative legal entitlement-disentitlement pairs, in which the conferral and shape of any particular entitlement depends on context and purpose – more precisely, we will argue, on the distinct interests and values implicated by distinct kinds of resources. The focus on the "thing" was marginal to Hohfeld himself and intentionally dropped in neo-Hohfeldian dematerialization accounts, in which property became unmoored, so as to no longer be anchored in *any*thing. But the resource-specific character of property was central to an autonomous tradition of property disaggregation developed in Continental Europe. It is to this tradition that we now turn, with the aim of retrieving its fundamental insights and illustrating the main stages in its development.

(A) The Roman "Law of Things" and the contextualist focus on resources

As is often the case when one seeks to understand continental European property law, we have to start with Roman law.[36] Our search for the European Hohfelds takes us back to the late Republic, a time of great juristic creativity, when the main features of Roman law as we know it today took shape.[37] Roman property has long struck the imagination not only of lawyers but also of historians, economists and philosophers because of its allegedly "absolute", "individualistic", "unitary", "extremely concentrated" nature.[38] This idea of Roman *dominium* being absolute and unitary is a pervasive one and its traces in the modern philosophical, economic and legal literature on property are ubiquitous. But, as Italian Roman law scholar Vittorio Scialoja put it, it is a legend.[39] This legend was concocted by the "Romano-Bourgeois" jurists, the liberal jurists

---

[36] For a relatively recent discussion of the importance of grounding the study of European property law in its Roman and medieval past see George L. Gretton, *Ownership and its Objects*, Rabels Zeitschrift für ausländisches und internationales Privatrecht, Bd. 71, H. 4 (Oktober 2007), pp. 802-851.

[37] H.F. JOLOWICZ & BARRY NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW (3rd edition, Cambridge University Press, 1972, reprint 2008) at 5.

[38] A quick glance at Roman law textbooks reveals the ubiquitous presence of the idea that Roman property is absolute and unitary. See JOLOWICZ & NICHOLAS *supra*, at 140 (arguing that "The Roman law of classical times, -a leading textbook reads- is dominated by what is commonly called the absolute conception of ownership" defined as "the unrestricted right of control over a physical thing"); W. W. BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW AND COMMON LAW (Cambridge University Press, 2nd edition 1952, reprint 2008) at 81-82 (arguing that the owner has very limited ability to parcel out to other individuals these three entitlements, in the way, in the Anglo-American common law and that this limited ability makes property a "unitary" or "concentrated" right).

[39] VITTORIO SCIALOJA, LEZIONI DI DIRITTO ROMANO, (1885) (The Roman theory of property has inspired the strangest legends not only among the populace but also, sometimes, among the educated).

who, in the nineteenth century, sought to construct a modern, individualistic property law for liberal, capitalist European nation states along the lines of Roman *dominium*. The truth is that Roman property law was less "absolute" and "individualistic" and "unitary" than the Roman-Bourgeois jurists would have us believe.[40] And, moreover, *dominium* was just one the many forms of ownership available in Roman law. It was the supreme form of ownership, reserved to Roman citizens, exempt from taxation and protected through the action known as *rei vindicatio*, which was a formal assertion of absolute title.[41] However, alongside *dominium*, there existed a large menu of more limited and differently shaped forms of "ownership" that were largely "resource-specific", i.e. tailored on the specific characteristics of and interests implicated by different resources.

The contextual focus on resources is a critical feature of Roman property law that has attracted scant attention in contemporary property law literature. Roman jurists developed a highly sophisticated "law of things", i.e. a classification of the various types of *res* that can be the object of property rights. Roman law, classified the various *res* according to their physical characteristics, the economic and social policy interests they involved and the moral and cultural values they implicated. In modern property law, the most familiar and fundamental distinctions are that between real property and personal property, and between private property and public property. But these two sets of categories were marginal to the Roman law of things. For the Romans, the critical distinction was that between *res in commercio* and *res extra commercium.*[42] The former were things that can be the object of private property, while the latter were things that, because of the social, moral or cultural values associated with them, cannot be the object of private property and of market transactions. The *res extra commercium* were further divided in *res (extra commercium) divini iuris* which could not be privately owned and exchanged because of their religious significance and *res (extra commercium) humani iuris* which were exempted from private property and commerce because they implicated important public interests. Among the things that were exempt form private property and market transactions because of the public interest they involved, particularly important were the *res communes*.[43] These were things like the sun, the air, the sea, the shores, that are given to all as an essential, innate gift and hence belong not to the state but to the public, who has a temporary and limited, but legally protected, right to access and use. Another critical category was that of *res mancipi*, things that had critical socio-economic value, the transfer of which required specific, highly ritualized modalities capable of ensuring certainty and publicity in economic transactions.[44] Yet another distinction, largely opaque to us because rooted in Stoic physics, was that between *res unitae* (single things,

[40] Eva Jakab, *Land, Law and Exploitation of Natural Resources. Property Rights in Ancient Rome*, in LAND AND NATURAL RESOURCES IN THE ROMAN WORLD, (P. ERDKAMP, K. VERBOVEN AND A. ZUIDERHOEK eds, Oxford University Press 2015).

[41] PIETRO BONFANTE, LA PROPRIETA'. CORSO DI DIRITTO ROMANO, vol II, Milano, (1968) p 327.

[42] See Yan Thomas, *Le Valeur des Choses. Le Droit Romain hors la Religion*, in ANNALES, HISTOIRE, SCIENCES SOCIALES 57 annee N6 nov-dec 2002 pp 1431-1462 (arguing that by classifying things into *res in commercio* and *res extra commercium*, the Romans marked off a separate realm, that of the sacred, the religious and the public, which are seen as contiguous and very close to each other).

[43] The list of res communes is in JUSTINIAN, INSTITUTES, (translated and with an introduction by Peter Birks and Grant McLeod, Cornell Univeristy Press, 1987), book II, 2.1 *de rerum divisione*; on the debate on the nature and significance of the concept or *res communes* see, Bonfante, La Proprieta', *supra* note, p.55.

[44] PIETRO BONFANTE, RES MANCIPI E RES NEC MANCIPI, ROMA (1988).

infused with one single breath of *pneuma*, the world soul), *res compositae* (composite things), and *universitates rerum* (totalities of things).

For each of these *res,* the owner's entitlements were shaped to reflect the special interests and values implicated by the resource. The characteristics of the resource determined (a) which entitlements were conferred to the owner (b) the scope of the owner's entitlements; (c) whether these entitlements were exclusive or shared with others. This contextualist focus on resources meant that, alongside *dominium*, the supreme and full (even if never "absolute") form of ownership, Roman law allowed for a wide menu of more limited forms of ownership for specific resources that were critical for the Empire's economic, military and political needs. For example, land situated in the provinces of the Empire was a critical resource for both economic and geo-political reasons. Accordingly, property entitlements were split between the Roman state and private "owners" or users and shaped to achieve a variety of goals. The vast literature on the Roman province of Egypt gives us a good sense of what some of these goals and policies were. By recognizing "ownership" bundles with different scope and shape, the Roman state sought to balance two, largely conflicting, goals: advancing the economic power and political influence of the Empire's landowning elite and securing significant stable state revenues in the long term.[45] Another reason for the state to retain control on provincial lands was the role it played as an economic actor, deciding what crops would be planted and, for example, subsidizing the production of wheat by leasing wheat land on favorable terms.[46] Another specially tailored form of ownership was ownership of "*ager publicus*", i.e., land situated in Italy, for which the state retained title while granting private users entitlements that, with time, came to resemble "ownership". The content and scope of users' entitlements were shaped to encourage the establishment of large-scale commercial farming at a time when a Mediterranean market economy was developing.[47]

(B) The Medieval Concept of "dominim divisum"

While these more limited forms of resource-specific property were central to Rome's social and economic life, they were never explicitly theorized or conceptualized. Roman legal thought was eminently practical and disinclined to offer abstract definitions.[48] Modern jurists have painstakingly searched for *the* definition of the concept of property in the Roman sources, but none of the many supposed definitions they found can hardly be considered *the* definition. For a conceptualization of property able to accommodate these more limited forms of resource-specific ownership we have to wait for the 14th century, when the jurists known as the "Glossators" and the "Commentators" were busy developing a property law functionally suited to the socio-

[45] See Dennis P. Kehoe, *Property Rights over Land and Economic Growth in the Roman Empire*, in OWNERSHIP AND EXPLOITATION OF LAND AND NATURAL RESOURCES IN THE ROMAN WORLD, *supra* note, p. 88-106, at 90-91; Id., LAW AND RURAL ECONOMY IN THE ROMAN EMPIRE (The University of Michigan Press, Ann Arbor, 2007); On the political significance of the imperial agrarian land policy in Egypt see ANDREW MONSON, FROM THE PTOLEMIES TO THE ROMANS: POLITICAL AND ECONOMIC CHANGE IN EGYPT**,** (Cambridge University Press, 2012).

[46] Id., p. 101.

[47] SASKIA ROSELAAR, PUBLIC LAND IN THE ROMAN REPUBLIC. A SOCIAL AND ECONOMIC HISTORY OF AGER PUBLICUS IN ITALY, 396-89 BC, (Oxford University Press, 2010), pp. 3-4.

[48] ALDO SCHIAVONE, THE INVENTION OF LAW IN THE WEST, (Belknap/Harvard University Press 2012) p. 76-80; FRITZ SCHULTZ, ROMAN LEGAL SCIENCE (Oxford University Press, 1946) pp 6-20; BRUCE W. FRIER, THE RISE OF THE ROMAN JURISTS (Princeton University Press, 1985) p 191.

economic and political needs of their own world, medieval society, using Roman materials.[49] This task required conceptual creativity as well as pragmatic awareness of the problems and needs of the real, actual life of property law. It is to the creativity and pragmatism of one of the most prominent "Commentators", Bartolus of Saxoferrato (1313-1357), that we owe *dominium divisum*, a new concept of property informed by two fundamental intuitions that today we associate with Hohfeld: (a) that property consists of analytically distinct entitlements and (b) that each entitlement in the bundle is variable, i.e., its very existence, scope and the number of its holders can vary without property losing its "propertiness". The concept of *dominium divisum* describes a type of property in which the distinct entitlements that ownership comprises were split between two "owners", who have respectively "*dominium directum*" and "*dominium utile*". While, roughly, the former had formal title, the right to receive some form of rent and the right to transfer title and the latter had the right to use, to appropriate the revenue generated by the property and the duty to pay rent, the specific shape and scope of the two owners' entitlements varied. In each of the property forms that Bartolus conceptualized as instances of *dominium divisum*, i.e. feudal tenure, *emphyteusis*, *superficies*, and the long term prescription (*longi temporis praescriptio*), the two owners' bundles were differently shaped and yet they were still "*dominium*", thereby emphasizing the malleability of property.[50]

Why Bartolus felt the need to finally formulate a concept of variable and divided ownership, the absence of which had not precluded the development of a sizable menu of forms of divided, resource-specific ownership in Roman times, is a fascinating question. The answer we suggest is that the structure and the daily lived experience of medieval society made medieval jurists uniquely aware of the fundamental insight in which any concept of variable and divided property is rooted, i.e., that property is a social relation, a relation between persons concerning a resource. Crafting a new concept of *dominium divisum*, consisting of analytically distinct entitlements each of which can be variously shaped, requires abandoning any abstract notion that property is a thing or a physical relation between a person and a thing and realizing that property, always and inevitably, involves relations between persons. The Roman political and cultural imaginary, largely shaped by Roman "Classical Law", obscured the web of social relations regarding resources; instead it spotlighted the relation between two poles of power, strong private property, conceived in very abstract terms, and a well-developed central state.[51] The disintegration of the Roman state ushered in a feudal structure in which everyone, feudal lords, vassals and serfs, is tied up in hierarchical relations regarding access to land. Feudalism forced medieval jurists to

---

[49] MANLIO BELLOMO, THE COMMON LEGAL PAST OF EUROPE (Lydia G. Cochrane transl. 1995).

[50] Andre Van der Walt and D.G. Kleyn, *Duplex Dominium: The History and Significance of the Concept of Divided Ownership*, in ESSAYS ON THE HISTORY OF LAW (D. P. Visser ed.) p 213-260; Thomas Rufner, T*he Roman Concept of Ownership and the Medieval Doctrine of Dominium Utile*, in THE CREATION OF THE IUS COMMUNE. FROM CASUS TO REGULA, John W. Cairns and Paul J. du Plessis eds, 2010) p 127-142; Ennio Cortese, *Contorversie Medievali sul Dominio Utile: Bartolo e il QUIDAM DOCTOR DE AURELIANIS*, IN AMICITIAE Pignus, Studi in Ricordo di Adriano Cavanna, Antonio Padoa Schioppa, Gigliola di Renzo Villata, Gian Paolo Massetto eds., 2003) p. 613-635; Robert Feenstra, *Les Origines du Dominium Utile Chez les Glossateurs* (avec un Appendice concernant l'opinion des ultramontanes), in FATA IURIS ROMANI ETUDES D'HISTOIRE DU DROIT par Robert Feenstra, 1974) p. 21-259; PAOLO GROSSI, LE SITUAZIONI REALI NELL'ESPERIENZA GIURIDICA MEDIEVALE. CORSO DI STORIA DEL DIRITTO (1968) p144-208.

[51] Of course, our modern understanding of the Roman law is largely based on what generations of modern Roman law scholars regarded as "classical law", the layer of juristic writing they believed to be "original", see SCHIAVONE, *supra* note 44, at 26-28; se also BRUCE FRIER, THE RISE OF THE ROMAN JURISTS (Princeton University Press 1985) at 252-268.

abandon abstractions and to realize that property is about hierarchies and complex webs of social relations.[52] Of course, it would be anachronistic to expect medieval jurists to explicitly crystallize their intuitions into an articulate conceptualization of property is a social relation. However, in avoiding the anachronism we should also not fail to see how, in retrospect, their development of the concept of *dominium divisum* was, indeed, rooted in glimmers of this realization.

Dominium divisum was the general conceptual category to describe the many, feudal and non-feudal, property forms that involved a relation between a "superior" owner and an "inferior" owner regarding access to a parcel of land. In each of the many property forms that belonged to the larger category of *dominium divisum*, ownership entitlements were differently shaped so as to structure different types of relations between the two owners with regards to the land. In some forms, the relation between the two owners was social and political, with the superior owner entitled to receive homage, military aid and to exercise a variety of jurisdictional rights and recreational privileges.[53] Other forms of *dominium divisum* were largely economic in character and resembled today's lease, with entitlements shaped to give the parties different degrees of control over the management and profits of the land.[54] In other words, medieval jurists felt the need to develop the concept of *dominium divisum* when faced with the new reality of feudal society, in which people were immersed in a complex web of political, social and economic relations with regards to land. The new concept of property as *dominium divisum* allowed the jurists to describe the new reality and to acknowledge and embrace their role as the technicians who shaped ownership entitlements to achieve a variety of political, social and economic goals. Practically, articulating the new concept required overcoming a number of major conceptual difficulties, such as the Roman rule that explicitly rules out the possibility of two owners for the same thing.[55] But Bartolus and his contemporaries were ready to bend and twist the Roman rules because the abstraction of Roman absolute *dominium* had lost its descriptive power. The new feudal world required a new property methodology that married the need for conceptual

---

[52] *See* ELLEN M. WOOD, FROM LIBERTY TO PROPERTY: A SOCIAL HISTORY OF WESTERN POLITICAL THOUGHT FROM THE RENAISSANCE TO ENLIGHTENMENT (2012).

[53] For a detailed discussion of the many forms of *dominium divisum* in medieval and early modern France see MARCEL GARAUD, LA REVOLUTION ET LA PROPRIETE FONCIERE, (Sirey, Paris, 1959) at 15-51.

[54] This was the case for forms such as *emphyteusis* and *bail a rente*, see GARAUD, *supra* note 48 at 39 and 122-124.

[55] The road towards *dominium divisum* was not a smooth one. The most significant obstacle was that, while in both feudal property and non-feudal forms of split ownership, there appeared to be two owners, the superior owner and the inferior owner, Roman law explicitly ruled out the possibility of two owners of the same thing. A passage of the Digest (D13.6.5.15) made it clear that "*duo non possunt habere dominium eiusdem rei in solidum.*" What this rule meant is that there can very well be two or more co-owners of one thing, each owning a "share," but no two persons can own the entirety of the same thing at the same time. This raised a crucial question, clearly stated in a passage from the collection of Roman definitions known as *Excerpta Codicis Vaticani*: are the inferior parties in the relationship (the e*mphyetcarius*, the *superficiarius*, the *colonus*) actual owners or mere holders of *iura in re aliena*? Bartolus confidently declares that *both* are owners because there are two types of ownership, *dominium directum* and *dominium utile*. "A German doctor who yesterday held a class (*repetitio*) here" – Bartolus explains – "reports that there is only one type of ownership. But there are two." Bartolus then proceeds to support his statement with Roman texts. The *Lex Possessores* (C.11, 62,12), a late constitution included in Justinian's compilation, described the holders of a right of *emphyteusis* as "owners of the land" (*fundorum domini*). And yet, according to another text, (C 4.66.1-2) Bartolus explains, someone else remains the owner *vis-a-vis* the lessor. If there are two owners, Bartolus concludes, then the types of ownership must be different, because the same ownership cannot belong to two persons as stated in the Digest (D 13.6.5.15). See Rufner, *supra* note 46 at 131 and 139-141.

systematization with close sociological attention to the variety of relations between individuals regarding land.

(C) The Concept of Property as a Tree

The Roman "law of things" and the concept of *dominium divisum* introduced into European property thought the awareness that property, rather than being a monolithic right, involves a number of distinct and limited entitlements, each of which may be shaped and divided to best promote the values and interests implicated by the different resources that are the object of property. *Dominium divisum* continued to be an accurate description of landownership in continental Europe throughout the early modern era. However, starting in the 18th century, as feudal property relations transformed and economic and political modernity started taking shape, *dominium divisum* and the forcus on the resource lost their descriptive usefulness and their appeal. By the 18th century, landholding relations throughout Europe had fundamentally transformed, with a gradual but steady shift in the socio-economic and legal status of "superior" and "inferior" "owners".[56] The bond between the "superior" owner and the land became increasingly tenuous while the bond between the "inferior" owner and the land grew stronger. One of the fundamental ideas of political and economic modernity was to transform medieval, limited "inferior" ownership into full-blown ownership.[57] Jurists, economists and philosophers embarked in the project of crafting "Roman-Bourgeois" property, a new concept of unitary and full property for modern, liberal, capitalist European nation states, modeled along the lines of Roman *dominium*. The jurists did the conceptual groundwork, while the economists developed a new political economy that praised the economic and civic-republican benefits of absolute property[58], and political theorists proposed a new constitutional vision of equal citizenship based on the demarcation between absolute private property and public sovereignty.[59] At the dawn of the 19th century, absolute and unitary property was enshrined in the *Code Napoleon*.[60] And, in the decades between the Bourgeois Monarchy of Loius Philippe and the end of the 19th century, French jurists completed the work, interpreting the *Code*'s property in light of the mandates of liberal individualism, effectively transforming it into full blown Roman Bourgeois property.[61] Charles Bonaventure Marie Touiller, the author of one of the most influential "commentaries" on the *Code Napoleon*, captured the essence of Roman-Bourgeois property in one brief sentence

[56] MARCEL GARAUD, LA REVOLUTION ET LA PROPRIETE FONCIERE, (Sirey, Paris, 1959) at 2.
[57] See RAFE BLAUFARB, THE GREAT DEMARCATION. THE FRENCH REVOLUTION AND THE INVENTION OF MODERN PROPERTY (Oxford University Press 2016) at 48-57. Of course, the other parallel transformation was the enclosure of common lands and the abolition of rights over communal lands. *See* JOHN MARKOFF, THE ABOLITION OF FEUDALISM. PEASANTS, LORDS AND LEGISLATORS IN THE FRENCH REVOLUTION (Pennsylvania State University Press 1996) at 485.
[58] JOHN SHLOVIN, THE POLITICAL ECONOMY OF VIRTUE. LUXURY, PATRIOTISM AND THE ORIGINS OF THE FRENCH REVOLUTION (2006).
[59] RAFE BLAUFARB, THE GREAT DEMARCATION. THE FRENCH REVOLUTION AND THE INVENTION OF MODERN PROPERTY (2016) p 48-80.
[60] Andre-Jean Arnaud, Les Origines Doctrinales du Code Civil Francais (Librairie Generale de Droit et de Jurisprudence 1969) at 179 ff.
[61] Michel Vidal, *La Propriete dans l'Ecole de l'Exegese in France*, QUADERNI FIORENTINI, 5-6 (1976-1977).

that seems a direct refutation of any Hohfeldian insight: "property is the relation between a person and a thing irrespectively of all others".[62]

Roman Bourgeois property was the dominant conceptualization of property throughout the 19th century. Classical liberal jurists and their social critics engaged in a close debate over its conceptual accuracy, its policy implications and its moral foundations. The latter exposed the unrealistic assumptions behind Roman Bourgeois property, sought to mitigate its most obvious distributive inequities and questioned its moral foundations. However, they did not provide an alternative conceptualization of property. It is only in the first half of the 20th century that a new generation of French and Italian jurists developed a new conception of property that rested on some intuitions having affinity with the ideas underlying Hohfeld's approach. A recent and radical transformation in the actual life of property law, these jurists argued, demanded a new concept of property. The decades between 1850 and 1920 witnessed momentous economic, social, and political changes: the rapid industrialization of late-blooming economies such as France and Italy, the agrarian crisis of the 1880s, World War I, the crisis of liberalism, and the rise of Fascism. Under the pressure of these events, property was transformed, becoming more limited and "specialized" or "pluralistic." Special legislation limited the use rights and transfer rights of owners of things of historical and artistic interest, imposed duties on owners to improve and to cultivate their land, subjected owners of utilities or industries of critical importance for the national economy, such as textile or manufacturing, to duties and limits. Emergency legislation passed during World War I further limited the rights of owners of resources critical to national security and the inventory of resources subtracted from private property and held by the state in trust for the public was expanded to include water, forests, and mines. The protection of the owner's absolute rights was no longer the paramount concern and equal access to property and the public interest became part of the vocabulary of property.

These changes in the legal regime of property were the catalysts that helped this new generation of jurists come to see the concept of property in a new light, revealing what more than a century of Roman-Bourgeois emphasis on the individual owner's absolute right had obscured: that property rights have significant effects on social relations among individuals regarding access and use of resources. Articulated in the guise of the "social function" of property, this new concept closely interwove the empirical registry of increasing social interdependence with a normative emphasis on the need for property to serve a "public interest."[63]

The two jurists who made the greatest contribution to the reconceptualization of property were the French Louis Josserand (1868-1941) and the Italian Salvatore Pugliatti (1903-1976). The concept of property Josserand and Pugliatti developed sought to mediate two conflicting impulses: disaggregating property into a plurality of resource-specific regimes, to reflect the

---

[62] CHARLES BONAVENTURE MARIE TOUILLER, DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE NAPOLEON (Paris, 1811-1831), t.3, n. 84, p70.

[63] In two respects, then, this process paralleled the one we described above concerning dematerialization: (a) just as dematerialization of the objects and interests of property proved a crucial historical stimulus to the conceptual crystallization, by Hohfeld, of property as a social relation, so increasing industrialization and socio-economic interdependence catalyzed a conceptual focus, by Josserand and Pugliatti, toward property's "social function"; and (b) just as Hohfeld's social relations insight was often buried under, being entangled with, a mass of dematerialization points, so here the conceptual aspect of property's "social function" was often directly assimilated to normative claims regarding the "public interest." Indeed, the conceptual claim of property *as a social relation* – as distinct from its empirical (property *affecting* social relations) and normative (property *serving* social interests) dimensions – seems not to have been explicitly recognized, or at least articulated, by the "social function" theorists.

changes they were witnessing in property law, and preserving a robust core for property rights in a Europe threatened by totalitarianism. In Pugliatti and Josserand's new conceptualization, property resembles a tree with a unitary trunk and many branches.[64]

The trunk is the essence of property, the core entitlement or entitlements that are necessary for a right over a thing to be property. For Josserand and Pugliatti, the trunk is the owner's right to control the use of the resource.[65] However, the theorists of the tree concept realized that protecting the owner's sphere of autonomous control was not enough and that a modern, liberal concept of property had to acknowledge that property also implicates the public interest. The rise of Fascism, they realized, was the consequence of liberals' insensibility to new ideas about the proper balance between individual rights and the interest of the collectivity. The tree-concept jurists' solution was to argue that owners should exercise their use-control entitlements, while remaining mindful of property's "social function."[66] The "social function" of property is part of the trunk of the tree. Property, Josserand and Pugliatti suggested, had always included social elements. At no point in history, not even in Roman law, was property absolute and the idea of a social interest, parallel to the interest of the individual owner, had always been there.

The problem with the notion of "social function" was that it was hopelessly indeterminate. Its content and the precise extent of the duties it imposed on owners were highly contested. The tree-concept theorists' response to indeterminacy of the "social function" was captured in the image of the branches of the tree. Josserand and Pugliatti drew inspiration from the Roman "law of things" and argued that the "social function" concept alludes to the multiple values and interests implicated by different resources. The branches of the property tree are many resource-specific agglomerates of entitlements: agrarian property, family property, affordable urban residential property, entrepreneurial property, and intellectual property. The content of the social function of property is different for each of the branches. Because of the differences in its object," Josserand argued, "property takes on different shapes depending on the type of resource involved. Property is no longer uniform, rather it is multiform, infinitely diverse and varied. There is no longer one property but many properties subject each with its own specialized regime."[67] No longer "one" but "infinitely … varied," property, it would seem, had again disintegrated.

III. What is Property? Two Modest Ways Forward

As we have seen, in both American and European debates the specter of disintegration haunts post-formalist conceptions of property, making clear the need for better answers to "what is property." An initial step in the right direction, we have suggested, is to break that question down into two distinct sub-parts: (a) what is property *about* – as a distinct concept or field of

[64] SALVATORE PUGLIATTI, LA PROPRIETÀ NEL NUOVO DIRITTO 149 (Dott. A. Giuffrè ed., 1964).
[65] The conceptualization of this "right" involved eliding precisely what Hohfeldian analysis would insist on keeping sharply distinct, namely interests in use protected by use-privileges versus interests in use protected by exclusion-rights.
[66] PUGLIATTI, supra note 8, at 281 (starting his discussion on the social function of property by saying that "the core of property is now open to transformations").
[67] Louis Josserand, Configuration du Droit de Propriete Dans L'ordre Juridique Noveau, in MELANGES SUGIYAMA 101–03 (1940), at 100.

law?[68] and (b) what does property *consist of* – in terms of its central, identifying forms of legal entitlements? And answers to each of these can only be evaluated in light of our reasons for why we need an answer – in light of, that is, our sense of what precisely is wrong with the forms of disintegration corresponding to each question: unmooring and unspooling.

(A) What is property about? (the objects of property)

On the disintegration view, the dematerialization of the objects and interests of property is taken to issue in the conclusion that since property rights needn't relate to tangible "things," they can obtain in "anything and everything." But if property is about everything it is also about nothing in particular, emptying the field of any distinguishing features. And what's wrong with *that* is two-fold. First, such an intellectual move disarms us in the face of real-world cognitive and institutional practices, where "property law" is still taught in law schools, understood as a field of legal scholarship and its concepts regularly invoked in real-world legal disputes and policy decisions. If these practices really are about nothing in particular, we should at least explain why their distinguishing boundaries nevertheless persist and, preferably, also offer some prescriptions for reforming our conceptualization and organization of fields and practices.

But, and second, in any case they are not about nothing in particular. Rather, as is made clear by both long-standing social practices and "external" social and political theory, they are about the legal regulation of resources. The anchoring of property in resources may well be the single most enduring theme in the history of European practices and theory around property law – as we showed in Part II. And even today, no matter how loud the disintegration cry of "there's nothing (distinctive) there," historical, economic, and philosophical works continue to provide descriptive, explanatory and normative accounts of "property." Why? Because there really is "something there," something of distinct significance to humans in society. And that is how we structure social relations with respect to *resources*, to form persons and satisfy interests through the allocation, production and distribution of "goods."

By "resources" we do not mean simply some intuitive, straightforward or pre-theoretical, notion. Rather, we mean precisely to invoke a notion requiring explicit conceptualization, one that can be made sense of only within *external* frames of positive (e.g., economic) and normative (e.g., political philosophical) analysis, those lying to a considerable extent outside of law.[69]

---

[68] For discussion of the differences between this formulation and an alternative often used by both disintegration and neo-Blackstonian theorists (namely, "in what may one have property?") *see* supra note 35.

[69] Central to our point here, then, is to emphasize a contrast with more traditional "inside out" approaches, whereby the salient features of resources, if specified at all, are perceived through a glass darkly, through the filter of existing lay usages and legal doctrines. By contrast, we wish to underline the importance of starting "outside in," so as to conceive resources, at least initially, independently of their existing legal-property treatment, by foregrounding, as the initial drivers of the analysis, a conceptualization of what resources and their distinctive features are that draws systematically on external frames of positive and normative analysis. For illustrative analyses along these lines, *see* Yochai Benkler, *Intellectual Property and the Organization of Information Production* (1999); Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production* 114 YALE L. J. 273 (2004); BRETT FRISCHMANN, INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES (2012); *and* Lee Anne Fennell, *The Problem of Resource Access*, 126 HARV. L. REV. 1471 (2013). An alternative way forward beyond Blackstonian and disintegration views has been articulated in important recent work by Hanoch Dagan. HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS (2011). Space limitations prevent us from exploring here possible points of convergence and contrast between Professor Dagan's value-centered approach and our resource-anchored view. And similarly for points of convergence and contrast between our emphasis on *external*

Frames of analysis for issues such as the static allocation and dynamic production of "goods-types" varying in rivalry and excludability, or the constitutive effects of different goods on interests in freedom, personhood, or flourishing, or their strategic implications for values such as distributive justice or democracy. Although developing a full account of resources along these lines lies beyond our present scope, two important implications of having such a conception serve as the anchor for property merit emphasis here.

First, resources so conceived are not synonymous with "things." Not only may resources be immaterial, but not all material objects need be resources.[70] A signal example in this latter respect are the tangible insignia subject to trademark protection. As a distinguished line of analysis has insisted from the origins of trademark law through to the present, there is a sharp distinction to be drawn between "misrepresentation" and "misappropriation" bases for "unfair competition" claims, just as there between "consumer confusion" and confusion-independent "dilution" claims in trademark.[71] Underlying these, we suggest, is a fundamental distinction to be

---

frames of analysis of "*resources*" and, what we very much build on here, an emphasis on *external institutional regimes* to *private property* advanced in an important line of (principally intellectual) property scholarship. *See, e.g.*, William W. Fisher, *Intellectual Property and Innovation: Theoretical, Empirical and Historical Perspectives* (2001), available at https://cyber.harvard.edu/people/tfisher/Innovation.pdf; Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657 (2010); *and* Amy Kapczynski, *The Cost of Price: How and Why to Get Beyond IP Internalism*, 59 UCLA L. REV. 970 (2012).

[70] It may be objected that, with respect to the first two points we have just made demarcating "resources" as distinct from "things" – namely, first, that resources as an object require explicit conceptualization, rather than simply registering a pre-theoretical perception or intuition of a pre-given (likely tangible) "thing," and, second, that resources so conceived need not be tangible at all – that these may also be shared by those offering a revised account of "things," fit for a post-dematerialization world. Indeed, an important such account, by Fredrick Pollock, serves as a touchstone for both Professors Penner's and Smith's views that, dematerialization notwithstanding, the objects of property remain "things." PENNER, *supra* 4 note at 111; and Henry E. Smith, *The Thing About Exclusion*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 94, 117ff (2014). At the center of Pollock's account is the idea that a "thing," for purposes of legal analysis, is simply any individuated matter of discrete rights and duties. Pollock, *supra* note 318 ("A thing is, in law, some possible matter of rights and duties conceived as a whole and apart from all others, just as, in the world of common experience, whatever can be separately perceived is a thing.") However illuminating in other respects Pollock's quite brilliant treatment of this topic may be, as the basis for an account of the objects of property, it faces a strong – we think insuperable – objection: so conceived, "things" are so general as to run precisely the risk that one may now have "property" in "*any*thing." Thus, for instance, among the "things" in which we may have property-like rights, Pollock lists the "exclusive right to ferry passengers across a river for hire at a certain place." *Id.* at 319. But this would seem precisely to usher in the disintegration of property as a distinct field of law, very much along the lines heralded by Professor Grey. Grey, *supra* note 26. And, thus, to serve as an unpromising basis upon which to reconstruct, post-dematerialization, property as a distinct field of law.

Needless to say, this is far from the last word on different proposals and bases for the "rethingification" of the objects of property in a post-dematerialization world – including those that would frontally reject dematerialization, and insist on retaining a sharp distinction between "property" in tangible things as the heart of the field, with any legal rights in intangible things, such as those commonly referred to as "intellectual property," as lying outside the scope of "property" strictly speaking. However, space limitations prevent us from undertaking here a fuller exploration of the potential points of difference or convergence between two these views – (a) of "things" as the objects of property; and (b) "resources" as the distinctive subject matter of property, as what it is about – and hence for present purposes we will limit ourselves to simply delineating the central outlines of our contrasting "resource" view. For such a fuller exploration, see Syed, *Architecture of Property*, *supra* note 33.

[71] On misrepresentation versus misappropriation in unfair competition law, *see, e.g.*, *Felix Cohen, Transcendental Nonsense and the Functional Approach*, COLUM. L. REV. (1935); Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L. J. 1165 (1948); Richard Posner, *Misappropriation: A Dirge*, 40 HOUSTON L. REV. 641 (2003). On consumer confusion versus confusion-independent "dilution" claims in

drawn between treating commercial insignia as "communicative" vehicles, for the sake of regulating the integrity of market information for consumers, and treating them as "resources," for the sake of protecting firms' investments in goodwill.[72]

Second, once we start down this road – of anchoring property in a purposive analysis of what matters, requiring external positive and normative analysis of the object of significance rather than simply registering lay and legal usages – there is likely to be little reason to stop at "resources" as a crude monolith. Rather, we will likely need to break our analysis down into resource-specific units, as suggested by categories and implications of positive and normative analysis. Consider three illustrations. First, as revealed by positive economic analysis of goods-types, the purpose, feasibility and desirability both of conferring exclusionary rights over resources *and* of organizing their production on the basis of markets or commons or the state vary dramatically for private, common-pool, club, toll and public goods. The virtual absence of such elementary analytics in our current property law curriculum is disconcerting.[73] Or to take a second, more normative, frame of analysis: are there resources of such fundamental significance for self-determination or the development of personhood – housing being a prime candidate – that equitable access to them should be understood as imperative as a matter of "right," and not

---

trademark, *see, e.g.*, Glyn Lunney, *Trademark Monopolies*, 48 EMORY L. J. 367 (1999); *and* Mark Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L. J. 1687 (1999).

[72] Such a distinction would serve as the conceptual marker for drawing two sharp substantive lines in this area: First, *between* trademark and other regimes of "intellectual *property*" proper, such as copyright, patent and trade secret protection. *See, e.g.*, Peter Menell & Suzanne Scotchmer, *Intellectual Property*, *in* 2 HANDBOOK OF LAW & ECON. 1474 (A. Mitchel Polinsky & Steven Shavell, eds., 2007). Second, *within* trademark, between "consumer confusion" and "dilution" sources of concern. *See, e.g.*, Lunney, *id*.; *and* Lemley, *id.*

[73] To speak of a "virtual absence" may be thought to overstate matters, but for purposes of underlining both the precise content of our point and our sense of its import, we think it worthwhile to state it somewhat starkly. It is not only that a review of leading property casebooks reveals, as Julie Cohen observes, that they "are organized almost entirely around the intricacies that attend land use and land transactions." Julie Cohen, *Property as Institutions for Resources: Lessons from and for IP*, 94 TEXAS L. REV. 1, 6 (2014) (citing in support: "*See, e.g.*, JESSE DUKEMINIER ET. AL, PROPERTY, AT XI-XXIV (8th ed. 2014); ERIC T. FREYFOGLE & BRADLEY C. KARKKAINEN, PROPERTY LAW: POWER, GOVERNANCES, AND THE COMMON GOOD, at vii-xv (2012); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES, at xix-xxx (2d ed. 2012); JOSEPH W. SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES, at xiii-xxviii (6th ed. 2014); JOHN G. SPRANKLING & RAYMOND R. COLLETTA, PROPERTY: A CONTEMPORARY APPROACH, at xi-xx (2d ed. 2012)"). But it is also that, even with respect to land, there is little by way of external positive and normative analysis of it as a resource (indeed, as a set of distinct resources, as such external analysis would likely conclude). Moreover, the absence of such external analytics can be felt even in the one exceptional casebook, which explicitly seeks to remedy the "lack" of "theoretical and structural coherence" of the "traditional" property syllabus of "a disparate set of doctrinal areas loosely tied together by their relationship to land" – and does so by "address[ing] not only issues regard land, but also the many other resources, including natural resources and intellectual property, that are increasingly important in our society." JOHN P. DWYER & PETER MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE, at v (1998). Here also, however, the distinctive positive and normative features of resources are not explicitly developed, but perceived primarily through the prism of existing legal doctrines and categories. *Id.* at xix-xxix. Indeed, telling in this respect is the reference to intangible resources as "intellectual property." Not because it necessarily portends the hazards of a by-gone era, where the use of "property" to refer both to the good and potential rights regarding it would tend to smuggle normative conclusions into one's descriptive premises. But rather because use of the same label for two distinct notions is illustrative, we believe, of the lack of explicit conceptualization of the second notion, i.e., of the underlying goods protected by IP rights, as *resources* of, e.g., "information, knowledge and culture" or "expressive forms" and "functional ideas," which merit being expressly conceived and analyzed as such, independently of their existing legal treatment.

"merely" to promote social welfare or even general distributive justice?[74] If so, can such goods be classed into sufficiently coarse-grained units as to provide distinct foci of analysis from other, more "generic" resources subject merely to the imperatives of efficiency and distribution?[75] Or, to shift lenses again, do certain resources – say, financial assets – have such strategic social significance, impacting not only concentrations of wealth but also of power, as to merit special attention from the vantage of democratic commitments?[76] Analysis proceeding along such lines would, we suggest, remain sensitive to important "delineation cost" concerns raised against ad-hoc disaggregation, while simultaneously attending to similarly significant "uniformity costs" concerns in the other direction.[77]

(B) What does property consist of? (the entitlements of property)

On the disintegration view, the disaggregation of the entitlements of ownership is taken to issue in the conclusion that since property rights needn't take any one form – i.e., since the "right" of ownership is neither a single entitlement nor any necessarily unified package of entitlements – then property rights can take *any* form. And seemingly counseling in its favor is an argument from flexibility: "Well at least here," says the disintegrationist, "there can be no complaint. Once we accept that property law, policy and theory is about the structuring of social relations regarding resources through legal entitlements, it can only be a boon to be maximally flexible about the relevant entitlement options, no?"

No. The unspooling of disaggregation into an ad-hoc laundry list of entitlements is not about analytic or institutional flexibility. Rather, it is a counsel of intellectual and programmatic disorientation. Real-world thinking and institutional design need focal points for normative and positive analysis. A telling illustration in this respect is the fact that virtually all philosophical treatments of property, no matter how much they initially genuflect before the "bundle of rights" view, revert precisely to some strong "ownership" model to provide a focal point, some potential or actual legal content of entitlements for purposes of positive and normative analysis.[78] Thus, we agree here with the insistence of Professor Henry Smith that we need a theoretically powerful analysis of the "architecture" of property.[79] On our view, however, it should be one that does not

---

[74] *See, e.g.*, Nestor Davidson, *Property and Identity: Vulnerability and Identity in the Housing Crisis*, 47 HARV. C.R.-C.L. L. REV. 119 (2012); Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511 (2007).

[75] For an example of another set of goods deemed amenable to analysis as a demarcated sub-domain, on account of their distinctive normative salience, *see* Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75 (2004).

[76] For an analysis of how agricultural land may have been such a strategically significant resource given the structure of an earlier phase of the American economy, with design choices in the configuration of property entitlements having fundamental implications for the construction of individual freedom, see Yochai Benkler, *Distributive Liberty: A Relational Model of Freedom, Coercion, and Property Law*, 107 HARV. L. REV. 859 (1994).

[77] For "delineation costs," *see* Smith, *supra* note 4 at 1698. For "uniformity costs" *see* Michael W. Carroll, *One for All: The Problem of Uniformity Cost in Intellectual Property Law*, 55 AM. U. L. REV. 845 (2006).

[78] *See, e.g.*, JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988). SINGER, *supra* note (observing that the bundle of rights model has had little impact in displacing the "ownership" model even among legally sophisticated philosophical accounts).

[79] Smith, *supra* note 4 at 1692-97, 1700. We should note that, as discussed above and below, Professor Smith's discussion of the "why and how" of an "*architectural* or *modular* theory of property" combine what we wish here to keep separate, namely: theoretical reasons for conceptual parsimony (e.g., simplicity and generative power) and substantive reasons for institutional parsimony (e.g., transaction costs). *See* note 27, *supra* and note 80, *infra* and

prejudge substantive questions of positive, normative and institutional analysis. Rather its role should be limited to providing the conceptual focal points for such substantive analysis.[80]

We offer such an account here, of the fundamental building blocks of *all* property analysis, consisting of four elemental entitlements: use-privilege, exclusion-right, expropriation-immunity and transfer-power. Before elaborating on the *content* of these entitlements, a word about their *status* is in order: (a) they form a conceptually tightly integrated set, starting out from the most basic one, a use-privilege, to build out to the rest in a series of close conceptual steps of correlatives and opposites, primary and secondary entitlements, which in turn track core underlying interests in resources; (b) to result in a theoretically powerful, indeed, generative, architecture: yielding the four primitive building blocks for all property entitlement analysis, the ones necessary and sufficient for generating all possible permutations and combinations of property buildings; and (c) they are the *differentia specifica* of all property entitlements, distinguishing the field from other areas of law.

The most basic human interest in a resource is simply to "use" it in some direct, immediate way. It is the foundational interest upon which all others are built. Indeed, there are two distinct reasons why the use-privilege is the basic unit of analysis, the primitive building block for all the rest. One has been emphasized by both sides of the debate among neo-Blackstonians: namely the "substantive" or "external" point that, simply as a matter of human interests, the primary interest in resources is not to exclude others but to use ourselves.[81] But

---

accompanying text. It is with the former that our argument here is concerned, as we seek to conceptually specify the focal points for any substantive – i.e., positive, normative and institutional – analysis of real-world property arrangements. We bracket here the latter, substantive, issues such as how to weigh, in evaluating and shaping such arrangements, considerations of administrative simplicity against fine-grained pursuit of social policy objectives.

[80] Our approach here, then, is less substantive and more conceptual than most alternatives to an unspooled disaggregation advanced by critics of the Hohfeldian view, in the form of an "essence" or "core" of property. Many of these accounts base their views of a core entitlement or set of entitlements in a substantive normative conception of the central interests that ought to be protected by property rights as a general matter. *See, e.g.*, Penner, *supra* note 1 at 742ff; PENNER, *supra* note 4 at 71ff; Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L. J. 275 (2008); and Claeys, *supra* note 1 at 631ff (defending a "core" or "essence" of "exclusive use," centered on normative considerations of autonomy). Or, alternatively, in substantive positive-cum-normative suppositions concerning the relative merits of facilitating market-based private ordering versus directly pursuing social policy objectives. *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000) (arguing for a limited menu of property forms based on "information" and "frustration" cost concerns). By contrast, our aim is simply to specify, as a conceptual matter, the elemental building blocks that are the necessary and sufficient focal points for *any* substantive account of what matters in terms of the positive, normative and institutional analysis of the design of property rights. Much closer to our focus on conceptual, over substantive, considerations is Professor Smith's more recent emphasis on formal criteria such as simplicity and generative power in devising and evaluating theories of property's architecture. Smith, *supra* note 4 at 1694-95. On our view, however, Professor Smith's category of "delineation costs" straddles the divide between more formal and substantive criteria, in part being concerned with the theoretical costs of undue complexity, in giving up conceptual simplicity and generative power, and in part with more substantive costs of such complexity, in terms of real-world "information costs" in administering property rights. Smith, *id.* at 1698.

[81] Thus, even those advancing a "right to exclude" as the "core" or "essence" of property have typically recognized that, as a substantive normative matter, interests in use are prior to, indeed provide the basis for, those in exclusion. See Penner, *supra* note 1 at 743 ("use justifies the right, while exclusion frames the practical essence of the right"); PENNER, *supra* note 4 at 71 ("the right to property is a right to exclude others from things which is grounded by the interest we have in the use of things"); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731 (1998) ("the right to exclude others is a necessary and sufficient condition of identifying the existence of property"); Thomas W. Merrill, *Property and the Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1, 3 (2014) (agreeing with PENNER, *supra* note 4 that interests in use are a precondition for the right to exclude, while

there is also a tighter, more internal-conceptual reason: you simply cannot specify the content of (the concept of) Exclusion, without first already possessing the content of (the concept of) Use. But this is not so for Use. We cannot understand what it means for A to exclude B from Y unless we already possess some notion of exclude "from what"? But we can understand what it means for A to "use" Y without possessing any notion of "exclusion."

If A has the legal entitlement to use resource Y, this means of course that B has no entitlement to exclude A from Y. And so we arrive at our first entitlement-disentitlement pair:

(1) (a) Use-privilege of A
which correlates with
(b) no-right of Exclusion for B

What is our next step from here? For lawyers already familiar with various contingencies and options, a number of alternative next moves suggest themselves, including: What if B *did* have an exclusion-right? What if A had a use-right? What if A had an exclusion-right? While we could build out the analysis taking any of these steps, we suggest that in fact the most basic and obvious next step, conceptually, is simply to ask: can B still have a Use-privilege over Y as well? That is, not to introduce any new concepts/entitlements or persons or resources, but simply to transfer an existing known entitlement over a known resource to a known person. The answer, of course, is yes: alongside, simultaneously with, A's use-privilege may co-exist B's use-privilege.

At this point, the next question virtually forces itself upon us: What would it mean for only one of them to have the use-privilege? Suppose the uses in question are rivalrous of the resource and we wish only to let either A or B to use it. We would then need to confer upon one of them the *opposite* of what correlates with a use-privilege: i.e., not a no-right of exclusion but an exclusion-right. Which, of course, in turn correlates with a no-privilege to use, or a duty to refrain from using. To result in the following two pairs of entitlements:

(1) (a) Use-privilege of A which correlates with (b) no-right of Exclusion for B	which is the opposite of	(2) (a) Exclusion-right of A which correlates with (b) no-privilege to Use for B

It is worth dwelling for a moment on the conceptual inter-relations between entitlements and how they unfold. We began with a concept of an entitlement and then moved to understand

---

maintaining that exclusion-entitlements, not use-entitlements, are the "defining feature" of property); Smith, *supra* note at 4 at 1693 ("There is no interest in exclusion per se. Instead, … the right to exclude … serve[s] the interest in use.") (For a dissenting view, arguing that exclusion stands on its own bottom, see Arthur Ripstein, *Possession and Use, in* PHILOSOPHICAL FOUNDATION OF PROPERTY LAW 156 (James Penner & Henry E. Smith, eds. 2013).) By contrast, others insist that the normative priority of use-interests should issue in a conceptual priority of use-entitlements, so that the core or essence of property is conceived in terms of "exclusive use" – i.e., a bundling together (or, less charitably, a muddling as one) the distinct Hohfeldian entitlements of a use-privilege and exclusion-right (although with less than crystalline clarity on whether the core or essential use-entitlement is to be understood in terms of a "privilege" or a "right"). *See* Claeys, *supra* note 1 at 631ff; Katz, *supra* note 80. (We should note that Professor Smith has also underlined the incompleteness of "the right to exclude" as a "linchpin" or "core" for property law, and emphasized the need to supplement, indeed ground, it in an account of "things" as the object of property. Smith, *supra* note 70. From our vantage however, that goes to a distinct issue, concerning not what property *consists of*, but rather what property *is about* – and our reasons for preferring, in that latter respect, "resources" over "things" are briefly given in note 70, *infra*.)

what its jural *correlative* was. At that point, we had no idea – or even the need for an idea – of something called its "opposite." The move to develop a concept of the opposite of an entitlement only happens at a subsequent stage of the analysis, when we go on either (a) to ask, as a kind of formal matter, what if B did have what they do not have here? or (b) more substantively, to inquire into a distinct new interest (what if we needed to enable A not only to use but prevent B from using)? This point, seemingly elementary, is quite fundamental: the failure to appreciate the conceptual centrality and priority of *correlatives* over *opposites* is precisely to fail to grasp the relational method of Hohfeldian analysis.[82] Foregrounding, as is often done, jural "opposites" as central to the analysis – rather than understanding them as *entirely* derivative of a correlative-then-distinct-interest structure of the analysis[83] – is precisely to invite the (on our view) misleading understanding of Hohfeldian analysis as "atomistic."[84]

Returning back from method to substance, we now have before us the basic quartet of Hofheldian entitlement-disentitlements concerning resources. This quartet pertains, of course, solely to "primary" entitlements-disentitlements, meaning here entitlements (that structure relations) pertaining directly to the object or resource itself. We now continue to the second quartet, of "secondary" entitlements, or entitlements about entitlements.

Suppose we have conferred upon A both a use-privilege and exclusion-right relating to a house, which is now their "home." What secondary entitlement might make sense as the next step? We suggest it is immunity from expropriation of their primary use and exclusion entitlements, to protect their interest in "security" in holding said entitlements over their home. What good is it to enjoy use and exclusion over one's home on Monday without any security that these entitlements cannot simply be "taken" on Tuesday, by either a private person or the state? This brings us to our third entitlement-disentitlement pair:

(3) (a) Expropriation-immunity (of A)
which correlates with
(b) No-power of (disability to) transfer (of other private persons or state)

---

[82] For important discussions of Hohfeldian analysis in a somewhat distinct "structuralist" vein, *see* Jack Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 119 (1990); *and* Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991). Our analysis here places greater emphasis than these authors on the purposive and concretely relational – as opposed to self-contained and generally "structuralist" – character of Hohfeldian analysis, i.e., on the grounding of the relevant conceptual distinctions, between discrete entitlements, in substantive judgments concerning important differences in underlying interests-in-resources, and of the relevant conceptual inter-relations, between correlatives, in the underlying social relations they track.

[83] To underline the point as clearly as we can, in contrast to a long-standing tradition of foregrounding opposites such as "right/no-right," on our view the central relations and contrasts of significance are privilege/no-right and privilege-right – with "right/no-right" simply having, on its own, no real significance at all. That is, it is not only that jural correlatives, such as privilege/no-right or right/duty, are conceptually prior, the central drivers of the analysis. But it is also that, on their own, jural opposites are not even of secondary significance – rather, they are merely the connective tissue between two distinct pairs of jural correlatives, as shown in our basic quartet of primary entitlement-disentitlements above. The important relations or contrasts are (a) first, the inter-relations between jural correlatives (privilege/no-right, right/duty) and (b) next, the distinctions between different pairs of correlatives (privilege versus right). On their own, jural opposites such as right/no-right are of unclear standing and import.

[84] *See* Schlag, *supra* note 25 (treating Hohfeldian analysis as "atomistic"); Henry E. Smith, *Property Is Not Just a Bundle of Rights*, 8 ECON. J. WATCH 271 (2011) (same).

And again we face the ineluctable question: what if A did not have this entitlement, or at least not against all parties? What if, for instance, we conferred upon A this entitlement only against private persons, but not the state? We would then we arrive at a fourth pair:

(4) (a) Transfer-power (of the state)
which correlates with
(b) Liability (vulnerability)-to-loss (of A)

An interesting feature of this analysis is that it resolves, at least for this pair, the puzzle raised long ago by Walter Wheeler Cook and Arthur Corbin as to whether a Hohfeldian "liability" or exposure of B, correlating with the transfer power of A, is really a "disadvantage" – since often B is the one in a position to receive the entitlement.[85] Here, however, the liability correlating to the state's transfer power is that of A, who is vulnerable to having their primary entitlements transferred away. This, clearly, is a disadvantage to, or burdening of, A's interests. Hence for at least this correlative pair, the Cook/Corbin puzzled is solved.

This completes our analysis of the four fundamental building block entitlement-disentitlement pairs of property, those necessary and sufficient for generating all permutations and combinations of property structures and the *differentia specifica* of property as a legal form.[86]

Conclusion

Imagine a property law casebook organized around the interaction of two levels of analysis: (1) the "stuff of the world," as broken down into resource-specific categories conceived in terms of their (im)material characteristics, human interests and social significance; and (2) the "building blocks of society" conceived in terms of the fundamental entitlement options necessary and sufficient for constructing all the legal architectures of social relations regarding resources. That such a curriculum is even now only a glimmer on the horizon – a full century after Hohfeld – is one measure of the distance by which this pioneer's thoughts outstripped his world. To honor his legacy would be to bridge that gap.

---

[85] *See* Walter Wheeler Cook, *Introduction: Hohfeld's Contribution to the Science of Law, in* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 8 (Walter Wheeler Cook, ed. 1919); *and* Arthur Corbin, *Legal Analysis and Terminology*, 29 YALE L. J. 163, 169 (1921).

[86] To be sure, this is only the barest sketch of both the content of the elemental entitlements and also, importantly, of their architectural status. Regarding their content, our analysis does not provide details on the shape and conferral of any of these entitlements, either singly or in their combined configuration, for any specific setting. That of course is the work of concrete legal analysis and institutional design, ideally sensitive to the distinct contexts and purposes implicated by different resources, in terms of the positive, normative and strategic concerns they raise. And it is indeed precisely our aim here *not* to pre-judge such substantive analysis, but rather simply to furnish the focal points indispensable for organizing the inquiry. Moreover, regarding their architectural status, a further step of institutional analysis, not undertaken here, would be to specify not only how these elements may be used as fundamental building blocks in the configuration of specific ensembles of property rights, but also how such ensembles may then usefully be conceived and designated as belonging to larger families of, e.g., "private," versus "commons" versus "public" property regimes. Or, to move even farther afield, of when an institutional regime for structuring the allocation, production and distribution of resources may be said to leave "property" altogether (as it might be said, for instance, of "prize" system alternatives to patent rights). These are matters for another day. *See* Syed, *Architecture of Property*, forthcoming.