
EXCLUSION AND PRIVATE LAW THEORY:
A COMMENT ON *PROPERTY AS THE LAW OF THINGS*

*Eric R. Claeys**

INTRODUCTION

Although I am most honored to comment on *Property as the Law of Things*¹ (*The Law of Things*) by Professor Henry Smith, I approach my commenting duties with some trepidation. Smith and I agree on many important principles about how property should be designed in practice. More importantly, over the last dozen years, Professor Smith has propounded a systematic critique of what he calls in *The Law of Things* the “bundle” picture of property.² The articles developing that critique have been more original and influential in American property scholarship than has work by anyone else in his and my cohort. My own property scholarship would not have penetrated nearly as far as it has if I could not have taken advantage of paths Smith has cleared in his scholarship.³

Nevertheless, here, I am going to mark off my disagreements with Smith. I have two motivations for doing so. One is philosophical. For my part, I consider myself a friend of Smith’s but a greater friend to the truth.⁴ The other motivation relates to the theme of this Symposium. I confess that I am not entirely sure what the term “New Private Law Theory” means. I gather that New Private Law scholarship studies private law not doctrinally but by relying on help from

* Professor of Law, George Mason University. Thanks to Avihay Dorfman, Adam Mossoff, Chris Newman, Henry Smith, and Stephen A. Smith for helpful criticisms and suggestions on an earlier draft of this Response. Thanks to the Editors of the *Harvard Law Review* for especially careful and diligent editing of this Response.

¹ Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012).

² See, e.g., Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007) [hereinafter Merrill & Smith, *Morality*]; Thomas W. Merrill & Henry E. Smith, Essay, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 376–83 (2001) [hereinafter Merrill & Smith, *What Happened*]; Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000) [hereinafter Merrill & Smith, *Optimal Standardization*].

³ Compare Merrill & Smith, *What Happened*, *supra* note 2, at 378–79, 391–94 (criticizing contemporary welfare-maximizing law and economic tort scholarship using information-cost economics), and Henry Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965 (2004) (explaining existing nuisance doctrine using information-cost economics), with Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379 (2010) (criticizing welfarist economics and defending existing nuisance doctrine with natural rights principles).

⁴ Cf. ARISTOTLE, NICOMACHEAN ETHICS bk. I, ch. 6, at 5–6 & n.7 (Joe Sachs trans., Focus Publishing 2002) (c. 384 B.C.E.) (subordinating the author’s friendship with Plato to his criticisms of Plato’s theory of the forms).

nonlegal academic disciplines. I also gather that such scholarship differs from other contemporary interdisciplinary work by respecting private law's autonomous content almost as much as doctrinal scholarship professes to respect that content.⁵ If I understand the New Private Law correctly, there is a significant gap in contemporary property scholarship. New Private Law scholars have critiqued economic analyses of law in contracts and tort. In property, however, such critiques are at best underdeveloped and at worst nonexistent. This Symposium seems the perfect venue in which to escalate or instigate a quarrel, between economics and philosophy, over the private law of property.

Because Smith and I agree considerably about how private property should be structured in practice, my differences with him relate primarily to whether philosophy or economics better explains or justifies private law. I favor philosophy. *The Law of Things* confirms for me that my instincts are sound. My reasons for doubt may not be very familiar to many American property scholars. Yet that fact just goes to show how much American property scholarship has to learn from philosophical developments in other private-law fields over the last generation. By giving *The Law of the Things*'s methodological priors a hard look here, I hope to articulate some themes that deserve attention in future private law-oriented property scholarship.

I. LEGAL REALISM IN *THE LAW OF THINGS*

In *The Law of Things*, Smith sets his sights on key realist generalizations about property: “property is *not* about things,” property is instead “a bundle of rights and other legal relations availing between persons,” “[t]hings form the mere backdrop to these social relations,” and the “thing” backdrop is “a largely dispensable one at that.”⁶ Smith tests the bundle picture by analyzing how well it explains several quintessential attributes of property — especially property's in rem character, modularity, and connection to the residual claim.⁷ *The Law of Things* concludes that a “thing” picture explains property law better than the realist bundle picture.

Yet the bundle picture is not the only legacy of American legal realism for contemporary law or scholarship.⁸ As Professor John Gold-

⁵ See generally John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640 (2012).

⁶ Smith, *supra* note 1, at 1691; see also HANOCH DAGAN, PROPERTY, at xxii–xxiii, 8–12 (2011) (recounting the realist legacy in property theory).

⁷ Smith, *supra* note 1, at 1702–10.

⁸ Indeed, the bundle picture is not the only important legacy of American legal realism for contemporary property scholarship. Prominent realists also propounded a conception of the “right to exclude” that included many problems similar to those Professor Smith deplors in the bundle

berg's Introduction suggests, American legal realism legitimated several dominant but debatable claims about what law is and how it is best studied.⁹ From this jurisprudential standpoint, it is striking how realist *The Law of Things* is.

The Law of Things is quite realist in its presuppositions about scientific method. Smith "accept[s] the social-scientific theoretical style of the bundle."¹⁰ *The Law of Things* treats the bundle and thing pictures as two test hypotheses and finds that the former explains less than the latter does.

The Law of Things is also quite realist in its instrumental understanding of law. Throughout, the Article assumes that economic actors would and should rationally prefer to have and to work with thing-like rights. Smith's argument is perfectly understandable and familiar, for he is an economic analyst of law. Law and economics scholars assume that "law [is] a manifestation of social policy."¹¹ Here, however, Professor Jules Coleman speaks for many analytical philosophers of law when he observes that "economists of law sometimes mangle the normative categories embodied in law" and that they do so primarily because, "[a]t bottom, economic analysis takes the law's normative categories to be merely of instrumental value."¹² Although the legal realists did not invent this instrumentalist view themselves,¹³ they certainly embraced it and made it respectable.

II. TWO KINDS OF REALISM TOWARD LAW

Let me recapitulate some common philosophical complaints about the instrumentalism typical of legal realism. For brevity's sake, I will follow Goldberg's lead and use Justice Oliver Wendell Holmes's *The Path of the Law*¹⁴ as a shorthand reference.¹⁵ According to Justice Holmes,

picture. See Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617, 634–38 (2009) (book review); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 395–97 (2003).

⁹ See Goldberg, *supra* note 5, at 1647–48.

¹⁰ Smith, *supra* note 1, at 1695.

¹¹ WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 8 (1987).

¹² Jules L. Coleman, *Some Reflections on Richard Brooks's "Efficient Performance Hypothesis"*, 116 YALE L.J. POCKET PART 416, 416 (2007).

¹³ See, e.g., LANDES & POSNER, *supra* note 11, at 4 & nn.9–11 (citing social-scientific studies of law from 1880 to 1915 as important "[a]ntecedents of the [p]ositive [e]conomic [t]heory of [t]ort [l]aw," *id.* at 4).

¹⁴ O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

¹⁵ See Goldberg, *supra* note 5, at 1642–43; accord DAGAN, *supra* note 6, at xix (citing *The Path of the Law* as the article illustrating how "realists place coerciveness at the center of their conception of law").

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.¹⁶

If most citizens act like Justice Holmes's bad man, the state must order, penalize, or deter them to do what general welfare requires. Bad men do not experience the law except as a yoke.

Many philosophical students of law believe that this account of law is not very realistic.¹⁷ Law is not *merely* coercive. Law applies to members of a political community, all of whom are free and rational actors. Those community members may be bad men sometimes, but they are also at least capable of acting for and being persuaded by moral reasons. Some of these members' interests and reasons for action are self-regarding, but other of their interests and reasons are sociable. Law's coerciveness then seems not a brute fact but rather a problem needing explanation. The law has legitimate authority — that is, persuasive justification for being coercive — if it coerces citizens to act according to standards that reasonably well-socialized citizens could plausibly accept as the standards to which free, rational, and moral agents would adhere.¹⁸

Consider two opposing examples. If Marshall holds Taney up and takes his money, Taney experiences the hold-up as a theft.¹⁹ If a court enters a judgment ordering Taney to pay Marshall compensatory damages for having polluted on his land for a month, some Taney's will experience the court order in the very same way they experience the hold-up. In principle, however, at least some Taney's should experience the judgments differently.²⁰ A reasonably well-socialized Taney should expect that the controlling nuisance rules reconcile his and Marshall's concurrent property rights with the concurrent property rights of oth-

¹⁶ Holmes, *supra* note 14, at 459.

¹⁷ In what follows, I hope to restate principles that are shared as common grounds between natural law scholars and analytical legal positivists who take the internal point of view seriously. Although I rely on terms most familiar from H.L.A. Hart's (analytical legal positivist) work, natural law scholars stress the internal point of view at least as emphatically as Hart. See John Finnis, *Natural Law: The Classical Tradition*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 1, 26–27 (Jules Coleman & Scott Shapiro eds., 2002). Natural law scholars also share Hartians' general complaints about legal realism. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 1–19 (2d ed. 2000).

¹⁸ See, e.g., STEPHEN A. SMITH, *CONTRACT THEORY* 18–24 (2004). Readers may construe the phrase “well-socialized” in two overlapping ways. Analytical legal positivists may understand me to be referring to the quality by which citizens internalize their respect for legal rules with the same seriousness as judges and other public officials who apply the law officially. Natural law scholars may understand me to be referring to the sociability toward fellow citizens and the respect for the rule of law that a community may expect from reasonably virtuous citizens.

¹⁹ H.L.A. HART, *THE CONCEPT OF LAW* 18–25 (2d ed. 1994).

²⁰ See *id.* at 101–10.

ers and the welfare of the general public.²¹ Those rules set a normative baseline regulating all owners and land possessors' conduct. A reasonable Taney should understand that the nuisance judgment cancels out the wrong he inflicted on Marshall by polluting on his land in excess of that baseline.²² Similarly, lawyers and judges understand nuisance law not as a tool to nudge or coerce Taney and Marshall to contribute to some policy goal extraneous to the law; they assume that the law embodies land possessors' reciprocal obligations. Taney and Marshall's judge thus takes the law of nuisance "as his *guide* and the breach of the rule as his *reason* and *justification* for" assigning liability.²³

Some readers may assume that, because I am criticizing realist instrumentalism, I necessarily embrace a formalist understanding of the private law.²⁴ Not so. Other understandings of law stake out sensible middle grounds between formalism and realist instrumentalism. Coleman has contrasted "moral instrumentalism" with formalism and "economic instrumentalism,"²⁵ Professor Benjamin Zipursky has proposed "pragmatic conceptualism" as a middle ground between formalism and instrumentalism,²⁶ and Professor John Gardner has assumed that a law can be "teleological" (the term I will continue to use here²⁷) without veering into formalism or functionalism.²⁸ In a formalist account, "[t]he purpose of private law is simply to be private law."²⁹ In contrast, in a teleological account, the law's goals are embodied in the law. Because law consists of rules coordinating the actions of individuals in a political society,³⁰ law usually supplies those individuals with a practical reason for coordination — that is, a reasoned justification why the social result the law compels accords with the individuals' own interests. Thus, nuisance embodies a normative goal "to adjust the rights of adjacent owners and occupiers so as to give each his own without jostling the other."³¹ Nuisance remains instrumental in the

²¹ See Claeys, *supra* note 3, at 1398–1430.

²² See Eric R. Claeys, *Private Law Theory and Corrective Justice in Trade Secrecy*, 4 J. TORT L., no. 2, 2011, at art. 2, 1, 19–20.

²³ HART, *supra* note 19, at 11.

²⁴ I thank Chris Newman for encouraging me to clarify this point.

²⁵ JULES L. COLEMAN, RISKS AND WRONGS 200–04 (1992).

²⁶ See Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457 (2000).

²⁷ I believe the term "teleological" captures the relation between law and moral norms better than the alternatives. I also suspect it would be too cumbersome and confusing to alternate between different senses of "instrumentalist" or "pragmatic" throughout the rest of this Response.

²⁸ John Gardner, *What Is Tort Law for? Part 1. The Place of Corrective Justice*, 30 LAW & PHIL. 1, 2 (2011).

²⁹ ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 21 (1995).

³⁰ See SCOTT J. SHAPIRO, LEGALITY 120 (2011); LON L. FULLER, THE MORALITY OF LAW 106 (rev. ed. 1969).

³¹ Galbraith v. Oliver, 3 Pitts. R. 78, 80 (Pa. Comm. Pl. 1867).

sense that it uses different doctrines — the live-and-let-live principle, the locality principle, and so on — to secure these equal use rights as best it can in different situations.³² Yet nuisance is not instrumental in the realist sense, because the commitment to “equal rights” “of person and property” is internal to the field.³³

These insights about law and human sociability supply the foundations for a different method for studying private law. This method makes central the private law’s “internal point of view.”³⁴ In private law, legal theory must attend carefully to the law’s rights and wrongs, the normative interests that ground both, and the common moral norms that supply practical reasons why interests and rights relate to one another and to the public welfare.

III. THE METHODOLOGICAL COMMITMENTS OF *THE LAW OF THINGS*

How well does *The Law of Things* live up to these conceptual standards? I have two answers. On one hand, *The Law of Things* treats the rights and institutions in property law much more respectfully than many other instrumentalist economic explanations do the corresponding rights and institutions in other fields of private law. As Coleman pointed out, leading economic analyses ignore the rules and practices that make tort a bilateral institution, which asks whether, in some previous interaction, one defendant violated the rights to which one plaintiff was entitled as a matter of justice.³⁵ *The Law of Things* does not deserve criticism on this score. At least in its central features, Smith’s account is far more respectful of the practice of property than most leading law and economics accounts of property doctrines.³⁶ Indeed, in *The Law of Things* and the magnificent twelve years of scholarship which that Article summarizes, Smith *rescues* many crucial features of property from the atomizing tendencies of economics scholars in tort and contract.³⁷

On the other hand, Smith’s main argument remains an economic argument, grounded on realist instrumentalist premises. As a result, *The Law of Things*’s argument remains subject to Coleman’s methodo-

³² See Claeys, *supra* note 3, at 1419–23.

³³ Galbraith, 3 Pitts. R. at 85.

³⁴ HART, *supra* note 19, at 102; *see id.* at 56–58, 88–91, 101–10.

³⁵ See JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 13–24 (2001).

³⁶ Here, *The Law of Things* builds on Professors Thomas Merrill and Henry Smith’s previous critiques of law and economics scholarship — including the “tort perspective,” *see* Merrill & Smith, *What Happened*, *supra* note 2, at 378–79, and economic “causal agnosticism,” *see id.* at 391–94.

³⁷ *See, e.g.*, Merrill & Smith, *Morality*, *supra* note 2, at 1856–57; Merrill & Smith, *What Happened*, *supra* note 2, at 376–83; Merrill & Smith, *Optimal Standardization*, *supra* note 2, at 3–6.

logical criticisms. So, even if Smith's account were fully convincing on its own terms, it still would not supply answers to questions that flow directly from property law's internal point of view.

Like many economic analyses of tort, *The Law of Things's* account of property is "difficult to criticize: since it seldom is clear exactly what kind of explanation is being offered, the criteria of adequacy . . . are not immediately apparent."³⁸ Although the Article offers criteria for judging its thing hypothesis against the bundle picture,³⁹ these criteria are weak. If *The Law of Things's* thing hypothesis correlates with more basic features of property than the bundle hypothesis, that is enough for Smith. By establishing this correlation, however, *The Law of Things* does not necessarily prove fit or causation.

Furthermore, the correlations that the Article purports to show still abstract from significant features about law. Coleman suggested three criteria to establish fit or causation. An economic analysis of law may be understood as a reductive conceptualist explanation, seeking "to explain [a given field of] law by showing that its central concepts can be reduced to [one interpretation of] the concept of economic efficiency."⁴⁰ An economic analysis may also be understood as a Dworkinian "constructive interpretation," which "reveals to us the way in which the disparate components of the structure and substance of [a given field of] law hang together in a way that is, at the same time, normatively attractive."⁴¹ Or, an economic analysis may be understood as a functional explanation, a "causal explanation of the existence and shape of [the given field of] law."⁴²

The Law of Things falls short when judged by those criteria. In the law and practice of property, norms about justice, rights, fairness, and the goodness or worthiness of "use" loom large. Normative notions about "efficiency," efficiency in relation to "information costs," or "modularity" do not loom anywhere near as large. If *The Law of Things* purports to be a reductive conceptual explanation, it reduces out of Smith's theory of property the normative concepts that matter most in practice.⁴³ For *The Law of Things* to be satisfying as a constructive reinterpretation, respect for the interpretive method "requires an argument for the moral attractiveness of [information-cost] efficiency as the exclusive or paramount aim of [property] law."⁴⁴ The Article

³⁸ COLEMAN, *supra* note 35, at 11.

³⁹ See Smith, *supra* note 1, at 1695.

⁴⁰ COLEMAN, *supra* note 35, at 11.

⁴¹ *Id.* at 30.

⁴² *Id.* at 12.

⁴³ See *id.* at 13–24; Adam Mossoff, *The False Promise of the Right to Exclude*, 8 ECON J. WATCH 255, 261 (2011).

⁴⁴ COLEMAN, *supra* note 35, at 31.

assumes but does not demonstrate such an argument. And if efficiency, information costs, and so on are external to the concepts important in property law, then *The Law of Things*'s argument attempts to explain the law of property "by an outcome that lies outside the intentions of those who have developed and maintained it."⁴⁵ The information-cost account makes a nice "Just So Story," but methodologically it is not an adequate causal account.⁴⁶ These deficiencies do not prove that *The Law of Things* is irrelevant or uninteresting. Yet they do suggest that *The Law of Things* does not explain the phenomena that most need explaining: the practical reasons that give structure and direction to property in private law and pre-legal social practice.

In fairness, *The Law of Things* proposes a second explanation of property using concepts besides information costs. Occasionally, Smith stresses the importance of "use."⁴⁷ Because the normative concept of "use" is central to existing property law,⁴⁸ this line of argument may satisfy Coleman's adequacy criteria. Yet if *The Law of Things* made such an account central, it would cease to be an instrumental economic account of property. A use-based account of property is instrumental in the teleological sense I described in Part II. At best, *The Law of Things*'s insights would be ancillary to such teleological scholarship. At worst, its insights would be parasitic.⁴⁹

IV. PROPERTY'S PARADIGM CASES

Many readers may find my criticisms thus far not practical enough. In the remainder of this Response, let me suggest a few ways in which *The Law of Things*'s method generates practical confusions. Let me begin at the most concrete level possible. *The Law of Things* uses land and cars as paradigm cases of property. In other words, to test whether a given legal arrangement counts as "property," the Article asks whether the arrangement institutes the boundary-driven rights of exclusive control, use, and disposition we associate with trespass to land and chattels.⁵⁰ Yet riparian rights have long been classified as "property" rights as well.⁵¹ Although riparian rights do not confer

⁴⁵ *Id.* at 26.

⁴⁶ *See id.*

⁴⁷ *See, e.g.*, Smith, *supra* note 1, at 1693, 1702.

⁴⁸ *See, e.g.*, J.E. PENNER, THE IDEA OF PROPERTY IN LAW 49–51, 70 (1997).

⁴⁹ *Cf.* Eric R. Claeys, Colloquy Essay, *The Right to Exclude in the Shadow of the Cathedral: A Response to Parchomovsky and Stein*, 104 NW. U. L. REV. 391, 405–06 (2010) (applying a similar critique to economic justifications for liability rules).

⁵⁰ *See* Smith, *supra* note 1, at 1701.

⁵¹ *See, e.g.*, Eric R. Claeys, *Exclusion and Exclusivity in Gridlock*, 53 ARIZ. L. REV. 9, 24–25 (2011) (book review); Adam Mossoff, *Exclusion and Exclusive Use in Patent Law*, 22 HARV. J.L. & TECH. 321, 333–35 (2009). When I refer to riparian rights and water law here, I mean in par-

“that sole and despotic dominion” Blackstone associated with property, even Blackstone conceded that “an usufructuary property is capable of being had” in riparian rights.⁵²

That legal principle creates complications for any conceptual account of property. It is quite understandable why lay intuitions are confused by riparian rights. After all, in lay intuitions, the “owner” of “property” has a near-absolute right to exclude non-owners from a lot, or a car, or any other discrete and tangible article. Nevertheless, riparian law suggests that one can have a property right (though a limited one, to be sure) simply by virtue of having a use-based claim. If so, a conceptual analysis of property has two issues to explain: What is property? And why do rights of exclusive control and disposition seem “core” property and usufructs only “peripheral” or “limited” property? Instead, *The Law of Things* trivializes riparian rights on the ground that they are “less property-like.”⁵³ Here, the Article seems to trivialize data points that do not fit its preferred hypothesis, to obscure or eliminate tension between the hypothesis and the data.⁵⁴

Some readers may wonder whether my account of property overclaims. *The Law of Things* seems to explain a lot about a few cases involving property: the cases approximating the paradigm cases of land and cars. In contrast, my account classifies a wider range of legal rights as “property” but then makes seemingly contradictory claims about the consequences of calling these various rights “property” rights.⁵⁵ I have two responses.

First, my method does not go that far. In my approach, the classification “property” covers more widely but shallowly than the corresponding classification does in Smith’s approach. In practice, exclusive and modular property rights exemplify only *one* of several strategies “property” may deploy. Sometimes, property rights encourage owners to invest by bestowing rights that are clearly delineated for the benefit of strangers and prospective contracting partners. In fields where such rights are appropriate, Smith’s exclusion- and modularity-based account makes considerable sense. Even so, some fields of property law, especially those associated with usufructs, focus on encouraging as many claimants as possible to extract and deploy a re-

ticular the law and rights relating to the use of water in running rivers as specified *at common law*. Contemporary public law administrative schemes allocating riparian water may treat water in a manner inconsistent with the manner in which the common law treats it. Those differences do not affect my theory or account because they focus on private law.

⁵² 2 WILLIAM BLACKSTONE, COMMENTARIES *2, *14.

⁵³ Smith, *supra* note 1, at 1711.

⁵⁴ For these reasons, I also have reservations about the conceptual assumptions in Henry E. Smith, *Governing Water: The Semicommons of Fluid Property Rights*, 50 ARIZ. L. REV. 445 (2008).

⁵⁵ I thank Avihay Dorfman and Henry Smith for prompting me to consider this objection.

source that is not labor- or investment-intensive to extract.⁵⁶ Both strategies are separate from the analytical classification. The choice between these strategies raises normative issues, which need to be evaluated normatively, in light of all the characteristics of, uses of, and claims on the asset in question. Yet my analytical approach can at least flag that the usufructuary strategy exists. *The Law of Things* pushes this strategy either to the periphery of property or beyond property altogether.

Second, this objection underscores my suspicions about the social-science method. To philosophers, the “science” appropriate to any thing must calibrate the method for studying the thing “to look for just so much precision in each kind of discourse as the nature of the thing one is concerned with admits.”⁵⁷ In practice, laypeople appreciate that property claims tend to attract two competing arguments: “Stay off, because it’s *mine*,” and “No, *I’m* using it right now and you’re not.” Different species of property reconcile these claims differently — which is why land and tangible chattels have relatively exclusionary rights while water has relatively usufructuary rights. Yet by paying attention to these claims and the way different property institutions settle them, an analytically minded moral philosopher learns a lot about the practical reasons shaping property — and the coverage and limits of “property” as a social and legal concept. By contrast, if one deploys a realist social-science control-test method, people’s arguments and conceptual assumptions do not necessarily deserve any more or less priority than any other feature of law. And if one assumes the truth of realist instrumentalism, those arguments and conceptual assumptions seem irrelevant — or (worse) phenomena of interest only to a benighted and antiquated science of law.

V. PROPERTY’S ANALYTICAL STRUCTURE

This contrast in paradigm cases brings me to the question that separates Smith and me the most: what is the right way to define property analytically? *The Law of Things* portrays property conceptually as a combination of exclusion and governance. Property law, or so the Article suggests, institutes a “default” or “starting point” preference for a right to exclude.⁵⁸ Property law then recalibrates with “govern-

⁵⁶ See generally Richard A. Epstein, *On the Optimal Mix of Private and Common Property*, 11 SOC. PHIL. & POL’Y, June 1994, at 17; Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 J.L. & ECON. 393 (1995); Carol M. Rose, *Energy and Efficiency in the Realignment of Common-Law Water Rights*, 19 J. LEGAL STUD. 261 (1990).

⁵⁷ ARISTOTLE, *supra* note 4, bk. I, ch. 3, at 2.

⁵⁸ Smith, *supra* note 1, at 1705.

ance” alternatives when the gains from making exceptions to in rem rights to exclude outweigh the information costs.⁵⁹

As Part III suggested, however, explanatory economic analysis reduces out of the study of “law” the practical moral reasons embodied in law. That reductionism is most apparent when *The Law of Things* focuses on exclusion and governance. The Article does not explain *how, why, or to what extent* exclusion and governance each institute or embody the moral norms internal to property in practice. The Article’s reductionism makes sense only if the phenomena most worth studying are the phenomena realist instrumentalism makes important — the most external and coercive manifestations of property, like the right to exclude.

By contrast, in my understanding of sound method, the things most worth knowing are why and in what circumstances an owner *deserves*⁶⁰ a right to exclude. These practical reasons are logically prior to the rights to exclude enforced in doctrine. In that spirit, as Professor Larissa Katz,⁶¹ Professor Adam Mossoff,⁶² I,⁶³ and (with variations) Professor James Penner⁶⁴ have all explained, the practical reasons central to property reconcile the various normative interests owners and non-owners claim in using and engaging with external assets. Primarily, individuals claim and recognize in others a normative interest in using external assets for the user’s own gratification; secondarily, they claim and recognize in others a general domain of liberty to decide how to use an external asset for such gratification. Property rights thus endow owners with rights to use (and/or to determine the uses of) external assets, exclusive of interference with those legitimate domains for use (and/or use-determination). In this formulation, property’s exclusivity is always calibrated to property’s legitimate use or use-determination — not the other way around.

To repeat, property’s analytical structure does not determine or settle all questions about how to design property rights. One community may configure the general freedom to “use” land in order to encourage

⁵⁹ See *id.* at 1713–14.

⁶⁰ Or, perhaps, why officials and citizens who shape the political community’s morals *believe* an owner deserves.

⁶¹ See generally Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275 (2008).

⁶² See generally Mossoff, *supra* note 8.

⁶³ See Claeys, *supra* note 51, at 17–36.

⁶⁴ See PENNER, *supra* note 48, at 49–51, 66–75. Penner presents a slightly different case because he portrays property as a right to exclude, grounded in an interest in use. He portrays the right to exclude as primary because the law operates by enforcing on nonowners a duty “to exclude themselves from the property.” *Id.* at 72. By contrast, Mossoff, Katz, and I all portray property as a right to decide how to use exclusively, grounded in an interest in use. The normative interest in use is in “law of property” and is more central to the “the law of property” than is the duty to exclude. See Claeys, *supra* note 51, at 23–25.

the active development of land and discourage the passive enjoyment of sunlight, while another may do the opposite.⁶⁵ My definition can highlight that choice, but it cannot determine or make the choice. My definition is analytical, while the choice remains normative. Yet at least my analysis shows how social practice and private law settle general normative choices and then bracket and focus subsidiary choices. In both communities, nuisance continues to secure a general right of noninterference for *some* uses; the communities disagree on the subsidiary question of which specific activities are swept into that general right.

The Law of Things suffers because it delinks both exclusion and governance from use. Obviously, this misconception helps explain why *The Law of Things* treats riparian rights and other usufructs so dismissively. Although usufructs may not convey rights to exclude with modularity and all the other attributes of thingness, they have more content and direction than is conveyed by a term like “governance.” Usufructs configure the right to exclude to protect riparians’ concurrent interests in using river water for their personal and land needs.⁶⁶

There are similar if subtler puzzles in how *The Law of Things* portrays the right to exclude in relation to land and chattels. To his credit, Smith acknowledges that “[r]ights to exclude are a means to an end, and the ends in property relate to people’s interests in using things.”⁶⁷ Correctly, Smith denies that “the right to exclude is . . . why we have property.”⁶⁸ Dubiously, however, he asserts that “the right to exclude is part of *how* property works.”⁶⁹ Rather, in both practice and law, the right to exclude becomes part of property law only to the extent it implements the practical reason that shapes property rights. That reason is a general right to use or determine the use of an object of ownership, within certain general parameters. The right is designed to reconcile the concurrent interests owners and non-owners have in using the object.

To illustrate, consider the choice between injunctions and damages in trespass.⁷⁰ In trespass, the possessory interest embodies a normative

⁶⁵ Compare *Prah v. Maretti*, 321 N.W.2d 182, 184 (Wis. 1982) (endorsing such a use right), with *Sher v. Leiderman*, 226 Cal. Rptr. 698, 699 (Cal. Ct. App. 1986) (rejecting such a use right).

⁶⁶ See generally Eric R. Claeys, *Intellectual Usufructs: Trade Secrets, Hot News, and the Usufructuary Paradigm at Common Law*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* (Shyamkrishna Balganeshe ed., forthcoming 2013), available at <http://ssrn.com/abstract=1889231>.

⁶⁷ Smith, *supra* note 1, at 1704.

⁶⁸ *Id.* (emphasis omitted).

⁶⁹ *Id.*

⁷⁰ The following argument restates an argument made in Claeys, *supra* note 8, at 645, and my criticisms therein of Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719 (2004).

relation by which property owners have nearly total control over access to their lots and nonowners have virtually none. That absolute control indirectly promotes use. Such control encourages different owners to use similar lands for a wide range of legitimate uses, it secures the investment necessary for long-term uses, and it helps the owner accomplish plans that involve not only land but also other people or other factors of production. To borrow Smith's terminology, trespass institutes a right to exclude, and the right to exclude gives land modularity — but the exclusion and the modularity are justified in relation to use. In Blackstone's words, "sole and despotic dominion"⁷¹ encourages each owner to "retain to himself the sole *use* and occupation of his soil."⁷²

That norm shapes the remedies applicable in trespass. If Taney builds an encroaching structure on Marshall's land, equity starts with a strong presumption that Marshall deserves an injunction.⁷³ By reinforcing Marshall and other land owners' rights of exclusive control, this presumption indirectly encourages them to use their land with all the more initiative. As one case put it:

A particular piece of real estate cannot be replaced by any sum of money, however large; and one who wants a particular estate for a *specific use*, if deprived of his rights, cannot be said to receive an exact equivalent or complete indemnity by the payment of a sum of money.⁷⁴

Remedy law reinforces the same normative structure in how it treats scienter. Assume that Taney trespasses intentionally or with some other scienter more culpable than good faith. Unless some other circumstance excuses the encroachment, it will be extremely difficult for Taney to persuade a court of equity not to enjoin his encroachment.⁷⁵ This norm also protects and encourages use interests, indirectly. Property rights are threatened most by deliberate and coordinated trespasses; this rule deters and delegitimizes such trespasses.

Yet assume that Taney's encroachment is minor, that it is expensive to tear down, and that Taney encroached mistakenly even though he diligently checked titles and boundary lines before building. Taney does not jeopardize the secure control and use of property; by conducting due diligence, he respects others' property claims. The requirement that the encroachment be minor embodies a moral insight: the

⁷¹ 2 BLACKSTONE, *supra* note 52, at *2.

⁷² 3 *id.* at *209 (emphasis added).

⁷³ *Accord* Smith, *supra* note 1, at 1714–15.

⁷⁴ Lynch v. Union Inst. for Sav., 34 N.E. 364, 364–65 (Mass. 1893) (emphasis added).

⁷⁵ See Golden Press, Inc. v. Rylands, 235 P.2d 592, 594–95 (Colo. 1951); Heaton v. Miller, 391 P.2d 653, 658–59 (N.M. 1964); M. T. Van Hecke, *Injunctions to Remove or Remodel Structures Erected in Violation of Building Restrictions*, 32 TEX. L. REV. 521, 530–31 (1954).

encroachment does not deprive Marshall “of any beneficial use”⁷⁶ of his land. Similarly, the requirement about the hardship to Taney embodies another moral insight: if he makes his encroachment in good faith, it is reasonable to say *Taney* is using the encroached land beneficially. In this circumstance, the law better protects and encourages the concurrent use interests of Taney, Marshall, and other similarly situated parties in later cases if it *qualifies* the ordinary broad right of use-determination. The law should vest in a nonowner a privilege to acquire, and a power to divest a title owner of, ownership of a small strip of unused land when the nonowner mistakenly occupies and build on the strip in good faith.⁷⁷

The Law of Things explains trespass’s features as examples of the interplay between exclusion and governance.⁷⁸ From the internal point of view, however, a lawyer can “reason forward” to the exclusion and governance in doctrine from a general account explaining why owners’ interests in use-determination take priority sometimes and nonowners’ interests in use take priority at other times. The lawyer cannot “reason backwards”⁷⁹ from exclusion and governance to property’s internal substantive goal. Perhaps *The Law of Things*’s exclusion-governance continuum allows lawyers or policy analysts to consider other goals. If so, it portrays existing property law inaccurately. Perhaps the exclusion-governance continuum accords with the internal explanation I have just provided. If so, I suspect the former is parasitic on the latter, for reasons stated in Part III.

Here, readers may wonder whether I have just supplied a “Just So Story” of my own.⁸⁰ Although my account of trespass is certainly not such a story in the sense explained in Part III,⁸¹ it may seem such a story in the sense that it may seem *ad hoc*. My account rationalizes the *de minimis* exception as a direct use right but rationalizes trespass’s other and more general features as *indirect* use-based rights. Yet people rely on such indirect forecasts and generalizations quite often in ordinary practical life. It is as absurd “to demand demonstrations from a rhetorician” as it is to “accept[] probable conclusions from mathematician.”⁸² By the same token, it is unrealistic to expect a

⁷⁶ *Loughlin v. Wright Mach. Co.*, 173 N.E. 534, 535 (Mass. 1930).

⁷⁷ See *Claeys*, *supra* note 51, at 31–32.

⁷⁸ Smith, *supra* note 1, at 1704–05.

⁷⁹ Mossoff, *supra* note 8, at 394–95.

⁸⁰ I thank Henry Smith for prompting me to consider this possibility.

⁸¹ Strictly speaking, the account given moves beyond the analytical to the normative. I assume here that it is easy to justify trespass’s right of exclusive control on several overlapping moral grounds. “If we believe in any fairly robust interest in autonomy, then the interest in determining the use of things is in part an interest in trying to achieve different goals.” PENNER, *supra* note 48, at 49.

⁸² ARISTOTLE, *supra* note 4, bk. I, ch. 3, at 2.

practical decisionmaker not to implement a scheme of trespassory rights until a modern law and economics scholar develops an intricate formal-mathematical or empirical justification for trespass's possessory interest in exclusive control. For the same reason, economic accounts are at least as *ad hoc* as the account supplied here.⁸³ This *ad hoc* character is perfectly understandable. In formal, economic terms, injunctions can (inefficiently) encourage holdouts, but permanent-damage remedies can (inefficiently) encourage subjective-value expropriation, market demoralization, and rent dissipation.⁸⁴ The best economic analyses of which I am aware admit that these tradeoffs are "implicitly empirical but not capable of precise justification."⁸⁵ Such analyses proceed to settle the relevant tradeoffs by interpreting from a "strong set of practices" that a "judgment has been made, perhaps unconsciously, by large numbers of persons who have been forced to confront" those tradeoffs.⁸⁶ Although these accounts are admirable for their candor, they are bootstrapping explicitly on doctrine. After all, by their method, the analysis that makes the most sense economically is the one that conforms most closely to doctrine and practice. That bootstrapping provides further confirmation of my general suspicions about the inadequacy of economic method.⁸⁷

VI. PROPERTY'S RELATION TO THE REST OF PRIVATE LAW

My last doubt relates to the general topic of this Symposium — the private law. Does the account of property in *The Law of Things* help clarify the conceptual relations among different fields of private law? I am skeptical.

Because *The Law of Things* abstracts from the law's internal point of view, it is relatively uninterested in how different fields of private law interact with one another. *The Law of Things* begins by taking for granted that the private law has a "need for baselines" and that

⁸³ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.10, at 86–90 (8th ed. 2011); Eric R. Claeys, *Locke Unlocked: Productive Use in Trespass, Adverse Possession, and Labor Theory* 62–63 (George Mason Univ., Law and Econ. Research Paper Series, Paper No. 12–21, 2012), available at <http://ssrn.com/abstract=1759551>.

⁸⁴ See Thomas W. Merrill, *The Economics of Public Use*, 72 *CORNELL L. REV.* 61, 72–89 (1986). Merrill applies the property rule/liability rule distinction first propounded in Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089 (1972).

⁸⁵ Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 *YALE L.J.* 2091, 2095 (1997).

⁸⁶ *Id.* I read Smith to rely on the same method. See Smith, *supra* note 70, at 1743–44 (criticizing other economics scholars for making unfounded empirical claims); see also *id.* at 1781 (settling an economic trade with "an empirical guess").

⁸⁷ See *supra* Part III.

“[p]roperty is a platform for the rest of private law.”⁸⁸ Yet the article does not supply a detailed account of how property provides such a baseline or platform. Nor does it explain how the characters of other fields of private law are shaped by property’s supplying such a baseline or platform. *The Law of Things* refers to “torts like trespass”⁸⁹ and “aspects of property like nuisance.”⁹⁰ Are trespass and nuisance torts, property doctrines, or both? If trespass and nuisance are both — that is, property torts — in what respects do they partake of property and of tort? *The Law of Things* refers to nuisance and covenants both as “governance strategies.”⁹¹ This portrait gives short shrift to the important structural differences between torts,⁹² contracts, and remedies for wrongs in both fields. Part IV, the section of the Article most focused on this relation, more or less asserts that “[m]odular property feeds into tort, contract, and restitution.”⁹³ How so?

Since space constraints limit Smith only to speculating about these questions,⁹⁴ let me finish with a few speculations of my own. I doubt my speculations are original, for I am repeating here general points already noted by analytical legal positivists⁹⁵ and natural law scholars.⁹⁶ Yet it is also worth noting that these suggestions have generally been overlooked in American private law scholarship. In my opinion, this gap confirms that, on some fundamental matters, legal realism has obscured the study of private law. I suspect the issues I consider here will be extremely important to the New Private Law movement.⁹⁷

I suspect that tort, contract, unjust enrichment, and the law of remedies all relate to property teleologically in the sense described in Part II.⁹⁸ In a political community, the law of private property follows, declares, and embodies broader common social opinions about the legal relations in which citizens should stand to one another regarding the use of external assets. Tort, contract, unjust enrichment, and remedy law are all secondary in an important respect. These fields are shaped to help carry property’s norms into practice, and they are all judged by how well they carry those norms into practice. In part, they do so by imposing primary duties consistent with what

⁸⁸ Smith, *supra* note 1, at 1691.

⁸⁹ *Id.* at 1693.

⁹⁰ *Id.* at 1717.

⁹¹ *Id.* at 1710.

⁹² On this basis, I have reservations about Henry E. Smith, *Modularity and Morality in the Law of Torts*, 4 J. TORT L., no. 2, 2011, at art. 5.

⁹³ Smith, *supra* note 1, at 1723.

⁹⁴ *See id.* at 1723–25.

⁹⁵ *See, e.g.*, COLEMAN, *supra* note 35, at 31–34.

⁹⁶ *See, e.g.*, Finnis, *supra* note 17, at 45–48, 51–52.

⁹⁷ *See generally* Claeys, *supra* note 22 (applying the following observations to explain how property, tort, contract, unjust enrichment, and remedy principles interrelate in trade secrecy).

⁹⁸ *See supra* p. 5.

property norms require. Thus, trespass declares and enforces a general duty on nonowners to “keep off” owners’ land.⁹⁹ In part, these secondary fields institute corrective mechanisms. Thus, if Taney violates his in rem duty to keep off Marshall’s land, trespass supplies the institutional mechanism by which Marshall seeks confirmation that he suffered a wrong and obtains rectification for that wrong.

In addition, however, tort, contract, unjust enrichment, and the law of remedies all help specify or fill in the details of property’s primary duties. Each of the secondary fields makes available a rack of different doctrinal options. Different secondary doctrines take different options off the rack to make the field protect and correct rights consistent with the ideals set by primary norms associated with property law and policy.¹⁰⁰

Consider trespass again. Tort law provides menu options for harm requirements (harm-based and rights-based torts) and for scienter requirements (intent, fault, or strict liability). Property law prescribes that the possessory interest in controlling land should be nearly exclusive or modular. To carry these prescriptions into practice, trespass dispenses with the harm element and institutes strict liability.¹⁰¹ Back in property law, however, the possessory interest in control is not absolute. Trespass institutes affirmative defenses (for airplane overflights, or for implied rights of access to land) to conform the tort to the proper bounds of the possessory interest.¹⁰² In addition, the possessory interest in using land is more contextual than the corresponding interest in controlling it. Behind the veil of ignorance, most landowners’ interests in using their land will be enlarged if each owner is bound to waive the right to sue others for low-level nontrespassory invasions that are reasonably necessary to common beneficial uses of land. The tort of nuisance adapts the tort of trespass (and picks from menu options generally available in tort) to accord with this difference. Unlike trespass, nuisance institutes a harm element — that is, proof of actual interference to some ongoing use of land. It also requires proof that a defendant’s pollution is “unreasonable” in relation to local live-and-let-live norms.¹⁰³

Contract fits the same picture. Not only does property supply the “platform” that Smith envisions for contracting, it also supplies norms

⁹⁹ See Smith, *supra* note 1, at 1693. I suspect that tort and the other fields I call “secondary” in text relate to “primary” norms about bodily health and safety, free locomotion, free competition, reputation, intimacy of association, and other similar personal interests in the same manner in which they relate to property norms. I focus on property norms simply for ease of exposition.

¹⁰⁰ See Claeys, *supra* note 22, at 43.

¹⁰¹ See Claeys, *supra* note 3, at 1405–09, 1414–16.

¹⁰² See Claeys, *supra* note 51, at 32–34.

¹⁰³ See Claeys, *supra* note 3, at 1418–20.

that reconfigure contract doctrine. Although a “contract ordinarily binds the parties to it and not others,” a covenant running with the land empowers an owner, “simply by virtue of becoming owner of the estate in land, [to] enforce the contract.”¹⁰⁴ In other words, at the interface of property and contract, the private law abandons contract’s general preference for in personam obligations and adapts contract doctrine to promote all the policies that, as Smith explains, make land rights in rem. Similarly, trespass remedies help specify the substance of land possessors’ use rights.¹⁰⁵ As the exception for *de minimis* encroachment shows, however, the remedies embody normative principles about free use-determination coming from the law of property.¹⁰⁶

CONCLUSION

My criticisms of *The Law of Things* do not detract from my admiration for the article or my gratitude for the previous articles on which Smith builds. The bundle picture remains prominent in contemporary property law and scholarship,¹⁰⁷ but Smith is quite right that it is defective and deserves reconsideration.¹⁰⁸

Nevertheless, although it is not yet clear what “New Private Law Theory” is or aspires to be, legal philosophers in that project hope to set adequacy criteria for private law theory more rigorous than the criteria established by the legal realists. *The Law of Things* and Smith’s prior work deserve to be judged by those adequacy criteria. By those criteria, an exclusion portrait grounded in information costs is pretty good — for an economic analysis. Yet that economic analysis remains philosophically inadequate in important respects because it abstracts from “use” and other normative concepts internal to the law of private property.

¹⁰⁴ See HERBERT HOVENKAMP & SHELDON F. KURTZ, PRINCIPLES OF PROPERTY LAW §§ 10.1–10.2, at 339–40 (6th ed. 2005).

¹⁰⁵ See generally Jules L. Coleman & Jody Kraus, *Rethinking the Legal Theory of Rights*, 95 YALE L.J. 1335 (1986).

¹⁰⁶ See *supra* pp. 13–14. But see generally Henry E. Smith, *An Economic Analysis of Law Versus Equity* (Oct. 22, 2010) (unpublished manuscript), available at http://www.law.yale.edu/documents/pdf/LEO/HSmith_LawVersusEquity7.pdf.

¹⁰⁷ See Eric R. Claeys, *Takings: An Appreciative Retrospective*, 15 WM. & MARY BILL RTS. J. 439, 447–51 (2006) (book review).

¹⁰⁸ See generally Symposium, *Property: A Bundle of Rights?*, 8 ECON J. WATCH 193 (2011).