WHAT IS PROPERTY? PUTTING THE PIECES BACK TOGETHER

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Table of Contents

I. INTRODUCTION

What is property? Is it merely a linguistic term, denoting a complex aggregate of separate rights that have been merely "bundled" together for ease of reference? Is it a matter of only excluding other people from one's possessions? Or is it something more—a concept that represents an integrated unity of the exclusive right to acquire, use and dispose of one's things? The complex institutions that have been created around the concept of property are omnipresent in our society today, but the pressing question remains whether there is a theoretical account of property that can sufficiently describe and guide these institutions.

A. The Fragmentation of the Concept of Property: The Bundle and Exclusion Theories

The death of the concept of property actually was declared to be imminent just twenty years ago. In an oft-cited article, Thomas Grey noted that the theories and institutions concerning property over the past 200 years produced "the ultimate consequence that property ceases to be an important category in legal and political theory."[1] It was clear, wrote Grey, that we had reached a point in which the "specialists who design and manipulate the legal structures of the advanced capitalist economies could do without using the term 'property' at all."[2] Such sentiments were not hyperbole.

Since the turn of the century, the concept of property had succumbed to the acid wash of a nominalism first popularized in the law by the legal realists. Early in the twentieth century, Wesley Hohfeld assiduously analyzed the concept of a "right" into its respective components of correlative claims and duties between individuals in society.[3] Property was not spared from this analysis.[4] Walter

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1. Thomas C. Grey, *The Disintegration of Property*, in NOMOS XXII: PROPERTY 69, 81 (J. Roland Pennock & John W. Chapman eds., 1980).

2. *Id.* at 73.

3. Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter Hohfeld, *Fundamental Legal Conceptions*]; Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

Wheeler Cook summarized Hohfeld's analysis of property as having shown that "what the owner of property has is a very complex aggregate of rights, privileges, powers and immunities," not in a thing (*in rem*) but rather against other people (*in personam*).[5] On the less circumspect side of the realist movement, Felix Cohen's infamous attack on a conceptual approach to law included "property rights" within a class of legal concepts that Cohen viewed as "supernatural entities" and "transcendental nonsense."[6] Although the realists were not necessarily of one mind on any substantive issue within legal theory,[7] their methodological approach achieved the same result—legal concepts were thereafter largely viewed as conventional associations that served socio-political goals.

This approach had, in the words of Grey, "disintegrated" the concept of property,[8] and what was left was a collection of distinct rights referred to by both academics and the courts as merely a "bundle."[9] In accordance with its nominalist origins, this "bundle theory of property" connotes a contingent arrangement of

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4. Hohfeld, *Fundamental Legal Conceptions*, *supra* note 3, at 743 (noting that "the supposed single right *in rem* . . . really involves as many separate and distinct 'right-duty' relations as there are persons subject to a duty").

5. Walter Wheeler Cook, *Introduction* to WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 14 (1919).

6. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935). Cohen advocated a "functional method" that redefined legal concepts pragmatically according to the results they achieved in society. *Id.* at 827–29. Cohen also refers to Hohfeld, as well as Holmes, as having made progress in "the redefinition of every legal concept in empirical terms." *Id.* at 828; *see also* Jeremy Waldron, *"Transcendental Nonsense" and System in the Law*, 100 COLUM. L. REV. 16 (2000) (analyzing and critiquing Cohen's approach).

7. "Legal realism" as an appellation stands less for any positive ideals than it does for the critical response to legal formalism and its attendant political positions. NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 69 (1995) (recognizing that "[r]ealism was more a mood than a movement. That mood was one of dissatisfaction with legal formalism"); *see also* Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1233–34 (1931) (noting that the realists were not of one mind on any issue).

8. Grey, *supra* note 1, at 74 ("The concept of property and the institution of property have disintegrated.").

9. Andrus v. Allard, 444 U.S. 51, 65–66 (1979); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); *see also* GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970, at 381 (1997) ("[T]he Realists . . . were responsible for replacing in mainstream legal consciousness that conception [of property as absolute dominion and control over a thing] with the disaggregated, more explicitly social 'bundle of rights' conception."); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711 (1996) (discussing and criticizing the bundle theory); Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239 (1994) (discussing and critiquing the bundle theory from a feminist perspective); Margaret J. Radin, *The Consequences of Conceptualism*, 41 U. MIAMI L. REV. 239, 242 (1986) (noting that "if exclusion rights against nonwhites were formerly considered to be part of the bundle of rights called property, they were wrongly so considered"); BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 26–29 (1977) (discussing the "scientific" analysis of property as a "bundle" of rights).

analytically distinct elements. As with any bundle of items—say a shopping bag of fruit, filled with oranges, apples, bananas and peaches—people are free to pack it and rearrange it in whatever way they see fit. A person may take out the apples, for instance, and they still possess a "shopping bag of fruit." Moreover, a person may speak about and use the particular items of fruit within the bag without invoking the larger category of "shopping bag of fruit." There is nothing essential or necessary about any particular component of the shopping bag of fruit. As applied to the concept of "property," the bundle theory maintains that there is "no essential core of those rights that naturally constitutes ownership."[10] In the law, this bundle of duties and claims could be analytically dissected by scholars and adjudicated by the courts without any need for reference to "property" at all.

Obituaries for property, however, proved as premature as Grant Gilmore's prediction less than ten years earlier of a similar demise for contract.[11] In the ensuing years, a variety of scholars and philosophers have returned to the concept of property with enthusiasm. Property rights have been expounded upon in a variety of contexts, including how takings should occur under the Fifth Amendment,[12] how communities define property rights without the necessity of referring to legal rules,[13] how property is a necessary prerequisite for political liberty,[14] and how property has been defined and protected under the Constitution.[15] Furthermore, scholars in law and philosophy have published a variety of analytical exegeses of property as both a concept and a moral right.[16] The Supreme Court also has redefined the constitutional doctrine of takings in a manner that has helped bring (private) property to the forefront of the academic and public policy debate.[17] In the early nineties, the work of academics and the Supreme Court prompted one prominent property scholar to remark that

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10. Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 30 (1986).

11. GRANT GILMORE, THE DEATH OF CONTRACT (1974) (arguing that contract was collapsing back into torts from which it was begot in the nineteenth century).

12. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

13. ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

14. RICHARD PIPES, PROPERTY AND FREEDOM (1999).

15. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2d ed. 1998); *see also* TOM ALLEN, THE RIGHT TO PROPERTY IN COMMONWEALTH CONSTITUTIONS (2000) (discussing the protection of property under the myriad countries that have evolved from under British rule, including the United States).

16. *See, e.g.*, J.E. PENNER, THE IDEA OF PROPERTY IN LAW (1997); STEPHEN R. MUNZER, A THEORY OF PROPERTY (1990); YORAM BARZEL, ECONOMIC ANALYSIS OF PROPERTY RIGHTS (1989); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988); ALAN RYAN, PROPERTY AND POLITICAL THEORY (1984); *see also* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY (Stephen R. Munzer ed., 2001); PROPERTY RIGHTS (Ellen Frankel Paul et al. eds., 1994).

17. Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

"[p]roperty rights are clearly back on the public agenda as a subject for discussion and debate."[18]

Within these myriad opinions and texts of the past two decades there is a movement to rescue the concept of property from the disintegrating effects of the bundle theory by focusing on the right of a property owner to exclude other people. Property, some scholars maintain, is not merely a contingent assortment of rights and obligations. This concept has a necessarily essential characteristic: the right to exclude. Thomas Merrill has recently declared that the right to exclude is the *sine qua non* of the concept of property,[19] and J.E. Penner argues that "the right to property should be conceived as the right of exclusive use."[20] By adopting the "exclusion theory of property," these scholars hope to explain fully the concept and its institutions, and thus rescue it from an undeserving and premature demise.[21] Such an approach, according to exclusion theorists, would ultimately provide the necessary material for either justifying or critiquing property doctrines, as well as "offer a complete account of constitutional provisions like the Due Process Clause and the Takings Clause that protect 'property.'"[22]

Nonetheless, the exclusion theory does not succeed in rescuing the concept of property. In response to the bundle theory, exclusion theorists merely pick a single stick—the right to exclude—and attempt to reduce property to this single right. As such, it shares with the bundle theory a fragmented view of property, and its positive insight is too narrow to account fully for the assorted legal doctrines subsumed under this concept.

These insights will be illustrated in this Article through a survey of a wide variety of property doctrines. For instance, the exclusion theory cannot provide an adequate descriptive account of the evolution of basic property rules, such as the common law rule of first possession.[23] Moreover, the exclusion theory fails to explain *why* we are interested in protecting some entitlements as "property," such as the varied rights subsumed under the increasingly significant domain of intellectual property.[24] Finally, in its extremely narrow conception of property, the

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18. Richard A. Epstein, *Property as a Fundamental Civil Right*, 29 CAL. W. L. REV. 187, 187 (1992). Current international and political events also may have played a role in the resurgence of interest in the concept of property. *See* Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 329 (1996) ("The collapse of socialist regimes has revived an interest in property rights all over the world, as once-statist nations consider privatization as a route to commercial and economic revitalization."). Thomas Merrill and Henry Smith, however, have a less optimistic perspective on current property scholarship. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 357 (2001) (remarking that "[p]roperty has fallen out of fashion" and that "in the academic world there is little interest in understanding property").

19. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) ("[T]he right to exclude others is more than just 'one of the most essential' constituents of property—it is the *sine qua non*.").

20. PENNER, *supra* note 16, at 103.

21. *See* Merrill, *supra* note 19, at 731.

22. *Id.*

23. *See infra* Part IV.B.1.

24. *See infra* Part IV.B.2.

exclusion theory fails to explain the intellectual context underlying the takings clause of the Constitution, and therefore does not offer its promised "complete account" of such constitutional provisions.[25] The exclusion theory, like the bundle theory, ultimately fails in producing a concept of property that can serve as a viable, substantive foundation for our property doctrines.

B. The Integrated Theory of Property

Our choices, however, are not constrained to either the bundle or the exclusion theories. A third approach rejects the fragmentation of property achieved by the bundle theory and accepted as a basic premise of the exclusion theory. In doing so, it offers a more complete account, both analytically and normatively, of the concept of property. This third approach, the "integrated theory of property," maintains that the right to exclude is essential to the concept of property, but it is not the only characteristic, nor is it the most fundamental. Other elements of property—acquisition, use, and disposal—are necessary for a *sufficient* description of this concept. Unlike the bundle theory, however, the integrated theory maintains that the elements of exclusive acquisition, use, and disposal represent a conceptual unity that together serve to give full meaning to the concept of property.

In explaining this proposition, this Article is divided into three parts. Part II will complement the work of the exclusion theorists by surveying the role of the right to exclude in the works of the seventeenth-century property theorists. In particular, it will show how the work of Hugo Grotius (1583–1645), Samuel Pufendorf (1632–1694) and John Locke (1632–1704) treated the right to exclude as the final characteristic that brought property—an individual right to property—into the world. This historical record, however, should not be interpreted as an unqualified endorsement of the exclusion theory. While clearly evidencing the essential role of exclusion in the development of property, the work of these property theorists indicates that property is defined by something *more* than merely the right to exclude. Accordingly, Part III will criticize the exclusion theory, explaining how exclusion is a formal requirement of property that does not provide the substantive content necessary to give this concept its analytical and normative meaning. The concept of property is explained best as an integrated unity of the exclusive rights to acquisition, use and disposal; in other words, property is explained best by the integrated theory of property. Finally, Part IV will show how this theory was ultimately applied in the law by common-law jurists on both sides of the Atlantic. As such, the integrated theory of property provides a basis both for understanding existing property doctrines as well as for evaluating how these doctrines should be defined in the future. There is much to be learned from the integrated theory of property, which provides an alternative to the fragmented bundle theory, but does not adopt the excessively narrow approach of the exclusion theory.

A preliminary comment about the methodology adopted in this Article is in order. The arguments of the seventeenth-century property theorists are important, not because of any alleged historical authority, but because their

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25. *See infra* Part IV.B.3.

approach reflects a concept of property that is distinct from the now-dominant bundle or exclusion theories. It is an integrated theory of property. Philosophers and intellectual historians therefore may find the ensuing analysis interesting or valuable, but these ideas are important because they have had, and will continue to have, a significant impact on the definition and application of our legal rules concerning property. This Article advances not a historical theory, but rather an alternative theory of property that explains past practice and is capable of guiding future action.

II. THE RIGHT TO EXCLUDE AS AN ESSENTIAL BUT INSUFFICIENT COMPONENT OF PROPERTY

Although exclusion theorists ultimately fail in fully describing the concept of property and the legal rules intended to protect it, their intended goal to save this concept from the disintegrating effects of the bundle theory is laudable. It is the positive insight of the exclusion theory—property has at least one essential characteristic—that suggests why it is viewed by some people as a better alternative to the bundle theory. In providing at least one essential hook upon which to hang our property rules, the exclusion theory gives our legal institutions a theoretical grounding. At a minimum, the exclusion theory says *something* about property.[26] It is for this reason the exclusion theory is both important and ultimately ineffectual: its substantive description of property lacks the breadth necessary to sufficiently describe and justify Anglo-American property institutions. This also illustrates why we are concerned about these theories of property—they constitute the policy arguments that legislators and courts use in defining our legal rules and applying these rules in particular cases.

Notably, the Supreme Court has put the exclusion theory into practice in recent years, holding that the "right to exclude [is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[27] There is also significant historical pedigree to the exclusion theory, such as James Madison's belief that property "means 'that domination which one man claims and exercises over the external things of the world, in *exclusion* of every other individual.'"[28] Thomas Jefferson did not think that intellectual property is in fact "property," arguing that that "[i]nventions . . . cannot, in nature, be a subject of property" because an idea is "incapable of confinement or *exclusive*

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26. Penner, an exclusion theorist, has emphasized this point in his critique of the bundle theory that it "is really no explanatory model at all, but represents the absence of one. 'Property is a bundle of rights' is little more than a slogan." Penner, *supra* note 9, at 714.

27. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)); *see also* Dolan v. City of Tigard, 512 U.S. 374, 394 (1994) (holding that a taking had occurred because a property owner's "right to exclude . . . would be eviscerated" under local regulatory requirements).

28. James Madison, *Property*, NAT'L GAZETTE, Mar. 5, 1792, *reprinted in* JAMES MADISON, THE MIND OF THE FOUNDER 186 (Marvin Meyer ed., 1981) (emphasis added). Madison is, of course, paraphrasing Blackstone's famous introduction to his discussion of property in the *Commentaries*. *See infra* note 101 and accompanying text.

appropriation."[29] The right to exclude certainly is an essential characteristic of property—at least by the lights of those individuals who created our Constitution and who implement this document today on the Supreme Court.

A recognition of the history underlying the right to exclude, however, is lacking in the recent work of the exclusion theorists. This is significant because Anglo-American property institutions were not born *ex nihilio*, but rather find their intellectual roots in the concept of property defined and justified by Grotius, Pufendorf and Locke. The work of William Blackstone, Thomas Rutherforth, Lord Mansfield, James Kent and others brought the ideas of Grotius, Pufendorf and Locke to bear upon a multitude of political and legal doctrines. These writings in turn heavily influenced the Founders and later generations of Americans who defined the property institutions of our nascent country. It is therefore instructive to review the doctrines of Grotius, Pufendorf and Locke to see to what degree they maintain that the right to exclude is a necessary characteristic of property.[30] In this way, we can gain a better understanding of our property rules today and thereby have a basis for critiquing or justifying these rules in the future.

It is the purpose of Part II to draw out the implicit notion of the right to exclude in the conception of property in the seventeenth and eighteenth centuries. In this regard, the project set forth by Grotius, Pufendorf and Locke is significant and is deserving of study, but not merely because it offers historical support for the claims of the exclusion theory. As illustrative of the integrated theory of property, these theorists go beyond the analytical claim of the exclusion theory that property is synonymous with the right to exclude. In providing a developmental argument for property, their work explains *why* the right to exclude is important, and *how* this particular right functions in the concept of property. Furthermore, they also explain the function of exclusion vis-à-vis the other elements of property, i.e., acquisition, use, and disposal. At a minimum, this indicates how the exclusion theory, while incomplete and unsatisfactory in its conclusions, is reacting properly to a fundamental failing of the bundle theory.

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29. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* THOMAS JEFFERSON, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 577 (Adrienne Koch & William Peden eds., 1972) (emphasis added).

30. There has been a recent resurgence of interest in the work of these three particular scholars and related seventeenth-century philosophers. *See, e.g.*, KNUD HAAKONSSEN, GROTIUS, PUFENDORF AND MODERN NATURAL LAW (1999); KNUD HAAKONSSEN, NATURAL LAW AND MORAL PHILOSOPHY: GROTIUS TO THE SCOTTISH ENLIGHTENMENT (1996); STEPHEN BUCKLE, NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME (1991). For new translations and republished texts, see, for example, NATURAL RIGHTS ON THE THRESHOLD OF THE SCOTTISH ENLIGHTENMENT: THE WRITINGS OF GERSHOM CARMICHAEL (James Moore & Michael Silverthorne eds., 2002); ALGERNON SIDNEY, COURT MAXIMS (Hans W. Blom et al. eds., 1996); THE POLITICAL WRITINGS OF SAMUEL PUFENDORF (Michael J. Seidler trans., Craig L. Carr ed., 1994); SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW (James Tully ed., Michael Silverthorne trans., 1991) (1673).

A. The Right to Exclude in the First Modern Theory of Property

The dominant theory of property in Anglo-American law has always required exclusion as one of many essential and necessary characteristics of this concept. One finds the first account of this modern theory of property in the texts of Hugo Grotius. Grotius is regarded as the first modern rights theorist,[31] and it is to his moral and political philosophy that one looks today to find the first exposition on what is now considered the "traditional" triad of political rights—the rights to life, liberty and property. Although his work is rife with citations and quotes from sources in Greek antiquity, Roman law, Medieval Scholastics and the Bible, Grotius's conception of rights, and especially of the right to property, was quite novel in his time.[32] Moreover, Grotius's concept of property is unlike that offered by contemporary bundle theorists or exclusion theorists because Grotius's analysis is *developmental* and *functional* in nature—focusing on the conditions and goals that give rise to the need for the moral concept and accompanying institution of property. In developing this original argument for property, his work is paradigmatic of the integrated theory, and it reveals the extent to which exclusion is an integral part of property, but is neither the genesis nor the core of this concept.

Generally speaking, Grotius sets forth a two-step process for defining the source and nature of property: first, there must be some action by an individual

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31. Knud Haakonssen, *Hugo Grotius and the History of Political Thought*, *reprinted in* GROTIUS, PUFENDORF AND MODERN NATURAL LAW 35, 36 (Knud Haakonssen ed., 1999) ("Grotius's most important contribution to modern thought was his theory of rights, for, although he had precursors, it was in his formulation that it gained currency. . . ."); RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 71 (1979) ("Grotius was . . . the first radical rights theorist.").

The recognition that Grotius's ideas lie at the foundation of modern rights theory is not a contemporary insight. He was revered in the seventeenth century, as evidenced by Pufendorf's statement in the preface to the second edition of *De Jure Naturae et Gentium* that Grotius was "the first to call his generation to the consideration of that study" of the law of nature and nations and that scholars who have followed "have been accorded the special designation of his 'Son.'" SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM, at v–vi (C.H. Oldfather & W.A. Oldfather trans., 1934) (1688) (the title translates to *On the Law of Nature and Nations*); *see also infra* Part IV.B.1 (discussing the influence of Grotius and his intellectual progeny on eighteenth and nineteenth-century scholars).

32. Scholarship antecedent and contemporaneous to Grotius typically treated property as a neutral concept, which may or may not implicate moral appraisal. For example, Francisco Suarez, a political theorist writing at approximately the same time as Grotius, believed that property was not a moral concept. He argued that "nature has conferred upon men in common dominion over all things, and consequently has given to every man a power to use these things; but nature has not conferred private property rights in connexion with that dominion, a point well brought out by Augustine." FRANCISCO SUAREZ, *De Legibus, Ac Deo Legislatore*, *in* FRANCISCO SUAREZ, SELECTIONS FROM THREE WORKS 278 (G.L. Williams et al. trans., 1944) (1612) (the title translates to *A Treatise on Laws and God the Lawgiver*) (citation omitted). Suarez, though, further argued that how people acted vis-à-vis another's property could implicate moral judgment; he noted that "although division of property may not be prescribed by natural law, nevertheless, after this division has been made and spheres of dominion have been distributed, the natural law forbids theft, or the undue taking of another's property." *Id.* at 279.

that places him in the proper relationship with an object in the world, and second, there must be some sort of social recognition of this relationship. In other words, the concept of property begins with the *use* or *occupation* of a possession, but this is not a sufficient condition for creating property (*dominion*) in the world. In order for property to make its final appearance, individuals must *consent* to recognize and respect each other's rights.

The first step—the proper physical relationship between an individual and an unowned object in the world—begins with Grotius's invoking an idea first conceived by the Roman Stoics. This starting point is significant because it lays the foundation of virtually all property theory for the next several centuries. In the beginning, writes Grotius,

> the human race [possessed] a general right over things of a lower nature. . . . In consequence, each man could at once take whatever he wished for his own needs, and could consume whatever was capable of being consumed. The enjoyment of this universal right then served the purpose of private ownership; for whatever each had thus taken for his own needs another could not take from him except by an unjust act.[33]

In other words, individuals possessed only *use-rights* in the original state of nature. Insofar as people required objects to sustain their lives, such as water from a stream or a field for harvesting wheat, they had a right to acquire and use such things. Yet at the conclusion of the use of the stream or field, the right of the individual to such material resources terminated.

Grotius further explains the nature of a use-right by calling upon Cicero's famous analogy of the use of theater seats by Roman citizens. "Although the theater is a public place," writes Cicero, "it is correct to say that the seat which a man has taken belongs to him."[34] The citizen has the right to claim and use the theater seat insofar as it is necessary to attend the performance, but the citizen does not then have the right to rip the seat out of the theater and carry it with him when he leaves for the night. On the contrary, the seat is left in the commons, so to speak, for the next theatergoer to rightfully use. Thus, the state of nature in which man exists prior to the formation of civil society is, according to Grotius, similar "to the theater, which though it be common, yet when a man has taken any place, it is his."[35]

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33. HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 186 (Francis W. Kelsey trans., 1925) (1625) (the title translates to *The Law of War and Peace*). Standard citation for this work is to refer to the book, chapter, section and paragraph numbers. This quotation for example would be cited as follows: II.2.ii.1. This Article uses this format in addition to page number references for all further citations to this text.

34. *Id.* at II.2.ii.1, 186 (quoting MARCUS TULLY CICERO, DE FINIBUS, III.xx.67); *see also* note 63 and accompanying text.

35. This statement is from an earlier translation of Grotius's text. *See* HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES II.2.ii.1, at 69 (William Whewell trans., 1853) [hereinafter GROTIUS, BELLI (Whewell)]. In another work, Grotius quotes approvingly from Seneca, a Roman stoic, to make the same point: "To all the way was open; The *use* of all things was a *common* right." HUGO GROTIUS, DE JURE PRAEDAE COMMENTARIUS 228 (G.L.

If there exists only a right to use the commons in this original state of nature (something akin to the legal concept of a usufruct), then what accounts for the shift to the more complex and exclusionary right to property in civil society? Grotius provides several explanations for how and why the shift from use-rights to property rights occurs. In an early work, he notes that

> there are some things which are consumed by use, either in the sense that they are converted into the very substance of the user and therefore admit of no further use, or else in the sense that they are rendered less fit for additional service . . . . Accordingly, it very soon became apparent, in regard to articles of the first class (for example, food and drink), that a certain form of private ownership was inseparable from use. *For the essential characteristic of private property is the fact that it belongs to a given individual in such a way as to be incapable of belonging to another individual.*[36]

This is a significant observation on several accounts. First, Grotius maintains that *occupation* or *use* is the ultimate source for the development of private property rights. (This idea is a progenitor of Locke's labor argument for property.) Regardless of the philosophical justification for this claim, this argument identifies a basic intuition, i.e., a use-right logically creates a private right insofar as something is consumed or depleted in the process of using it. A piece of meat can be eaten only once, for instance, and, in the process of building a shelter, a tree can be cut down only once.[37]

More important, the implicit premise in Grotius's observation that occupation or use logically leads to private rights of possession is made explicit in the last sentence of the passage quoted above. Property evolves out of use-rights because occupation or use necessarily turns objects into *exclusive* possessions, i.e., a piece of meat is "incapable of belonging to another individual" after it has been consumed. Grotius in fact identifies this point as "the essential characteristic of private property." Thus in the first modern exposition of the right to property, exclusion is the analytical fulcrum that moves people from use-rights in the state of nature to property in civil society. Grotius repeats this point in his own words

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Williams & W.H. Zeydel trans., 1964) [hereinafter GROTIUS, PRAEDAE] (the title translates to *Commentaries on the Law of Prize and Booty*). *De Jure Praedae* was originally a brief written by Grotius in 1604, and was included (in a substantially revised version) in Grotius's second famous published work, *Mare Liberum* (1609). The brief was rediscovered and first published as a separate manuscript in 1868. George Finch, *Preface to* GROTIUS, PRAEDAE, *supra*, at x.

36. GROTIUS, PRAEDAE, *supra* note 35, at 228 (emphasis added).

37. This was also an idea that appealed to the common-law lawyers and jurists of the seventeenth century, and it is cited in decisions as early as 1648. For instance, the East India Company defended its letter patent for a monopoly in trade routes, in part, by claiming that it "hath been in possession of this trade near one hundred years, and that possession will in time give a right," citing Hugo Grotius' *De Jure Belli ac Pacis*. The East India Co. v. Sandys, 10 St. Tr. 371, 518 (1648). This claim by the East India Co., of course, contradicts Grotius's own position that the sea is not the subject matter of property claims. *See infra* notes 49–52 and accompanying text; *see also* Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550–1800*, 52 HASTINGS L.J. 1255, 1281–83 (2001) (discussing *The East India Co.* decision and the role of Grotius's ideas in this case).

shortly before his references to Cicero and Seneca: "in the present age, the term [*dominion*] connotes possession of something peculiarly one's own, that is to say, something belonging to a given party in such a way that it cannot be similarly possessed by any other party. . . ."[38] Such statements indicate the long lineage behind the contemporary exclusion theorists.

The second step in Grotius's explanation of the evolution of property is that individuals *consent* to the recognition of property rights as a means of providing for proper and peaceful social relations.[39] Grotius writes that from historical texts

> we learn how things became subject to private ownership [*dominion*]. This happened not by a mere act of will, for one could not know what things another wished to have, in order to abstain from them—and besides several might desire the same thing—but rather by a kind of agreement, either expressed, as by a division, or implied, as by occupation. In fact, as soon as community ownership was abandoned, and as yet no division had been made, it is supposed that all agreed, that whatever each one had taken possession of should be his property.[40]

In this passage, Grotius suggests that what "all agreed" to respect after the abandonment of "community ownership" is that possessions acquired through occupation or use shall be retained by their owner *exclusively*.

Prior to this agreement, people are already *using* things, and the use-right that justifies this act does not require any recognition or consent by others to be a valid entitlement. As discussed earlier, in the pre-social conditions of the state of nature, a person has the right to use things *before* any social agreements, tacit or express. These actions—the killing of a deer for food, the curing of the deer's hide for clothing, the gathering of wood and Earth to make shelter—do not presuppose anyone else accepting them as valid sources of entitlement, at least for the duration of the action or occupation. The only thing left then for people to consent to is that

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38. GROTIUS, PRAEDAE, *supra* note 35, at 227. The translators, Williams and Zydel, translate *dominion* as "ownership," but this is an inadequate translation. The English word "ownership" fails to capture the full meaning of the Latin term, *dominion*, because "ownership" has a more narrow sense than *dominion*. *Dominion* denotes more than merely ownership, but also property, entitlement, and rightful possession. As such, I depart from the translation throughout the article and retain the original term, *dominion*, which is a practice followed by other contemporary scholars. *See, e.g.*, TUCK, *supra* note 31, at 60 (retaining the term *dominion* in the identical quote above).

39. Many scholars and philosophers have critiqued the notion of consent as a source for either moral or political obligation, but Grotius's account nonetheless requires either express or tacit consent for the complete development of property as a concept and as a right. *See, e.g.*, H.L.A. Hart, *Are There Any Natural Rights?*, *reprinted in* THEORIES OF RIGHTS 84 (Jeremy Waldron ed., 1984); DAVID HUME, A TREATISE OF HUMAN NATURE 542–49 (L.A. Selby-Bigge and P.H. Nidditch eds., 2d ed. 1978) (1740); Sir Robert Filmer, *Observations upon H. Grotius* De Jure Belli et Pacis, *in* PATRIARCHE AND OTHER POLITICAL WORKS OF SIR ROBERT FILMER 273–74 (Peter Laslett ed., 1949) (1652).

40. GROTIUS, *supra* note 33, at II.2.ii.5, 189–90.

the use of something should be transformed into an *exclusive right* that endures over time.

This begs the question, however, that there is a normative justification for individuals to use things, i.e., that there is such a thing as an original use-right. The justification of the use-right is revealed in Grotius's formulation of exactly what people are consenting to accept: "that what each had occupied he should have as *his own*."[41] The concept of "one's own" (*suum*) plays a fundamental role in his overall conception of rights, including the right to property.[42] According to Grotius (and the property theorists who followed in his intellectual footsteps), *suum* is the just entitlement that an individual has to one's life, limbs and liberty.[43] It is *suum* that justifies the original use-right in the state of nature, because one's right to life justifies a right to use things to maintain that life. This is best exemplified in Grotius's acknowledgment that

> society has [as its purpose] that through community of resource and effort each individual be safeguarded in the possession of what belongs to him.
>
> It is easy to understand that this consideration would hold even if *dominion* (as we now call it) had not been introduced; for life, limbs, and liberty would in that case be the possession belonging to each, and no attack could be made upon these by another without injustice.[44]

It is one's right to life that justifies the liberty required for him to take the actions necessary to support this life (*suum*), which temporally and logically results in the development of property (*dominion*). Thus, writes Grotius, "property ownership was introduced for the purpose . . . that each should have his own."[45] It is "one's own" that is the fundamental right; property is the derivative right. It is

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41. GROTIUS, BELLI (Whewell), *supra* note 35, at II.2.ii.5, 70–71.

42. The source of this concept for these seventeenth-century property theorists is in Roman law. Justinian's *Digest* provides that "[j]ustice is a steady and enduring will to render unto everyone his right. . . . The basic principles of right are: to live honorably, not to harm any other person, to render to each his own [*suum*]." DIG. 1.1.10.1 (Ulpian, *Rules* 1) (Alan Watson, trans.).

43. BUCKLE, *supra* note 30, at 29 ("What belongs to a person is what is one's own—in Latin, *suum*. The notion of the *suum* is pre-legal (that is, prior to *positive* laws) . . . . What belongs to a person is prior to private ownership according to positive law. Essentially it includes a person's life, limbs, and liberty. . . .").

44. GROTIUS, *supra* note 33, at I.2.i.5, 53–54. The impact of this view of the structure of rights is evident in an 1883 opinion of the Illinois Supreme Court, which argued that "[o]ne of the primary rights of the citizen, sanctioned by the positive law of the State, is security to life and limb, and indemnity against personal injuries occasioned by the negligence, fraud or violence of others." Wabash, St. Louis & Pac. R.R. Co. v. Shacklet, 105 Ill. 364, 379 (1883).

45. GROTIUS, PRAEDAE, *supra* note 35, at 322. This point is repeated throughout Grotius's texts. *See id.* at 227 (noting that "the term *dominion* connotes possession of something peculiarly one's own"); GROTIUS, *supra* note 33, at I.1.v, 35 (explaining that a "legal right (*facultas*) is called by the jurists the right to one's own (*suum*)"); HUGO GROTIUS, THE JURISPRUDENCE OF HOLLAND 2 (R.W. Lee ed. & trans., 1936) (1620) (explaining that "[p]roperty means that something is called ours").

this analytical structure that beget the "traditional" triad of political rights—the rights to life, liberty and property. For, as Grotius explains, "liberty in regard to actions is equivalent to *dominion* in material things."[46]

Implicit in Grotius's argument that *dominion* is derived from *suum* is the proposition that the right to one's life, limbs and liberty is an *exclusive right*, i.e., "these could not be attacked without wrong done to him." One's life and one's limbs cannot be shared with another person—these are intrinsically exclusive of others. The agreement necessary to recognize a right to property is an agreement to treat property rights as morally equivalent to one's (exclusive) right to life and liberty.[47] In other words, the agreement to recognize that everyone in civil society is to possess rightfully what is "one's own" is the recognition that property is inherently an *exclusive* right.[48]

The essential status of exclusion in this developmental argument for property is supported further by Grotius's own application of his property theory. Grotius was not a cloistered Scholastic or philosopher, but rather wrote on pressing political and legal issues of his day. One such issue was the claim by the Portuguese in the late sixteenth and early seventeenth centuries that they owned the oceans traversed by their trade ships, as well as the island nations with which they traded. Writing on behalf of the Dutch East India Company, Grotius sought to repudiate these property claims by the Portuguese.[49]

In his little treatise, *Mare Liberum*, Grotius denies the property claim of Portugal by focusing upon the first of the two prerequisites for property: possession. He writes that "[p]ossession of movables implies seizure, and possession of immovables either the erection of buildings or some determination of boundaries, such as fencing in."[50] The significance of possession turns, in part, upon an implicit notion of exclusion. In a social context, it is exclusion that is being communicated when one seizes items or erects fences around land: it is a declaration to the world in physical action that something is one's own and that others are therefore excluded from possessing or using it. Grotius concludes that "that which cannot be occupied, or which never has been occupied, cannot be the property of any one, because all property has arisen from occupation."[51]

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46. TUCK, *supra* note 31, at 60 (quoting GROTIUS, PRAEDAE, *supra* note 35, at 18).

47. *See id.* at 227 ("in the present age, the term *dominion* connotes possession of something *peculiarly one's own*, that is to say, something belonging to a given party in such a way that *it cannot be similarly possessed* by any other party. . . .") (emphasis added); *see also supra* note 38 and accompanying text.

48. It bears noting that Grotius later qualifies the right to property by permitting a usufruct-type "right of necessity" under certain, limited conditions. GROTIUS, *supra* note 33, at II.2.vii, 194. Moreover, Grotius is ambivalent about whether he is ultimately an advocate for liberal or authoritarian regimes. *See* TUCK, *supra* note 31, at 77–79.

49. James Brown Scott, *Introductory Note*, *in* HUGO GROTIUS, MARE LIBERUM viii (James B. Scott, ed., Ralph Van Deman Magoffin, trans., 1916) (1608) (the title translates to *Freedom of the Seas*).

50. *Id.* at 25–26.

51. *Id.* at 27.

With respect to the ocean, Grotius asks "where in this case is that corporal possession or physical appropriation, without which no ownership arise? . . . . [S]ince the sea is just as insusceptible of physical appropriation as the air, it cannot be attached to the possessions of any nation."[52] The ocean is incapable of being the subject of *dominion* because it is incapable of being occupied, which means that it is incapable of an exclusive possession that would give rise to a right to property. Without the ability to exclude others physically, according to the first application of the modern concept of property, there can be no right to property. The right to property is analytically predicated upon the right to exclude.

Although articulating a far more detailed and complex philosophical project, Pufendorf follows the general guidelines first laid down by Grotius. For instance, he recognizes the logical and historical primacy of use-rights in human development. He writes that "when at the creation all things were in common, man had the right to apply to his own ends those things which were freely offered for the use of all."[53] Moreover, in order for property rights to evolve out of use-rights, Pufendorf maintains

> there was need of an external act or seizure, and for this to produce a moral effect, that is, an obligation on the part of others to refrain from a thing already seized by some one else, an *antecedent pact was required* and an express pact, indeed, when several men divided among themselves things open to all; but a tacit pact sufficed when the things occupied at that time had been left unpossessed by the first dividers of things.[54]

Following Grotius, Pufendorf believes that property is predicated upon two conditions: (i) an individual act of possession (i.e., use or occupation), and (ii) an agreement among individuals to recognize and respect these rights in a society. Again, implicit in this argument is that a person acquires the moral claim to *exclusive use* of possessions once these preconditions are satisfied—such things become property. As Pufendorf explains, "when *dominion* had once been established, each man was given the right to dispose of his own property, and among the non-owners there arose the obligation to keep hands off such property."[55] In overcoming the central difficulty with Grotius's and Pufendorf's account—their reliance upon consent as a predicate for property rights—Locke will only emphasize the importance and significance of exclusion in the moral achievement of *dominion*.

B. The Right to Exclude in John Locke's Theory of Property

In a 1703 letter to his cousin, Richard King, Locke declared that "[p]roperty, I have found nowhere more clearly explained, than in a book entitled,

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52. *Id.* at 39. In an earlier legal brief on this same issue, Grotius concludes that no claim to property in the ocean could be maintained by "any nation or private individual, since occupation of the sea is impermissible both in the natural order and for reasons of public utility." GROTIUS, PRAEDAE, *supra* note 35, at 238.

53. PUFENDORF, *supra* note 31, at 16.

54. *Id.* at 547 (emphasis added).

55. *Id.* at 16.

Two Treatises of Government."[56] Locke apparently thought well of his argument for property, and he did so because it achieved its goal—it rescued the integrated theory of property from seventeenth-century critiques of Grotius's and Pufendorf's projects.[57] In accomplishing this task, Locke reformulated the developmental argument for property, removing the second step of consent that was required by his predecessors. The end result is an integrated theory of property that relies solely upon the acts of acquisition and labor as the fountainhead for the concept of property.

Although he parts company with Grotius and Pufendorf in the details, Locke begins from the same theoretical starting point. Whether one considers reason or revelation, avers Locke, it is apparent that "the Earth, and all that is therein, is given to Men for the Support and Comfort of their being."[58] In the beginning, the world was available for the use of "Mankind in common."[59] But for Locke, this gives rise to the problem, which he quickly acknowledges: "But this being supposed, it seems to some a very great difficulty, how any one should ever come to a *Property* in any thing. . . ."[60] More to the point, Locke is confronted with the quandary of how to derive property from common use-rights without the device of consent. This is the problem that Locke sets out to solve in Chapter Five of the *Second Treatise*.

It need not be stressed that the rights possessed by individuals in the early state of nature, according to Locke, are *not* exclusive rights. This is emphasized by Locke's own admission that in the beginning "no body has originally a private Dominion, exclusive of the rest of Mankind. . . ."[61] Moreover, Locke admits in the *First Treatise* that God's original grant "was not to *Adam* in particular, exclusive of all other Men: whatever *Dominion* he had thereby, it was not a *Private Dominion*, but a Dominion in common with the rest of Mankind."[62] Locke could not be any more explicit—exclusion is the essential element that is missing in the

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56. Letter to Richard King (August 25, 1703), *quoted in* JAMES TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES, at x (1980). Notably, this was an anonymous recommendation because Locke never publicly acknowledged his authorship of the *Two Treatises* during his lifetime. *See* Peter Laslett, *Introduction* to JOHN LOCKE, TWO TREATISES OF GOVERNMENT 3, 4 (Peter Laslett ed., 1988) (1690) (noting that if it were not for Locke's alteration of his will two weeks before his death, adding an oblique reference to his authorship of the *Treatises*, "we should have no direct proof that he wrote the book at all.").

57. A survey of these critiques is beyond the scope of this Article, but the archetypical criticism was offered by Sir Robert Filmer, who maintained that universal consent actually supported the divine right of kings and their dominion over all things and people, rather than individualized property rights. *See* Sir Robert Filmer, *Patriarcha*, *in* PATRIARCHA AND OTHER POLITICAL WORKS OF SIR ROBERT FILMER 47–126 (Peter Laslett ed., 1949) (1680); *see also* BUCKLE, *supra* note 30, at 162–67 (discussing Filmer's arguments and explaining how they misinterpret central tenets of the Grotian argument for property).

58. LOCKE, *supra* note 56, § 26, at 286.

59. *Id.*

60. *Id.* § 25, at 286.

61. *Id.* § 26, at 286.

62. *Id.* § 29, at 161.

right to use the commons in the original state of nature. For this reason, individuals in the state of nature do not possess property rights, but rather share a common right to use things in the world.

Moreover, the common rights shared by all men in the state of nature are different from those described by Grotius and Pufendorf. Unlike most property theorists of his day, Locke does not draw upon the Stoic theater analogy,[63] and he spends only two sections (sections 25–26) briefly asserting that things in the world were available for use to "Mankind in common" before beginning his argument for the evolution of property. Thus, in Locke's state of nature, it seems more appropriate to identify the right to the means necessary for self-preservation as a *claim-right*.[64] In other words, the right to use the commons is only a moral claim that others should allow one to be *included* in the general use of the commons, i.e., it is an *inclusive* rather than an exclusive right. Lockean scholar James Tully writes that in the original state of nature "others have a duty to let the rightholder exercise his right. . . . Others have a duty to move over and include the holder of Locke's right in the use of the common property."[65]

The question then becomes how Locke derives an exclusive property right from an inclusive claim-right to use the commons.[66] The answer is Locke's

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63. *See supra* notes 34–35 and accompanying text. This analogy is quite ubiquitous among early advocates of the integrated theory of property. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *4 (noting that the common use "doctrine [is] well illustrated by Cicero, who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is for the time his own."); Thomas Reid, *Of Morals*, *in* 2 THE WORKS OF THOMAS REID 637, 657 (William Hamilton ed., 1863) (according to "ancient moralists" every person has a common right to use things in the world, which is similar to "the right which every citizen had to the public theatre, where every man that came might occupy an empty seat, and thereby acquire a right to it while the entertainment lasted, but no man had a right to dispossess another"); JAMES TYRRELL, PATRIARCHA NON MONARCHA 99 (1681) (referring to the theater as a place "in Common to all that have a right of coming thither, but no man can say that one place in it is more his than another's, until he is seated in it, . . . so likewise supposing the Earth and fruits thereof to have been at first bestowed in Common on all its inhabitants") (The publisher of Tyrrell's manuscript made an error in the pagination, and thus this discussion of the theater analogy actually appears on pages 139–40.); PUFENDORF, *supra* note 31, at 548 (noting that a "common theatre is erected by the State for the use of its citizens. But if one citizen rather than another is to secure a seat for a performance, from which he cannot rightfully be removed by another, there is need of a corporal act, that is, of his occupying the seat.").

64. Jeremy Waldron describes the nature of a claim-right as follows: "Talk of P's right to do X may be meant to indicate that Q (or everyone) has a duty to let P do X." Jeremy Waldron, *Introduction* to THEORIES OF RIGHTS, *supra* note 39, at 6. This terminology is adopted from Hohfeld, *supra* note 3, and HOHFELD, *supra* note 5, whom Waldron cites in his discussion.

65. TULLY, *supra* note 56, at 61.

66. The use of the commons is validated according to something akin to *suum*. For Locke, the primary duty of natural law is that each individual act to preserve his life. *See* LOCKE, *supra* note 58, § 6, at 271 ("The *State of Nature* has a Law of Nature to govern it, which obliges every one; . . . . Every one as he is *bound to preserve himself*, and not to quit his station willfully . . . ."). It is this duty that morally justifies the claim-right to acquire things in the commons to maintain one's life.

well-known "mixing labor" argument for property. In the oft-quoted passage, Locke writes:

> Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, it hath by this *Labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough and as good left in common for others.[67]

This Article will not address the underlying reasons for why Locke focused upon labor because this is not only beyond the purview of this Article, it has also been discussed in detail by Tully and others.[68] Nor will it review either the "enough and as good" proviso or the natural-law injunction against waste that limits acquisition of property in the state of nature.[69]

The focus of this section is that labor adds the essential element of *exclusion* that transforms something that is the subject of common claim-rights into an object representing property rights. The essence of Locke's "mixing labor" argument is that an individual *exclusively owns* his life and his labor—such things are, in the Latin used by Grotius and Pufendorf, an individual's *suum*—and that labor extends this moral ownership over things appropriated from the commons.[70] Accordingly, property is created in the world through the labor made possible by one's life and liberty—a *dominion* characterized by the *exclusive* moral claim to one's own life and liberty that is now extended over external objects in the world. Thus, the significant phrase in the "mixing labor" passage quoted above is that labor does something to objects which "*excludes* the common right of other

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67. LOCKE, *supra* note 58, § 27, at 287–88.

68. *See* TULLY, *supra* note 56, at 104–11 (discussing how "person" is a term of art in Locke's philosophy, and thus how the meaning of "person" logically requires that one's labor is freely and exclusively one's own); WALDRON, *supra* note 16, at 178–81 (discussing Tully's "person" analysis of Locke's labor theory of property); *see also* Adam Mossoff, *Locke's Labor Lost*, 9 U. CHI. L. SCH. ROUNDTABLE 155 (2002) (interpreting Locke's labor argument for property in the context of his natural law ethics).

69. For varying analyses of these ideas within the Lockean argument for the natural right to property, see, for example, BUCKLE, *supra* note 30, at 153–61; WALDRON, *supra* note 16, at 207–18; Jeremy Waldron, *Enough and as Good For Others*, 29 PHIL. Q. 317 (1979); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 178–82 (1974); C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 199–221 (1962); LEO STRAUSS, NATURAL RIGHT AND HISTORY 236–44 (1953).

70. As Grotius declared: "liberty in regard to actions is equivalent to *dominion* in material things." TUCK, *supra* note 31, at 60 (quoting GROTIUS, PRAEDAE, *supra* note 35, at 18).

Men."[71] It is *labor* that transforms the inclusive claim-rights in the state of nature into exclusive property rights, which is one of the primary rights civil society is formed to protect.

For, as Locke asks, what is it that makes acorns belong to the person who picked them? His answer: "That *Labour* put a distinction between [the acorns] and common. That [labour] added something to them more than Nature, the common Mother of all, had done; and so they became his private right."[72] The essential characteristic of labor is that it is an *exclusive* right—it is representative of one's exclusive *suum*. Locke concludes his acorn example by observing that "[t]he *labour* that was mine, removing them out of the common state they were in, hath *fixed* my *Property* in them."[73] By mixing something one already owns—labor—with an object in the commons, the resulting product is, morally speaking, removed from the commons and itself becomes exclusively owned, i.e., it becomes property.

Locke is clear that "labor" begets the concept of property by extending one's exclusive moral claim to one's life and liberty over material objects in the world at large. In this way, "labor" for Locke is a necessary and sufficient means to create property; agreement among others to recognize each other's rights is no longer a requirement in the developmental analysis of property. Locke thus successfully short-circuits the critique of Grotius's property theory, and in so doing emphasizes to a greater degree the role of the right to exclude that derives from an individual using or laboring upon something in the world. In this context, the "mixing labor" argument reflects the premises of *suum* and *dominion* that explicitly take center stage in Grotius's and Pufendorf's arguments for property. The *exclusive* moral possession of one's life, limbs and liberty that one extends over things in the world when one engages in labor is, according to Locke, the fountainhead of property.

C. Conclusion: The Right to Exclude as a Necessary Element of Property

The work of Grotius, Pufendorf and Locke presents a developmental explanation and justification for property that is distinct from the now-dominant bundle and exclusion theories of property. In deriving property from the logically and temporally prior rights to life and liberty, they create a concept of property that comprises the exclusive rights to acquire, use and dispose of one's possessions—it is an integrated theory of property. Yet there is a significant point of agreement between these early integrated theorists and the exclusion theorists today: they all agree that the right to exclude is a necessary characteristic of the concept of property. Pufendorf's definition of property provides that "[o]wnership is a right, by which what one may call the substance of a thing belongs to someone in such a

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71. LOCKE, *supra* note 58, § 27, at 287 (emphasis added).

72. *Id.* § 28, at 288. Although this example in the *Second Treatise* is often discussed by contemporaries trying to assess the meaning of Locke's concept of "labor," it is not original to Locke. *See* PUFENDORF, *supra* note 31, at 554 ("An oak-tree belonged to no man, but the acorns that fell to the ground were his who had gathered them.").

73. LOCKE, *supra* note 56, § 28, at 289.

way that it does not belong in its entirety to anyone else in the same manner."[74] A thing belongs to someone in its entirety because the possessor has the *right to exclude* others from accessing or using that thing. There are other necessary elements—what Pufendorf identifies as the "substance" of a property claim—but the right to exclude is part of the unified set of rights that constitute the concept of property that is defined and protected by our legal institutions.

III. THE INTEGRATED THEORY OF PROPERTY

Although the early integrated theorists maintain that the right to exclude is a necessary element of property, they recognize that a sufficient account of the concept of property includes the more fundamental rights of acquiring, using, and disposing of one's possessions, called generally "use-rights" by some and what this Article will identify as the "possessory rights."[75] Within their developmental argument, for instance, exclusion represents only the *final* step in the complete account of property in an operating legal system. Accordingly, a fully descriptive and normative account of Anglo-American property rules must do more than merely establish the fundamental status of exclusion in the concept of property. It must be able to account for *all* elements of property, including the central possessory rights of acquisition, use, and disposal. As will be explained in this Part, this is why the integrated theory is so significant—it defines a sufficiently broad enough concept of property that serves the dual function of describing existing legal rules and guiding these rules as social and economic conditions continue to evolve.

In this respect, it is significant that the right to exclude largely is ignored within the developmental arguments advancing an integrated concept of property. In fact, much of Part II is dedicated to making explicit what is for the most part an *implicit* notion of exclusion within this concept of property. Linguistically, exclusion plays a role largely as an adjective of the rights of acquisition, use and disposal, and substantively, exclusion is, for the most part, only a corollary of the more fundamental premises that focus on the possessory rights. This is revealed in Grotius's application of his concept of property to the controversial issue of his day of whether the seas could be owned as property. Pufendorf's definition of the right to property quoted at the conclusion of Part II, for example, does not name explicitly the right to exclude; it is at best implicit in Pufendorf's claim that the "substance of a thing" belongs to someone in a way that cannot be owned by someone else. The focus of Pufendorf's definition is arguably this "substance" possessed by the property-holder, which he argues elsewhere comprises the rights

74. PUFENDORF, *supra* note 30, at 85..

75. The label "possessory rights" is preferred to that of "use–rights" because the central rights of property are broader than the right to use a possession. The fundamental rights also include the rights of acquisition and disposal. "Possessory rights" captures the breadth and scope of these fundamental rights, and focuses one's attention on the fact that property is fundamentally about what one does with one's *possessions*. I will retain "use-rights," though, for referring to the concept of the common right to use in the state of nature.

to "use, abuse and destroy [a possession] at our pleasure."[76] These rights—the modern equivalent are the rights to acquire, use, and dispose of something—constitute the core of the arguments discussed in Part II. It is also to these substantive rights, to continue Pufendorf's terminology, that we must ultimately look to find the core of the concept of property, both as a concept and as a legal right protected within our legal system.

A. The Historical Primacy of the Rights of Acquisition, Use and Disposal

In their emphasis on characteristics of property other than exclusion, the early integrated theorists were working within a well-established philosophical and legal tradition. Aristotle's definition of property provides that something "is 'our own' if it is in our power to dispose of it or keep it."[77] The right to exclude admittedly is implied in this early definition of property—it is, at a minimum, encompassed by the term "power." Nonetheless, this definition explicitly focuses on the element of property that also is emphasized by later advocates of an integrated conception of property: the right to use. To emphasize explicitly the characteristic of use in a definition, while the characteristic of exclusion is at best only a logical implication, suggests that what was of central significance to the ancient Greeks was what one *did* with one's property. In a fundamental sense, the concept of property was more about *using* something than it was about *excluding* others.

The Roman concept of property also reflects the integrated theory, emphasizing the substantive elements of acquisition, use and disposal, and leaving exclusion as only a logical corollary. According to extant sources, Roman law did not define *dominion*,[78] but the closest definition that modern commentators infer from the Roman legal texts indicates that use, rather than exclusion, was their central concern. Roman law scholar, Barry Nicholas, notes that

> there is no Roman definition of ownership, [but] there is no lack of Romanistic ones, and these are usually in terms of enjoyment. Thus,

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76. PUFENDORF, *supra* note 30, at 130. This comment reflects Pufendorf's knowledge of classical sources, because it paraphrases the Roman conception of property. *See infra* note 79.

77. ARISTOTLE, RHETORIC 1361a21–22 (W. Rhys Roberts trans., 1954); *see also* ARISTOTLE, POLITICS 1262b37–1264b26 (W.D. Ross trans., 1952) (critiquing communism in Plato's *Republic*).

78. ALAN RODGER, OWNERS AND NEIGHBORS IN ROMAN LAW 1 (1972) ("It is well known that no ancient legal text contains a Roman definition of ownership."). This failure to define ownership may result from the Romans' practical-oriented approach to theory, which is best exemplified by the fact that their legal texts immediately delve into the distinctions between property and the various legal rights in things (*res*). *See generally* G. INST. II.1-289 (W.M. Gordon & O.F. Robinson trans., 1988); DIG. 7.1.1 (Paul. Vitellius 3)–8.6.25 (Paul. Views 5); *see also* ALAN WATSON, THE LAW OF THE ANCIENT ROMANS 49–70 (1970) (providing a succinct summary of Roman legal doctrines concerning property). Another explanation for the lack of any definition of ownership is provided by Justinian's *Digest*, which, under the heading of Various Rules of Early Law, provides that "[e]very definition in civil law is dangerous; for it is rare for the possibility not to exist of its being overthrown." DIG. 50.17.202 (Javolenus, *Letters* 11).

> [subsequent] commentators adapted the definition of usufruct by adding to the rights of use and enjoyment the right of abuse—*ius utendi fruendi abutendi.*[79]

Keeping in mind that Roman lawyers were interested in the meaningful, real-world application of political and legal concepts, it is revealing that the elements of use, enjoyment and disposal prevail in their concept of property. If what people choose to say and write reflects what they consider to be important, this indicates that classical antiquity did not regard the right to exclude as the singularly essential element in the concept of property.

These ancient philosophic and legal conceptions of property are important because they directly influenced the early advocates of the integrated theory of property in the seventeenth century. The texts of Grotius, Pufendorf and Locke repeatedly quote from, discuss, and cite to the relevant texts from antiquity.[80] For instance, Grotius notes that "men, who are the owners of property, should have the right to transfer ownership, either in whole or in part. For this right is present in the nature of ownership,"[81] and then quotes Aristotle's definition of ownership.[82] Although he does not express his substantial knowledge of ancient philosophy and Roman law in the *Second Treatise*, Locke knew of these sources and likely drew upon them as well in developing his own moral and political theories.[83]

This is further evidence for the analytical claim that the right to exclude, albeit an essential characteristic of property, is not a fundamental or sufficient element in the concept of property. When philosophers, scholars, and jurists throughout history have analyzed and defined the concept of property, they have returned again and again to the substantive possessory rights—the rights of acquisition, use and disposal—and the right to exclude is left as only a corollary of these three core rights. It is the possessory rights that form the basic building blocks of property, and the right to exclude enters the picture at the point that property comes to play a role as a political and legal right in a social context, i.e., at the point that property serves its normative function in organized society and politics.

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79. BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 154 (1962). Pipes suggests that the "best-known Roman law definition described *dominion* as 'the right to use and consume one's things as allowed by law' (*jus utendi et abutendi re sua quatenus iuris ratio patitur*)," although he acknowledges that this definition "is not of Roman origin but dates to the sixteenth century." PIPES, *supra* note 14, at 11 & n.*. An early twentieth-century commentary posits that *dominion* in the Roman law consisted of "the unrestricted right of using, enjoying and disposing of a thing." 2 CHARLES P. SHERMAN, ROMAN LAW IN THE MODERN WORLD § 572, at 149 (1917) (citing to Gaius' *Institutes* and Justinian's *Digest*); *see also* WILLIAM C. MOREY, OUTLINES OF ROMAN LAW 282–83 (1884) (noting that the "plenary control" over an object represented in Roman law the technical rights of use, enjoyment and disposition).

80. *See, e.g.*, *supra* notes 34–35, 63 and accompanying text.

81. GROTIUS, *supra* note 33, at II.6.i.1, 260.

82. *Id.* (translating Aristotle's text as "[t]he definition of ownership . . . is to have within one's power the right of alienation."); *see supra* note 76 and accompanying text.

83. *See generally* JOHN LOCKE, QUESTIONS CONCERNING THE LAW OF NATURE 251 (Robert Horwitz et al. trans. & eds., 1990) (manuscript left unpublished during Locke's lifetime) (analyzing natural law with frequent citations to classical sources).

B. The Formal Status of the Right to Exclude

None of this analysis is intended to deny that the right to exclude is an essential element of property; rather, it shows that the right to exclude is only a secondary or derivative right within the concept of property. In other words, the right to exclude lacks substantive meaning by itself and only serves to emphasize the social function that a right to property—that all political rights—must ultimately serve. The right to exclude is thus a necessary *formal requirement* of the social function of rights. The fact that exclusion is a formal element of property, as opposed to a substantive element, is reflected in two decidedly different approaches to property: the integrated theory and the bundle theory.

1. The Integrated Theory of Property

Within the integrated theory (as discussed in Part II), the right to exclude arises only *after* individuals begin the process of creating civil society. Although Blackstone believes that the "dispute" between Locke versus Grotius and Pufendorf amounts to a "nice and scholastic refinement," he nonetheless finds that they share a fundamental insight that is valuable for our understanding of property.[84] He writes:

> Property, both in lands and moveables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to *his own use*, it remains in him, by the principles of universal law, till such time as he does some other act which shows an intention to abandon it; for then it becomes, naturally speaking, *publici juris*, once more, and is liable to be again appropriated by the next occupant.[85]

Noticeably, the right to exclude is absent in these remarks. It is not exclusion that is fundamental in understanding property; the fountainhead of property is found in possession, i.e., the *use* of something, and it is this fact that serves as the primary element in the concept property. The analytical framework shared by all of the early integrated theorists is straightforward: first, possession or labor, and, second, exclusion of this pre-existing possession or labor. Of course, the right to exclude is a particularly significant element of property once the property-holder lives among other people within an explicit social and political organization.

Yet the development of the normative concept of property begins long before civil society comes into the picture. Pufendorf's "substance of a thing," i.e., one's ability to acquire, use and dispose of something, exists *before* the right to exclude even enters the descriptive account of property. It is only when property comes to serve as a fundamental benchmark for defining certain types of interactions among people in society that the right to use becomes absolute—when *mere use* becomes *exclusive use*. As the respected eighteenth-century scholar, Thomas Rutherforth, explained in his treatise on Grotius's moral and political theory:

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84. 2 BLACKSTONE, COMMENTARIES *9.

85. *Id.* ("his own use" emphasis added).

> Full property in a thing is a perpetual right to use it to any purpose, and to dispose of it at pleasure. Property, in a strict notion of it, is such a right to a thing as excludes all persons, except the proprietor, from all manner of claim upon it. No person therefore can, consistently with such a right, take the thing from him at any time, or hinder him in the free use of it, or prevent him from disposing of it as he pleases.[86]

The structure of the argument is clear: use and possession come first, and exclusion is understood by reference to these prior-existing entitlements. The possessory rights not only have a logical priority in the descriptive account and normative justification of property, but the right to exclude is only a *formal requirement* of how the acquisition, use and disposition of property occurs vis-à-vis other people in society.

In fact, the work of the early integrated property theorists in deriving property from the possessory rights indicates that Merrill, as a representative of the exclusion theory, is incorrect to maintain that "the right to exclude cannot be derived from the right to use."[87] Merrill explains that

> if we start with the right to exclude, it is possible with very minor clarifications to derive deductively the other major incidents that have been associated with property. However, the converse is not true: we cannot start with any of the other incidents, and reason backwards to derive the right to exclude.[88]

The problem with this analysis may rest largely upon the locution "reason backwards," which is a perspective Merrill maintains in all of his examples in his article, presupposing a pre-existing legal system with a full array of property entitlements, such as easements, inheritance and air rights.[89] Thus, Merrill's basic premises require him to reduce the concept of property from its fully developed legal status in our modern world to its more fundamental conceptual elements.

In contrast, the integrated theory of property works from a perspective that attempts to "reason forward" from a non-property to a property context—and eventually to the legal definition of derivative property rights. Accordingly, the early integrated theorists sought to derive the analytical core of the concept of property by examining the conditions under which it arose. Their approach was arguably theoretical—few people maintained that the reconstructive device of the "state of nature" actually existed as a historical fact—but it did its job: it demonstrated the analytical elements of "property" that form the core of the concept *prior* to its definition under a functioning (modern) legal system. Regardless of whether one agrees that the early integrated theorists succeeded in their argument, they do exactly what Merrill maintains as analytically impossible,

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86. THOMAS RUTHERFORTH, INSTITUTES OF NATURAL LAW 34–35 (American 2d ed., 1832). For a sense of Rutherforth's impact on the development of American legal institutions, see *infra* note 133 and accompanying text (where James Kent includes him in a long list of scholarship that all law students must study).

87. Merrill, *supra* note 19, at 744.

88. *Id.*

89. *Id.* at 740–45.

i.e., derive the right to exclude from a prior right to use. It may therefore be true that one can "[s]tart with any other incident [of property], and one cannot *reason back* to the right to exclude,"[90] but integrated theorists (and the intellectual history underlying their project) reveal that it is possible nonetheless to *reason forward* from use to exclusion.

By reasoning forward from the use of something to the fully exclusionary property right in civil society, the integrated theory of property reveals that the *substance* of the concept of property is the possessory rights: the right to acquire, use and dispose of one's possessions. The right to exclude enters the picture, so to speak, at the point at which one identifies one's property entitlements in the context of creating and applying explicit legal protections within civil society. The property-holder rightly seeks to exclude people from the various uses of one's property, and society creates legal institutions to define and protect these essential entitlements. Exclusion therefore represents only a formal claim between people once civil and political society is created, and it has meaning only by reference to the more fundamental possessory rights that logically predate it.

2. *The Bundle Theory of Property*

It is instructive that the right to exclude began to assume prominence within property theories at approximately the same time that the social-oriented, legal-relationships view of property began to take root in the contemporary American legal mind.[91] In fact, one of the pioneers in the pragmatic approach to analyzing legal concepts, Justice Oliver W. Holmes, Jr., spoke in terms remarkably similar to exclusion theorists today when he reduced the rights that are "incident to possession" to simply the right of the owner "to exclude all" from his property.[92] For Holmes and the Progressives and legal realists who followed in his footsteps, the essence of property was exclusion because the right to exclude was the only purely formal, social element of property; and property, like all rights, was simply shorthand for identifying a particular set of "social relations" between people in society.[93] As noted in the Introduction, it was but a short step from "social relations" to "bundle of rights."

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90. *Id.* at 745 (emphasis added).

91. *See supra* notes 3–9 and accompanying text.

92. OLIVER W. HOLMES, JR., THE COMMON LAW 246 (1991) (1881). Holmes asks: "But what are the rights of ownership? . . . . The owner is allowed to exclude all, and is accountable to no one." *Id.*

93. *See supra* notes 3–7 and accompanying text; *see also* Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 361–63 (1954); RESTATEMENT (FIRST) OF PROPERTY ch. 1, introductory cmt. (1936) (noting that "[t]he word 'property' is used in this Restatement to denote legal relations between persons with respect to a thing").

The social-relations view of property was not an original insight of the legal realists, but rather has roots going back to at least the early nineteenth century. *See* PIERRE-JOSEPH PROUDHON, WHAT IS PROPERTY 48 (Donald R. Kelly & Bonnie G. Smith eds. & trans., 1994) (1840) ("Thine and mine more often indicate a relation . . . . In short thine and mine are signs and expressions of personal, but equal, rights."); 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 290–91 (Robert Campbell ed., 3d ed. 1869) (1832) (explaining that "every legal right is the creature of a positive law" and as such reflect tripartite relations between

The essential possessory rights do not fit within this model because they are rights *in rem*, not rights *in personam*. Accordingly, the possessory rights of acquisition, use and disposal were excluded from the concept of property when legal theorists at the turn of the century recast this concept as a pragmatic set of social relations. For instance, in Hohfeld's path-breaking work in redefining the concept of property as a "complex aggregate of rights (or claims), privileges, powers, and immunities,"[94] he concluded that it "is a very inadequate view" of property that its "sole purpose" is for "guarding or protecting A's own physical use[] or enjoyment of . . . land."[95] For Hohfeld, the possessory rights were inadequate in defining the core of property because they failed to capture what he believed was this concept's essential nature: its function as a set of social relations. The social-relations view of the concept of property thus leads its advocates to identify the right to exclude as *the* essential element or "stick"[96] of property because this is the only formal element of this concept that reflects its social function.[97]

These two illustrations of the role of the right to exclude in the integrated and bundle theories support the proposition that the right to exclude is only a *formal claim* of a property-holder against others. The *substance* of the concept of property remains uninformed by the right to exclude. For if one speaks only of the right to exclude, the unanswered questions remain: a right to exclude from *what*? And *why* a right to exclude? The answer according to the integrated theory of property is straightforward: it is the right to exclude from the *right of use*, or more specifically, from the rights of acquisition, use and disposal. Moreover, the integrated theory explains why we are interested in excluding people from these possessory rights: because they represent fundamental entitlements pre-existing civil society and legal rules. The right to exclude is the formal means by which Anglo-American legal rules identify and protect the substantive core of rights that constitute property.

The analytical and normative fulcrum for property is not exclusion, but rather the use of things in the world. This is why Pufendorf identified the rights to acquire, use and dispose as the "substance" of property,[98] and why Grotius defined property in terms of one's moral claim to act upon things in the world.[99] The right to exclude is only a formal requirement that is predicated upon the more substantive rights at the core of the concept of property.[100] This is ultimately why

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individuals, governments, and the subject-matter of the right). Hohfeld quotes extensively from Austin's work in his own articles on the nature of rights. *See generally* Hohfeld, *Fundamental Legal Conceptions*, *supra* note 3.

94. Hohfeld, *Fundamental Legal Conceptions*, *supra* note 3, at 746.

95. *Id.* at 747.

96. Andrus v. Allard, 444 U.S. 51, 176 (1979).

97. *See* Cohen, *supra* note 93, at 370–71 (arguing that the "essential factor" of property is "a right to exclude others from doing something").

98. *See* PUFENDORF, *supra* note 30, at 85.

99. *See supra* notes 41–46 and accompanying text.

100. Grotius's contemporaneous critics shared this basic assumption about the nature of property. In his critique of Grotius's arguments concerning ownership of the sea, for instance, John Selden offered his own definition of "property." He writes:

the exclusion theory fails to fully explain our legal rules, and thus fails to provide a basis for guiding these rules in our rapidly developing world of commerce and technology. The exclusion theorist's account focuses on a narrow, formal fragment of the concept of property that ultimately leaves the underlying theoretical foundation of our property institutions uninformed. An adequate account of property, both descriptively and normatively, must recognize both the substantive and the formal rights that give meaning to our legal rules and institutions.

C. The Integrated Theory of Property: A Broader Concept of Property

The contention of the integrated theory that possessory rights form the substance of the concept of property is not intended to replace or downplay the existence of other characteristics of property. The status of essential characteristics of the concept of property is not an either-or proposition; just as we are not faced with a choice between only the bundle or exclusion theories of property, we are not faced with a similar choice between the right to use or the right to exclude. Both of these constituent rights are essential to the moral and legal concept of property. In recognizing this truth, the integrated theory of property is the only approach that treats property both as an internally integrated concept and as a moral right that is integrated with other political rights.

This point is emphasized best by what appears to modern interpreters to be equivocal usage of the term "property" in the eighteenth century, a period marked by the predominance of the integrated theory of property within political and legal scholarship. For example, it is sometimes observed that Blackstone shifts between two distinct notions of property in the *Commentaries* because in different places in the text Blackstone emphasizes different constituent elements of property. In Blackstone's introduction to the second volume of the *Commentaries*, it sounds as if the right to exclude is *the* singularly essential attribute of the right to property:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that *sole and despotic* dominion which one man claims and exercises over the external things of the world, in *total exclusion* of the right of any other individual in the universe.[101]

> *Dominion,* which is a Right of Using, Enjoying, Alienating, and free Disposing, is either Common to all men as Possessors without Distinction, or *Private* and peculiarly lonely to some; that is to say, distributed and set apart . . . in such a manner that others are excluded, or at least in some sort barred from a Libertie of Use and Enjoiment.

JOHN SELDEN, OF THE DOMINION, OR, OWNERSHIP OF THE SEA 16 (M. Nedham trans., 1652) (1635), *quoted in* TUCK, *supra* note 31, at 86–87. Note again that the content of property consists of the fundamental possessory rights, which logically precede any mention of the right to exclude. This reflects the basic premises of the time among property theorists that exclusion was a formal right that had meaning only by reference to the substantive rights of property—acquisition, use, and disposal.

101. 2 BLACKSTONE, COMMENTARIES *2 (emphasis added).

In the first volume, however, Blackstone writes that "[t]he third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."[102] In volume two, Blackstone emphasizes exclusion, and in volume one, he emphasizes the possessory rights of use, enjoyment and disposal. It thus appears, on its face, that Blackstone vacillates between two competing conceptions of property: an exclusion theory and a bundle theory.[103]

The allegation that Blackstone is equivocal about the nature of property is an unduly modern interpretation of Blackstone's arguments. This approach analyzes Blackstone's ideas into their component parts without regard for the theoretical context in which he worked; every sentence and paragraph is treated as an independent, self-standing claim. In other words, this interpretive approach *presupposes* the bundle theory of property, i.e., that each constituent element of property described by Blackstone is analytically independent of any other element he may also discuss. Yet it is anachronistic to impose this twentieth-century conception of property upon Blackstone's work. This is the case for two reasons—one textual and the other theoretical.

First, the bundle-theory interpretation of Blackstone ignores the surrounding text—and the entire context of the *Commentaries* itself—which may inform a selected portion of Blackstone's text quoted therefrom. For example, Blackstone includes the right to exclude in his discussion of property in the first volume; the reader may recall that this is where it appears that only "free use, enjoyment and disposal" are essential characteristics of property. In the immediately succeeding paragraph, however, Blackstone discusses the right to property in terms that are indicative of exclusion:

> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land.[104]

The consent of the land owner is required in a takings case because the individual has the *exclusive right* to permit or refuse other people access to his land. In other words, Blackstone reinserts the right to exclude as an essential

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102. 1 BLACKSTONE, COMMENTARIES *138.

103. *See* Merrill, *supra* note 19, at 734, 736. Actually, equivocation and lack of fidelity to logical consistency are charges that have been leveled at Blackstone throughout the years. Felix Cohen, a legal realist, accused Blackstone of having "infest[ed] the classical conception of law" with "confusion and ambiguity." *See* Cohen, *supra* note 6, at 838. Judge Posner reports that Jeremy Bentham found "Blackstone's analysis of the nature and sources of legal obligation was shallow, amateurish, and contradictory." Richard A. Posner, *Blackstone and Bentham*, 19 J. LAW & ECON. 569, 570 (1976).

104. 1 BLACKSTONE, COMMENTARIES *139. This statement indicates one of many sources available to the Founders on the doctrine of eminent domain. *See infra* note 142 and accompanying text.

element of property at the point in which he discusses the role of property in civil society. (This reaffirms the point made in the prior section that exclusion is a formal right that logically follows the substantive possessory rights when one begins to discuss the role of property in a civil society.).

Moreover, in volume two, where Blackstone allegedly argues that exclusion constitutes the essential element of property, he explicitly maintains a few pages later that property evolves out of the chronologically and logically prior possessory rights. He writes:

> The only question remaining is, how this property became actually vested; or what it is that gave a man an *exclusive right* to retain in a permanent manner that specific land, which before belonged generally to everybody, but particularly to nobody. And, as we before observed that occupancy gave the right to the temporary *use* of the soil, so it is agreed upon all hands that occupancy gave also the original right to the permanent property in the *substance* of the earth itself; which *excludes* every one else but the owner from the use of it.[105]

Working within the context of the integrated theory, Blackstone identifies the right to exclude as the element that separates the original common right to use in the state of nature from the mature concept of property that later serves as the foundation for creating civil society.[106] In sum, exclusion is essential, according to Blackstone, but only as a formal right that distinguishes one's pre-existing substantive possessory rights from others within civil society. At the point at which Blackstone often is identified as an exclusion theorist, the central proposition of the integrated theory reasserts itself in his discussion of property.

The lesson to be learned is that statements quoted hither and thither cannot be taken out of context from each other. Each sentence, paragraph or section is part of an integrated whole that consists of the entire text. When Blackstone's various comments on property are viewed in their entirety, i.e., in the full context of the *Commentaries*, the conclusion is inescapable. He is an advocate of the integrated theory of property.

The second reason why it is invalid to interpret Blackstone as equivocal about the nature of property is that it ignores the larger *intellectual context* in which Blackstone published his *Commentaries*. The advent of the bundle theory of property would not come about for approximately 120 years after he lived, but many modern interpreters of Blackstone still assume the bundle theory as the analytical framework for understanding his theories. Blackstone, however, was clear about the nature of his project, and, specifically, about the source of his views on property. He repeatedly called upon the property theorists discussed in Part II—Grotius, Pufendorf and Locke—to both explain and justify the English

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105. 2 BLACKSTONE, COMMENTARIES *8 ("exclusive right" and "excludes" emphasis added).

106. 1 BLACKSTONE, COMMENTARIES *135 ("[T]he public good is in nothing more essentially interested than in the protection of every individual's private rights, as modeled by the municipal law."); *see also* LOCKE, *supra* note 56, §§ 87, 123, 131, at 323, 350, 353 (respectively)

common law.[107] In volume one of the *Commentaries*, he follows these early integrated theorists' general analytical structure, deriving property rights from the possessory rights in the state of nature.[108] In sum, Blackstone's work is explicitly animated by the ideas of the integrated theory.

The evidence for this is overwhelming. Blackstone emphasizes again and again that possessory rights are both temporally and logically prior to the right to exclude—the occupation or use of a possession is the substantive predicate of excluding others.[109] In volume one, for instance, Blackstone describes the content of property as the right of the individual to "free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."[110] As seen repeatedly in Grotius's and Locke's work (described in Part II), the implicit notion of exclusion in Blackstone's phrase "without any control or diminution" *follows* a description of the core elements of property, i.e., "free use, enjoyment, and disposal." This description of the concept of property also reflects in important ways the Roman definition of property discussed earlier; property is fundamentally about what one does with one's possessions and exclusion of others is predicated on these actions.[111] Moreover, Blackstone's identification that the right to use forms the "substance" of "permanent property"[112] mimics Pufendorf's definition of property mentioned at the conclusion of Part II.[113] In these words, Blackstone evidences his commitment to the integrated theory of property, which is a distinct conception of property from that of the bundle or exclusion theories.

Once Blackstone's comments on property are interpreted within the appropriate textual and intellectual context, it is apparent that what he is doing in the *Commentaries* is emphasizing the essential, varied elements of property. As defined by the integrated theory, property is a broad concept that is capable of diverse applications in myriad political and legal doctrines. To wit, different constituent elements of the concept of property simply matter in different contexts. For instance, when Blackstone discusses the "substance" of property, or when he further explains the meaning of his elegant phrase of "sole and despotic dominion," then the rights to acquisition, use, and disposal take center stage. When he discusses the function of property vis-à-vis "any other individual in the universe" or "the general good of the whole community," then the right to exclude takes center stage. The integrated theory advances a concept of property that fits as much within a discussion of political philosophy as it does within a legal system containing a panoply of rules protecting various forms of property, such as estates, chattels, trademarks or trade secrets. This is the result of a robust concept of

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107. *See generally* 1 BLACKSTONE, COMMENTARIES 1–115. "By the absolute *rights* of individuals, we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it." *Id.* at 124.

108. *Supra* note 85 and accompanying text.

109. *Supra* notes 105–06 and accompanying text.

110. 1 BLACKSTONE, COMMENTARIES *138; *see also supra* note 102 and accompanying text.

111. *See supra* notes 78–79 and accompanying text.

112. 2 BLACKSTONE, COMMENTARIES *8.

113. *See supra* notes 74, 76 and accompanying text.

property consisting of the substantive elements of acquisition, use, and disposal, and a formal element of exclusion. Nonetheless, at the end of the day, these necessary and sufficient characteristics of property represent a *conceptual unity*—not a mere collection or bundle that can be stripped apart and reconfigured as shifting political and social goals require.

Finally, the integrated theory's emphasis on the conceptual integration of property explains why politicians and scholars of the eighteenth century sometimes spoke of "property" as encompassing all rights. James Madison, for instance, recognizes that "property" is sometimes used in a legal sense, referring to "a man's land, or merchandise, or money."[114] He notes, however, that property also has a "larger and juster meaning, [in which] it embraces everything to which a man may attach a value and have a right."[115] In this larger sense, Madison argues that "a man has a property in his opinions," he has property "in the safety and liberty of his person," and "he may be equally said to have a property in his rights."[116] The source of Madison's views on this subject rest ultimately in Locke, who writes in the *Second Treatise* that a person who acts to "preserve his Property" acts to preserve "his Life, Liberty and Estate."[117] In his subsequent discussion of the formation of civil society, Locke notes that people enter into civil society "for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property*."[118] Locke, for his part, found the progenitor of such claims in Grotius's argument that "liberty in regard to actions is equivalent to *dominion* in material things."[119]

The reason the early integrated theorists drew this conclusion—it is rather odd-sounding to our modern ears—is that they were working within the classical framework of *suum* and *dominion*.[120] For these scholars, property is created in the world when an individual acts upon the moral sanction of one's life and liberty, i.e., in their terms, *dominion* is derived from *suum*. This is why the traditionally conceived Lockean triad—the rights to life, liberty and property—represents a *logical priority* as well as a conceptual unity. In the broader context of political philosophy, property is causally derived from the rights to life and liberty; as such,

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114. Madison, *supra* note 28, at 186.

115. *Id.* The phrase "property in his opinions" suggests a property-based approach to free speech. *See* John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49 (1996). Notably, McGinnis (implicitly) identifies the integrated theory of property as underlying the First Amendment, which is revealed in his argument that the "right to use material property" and the "use value of . . . information" are central to understanding the property-based jurisprudence of the First Amendment. *Id.* at 68–69.

116. Madison, *supra* note 28, at 186.

117. Locke, *supra* note 58, § 87, at 323.

118. *Id.* § 123, at 350.

119. *See supra* notes 41–46, 70 and accompanying text.

120. *See* Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 136 (1990) (noting that the earlier "broader understanding of property . . . is radically different from the ordinary understanding of property today"). Underkuffler effectively summarizes the developmental argument and conceptual framework of the integrated concept of property, although she calls it the "comprehensive approach to property." *Id.* at 133–39; *see also supra* notes 41–46 and accompanying text (describing the *suum-dominion* argument).

it includes elements of these rights, such as freely acting and using things in the world. Thus, property necessarily constitutes all aspects of one's life and liberty.

This explains, in one respect, why the early integrated theorists were so interested in offering a functional account of property. The reason is that they saw property as conceptually linked to the other rights people claim for themselves, which together serve the goal of creating and maintaining a peaceful, functioning civil society. For instance, Grotius argues that property develops, in part, as a result of the general progress of civilization. He explains:

> From [classical and religious texts] we learn what was the cause on account of which the primitive common ownership . . . was abandoned. The reason was that men were not content to feed on the spontaneous products of the earth, to dwell in caves, to have the body either naked or clothed with the bark of trees or skins of wild animals, but chose a more refined mode of life; this gave rise to industry, which some [people] applied to one thing, others to another.[121]

Thus, once society is held in the thrall of "a more exquisite kind of living," shared use of the commons is no longer a viable form of interaction between people. As the number of humans increases, production increases, creating an ever-expanding cycle of increased population and increased industry. The result is a world in which the value of land and chattels increases as economic relationships multiply among the corresponding growth in population, which thereby prompts people to define property rights. The existence of property therefore is a natural and logical part of the development of human society: it internalizes costs and benefits and thus better effectuates economic activity. In advancing this Demsetzian thesis,[122] Grotius identifies that individuals require a *standard* by which to divide land and items possessed by each individual.[123] This standard is: "Property, or Ownership, which the jurists call *Dominion*."[124]

Property is not only an integrated concept, representing the exclusive right to acquire, use and dispose of one's possessions, it is also a moral right that is integrated with an individual's other moral rights. In short, property is integrated conceptually and normatively.

Working within a context defined, in part, by the integrated theory, Blackstone's project in jurisprudence and law illustrates the breadth of this concept of property. The various characteristics of property highlighted by Blackstone—exclusion, use, enjoyment, disposal—are necessary correlatives of each other, which together give full meaning to the concept of property. The substantive role of acquisition, use and disposal derive from the fact that property is a consequent

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121. GROTIUS, *supra* note 33, at II.2.ii.4, 189.

122. *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967) (arguing that property rights evolve when individuals need to internalize benefits and costs given increased value in affected goods).

123. *See* GROTIUS, PRAEDAE, *supra* note 35, at 227 (noting in ancient times "that fields were not divided by boundary lines in that age, and that there were no commercial transactions").

124. GROTIUS, BELLI (Whewell), *supra* note 35, at II.2.i, 69.

of the actions necessary to maintain life and liberty. The formal role of exclusion derives from the fact that property cannot do what it is supposed to do—maintain one's life and liberty—if the owner cannot prevent other people in society from appropriating the property. These elements together form a conceptual and normative unity. Neither characteristic is reducible to the other, because each characteristic refers to some aspect of property that is necessarily derived from or leads to other characteristics. In the terms of the early integrated theorists, the elements of *suum* do not disappear when it is extended to create *dominion*. The liberty and use of one's life and limbs are as much a part of property as the power to exclude others from the objects to which one claims entitlement. Such is the nature of the integrated theory of property.

IV. THE PRACTICAL VALUE OF THE INTEGRATED THEORY OF PROPERTY

The preceding discussion is admittedly framed in historical terms—assessing claims by the Greeks, Romans, seventeenth-century property theorists, and Blackstone—but the thesis is theoretical. The integrated theory of property provides an account of property that effectively describes the nature of property and thus the nature of the legal rules created to protect this property; from this perspective, the integrated theory also serves to criticize or justify the evolution of these institutions into the future. Unlike the bundle or exclusion theories, the integrated theory is capable of performing these descriptive and normative tasks because it offers a developmental argument for property, which produces a broad, substantive concept comprising the unified rights to exclusive acquisition, use and disposal of one's possessions. It is in the practical results this concept of property produces that we discover the ultimate value of the integrated theory.

In her own work on property law, Carol Rose has recognized the practical significance of a theoretical account of property, noting that "[t]he law tells us what steps we must follow to obtain ownership of things, but we need a theory that tells us why these steps should do the job."[125] This is true, and the integrated theory of property has served this fundamental role in defining our property rules, both past and present. In fact, given the predominance of the integrated theory in the eighteenth and nineteenth centuries, the integrated theory is the foundation of much of modern property law. Unfortunately, today's legal scholars and judges, working within the now-dominant bundle theory of property, misunderstand this truth because they impose their own (contemporary) view of property upon these doctrines. This has had an impact on American property rules, particularly within intellectual property in which several doctrines have indeed "disintegrated" as property policies.[126] A general conception of property, whether it is the bundle theory, the exclusion theory, or the integrated theory, has an identifiable impact on the definition and application of legal rights.

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125. Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 73 (1985).

126. *See infra* notes 175–182 and accompanying text (discussing trade secrets); *infra* notes 189–195 and accompanying text (discussing trademarks).

In offering a theoretical account of property, the integrated theory is a viable alternative to the bundle and exclusion theories. Most important, the integrated theory of property is explanatory on its own terms—and it survives, at least implicitly, within our legal system today.[127] For this reason, an understanding of this concept of property has both descriptive and normative significance. It can (i) assist us generally in understanding the nature of property rights in our legal system, and (ii) provide an account of the evolution of our property rules and how these rules may be applied today and tomorrow. For instance, the integrated theory explains the legal rules concerning first possession, intellectual property (trade secrets, trademarks, copyright), and eminent domain, while also serving as a basis to criticize or justify new rules in several of these property doctrines. In all of these respects, the integrated theory of property offers a theoretical account of property that can serve both to explain and modify our property rules.

A. The General Influence of The Integrated Theory of Property in the Law

The influence of the integrated theory of property within Anglo-American law is not circumstantial, nor is it inconsequential because it indicates the degree to which the types of property we have in our society today are based on this theory. In England, Blackstone's claims about property in his *Commentaries* reflect a paradigmatic understanding of the integrated theory of property (and his repeated reference to and familiarity with the ideas of Grotius, Pufendorf and Locke is all too familiar for readers of the *Commentaries*).[128] In America, James Kent looked to Blackstone, as well as to Grotius, Pufendorf, Vattel, and the Roman law for the theoretical underpinnings of the concept of property in writing his own American version of the *Commentaries*.[129] Repeatedly citing Grotius's *De Jure Belli ac Pacis*, for example, Kent notes the virtual truism of his day that "[o]ccupancy, doubtless, gave the first title to property in lands and moveables,"[130] and that "[t]he exclusive right of using and transferring property, follows as a natural consequence, from the perception and admission of the right itself."[131] The evolution of the modern legal right of property in England and America finds its roots in the integrated theory of property.

In America, in particular, the integrated theory of property found an even larger audience in the formation of newly independent political institutions and legal rules in the eighteenth and nineteenth centuries. In a lecture delivered at Columbia University in 1824, for instance, Kent stressed the relevancy of seventeenth- and eighteenth-century political and legal scholarship in American legal education. He explained that a basic legal education entailed "the study of public treatises" and required "becoming familiar with the doctrines of those great masters of public law," whom he "place[d] at the head of these illustrious jurists

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127. *See infra* notes 217–227 and accompanying text (discussing copyright).

128. *See supra* notes 84, 101–02, 105–07 and accompanying text.

129. *See, e.g.*, 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 255–76 (1826) (citing, among others, Justinian, Blackstone, Grotius, Pufendorf, and Vattel).

130. *Id.* at 256.

131. *Id.* at 257–58.

the learned Grotius."[132] Kent added the names of "Puffendorf, Barbeyrac, Bynkershoeck, Burlemaqui, Wolfius, Vattel, Heineccius, Montesquieu, Rutherforth, and Martens" to the list of exemplars of political and legal scholarship—men worthy of being identified as Grotius's "most illustrious disciples in the school of public law."[133] Such sentiments were not limited to judges and law students, as revealed in Thomas Jefferson's official statement in 1793 as Secretary of State on whether the U.S. should renounce its prior treaties with France. Toward the end of his opinion, Jefferson refers to "Grotius, Puffendorf, Wolf, and Vattel" as scholars who are "respected and quoted as witnesses of what is morally right or wrong."[134]

Through direct study of these property theorists, Americans acquired the understanding of the integrated theory of property that served, in Rose's words, to justify what "steps we must follow to obtain ownership of things."[135] As Rutherforth explains: "property is here meant the right . . . to a thing, exclusive of the rest of mankind . . . property is introduced either by express division and assignment, or else by particular occupancy."[136] This basic analytical structure—first, occupancy or agreement and second, exclusion of what has been occupied—formed the content of the concept of property for American and British legal scholars, politicians and judges.

Possession—understood as occupancy, use or labor—thus took its central place in the common-law rules concerning property.[137] The right to exclude was

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132. James Kent, *A Lecture, Introductory to a Course of Law Lectures*, *in* THE LEGAL MIND IN AMERICA 92, 100–01 (Perry Miller ed., 1962).

133. *Id.* at 101. Another example of how classical and modern natural law scholarship formed the core of American legal education at this time is found in David Hoffman's *A Course of Legal Study*, first published in 1829 and reissued in a second edition in 1836. Under the heading "Moral and Political Philosophy," Hoffman lists texts by every scholar mentioned in Part II and III of this Article, such as Aristotle, Cicero, Seneca, Grotius, Pufendorf, and Locke. He also advocates the study of other natural law scholars, including Burlamaqui, Rutherforth, and Montesquieu. DAVID HOFFMAN, A COURSE OF LEGAL STUDY 59–63 (2d ed. 1836). An advertisement reprinted in the second edition contains an endorsement by James Kent. *Id.* at 2.

134. JEFFERSON, *supra* note 29, at 296. Further evidence of the extent of the integrated theorists' influence is found in an early American political pamphlet, written by Reverend John Wise and distributed in 1717. Reverend Wise cites Pufendorf as having influenced him in his views on moral and political philosophy generally. ERNEST CASSARA, THE ENLIGHTENMENT IN AMERICA 70 (1988). This is but one example of how the treatises by Pufendorf, Grotius and other European scholars formed the content of a general education in eighteenth- and nineteenth-century America. *See* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 914–15 & nn.23–25 (1993) (discussing in some detail the dominance of the integrated theorists in early American education).

135. Rose, *supra* note 125, at 73.

136. RUTHERFORTH, *supra* note 86, at 32–33.

137. As will be seen later in Part IV, it is the elementary aspect of possession (broadly defined) that made it useful as the foundation for the wide array of property doctrines we have today. *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1,

understood only by reference to the more fundamental possessory rights, i.e., acquisition, use and disposal. This is revealed in nineteenth-century treatises, such as in Stephen Leake's analysis of property in 1874:

> Rights to things, *jura in rem*, have for their subject some material thing, as land or goods, which the owner may *use* or *dispose* of in any manner he pleases within the limits prescribed by the terms of his right. A right of this kind imports in all persons generally the correlative negative duty of abstaining from any interference with the exercise of it by the owner; and by enforcing this duty the law protects and establishes the right.[138]

This compact statement on the nature of the right to property reflects the volumes of analysis discussed in Part II and III of this Article: the primacy of the right to use and the derivative right of exclusion that the right to use logically implies. This is also why the right to exclude is often listed by courts in the nineteenth century as a modifier, albeit a necessary modifier, of the other constituent rights of property. As the California Supreme Court stated in 1858: "Property is the exclusive right of possessing, enjoying, and disposing of a thing."[139] Moreover, Blackstone, Kent, and other representatives of the integrated theory were viewed as authoritative sources for adjudicating property rights in courts throughout the United States.[140] The legal concept of property, representing

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37 (2000) ("Quite complex structures—of property rights or sentences—can be constructed from a limited number of standard building blocks.").

138. STEPHEN MARTIN LEAKE, LAW OF PROPERTY IN LAND 2 (1874) ("use" and "dispose" emphasis added).

139. McKeon v. Bisbee, 9 Cal. 137, 142 (1858). The Patent and Copyright Clause of the Constitution illustrates the same point because it provides that Congress may "secur[e] for limited Times to Authors and Inventors the *exclusive* Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

140. Citations to Blackstone, Kent and even sources in Roman law are common in nineteenth-century property cases. *See, e.g.*, McKeon, 9 Cal. at 138 (citing Blackstone by counsel); Young v. McKenzie, 3 Ga. 31 (1847) (citing Kent and "civil jurists"); Lampton's Ex'rs v. Preston's Ex'rs, 24 Ky. (1 J.J. Marsh.) 454 (1829) (citing Blackstone and Kent); Cherry v. Stein, 11 Md. 1 (1858) (citing Kent); Binney's Case, 2 Md. (2 Bland) 99 (Md. Ch. 1829) (citing Blackstone, Justinian, and Vattel); Strike's Case, 1 Md. (1 Bland) 57 (Md. Ch. 1826) (citing Justinian); Waters v. Lilley, 21 Mass. (4 Pick.) 145 (1826) (citing Blackstone, Kent, and Justinian by counsel and the court); Morss v. Elmendorf, 11 Paige Ch. 277 (N.Y. Ch. 1844) (citing Kent by counsel); Eagle Fire Co. v. Lent, 6 Paige Ch. 635 (N.Y. Ch. 1837) (citing Kent); Jackson ex dem. Beekman v. Sellick, 8 Johns. 262 (N.Y. Sup. Ct. 1811) (citing Blackstone by counsel); Buckingham v. Smith, 10 Ohio 288 (1840) (citing Kent); Lewis v. Bradford, 10 Watts 67 (Pa. 1840) (citing Kent); Union Canal Co. v. Young, 1 Whart. 410 (Pa. 1836) (citing Blackstone); Krider v. Lafferty, 1 Whart. 303 (Pa. 1836) (citing Blackstone); Eastern Lunatic Asylum v. Garrett, 68 Va. (27 Gratt.) 163 (1876) (citing Kent); Spencer v. Pilcher, 35 Va. (8 Leigh) 565 (1837) (citing Justinian and Tucker's edition of Blackstone); Briggs v. Hall, 31 Va. (4 Leigh) 484 (1833) (citing Kent); Williams v. Snidow, 31 Va. (4 Leigh) 14 (1832) (citing Blackstone); Stokes & Smith v. Upper Appomatox Co., 30 Va. (3 Leigh) 318 (1831) (citing Kent).

Direct citations to Grotius and Puffendorf, while less common, are also not unheard of within American courts. *See, e.g.*, Gardner v. Trustees of the Village of Newburgh, 2 Johns. Ch. 162 (N.Y. Ch. 1816); Pierson v. Post, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

"the exclusive right of using and transferring property,"[141] was derived from the integrated theory of property, as originally described and justified in the texts of Grotius, Pufendorf and Locke. Property scholars and jurists in the eighteenth and nineteenth centuries understood this theoretical framework all too well,[142] and the general impact on our past and present property rules is evident.

B. Illustrations of the Integrated Theory of Property in Particular Property Doctrines

1. The Common-Law Rule of First Possession

This real-world impact of the integrated theory makes it possible for us today to assess claims about property laws, such as Rose's claim that the common-law rule of first possession represents a "third approach," which is contrary to either Locke's labor theory or Grotius's consent-based theory.[143] Generally speaking, this is incorrect. First, Grotius requires occupancy or use as a necessary predicate for creating property.[144] Thus, "possession" (broadly defined) is a necessary requirement in both Grotius's and Pufendorf's property theories. Second, judges in the eighteenth and nineteenth centuries focused on the rule of first possession *because* they understood this rule as implementing the integrated theory of property that they acquired from these political and legal philosophers.[145] As indicated above, the integrated theory of property was omnipresent both in academia and on the bench. Judges were not striking out on their own terms, creating a legal rule of property from a novel theoretical foundation. On the contrary, the common-law rule of first possession represents a practical application

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141. KENT, *supra* note 131, at 257–58.

142. *See* Joan E. Schaffner, *Patent Preemption Unlocked*, 1995 WIS. L. REV. 1081, 1099–1103 (discussing the role of Locke's property theory in the enactment of the first federal patent statute); Carl F. Stychin, *The Commentaries of Chancellor James Kent and the Development of an American Common Law*, 37 AM. J. LEGAL HIST. 440 (1993) (discussing the fundamental role of natural law and natural rights in Kent's work); Hamburger, *supra* note 134 (discussing the eighteenth-century American understanding of natural law and natural rights in government and law generally); Douglas W. Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL. U. L. REV. 367 (1991) (discussing, in part, the role of natural law theories in both constitutional and legal cases concerning property rights); Eric R. Claeys, *The Revolution in American Nuisance Law* (manuscript on file with the Author) (discussing the role of natural law and natural rights as principles guiding the adjudication of nuisance cases in the nineteenth century); DAVID DANA AND TOM MERRILL, PROPERTY: TAKINGS ch. 2 (2002) (discussing Grotius, Pufendorf and Blackstone as setting the intellectual context for the Founding Fathers' understanding of the takings clause).

143. Rose, *supra* note 125, at 74. This is a highly influential article. A casual (and unscientific) survey of citations to this article on Westlaw produced a total of ninety-five references in a wide variety of legal scholarship in both property law and other fields.

144. *See supra* notes 33–37 and accompanying text.

145. *Cf.* GROTIUS, *supra* note 33, at II.8.i.2, 296 ("Now the first method of acquiring property, which by the Romans was ascribed to the law of nations, is the taking possession of that which belongs to no one. This method is without a doubt in accord with the law of nature. . . .").

of the more abstract concept of property represented in the integrated theory of property.

Moreover, placing the development of the common-law rule of first possession in this historical and intellectual context shows that Rose's overall assessment of this legal rule is flawed. Working from the mistaken premise that the common law diverges from the original tenets of the integrated theory of property, Rose maintains that the primary function of first possession is to effect proper "communication" about property claims in society.[146] The law promotes the active communication of title to others because this in turn eliminates uncertainty in social interaction and thus "facilitate[s] trade and minimize[s] resource-wasting conflict."[147] This state of affairs certainly "does reward useful labor," according to Rose, but that is only a derivative benefit and is not the primary goal of the rule of first possession.[148] The goal is the facilitation of property claims through defining the conditions of how people communicate such claims; the immediate benefit is the achievement of economic efficiency and a derivative benefit is the ultimate moral reward to labor. Rose sums up her thesis by noting that the supremacy of possession in the law of property represents "the articulation of a specific vocabulary within a structure of symbols approved and understood by a commercial people."[149]

Although she does not speak in such terms in her article, Rose's thesis about the rule of first possession implicitly rests upon the exclusion theory of property. She speaks about transaction-facilitating communication, but *what* is being communicated by a property-holder? It is not use, enjoyment or disposal. Rose maintains in no uncertain terms that these possessory rights are merely devices for communicating a property claim to others. Although she does not name it in her article, Rose believes it is *exclusion* that the possessor communicates to others in society. All of the substantive elements of property are simply a means by which the property-holder is able to say: "This is mine and thus if you want to own it or rent it, you must come to me first. Otherwise, stay away and keep off!" Stripped of the rhetorical analysis of property, and its complementary economic analysis,[150] Rose's interpretation of the rule of first possession is simply a variant of the exclusion theory of property.

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146. Rose, *supra* note 125, at 80–81.

147. *Id.* at 81. Writing as early as 1927, Morris Cohen provides a similar justification for the first possession rule: "Protecting the discoverer or first occupant, . . . makes for certainty and security of transaction as well as for public peace . . . ." Morris R. Cohen, *Property & Sovereignty*, 13 CORNELL L.Q. 8, 15 (1927).

148. Rose, *supra* note 125, at 82.

149. *Id.* at 88.

150. Generally speaking, the law and economic analysis of property adopts the exclusion theory. In his premier economic analysis of property rights, Harold Demsetz maintains that "[p]rivate ownership implies . . . the right of the owner to exclude others." Demsetz, *supra* note 122, at 354. Exclusion thus becomes the fulcrum in the economic analysis of property, because "private ownership of land will internalize many of the external costs associated with communal ownership, for now an owner, *by virtue of his power to exclude others*, ... [has] incentives to utilize resources more efficiently." *Id.* at 356 (emphasis added).

The early cases applying the rule of first possession, however, do not reflect the singular purpose of communication identified by Rose. In *Ingraham v. Hutchinson*,[151] a riparian rights and adverse possession case decided by Chief Justice Swift in the Supreme Court of Errors of Connecticut, there is much talk of things other than the alleged notice function of property rights. In this case, a downstream mill operator sued the defendant for constructing a dam upstream that prevented water from reaching the mill. In appealing from a jury verdict in favor of the plaintiff, the defendant argued for a new trial because, unlike the circumstances in several cases relied upon by the plaintiff, there was no "invasion of the plaintiff's natural rights."[152] Plaintiff's counsel responded in terms that evidence the omnipresence of the integrated theory of property within the legal profession:

> Where two cannot, at the same time, severally enjoy an equal right, one may gain a precedence by long-user. It can make no difference where a person is to assert his right, by bringing an action at law, or by taking possession. If he does not expect to lose his right, he must enjoy it, according to its nature; if he will do nothing, it is just that another should gain a sole and perfect right.[153]

In support of this argument, the plaintiff relied upon an earlier Connecticut case, which provided that a "right ought to be considered as lost by a non-user of it, and by an adverse possession inconsistent with such right."[154] Notably, the "and" is disjunctive here, not conjunctive. The plaintiff in *Ingraham* understood this point because he was in fact arguing against the defendant's claim that there was no adverse possession in this case and thus no remedy available to the plaintiff. The plaintiff agreed that there was no adverse possession and thus italicized "*lost by a nonuser of it*" in the quoted passage, indicating that property rights could be lost simply by not treating them as property, i.e., using or possessing the object of the right. Agreeing with the plaintiff (and with the precedent relied upon by him), Chief Justice Swift upheld the jury verdict.

Throughout the arguments and decision in *Ingraham*, there is not a single mention of notice to third parties. The counsel and judges focus instead on the essential requirement that *use* is the fountainhead of property—and the essence of the concept of property according to the integrated theory. Even more significant,

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Merrill and Smith confirm this point when they maintain that "the right to exclude is shorthand for the proposition that property rights are being defined by rough proxy . . . that sweeps many uses within the control of the 'owner.'" Merrill & Smith, *supra* note 18, at 389. Their analysis also confirms the logical connection between the two social-conceptions of property—the bundle theory and the exclusion theory. They explain how the "early law and economics scholars . . . did not question the realists' conception of property as a contingent bundle of rights," *id.* at 366, and that Coase's conception of property "implicitly modeled property rights as a collection of *in personam* rights." *Id.* at 371. Yet Merrill, Smith and Demsetz all eventually conclude that property is best captured in only the right to exclude others from one's possessions.

151. 2 Conn. 584 (1818).

152. *Id.* at 586 (citations omitted); Sherwood v. Burr, 4 Day 244 (Conn. 1810)).

153. *Id.* at 589.

154. *Sherwood*, 4 Day at 250.

the precedent relied upon by both the plaintiff and the court in *Ingraham*—the case of *Sherwood v. Burr* that provided the essential rule in favor of the plaintiff's verdict—contains two further important points. First, the victorious plaintiff in *Sherwood* relied upon Blackstone.[155] Second, the *Sherwood* opinion is joined by a concurrence that explicitly argues that the defendant had *notice* of plaintiff's activities and yet did nothing in face of this notice.[156] The concurring justice in *Sherwood* goes so far as to say that it is unnecessary to determine if the defendant lost his rights by not using them—the basic property rule relied upon by Chief Justice Mitchell in the majority opinion. The defendant was aware of plaintiff's activities and permitted them to occur, which is a sufficient basis for denying him relief on his appeal. This separate concurrence in *Sherwood* is completely ignored by the parties and the court in *Ingraham.*

None of this is intended to deny outright Rose's claim that communication and economic efficiency are essential byproducts of the rule of first possession. Her thesis that these goals form the content of this legal rule is simply overstated. Pufendorf would likely agree with Rose, at least to some degree.[157] In discussing the Roman doctrine of *usucaption* (the progenitor of the modern doctrines of prescription and adverse possession), Pufendorf notes that a property-holder must evidence his intent to possess his property "by means of certain signs," and that "non-performance or omissions, considered with the circumstances due to them, are held in moral matters as acts which can work to the prejudice of the one who makes no sign."[158] Moreover, Pufendorf makes similar claims as Rose concerning the purpose of property. Early in *De Jure Naturae et Gentium*, Pufendorf writes: "The most important [points about property] advanced are, [1] that thereby the quarrels arising from the original community of ownership are avoided, and [2] that the industry of man is increased, in that each man has to secure his possession by his own efforts."[159] Later in the treatise, in discussing the common use-right in the state of nature, Pufendorf recognizes that

> an occasion for quarrels and wars lay ready at hand, if two or more men needed the same thing, when it was not enough for all. Moreover, most things require labour and cultivation by men to produce them and make them fit for use. But in such cases it was improper that a man who had contributed no labour should have [a] right to things equal to his by whose industry a thing had been raised or rendered fit for service. Therefore, it was advantageous to peace among men that, as soon as men multiplied, there should be introduced *dominion* of mobile things, especially such as require labour and cultivation by men, and, among immobile things,

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155. *Id.*

156. *Id.* at 251 (Baldwin, J., concurring).

157. *See also supra* notes 50–51 and accompanying text (discussing Grotius's view that possession, in part, communicates one's right to exclude to others).

158. PUFENDORF, *supra* note 31, at 653 (discussing Grotius' views in *De Jure Belli ac Pacis*, II.4); *see also supra* notes 50–51, 121–24 and accompanying text (discussing economic and communication-facilitating aspects of Grotius's argument for property).

159. PUFENDORF, *supra* note 31, at 301.

> *dominion* of those which are of immediate use to me, such as places for dwelling. . . .[160]

Pufendorf and Grotius[161] would thus agree with many of Rose's insights, such as the peaceful transaction-facilitating function of property, and her claims could still be inferred from the cases discussed in this section. Yet this hardly means that Rose's reconstruction of the rule of first possession is correct. The integrated theory of property is not so easily dismissed.

First, Pufendorf is not a proto-economist, and to interpret him as such is to commit the same anachronistic error as those scholars who fail to recognize the intellectual context that animates Blackstone's writings.[162] Pufendorf was not offering the equivalent of an early economic analysis of the law. The operative phrase here is Pufendorf's insistence that signaling is important in *"moral matters,"*[163] which itself signals that this discussion of adverse possession presupposes his overall theory of property. This context—the integrated theory of property—maintains that the right to use is the fundamental element of the concept of property. In their terms, *dominion* is derived from *suum*.[164] Grotius explains that "the very source . . . of the institution of private property" was "the right to use the goods in question [as] originally acquired through a physical act of attachment," and that the legal "recognition of the existence of private property" in society is predicated on this preexisting "occupation."[165] Therefore, as the common-law courts defined the first rules concerning the acquisition of property, they formulated the rule of first possession.

Second, and more important, Pufendorf's recognition of the social-function of property rights reveals the comprehensive breadth of the integrated theory of property, not the veracity of Rose's reconstruction of the rule of first possession. Given its focus on the substance of property—the possessory rights to acquisition, use and disposal—the integrated theory analyzes this concept functionally. The right to use is the fountainhead of property because it is a necessity of humans to use things in the world in order to live—people must build shelter, produce clothing, cultivate land, raise animals, invent industry. The institution of property is brought into the world because it recognizes this fact and facilitates the conditions necessary for human survival. In other words, the integrated theory of property does not advance principle forsaking consequences; on the contrary, principle *serves* consequences. In providing this functional

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160. *Id.* at 539–40 (citing THOMAS HOBBES, DE CIVE ch. i, § 6 (1642)) (emphasis added). Pufendorf notes in the next section that this "shows the falsity of the old saying: 'Mine and thine are the causes of all wars.' Rather it is that 'mine and thine' were introduced to avoid wars." *Id.* at 541.

161. *See supra* notes 121–24 and accompanying text (discussing Grotius's view of property as evolving out of a basic need to provide a standard for interactions between people in society).

162. *See supra* notes 101–13 and accompanying text.

163. *See* sources cited *supra* note 158.

164. *Supra* notes 41–46, 70–73 and accompanying text. As Grotius says: "[P]roperty ownership was introduced for the purpose . . . that each should have his own." GROTIUS, PRAEDAE, *supra* note 35, at 322.

165. GROTIUS, PRAEDAE, *supra* note 35, at 229.

account of property, the integrated theory not only offers a basis for justifying the rule of first possession, but it also can account for the utility-enhancing consequences highlighted by Rose's article.[166]

Thus, Rose is correct that the first possession rule ultimately facilitates communication and reduces transaction costs in economic activity, but this was never the standard for the rule of first possession. Rose has the causal relationship reversed. Communication and economic efficiency are achieved when the first possessor—the occupier, user or laborer—is recognized and protected as the property owner. The utility is the result, not the guiding principle.[167] The guiding principle is the use or labor that has created the property—that each person shall reap what he sows.[168] The first possessor should have his entitlement recognized

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166. According to Locke, "[self-]interest is not a foundation of [moral] law or a basis of obligation, but the consequence of obedience." LOCKE, *supra* note 83, at 251. Moral principles, according to Locke, should guide humans in living successfully. This is why virtue produces utility: virtue is "that famous precept 'live according to nature,' which the Stoics urge upon us so insistently." *Id.* at 101. Thus, according to Locke, "the rightness of an action does not depend on interest, but interest follows from rectitude." *Id.* at 251.

Working from the same basic tenets of classical moral theory, Pufendorf agrees with Locke that "actions in conformity with the law of nature have, indeed, this characteristic, that not only are they reputable, that is, they tend to maintain and increase a man's standing, reputation, and position, but they also are useful, that is, they procure some advantage and reward for a man, and contribute to his happiness." PUFENDORF, *supra* note 31, at 196. In support of his arguments on this point, Pufendorf approvingly quotes Cicero that "nothing more pernicious can be introduced into human life" than "separating virtue from expediency." *Id.* at 195 (quoting CICERO, ON DUTIES, bk. II.iii). For a recent translation, albeit slightly different, see CICERO, ON DUTIES 66 (M.T. Griffin & E.M. Atkins eds., E.M. Atkins trans., 1991).

For their part, these philosophers are simply reiterating the ethical principles of the Greek Stoics, who believed that human happiness would result from guiding one's actions in accordance with the nature of the universe and of man. The goal is successful living and happiness (what would be redefined in the modern era as "utility"), and the standard used to achieve this goal is objective moral principles derived from the facts of the world. *See* Gisela Striker, *Origins of the Concept of Natural Law*, *in* 2 PROCEEDINGS OF THE BOSTON AREA COLLOQUIUM IN ANCIENT PHILOSOPHY 84, 91 (John J. Cleary ed., 1987) (explaining that, according to the Stoics, "[k]nowledge of the laws of nature will make one capable of organizing one's life so as to exhibit the orderliness that will make it a good life. Since happiness consists precisely in leading a good life, the Stoics could then even define the good for man as living in agreement with nature"). As one ancient Greek recorder noted, the Greek Stoics maintained that "the goal [of man] was to live in agreement with nature, which is to live according to virtue." HELLENISTIC PHILOSOPHY: INTRODUCTORY READINGS 136 (Brad Inwood & L.P. Gerson trans., 1988) (quoting Diogenes Laertius 7.87). For Locke and other advocates of the integrated theory of property, this is precisely what the doctrine of property—and its corollary rights of life and liberty—achieved for individuals and society writ large.

167. HELLENISTIC PHILOSOPHY: INTRODUCTORY READINGS, *supra* note 166, at 136 (discussing the argument that utility is the result of, but not the standard for, moral action).

168. *See, e.g.*, PUFENDORF, *supra* note 31, at 539–40 (noting that "most things require labour and cultivation by men to produce them and make them fit for use," and it is accordingly "improper that a man who had contributed no labor should have [a] right to

and protected by the law *because* he has engaged in the use or labor upon a thing that turns something into the object of a property claim. The derivative benefit is the peaceful relations and utility that result from the laws and court judgments fashioned according to this principle. The common law thus puts into practice the principal tenet of the integrated theory of property: the right to use is the foundation of property as a concept and moral right.

2. Intellectual Property

The integrated theory of property sheds a similar light upon the formation and development of intellectual property rights. Sharing the same fate as tangible property doctrines, the domain of intellectual property has succumbed in the twentieth century to the effects of the bundle theory.[169] Accordingly, when a set of intellectual rights is treated as a form of "property" and analyzed into its respective "bundle of rights," this has lead to the same fragmentation noted in the Introduction of this Article. As the property foundations of intellectual property have weakened and become tenuous, the claim that intellectual rights represent merely state-granted monopolies or privileges has gained prominence.[170]

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things equal to [another man] by whose industry a thing had been raised or rendered fit for service").

169. *See, e.g.*, Aaron Xavier Fellmeth, *Control Without Interest: State Law of Assignment, Federal Preemption, and the Intellectual Property License*, 6 VA. J.L. & TECH. 8, 70 (2001) ("Intellectual 'property' in the form of patents and copyrights is intangible property granted by federal statute, but the bundle of rights to the property can be owned like a chose in possession . . . ."); Richard J. Gilbert & Michael L. Katz, *When Good Value Chains Go Bad: The Economics Of Indirect Liability for Copyright Infringement*, 52 HASTINGS L.J. 961, 965 (2001) (noting that in copyright law the term is only "the time period over which the rights-holder possesses the bundle of protected rights associated with the particular type of intellectual property").

170. For the "intellectual property as monopoly grant" perspective, see, for example, John E. Mauk, Note, *The Slippery Slope of Secrecy: Why Patent Law Preempts Reverse-Engineering Clauses in Shrink-Wrap Licenses*, 43 WM. & MARY L. REV. 819, 838–39 (2001) (noting that companies' reverse-engineering clauses lead to an "extension of trade secret protection [that] will expand their limited intellectual property monopolies beyond what was originally intended by the architects of the current patent system"); Edward C. Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. INTELL. PROP. L. 315, 318–19 (2000) (noting that "patents and copyrights were clearly perceived [by James Madison and Thomas Jefferson] as monopolies, albeit desirable ones"); Aaron Xavier Fellmeth, *Copyright Misuse and the Limits of the Intellectual Property Monopoly*, 6 J. INTELL. PROP. L. 1, 3 (1998) ("The intellectual property laws confer a monopoly on patents and copyrights and encourage innovation by deterring infringement with severe civil and criminal sanctions."); Tom G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 HAMLINE L. REV. 261, 303–04 (1989) (arguing that patents and copyrights are "state-created monopolies," and as such "are unjustified interventions into voluntary market processes").

This monopoly perspective also animates the adjudication of intellectual property disputes. *See, e.g.*, Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146 (1989) (noting that a patent represents "the grant of a limited monopoly" to an inventor); Sony Corp. v. Universal City Studios, 464 U.S. 417, 429 (1984) (noting that "the text of the Constitution" is clear that "it is Congress that has been assigned the task of defining the

Working from the bundle theorists' analytical separation of the various rights subsumed under "property," the exclusion theorists have sought to rescue intellectual property in much the same way they have defended the traditional concept of property. Intellectual property, exclusion theorists argue, is property because intellectual property shares with this concept the essential right to exclude. In critiquing the "patent as monopoly grant" perspective, for instance, Judge Easterbrook writes:

> Patents are not monopolies, and the tradeoff is not protection for disclosure. Patents give a right to exclude, just as the law of trespass does with real property. Intellectual property is intangible, but the right to exclude is no different in principle from General Motors' right to exclude Ford from using its assembly line, or an apple grower's right to its own crop.[171]

Easterbrook's premise is that whenever an individual's "right to exclude" is protected by the law, then this is a necessary and sufficient basis for finding that the individual has a legally-protected "property right." Such sentiments are repeated by the intellectual property theorists, Donald Chisum and Michael Jacobs, who note that "[g]iving *exclusive rights* to an author or inventor is no more a monopoly or anticompetitive than other species of real or personal property."[172] These arguments are not confined to the pages of articles and hornbooks. In adjudicating patent disputes, the Federal Circuit has adopted the exclusion theory as the basis for conceptualizing patents as "property."[173] The shifting sands of the

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scope of the limited monopoly that should be granted to authors or to inventers"); Metallizing Engineering Co. v. Kenyon Bearing & Auto Parts Co., 153 F.2d 516, 520 (2d Cir. 1946) (Hand, J.) (explaining that "it is a condition upon an inventor's right to a patent that he shall not exploit his discovery competitively after it is ready for patenting; he must content himself with either secrecy or legal monopoly").

171. Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 109 (1990); *but see* Roberts v. Sears, Roebuck & Co., 723 F.2d 1324, 1345 (7th Cir. 1983) (Posner, J., dissenting) ("The problem is that patent protection has a dark side, to which the term 'patent monopoly' is a clue. A patent enables its owner to monopolize the production of the things in which the patented idea is embodied. To deny that patent protection has this effect . . . is—with all due respect—to bury one's head in the sand.").

172. DONALD S. CHISUM & MICHAEL A. JACOBS, UNDERSTANDING INTELLECTUAL PROPERTY LAW § 1C, at 1–7 (1992) (emphasis added); *see also* Simone A. Rose, *Patent "Monopolyphobia": A Means of Extinguishing the Fountainhead?*, 49 CASE W. RES. L. REV. 509, 516 (1999). Rose writes:

> "Property," like the term "monopoly" in its economically neutral sense, means no more than a granting of a right to exclude. The patent right excludes others from making, using or selling the claimed invention . . . . This squarely fits the definition of property.

Id. (citations omitted).

173. *See, e.g.*, Cygnus Therapeutics Sys. v. ALZA Corp., 92 F.3d 1153, 1160 (Fed. Cir. 1996) ("The patent statute grants a patentee the right to *exclude* others from making, using, or selling the patented invention."); *In re* Etter, 756 F.2d 852, 859 (Fed. Cir. 1985) ("The patent right is a right to exclude. The statute, 35 U.S.C. § 261, says that 'patents shall have the attributes of personal property.' The essence of all property is the right to exclude, and the patent property right is certainly not inconsequential.").

bundle theory and the narrow claim of the exclusion theory dominate the current crop of property analyses of intellectual property doctrines.

The problem with framing intellectual property rights as either a "bundle of rights" or a "right to exclude" is that this does little to define the concept of intangible *property* on its own terms. An explicit issue in both the bundle and the exclusion theorists' arguments about intellectual property is the competing claim that these laws represent only monopoly privileges proffered by the state. Without a theory that accounts for the substantive rights subsumed by intellectual property—the right to acquire, use and dispose of one's creations—then it is difficult, if not impossible, to counter the monopoly theory in explaining the substantive role and impact of intellectual property rights. The arbitrariness of the constitutive rights presumed by the nominalist bundle theory, and the excessively narrow and formalist premises of the exclusion theory, have ultimately left intellectual property without a firm grounding as a *property* doctrine.

As an alternative to this theoretical lacuna, the integrated theory of property can serve to describe both the evolution of some intellectual property doctrines as well as suggest ways that these doctrines should function today. Notably, the laws governing trademarks and trade secrets came to fruition in the nineteenth century, a period in which the identification of these legal entitlements as "property" made sense given the widely accepted terms of the integrated theory of property. Furthermore, the evolution in the twentieth century of other intellectual property doctrines, such as copyright, reflects a concept of property that is best explained by the integrated theory of property.[174] The application of these laws in the future could benefit from the organizing principles of the integrated theory of property. Although each of the following subsections is deserving of an extended analysis in its own right, this section will briefly explore some of the descriptive and normative contributions of the integrated theory of property to the intellectual property doctrines of trade secrets, trademarks, and copyright.

a. Trade Secrets

Almost immediately after its inception in the late nineteenth century, the theory of trade secret law began to languish. Although courts today recognize trade secrets as "property,"[175] many commentators find that this amounts to placing a

174. Wendy Gordon has worked diligently at applying a Lockean conception of property to copyright. *See, e.g.*, Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993); Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149 (1992).

175. *See, e.g.*, Carpenter v. U.S., 484 U.S. 19, 26 (1987) (holding that "[c]onfidential business information has long been recognized as property"); Ruckelshaus v. Monsanto, 467 U.S. 986, 1003–04 (1984) (holding that Monsanto has "a trade-secret property right under Missouri law, [and] that property right is protected by the Taking Clause of the Fifth Amendment."); Bd. of Trade of Chi. v. Christie Grain & Stock Co., 198 U.S. 236, 250 (1905) (noting that "the plaintiff's collection of quotations is entitled to the protection of the law. It stands like a trade secret.").

round peg into a square hole. The rules and underlying policies for trade secret law were first collected and explained, not in the *Restatement of Property*, but rather in the *First Restatement of Torts*.[176] The Restatement authors justified its placement there because such "protection is afforded only by a general duty of good faith."[177] The *Second Restatement of Torts* omitted the doctrine of trade secrets, arguing, as Bob Bone recently explained, that trade secret law is only "parasitic" on other doctrines of law, such as torts.[178] Twentieth-century commentators seem to all agree on one thing about trade secret law: it is not a doctrine of property. This point is stated succinctly by the First Restatement's authors: "The suggestion that one has a right to exclude others from the use of his trade secret because he has a right of property in the idea has been frequently advanced and rejected."[179] Further throwing the foundations of this doctrine into disarray is the Supreme Court's recent declaration that "[w]ith respect to a trade secret, the right to exclude others is central to the very definition of the property interest."[180]

The source of the difficulties with trade secret law, however, is found not in the doctrine, but in the twentieth-century analyses of this field of law by academics and the courts. It is significant that, although the *First Restatement of Torts* and the Supreme Court came to decidedly different conclusions about the status of trade secrets as property, both argued from the same premise: property is sufficiently described by the right to exclude. It makes sense that the authors of the First Restatement would focus on exclusion because they were writing in the early twentieth century, during the heyday of the new social-relations view of rights, which focused property scholars on the only formal, social right of property: exclusion.[181] Finding the absence of any traditional conception of exclusion in trade secret protection—unlike with a copyright or patent, for instance, the trade

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176. RESTATEMENT (FIRST) OF TORTS § 757 (1939). The First Restatement authors were not alone in these sentiments. A similar argument was made by the Supreme Court in an opinion authored by Justice Holmes in 1917. *See* E.I. du Pont & Co. v. Masland, 244 U.S. 100, 102 (1917). The Court held:

> The word "property" as applied to trademarks and trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith. . . . The property may be denied, but the confidence cannot be. Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs. . . .

Id.

177. RESTATEMENT (FIRST) OF TORTS § 757 cmt. A (1939).

178. Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CAL. L. REV. 241, 245 (1998). Bone avers that "trade secret law is based at its core on the breach of relationally specific duties," such as duties of confidentiality within employer-employee relationships. *Id.* at 244. Therefore, "we [should] stop seeking a functional justification for trade secret law and recognize this body of law for what it really is—a collection of other legal wrongs." *Id.* at 245–46.

179. RESTATEMENT (FIRST) OF TORTS § 757 cmt. A (1939).

180. *Monsanto*, 467 U.S. at 1011.

181. *See supra* notes 3–9, 91–97 and accompanying text; *see also* Bone, *supra* note 178, at 251–60 (providing a similar explanation of the intellectual history of property in the early twentieth century and its effect on trade secret law).

secret possessor cannot unilaterally prevent others from using the information if it is derived independently or in good faith—the Restatement authors concluded that trade secrets were not a species of property. Working within the dominant bundle theories and exclusion theories of property, the courts would later argue to the contrary: trade secrets are property because the legal protections are analytically reducible to the right to exclude. This explains why the Supreme Court found it necessary in *Monsanto* to argue that the essence of a trade secret is the right to exclude. According to its underlying property theories, the Court could define trade secrets as property only if these legal rights essentially represented the *right to exclude*, a right that the *Monsanto* opinion stresses is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[182]

The problem with this approach is that trade secret law has nothing to do with exclusion. The legal rules essentially protect the right of the trade-secret owner to dictate the conditions under which the secret information will be *used*. The common-law judges in the nineteenth century already understood and accepted the integrated theorists' concept of property, which provided that the legal entitlement to property arose from the possession or use of something in the world. Thus, the status of trade secrets as property made sense because it was this omnipresent element of use—the creation of information, the development of a business practice based on the information, and the subsequent efforts to keep the information concealed—that justified protecting these entitlements as property.

Nowhere is this revealed more than in *Peabody v. Norfolk*, the preeminent 1868 case that established trade secret law in the United States.[183] In explaining why it was going to protect trade secrets as property entitlements, the court stated:

> If a man establishes a business and makes it valuable by his skill and attention, the good will of that business is recognized by the law as property. . . . If he invents or discovers, and keeps secret, a process of manufacture, whether a proper subject for a patent or not, he has not indeed an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it; but he has a property in it, which a court of chancery will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or to disclose it to third persons.[184]

This explanation is nonsensical according to the exclusion theory because the court admits that the possessor of a trade secret does not have a right to exclude others from the trade secret. Moreover, the court's reasoning does little to establish trade secrets as "property" according to the bundle theory because the court maintains that the property right is enforced through contracts and the duty of confidence, which explains why the doctrine has indeed "disintegrated" in the twentieth century under the dominant bundle theory. Nonetheless, working from the premises of the integrated theory of property, it made sense to the *Peabody* court to view trade secrets as property.

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182. *Monsanto*, 467 U.S. at 1011 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)); *see also supra* note 9.

183. 98 Mass. 452 (1868).

184. *Id.* at 457–58.

Why? The reason is that the *Peabody* court understood that the essence of the concept of property consisted of the fundamental possessory rights—the rights to acquire, use, and dispose of things one has created through one's own efforts. It is the *right to use* that forms the core of trade secret law. The *Peabody* court's focus on the possessory attributes of property is straightforward: the possessor of the trade secret is the person who first created a valuable *business practice*, and other people with access to this information are therefore precluded from *using* it or *disclosing* it. This basic premise of trade secrets is also found in an even earlier case, cited by the *Peabody* court, which held that the possessor of secret business information may dictate that others may not disclose it "to the end that he might preserve the right, that he might keep the secret, for his own use and exclusive enjoyment."[185] The fundamental right is the possessor's "own use" of the information, which thus dictates the extent of the "exclusive enjoyment" of that information.[186] The birth of trade secret law as a property doctrine, and its continuing adjudication today as a property doctrine, makes sense only from the perspective of the integrated theory of property.

If one conceives of "property" as arising from and constituting the rights to acquire, use and dispose of things, then it is logical to recognize as "property" certain information and business practices created and kept secret by its possessor. If courts today are going to adjudicate trade secrets as property rights, then their efforts will be best served by adopting the integrated theory of property as the underlying policy justification for these legal rules. In this respect, it is with some irony that the *Monsanto* decision cited to Blackstone and Locke for the proposition that "property" subsumes all things that arise from "labour and invention."[187] In other words, "property" is derived from the use and creation of things—the principal tenet of the integrated theory of property. Although the Court ultimately looked to the exclusion theory to justify the protection of trade secrets as property—forsaking the ideas it referenced with the Blackstone and Locke citations—it at least has at hand the resources necessary to provide the proper theoretical foundation for trade secret law.

b. Trademarks

Unlike trade secrets, the doctrine of trademarks is not casting about for a justifying theory—since the turn of the twentieth century it has been placed squarely within the domain of commercial and trade law. The Supreme Court emphasized this as early as 1916 in a rare trademark case it accepted for review, *Hanover Star Milling Co. v. Metcalf*.[188] The Justices gave lip service to existing

185. Vickery v. Welch, 36 Mass. 523, 527 (1837).

186. *Id*; *see also* Taylor v. Blanchard, 95 Mass. 370, 376 (1866) (holding that "[t]he law regards the good will of a particular trade as property having a market value, and protects it to a reasonable extent, depending somewhat upon the nature and character of the business").

187. *Monsanto*, 467 U.S. at 1003 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *405 and citing generally JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT ch. 5 (J. Gough ed., 1947)).

188. 240 U.S. 403 (1916), *superseded by statute as stated in* Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189 (1985).

precedent that "[c]ommon-law trademarks, and the right to their exclusive use, are, of course, to be classed among property rights,"[189] but nonetheless concluded that "the trademark is treated as merely a protection for the goodwill, and not the subject of property except in connection with an existing business."[190] Over the years, scholars and jurists have taken this view of trademarks to its ultimate, logical conclusion, as revealed in a recent edition of an intellectual property casebook:

> [T]he fundamental principles of trademark law have essentially been ones of tort: the tort of misappropriation of the goodwill of the trademark owner, and the tort of deception of the consumer. In this sense, trademarks may not be thought of as analogous to "property rights" at all.[191]

Although originally defined as property rights by courts in the nineteenth century,[192] trademarks developed in the twentieth century squarely within the field of the tort of unfair competition.[193] In fact, this development in trademark law is a paradigmatic example of how property has indeed "disintegrated" in the twentieth century.[194] Simply put, what began as a property entitlement has evolved (devolved?) into a tort.[195]

The modern conception of trademarks as a tort represents a radical shift from the genesis of this legal right in the nineteenth century. When the U.S. law and equity courts were first asked in the nineteenth century to protect an owner's trademark, they responded by defining and protecting trademarks as property

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189. *Id.* at 413 (citing *In re* Trade-Mark Cases, 100 U.S. 82, 92–93 (1879)). Beginning in 1905, the federal government has enacted trademark statutes to complement (and replace) the development of this doctrine at common law. *See generally* 15 U.S.C. §§ 1051-1129 (2001).

190. Hanover Star Milling v. Metcalf, 240 U.S. 403, 414 (1916).

191. ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 559 (2d ed. 2000).

192. *See infra* notes 196–205 and accompanying text.

193. *See, e.g.*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9 (1995) (defining a trademark); *Hanover Star Milling*, 240 U.S. at 413 ("In fact, the common law of trademarks is but a part of the broader law of unfair competition."); Meadowmoor Dairies, Inc. v. Milk Wagon Drivers' Union of Chi., 21 N.E.2d 308, 311 (1939) ("At common law every man has full freedom in disposing of his own labor of capital and any one who maliciously invades that right by misrepresentation, fraud or coercion is liable, because such acts constitute unlawful competition."); Nat'l Football League Props., Inc. v. Consumer Enters., Inc., 26 Ill. App. 3d 814, 819–20 (1975) (noting that "the Illinois Deceptive Practices Act . . . merely codifies Illinois common law" with respect to the likelihood of confusion or misunderstanding test for trademark infringement).

194. *See* Grey, *supra* note 1; *supra* notes 1–2, 8 and accompanying text.

195. *See, e.g.*, Yale Elec. Corp. v. Robertson, 26 F.2d 972, 973 (2d Cir. 1928) (Hand, J.) ("The law of unfair trade comes down very nearly to this—as judges have repeated again and again—that one merchant shall not divert customers from another by representing what he sells as emanating from the second."); New England Tel. & Tel. Co. v. Nat'l Merch. Corp., 335 Mass. 658, 673 (1957) (noting that in considering "alleged unfair competition" in competitor's use of telephone company's directory information, "consideration must always be given to the public interest in preventing the creation or extension of monopoly").

entitlements. In 1879, for instance, the Supreme Court recognized that "[t]he right to adopt and use a symbol or a device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of use by all other persons, has been long recognized by the common law . . . . It is a property right . . . ."[196] The Court further noted that "[a]t common law the exclusive right to [a trademark] grows out of its *use*, and not its mere adoption."[197] When a businessman *uses* a trademark and creates a *valuable interest* thereby, he may then *exclude* others in the use of that mark, i.e., "[i]t is a property right."[198] The concept of property underlying this assessment is clear: the first person to *use* a mark in commerce gains entitlement to it as property, and thus may exclude others from using it thereafter. First, use, and second, exclusion based on this use. The Supreme Court used the integrated theory to recognize trademarks as property in 1879.

The Supreme Court was not breaking any new ground, though, but was simply summarizing the well-established jurisprudence on this new form of property that had already been created in numerous state courts. In the first half of the nineteenth century, the equity courts in New York and Massachusetts first recognized this new type of property, enjoining defendants who, in Justice Story's words, "intentionally *pirated* the complainants' names" through the use of counterfeit trademarks.[199] The equity courts issued these injunctions because they recognized that the owner of a trademark possessed a "valuable interest,"[200] which was deserving of protection as a property right. By 1865, the status of trademarks as a legally protectable property right was so pervasive that the California Supreme Court could simply declare the truism that "the trademark is property, and the owner's right to property in it is as complete as that which he possesses in the

196. *In re* Trade-Mark Cases, 100 U.S. 82, 92 (1879).

197. *Id.* at 94.

198. *Id.* at 92.

199. Taylor v. Carpenter, 2 Sand. Ch. 603, 611 (Story, Circuit Justice, N.Y. Ch. 1845) (emphasis added). Interestingly, this is an equity case from Massachusetts that is reprinted in Sandford's New York Chancery Reports. *See* Coats v. Holbrook, 2 Sand. Ch. 586, 596 (N.Y. Ch. 1845) (noting that *Taylor v. Carpenter* "was instituted in the Circuit Court of the United States in Massachusetts, on the equity side of the court [and] Judge Story sustained an injunction").

It is acknowledged that there are comments in these early cases indicating a concern for the impact on consumers. *See id.* at 597–98 (noting that counterfeit trademarks have the effect of "imposing upon and swindling the community," and that the counterfeiter sought to have its goods "palmed off upon the consumer as being made by" the proper holder of the trademark); *Taylor*, 2 Sand. Ch. at 611 (noting that the counterfeiter acted with the "fraudulent purpose of inducing the public . . . to believe" its goods were in fact made by another); *id.* at 613 (Lott, Sen., affirming Story's decree upon appeal to the Court for the Correction of Errors, and noting that the counterfeiter commits "a fraud . . . on the public").

These consumer-oriented concerns, however, are not the principal goal the judges sought to protect in recognizing a businessman's trademark. It is repeatedly stated that the fraud upon consumers is only a *means* by which the counterfeiter achieves his ultimate end: "supplanting [businessmen] in the good will of their trade and business," *Taylor*, 2 Sand. Ch. at 611, which is a "gross violation of their rights," *Coats*, 2 Sand. Ch. at 598, because it serves "to deprive the owners thereof of the profits of their skill and enterprise," *Taylor*, 2 Sand. Ch. at 613 (Sen. Lott); *see also infra* notes 204–205 and accompanying text.

200. Partridge v. Menck, 2 Barb. Ch. 101, 103 (N.Y. Ch. 1847).

goods to which he attaches it, and the law protects him in the enjoyment of the one as fully as the other."[201]

In the famous 1849 New York case of *Amoskeag Manufacturing Co. v. Spear*,[202] Chief Justice Duer declared that "[t]he right does not become established until the trade mark be so often used, and so long employed, exclusively and uninterruptedly, as to create the presumption that everybody would know and acknowledge, that it was the distinctive badge of the plaintiff's ownership. . . ."[203] In affirming the injunction against the defendant, Justice Duer concluded that "the imitation or adoption of marks, forms or symbols which the [plaintiff-businessman] who first employed them had a right to appropriate, and this for the plain reason that when a right to property has been thus acquired, it must be protected."[204] If the injunction is not issued, then "the owner [of the trademark] is robbed of the fruits of the reputation that he had successfully labored to earn."[205]

For the judges in the nineteenth century, recognizing a property right in something first created and used by someone was simply a matter of legally protecting that person's entitlements. This was natural for them because their property theory justified this (to use Carol Rose's turn of phrase for the role of property theory). The integrated theory provided that the first possession, use, or labor upon something in the world turned this object into property, which required the protection of the law to make this use exclusive of others. As a case reporter noted in a nineteenth-century collection of trademark cases, a trademark "does not depend upon the right of property in the article sold, or in the lable [sic]; but rests upon the prior *use* and *application* of the mark."[206] In this way, the creation and early development of trademark law is a paradigmatic example of how the integrated concept of property was (and is) applied in the creation and enforcement of legal rules.

It is also important to realize that the elements of the integrated theory of property remain at work within trademark law,[207] although roundly denied by most

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201. Derringer v. Plate, 29 Cal. 292, 295 (1865); *see also* Spottiswoode v. Clark, 2 Sand. Ch. 628 (N.Y. Ch. 1846) (following this reprint of an English equity case in Sandford's New York Chancery Report is an index of trademark law with case citations, which notes the proposition that a right of property in a trademark "does not depend upon the right of property in the article sold, or in the lable [sic]; but rests upon the prior use and application of the mark").

202. 2 Sand. Ch. 599 (N.Y. Sup. Ct. 1849).

203. *Amoskeag*, 2 Sand. at 599, *quoted in* 2 Sand. Ch. 697, 698 (on file with Author) (the quote from this case is in the index on trademark law compiled by Vice-Chancellor Lewis Sandford of New York's Court of Chancery and is not in the Superior Court Reports).

204. *Id.* at 609.

205. *Id.* at 606.

206. This statement is made in an index of trademark cases in Sandford's New York Chancery Report that follows *Spottiswoode*, 2 Sand. Ch. at 628.

207. *See, e.g.*, CHISUM & JACOBS, *supra* note 172, § 5C, at 5–11 (noting that "a person acquires mark ownership by taking the steps trademark law prescribes—adoption and use of a distinctive mark," which is what is necessary in order to "acquire exclusive rights to use a mark").

commentators today who view property solely in terms of the bundle or exclusion theory. It is not a coincidence that the doctrine of trademark law became unhinged from property theory in the early twentieth century; like other legal rights at this time, trademarks were analytically separated into their respective social relations among people. After adopting the social-oriented bundle theory,[208] it was a short step to the recognition of the only formal, social-oriented right forming the content of a trademark: the right to exclude. As the Supreme Court recently stated: "The Lanham Act may well contain provisions that protect constitutionally cognizable property interests—notably, its provisions dealing with infringement of trademarks, which are the 'property' of the owner because he can exclude others from using them."[209] The "exclusive use" of a trademark became the essential right of trademark law.[210]

In this respect, the exclusion theorists reinforced the policy goals of the bundle theorists' approach to trademarks. The bundle theorists in the early twentieth century redefined the doctrine of trademarks so that it served the social goals of unfair competition law: business goodwill and customer recognition. Academics and courts quickly saw the next logical step: the right to exclude in trademarks is the essential feature by which trademarks maintain business goodwill and prevent customer confusion. These social goals now preempted the original function of trademarks, which was to reward the efforts of an individual's labors by protecting the resulting entitlements as property rights.[211] In sum, the exclusion theorists followed naturally from the bundle theorists, and the result was the "disintegration" of trademarks as a property doctrine. The Second Circuit recently summed up this current doctrinal state of affairs quite nicely:

> Although trademarks are often referred to as a form of property, or more specifically as "intellectual property," we recently reaffirmed that "'[t]here is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed.'"[212]

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208. *See* Kmart Corp. v. Cartier, Inc., 485 U.S. 176, 185–86 (1988) ("Trademark law, like contract law, confers private rights, which are themselves rights of exclusion. It grants the trademark owner a bundle of such rights."); *see also* MERGES ET AL., *supra* note 191, at 565 (discussing the economic criticism of "the strengthening of the bundle of rights associated with a particular trademark"); Kenneth L. Port, *The Illegitimacy of Trademark Incontestability*, 26 IND. L. REV. 519, 553 (1993) ("Trademarks . . . enjoy none of the 'bundle of rights' that other forms of property enjoy . . . . Mark holders do not possess a property right in the mark itself, because trademarks are nothing when devoid of the goodwill they have come to represent or the product on which they are used.").

209. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999).

210. Hanover Star Milling v. Metcalf, 240 U.S. 403, 413 (1916).

211. *See supra* note 199 (discussing early cases focusing on the nature of trademarks as a property right).

212. PaperCutter Inc. v. Fay's Drug Co., 900 F.2d 558, 561 (2d Cir. 1990) (quoting Pirone v. MacMillan, Inc., 894 F.2d 579, 581 (2d Cir. 1990) (quoting United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97 (1918))); *but see supra* note 197 and accompanying text.

The problem with this approach is that once trademarks were transformed from a property law doctrine into a derivative form of commercial and trade law doctrine, there was no longer any principled basis by which to delimit trademark protection. Once the courts decided that in trademark cases "the paramount concern of the courts is the protection of the public interest" in preventing customer confusion or dilution of goodwill,[213] then there was no principled basis by which to define the boundaries of trademark doctrine. The result of course is that there has been a creeping expansion of trademark protections, which is both widely recognized and criticized.[214]

From the perspective of the integrated theory of property, which gave birth to the very notion of legally protectible trademarks, this expansion of trademark protection is also unjustified. But the integrated theory offers a principled foundation on which to draw this conclusion and reign in the doctrine. For example, the 1988 amendment of the Lanham Act permitted people to register trademarks despite not having used the mark in any respect.[215] Under the new law, anyone can register a trademark as long as they express a "bona fide intention, under circumstances showing the good faith of such person, to use a trademark in commerce" in the near future.[216] This amendment to trademark law represents in principle an illegitimate "land grab." The basis of a property entitlement is in the *use* of something, which provides a substantive baseline for defining the limits of the legally enforced right to exclude. This is how property is created, and it is these actions that define the extent of the entitlement one may claim under law. In the context of trademark law, the owners of trademarks were originally accorded legal protection because the creation of trademarks represented the essence of property rights, i.e., the marks were things used for value-creating purposes, which served as the basis for an individual's entitlement in them and the exclusion of others. Yet the 1988 amendment short circuits this entire foundation for trademark law, and provides exclusive legal protection for a mark that someone who has not yet engaged in the basic possessory actions required in order to create a property right. Simply stated, federal trademark law now grants entitlements to people who have no right to claim them in the first place.

This is only one example of how the integrated theory of property can provide a coherent theoretical foundation for trademark law, and also serve the all-important task of defining the boundaries of this legal doctrine. As economic transactions and basic business practices continue to evolve, especially taking into account inventions and new technology, it is increasingly important to have a theoretical grounding for trademarks that also serves to delimit the boundaries of its legal protections. The integrated theory of property can do both of these tasks—

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213. Metro. Life Ins. Co. v. Metro. Ins. Co., 277 F.2d 896, 901 (7th Cir. 1960).

214. *See, e.g.*, MERGES ET AL., *supra* note 191, at 564 (noting that "trademark law has been expanding in recent years"); Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687 (1999) (detailing and criticizing the expansion of trademark protections).

215. 15 U.S.C. § 1051 (2001). The registrant has six months in order to put into use the trademark, § 1051(d)(1), with various extensions permitted thereafter, § 1051(d)(2).

216. § 1051(b)(1).

returning trademarks to its place within intellectual property and defining its doctrinal limits within this all-important domain of law.

c. Copyright

The doctrine of copyright is not adrift without an underlying doctrinal justification, nor has it been cut loose from its moorings as a property right. Although exclusion theorists and bundle theorists have both left their mark upon copyright,[217] this legal doctrine does not need to be rescued by the integrated theory of property. Nonetheless, what the integrated theory offers to copyright is roughly the same thing that it offers to trade secrets and trademarks: a coherent theoretical justification for this property entitlement that can also define the scope of its legal protection.

The structure of the entitlements enumerated under the Copyright Act of 1976 exemplifies the concept of property defined by the integrated theory.[218] The core of the Copyright Act provides that "the owner of a copyright under this title has the exclusive rights to do and to authorize" a subset of six types of uses of the

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217. For examples of the exclusion theory at work in copyright doctrine, see, for example, *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 19 (1908) (Holmes, J., concurring). Justice Holmes, in a concurring opinion, wrote:

> The notion of property starts, I suppose, from confirmed possession of a tangible object and consists in the right to exclude others from interference . . . . But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is now *in vacuo*, so to speak.

Id.; see also Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory*, 41 STAN. L. REV. 1343, 1356 (1989) (citing *Nollan* for the proposition that the "right to exclude is generally agreed to be the most important of the owner's entitlements").

There are numerous examples of the bundle theory at work. *See, e.g.*, Susan Thomas Johnson, Note, *Internet Domain Name and Trademark Disputes: Shifting Paradigms in Intellectual Property*, 43 ARIZ. L. REV. 465, 475 (2001) (noting that an owner of a copyright "enjoy[s] a larger 'bundle' of rights" than a trademark owner); Dane S. Ciolino, *Why Copyrights Are Not Community Property*, 60 LA. L. REV. 127, 133 (1999) (explaining that "the bundle of rights known collectively as 'the copyright' gives the author the exclusive rights to reproduce, to adapt, to distribute, to perform publicly, and to display publicly the copyrighted work"); Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 144 (1999) (noting that a copyright owner may license "less than her entire bundle of rights to a licensee under terms consistent with the copyright laws"); Senator Orrin G. Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. PITT. L. REV. 719, 721 (1998) ("The first principle of a contemporary copyright philosophy should be that copyright is a property right that ought to be respected as any other property right. . . . As with real property, copyright today is a bundle of rights. . . ."); Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 HAMLINE L. REV. 65, 67 n.12 (1997) (explaining that fair use, limited duration and the first sale rule comprise the "three major restrictions on the bundle of rights that surround copyright").

218. Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended in scattered sections of 17 U.S.C.).

copyrighted work.[219] The Copyright Act explicitly provides that the copyright-owner's right to exclude refers to the various things that one does with the copyrighted work. In the terms of the integrated theory: exclusion is a formal right that only has meaning by reference to the more fundamental, substantive possessory rights.[220] The drafters likely did not endorse the integrated theory themselves,[221] nor is it maintained that they consciously put this theory of property into practice. The insight is purely analytical: the drafters could not avoid describing the legal entitlements in this way because they were defining legal protections for a type of *property*.[222] If Congress is going to define and protect a copyright as a "property right," it would eventually settle upon the integrated rights subsumed under the concept of property—the exclusive rights to acquisition, use and disposal.

Moreover, the exclusive rights protected under § 106 of the Copyright Act reflect more than simply the analytical structure of the integrated theory of property. They reflect the integrated theory of property in substance as well. The exclusive control of the copyright-holder over reproductions of the work,[223] over the preparation of derivative works,[224] and over the distribution of the work[225] represent the various methods by which this form of intellectual property may be *used* and *disposed of* by the copyright-holder. This is further illustrated by the other exclusive rights protected under § 106: public performance of the work, public display of the work, and public performance of an audio work via digital transmission.[226] Each of these particular rights represent the fundamental right of a property-holder to control the way in which one's property may be *used*. In focusing upon the fundamental primacy of the possessory rights, the Copyright Act represents the integrated theory of property par-excellence.

This insight does more than provide a coherent theoretical foundation for protecting copyright as a property right. It also connects the protection of intellectual property in copyright to the traditional definition and protection of property within Anglo-American jurisprudence. To do so is not merely an academic exercise in intellectual orderliness. Regardless of what one thinks of history as a source of legal authority, the Anglo-American legal system values fidelity to precedent and coherence within and between our legal institutions.[227]

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219. 17 U.S.C. § 106 (2002). The sixth right, § 106(6), was added to the statute by the Digital Performance Right in Sound Recordings Act of 1995.

220. *See supra* Part III.B.

221. The House Report accompanying the Copyright Act supports this presumption. *See* H.R. REP. NO. 94-1476 at 61 (1976) (explaining that the first three subsections of § 106, "though closely related, are independent" of each other).

222. This is in part reflected in the House Report's admission that the rights of reproduction, adaptation and publication are "closely related," *id.*, and in its recognition that the "exclusive right to prepare derivative works . . . *overlaps* the exclusive right of reproduction to some extent." *Id.* at 62 (emphasis added).

223. § 106(1).

224. § 106(2).

225. § 106(3).

226. § 106(4)–(6).

227. This may explain in part the early work of law and economics in describing how past legal practices and rules reflect economic reasoning. As economists readily admit,

Copyright is defined and protected in the American legal system as a property right within the domain of intellectual property. Therefore, to connect copyright to the broader concept and institutional definition of property better grounds this legal doctrine within our legal system as such.

Beyond this descriptive function, the integrated theory of property also justifies the recently enacted protections afforded under the copyright laws. The evolution of technology has prompted the evolution of copyright protection. The first technology-driven addition to the substantive rights protected under copyright was a 1995 amendment to the Copyright Act, which added the right to control the public performance of a sound recording via a digital transmission.[228] From the perspective of the integrated theory, this is an appropriate means of protecting property that can be *used* in radically new ways. As technology evolves and the uses of one's property changes accordingly, the law should recognize this fact and continue protecting the fundamental possessory rights of the property-holder.

The integrated theory offers a similar justification for the Digital Millennium Copyright Act (DMCA).[229] The DMCA amended the copyright statutes in 1998, responding to issues raised by the Internet and the increasingly common placement of copyrighted works within digital formats, such as the storage of music and movies on discs and computer hard drives. Generally speaking, the DMCA provides standards for determining third-person liability in the use of the Internet by infringers,[230] and proscribes certain methods by which computer programmers access the digital code that expresses a copyrighted

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this descriptive work by itself does not justify the normative use of economics in the law today. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 23 (4th ed., 1992). Yet this descriptive account suggests an analytical and institutional coherence for a legal system that values principle and fidelity. Given these operating norms of the common-law system, Posner's claim that "[t]he economic theory of law is the most promising positive theory of law extant," says something more than merely being a scientific, neutral observation. *Id.* at 26; *see also* Richard Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 292, 294 (1979) (noting that economic efficiency "may be the *only* value that a system of common-law rulemaking can effectively promote" given conclusions drawn from both his descriptive and prescriptive projects).

228. § 106(6); *see supra* note 219.

229. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

230. 17 U.S.C. § 512(a) (2002) (providing that an Internet "service provider" (ISP) is not liable under the Copyright Act if someone uses its services without its knowledge or control in violating a copyright); § 512(c)(1) (providing that an ISP, Usenet host or website controlled by users is not liable under the Copyright Act provided it has no knowledge of the infringement, does not benefit from the infringement, and responds to requests to remove or disable any infringing material); § 512(d) (providing an ISP or a search engine is not liable under the Copyright Act provided it has no knowledge of the infringement, does not benefit from the infringement and responds to requests to remove or disable any infringing material).

work.[231] The famous (or infamous) *Napster* litigation and recent prosecutions of programmers are all consequences of the DMCA.[232]

From the perspective of the integrated theory of property, the copyright-holder should have the right to dictate and control the *use* of his property, regardless of the purpose for or manner in which it is used by third parties. It is a necessary entitlement of any property owner to control the use and disposal of his property. These substantive possessory rights are particularly relevant when the form of the property is capable of uses of which the property owner may wish to prevent. Prior to the invention of digital technology, the scope of use of copyrighted works was defined by only the direct infringement of the work. A person violated the copyright laws by *literally* copying a book or cassette tape. These methods of violating a person's intellectual property in a copyrighted work remain in the digital world,[233] but the rise of "high tech," such as the Internet, DVDs, MP3, and peer-to-peer (P2P) file swapping, expands the range in which a piece of intellectual property may be used by someone. In the same way that trade secrets and trademarks law evolved in the nineteenth century to account for new forms of intellectual property, i.e., new ways that property was being created and used, copyright law must evolve in the twenty-first century to account for new forms of this type of intellectual property. The issue is not one of exclusion, but rather of the right to use and dispose of one's property. It is these fundamental possessory rights that the DMCA protects—a valid entitlement of any property owner, including a copyright-holder. In this way, the integrated theory of property explains why these possessory rights are important and, in so doing, it explains how these rights are protected through such legal rules as the DMCA.

3. Eminent Domain

The integrated theory of property also has something to say concerning one of the principal property issues within American jurisprudence: eminent domain. Of course, the right to just compensation for taking of property for public

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231. *See* § 1201(a)(1) ("No person shall circumvent a technological measure that effectively controls access to a work protected under [the Copyright Act].").

232. *See* A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); *see generally* Greg Henderson, *Dishing Up Scrambled Signals: Free Speech vs. IP Rights in Tussle Over Code that Protects DVDs from Hackers*, 88 A.B.A. J. 24, 24–25 (2002) (discussing generally prosecutions, injunctions and court battles under the DMCA); Andrea L. Foster, *Scholars Defend Russian Graduate Student Jailed in Las Vegas Encryption Case*, THE CHRON. HIGHER EDUC., July 24, 2001, *at* http://chronicle.com/free/2001/07/2001072401t.htm (discussing the prosecution of a Russian graduate student, Dmitri Sklyarov, who presented at a conference his work on bypassing computer security programs in Adobe's Ebook Reader); Andrea L. Foster, *Scholars Rally to Online Magazine's Defense Over Publishing Software Code*, THE CHRON. HIGHER EDUC., Feb. 16, 2001, *at* http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery/chronicle-16-feb-2001.html (discussing the injunction issued again the webzine, 2600.com, preventing it from publishing software code that could decrypt digital data).

233. *See, e.g.*, Micro Star v. Formgen, Inc., 154 F.3d 1107 (9th Cir., 1998) (holding that Micro Star is illegally distributing derivative works of FormGen's popular computer game, Duke Nukem 3D).

use under both federal and state constitutions is a complicated issue that implicates many political and legal values. It is a property doctrine, but it is also much more than that, which is why many people spend their professional lives dedicated to explaining this doctrine and to suggesting ways that it should evolve at the hands of the Supreme Court. It is also for this reason that this Article will not attempt to resolve any longstanding disputes or make any grand theoretical claims about the nature of the takings clause. With respect to takings jurisprudence, this subsection will only note that the integrated theory of property may explain some elements of nineteenth-century eminent domain doctrine, as well as suggest some potential implications for more recent concerns in the area of regulatory takings.

a. An Account of Nineteenth-Century Eminent Domain Doctrine

Several Supreme Court decisions of the past decade concerning regulatory takings of property,[234] as well as academic scholarship prompted by the work of William Michael Treanor,[235] have brought the issue of the historical understanding of eminent domain to the forefront of takings debates. In many of the nineteenth-century cases, the courts used a concept of property defined by the integrated theory of property, particularly in the state courts adjudicating eminent domain cases under their own constitutions. This is reflected not only in their arguments concerning property, but also in the extensive citation to and reliance upon the model representatives of the integrated theory—Blackstone and Kent.

In a New Hampshire case in 1872, for instance, the state supreme court was confronted with the issue of whether there was a "taking" of plaintiff's property after the plaintiff's farm was damaged by water and gravel.[236] These damages resulted from the construction of the defendant's state-sanctioned railway line.[237] The court began by noting that the fundamental right of compensation for a taking of property was not provided in "an express provision" of the New Hampshire state constitution, but instead was adopted by the courts "in view of the spirit and tenor of the whole instrument."[238] The supreme court then recognized that various states have interpreted a "taking" as requiring "a complete ouster" or "an absolute or total conversion of the entire property," which it held "to be founded on a misconception of the meaning of the term 'property.'"[239]

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234. *See supra* notes 9, 17 and accompanying text.

235. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) [hereinafter Treanor, *Original Understanding*]; William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985).

236. Eaton v. Boston C. & M. R.R., 51 N.H. 504 (1872).

237. Plaintiffs plead that "the defendants, in constructing their road, made a deep cut, through which the waters of said river . . . flowed . . . carrying sand and gravel and stones upon [plaintiffs] farm . . . . The plaintiffs claim that the defendants are liable for the damages so occasioned . . . ." *Id.* at 506.

238. *Id.* at 510–11.

239. *Id.* at 511.

What then was the proper conception of "property" that animated the doctrine of eminent domain? The New Hampshire Supreme Court answered this question in a lengthy passage that explicitly restates the basic terms of the integrated theory of property. Although the passage is quite long, it is significant enough to justify reciting much of it:

> In a strict legal sense, land is not "property," but the subject of property. The term "property," although in common parlance frequently applied to a tract of land or a chattel, in its legal signification "means only the rights of the owner in relation to it." "It denotes a right . . . over a determinate thing." "Property is the right of any person to possess, use, enjoy, and dispose of a thing." . . . The right of indefinite use[] (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. "Use is the real side of property." This right of use[] necessarily includes the right and power of excluding others from using the land. . . . . If the right of indefinite use[] is an essential element of absolute property or complete ownership, whatever physical interference annuls this right takes "property"—although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature. He has not the same property that he formerly had. . . .
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> The framers of the constitution intended to protect rights which are worth protecting; not mere empty titles, or barren insignia of ownership, which are of no substantial value. . . . The constitutional prohibition must have been intended to protect all essential elements of ownership which make "property" valuable. Among these elements is, fundamentally, the right of use[], including, of course, the corresponding right of excluding others from the use. . . . "To deprive one of the use of his land is depriving him of his land;" for, as Lord Coke said,—"What is the land but the profits thereof?" The private injury is thereby as completely effected as if the land itself were "physically taken away."[240]

Aside from the citation to Blackstone (and others), the court could not have provided a more explicit account of the integrated theory of property. Notably, the court defined the essence of property in terms of the possessory rights, specifically the right to use, which it identified as the "essential quality or attribute of absolute property," and it identified the fact that it is the "fundamental" use of something which creates "the corresponding right of excluding others from the use."[241] Not surprisingly, the court held that "[c]overing the land with water, or

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240. *Id.* at 511–12 (some citations omitted).

241. *Id.* Notably, the court refused to equate the concept of property with its application to physical assets. *See id.* (noting that "[I]n a strict legal sense, land is not 'property,' but the subject of property"). This belies Treanor's claims that the "early view of the Takings Clause reflected a physicalist view of property." Treanor, *Original Understanding*, *supra* note 235, at 812. The legal realists also criticized earlier conceptions of property as improperly limited to physical assets. *See, e.g.*, Cohen, *supra* note 93, at 362–63; Hohfeld, *Fundamental Legal Conceptions*, *supra* note 3, at 724–25, 733.

with stones, is a serious interruption of the plaintiff's right to use it,"[242] and therefore concluded that "[w]e think that here has been a taking of the plaintiff's property."[243] Notably, this decision was not the result of any alleged late nineteenth-century formalism because antebellum decisions in New Hampshire came to the same result.[244]

These New Hampshire cases admittedly did not represent the majority rule for takings jurisprudence in the nineteenth century, which precluded compensation for any incidental damages to private property that arose from the lawful exercise of state or municipal authority.[245] Nonetheless, these New Hampshire cases were not rare outliers. The minority rule that compensation must be paid for any indirect damage or diminution in value resulting from state action had a substantial following among the jurisdictions, including one Supreme Court decision that applied Wisconsin law. In each of these cases, the conception of property advanced by the court represented the integrated theory, and the court (or counsel) invariably referred to at least one integrated theorist in the case report.

The Connecticut Supreme Court of Errors, for example, held in 1845 that "a franchise is an incorporeal hereditament known as a species of property, as well as any estate in lands. It is property, which may be bought and sold, which will descend to heirs, and may be devised."[246] Here, the Connecticut court did not equate property with exclusion of others, but rather identified property as comprising the possessory rights, i.e., the right to acquire, use and dispose of the entitlement. More important, the plaintiff in this case sued the defendant because the state franchise recently obtained by the defendant to build a railroad bridge *diminished the value* of plaintiff's earlier-obtained franchise to build and operate a

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For other examples of how the charge that earlier conceptions of property were limited to physical things is invalid, see Schroeder, *supra* note 9, at 274–81 (noting that early property theorists did not limit the concept to physical assets); Underkuffler, *supra* note 120, at 138–39 (same); *see also infra* notes 246–47 and accompanying text (discussing a nineteenth-century court opinion holding that a franchise is "property"); *supra* note 114, at 186 and accompanying text (quoting Madison as recognizing that one has a property right in one's "money").

242. Eaton v. Boston C. & M. R.R., 51 N.H. 504, 513 (1872).

243. *Id.* at 516.

244. *See* March v. Portsmouth & Concord R.R., 19 N.H. 372 (1849). The court concluded that:

> [A] railroad corporation have no more right to cover one's land with water, without compensation, than they have to cover it with the earth and rocks and rails of their track. They can no more take from an individual a stream of water, without compensation, than they can take the soil which he cultivates.

Id. at 380.

245. Treanor correctly states that "the majority view was that consequential damages . . . were not compensable takings," but he does not indicate the degree to which the minority view held sway in many jurisdictions. Treanor, *Original Understanding*, *supra* note 235, at 792; *see also Eaton*, 51 N.H. at 520–21, 522–33 (citing to and discussing the majority rule cases in state and federal jurisdictions).

246. Enfield Toll Bridge Co. v. Hartford & New Haven R.R. Co., 17 Conn. 40, 60 (1845).

bridge over the same river. Although the court decided the case in favor of plaintiff on grounds other than eminent domain, it nonetheless stated that "[i]n this case, the [plaintiff's] franchise is not in fact taken, but its value is in some measure impaired; and we see not why compensation may not be made for this, as well as for any other injury to property."[247] If property is defined fundamentally by the possessory rights, then a restriction of these rights is *ipso facto* a restriction of one's property per se. The plaintiff's franchise was diminished in use and value through a competing grant by the state, and therefore the state should compensate them for this act.[248] This was the nineteenth-century equivalent of the regulatory takings doctrine of today: a law enacted by the state diminished the value in a preexisting property entitlement, and the Connecticut Supreme Court recognized that this was a "taking" of property.

Although Illinois would amend its constitution in 1870 to provide compensation for private property "taken or damaged" by the state for public use,[249] the Illinois Supreme Court held municipalities liable for incidental damage to property at least four years before the state adopted this constitutional requirement. In the 1866 case of *Nevins v. City of Peoria*,[250] the Illinois Supreme Court laid down the rule that a municipality was liable for incidental damages to private property resulting from its changing the grade of a street. With citations to Blackstone's and Kent's respective *Commentaries*, the court invoked the common law maxim that a person "cannot use his property for a purpose that will prevent my enjoyment of mine."[251] The court then concluded:

> The same law that protects my right of property against invasion by private individuals, must protect it from similar aggression on the part of municipal corporations. A city may elevate or depress its streets, as it thinks proper, but if, in so doing, it turns a stream of mud and water upon the grounds and into the cellars of one of its citizens, or creates in his neighborhood a stagnant pond that brings disease upon his household, upon what ground of reason can it be insisted, that the city should be excused from paying for the injuries it has directly wrought?[252]

Although the Illinois Supreme Court did not draw out the implicit conception of property that underlies this holding, its ruling is predicated on the

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247. *Id.* at 62.

248. Although the court did not cite to any integrated theorist in its discussion of eminent domain, it later reflected its awareness of Blackstone as an authoritative source for property issues when it cited to him in a discussion of the government's lawful power to "to provide ferries and bridges." *Id.* at 64 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *219).

249. *See* City of Pekin v. Brereton, 67 Ill. 477, 480 (1873) (noting that "the constitution of 1870 . . . section 13 of the second article, [provides] that 'private property should not be taken or damaged for public use without just compensation'"). West Virginia would follow Illinois's lead and also amend its constitution to require compensation for "damage" in 1872. *See* Johnson v. City of Parkersburg, 16 W. Va. 402 (1880).

250. 41 Ill. 502 (1866).

251. *Id.* at 510.

252. *Id.* at 510–11.

integrated theory of property. The connection between the court's decision and the integrated theory is clear: the reason why a municipality should be held liable for throwing water onto a person's property, or for creating a stagnant, diseased pool nearby, is that these conditions necessarily impair the *use* of one's property. The "complete security of private rights" in property have thus been invaded,[253] and the state must compensate the property owner accordingly. The Illinois Supreme Court went so far as to rule that a municipality's "taking" of property is not limited solely to a physical invasion or degradation, as indicated by the court's example of a taking resulting from a nearby "stagnant pond" that brings "disease" to the property and thereby diminishes its use and value.

As early as 1840, Ohio also required municipalities that incidentally damaged estates to compensate the property owners.[254] Invoking the common-law maxim that "the rights of one should be so used as not to impair the rights of another," the Ohio Supreme Court held in *Rhodes v. City of Cleveland* that "justice and good morals require that a corporation should repair a consequential injury, which ensues from the exercise of its functions."[255] Six years later, Judge Read would write, over a vigorous dissent advancing the majority rule of no liability for incidental damages by public acts, that "[i]f a municipal corporation, for the good of all within its limits, see proper to cut down a street, it is nothing more than right that an injury there done to a single individual, should be shared by all."[256]

Yet it would not be until 1858 that the Ohio Supreme Court explained the theory of property it called upon in holding municipalities liable for consequential damages resulting from the impairment of the use of property. In *Reeves v. Treasurer of Wood County*,[257] a citizen challenged a municipal ordinance that mandated the digging of drainage ditches on privately held land. In holding this to be a taking of property, the Ohio Supreme Court reasoned that:

> The land occupied by the ditch and its banks is not, it is true, *wholly* appropriated. The owner may still use the ditch itself for purposes of irrigation, for watering stock, or may perhaps make it serve the purposes of a fence. He may grow timber and shrubbery on its banks. But his dominion over it—his power of choice as to the *uses* to which he will devote it, are materially limited; in short, other parties acquire a permanent easement in it. An easement is property; and to the extent of such easement, it is clear to us, that private property is taken, within the meaning and spirit of the constitutional prohibition.[258]

The baseline for determining the nature of a property right is the ability of the owner to have the freedom of "choice as to the uses" of the property. In other words, property is fundamentally comprised of the possessory rights—the rights of acquisition, use and disposal—and when one of these rights is infringed the owner

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253. *Id.* at 511–12.
254. *See* Rhodes v. City of Cleveland, 10 Ohio 159 (1840).
255. *Id.* at 161.
256. McCombs v. Town Council of Akron, 15 Ohio 474, 480 (1846).
257. 8 Ohio St. 333, 346 (1858).
258. *Id.* at 347 ("uses" emphasis added).

has the right to exclude the infringing activity. To paraphrase Rose, the theory that told the Ohio Supreme Court what the law would require for property to be taken away was the integrated theory of property.[259]

Other jurisdictions established similar eminent domain rules, requiring compensation when the incidental injuries were immense or were the result of negligence on the part of the municipality. The Kentucky Supreme Court, for instance, held in 1867 that "[i]f damages are great, they should not be imposed to the destruction of the individual proprietors."[260] In this case, the city of Louisville changed the grade in a street and incidentally damaged a mill located on the street. The court held that the damage was of such "an extraordinary character, and so peculiarly injurious to the proprietors of the rolling mill, that, . . . it should not be at all done without compensation to them."[261] The "extraordinary" damage described by the court was actually relatively minor; it consisted of requiring the mill owners to construct a wall supporting the street,[262] the blocking of a "passway" previously used by the mill operators,[263] and the blocking of "light and air, [which is] so essential to the operation of this machinery."[264] There was no loss to or encroachment upon the physical property per se, nor were the mill owners excluded from continuing to use their property in various economic enterprises.

Nonetheless, the Kentucky Supreme Court found that the mill owner's property had in fact been taken and that they were deserving of compensation. What is notable in this ruling is that the "injuries" described by the court all share a common element: they entail a limitation or change in the *use* of the property. The possessory rights defined the core of a property entitlement, and thus defined the ways in which this entitlement might be violated by others. In other words, the Kentucky courts were implicitly applying the integrated theory of property in determining when property rights were infringed by the state.

Although in a jurisdiction following the majority rule, a bridge owner in Massachusetts was compensated for damage done to his bridge resulting from the construction of a public bridge downstream.[265] In *Perry v. City of Worcester*, the court held that the public bridge was too narrow and low, permitting ice flows to back up and to ultimately damage the plaintiff's bridge. The court also found that the public bridge was built in an "improper and unskillful manner," and therefore the plaintiff had a right of action against the municipality for the "damage to private property" resulting from this negligent act.[266]

In *Walker v. Old Colony & Newport Railway Co.*,[267] the Massachusetts Supreme Judicial Court ruled that a jury may award damages for the depreciation in value of an entire estate after a small portion was taken for a railroad line. The

259. *See supra* note 125 and accompanying text.
260. Louisville v. Louisville Rolling Mill Co., 66 Ky. (3 Bush) 416, 430 (1867).
261. *Id.* at 429.
262. *Id.* at 427.
263. *Id.* at 429.
264. *Id.*
265. Perry v. City of Worcester, 72 Mass. 544 (1856).
266. *Id.* at 547.
267. 103 Mass. 10 (1869).

plaintiff claimed damages to his remaining property arising from "the noise, smoke and soot from passing trains," as well as the "blowing of the [train's] whistle near the [plaintiff's] land."[268] Judge Wells held that a public "corporation might be held liable in damages, directly, for injuries to property or disturbance in its occupation" resulting from "the appropriation of a part of it to the uses for which it is taken."[269]

The significance of *Walker* is that the plaintiff received compensation, not for the railroad's easement for its tracks, but for the effects of the railroad's operation on the rest of the (untaken) land. Setting aside the damage caused by soot and smoke, there was no demonstrable physical damages caused by the noise and the train's whistle. The essence of these consequential damages was simply a limitation on the *uses* of the plaintiff's property. In this respect, the *Walker* court went beyond the more limited rule it laid down only ten years earlier in *Perry*, when it required that the City of Worcester compensate a bridge owner for consequential physical damages to his bridge.[270] In *Walker*, the Massachusetts Supreme Court recognized that property comprised the possessory rights, and that limitations on the *use* of one's property was a violation of these possessory rights regardless of whether the violation was physical, such as by water or rocks. This is an application of the integrated theory of property par-excellence.

Finally, the U.S. Supreme Court in 1870 adjudicated a Wisconsin takings case under the state constitution, which the Court noted had "a [takings] provision almost identical in language" to the Fifth Amendment takings clause.[271] The case of *Pumpelly v. Green Bay & Miss. Canal Co.* arose from the flooding of plaintiff's 640-acre estate after the defendant constructed a dam authorized by a state statute. The defendant argued that any damage incurred by the plaintiff was "a consequential result" of lawful state-sponsored activities and thus "there is no *taking* of the land within the meaning of the constitutional provision."[272] In rejecting this argument, Justice Miller, writing for a unanimous opinion, notes:

> It would be a very curious and unsatisfactory result, if . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for public use. Such a construction would pervert the constitutional provision . . . and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.[273]

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268. *Id.* at 11.
269. *Id.* at 14.
270. *See Perry*, 72 Mass. at 265–66.
271. Pumpelly v. Green Bay & Miss. Canal Co., 80 U.S. (13 Wall.) 166, 177 (1871).
272. *Id.*
273. *Id.* at 177–78.

The Court concluded that whenever "real estate is actually invaded by superinduced additions of water, earth, sand, or other material . . . so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution."[274] The focus of the Court on the fundamental possessory rights of the property-owner—the Court's concern about destruction of "value" of property, the infliction of "permanent injury," and the obstruction of the "usefulness" of the property—reveals the extent to which it is working from the integrated theory of property. It is for this reason that the Court avoids what it identifies as an excessively "narrow" reading of the eminent domain doctrine, and instead finds that state action that results in interfering with the use and disposal of one's property requires compensation to the owner.[275]

The influence of the integrated theory of property upon the Supreme Court in the *Pumpelly* decision is also reflected in Justice Miller's discussion in *Pumpelly* of Chancellor Kent's takings decision in *Gardner v. Newburgh*.[276] In this 1816 case, Kent issued a decree in equity enjoining the Village of Newburgh from diverting water from a stream that ultimately flowed over the plaintiff's property, and thus prevented the plaintiff from continuing to use his property in several business enterprises. Kent justified enjoining the village based upon the authority of Grotius, Pufendorf, and Bynkershoeck, who "all lay it down as a clear principle of natural equity, that the individual, whose property is thus sacrificed, must be indemnified."[277] In *Pumpelly*, Justice Miller discusses the decision in *Gardner* with approval, noting that Kent came to his decision "citing several continental jurists on this right of eminent domain."[278] Thus, the Supreme Court explicitly identified the lineage between the early integrated theorists and its decision in *Pumpelly* that there was a taking of plaintiff's property requiring just compensation. Notably, Kent reached the same decision—that plaintiff's property was taken and required compensation—when he considered the same early integrated theorists.[279]

Although these cases did not represent the nineteenth-century majority rule on consequential damages caused by eminent domain, [280] they indicate that a substantial number of jurisdictions did follow the minority rule that the state was required to provide compensation when state action resulted in restrictions on the use or diminution in value of private property. More important, a short, and

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274. *Id.* at 180–81.

275. *See also* Pettigrew v. Village of Evansville, 25 Wis. 223, 237–38 (1870) (holding that the doctrine that municipalities are immune from liability for consequential injuries to private property that "destroy[] its value, is so iniquitous and unjust as to be abhorrent to the sense of justice of every intelligent mind").

276. 2 Johns. Ch. 162 (N.Y. Ch. 1816).

277. *Gardner*, 2 Johns. Ch. at 165. Kent then quotes from Blackstone's Commentaries on eminent domain. *Id.; see also supra* note 140 (listing *Gardner* among other early court opinions that cite Blackstone and other integrated theorists).

278. Pumpelly v. Green Bay & Miss. Canal Co., 80 U.S. (13 Wall.) 166, 179 (1871).

279. *Gardner*, 2 Johns. Ch. at 165 (deciding that "it would be unjust, and contrary to the first principles of government, . . . to take from the plaintiff his undoubted and prescriptive *right to the use and enjoyment* of the stream of water") (emphasis added).

280. *See supra* note 245 and accompanying text.

admittedly incomplete, survey of these cases reveals that the courts that implemented the minority rule were working from the integrated theory of property. As such, the integrated theory of property explains why some jurisdictions, and even some judges in majority-rule jurisdictions, found that property owners should be compensated for degradations in the use or value of their property resulting from lawful government action.

b. Eminent Domain Doctrine Today

The integrated theory of property may do more than provide an adequate descriptive account of the development of some eminent domain rules. This property theory also suggests that today's judges and scholars may be overstating the case when they maintain that Justice Holmes's opinion in *Pennsylvania Coal v. Mahon*,[281] in the words of Treanor, "established a new takings regime" by requiring compensation for losses arising from the effects of governmental regulations.[282] It is certainly true that there are a substantial number of federal and state cases prior to 1922 that preclude compensation for consequential or incidental damages arising from government acts or regulations.[283] Nonetheless, the cases discussed above also indicate that there were a substantial number of courts who found that diminishing the (economic) uses of a citizen's property triggered the compensation requirement of eminent domain. The courts in Connecticut, New Hampshire, Kentucky, Illinois, Ohio, West Virginia, and others[284] repeatedly reaffirmed the basic tenet of the integrated theory of property—that property is fundamentally defined by the possessory rights—and that property is therefore violated and "taken" when its use or value is restricted in any demonstrable way. Moreover, there is a nascent conception of regulatory taking in the 1845 Connecticut decision in *Enfield Toll Bridge*, wherein the court maintained (in dicta) that a diminution in value in a franchise resulting from another state-granted franchise is a taking that should require compensation.[285] In *Enfield Toll Bridge*, there was no direct, physical violation of property—yet the court maintained that the franchise was "property" and that this "injury" should be compensated.[286]

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281. 260 U.S. 393 (1922).

282. Treanor, *Original Understanding*, *supra* note 235, at 782.

283. *See supra* note 245; Treanor, *Original Understanding*, *supra* note 235, at 792–97 (surveying nineteenth-century state and federal cases holding that there is no constitutional requirement for the government to compensate property owners who have suffered injuries resulting from lawful state action).

284. *See, e.g.*, Ashley v. Port Huron, 35 Mich. 296 (1877); Richardson v. Vt. Cent. R.R. Co., 25 Vt. 465 (1853).

285. *See supra* notes 246–48 and accompanying text; *but see* Booth v. Town of Woodbury, 32 Conn. 118 (1864) (rejecting claim that local tax enacted to support men drafted into the U.S. army is a taking because it is not "something distinct from and more than [the citizen's] share of the public burthens [sic]").

286. *See also* Mason v. Harper's Ferry Bridge Co., 17 W. Va. 396, 417 (1880) (holding that "a ferry-franchise is private property within the meaning of [the eminent domain] section of the constitution"). The court would thus rule that a state-granted bridge did "damage" a ferry franchise in the loss of its business, and that the franchise owner was

Regardless of the validity of the historical claims by Treanor and others,[287] the integrated theory of property may provide a foundation for a regulatory takings jurisprudence that not only reflects some of the historical understanding of eminent domain, but also provides a more determinate rule for judging when an indirect taking may occur today. If one agrees that the loss of "economically beneficial uses" of one's property under regulations deserve compensation,[288] the integrated theory of property offers a compelling justification for the legal rule that such negative effects on property should be compensated. The integrated theory maintains that there is a conceptual unity to the exclusive possessory rights of property—the rights of acquisition, use and disposal—that should be recognized and protected by our legal institutions. Moreover, this theory of property has served as the foundation for the definition and adjudication of property rules going back more than two hundred years. As Justice Roberts recognized in a takings case in 1945: the concept of property in the Fifth Amendment "was employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it."[289] As such, the integrated theory offers a normative justification for adopting a regulatory takings doctrine that also maintains the values of fidelity and principle upheld by our common law institutions.[290]

Finally, the integrated theory may serve as an alternative to the regulatory takings principles offered by the eminent domain cases of the twentieth century. On the one hand, there are indeterminacy problems in the case-by-case analysis that the Supreme Court used in regulatory taking cases before 1992. Justice Holmes's "goes too far" rule[291] and Justice Brennan's "distinct investment-backed expectations" standard[292] provide little guidance for individuals who wish to know

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due compensation "for the injury done to his private property." *Id.* at 421–22. Notably, the successful plaintiff-appellant cited to both Blackstone and Kent. *Id.* at 406.

287. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1036–61 (1992) (Blackmun, J., dissenting) (providing a historical account of takings doctrine and thereby discounting the majority's claim that compensation for a taking should occur due to negative effects of regulations on property uses).

288. *Id.* at 1019.

289. United States v. Gen. Motors Corp., 323 U.S. 373, 377 (1945). Accordingly, the Supreme Court has in fact recognized the integrated theory of property as the theoretical foundation underlying the Fifth Amendment, although Justice Roberts was incorrect to limit this insight to solely *physical* things. *See supra* note 241 (discussing the incorrect modern view that early conceptions of property were physicalist). The Court need only adopt the integrated theory now in full awareness of what it is doing.

290. *See supra* note 227 (suggesting that this may, in part, motivate the positive and historical analysis of law offered by law and economics).

291. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

292. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978). Justice Brennan likely lifted this phrase from Frank Michelman's famous article on eminent domain, in which he said that compensation is required under regulatory taking doctrine when there are "distinctly perceived, sharply crystallized, investment-backed expectation[s]." Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1233 (1967). The added adjectives in Michelman's article do not specify this standard any better. Moreover, the notion that *ex ante* "expectations" are representative of legally cognizable

ex ante whether their property is "taken."[293] On the other hand, Justice Scalia's standard that a taking occurs only "where regulation denies all economically beneficial or productive use of land" is too narrow.[294] Justice Stevens correctly points out that this new standard for regulatory taking requires that a "landowner whose property is diminished in value 95% recovers nothing."[295] Although Stevens believes that the problem is that this result is "wholly arbitrary" vis-à-vis the landowner who receives compensation for a 100% loss in value to his property,[296] his complaint nonetheless highlights the exceedingly narrow protection of property under this new regulatory taking standard.[297]

Fundamentally, these two alternatives represent applications of the dominant theories of property of the twentieth century: the bundle and exclusion theories. The approach of Holmes and Brennan represents an underlying conception of property that views it as a contingent bundle of rights. The bundle theory maintains that there is no "property" for a court to adjudicate until the particular "sticks" of the "bundle" are defined by a particular fact pattern with respect to a particular set of claims between opposing persons in society. In the context of eminent domain doctrine, the Court saw the necessity for case-by-case analysis because there was no "property" allegedly taken until the particular rights of the overall bundle has been defined by the context that gave rise to the litigation.[298] The exclusion theory reacts against this nominalism and its attendant

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property interests was not new to Michelman; in fact, this well-known phrase is remarkably similar to a 1923 article by the legal realist, Robert Hale. Hale wrote that "there are 'legitimate expectations,' which have not crystallized into property rights . . . . To be deprived of these expectations may cause fully as great hardship as any destruction of a property right." Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 489 (1923).

293. *See* Underkuffler, *supra* note 120, at 130 ("Various tests . . . have been used to determine whether a constitutionally cognizable property interest exists. The resulting incoherence is profound.").

294. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

295. *Id.* at 1064 (Stevens, J., dissenting).

296. *Id.*

297. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 629–31 (2001). This case brings home Justice Stevens's concern that the *Lucas* rule is arbitrary and unfair for the property owner with 95% loss of economic value in his property to not receive compensation vis-à-vis the property owner with 100% loss of economic value in his property. *See supra* text accompanying notes 295–96 and accompanying text. In *Palazzolo*, the plaintiff was left with $200,000 development value after $3,150,000 was effectively eliminated through state wetland protection regulations. *Palazzolo*, 533 U.S. at 606–07. The plaintiff thus lost 94.03% of the economic value of his property, and retained only 5.97% of its economic value. Nonetheless, the Court concluded in the 6-3 portion of the opinion that possession of a $200,000 development value in the eighteen-acre parcel of the unaffected portion of the property was more than a mere "token interest," *id.* at 631, and that the property therefore was not "economically idle." *Id.* at 631 (quoting *Lucas*, 505 U.S. at 1019).

298. For example, in acknowledging the "essentially ad hoc, factual inquiries" that constitute modern eminent domain jurisprudence, the Court has admitted in the past that compensation required for regulations "depends largely 'upon the particular

indeterminacy by identifying the right to exclude as the essential hallmark of the concept of "property." The more recent Court decisions therefore have latched onto the absolute denial of all (economic) uses of one's property because this is tantamount to breaching the right to exclude.[299] This provides determinacy, but at the cost of eviscerating property entitlements to a mere sliver of what they once were—or should be.

Representing an alternative to the bundle and exclusion theories, the integrated theory of property may provide a standard for regulatory takings doctrine that is more determinate than case-by-case analysis, but does not discover this determinacy in an exceptionally narrow and restricted sense of "property." The fundamental possessory rights that define the essence of property, particularly the right to use one's property, may serve the function of guiding the Court's takings jurisprudence.[300] This Article, however, is not devoted to the sole issue of eminent domain, and there are obvious complexities that are beyond the boundaries of this subsection. It is thus best left to the experts in this field to develop this potential source for defining eminent domain doctrine in the twenty-first century.

V. CONCLUSION

This Article advances a property theory that both explains the development of property doctrines at common law and serves as a normative foundation for these doctrines today. This theory—the integrated theory of property—produces a concept of property that comprises the exclusive rights to acquire, use and dispose of one's possessions. Accordingly, the integrated theory produces a concept of property that is *both* analytically and normatively integrated.

The theory is analytically integrated in its explanation of the role of the possessory rights—the rights to acquire, use and dispose of one's possessions—in the development and definition of the concept of property. These possessory rights form a conceptual unity because each right necessarily implies the other right in both its derivation and application. In the Latin used by Grotius and Pufendorf, *dominion* is created through the exercise of *suum*. Property owners may later choose to divide their property into its respective components—creating, among

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circumstances [in that] case.'" *Penn Central*, 438 U.S. at 124 (quoting U.S. v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958)).

299. *See* Dolan v. City of Tigard, 512 U.S. 374, 394 (1994) (holding that a taking had occurred because a property owner's "right to exclude . . . would be eviscerated" under local regulatory requirements); *see also supra* note 27 and accompanying text.

300. Epstein's work in the field of eminent domain represents one way in which the integrated theory of property may be applied as a normative guide for future cases. For instance, he argues in his seminal work, *Takings*, that "possession, use and disposition do not form a random list of incidents. Instead they lie at the core of a comprehensive and coherent idea of ownership." EPSTEIN, *supra* note 12, at 60. Although he incorrectly identifies this position as "the Lockean theory"—it is much broader than Locke's contribution—he is essentially advancing the integrated theory of property when he recognizes this "unitary conception of ownership." *Id.* at 61; *see also* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORN. L. REV. (forthcoming Sept. 2003) (discussing the existence of a regulatory takings doctrine in the nineteenth century and suggesting how these principles may work today).

many things, life estates, easements, leases, options—but each of these is rightly regarded as a subdivision of a necessarily preexisting fee simple, i.e., a full estate that exists in perpetuity. In other words, before one can speak of derivative forms and applications of property, there must always first be the person who possesses the full rights to acquire, use and dispose of the property in question. "Without an accurate understanding of the base," write Merrill and Smith, "our conceptions of what happens in the refined atmosphere of the apex will often be distorted, or at least incomplete."[301] The integrated theory of property explains the base of the concept of property—regarded as either *dominion* or fee simple—showing how this concept is fundamentally defined by the basic possessory rights. Finally, the essential right to exclude is properly understood by reference to these more fundamental possessory rights; exclusion is, in essence, a formal right that explains the ways in which a property-holder is free to act upon the substantive possessory rights that constitute his right to property.

This Article advanced this thesis through several methods. First, it surveyed the ideas of the early integrated theorists, showing how property derives from and constitutes "use-rights" (what later would be identified more broadly as "possessory rights"), and that the right to exclude has meaning only by reference to these more substantive rights. To wit, the right to exclude presupposes an answer to the logically prior questions: excluding from *what* and *why*? Second, it showed how the right to exclude came to prominence in the analysis of property *after* the social-oriented perspective of rights came to dominate jurisprudence in the early twentieth century. In this way, the bundle theory and the exclusion theory of property both share a nominalist, conventional perspective of property, which explains why the concept of property and the relevant legal rules have disintegrated into more explicitly social-related doctrines, such as torts. Finally, this Article explained how the integrated theory of property explains past and current property doctrines, as well as provides normative guidance for applying these doctrines in the future. As property scholar, John Orth, has recently acknowledged:

> Common law doctrines display remarkable stability. The intellectual apparatus used in many areas of law, including terminology, basic concepts, and fundamental assumptions, was developed centuries ago. . . . Modern legal materials . . . obscure an important inquiry: how verbal formulas centuries old can continue to do useful service in the modern world.[302]

Contrary to the disintegrating effects of the nominalist bundle theory and the excessively narrow insight of the exclusion theory, the integrated theory of property offers legal scholars and judges a robust concept of property. This

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301. Merrill & Smith, *supra* note 18, at 398.

302. John V. Orth, *Joint Tenancy Law*, 5 GREEN BAG 2d 173, 173 (2002). Jeremy Waldron has also recognized that although "the working political theorist is primarily interested in modern political problems . . . . [Lockean, Hegelian and other historical theories] provide a rich fund of insight, reminder, and argument which can and should be drawn on in the modern debate." WALDRON, *supra* note 16, at 135–36.

concept of property is capable of providing both a coherent explanation and justification for a wide array of property doctrines in the American legal system.

It is important, though, for integrated theorists not to overstate their claims. The integrated theory does much for the property scholar, but it does not do everything. An integrated theorist, for example, would be hard pressed to deduce from the possessory rights the optimal term limit for a copyright or patent. The integrated theorist maintains that there should be legal protection *as such* for intellectual property, but important details of this protection are not deducible from the integrated theory. The integrated theory may speak generally to the terms of the debate concerning intellectual property term limits, explaining how excessively minimal protection, e.g., six months, or generously substantial protection, e.g., two hundred years, may violate the basic precepts of property. Nonetheless, the precise determination of the term itself is not dictated by the integrated theory.[303]

In fact, Pufendorf was explicitly aware of these limitations of the integrated theory. In his discussion of adverse possession,[304] for instance, Pufendorf agrees with Grotius's claim that this legal doctrine is dictated by the nature of property itself,[305] and thus the "tacit dereliction" of a possession justifies, in part, another person's *use* and *occupation* of it, which transfers the property claim to the new possessor.[306] Yet an important question remains: what is the proper time limit for determining when an adverse possessor should acquire the property as his own? Pufendorf recognizes that "we do not find that the length of time within which possession . . . takes on the strength of *dominion* is precisely determined either by natural reason or the universal agreement of nations."[307] The minimum time required for claiming adverse possession is not deducible from the basic possessory rights. To what then should legislatures or the courts look to set the minimum time required of open and notorious possession? Pufendorf explains that the time-limit rule "will have to be set with some latitude by the decision of upright men" who recognize the need "to lessen the intricacies of disputes" by setting "beforehand fixed and decisive universal limits."[308] Thus, while the possessory rights define the steps that the adverse possessor must take in order to claim something as property, it is the value of the *rule of law*, and the correlative value of *determinate legal rules*, that defines the nature of the time limit requirement.

In recognizing that rule of law and determinacy issues prevail over property concerns in defining the precise term limit for successful adverse possession, Pufendorf evidences a proper respect for the inherent limits of his property theory. Not every legal rule is capable of being deduced from the basic

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303. In this way, the work of economists in determining optimal rates of return on investment by inventors and authors complements the work of integrated theorists. This is another example of the ways in which the integrated theorist shares with the economist the same concern about proper consequences of legal rules. *See supra* note 166 and accompanying text.

304. *See supra* notes 158–60 and accompanying text.

305. PUFENDORF, *supra* note 31, at 653.

306. *Id.*

307. *Id.* at 655 (emphasis added).

308. *Id.* at 655–56

principles of the integrated theory of property.[309] Contemporary integrated theorists must also remain aware of the limits of their own approach, and thus recognize when additional data or other principles are necessary in order to explain fully or justify legal phenomena.

With respect to the application of the integrated theory to the property doctrines discussed in this Article, it bears repeating that there are several places at which other issues both in politics and law take priority over the integrated theory in explaining or justifying a legal rule. It has already been mentioned that the integrated theory does not speak to every issue raised by intellectual property law, such as copyright and patent term limits. Moreover, the DMCA raises constitutional issues, such as free speech, that are beyond the purview of the integrated theory.[310] Finally, there are vast policy issues and other legal rules that are brought to bear in eminent domain doctrine that deserve a place at the table as much as does the integrated theory of property. For example, one explanation for the majority rule in the nineteenth century that public authorities were not liable for consequential damages is that courts wished to impose equal liability upon state agents and private citizens.[311] This basic maxim of the common law—treat like cases alike—is not rooted in or explained by the integrated theory of property itself.

Nonetheless, the integrated theory of property offers us something more than the bundle theory or exclusion theory of property. It explains past institutions and legal rules, as well as the nature of those institutions still at work today in our legal system. As shown in this Article, the integrated theory explains the evolution of the common-law rule of first possession, which was adopted by the courts because the integrated theory dictated that possession was a primary requirement in the creation of property. The theory also explained why judges originally defined trade secrets and trademarks as property, because this entailed the protection of an entitlement that arose from the value-creating use or labor of the possessor. It explains why the drafters of the Copyright Act logically settled on the

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309. Richard Epstein has recently noted that "[i]t is a mistake to dismiss . . . general arguments as hopelessly abstract or even wishy-washy. . . . [W]e must remember that even if sound legal principles do not eliminate every anomaly or answer every single question of system design, they can help us avoid major errors that could carry with them disastrous social consequences." Richard A. Epstein, *Intellectual Property: Old Boundaries and New Frontiers*, 76 IND. L.J. 803, 827 (2001).

310. *See, e.g.*, Andrea L. Foster, *Princeton Cryptographer's Challenge to Music Industry Draws Computer Scientists' Support*, THE CHRON. HIGHER EDUC., Aug. 16, 2001, *at* http://chronicle.com/daily/2001/08/2001081602t.htm (discussing the dispute between Edward W. Felten and the music industry over his publicly presenting his research in decryption codes, which involves claims of "chilling" discussion of research).

311. *See, e.g.*, Burroughs v. Housatonic R.R. Co., 15 Conn. 124, 132–33 (1842) (reversing trial decision in favor of property owner on the grounds that "defendants only ask the same protection that an individual has"); Henry v. Vt. Cent. R.R. Co., 30 Vt. 638, 641 (1858) (affirming trial judgment for defendant and noting that the law imposes no duty on "riparian owners above. . . . to leave the force and direction of the stream [used] precisely the same as before"); Pettigrew v. Village of Evansville, 25 Wis. 223, 231 (1870) (noting that "the same principle which governs as between individuals, holds good as between towns and villages and individual proprietors").

basic possessory rights in defining the nature of exclusive use of copyrighted works. Finally, it explains how eminent domain may have been more varied in its original application, which reveals an implicit conception of regulatory takings that may serve as precedent for today. In sum, the integrated theory provides a coherent explanation of property that yields consistent results in a wide array of legal doctrines.

It does all of this without eviscerating the concept of property, emptying it of content. It does not excessively narrow the meaning of property so that the concept offers us little in way of explaining our property rules—the failing of the exclusion theory of property.[312] It does not fragment property into a plethora of distinct rights—the failing of the bundle theory of property.[313] Both of these modern theories undermine the status of property as a concept and as a legal right, and thus they undermine the ability of the courts to apply property doctrines with precision and consistency.[314] The integrated theory of property respects existing legal institutions and our myriad property doctrines, as well as accommodates the need to recognize and justify the new ways in which property is created and developed.

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312. *See* Merrill, *supra* note 19, at 731 ("the right to exclude is a necessary and sufficient condition of identifying the existence of property").

313. *See* Grey, *supra* note 10, at 30. Grey writes:

> Modern lawyers—or at least modern legal scholars—are nominalists about "ownership"; they see property in resources as consisting of the infinitely divisible claims to possession, use, disposition, and profit that people might have with respect to those things. There is, on this conception, no essential core of those rights that naturally constitutes ownership.

Id.

314. *See, e.g.*, *supra* notes 291–92 and accompanying text.

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