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Property: A Bundle of Sticks or a Tree?

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INTRODUCTION

In 1973 John Henry Merryman noted that property law is a largely unexplored field of comparative study.¹ According to Merryman, common lawyers and civilians have long viewed their respective property systems as radically different and hardly comparable. In Merryman's words, the civil law is a law of "ownership," while the common law is a law of "estate."² Civil law systems conceive of property as ownership, as holistic dominion: exclusive, single, indivisible, and different in nature from lesser property interests.³ By contrast, property in the common law is pluralistic and fragmented, having at its core the estates system and the many ways of carving up lesser property interests, from life estates to defeasible fees and future interests.⁴

Forty years have passed since Merryman's observations. Comparative property law is still a largely unexplored field, and civil law property and common law property are still perceived as

1. John Henry Merryman, *Ownership and Estate*, 48 TUL. L. REV. 916, 916 (1974).

2. *Id.* at 918; see also Yun-chien Chang & Henry E. Smith, An Economic Analysis of Civil Versus Common Law Property 2–3 (2011) (unpublished manuscript), available at http://extranet.isnie.org/uploads/isnie2011/chang_smith.pdf (analyzing the distinct emphases of common law and civil law, and offering a "transaction cost" explanation for the differences).

3. See Vera Bolgar, Commentary, *Why No Trusts in the Civil Law?*, 2 AM. J. COMP. L. 204, 210 (1953) (noting that the concept of autonomous and indivisible ownership was first formulated in the Justinian Code, then forgotten for centuries and then again declared in article 544 of the French Civil Code); Hessel E. Yntema, *Roman Law and Its Influence on Western Civilization*, 35 CORNELL L. REV. 77, 77–78, 87 (1949) (discussing the development of Roman law and its formal adoption by later civilizations, forming modern civil law). In their respective codifications Justinian and Napoleon sought to simplify an intricate network of customs, precedents, and local ordinances. Justinian sought to restore the classical concepts of a bygone capitalistic era. Napoleon sought to consolidate the outcomes of the revolution and in particular the abolition of feudal charges. Bolgar, *supra*, at 210.

4. Chang & Smith, *supra* note 2, at 2.

fundamentally different. In the United States, every first-year law student learns that property is a “bundle of sticks.” Introduced by Hohfeld, and further developed by the realists, the bundle of sticks concept characterizes property as a bundle of entitlements regulating relations among persons concerning a valued resource.⁵ The metaphor suggests that the bundle is malleable (i.e., that private actors, courts, and lawmakers may add or remove sticks, and that the bundle structures relations among persons, only secondarily and incidentally involving a thing). By contrast, in civil law countries, a law student may easily graduate without having ever heard that property is a bundle of rights. By and large, civil lawyers still view property as ownership.⁶ For civil law jurists, property is still a coherent and monolithic aggregate of entitlements over a thing, giving the owner an ample sphere of negative freedom (i.e., ample power to use the thing free from interference by nonowners or by the state).⁷

This conventional picture of comparative property raises a number of questions. Are Europeans actually unsophisticated old-style conceptualists who simply missed the realist revolution in property law? Furthermore, are the bundle of sticks concept and the ownership concept the only models to have been developed in the history of Western property law?

This Article provides a new answer to both questions. It argues that Europeans had their own realist revolution in property law. Further, it argues that the concept of property this realism ushered in, which I call the “tree” concept of property, provides a better way of

5. See Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 363 (1954) (explaining that property consists of the relations among men and may not always involve external objects); see also JOSEPH W. SINGER, PROPERTY LAW xlvi (3d ed. 2002) (“Property rights concerns legal relations among people regarding control of valued resources.”).

6. BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 26 (1977):

For, in dealing with the concept of property it is possible to detect a consensus view so pervasive that even the dimmest law student can be counted upon to parrot the ritual phrases on command. I think it is fair to say that one of the main points of the first-year Property course is to disabuse entering law students of their primitive lay notions regarding ownership. They learn that only the ignorant think it meaningful to talk about owning things free and clear of further obligation. Instead of defining the relationship between a person and “his” things, property law discusses the relationships that arise *between people* with respect to things.

7. *Id.*; see also Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S459, S465, S467 (2002) (using proxy measurement to distinguish between exclusion and governance); Henry E. Smith, *Property Is Not Just a Bundle of Rights*, 8 ECON. J. WATCH 279, 280–82 (2011) [hereinafter Smith, *Property Is Not Just a Bundle of Rights*] (discussing the “exclusion strategy” as part of an alternative approach to property theory).

understanding property than either the bundle of sticks model or the ownership model.⁸

The tree concept of property was developed by French and Italian jurists at approximately the same time Hohfeld and the realists invented and popularized the bundle of sticks concept. It rests on similar intuitions but still differs significantly. The tree concept views property as a tree with a trunk—representing the core entitlement that distinguishes property from other rights—and many branches—representing many resource-specific bundles of entitlements. The trunk of the tree is the owner's entitlement to control the use of a resource, mindful of property's "social function." For the theorists of the tree model, the social function of property evokes a plurality of values: equitable distribution of resources, participatory management of resources, and productive efficiency. The branches of the property tree are the multiple resource-specific property regimes present in modern legal systems: family property, agricultural property, affordable-housing property, industrial property, etc. Each of these branches requires a different balance of the plural values evoked by the social function of property, which is often translated as the many resource-specific bundles of entitlements.

The tree model of property has received virtually no attention by historians and comparativists. Part of the reason is that the model was developed in a Europe shaken by dramatic events: the crisis of liberalism and the rise of Fascism.⁹ Legal historians have long been reluctant to look back to the concepts and ideas discussed in Europe in the years of totalitarianism. For at least a generation of postwar European historians, these ideas were still too raw, and the personal and professional ties to their authors still too vivid, to allow historical investigation.¹⁰ It is only in recent years that a burgeoning literature has started excavating the debates that took place among European

8. SALVATORE PUGLIATTI, LA PROPRIETÀ NEL NUOVO DIRITTO 149 (Dott. A. Giuffrè ed., 1964) (using the tree image to explain the concept of property).

9. On the rise of Italian Fascism, see generally ALEXANDER DE GRAND, ITALIAN FASCISM 41–102 (2000); ADRIAN LYTTTELTON, ITALIAN FASCISMS FROM PARETO TO GENTILE 11–36 (1975) (reviewing the individual leaders who established Fascism in Italy and answering ideological critiques of Italian Fascism). On the agrarian crisis, see generally MANLIO ROSSI-DORIA, RIFORMA AGRARIA E AZIONE MERIDIONALISTA (2003); FRANK M. SNOWDEN, VIOLENCE AND THE GREAT ESTATES IN THE SOUTH OF ITALY 175 (1986) (summarizing Fascist violence between 1921 and 1922 in southern Italy).

10. Michael Stolleis, *Prologue to DARKER LEGACIES OF LAW IN EUROPE* 1, 3–5 (Christian Joerges & Navraj Singh Ghaleigh eds., 2003) (discussing the case of Germany and arguing that lawyers, like the rest of the nation, "were reluctant to look back into the abyss"). It was a self-imposed *damatio memoriae*, Stolleis argues, and hence it is only logical that there were very few studies in legal history to address the period before 1965 and that contemporary legal history did not take shape as a discipline until much later.

legal scholars in the age of totalitarianism.¹¹ The focus of this literature has been mostly on public law, leaving property law largely to be explored.¹²

By reviving the tree concept of property, this Article helps move property debates beyond the current impasse between the bundle of sticks model and the ownership model. American property theory has become a highly polarized field where much of the turmoil revolves around the respective merits of these two models.¹³ Progressive property scholars resort to the bundle of sticks concept because it allows the state to bind up and rearrange an owner's entitlements to achieve a variety of regulatory and redistributive goals.¹⁴ Post-Coasean law-and-economics scholars have also widely relied upon the bundle of sticks concept, arguing courts and private actors should tailor ad hoc bundles that approximate the economically optimal definition of property rights and guide efficient resource use.¹⁵

By contrast, the ownership concept has been revived by "information theorists" of property who emphasize its advantages over the bundle of sticks model. Because the ownership model has

11. See generally Stolleis, *supra* note 10, at 3, 13–15, 17 (detailing the hesitancy of European law scholars to examine law under the Nazi regime); James Q. Whitman, *Of Corporatism, Fascism and the First New Deal*, 39 AM. J. COMP. L. 747, 750 (1991) (discussing the rise of literature on the nature of corporatism in the 1980s). For an example of the growing literature on European law and totalitarianism, see, for example, Hauke Brunkhorst, *Sleeping Dogs: A Blemish on the Clean Slate of Western Liberalism*, 7 GERMAN L.J. 83, 84 (2006) (analyzing the impact of Nazism on European liberalism).

12. On Fascist private law, see Pier Giuseppe Monateri & Alessandro Somma, *The Fascist Theory of Contract*, in DARKER LEGACIES OF LAW IN EUROPE, *supra* note 10, at 55, 55–70 (focusing on the modifications to Italian law of contract by Fascist and National Socialist governments).

13. Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917, 917 (2010).

14. On progressive property theorists, see Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1017, 1017 (2011):

Welfarism is no longer the only game in the town of property theory. In the last several years a number of property scholars have begun developing various versions of a general vision of property and ownership that, although consistent with welfarism in some respects, purports to provide an alternative to the still-dominant welfarist account. This alternative proceeds under different labels, including "virtue theory" and "progressive," but for convenience purposes let us call them collectively "social obligation" theories.

See also Baron, *supra* note 13, at 927–32 (illustrating progressive property theorists' commitment to "human flourishing," "virtue," "freedom," and "democracy").

15. For a discussion of the bundle of sticks concept in Coasean and post-Coasean law and economics, see Eric R. Claeys, *Bundle-of-Sticks Notions in Legal and Economic Scholarship*, 8 ECON. J. WATCH 205, 206–11 (2011) [hereinafter Claeys, *Bundle-of-Sticks Notions*]; Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV 617, 621–29 (2009) [hereinafter Claeys, *Property 101*]; Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 368, 366–82 (2001).

exclusion at its core, it protects owners' interests in using things in a cost-effective way by conveying the simple message of "stay off" to nonowners.¹⁶ Further, the ownership model is morally appealing, being grounded in the everyday morality of "thou shalt not steal," which is simple and accessible to all members of the community.¹⁷

There is growing dissatisfaction with both models, however. First, not all advocates of the ownership model agree the right to exclude is the core of property. Many suggest the ownership model's focus on the right to exclude misses the fact that property doctrines are much more varied and complex than merely securing assets through bright-line trespass rules. The vast majority of property doctrines—from nuisance to adverse possession, from water rules to support rules—focus on use rather than on exclusion, qualifying and regulating owners' abilities to use a resource.¹⁸

Second, in the progressive property camp, many scholars dislike the bundle of sticks concept because it emphasizes owners' rights, rather than their duties and obligations, and it masks an individualistic conception of property as the ownership concept.¹⁹ Further, they recognize that, as far as its ability to allow a progressive regulatory or redistributive agenda is concerned, the bundle of sticks model is a double-edged sword. Scholars have long assumed that the bundle is malleable; hence, any time the state curbs one of the sticks, it is merely rearranging the bundle rather than taking property rights. But, the bundle of sticks concept may be used equally well as a trump against state regulation. Pursuant to this interpretation, the

16. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (2007); Smith, *Property is Not Just a Bundle of Rights*, *supra* note 7, at 282–84.

17. Merrill & Smith, *supra* note 16, at 1850.

18. Claeys, *Bundle-of-Sticks Notions*, *supra* note 15, at 210 ("[N]or should my definition of property be confused with definitions holding that 'property at its core entails the right to exclude others from a thing.' There are subtle but important differences between a right to exclude and what I prefer to call a right of exclusive use-determination."); Larissa Katz, *The Regulative Function of Property Rights*, 8 ECON. J. WATCH 236, 240 (2011) ("[T]he idea of ownership is found not in the exclusionary function of the right but in the owner's exclusive authority to set the agenda for a resource."); Adam Mossoff, *The False Promise of the Right to Exclude*, 8 ECON. J. WATCH 255, 255 (2011) ("I and others have sought to recover the earlier concept of property that was buried by the realists . . . the right to property secures a use-right in, agenda-setting control over, or a sphere of liberty in using the thing.").

19. On the marginality of duties to property law, see JOSEPH W. SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 197–215 (2000). On the "thin" nature of most theories of duties in property, see Gregory S. Alexander, *The Social Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 753–58 (2009); Eric T. Freyfogle, *The Construction of Ownership*, 1996 U. ILL. L. REV. 173, 174–82 (arguing that we should readjust our vision of the rights and responsibilities that accompany land ownership).

bundle has a coherent shape, and any time the state curbs a stick, it should pay compensation.²⁰

Finally, neither the ownership model nor the bundle of sticks model accounts for the increasingly resource-specific nature of property law. Social, economic, and technological changes have transformed the nature of certain resources, creating regulatory dilemmas that are resource specific. For example, today the value of a home has come unbound from the four corners of an owned parcel. A home now serves as the placeholder for other resources, such as schools and social associations, that are not contained within the physical boundaries of the parcel. Property scholars have responded to this transformation by suggesting a reconfiguration of homeownership entitlements that would not only address extraparcel impacts but also do a better job of protecting homeowners' interests.²¹ Similarly, the unique physical characteristics of ecologically sensitive lands require a reconfiguration of owners' entitlements, such as use and exclusion rights, as well as their entitlements to be immune from loss.²² In other words, property is increasingly becoming a constellation of resource-specific regimes.²³

While there is growing dissatisfaction with both the bundle of sticks model and the "ownership" model, no alternative has emerged. The tree concept of property addresses the reasons for dissatisfaction with the other two models and resonates with insights that are emerging in American property theory. More specifically, the tree concept of property provides the historical background for contemporary theories of value pluralism in property law.

The tree concept of property provides an account of property that would enrich contemporary property debates. It is descriptively accurate and normatively rich. First, the tree concept of property is concerned with the structure of property, as information theorists are; but, rather than envisioning property as having a simple architecture

20. Alexander, *supra* note 19, at 800–01 ("[T]he bundle-of-rights metaphor is an unsatisfactory way of explaining why the statute is valid because it really begs the question. One could just as easily argue, as Epstein has, that the bundle of rights is unitary so that removing any one twig from the bundle itself constitutes a taking."); Claeys, *Bundle-of-Sticks Notions*, *supra* note 15, at 211; Richard A. Epstein, *Bundle of Rights Theory as a Bulwark Against Statist Conceptions of Private Property*, 8 ECON. J. WATCH 223, 226–33 (2011).

21. LEE ANNE FENNELL, THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES 9–24 (2009).

22. Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 306–10 (2002).

23. See generally Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 STAN. L. REV. 1529, 1530–31 (1989) (arguing that property rights are becoming context-specific use rights).

with exclusion at its core, it emphasizes the complexity of the structure of property. The tree model more accurately describes the trunk of the property tree as the owner's qualified right to govern the use of the resource, rather than as an abstract right to exclude.

Second, the tree concept of property emphasizes that owners have a duty to exercise their control rights mindful of property's social function, and translates this general obligation into rules concerning the use of specific resources. Hence, the tree concept underscores the importance of the duties that owners of particular resources (such as water, agricultural land, wetlands, or housing) owe to nonowners and society at large.

Third, by acknowledging that the social function of property refers to a plurality of goals, including equitable distribution, participatory control, and efficiency, the tree concept of property provides a more nuanced account of the normative commitments of property law. This concept is richer than the ownership model, which sees exclusion as the means for promoting one end: the efficient use of resources.

Finally, by making resources the entry point of property analysis, the tree concept of property eases the fundamental problem faced by advocates of value pluralism in property: choosing between conflicting values. When grounded in the context of specific resources, the conflict between competing goals appears less intractable: contestable but nonarbitrary.²⁴

This Article is structured in three parts. Part I sets the stage for the analysis of the tree concept of property by discussing the two rival models: the bundle of sticks concept of property and the ownership model. Part II discusses the development of the tree model of property in mid-twentieth-century property debates. Part III discusses why the tree concept of property provides a better understanding of property than the bundle of sticks model and the ownership model.

24. HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS xii, 1, 3–36 (2011); Gregory S. Alexander, *The Complex Core of Property*, 94 CORNELL L. REV. 1063, 1064 (2009); Alexander, *supra* note 14, at 1045–51.

I. THE BUNDLE OF STICKS MODEL AND THE OWNERSHIP MODEL OF PROPERTY

A. *The Bundle of Sticks Model*

The ownership model has provided the dominant understanding of property in the West since the Enlightenment.²⁵ The ownership model views property as a coherent and monolithic aggregate of entitlements that give an owner ample power over a resource. Blackstone's widely cited assertion that property is "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" brought this model to fame.²⁶ It was eventually enshrined in the most influential of the Western codes, the French Code Napoleon. Article 54 recited that property is "the right of enjoying and disposing of things in the most absolute manner provided that they are not used in a way prohibited by the laws or the statutes."²⁷

By the early twentieth century, however, a group of jurists in the United States developed an alternative model. In a 1922 article, Arthur Corbin noted that "our concept of property has shifted Property has ceased to describe any res, or object of sense, at all and has become merely a bundle of legal relations-rights, powers, privileges, immunities."²⁸ While the image of a bundle may be credited to an 1888 treatise on eminent domain, the bundle of sticks concept is the result of the combined efforts of early twentieth-century analytical jurisprudence: progressivism and legal realism.²⁹ It was developed in

25. On the development of the idea of ownership in the West, see PETER GARNSEY, THINKING ABOUT PROPERTY: FROM ANTIQUITY TO THE AGE OF REVOLUTION 1–5 (2007).

26. On the Blackstonian concept of property and its disintegration in modern United States, see generally Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1980).

27. CODE CIVIL [C. CIV.] art. 544 (Fr.), available at http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code_22.pdf (English transl.).

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

29. Legal historians debate the nature of the relationship between these movements. While some emphasize continuity, others suggest a discontinuity approach that views realism as an autonomous movement. For the discontinuity view, see LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986); G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth Century America*, 58 VA. L. REV. 999, 1013–28 (1972). For the continuity view, see GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970*, at 312 (1997); NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 65–158 (1995); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 145–92 (1992).

years that were “among the most tumultuous in American history.”³⁰ As capitalism bloomed, wealth became increasingly dephysicalized. The country underwent successive depressions, and wealth and power became increasingly concentrated.³¹ The bundle of sticks concept seemed to better account for these developments. It reflected the dephysicalization, and it allowed greater flexibility in regulating property.

The origins and the development of the idea that property is a bundle of rights have been thoroughly investigated by U.S. property scholars and legal historians.³² In this section, rather than rehearsing this literature, I will lay the ground for my analysis of the European tree concept of property by discussing the most important intuitions behind the bundle of sticks image. I believe these intuitions are fourfold: (1) property is a set of analytically distinct entitlements rather than a full and monolithic aggregate of rights; (2) property entails delicate relations among individuals concerning a given resource (i.e., each owner’s entitlements correspond to other owners’ vulnerabilities); (3) an owner’s entitlements are “bundled” and backed by the state, rather than derived from the law of nature; and (4) the property bundle is malleable (i.e., the owner’s entitlements may be recombined into different bundles to achieve a variety of policy purposes).³³

1. Property as a Set of Analytically Distinct Entitlements

The first contribution of the bundle of rights image was that it brought analytical clarity to the concept of property. It made clear that property is not a monolithic aggregate of powers but a set of distinct entitlements. This clarification originated in the concern with clarity and systematization typical of early twentieth-century analytical jurisprudence.³⁴ Jurists like Wesley Hohfeld, Henry Terry,

30. ALEXANDER, *supra* note 29, at 313 (citing ALAN DAWLEY, STRUGGLES FOR JUSTICE: SOCIAL RESPONSIBILITY AND THE LIBERAL STATE 1 (1991)).

31. *Id.*

32. *Id.* at 319. Alexander notes that Hohfeld seems not to have used the bundle of rights metaphor at all. *Id.* at 322 n.40. The first use of the metaphor to describe the modern concept of property, Alexander notes, is in HORWITZ, *supra* note 29, at 145; JOHN LEWIS, TREATISE ON THE LAW OF EMINENT DOMAIN (1888); STEPHEN R. MUNZER, A THEORY OF PROPERTY 15 (1990).

33. ALEXANDER, *supra* note 29, at 319 (arguing that the metaphor was intended to signify three key insights: first, it indicates that ownership is a complex legal relationship; second, it illuminates the fact that the constitutive elements of that relationship are legal rights; and third, and most importantly, it underscores the social character of that relationship).

34. On the “jural relations” debate in early twentieth-century analytical jurisprudence, see generally Joseph W. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 987–89.

Albert Kocourek, and Arthur Corbin believed in the need for “an exhaustive analysis of legal conceptions, the results of which must be expressed in a systematized terminology.”³⁵

In a 1903 essay, Henry Terry first attempted to analyze separately the entitlements that make up the Blackstonian monolithic right of property. For Terry, the elementary rights of property are the right to possess, use, and transfer; the right to have law protect both the fact of one’s possession and the physical condition of the thing; and the powers of appointment and liens.³⁶ Nevertheless, Hohfeld, in his 1913 and 1917 essays, was the scholar to clearly distinguish and name the four primary legal entitlements of an owner.³⁷ The fact that A is the fee-simple owner of Blackacre, Hohfeld noted, means that his property relating to the tangible object we call land consists of a complex aggregate of rights (or claims), privileges, powers, and immunities.³⁸ First, A has a legal right that others may not enter the land or cause physical harm to the land. Second, A has an indefinite number of legal privileges of entering the land, using the land, and harming the land. Third, A has the legal power to alienate his legal interest to another. Finally, A has an indefinite number of legal immunities, among which are the immunity that no ordinary person can alienate A’s aggregate of jural relations to another, and the immunity that no ordinary person can extinguish A’s privileges of using the land.³⁹ As the bundle of rights approach became the predominant view, others further specified the standard incidents of property. Well known is Tony Honore’s list of the eleven standard incidents of full liberal ownership in Western legal systems.⁴⁰

35. Henry T. Terry, *Legal Duties and Rights*, 12 YALE L.J. 185, 185 (1903).

36. *Id.* at 199.

37. Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 714–70 (1917) [hereinafter Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*]; Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 24–53 (1913) [hereinafter Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*].

38. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, *supra* note 37, at 746.

39. *Id.*

40. A. M. Honore, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE (A. G. Guest ed., 1961). For a variation on Honore’s list, see LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 18–20 (1977). For a combination and extension of Hohfeld’s and Honore’s views, see MUNZER, *supra* note 32, at 22–28. The rights Munzer identifies are: (1) the right to possess; (2) the right to use; (3) the right to manage; (4) the right to income of the thing; (5) the right to the capital; (6) the right to security; (7) the incident of transmissibility; (8) the incident of absence of term; (9) the duty to prevent harm; (10) the liability to execution; and (11) the incident of residuarity.

While in the ownership model these entitlements constituted a monolithic aggregate, Hohfeld and Terry made clear that the entitlements are distinct and may be disaggregated. Hohfeld did not deny that, in order to have an adequate analytical view of property, it is important to see all these various constitutive elements in the aggregate.⁴¹ But, he noted, equally important is that the different elements should not be loosely confused with one another.⁴²

2. The Relational Nature of Property

The second crucial intuition of the bundle of rights approach is the relational nature of property. In the ownership model, property is a relation between a person and a physical thing. The bundle of sticks concept made it clear that property is a relation among persons concerning a thing. As Arthur Corbin put it, all jural relations are between persons, either as individuals or in groups. Things, Corbin wrote, do not have rights, and there is no legal relation between a person and a thing.⁴³ Property is a relation among persons, in that to each of the owner's entitlements corresponds a vulnerability on the part of others.⁴⁴

Terry discussed the relational nature of property rights when he distinguished between the owner's "permissive rights" and "protected rights." The right to possess, use, and transfer are, for Terry, permissive rights. Permissive rights are not corroborated by a duty to others. The content of these rights, Terry noted, is an act, but "the act is to be done by the holder of the right himself and not by the person subject to a corresponding duty."⁴⁵ Indeed, he continued, "there is no such person and no such duty."⁴⁶ Permissive rights to possess, use, and transfer can be exercised but not violated.⁴⁷ By contrast, protected rights are corroborated by duties imposed on others. Owners have a protected right of possession and a protected right to the condition of the thing. A protected right, Terry wrote, "is the legal condition of a person for whom the law protects a state of fact by imposing duties upon other persons whose performance will or will

41. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, *supra* note 37, at 747.

42. *Id.*

43. Arthur L. Corbin, *Rights and Duties*, 33 YALE L.J. 501, 509 n.11 (1924).

44. Stephen R. Munzer, *A Bundle Theorist Holds on to His Collection of Sticks*, 8 ECON. J. WATCH 265, 265–67 (2011); Singer, *supra* note 34, at 987.

45. Terry, *supra* note 35, at 189.

46. *Id.*

47. *Id.*

tend to bring the state of fact into existence.”⁴⁸ The protected state of fact (i.e., possession or the condition of the thing) is the content of the right; hence a protected right cannot be exercised but can be violated.⁴⁹

Terry’s distinction between protected and permissive rights was a first, incomplete, and imperfect attempt at describing the relational nature of property. The concept was fully clarified in Hohfeld’s full-blown table of correlatives, which linked each of the owner’s entitlements to a correlative.⁵⁰ If A, fee-simple owner of Blackacre, has a right that others shall not enter or cause physical harm to the land, these others are under a correlative duty not to enter or cause harm. A’s indefinite number of privileges of doing on, or to, the land what he pleases corresponds to the respective legal “no-rights” of other persons. The correlative of a privilege, Hohfeld explains, is a “no right,” there being no term available to express the idea that A’s privilege of entering the land corresponds to X’s no right that A shall not enter. Further, A’s power to transfer his full aggregate of entitlements to another, or to transfer a smaller aggregate, for example by creating a life estate in another and a reversion in himself, correspond to legal liabilities in other persons. That is, “[O]ther persons are subject, *nolens volens*, to the changes of jural relations involved in the exercise of A’s powers.”⁵¹ Finally, A’s immunities, for example A’s immunity that no ordinary person can transfer A’s aggregate of entitlements to another, or that no ordinary person can extinguish A’s own privileges of using the land, correlate to other persons’ respective disabilities in general.⁵²

Emphasis on the relational nature of property had important conceptual and policy implications. At the level of conceptual analysis, the notion that property is a relation among individuals regarding a thing led jurists to revisit and clarify the traditional distinction between rights *in rem* and rights *in personam*. Rights *in rem* are rights with respect to things and are available against the world at large. By contrast, rights *in personam* are rights residing in persons and are available against named persons or entities. Corbin, Terry,

48. *Id.* at 194.

49. *Id.*

50. See Singer, *supra* note 34, at 1039–40 (arguing that Terry’s notion of protected rights has two problems from a Hohfeldian standpoint: first, protected rights are merely legally protected interests and not rights at all—it merely describes the legal interest that is being protected—and second, protected rights obscure the relationship between liberties and rights).

51. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, *supra* note 37, at 746.

52. See *id.* (laying out this line of reasoning).

and Hohfeld argued that the distinction rested on a point of confusion. In Corbin's words, "[I]t would be an extremely useful social achievement if people could be made to understand that property rights (rights *in rem*) are just as personal as are contract rights and other rights *in personam*."⁵³ Corbin, Terry, and Hohfeld argued that *in rem* rights are nothing more than clusters of *in personam* rights and hence can be broken down into a large and indefinite number of individual *in personam* rights.⁵⁴

Hohfeld renamed *in rem* rights "multitital" rights. He described a multitital right as "one of a large class of fundamentally similar yet separate rights, actual and potential residing in a single person," and having as its correlative "fundamentally similar rights or claims, residing respectively in many different persons."⁵⁵ By contrast, a right *in personam*, renamed a "paucital" right, is either a unique right residing in a person and availing against a single person, or one of few fundamentally similar yet separate rights availing respectively against a few definite persons.⁵⁶ In other words, *in rem* and *in personam*—or, better, multitital and paucital—rights are intrinsically of the same nature and differ only as to the number of companions they have. The former have many companions, the latter few, if any.⁵⁷ As an illustration, Hohfeld described a situation where A is the owner of Blackacre, and X is the owner of Whiteacre. In consideration of a sum paid by A to B, the latter agrees not to enter X's Whiteacre. It is clear, Hohfeld notes, that A's right against B regarding Whiteacre is a right *in personam*, and, by contrast, A's right against B regarding Blackacre is a right *in rem*. However, it is also evident that A's Blackacre right against B and A's Whiteacre right against B are intrinsically of the same nature. The Blackacre right differs only extrinsically in having many fundamentally similar rights as its companions.⁵⁸

53. Corbin, *supra* note 43, at 509; Arthur L. Corbin *Jural Relations and Their Classification*, 30 YALE L.J. 226, 227 (1921) (noting that it is "pleasant" that even a critic of Hohfeld like Albert Kocourek recognized that a jural relation is always that of one individual person to another). This fact, Corbin adds, has a very far-reaching effect upon much juristic thought and expression. *Id.*

54. See Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 786 (2001) (arguing that Hohfeld conceived of *in rem* rights "as a kind of cluster bomb of actual and potential *in personam* rights").

55. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, *supra* note 37, at 718, 745.

56. *Id.* at 718.

57. *Id.* at 723.

58. *Id.*

At both a practical and a policy level, the effort to clarify the relational nature of property rights paved the way for a further, important insight: the realization that property entails coercion. Hohfeld noted that understanding the right-duty pair is not only a matter of accurate analysis, but also a matter "of great practical consequence and economic significance."⁵⁹ This is because the right-duty relation confers to the right holder significant economic power over others. Hohfeld noted that some believe that owners' rights are created by the law for the sole purpose of protecting the owners' use and enjoyment of their property. This implies that the use was the only economically relevant factor in the creation of the right.

But this view is inadequate. It fails to see value in exclusion of nonowners even if the owner has no intention of using the land and the land is vacant. Hohfeld's limitations become clear when the nonowner's use is temporary but of great economic significance. Others who seek to use the land will need to compensate the owner for the extinguishment of his rights and the creation of privileges of use and enjoyment. Hence, Hohfeld's table of correlatives highlighted the social and political dimensions of legal decisions recognizing a right in an owner.⁶⁰

A few years later, the realists adopted, as a dominant theme, the notion of property as a sovereign power compelling service and obedience. This theme reflected a preoccupation of New Deal administrators. Throughout the 1930s, the goal of establishing a fairer distribution of wealth and a comprehensive welfare state dominated the American political agenda.⁶¹ Morris Cohen famously noted that if someone else wants to use the food, the house, the land, or the plow that the law calls his, "he has to get my consent."⁶² Hence, "[t]o the

59. *Id.* at 747.

60. See *id.* (underscoring the practical consequences of properly delineating property rights).

61. ALEXANDER, *supra* note 29, at 313–14 (describing the period between 1890 and 1913 as one of increasing concentration of capital and wealth that widened the gaps between the haves and the have-nots, deepened feelings of social conflict, and resulted in unprecedented political clout for leftist political groups, such as the "Industrial Workers of the World"—an anarchosyndicalist group—and the Populist Party, as working people came to regard the existing distribution of wealth as fundamentally unjust); Neil Duxbury, *The Reinvention of American Legal Realism*, 12 LEGAL STUD. 137, 155–56 (1992):

Throughout the 1930s, the goal of economic recovery dominated the American political agenda to such degree that more traditional liberal democratic concerns were somewhat overshadowed. New Deal administrators were preoccupied primarily with establishing a fairer distribution of wealth, a comprehensive welfare state, remedies for rural poverty and general unemployment, a system of coordinated planning and control of the physical resources of the nation—with establishing, in short, a comprehensive programme of public welfare.

62. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8, 12 (1927).

extent that these things are necessary to the life of my neighbor, the law confers on me a power, limited but real, to make him do what I want.”⁶³ Modern writers had seen the concept of property ushered in by the modern revolutions as having freed individuals from the shackles of feudal oppression. By contrast, the realists showed that the sovereign power possessed by the modern large-property owners is not less real or less extensive than the power of a feudal lord.⁶⁴ Robert Hale illustrated this point by examining the property rights of the owner of a large manufacturing plant. In Hohfeldian terms, Hale noted, the right of ownership in a manufacturing plant is a privilege to operate the plant, plus a privilege not to operate it, plus a right to keep others from operating it, plus a power to acquire all the rights of ownership in the products. Having exercised the latter power, Hale continued, “the owner has a privilege to use them plus a much more significant right to keep others from using them, plus a power to change the duty thereby implied in the others into a privilege coupled with rights.”⁶⁵ This power, Hale clarified, is a power to release (and create) a pressure on the liberty of others through the law of property. If the legal pressure is great, the owner may be able to compel the others to pay him a big price for their release. If the pressure is slight, he can collect but a small income from his ownership.⁶⁶

3. Property as a Bundle Assembled and Backed by the State

The third fundamental intuition of the bundle of rights approach is that the state itself assembles and backs owners’ bundles of entitlements. In 1893, John R. Commons wrote that property is “not a single absolute right, but a bundle of rights. The different rights which compose it may be distributed among individuals and society.” Commons did not specify who distributes the sticks in the bundle, but many passages from the realists suggest that the state is the actor that assembles and shapes the bundle. The realists made it clear that property rights are state-backed entitlements rather than natural rights. The idea that property is a natural right—a right guaranteed by natural law, which is the set of universally valid legal and moral

63. *Id.*

64. *Id.* at 13.

65. Robert L. Hale, *Rate Making and the Revision of the Property Concept*, 22 COLUM. L. REV. 209, 214 (1922).

66. *Id.*; see also Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471 (1923) (“What is the government doing when it ‘protects a property right?’ Passively, it is abstaining from Interference with the owner when he deals with the thing owned; actively, it is forcing the non-owner to desist from handling it, unless the owner consents.”).

principles that can be inferred from nature—was central to the political sensibilities of the eighteenth and nineteenth centuries. The realists argued that establishing the presence of a natural right to property is meaningless unless the law of the state recognizes and protects that right. From this perspective, property relationships always involve government.⁶⁷

Discussing Hohfeld's right-duty pair, Arthur Corbin noted that a right exists when its possessor has the aid of some organized governmental society in controlling the conduct of the person who owes a duty.⁶⁸ When we think about property rights, Corbin noted, what we think is, "What will society do for A (owner) against whom it may concern?"⁶⁹ In other words, property rights require the command of society—with the threat of societal coercion—against an individual, for the benefit of A. Similarly, Morris Cohen stated that the essence of property is a state-enforced right to exclude others.⁷⁰ In Cohen's words:

[T]he law does not guarantee me the physical or social ability of actually using what it calls mine; it may indirectly aid me by removing certain general hindrances to the enjoyment of property But the law of property helps me directly only to exclude others from using the things which it assigns to me.⁷¹

While the realists insisted that the sticks are bundled top-down by the state, critics have noted that nothing in the bundle of rights conception of property drives this conclusion. Richard Epstein has argued that the bundle of rights terminology and the question of whether we think of property from a top-down or a bottom-up perspective are separate questions.⁷² The bundle of rights concept can also be seen in the context of a bottom-up perspective where property entitlements arise under natural law before the creation of the state. Both Roman law and the common law, Epstein notes, "initiated a system of private property from the bottom up: first possession of land (i.e., occupation) was the only mode by which to acquire property."⁷³ In Justinian's Institutes, Epstein further notes, even common property

67. Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 371 (1954) ("Would you say then that there is no property without sovereignty and that property relationships always involve government, in other words that property is a function of government or sovereignty?").

68. See Corbin, *supra* note 43, at 502 (arguing that the government's willingness to recognize and enforce such a duty creates the right).

69. *Id.* at 509.

70. See Cohen, *supra* note 62, at 12 (defining property rights in terms of governmental enforceability).

71. *Id.*

72. Epstein, *supra* note 20, at 227.

73. *Id.* at 229.

(i.e., air, lakes, rivers, and the shoreline) arises under natural law, giving access to these resources to all individuals in their private capacities with no element of centralized control.⁷⁴

4. Property as a Malleable Bundle

The fourth fundamental intuition of the bundle of rights approach is that the bundle is malleable rather than having a prefixed and coherent structure or essence. Courts and legislatures may shape an owner's bundle in a variety of ways for regulatory or redistributive purposes. They may take out or curb specific sticks, and the bundle will still be property. Hohfeld paved the way for this intuition by arguing that the design of jural relations—for example, whether a privilege or liberty to deal with others at will should be paired with any peculiar concomitant rights against third parties as regards certain types of interference—is ultimately a question of justice and policy.⁷⁵ The realists carried Hohfeld's argument further. Property is neither a preexisting economic nor ethical fact. Property rights are shaped by courts and legislatures based on considerations of policy or ethics. "Orthodox legal theology," as Felix Cohen called conceptualist legal reasoning, obscures the design work done by courts.⁷⁶ The property rights of utility companies provide a good illustration of how courts shape the property bundle. In Felix Cohen's words, the actual value of a utility's property is a function of courts' decisions, and courts' decisions cannot be based in fact upon the actual value of the property. Courts create that value; prior to their decisions, it is not an economic fact. Nor is the value an ethical fact based upon a determination, in light of social facts and social policies, of the amount that a given utility ought to be allowed to charge its patrons.⁷⁷

If property is a variable bundle of sticks, rather than a preexisting and fixed package, courts and legislatures may add or remove sticks to achieve a variety of social goals. For example, at times, because large-property owners exert power on others, the government includes in their bundle not only rights but also duties. As an illustration, Morris Cohen noted:

74. *Id.* at 228.

75. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, *supra* note 37, at 36.

76. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815–18 (1935).

77. See *id.* at 818 (using utility providers as an example of judicial shaping of property rights).

[T]he owner of a tenement house in a modern city is in fact a public official and has all sorts of positive duties. He must keep the halls lighted, he must see that the roof does not leak, that there are fire escape facilities, he must remove tenants guilty of certain public immoralities etc and he is compensated by the fees of his tenants which the law is beginning to regulate.⁷⁸

Similarly, Cohen continued, there is generally no reason to insist that people should make the most economic use of their property. By and large, owners make good use of their property out of self-interest, and the cost of government enforcement would be prohibitive. "Yet," Cohen added, "there may be times, such as occurred during the late war, when the state may insist that man shall cultivate the soil intensively and be otherwise engaged in socially productive work."⁷⁹

At other times, the government curbs owners' entitlements. In regulating the rates of utilities, Hale noted, the law is experimenting with curbing owners' entitlements. The revision of property rights worked out within the utility field may serve as a model for the revision of other property rights.⁸⁰ In other words, the job of courts is to critically assess the justifications for the various sticks in the bundle. The result of this assessment, Hale notes, "might be radical; if so it would be because, on a piecemeal and candid review, many of the incidents of property would prove themselves to be without justification."⁸¹ This judicial and legislative job of tweaking the owners' entitlements, Hale argues, is vital to the very survival and solidity of property as an institution. "If property is not revised methodically by its friends," Hale suggests, "it is likely to be revised unmethodically by its enemies, with disastrous results."⁸²

The realists' idea that the property bundle is malleable is widely accepted by property scholars as well as by the Supreme Court. Bruce Ackerman noted in 1977 that the "Scientific Policymaker" (i.e., any legal professional trained in the postrealist era) is aware that "the ways in which users' rights may be packaged and distributed are wondrously diverse."⁸³ What separates the "Ordinary Observer" (i.e., the layman) from the Scientific Policymaker is that the former commits "the error of thinking that 'the' property owner, by virtue of being 'the' property owner must *necessarily* own a *particular* bundle of rights over a thing."⁸⁴

78. Cohen, *supra* note 62, at 26.

79. *Id.*

80. See Hale, *supra* note 65, at 213, 216 (highlighting utilities as an example of the law limiting property owners' entitlements).

81. *Id.* at 216.

82. *Id.*

83. ACKERMAN, *supra* note 6, at 26.

84. *Id.* at 27.

The Supreme Court has also embraced this malleability view in regulatory takings cases, suggesting that, because the bundle is malleable, a regulation that deprives the owner of only one stick does not amount to a taking, which would require just compensation. In *Penn Central Transportation Co. v. New York City*, the Court held that a historic-preservation law that deprived Grand Central Station's owners of the right to develop the air rights of the Terminal site did not constitute a taking.⁸⁵ The Court noted that "the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."⁸⁶ Similarly, in *Andrus v. Allard*, the Court held that the Eagle Protection Act's ban on the sale of golden eagles or artifacts made with eagles' feathers did not constitute a taking.⁸⁷ Again, the Court suggested the bundle is malleable. "The denial of one traditional property right," Justice Brennan noted, does not always amount to a taking. "At least where an owner possesses a 'full' bundle of property rights," Brennan continued, the destruction of one " 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."⁸⁸

While the bundle of rights approach is largely thought to imply that the bundle is malleable and that the state may drop or curb sticks without taking owners' property rights, it may easily be taken to suggest the opposite. For Richard Epstein, the bundle of rights image may be seen equally well as giving a strong and internally coherent notion of property.⁸⁹ For Epstein, the bundle includes possession, use, and disposition. In other words, the bundle metaphor may be used to refer not to a nominalist claim about property (i.e., property is whatever set of sticks the state bundles together) but to a fixed and coherent set of entitlements. For example, Eric Claeys has noted that if we agree that property protects the owner's interest to exclusively determine how a resource may be used, then a bundle

85. See generally *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

86. *Id.* at 130.

87. *Andrus v. Allard*, 444 U.S. 51, 68 (1979).

88. *Id.* at 66.

89. Epstein, *supra* note 20, at 226; see also Richard A. Epstein, *Property and Necessity*, 13 HARV. J.L. & PUB. POL'Y 2, 3 (1990):

By using that [bundle of sticks] metaphor you get the impression that these sticks have been hastily thrown together, that they are not all quite the same length and that it is almost a matter of random choice that they stand next to one another. I suggest the bundle of rights normally associated with the concept of property, far from being randomly and fortuitously put together, actually coheres and forms the basis of huge portions of the terrain of the ordinary common law.

conception can explain why all the various entitlements that go into the bundle belong there.⁹⁰ In turn, this coherent and coordinated bundle concept works as a trump against government confiscation.⁹¹ The state takes property whenever it takes any stick out of an owner's bundle.

B. The Ownership Model

Until recently, it seemed that the bundle of sticks model had become the dominant model. It had largely supplanted the ownership model in scholarly debates, gaining wide acceptance in both the law-and-economics and progressive circles. Moreover, it had become the basic analytical framework taught in most law schools' first-year property courses. According to Lawrence Becker, the bundle of sticks model was, in Kuhnian language, "normal science." In recent years, however, the ownership model has regained some of its lost terrain. Scholars writing in the classical-liberal tradition, as well as in the law-and-economics approach, argue that the ownership model has several advantages over the bundle of sticks concept.

1. Analytical Clarity

The idea that the ownership model is analytically and descriptively preferable to the bundle of sticks concept is most famously associated with the work of J.E. Penner. Penner has repeatedly argued that the bundle of sticks concept is not simply "an otiose bit of intellectual flotsam"; rather, it is "positively pernicious."⁹² It obscures more than it illuminates. It obscures the distinction between property rights and other legal relations, and it marginalizes the idea of property as a right to a thing, generating the illusion that we can have a workable idea of property without having a workable idea of the things that can be owned.⁹³ For Penner, a more precise

90. Claeys, *Bundle-of-Sticks Notions*, *supra* note 15, at 215:

[A]nalytically a bundle conception can explain why any slice of pizza is still pizza and it can describe and account for all the slices of a single pizza even if those slices come in different shapes and sizes. Yet one needs a separate definition of pizza to determine whether a bagel pizza or any slice of it really counts as pizza. So too with property.

See also id. at 211.

91. *See id.* at 211; Epstein, *supra* note 20, at 224 ("But I am a classical liberal and I think the bundle of rights image rightly understood offers the best path to preserving the institution of limited government.").

92. J. E. Penner, *Potentiality, Actuality and Stick-Theory*, 8 ECON. J. WATCH 274, 274–78 (2011).

93. *See* J. E. Penner, *The Bundle of Rights Picture of Property*, 43 UCLA L. REV. 711, 724 (1996).

reformulation of the layman's idea that property is a right to a thing—an idea widely disparaged in postrealist times—may provide a better grasp of the distinctive nature of property.

Penner's reformulation highlights two features of property: "thinghood" and "non-interference." Property entails the general duty not to interfere with particular things. As such, property is a relation among persons, as the bundle of sticks concept suggests, but a relation that is always mediated by a thing with certain characteristics, a thing that is only contingently ours and could just as well be someone else's. The thinghood criterion differentiates property from personal rights or "personality-rich" relationships, such as rights arising from a labor contract or the right not to be murdered.⁹⁴ While we could notionally regard the object of the right, the contractual relation, or the protection of one's life as things, the conceptual impossibility of separating these things from the person who has them removes them from the realm of things that can be property.

The duty to respect property by noninterference is a second feature that distinguishes property from personal rights. This duty is a general duty—a blanket prohibition; it does not involve the duty over in any personal dealing with the owner in order to respect his ownership. Penner explains: "[T]he scope of the right is not to be visualized as an owner's possession of billions of personal rights against others, each of whom has individuated personal duties to every owner of property in respect of each of the things he owns. Rather, we all simply have a duty not to interfere with the property of others . . ."⁹⁵ It is an impersonal duty because we do not need to know who owns what to comply with it.

2. An Efficient Delineation Strategy

Another merit of the ownership model is that it is the most efficient way of designing property rights. This argument is an important theme in the work of Thomas Merrill and Henry Smith. The bundle of sticks concept, Smith argues, obscures the architecture of property, which emerges in the course of protecting owners' interests in using things in a cost-effective way.⁹⁶ Property law, Smith argues, is a means to an end (i.e., the ability to use things and to do so with some security, stability, and flexibility). Property law serves this interest by employing a variety of delineation strategies. But, because

94. See *id.* at 802–05.

95. See *id.* at 808.

96. Smith, *Property Is Not Just a Bundle of Rights*, *supra* note 7, at 284.

the costs of delineation are not zero, the choice of strategy will depend not only on its benefits but also on its costs.⁹⁷ For this reason, the architecture of property has at its core an exclusion strategy. An exclusion strategy puts a thing under an owner's control and prohibits nonowners from using, possessing, or interfering in any way with the owner's thing without the owner's consent. This strategy is insensitive to context in that it does not require information about the uses, their interactions, or the user.⁹⁸ Hence, the strategy is cost effective. It is a convenient starting point—a rough first cut.

Exclusion is not a value or an end in itself. It is a means to an end.⁹⁹ Nor is it absolute. This architecture based on exclusion is refined by a governance strategy, which often entails exceptions to the right to exclude.¹⁰⁰ A governance strategy deals with spillover effects and scale problems by facilitating coordination between uses. It requires contextual information about the nature of uses and their interactions, as well as about users, and hence it is more costly. It is supplied by government or through fine-grained contracting among interested parties. In a zero-transaction-cost world, we could use governance all the time, but in our world, contextualized governance is too costly.¹⁰¹ The bundle of sticks model misses this architecture made of a core of exclusion refined by governance. It misses the fact that the right to exclude is not a stick or a freestanding interest that can be added or subtracted without changing the rest of the setup. Rather, the right to exclude is the core of property; it is an integral product of this delineation process.¹⁰² As Thomas Merrill put it, "[T]he

97. *Id.* at 281.

98. *Id.* at 282.

99. *Id.* at 281.

100. *Id.*

101. *Id.* at 282.

102. See Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) [hereinafter Merrill, *Right to Exclude*] (describing the right to exclude as the *sin que non* of property rights). Thomas Merrill has suggested replacing the bundle metaphor with the image of property as a prism. See Thomas W. Merrill, *The Property Prism*, 8 ECON. J. WATCH 247, 254 (2011) [hereinafter Merrill, *The Property Prism*]. For Merrill, like the bundle metaphor, the prism image conveys the complexity of property, the fact that property is heterogeneous and cannot be reduced to simple maxims about ownership sovereignty. *Id.* at 252. But unlike the bundle concept, the prism tells us that property is not a random collection of sticks but has an inherent structural integrity whose shape can be explained by information costs. For Merrill, property is a prism that takes on a different color from different angles. Each angle corresponds to an "audience" of property rules. From the "stranger" angle property takes on a red light: it is a very simple "keep out" rule. For potential transactors, who look out for particular types of property to purchase or rent, property takes on an amber light. Here, property presents itself in a finite number of standard forms: the fee simple, the trust, the easement, the condominium, etc. These forms are sufficiently numerous for users to achieve different objectives but sufficiently standardized to lower information costs. For a third audience, persons inside the "zone of privity"

right to exclude is more than just one of the most essential constituents of property—it is the *sine qua non*.” Give someone the right to exclude others from a valued resource, Merrill noted, and you give them property; deny someone the exclusion right, and they do not have property.¹⁰³

3. The Morality of Ownership

Another merit of the ownership model, its proponents argue, is that it reflects and boosts the moral significance of property. In civil law systems, the question of the morality of the ownership model was an important theme in a natural law tradition running from Gratian, the medieval canon lawyer, to Francisco de Vitoria and Francisco Suarez, the Spanish Scholastics of the sixteenth century, to Kant’s Doctrine of Right.¹⁰⁴ For this tradition, at first God gave the whole world to humans in common. Natural law obliged humans to seek their own perfection and gave them freedom to do whatever was conducive to that end. In other words, “permissive natural law” defined an area of human freedom where a judgment of practical reason could decide, according to circumstances, how to fulfill the law obliging to self-perfection. Because it is natural for common things to be neglected, and because life had lost the simplicity that had characterized the primeval community, permissive natural law authorized individuals to occupy things held in common. This permission had annexed a command that others should not disturb the occupant. Hence, it was the natural law obligation of self-perfection that justified ownership and exclusion.¹⁰⁵

(e.g., bailors and bailees, landlords and tenants, cotenants, etc.), the prism reveals a green light. Persons inside this zone can bargain to achieve an immense variety of rules and practices. The explanation for allowing great contractual freedom is information costs. Idiosyncratic rules are useful to achieve a variety of purposes, and the costs of learning about these idiosyncratic rules are low for persons inside the zone. Finally, for the audience of neighbors, the prism reflects a white light. The law regulates spillover effects through a combination of *ex ante* rules, such as zoning and covenants, and *ex post* liability rules in nuisance. The higher information costs are tolerable because legal intervention to protect neighbors tends to be “episodic.”

103. Merrill, *The Property Prism*, *supra* note 102, at 254.

104. See Brian Tierney, *Kant on Property: The Problem of Permissive Law*, 62 J. HIST. IDEAS 301, 301–12 (2001); Brian Tierney, *Permissive Natural Law and Property: Gratian to Kant*, 62 J. HIST. IDEAS 381, 381–99 (2001) [hereinafter Tierney, *Permissive Natural Law*].

105. See Tierney, *Permissive Natural Law*, *supra* note 104, at 385–87, 393–96. Tierney points out the contradictions in Kant’s argument. Earlier theories of natural law, from Gratian to Wolff, had based the permissive natural law authorizing private property on considerations of necessity and utility and on a view of humans as frail and sinful and yet capable of moral discernment and of working out institutions that would enhance human life. Because they were arguing on pragmatic grounds, earlier authors could formulate their theories without contradictions. They did not find it necessary to propose a natural law of pure reason concerning

Contemporary advocates of the ownership model also place the moral advantages of the model in the foreground. They argue that the bundle of rights model dismisses the traditional everyday morality of property and regards property rights as plastic in the hands of the enlightened social engineer.¹⁰⁶ By contrast, the ownership model requires acknowledgement of the moral significance of property.¹⁰⁷ However, these theorists' understanding of the morality of property differs from the natural law tradition.

The contemporary advocates of the ownership model view the morality of property in instrumentalist terms. Acknowledgment of the moral significance of property rights is necessary for the proper functioning of the property system, the paramount aim of which is to coordinate property users in a cost-effective way.¹⁰⁸ Merrill and Smith note that no system of property rights can survive unless property ownership is infused with moral significance. For property to work as a device coordinating interactions over things, the right to exclude must be viewed by members of the community as a moral right.¹⁰⁹ Both law and self-help are inadequate to achieve the level of compliance required. The formal legal protection of property is modest, both in terms of the severity of sanctions and the frequency of enforcement actions. Further, when the legal protection of property loses touch with common morality, as is the case with downloading copyrighted material from the Internet today, there is widespread

universal freedom and hence were able to explain without contradictions how permissive natural law could give rise to an obligation imposed on nonowners not to interfere with owners' property. Because common ownership would be neglected and would give rise to dissent and strife, permissive natural law authorized individuals to occupy things and imposed on nonowners a duty to abstain from interference. But Kant's arguments were metaphysical, not pragmatic. Kant excluded any appeal to human inclinations and argued based on a concept of freedom understood as a pure rational concept. Hence, Kant's argument ran into a number of contradictions. Kant maintained that every person had an innate right to freedom and from this he deduced a universal law of Right: act externally so that the free use of your choice can coexist with the freedom of everyone. But the person who first seized for himself what had been common to all evidently did encroach on the freedom of others. To solve this problem, Kant formulated a postulate of practical reason concerning property. He argued, citing the Roman doctrine of *res nullius*, that external things could be occupied, and he restated the postulate as a permissive law of practical reason that gives us authorization to put others under an obligation not to interfere with the occupant's property. But to put others under an obligation is to encroach on their freedom, which would be a violation of the universal law of Right. It seems therefore that natural law contradicted itself: it prohibited and permitted an action at the same time. *Id.* at 381–82.

106. Merrill & Smith, *supra* note 16, at 1867–70.

107. See *id.* at 1868 (citing the work of Felix Cohen in establishing the necessity of a morality-based view of property rights).

108. On the instrumental character of Smith's moral theory of property, see Eric R. Claeys, *Exclusion and Private Law Theory: A Comment on Property as the Law of Things*, 125 HARV. L. REV. F. 133, 137–39 (2012).

109. Merrill & Smith, *supra* note 16, at 1850.

disregard of legally recognized property rights. Self-help is also unlikely to sustain a system of property rights. Self-help works best in communities that have a strong sense of the moral importance of property rights. Further, the very process of using self-help is governed by moral norms that tell owners when and how much to retaliate against an infringement of their rights.¹¹⁰

The morality upon which a property system rests must be simple and accessible to all members of the community.¹¹¹ Merrill and Smith acknowledge that there are different moralities of property coming from different sources. They do not offer a theory of the content of property's morality. Instead, they argue that this morality must be simple, comprehensible, and suitable for all members of the community. Any moral theory that endorses general, simple, and robust rules for core property situations would be consistent with their view of the relation of morality to property law.¹¹²

II. THE TREE MODEL OF PROPERTY

A. *The Political and Methodological Context for the Tree Concept of Property*

At approximately the same time Hohfeld and the realists were developing the bundle of sticks image, continental European jurists were also revolutionizing their understanding of the concept of property. They argued that the ownership concept of property adopted in the Code Napoleon and the other European codes was a fiction, rooted in the ideology of the French Revolution.¹¹³ By contrast, they

110. See *id.* at 1855–56 (although these governing moral norms only work when they are “easy to communicate and shared by the relevant members of the population”).

111. *Id.* at 1855.

112. *Id.* at 1855–56.

113. The impetus for the new property came from a long-felt dissatisfaction with the ownership concept of property. Francesco Ferrara, professor at the University of Pisa and prominent property scholar, started his 1935 essay *Property As a Social Duty* by discussing the shortcomings of the ownership model of property. Under the ownership approach, Ferrara noted, property is considered a “*ius plenum in re corporali*” (i.e., a unitary aggregate of rights to use and dispose that gives the owner the fullest and most absolute “sovereignty” over a physical thing). Writers who seek to define property, Ferrara further noted, highlight its abstract, universal, and perpetual character. The owner’s right extends to any external thing that may be used, regardless of the different relevance that different resources have for the public interest. In the case of land, the owner’s right extends to everything that is under or above the surface. The owner’s right confers exclusive absolute powers to use or not to use the thing. A landowner, Ferrara suggested, is equally acting within his right whether he productively cultivates his land or whether he abandons it to the weeds. In case of conflict between the owner’s right and the public interest, the former is to be privileged. Under the traditional approach, Ferrara notes, this

developed a new concept of property, the tree concept of property, that rested on some of the same intuitions embraced by the bundle of sticks approach.

The foundations for the tree model of property were laid by French jurists at the beginning of the twentieth century, but most of the craft work was done in the 1930s in Italy.¹¹⁴ The proving ground for the tree concept was the debate over the new draft Italian Civil Code, which would be approved in 1942. The old 1865 Italian Civil Code was largely an adaptation of the French Code Napoleon.¹¹⁵ As the latter, it was a code of property (i.e., property law was the central pillar of the code).¹¹⁶ The Civil Code was organized in three books, two of which were devoted to property and modes of acquiring property.¹¹⁷ The Civil Code's definition of property was based on the ownership model. As in the Code Napoleon, property was defined as the right to use and dispose of things in the most absolute way, provided they are not used in a way prohibited by laws and regulations.¹¹⁸ The drafting of a new civil code was the occasion to draw a new concept of property that would reflect the many ways property law had changed in real life.

The decades between 1850 and 1920 witnessed momentous economic, social, and political changes: the rapid industrialization of late blooming economies such as France and Italy, the agrarian crisis of the 1880s, World War I, the crisis of liberalism, and the rise of Fascism. Under the pressure of these events, lawmakers passed

is a necessary evil. See Francesco Ferrara, *La Proprietà come Dovere Sociale*, in LA CONCEZIONE FASCISTA DELLA PROPRIETÀ PRIVATA 277 (1935).

114. The idea of property as a tree with a unitary trunk and many branches was Pugliatti's, but the intuition that property has many branches was first outlined by Louis Josserand. See Louis Josserand, *Configuration du Droit de Propriete Dans L'ordre Juridique Noveau*, in MELANGES SUGIYAMA 101–03 (1940):

Even if we limit our investigation to real property, we find that, within this genre there are multiple species. Agricultural land is treated differently than urban real estate. In France a rural code is being drafted that contains all the rules regulating agricultural life and in most countries, most notably in Italy, an agrarian law is developing; a prominent legal innovation that is attracting the attention of lawmakers and law professors, in universities as well as in the official palaces. And other special regimes have developed within real property; family property has its own regime and so does low-income housing.

115. DOMENICO CORRADINI, GARANTISMO E STATUALISMO: LE CODIFICAZIONI CIVILISTICHE DELL'OTTOCENTO 125 (1986); CARLO GHISALBERTI, LA CODIFICAZIONE DEL DIRITTO IN ITALIA 1865–1942, at 251 (1985); STEFANO RODOTÀ, IL TERRIBILE DIRITTO. STUDI SULLA PROPRIETÀ PRIVATA (1990).

116. CORRADINI, *supra* note 115, at 125–26.

117. *Id.* at 126.

118. See Codice Civile [C.c.] 1865 art. 436 (It.), available at <http://giurisprudenza.unica.it/dlf/home/portali/unigiurisprudenza/UserFiles/File/Utenti/c.cicero/dispense/Proprieta.pdf>.

“emergency” or “special” legislation that significantly altered the rules of property.¹¹⁹

First, property was becoming increasingly incorporeal. Patents, trademarks, and *fonds de commerce* were new crucial intangible forms of property.¹²⁰ Second, property rights were becoming limited and specialized.¹²¹ The owner’s right is not the same regardless of whether it pertains to a piece of furniture, an antique painting, a parcel of agricultural land, or an industrial plant. In both Italy and France, early twentieth-century legislative provisions limited the use rights and transfer rights of owners of things of historical and artistic interest.¹²² In Italy, starting in the 1920s, land reclamation laws imposed duties on owners to improve and to cultivate their land. The Italian government also subjected owners of utilities or industries of critical importance for the national economy, such as textile or manufacturing, to duties and limits. Emergency legislation passed during World War I further limited the rights of owners of specific resources, in particular their rights to be immune from having their property taken. Military authorities could temporarily occupy or use resources important for national security, such as land, buildings, or means of transportation.¹²³

Third, the end of the nineteenth century and the beginning of the twentieth century witnessed changes in the boundaries between private property and public property. The inventory of resources subtracted from private property and held by the state in trust for the public was expanded. Water, forests, and mines became largely public property.

Fourth, property rights were relativized: that is, protection of the owner’s absolute rights was no longer the paramount concern. Equal access to property and promotion of the public interest became part of the vocabulary of property debates. In the wake of the agrarian crisis that struck Europe in the 1880s, the need to redress inequalities in the distribution of land became a heated topic of policy debates. In

119. For a discussion of how special legislation decodified private law, i.e., marginalized the rules of private law contained in the Civil Code, see generally NATALINO IRITI, L’ETA DELLA DECODIFICAZIONE (1989). While Iriti described the process as one of decodification, Pugliatti and Josserand referred to special legislation as “the new legal order” (“nuovo diritto”, “ordre juridique nouveau”). See PUGLIATTI, *supra* note 8; Josserand, *supra* note 114.

120. Josserand, *supra* note 114, at 104.

121. PUGLIATTI, *supra* note 8, at 1–33 (discussing the special rules for a variety of resources including mines, railways, water, urban streets, etc.).

122. Josserand, *supra* note 114, at 105; Filippo Vassalli, *Per Una Definizione Legislativa del Diritto di Proprietà*, in LA CONCEZIONE FASCISTA DELLA PROPRIETÀ PRIVATA, *supra* note 113, at 99.

123. PUGLIATTI, *supra* note 8, at 23–24.

Italy and France, policymakers and lawmakers pondered the pros and cons of private property and common property as alternative means for promoting more equal access to land.¹²⁴ Owners' immunity from having their property taken was also becoming more limited. In France, for example, the *decret-loi*¹²⁵ of August 8, 1935 modified the procedure for assessing just compensation in takings. Under the new procedure, the award was no longer determined by a *jury*, which would have been largely sympathetic to private owners. Instead, the award was assessed by a *commission arbitrale* composed of one *contribuable*—that is, a taxpayer who represented the interest of private owners—and a majority of public officials representing the interest of the government.¹²⁶

While property had become increasingly incorporeal, specialized, and relative under the pressure of social and economic change, the most dramatic change in the discourse of property lawyers came with the rise of Fascism in Italy. The Fascist regime sought to redesign property law so that it would provide the legal framework for the new corporatist economic system. Italian Fascism was the outcome of the economic and social crisis of late nineteenth-century Italy, which was greatly exacerbated by the First World War.¹²⁷ The so-called Liberal Italy (i.e., the liberal-constitutional monarchy that governed Italy between 1861 and 1919) was the creation of a tiny northern elite, disconnected from the mass of the population. Liberal Italy enjoyed rapid but uneven economic development, resulting in the coexistence of a modern industrial sector alongside a backward artisan sector and rural cottage industry. In the agricultural sector, large-scale capitalist production in the northern Po Valley coexisted with the small-scale subsistence farming in the rest of the country.¹²⁸

This uneven development gave rise to a large and strong urban and industrial proletariat. The liberal monarchy failed to broaden its

124. See generally PAOLO GROSSI, AN ALTERNATIVE TO PRIVATE PROPERTY (1981) (discussing the European controversy of collective ownership, specifically the Italian experience); NADINE VIVIER, PROPRIETE COLLECTIVE ET IDENTITE COMMUNALE : LES BIENS COMMUNAUX EN FRANCE (1750-1914) (1999). For a study of collective property in different European countries, see MARIE-DANIELLE DEMELAS & NADINE VIVIER, LES PROPRIETES COLLECTIVES FACE AUX ATTAQUES LIBERALES (1750-1914) (Marie-Danielle Demelas & Nadine Vivier eds., 2003). On the debate over common ownership in late nineteenth-century Europe, see Anna di Robilant, *Common Ownership and Equality of Autonomy*, 58 MCGILL L.J. (forthcoming 2013) (on file with author).

125. A *decret-loi* is a statutory order proposed by the executive.

126. Josserand, *supra* note 114, at 104.

127. On the crisis of liberalism and the rise of Fascism in Italy, see generally MARCELLO DE CECCO, *The Economy from Liberalism to Fascism*, in LIBERAL AND FASCIST ITALY 1900-1945, at 62 (Adrian Lyttleton ed., 2002); JOHN POLLARD, THE FASCIST EXPERIENCE IN ITALY (1998); CHRISTOPHER SETON-WATSON, ITALY FROM LIBERALISM TO FASCISM 1870-1925 (1967).

128. POLLARD, *supra* note 127, at 1-19.

base and to respond to the working class movement's demands for change. World War I worsened the economic situation, exposed the incompetence of the liberal political class, and further radicalized the masses.¹²⁹ The years 1918–20 witnessed mass unrest and were dubbed "the Two Red Years."¹³⁰ The parliamentary system became paralyzed, and Fascism's rise to power was extremely rapid.¹³¹ Fascism sought to replace the weak liberal state with an authoritarian corporatist state.¹³² The corporatist system was seen as an alternative to the evils of individualistic liberalism and collectivist Bolshevism.¹³³ Corporatism sought to overcome social conflict by organizing society and the economy into associations (or corporations) of workers and employers and by facilitating cooperation between them in the national interest.¹³⁴

The new Civil Code was one of the first and most publicized efforts of Fascism.¹³⁵ It sought to establish a new private law framework for the corporatist state.¹³⁶ Specifically, the law of property was of critical importance for establishing and sustaining a corporatist system. The new relations of production between workers and employers needed to rest on new property relations. Hence, the Fascist regime invested a great deal of energy in the fascistization of property law.

The Fascist Confederation of Agricultural Workers convened its first national conference of agrarian law in Rome in 1935. The topic of the conference was "The Fascist Concept of Private Property." Fascist property scholars agreed on the importance of private property. Carlo Costamagna, member of the Commission of the Eighteen (the legislative commission that drafted the law on

129. *Id.* at 19–39.

130. *Id.* at 27–28.

131. PAOLO GROSSI, A HISTORY OF EUROPEAN LAW 154 (Laurence Hooper trans., Wiley-Blackwell 2010).

132. *Id.* at 155.

133. *Id.*

134. *Id.* at 141.

135. *Id.* at 154.

136. See Whitman, *supra* note 11, at 752:

The term "corporatism" is by no means easy to define. As a general matter, one can say that corporatism is the body of political theory that seeks to establish a modern guild order; an order, that is, somehow founded neither on state power nor on individual liberty, but on the autonomy of guild-like intermediary bodies, such as unions and professional associations. Yet such intermediary bodies appear in all modern societies; what is it that distinguishes specifically *corporatist* intermediate bodies from others? Unfortunately, the best scholars at work on the subject have offered discussions that are cryptic or vague; we lack the sort of definition one wants most for a historical study: a definition both handy and exact.

corporations) and professor of corporatist law, emphasized that, as Mussolini himself had proclaimed, private property is a fundamental institution of the Fascist corporatist state.¹³⁷ Gino Arias, another member of the Commission, explained that “property complements personhood” and that “since property is the fruit of labor, and labor is the fundamental value of fascist doctrine, rejecting property would contradict the very foundations of fascism.”¹³⁸

Fascist property scholars did not do away with the classical-liberal vocabulary of property, with its emphasis on personhood and labor. The central theme of their writings, however, was the idea that the individual owner’s interest is subordinated to the larger interest of the Fascist state. Fascist literature identified the interest of the state in the promotion of the necessities of national production. In Fascist literature, productive efficiency often prevailed over the preservation of ethnic purity.¹³⁹ Mussolini’s project of economic autarky (i.e., economic self-sufficiency) made productive efficiency a priority. In the mid-1930s (there were a number of famous autarky speeches, one in Bolzano in 1935 and one in 1936, so mid-1930s is more accurate), Mussolini announced to the world that Italy would manage alone.¹⁴⁰ World War I had exposed the weaknesses of the Italian economy and its dependence on foreign economies. Fascism launched a huge propaganda campaign and a set of policy measures designed to achieve economic autarky. The 1927 Labor Chart (the document that spelled out the fundamental tenets of Fascist doctrine) exalted the theme of enterprise productivity and economic solidarity in the superior interest of the nation. Article 1 stated that “the Italian

137. Domenico Carbone, *La Proprietà Nella Dottrina Fascista*, in LO STATO: RIVISTA DI SCIENZE GIURIDICHE, ECONOMICHE E SOCIALI 6, 16 n.7 (1936). For more information on Carlo Costamagna, see Monica Toraldo di Francia, *Per un Corporativismo Senza Corporazioni: Lo Stato di Carlo Costamagna*, 18 QUADERNI FIORENTINI 267, 267–327 (1989).

138. Gino Arias, *La Proprietà Privata nel Diritto Fascista*, in LO STATO: RIVISTA DI SCIENZE GIURIDICHE, ECONOMICHE E SOCIALI, *supra* note 137, at 332, 333 n.6.

139. Monateri & Somma, *supra* note 12, at 58 (arguing that “it is widely known that in the Nationalist Socialist ideology the group on which the destiny of the individuals depends, has in the first place a racial connotation”). However, references to its economic value often prevail and, together with them, statements regarding the subordination of the individual needs to the requirements of production. And, “in the Fascist literature the intent of supporting economic interests, and in particular the necessities of national production, prevails.” *Id.* at 60. Italian authors substantially agree (1) in believing that such circumstances may be ascribed to the development of the corporative idea of state and (2) in underlining that it led to exalting themes such as enterprise productivity and economic solidarity in the superior interest of the Nation.

140. POLLARD, *supra* note 127, at 88–90; Tiago Saraiva & M. Norton Wise, *Autarky/Autarchy: Genetics, Food Production, and the Building of Fascism*, 40 HIST. STUD. NAT. SCI. 419, 426 (2010). On corporatism and the productivist myth, see Traute Rafalski, *Social Planning and Corporatism: Modernization Tendencies in Italian Fascism*, 18 INT’L J. POL. ECON. 10, 32–35 (1988).

Nation is an organism with life, objectives, and means that are superior to those of the individuals who compose it. It is a moral, political and economic unity fully realized in the Fascist State.”¹⁴¹

Fascist property scholars saw no contradiction between subordinating individual property rights to the larger interest of the Fascist state and the liberal language of autonomy, personhood, and labor. Giovanni Gentile, the Italian philosopher who was the “ideologue” of the Fascist regime, resolved the contradiction in his theory of Italian liberalism, that is, Fascist liberalism.¹⁴² Fascist liberalism is true liberalism, according to Gentile. While decadent classical liberalism sees liberty from the point of view of the individual, true liberalism sees it from that of the state. Liberty is the supreme end and the norm of every human life, but it realizes itself in the common will, not in the individual will. The greatest liberty coincides with the greatest strength of the state. The state is an ethical entity: not an association between men (*inter homines*), rather an entity that every individual holds in her heart (*interiore homine*).¹⁴³ This ethical state that individuals hold in their hearts motivates them to act as statesmen, in the superior interest of the nation.¹⁴⁴

The property scholars who developed the tree concept of property worked against this background. Their commitment was twofold. At a descriptive level, they sought to draw a more modern concept of property, one that would, better than the ownership model, account for the changes in the real life of property (i.e., the relativization and specialization of property rights discussed above). At a normative level, the theorists of the tree concept of property sought to resist and to offer an alternative to the theory of “Fascist property.” To oppose the narrowly monistic Fascist theory of property—monistic in that it foregrounded one single value, the productive strength of the Fascist nation—they proposed a theory of property grounded in value pluralism. The tree concept of property, I

141. CARTA DEL LAVORO art. 1 (1927), available at <http://www.upf.edu/materials/fhuma/hcu/docs/t5/art/art8.pdf>.

142. See GIOVANNI GENTILE, CHE COSA È IL FASCISMO (1924). For further narration on Gentile’s theory of Fascist liberalism, see NORBERTO BOBBIO, IDEOLOGICAL PROFILE OF TWENTIETH-CENTURY ITALY 127 (1995):

[T]here were two liberalisms, the atomistic liberalism of Enlightenment origins, and the Italian (or German) variety, in which ‘liberty is indeed the supreme end and the norm of every human life, but in so far as individual and social education realizes it, kindling in the individual the common will that is manifested as law, and therefore as state.’ This Italian liberalism was the same thing as fascism, ‘which sees no other individual subject of liberty than the person who feels pulsing in his own heart the superior interest of the community and the sovereign will of the State.’

143. BOBBIO, *supra* note 142, at 128.

144. *Id.*

will argue below, serves a fundamental commitment to individual owners' autonomous control, as well as to a plurality of public values, such as equitable access to resources, productive efficiency, and participatory management of resources.

Although the theorists of the tree concept of property had insights in many ways similar to those of the American realists, they worked in parochial isolation, largely ignoring the work done by their Anglo-American colleagues. Actually, the only American who appears in their footnotes is probably, today, the least well known of the analytical jurists, Henry Terry.¹⁴⁵ Also, unlike the American realists, they were perceived neither as methodological heretics nor as political radicals. Methodologically, the scholars who developed the tree model of property were influenced by the *Juristes Inquiets*,¹⁴⁶ a group of late nineteenth-century French jurists who had developed a sociological approach to legal analysis but were also steeped in traditional European conceptualism. For instance, Salvatore Pugliatti, the jurist to whom we owe the image of property as a tree, described his approach to property as an effort to reconcile conceptualism and sociological jurisprudence. More than any other legal institution, property reflects social reality, Pugliatti wrote.¹⁴⁷ Nevertheless, property scholars cannot do away with abstract schemes. Therefore, Pugliatti concluded, property scholarship oscillates between the two opposite poles of conceptual order and experience of real life.¹⁴⁸

As to their ideological and political leanings, the theorists of the tree model were very diverse. They were liberals, but with

145. MARIO ROTONDI, L'ABUSO DI DIRITTO 82 (1923).

146. Marie-Claire Belleau, *Les "Juristes Inquiets": Legal Classicism and Criticism in Early Twentieth Century France*, 1997 UTAH L. REV. 379. As to their methodological beliefs, the *Juristes Inquiets* believed in a blend of antiformalism, historical/sociological insights, and progressive political beliefs. Their antiformalism did not go as far as rejecting the very idea of a system of private law concepts. They retained the vocabulary of the system, but they showed the existence of gaps and contradictions in the system. As pioneers of a historical/sociological approach to law, they were interested in the social and historical fabric of law, and they sought to make the system more reflective of the actual fabric of law. Collective landownership had shown extraordinary social and historical vitality. A social and historical fact in need of conceptual systematization, collective property seemed to these innovative jurists the ideal object of investigation. For further information on the Italians, see PAOLO GROSSI, SCIENZA GIURIDICA ITALIANA: UN PROFILO STORICO 1860-1950, at ch. I (2000) (calling them "Heretics"). For further information on the Germans and in particular on the coexistence of the formalist idea of system with the historical/sociological approach, see Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C. L. REV. 837, 859-73 (1990). For further information on the politics of the *Juristes Inquiets* and their commitment to a moderately redistributive agenda, see Amr Shalakany, *Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamise*, 8 ISLAMIC LAW & SOC'Y 201, 214-17 (2001).

147. PUGLIATTI, *supra* note 8, at 147-48.

148. *Id.* at 148.

different backgrounds. Some were classical liberals with an interest in natural law. Others were influenced by Benedetto Croce's liberalism, a liberalism embedded in an idealist and historicist philosophy. Still others were social Catholics or had Socialist leanings.¹⁴⁹ As to their relationship to Fascism, they were anti-Fascist but never formally disassociated from the Fascist regime. They were part of the unheroic majority, the large group of intellectuals who did not support the regime and privately expressed condemnation, but never openly disassociated from it.¹⁵⁰

149. Lodovico Barassi (1873-1961) was a professor at the universities of Perugia, Genova, and Bari and at the Catholic University in Milan. Barassi was a classical liberal. See GROSSI, *supra* note 146, at 59–60 (describing Barassi as “openly annoyed by the general intellectual climate that marginalized the individual to foreground ‘the social’ and hostile to any excessive intrusion of state regulation but fully aware of the complexity of modern social life”). Salvatore Pugliatti (1903-1976) was a professor at the University of Messina, dean of the law faculty, and “Rettore” of the university (1957-1975). Pugliatti was an eclectic intellectual: a jurist, a literary critic, and a scholar in the history and criticism of music. An extremely prolific legal scholar, Pugliatti also published two essays on the interpretation of music: “*L'Interpretazione Musicale*,” in 1940, and “*Canti primitivi*,” in 1942. Culturally deeply rooted in his native Sicily, he was part of the Sicilian literary avant-garde and a lifelong friend and soulmate of poet Salvatore Quasimodo. Pugliatti was a Social Democrat, secular but with an interest in Catholic thought reflected in the many letters he exchanged with Giorgio La Pira, one of the most prominent figures in the Christian Democratic Party. For a further information on Pugliatti, see LUIGI FERLAZZO NATOLI, *NEL SEGNO DEL DESTINO, VITA DI SALVATORE PUGLIATTI* (2007); GIORGIO LA PIRA, *LETTERE A SALVATORE PUGLIATTI* (1920-1939) (1980). Widar Cesarin-Sforza (1886-1965) was a Catholic and philosophically committed to Italian idealism. As a Catholic, Cesarin-Sforza was close to the intellectual/ideological movement known as modernism (an attempt to provide a new reading of the texts of Christianity, more consonant with modern industrial society), a movement which was firmly condemned by the Vatican orthodoxy, in particular by Pius X's encyclical *Pascendi* (1907). Methodologically eclectic, Cesarin-Sforza applied to law the insights of religious modernism, thereby insisting on the need for a functional and nontextualist interpretation of legal texts. See GROSSI, *supra* note 146, at 102–03; Pietro Costa, *Widar Cesarin-Sforza, Illusioni e Certeze della Giurisprudenza*, in 5-6 QUADERNI FIORENTINI PER LA STORIA DEL PENSIERO GIURIDICO MODERNO 1031 (1976-77). Francesco Ferrara (1877-1941) was one of the most prominent and prolific jurists of the first half of the twentieth century, a professor at the University of Pisa and later of Naples, a classical liberal and, methodologically, a solid conceptualist. For further information on Ferrara, see GROSSI, *supra* note 146, at 76–79, 130–34. Filippo Vassalli (1855-1955) was a professor in the universities of Perugia, Camerino, Genova, and Torino and dean of the law faculty at Rome's La Sapienza University. Vassalli was the coordinator of the commission that drafted the Italian Civil Code of 1942. For further information on Vassalli, see G.B. FERRI, FILIPPO VASSALLI, O IL DIRITTO CIVILE COME OPERA D'ARTE (2002).

150. Salvatore Pugliatti maintained an ambiguous relationship to the Fascist regime. A critic of the regime, he maintained formal relations of affiliation and collaboration with the GUF, the Fascist association of university students and faculty. This formal affiliation allowed him to launch a number of cultural projects, including the experimental theatre project known as Teatro Sperimentale di Messina. His anti-Fascist sentiments are reflected in several anecdotes. Luigi Ferlazzo Natoli in his biography of Pugliatti tells that once Pugliatti showed up at a public event of the GUF with a white shirt rather than the black Fascist uniform. Ferlazzo Natoli also wrote that Pugliatti had been denounced as anti-Fascist, and the Fascist regime put him under surveillance. One day an employee of the postal office showed up at Pugliatti's home and handed

The uneasy tension between conceptualism and sociological insights, individualism and social impulses, and continuity and change that underlies the tree concept of property is the result of the effort to negotiate this complex set of events and influences.

B. The Tree Concept of Property

1. Property Comprises Analytically Distinct Entitlements

The first step in the design of the tree concept of property was to dissect property into its constitutive elements (i.e., the different sticks in the bundle.) The European theorists of the tree concept of property did not talk of a bundle or sticks, but like the realists, they recognized that property is a set of distinct entitlements that the government may reshape for regulatory or redistributive purposes. In the first chapter of his book "*La proprietà nel nuovo diritto*," Salvatore Pugliatti acknowledged that, "although we tend to think of property in unitary terms, as one right, in fact, property, as any other right, comprises different entitlements." It is neither easy nor possible to list all the entitlements, Pugliatti noted, but two clusters of entitlements need special mention: the right to use and the right to transfer.¹⁵¹ Both can be broken down further, into more specific entitlements. Along similar lines, Ludovico Barassi, another of the craftsmen of the new property, noted that jurists used to think of property as an unlimited right.¹⁵² "We have now concluded," Barassi continued, "that the content of property consists in a variety of specific entitlements, an exhaustive enumeration of which is not possible."¹⁵³

This was hardly a new insight. Since Roman law, civil law jurists had recognized that property consists of distinct entitlements,

him a letter. The letter was addressed to the Fascist authorities and was yet another denunciation of Pugliatti's anti-Fascism. It asked that Pugliatti be placed under a confinement regime in one of the Fascist confinement locations. The postal employee had seen the content of the letter and took it out of the mailbag to protect Pugliatti. See FERLAZZO NATOLI, *supra* note 149, at 62, 69. Cesarini-Sforza's relationship with Fascism was even more ambiguous. See Costa, *supra* note 149, at 1034 n.11. Historians of legal thought disagree on the role played by this unheroic majority. The conventional story is that this majority of liberals who kept their academic jobs and resisted from within, continuing their work as scholars and teachers, prevented the penetration of Fascist ideas into law and hence shielded the legal system from Fascism. More recently, others have cast doubt on this narrative, suggesting that this ample circle of intellectuals who did not openly dissociate from the regime made the totalitarian perversion possible. See Monateri & Somma, *supra* note 12, at 56.

151. Salvatore Pugliatti, *Strumenti Tecnico-Giuridici per la Tutela dell'Interesse Pubblico nella Proprietà*, in *LA CONCEZIONE FASCISTA DELLA PROPRIETÀ PRIVATA*, *supra* note 113, at 161.

152. Ludovico Barassi, *Il Diritto di Proprietà e la Funzione Sociale*, in *LA CONCEZIONE FASCISTA DELLA PROPRIETÀ PRIVATA*, *supra* note 113, at 183, 186.

153. *Id.*

and that owners may parcel out some of these entitlements and still be owners. Roman *dominium*, the earliest progenitor of the ownership model of property, was the owner's plenary control over an object availing against the world. It was the largest aggregate of entitlements. The owner, or *dominus*, has the *ius utendi*, *fruendi*, *abutendi*.¹⁵⁴ The *ius utendi* is the right to make use of the thing to the exclusion of all others, the *ius fruendi* is the right to reap all the benefits capable of being legitimately derived from the thing, and the *ius abutendi* involves the right of consumption, destruction, and the right to freely dispose of it during her lifetime or at her death. *Dominium* was *plenum* (full) when all these rights were vested in the owner herself. The owner, however, may choose to transfer certain rights to another person. For example, she may transfer the right to use and to reap the civil and natural fruits of the thing to another person called an *usufructuary*. The *dominus* remains a *dominus* even though her rights are now restricted and qualified by the *usufructus*. Her *dominium* does not lose its essential character.¹⁵⁵

What was new was the emphasis on the state's role in curbing or reshaping ownership entitlements. In other words, like the realists, the theorists of the tree concept of property called attention to the fact that not only the owner can reshape the standard set of property entitlements, as civil law jurists had long recognized, but also the state may do so. Pugliatti devoted a long essay to the regulatory limits to property entitlements.¹⁵⁶ Limits to the right to use were not too puzzling to civil law jurists. After all, the Code Napoleon clearly said that property is the right to use and dispose of things in the most absolute way, *provided they are not used in a way prohibited by laws and regulations*. Hence, setback and height requirements, the prohibition to erect constructions on certain types of land such as forest land, or the need to request authorization to plant certain types of crops, were seen as mere conditions for the exercise of the right to use. These conditions were justified by the need to coordinate the interests of neighboring owners, or to mediate between the interests of owners and that of the collectivity.¹⁵⁷ By contrast, limits on the right to transfer—such as the requirement of previous governmental authorization for the transfer of things of historical and artistic interest or the requisition of aircrafts or horses in time of war—were

154. W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW: FROM AUGUSTUS TO JUSTINIAN 187–88 (3d ed., Peter Stein rev. ed. 2007).

155. *Id.* at 187.

156. PUGLIATTI, *supra* note 8, at 252 (“*Interesse pubblico e privato nel diritto di proprietà*.”).

157. *Id.* at 16–22.

perceived as more pervasive intrusions on ownership. But, Pugliatti warned, they are not. They are similar in nature to limits on use rights. They are suspensions of the right to transfer justified by the government's interest in controlling resources that are critical for the public interest. The right to transfer property, Pugliatti noted, is not an essential element of property.¹⁵⁸ State regulation may limit or take the right and the property will still be property.

2. The Trunk of the Property Tree: Autonomous-Control Rights and Social Function

a. The Individualist Element

Contrary to the realist and many postrealist property analysts, the Europeans discussed the owner's distinct entitlements but never lost sight of the overall structure of property. The structure of property, Pugliatti wrote, resembles that of a tree with a unitary trunk and many branches.¹⁵⁹ The trunk is the essence of property, the core entitlement or entitlements that are necessary for a right over a thing to be property. While Lodovico Barassi vaguely described this core as "the owner's sovereignty," Pugliatti argued that the core is the owner's right to exclusively control the use of a resource.¹⁶⁰ In other words, the trunk of the property tree is the owner's right to have the exclusive ultimate control over how and by whom the thing will be used. Pugliatti insisted that the trunk of property is use-control rights rather than exclusion rights, as in the ownership model of property. Through the institution of property, Pugliatti wrote, the legal system protects an owner's interest in using the resource and the full range of possible alternative uses a resource may be put to.¹⁶¹ Exclusion follows logically from use. It is from the importance of an owner's interest in using a resource and from the scope of the legal protection this

158. *Id.* at 22–23.

159. *Id.* at 149.

160. *Id.* at 159:

[P]roperty is general control . . . through the concept of property law protects the owner's interest in the full use of the thing . . . from the generality and the extension of the protection accorded to the owner as well as from the nature of this protection [i.e., against the world, *erga omnes*] we deduce the exclusivity that characterizes property rights.

Id. at 149 ("[I]t has been noted that his multiplicity of aspects does not compromise the conceptual unity of property."); *id.* at 302 ("[T]he inner core is the owner's interest in the full use of the thing to the exclusion of anyone else."); Barassi, *supra* note 152, at 186.

161. PUGLIATTI, *supra* note 8, at 159.

interest is afforded, Pugliatti continued, that we deduce exclusion rights.¹⁶²

The trunk of the property tree was important for two reasons, a conceptual and a normative reason. Conceptually, identifying the trunk of property was necessary to distinguish property from other rights as well as to render the very concept of rights *in rem* meaningful. First, the owner's ultimate control over the use of the resource distinguishes property from *usufructus* or *emphiteusis*. In *usufructus*, the right holder has use rights but not the right to choose a new or different economic use of the thing. In *emphiteusis*, the right holder's ample control over the use of land is virtually indistinguishable from that of an owner. That has generated disagreement among property scholars over the nature of *emphiteusis*, leading some to consider it a form of substantive property rather than one of the minor real rights.¹⁶³ Also, identifying the core entitlements made the category rights *in rem* as rights against the world at large practically meaningful. It clarified the owner's entitlements that the world at large has an obligation to respect.

More importantly, identifying the essence of property was crucial from a normative perspective. The owner's core entitlements are the entitlements the state can limit or reshape only for extremely weighty social goals. They define the owner's sphere of autonomy that the state, in this case the Fascist state, cannot invade. This insistence on the owner's sphere of autonomy may seem puzzling, coming from jurists who were interested in designing a concept of property that would account for, and validate the fact that, in modern society, property is regulated for a variety of social purposes. The urgent need to propose an alternative to the Fascist theory of property and its shrinking of the owner's sphere of autonomous control explains the insistence on autonomy by the theorists of the tree concept. At the core of property, Barassi insisted, is the sovereign autonomy of the individual owner.¹⁶⁴ The words "sovereignty" and "autonomy" are endlessly repeated in Barassi's essay. "In times of fascist rule," Barassi continued, "we need not be afraid of words."¹⁶⁵ Barassi's quote and his repeated use of the word "autonomy" illustrate the liberals' fear that Fascist property theorists would expel the very word "autonomy" from property debates.

162. *Id.*

163. *Id.* at 240–45.

164. Barassi, *supra* note 152, at 189.

165. *Id.* at 187.

b. The Social Element

The theorists of the tree concept realized that, to provide a good alternative to Fascist property, protecting the owner's sphere of autonomous control was not enough. A modern liberal concept of property is one that acknowledges and foregrounds the social dimension of property. The rise of Fascism, they realized, was the consequence of the crisis of liberalism. It was the consequence of liberals' insensitivity to new ideas about the proper balance between individual rights and the interest of the collectivity. The jurists and intellectuals supporting the Fascist regime could easily argue that liberals were still under the spell of decadent enlightenment individualism and had proved unable to fully adapt the social, economic, and legal institutions of liberal Italy to the new needs of modern interdependent society.¹⁶⁶ By contrast, Fascist property scholars argued, Fascist property, fully malleable to reflect the public interest of the Fascist state, accounted for the socialization of property in modern society.

The challenge for the theorists of the tree concept was to find a new equilibrium between the individual and the social element in property. The new tree concept of property had to be both liberal and social.¹⁶⁷ The tree-concept jurists' solution was to argue that owners should exercise their use-control entitlements, while remaining mindful of property's social function. The social function of property is part of the trunk of the tree.¹⁶⁸ Property had always included social elements. "At no point in history, not even in Roman law," Barassi suggested, "was property absolute." "The idea of a social interest, parallel to the interest of the individual owner," he continued, "has always been there."¹⁶⁹ Similarly, Widar Cesarini-Sforza noted that, while the ownership concept was a product of the French Revolution, and its abstract individualism was an overreaction to the status-based restraints the *Ancien Régime* imposed on owners, "not even the revolutionaries of 1789 could ignore that ownership of land is

166. See BOBBIO, *supra* note 142, at 129–30 (describing a speech by Alfredo Rocco that characterized the liberal state as "imported paradise" while the Fascist state "was a product of Italic genius 'that realizes to the maximum the power and coherence of the juridical organization of society' "); POLLARD, *supra* note at 127, at 1–19 (chronicling the rise of the "pre-history" of Italian Fascism and describing the failures of the liberal state that advanced the Fascist cause).

167. PUGLIATTI, *supra* note 8, at 1–5; Josserand, *supra* note 114, at 104.

168. PUGLIATTI, *supra* note 8, at 281 (starting his discussion on the social function of property by saying that "the core of property is now open to transformations").

169. Barassi, *supra* note 152, at 195.

premised on a fundamental obligation to cultivate it and make it productive.”¹⁷⁰

For others, the tree concept of property stood in ideal continuity with the civic ethos of the Italian Risorgimento, the political and ideological movement that led to the country’s political unification in 1861. Barassi elaborated at length on this new civic property. In classical-liberal ownership, Barassi wrote, the interest of the individual owner trumped the interest of the collectivity. In Fascist property, the interest of the Fascist state trumped the interest of the individual owner.¹⁷¹ By contrast, the new tree property envisions the individual owner immersed in society. The owner’s dominion is a civic dominion qualified by social obligations.¹⁷²

The social function of property was by no means a new idea. It had been around for decades. It was introduced at the beginning of the twentieth century by Leon Duguit. Duguit argued that, in a modern industrial society, property is no longer a subjective right; rather, it is the social function of the owner of wealth.¹⁷³ Duguit pointed to some examples of the social function in French case law (cases prohibiting owners from excavating without reason, and erecting spite fences or fake chimneys) as well as in legislation (legislation requiring the running and maintenance of electric service without payment).

The problem with the notion of social function was that it was hopelessly indeterminate. Its content and the precise extent of the duties it imposed on owners were highly contested. The social function of property, Barassi noted, is a beautiful formula when you reason in abstract philosophical or political terms. But it provides little guidance to lawyers and judges who have to deal with actual specific facts, and not with general problems. For Duguit, the social function was a basic obligation not to harm others. This meant little more than the old maxim *sic utere tuo ut alienum non laedas*. Fascist property scholars had also appropriated the social function formula. For the Fascists, the social function of property meant the superior interest of the

170. Widar Cesarini-Sforza, *Proprietà e Impresa*, in LA CONCEZIONE FASCISTA DELLA PROPRIETÀ PRIVATA, *supra* note 113, at 361, 365.

171. Barassi, *supra* note 152, at 194.

172. *Id.*

173. LEON DUGUIT, LES TRANSFORMATIONS GENERALES DU DROIT PRIVE DEPUIS LE CODE NAPOLEON 21 (2d. ed. 1920); see also M.C. Mirow, *The Social-Obligation Norm of Property: Duguit, Hayem, and Others*, 22 FLA. J. INT'L L. 191, 192–93 (2010) (exploring “the origins of Duguit’s thought on [the social-obligation norm] as some necessary background work to the current debate concerning the social function of property”); Symposium, *The Social Function of Property: A Comparative Perspective*, 80 FORDHAM L. REV. 1003, 1004–08 (2011) (citing Duguit’s work as one of the more influential alternative concepts of property, and explaining Duguit’s view that “the state should protect property only when it fulfills its social function”).

Fascist state. As noted earlier, in Italian Fascism, the interest of the state was largely identified with the productivity of the national economy.

The tree-concept theorists' important contribution is that they envisioned the content of the social function in pluralistic terms. Earlier writers had been hopelessly evasive about the meaning and content of the social element of property. The Fascist property theorists had been more specific about the content of the social function of property. For them social function meant the productive needs of the Fascist nation. This was, in contemporary property theory language, a monistic definition, one that focuses on one value. By contrast, the tree-concept theorists argued that social function alludes to the multiple values and interests implicated by different resources. This pluralism was captured in the image of the branches of the property tree. The branches of the property tree are many resource-specific agglomerates of entitlements: agrarian property, family property, affordable urban residential property, entrepreneurial property, and intellectual property. The content of the social function of property is different for each of the branches.

3. The Branches of the Property Tree

Property law had long treated certain resources as special. For example, water law was a distinct subfield of Roman property law with rules reflecting the "fugitive" nature of water. The theorists of the tree model of property used this resource-specific analytical lens as their entry point to property analysis.¹⁷⁴

Louis Josserand was the first to talk of multiple resource-specific properties. In the twentieth century, Josserand argued that property is not only quantitatively different, in that owners' entitlements are variously limited, it is also qualitatively diverse. "Because of the differences in its object," Josserand argued, "property takes on different shapes depending on the type of resource involved. Property is no longer uniform, rather it is multiform, infinitely diverse

174. While Pugliatti uses the image of the tree, common in the property literature of the time is the slogan, "one property, many properties." The slogan was invented later, in the 1930s by Filippo Vassalli, who translated and popularized a passage from Josserand: "[P]roperty is no longer uniform, rather it is multiform, infinitely diverse and varied; there is no longer one property but many properties with different specialized regimes." Josserand, *supra* note 114, at 101. Pugliatti rejects what we would call today the full disintegration of property pursued by Filippo Vassalli. Vassalli dissolved property into different property regimes regulating different resources. Vassalli, *supra* note 122, at 103–04; see also Pietro Rescigno, *Disciplina dei beni e Situazione Della Persona*, 5-6 QUADERNI FIORENTINI PER LA STORIA DEL PENSIERO GIURIDICO MODERNO 861 (1976-77) (explaining this resource-specific approach).

and varied. There is no longer one property but many properties subject each with its own specialized regime.”¹⁷⁵ Along similar lines, Filippo Vassalli noted that “the entitlements granted to owners as well as the legal regime of property vary depending on the resource owned.” To accurately describe the real life of property, Vassalli continued, “we have to recognize that there is no longer one property, rather there are many properties. This is because the public interest demands that different resources be regulated differently to reflect the different policy objectives specific to different resources.”¹⁷⁶

The focus on the resource, the thing owned, is an important difference between the tree concept and the bundle of rights concept. The jurists who developed the tree model of property were not oblivious to the Hohfeldian intuition that property is a set of relations among persons, but they never lost sight of the thingness of property. For example, Lorenzo Mossa was ready to admit that “the idea of property as the individual’s absolute right over a thing is misleading . . . because property is not a right over a thing.”¹⁷⁷ For Mossa, property has an *in personam* aspect alongside its *in rem* nature. It necessarily involves a relationship between its active and passive subjects; property rights entail correspondent duties on others. But, Mossa continued, recognition of this *in personam* aspect should not lead us to conflate *in rem* rights and *in personam* rights.¹⁷⁸

However, in the tree model of property, this focus on the thing did not mean a return to a pure conceptualist analysis concerned with categories and bright lines. Rather, it triggered a shift toward normative analysis. Crafting multiple resource-specific properties required that property lawyers discuss the peculiar characteristics of different resources, and the plural values as well as the individual and social interests they implicate. In a Europe threatened by totalitarian rule, this resource-specific approach helped liberal jurists achieve two important goals.

First, it emphasized the value of pluralism in property law. In times where property debates were becoming increasingly focused on the productive efficiency of the Fascist nation, the theorists of the tree concept of property believed in the value of pluralism. In their discussion of the different branches of the property tree, they focused

175. Josserand, *supra* note 114, at 100.

176. Vassalli, *supra* note 122, at 103.

177. Lorenzo Mossa, *Trasformazione Dogmatica e Positiva Della Proprietà Privata, in LA CONCEZIONE FASCISTA DELLA PROPRIETÀ PRIVATA*, *supra* note 113, at 249, 253–54.

178. *Id.* at 254–55.

on individual owners' privacy and freedom of action, equality in access to productive resources, and cooperative management of resources.¹⁷⁹

Second, the focus on resources allowed our jurists to deal with the fundamental problem of the value of pluralism in property law. The plural values and interests property law should promote are often in conflict with each other, and lawmakers will be called upon to make difficult choices. In Fascist times, liberal property law scholars worried about the arbitrariness of these choices that may potentially lead to a virtual abrogation of individual property rights. By grounding values and interests in the context of specific resources, they sought to guide and constrain lawmakers' normative reasoning.

The actual characteristics of different resources narrow the scope of lawmakers' normative choices, suggesting what values and interests are particularly relevant for specific resources and what trade-offs are required. Freedom of action or privacy, equitable distribution, efficiency, and participatory management have different weight depending on whether the resource owned is an irrigation canal, a home, a parcel of agricultural land, or a manufacturing firm.

In weighing the conflicting values and interests, the tree-concept theorists suggested, lawmakers will look at how different resources have been treated and discussed historically as well as in past and present legislation. Historical and legislative materials are repositories of ideas about how to regulate different resources. "Property, more than any other legal institution," Pugliatti noted, "reflects, in its structure and shape, the social and historical environment."¹⁸⁰ Pugliatti urged the inversion of the century-long tendency to define property in absolute detachment from history and reality. To fully understand the problems of the many properties, property scholars need the help of history; they need to view the history of property against the background of the larger history of society.¹⁸¹ They also need to turn their attention away from the Civil Code and take a close look at the myriad of piecemeal laws and regulations that define the shape of the various properties.

In their writings, the tree-concept theorists produced detailed maps of how resource-specific legislation had, over the last four decades, limited and qualified ownership of mines, water, forest land, agricultural land, means of transportation, utilities, etc. For the tree concept's liberal advocates, analysis of the concrete characteristics of

179. See, e.g., PUGLIATTI, *supra* note 8, at 262–81 (offering a discussion of agrarian property).

180. *Id.* at 147.

181. *Id.*

resources, and fidelity to the historical and present legal framework for specific resources, was the way to reduce the arbitrary nature of normative reasoning in property law and to stem the Fascist regime's potential erosion of property rights in the name of a generic and unspecified interest of the Fascist state.

The two branches of the property tree that received special attention were agrarian property and enterprise ownership (*l'impresa*). The tree concept also accommodated what was then emerging as a new branch, the law of affordable housing.

a. Agrarian Property

Land had hardly ever been analyzed from a resource-specific perspective.¹⁸² Land was synonymous with real property and little differentiation was made.¹⁸³ Josserand and Pugliatti approached different types of land as different resources. They devoted particular attention to agricultural land. They believed that the changing social and economic conditions of the early twentieth century called for a new legal regime for agricultural land. The limited availability of good quality land, the migration to urban areas triggered by the development of industry and the services sector, and the shift to intensive and technologically advanced cultivation systems required property rules that would properly protect the public interests involved.¹⁸⁴ In particular, in Pugliatti's analysis, agricultural land requires dovetailing two public interests: productive efficiency and more equal access to the means of production.¹⁸⁵ For Pugliatti, "ownership of land as a productive resource involves the individual's

182. For a contemporary resource-specific approach to landownership, see Eduardo M. Penalver, *Land Virtues*, 94 CORNELL L. REV. 821, 821 (2009) (arguing that the "complexity of land—its intrinsic complexity, but even more importantly the complex ways in which human beings interact with it—undermines the positive claim that owners will focus on a single value, such as market value, in making decisions about their land").

183. Josserand, *supra* note 114, at 102–03:

[E]ven if we limit our investigation to real property, we find that, within this genre there are multiple species. Agricultural land is treated differently than urban real estate. In France a rural code is being drafted that contains all the rules regulating agricultural life and in most countries, most notably in Italy, an agrarian law is developing; a prominent legal innovation that is attracting the attention of lawmakers and law professors, in universities as well as in the official palaces. And other special regimes have developed within real property, family property has its own regime and so does low income housing.

184. For a later description of these developments, as well as of the idea that agricultural land is a highly significant resource that needs special property rules, see Francesco Santoro-Passarelli, *Proprietà*, in ENCICLOPEDIA DEL NOVECENTO § 6 (1980), available at [http://www.treccani.it/enciclopedia/proprietà_\(Encyclopedia-Novecento\)/](http://www.treccani.it/enciclopedia/proprietà_(Encyclopedia-Novecento)/).

185. PUGLIATTI, *supra* note 8, at 263.

entrepreneurship and his responsibility." When land is at stake, Pugliatti continued, "the economic interest of the individual blends with the interest of society and generates ethical and social impulses that end up shaping legal norms."¹⁸⁶ Making land available to all, Pugliatti wrote, "is a social goal. The generalization and expansion of access to property, not as an abstract legal concept, but as a concrete economic reality, is a crucial step toward the realization of the principle of the equal social dignity of all."¹⁸⁷ Pugliatti was interested in disaggregating and recombining the aggregate of entitlements pertaining to agricultural land to achieve the twin goals of productivity and egalitarian redistribution.

Pugliatti's ideas influenced the Italian legislature. The Italian provisional legislative decree number 89 of 1946 is an example of how this new resource-specific analysis of property entitlements had practical influence.¹⁸⁸ The new approach provided the legislature with an analytical framework that helped to reshape the bundle of rights pertaining to agricultural land for efficiency and redistributive purposes. The decree was supported by the Christian Democratic

186. *Id.* at 263–64.

187. *Id.* at 277.

188. *Id.* at 267–70. The decree number 89 was at the center of a political struggle between the Christian Democrats and the Communist Party, a struggle that happened against the background of the debate over the 1947 Republican Constitution. Through the decree, both the Christian Democrats and the Communists wanted to make a larger point about what type of protection property should be afforded in the new constitution. To make things more difficult, this happened at a moment of violent social unrest in the southern Calabria region. An earlier version of the decree had been passed with the support of the Communist Minister of Agriculture, Fausto Gullo. It provided that cooperatives of landless peasants or labor unions could apply to obtain in concession lands left idle or not productively cultivated. The decision on the concession would be made by a commission presided over by the prefect and including a representative of landowners and of the cooperatives. In the months before the decree, the military section of the Communist Party had organized the occupation of four thousand hectares of land in the Calabria region. The decree was seen by the moderate part of the Communist Party as a way to enlist the rural proletariat, traditionally more inclined to anarchist ideas, and to channel their action into the sphere of legality. It was also seen as a way to bring about the "revolution" that had never happened. The Risorgimento movement that led to the unification of the country was seen as a process that had been interrupted by the Fascist regime, a missed opportunity for a more radical social revolution. After the fall of the Fascist regime, it was the moment to complete the "interrupted" revolutionary process. It was also seen as a way to signal that the protection of private property in the new constitution should be limited, and that property should be qualified with some reference to a social function in the sense of a more equal distribution. The second version, the decree number 89 of 1946 discussed by Pugliatti, was supported by the Christian Democratic Minister of Agriculture Segni. The Christian Democrats were also interested in enlisting the rural landless peasantry. They organized "white" Catholic cooperatives that competed with the "red" Communist cooperatives. The Christian Democrats also wanted to make a point about property in the new constitution: protection of private property should be limited and qualified by the general interest. See generally EMANUELE BERNARDI, LA RIFORMA AGRARIA IN ITALIA E GLI STATI UNITI (2006).

minister for agriculture as a response to the peasants' demand for land in the South. According to the decree, cooperatives of agricultural workers could apply to obtain, in concession from the local government, privately owned parcels of land left either idle or not productively cultivated by their owners. In other words, failure to cultivate resulted in the owner losing the right to use, which was transferred to a cooperative of landless workers. The owner retained formal title, the right to transfer the formal title, and part of the income rights (i.e., the right to receive an annual rent). The right to use was split between the cooperative and the local government. The cooperative had the right to cultivate the land, a duty to improve the production, and the right to appropriate the product of the land. The local government also had the right to supervise the cooperative's use and management. Legislative decree number 89 was a short-lived experiment in land collectivization, though. It was a provisional legislative decree subject to yearly renewal. It was eventually dropped in 1950, when the new Republican Constitution of 1948 and a legislative proposal for land reform eased the social tensions in the South.¹⁸⁹ In the new Constitution the public interests implicated by ownership of agricultural land had special prominence. Article 44 of the Constitution declared that legislation may set conditions on ownership of agricultural land, impose limits on the size of landholdings, promote land reclamation, and protect small owners.¹⁹⁰

The special social and economic relevance of agricultural land as a means of production also required special rules protecting agricultural tenants. Starting in the mid-twentieth century, legislative concern for the power asymmetry between agricultural landlords and tenants translated into a gradual but sweeping reform of agricultural leases.¹⁹¹ *Mezzadria*, a form of land tenure where the tenant pays rent in kind in the measure of approximately half of the annual output, was seen with particular disfavor by policymakers. The law 756 of 1964 de facto abolished *mezzadria*, prohibiting the parties from entering into new contracts and converting existing contracts into agricultural leases with money rent.¹⁹²

189. See Lorenzo M. Belotti, *An Analysis of the Italian Agrarian Reform*, 36 LAND ECON. 118, 118 (1960) (discussing Italian land reform of the late 1940s and early 1950s).

190. Art. 44 Costituzione [Cost.] (It.).

191. See Santoro-Passarelli, *supra* note 184, at 26.

192. For more information on Legge 756 of 1964 and its implementation, see COMMENTARIO AL CODICE CIVILE ARTT. 2135-2246, at 80–81 (Paolo Cendon ed., 2009).

b. L'impresa (Enterprise Ownership)

Enterprise ownership (*l'impresa*) was the other branch of the tree that attracted the tree-concept theorists' interest.¹⁹³ In mid-twentieth-century Italy, worker-owned firms predominated in the service industry and agriculture and, hence, were the major focus of our jurists' analysis. *L'impresa* is the ensemble of physical things (the plant, machinery, etc.), and the incorporeal rights (leases, contractual rights, patents, trademarks, etc.), that are the means for the entrepreneur's productive activity.

L'impresa presents two important features. First, it is active property.¹⁹⁴ By active property, the theorists of the tree concept meant that the physical things and incorporeal property rights that make up *l'impresa* have their gravitational center in the person and the labor of the entrepreneur. In other words, *l'impresa* is both physical and incorporeal property, organized and managed by the entrepreneur for a productive purpose. This active dimension of enterprise ownership (i.e., the fact that property is functional to a productive process that involves management and labor) calls for special rules. For example, effective organization of the productive process requires that *l'impresa* be, to some degree, independent from the owner or entrepreneur. Accordingly, in case of death or incapacity of the owner or entrepreneur, certain management acts, such as contractual offers or the granting of a mandate to a representative, survive the person of the entrepreneur.¹⁹⁵

Second, *l'impresa* has an important public dimension. It is a means to an end—production—that involves public interests. The entrepreneur is both owner and entrepreneur, but her property rights, Professor Widar Cesarini-Sforza warned, are secondary.¹⁹⁶ She is first an entrepreneur and only secondarily an owner. In the productive process, Cesarini-Sforza continued, property acquires a social connotation: the individualistic attributes of property are limited to reflect the social relevance and the larger public interests involved in production. The social importance of entrepreneurial property justifies regulation in the public interest. A decade later, the public interests involved in enterprise ownership would be clearly stated in the new Republican Constitution. The public interests listed in Article 41 of

193. On *l'impresa* as a central theme of property law debates in the 1930s–1950s, see GROSSI, *supra* note 146, at 190–91. See also Alberto Asquini, *Il Diritto Commerciale Nel Sistema Della Nuova Codificazione*, in RIVISTA DI DIRITTO COMMERCIALE (1941).

194. Santoro-Passarelli, *supra* note 184, at 24.

195. *Id.* at 25.

196. Cesarini-Sforza, *supra* note 170, at 371–72.

the 1948 Constitution include protecting workers' dignity and ensuring coordination between private entrepreneurial activity and the government's economic policy.¹⁹⁷

While worker-owned enterprises were the main focus of property scholars' analysis, scholars also discussed investor-owned firms. At approximately the same time in the United States as scholars A. A. Berle and Gardiner C. Means discussed the problem of corporate property,¹⁹⁸ the European theorists of the new property also offered similar insights. They warned that the central characteristic of the modern corporation is the separation of ownership and control. Corporate managers and owners do not have the same incentives, so the traditional assumption that the quest for profits will spur the owner of industrial property to its effective use is no longer valid. Since self-interest alone is inadequate, the only alternative mechanism for assuring that corporations are governed in the public interest is government regulation.

c. Affordable Housing

Affordable housing is another branch of the property tree. This branch was not yet the object of academic lawyers' scholarly work in the early years of the twentieth century, but it was at the center of economic policy and urban-development debates.¹⁹⁹ In the first half of the twentieth century, industrialization had triggered a massive migration from rural areas to industrial cities resulting in a dramatic increase in the demand for low-cost housing. The first response to the housing crisis was the Luzzatti Law of 1903, named after Luigi Luzzatti, the constitutional law professor and member of Parliament who drafted the bill. In his political and academic work, Luzzatti had

197. Art. 41 Costituzione [Cost.] (It.).

198. See ALEXANDER, *supra* note 29, at 342, 346–50 (highlighting arguments made by Berle and Means in the United States that traditional property theories cannot apply to modern corporations and that “[c]orporate power should not be exercised for the exclusive benefit of the shareholders but for the benefit of society as a whole”).

199. Academic lawyers began writing about affordable housing only much later in the 1970s. See UMBERTO BRECCIA, IL DIRITTO DELL'ABITAZIONE 1–17 (1980) (one of the first comprehensive expositions of housing law); Temistocle Martines, *Il Diritto alla Casa*, in TECNICHE GIURIDICHE E SVILUPPO DELLA PERSONA UMANA 392 (N. Lipari ed., 1974) (discussing the legal and normative questions posed by the then emerging notion of a right to housing); Domenico Sorace, *A Proposito di "Proprietà dell'Abitazione," "Diritto d'Abitazione," e "Proprietà (Civilistica) della Casa,"* 31 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 1175 (1977) (discussing housing law that focuses on property rules).

focused on various aspects of the social question, that is, the problem of the living and working conditions of the working classes.²⁰⁰

The Luzzatti Law created a hybrid private-and-public affordable-housing scheme. It created regional “institutes for affordable housing,” public in nature but largely funded by private banks and mutual aid cooperatives. The institutes were empowered to purchase land and build affordable-housing units. Urban studies scholars describe the Luzzatti Law as inspired by nineteenth-century paternalism.²⁰¹ The law created two types of units, *case economiche* and *case popolari*, catering to two different segments of the lower-income population. *Case economiche* were medium- and larger-sized units to be sold at a fixed price, with favorable financing to lower-middle-class buyers, the “bourgeoisie of the future.” *Case economiche* were located in neighborhoods designed according to the principles of the garden city movement in the United Kingdom.²⁰² By contrast, *case popolari* were small units (in the Fascist period and in the postwar years, a single room, called *casa minima*) to be leased at a fixed rate to “the needy of today.”²⁰³

The Luzzatti Law designed a new property regime combining and shaping owners’ entitlements to achieve the goal of expanding access to decent housing. Duties were an important aspect of this regime. For both types of units, the affordable-housing institute had a duty to guarantee minimum standards of habitability, while buyers or tenants had a duty to maintain the unit in good repair.²⁰⁴ For the *case economiche*, owners’ use rights were limited. Buyers could not make improvements to the unit, grant easements, or use it as collateral without the housing institute’s consent. Transfer rights were also limited.²⁰⁵ Buyers of *case economiche* could lease their units only with the prior authorization of the institute.²⁰⁶ The law also limited the rent they could charge and prescribed that tenants had to meet

200. Luzzatti characterized his approach as “experimentalist” and “historicism.” A recurrent theme in his work was the need for a dialogue between the disciplines of economics and ethics. Luzzatti was among the founders of the Association for the Progress of Economic Studies in Italy, which promoted government regulation of and intervention in the economy. For more information on Luzzatti, see Paolo Pecorari & Pierluigi Ballini, *Luigi Luzzatti*, in 66 DIZIONARIO BIOGRAFICO DEGLI ITALIANI (2007), available at <http://www.treccani.it/enciclopedia/luigi-luzzatti> (Dizionario-Biografico).

201. Alfredo Agostoni, Politiche Abitative, Conflitti e Trasformazioni Urbane 2–4 (2008) (unpublished conference notes) (on file with author).

202. *Id.* at 1–2.

203. *Id.* at 4.

204. Testo Unico 27 febbraio 1908 n.89 art. 1. (It.).

205. *Id.* art. 8.

206. *Id.*

eligibility requirements. Similarly, tenants of the *casa popolare* could not sublet their units without the institute's authorization.²⁰⁷ Finally, the law granted the institute a right of first refusal in case the buyer decided to resell the *casa economica*.²⁰⁸

While these early affordable-housing projects were largely overlooked by academic writers, by the 1970s property scholars were discussing affordable homeownership as a separate branch of the property tree.²⁰⁹ In 1971, a new housing law (*legge sulla casa*) further modified the property rules pertaining to affordable homeownership. First, it made easier and cheaper the government's exercise of eminent domain to take property for affordable-housing projects. The new law simplified eminent domain proceedings and based the determination of "just compensation" on the agricultural value of the land rather than on its (higher) market value.²¹⁰

Second, the new housing law sought to attract developers of affordable housing by reviving the right of *superficies*, a property interest typical of civil law systems, which allows separate ownership of the land and the buildings erected on the land. The new housing law allowed local governments to grant public or private nonprofit developers of affordable housing the right of *superficies* (i.e., a right similar to ownership but limited in time) over the buildings erected on land owned by the local government. Both the new rules of eminent domain and the revival of the right of *superficies* spurred discussion by property scholars, making the new branch of the property tree a prolific subfield of property scholarship.²¹¹

207. *Id.* art. 14.

208. *Id.* art. 8.

209. See Pietro Rescigno, *Disciplina dei Beni e Situazioni dell'Persona*, 5/6 QUADERNI FIORENTINI 861, 873–74 (1976–77) (discussing Pugliatti's "one property, many properties" notion and including housing among the properties); Santoro-Passarelli, *supra* note 184, at 21 (explicitly referring to Pugliatti's idea of "many properties" and including housing in the list).

210. FRANCESCO CARINGELLA, STUDI DI DIRITTO CIVILE: PROPRIETA E DIRITTI REALI 378 (2007).

211. L. n. 856/1971 art. 35 (It.). For more information on the right of *superficies*, see Raffaele Caterina, *I Diritti Reali*, in TRATTATO DI DIRITTO CIVILE DIRETTO 197–222 (Rodolfo Sacco ed., 2009) (presenting a comprehensive exposition of the right of *superficies* and explaining how the right of *superficies* became relevant in the context of the housing law of 1971).

III. BEYOND THE BUNDLE OF RIGHTS AND THE OWNERSHIP MODELS: A PLURALISTIC CONCEPT OF PROPERTY

A. *The Structure of Property*

The European jurists who developed the tree concept of property took the question of the structure of property seriously by questioning which entitlements the right of property comprises, and which entitlements are essential for property to be property. Their tree image outlined a pluralistic concept of property that still has great potential in contemporary property debates and resonates with recent theories of structural pluralism in property theory.

Neither the bundle of rights model nor the ownership model has dealt with the question of the structure of property satisfactorily. The bundle of rights model has, often, translated to what critics call a nominalist approach, whereby property is a purely conventional concept with no fixed structure.²¹² Walter Hamilton's 1937 entry on property in the Encyclopedia of the Social Sciences is often quoted as an example of the realists' nominalism.²¹³ Hamilton wrote that property is "nothing more than an euphonious collection of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth."²¹⁴ Similarly, contemporary proponents of the bundle of rights concept largely consider the question of the structure of property meaningless. Since property is a bundle of relations among persons concerning a thing, and since these relations are immeasurably variable in different contexts, property

212. See Merrill, *Right to Exclude*, *supra* note 102, at 737:

[Nominalism] views property as a purely conventional concept with no fixed meaning—an empty vessel that can be filled by each legal system in accordance with its peculiar values and beliefs. On this view the right to exclude is neither a sufficient nor necessary condition of property. It may be a feature commonly associated with property, but its presence is not essential; it is entirely optional. A legal system can label as property anything it wants to.

The critique of nominalism is shared by property scholars who do not embrace the ownership model. See JOHN CHRISTMAN, THE MYTH OF PROPERTY: TOWARD AN EGALITARIAN THEORY OF OWNERSHIP 20 (1994):

In many circles these days it has become a commonplace to treat the notion of ownership with dismissal The argument for this conclusion proceeds like this: once it is noticed that ownership is not a simple legal relation but a wide variety of legal relationships, and once it is noticed how immeasurably variable these relations can be in different contexts, it ceases to be useful to refer to any one relation as that of ownership.

213. Merrill, *Right to Exclude*, *supra* note 102, at 738.

214. Walter Hamilton, *Property*, in 11 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 528 (1937).

ceases to be a useful category.²¹⁵ In particular, because the array of entitlements that a property arrangement might be composed of is as various and flexible as one created purely by contract, there is merely a nominal difference between property and contract-based entitlements.²¹⁶

But the question of the structure of property is an important one. First, historically, the tendency to cluster proprietary entitlements in a standard bundle is a perennial one in Western legal culture.²¹⁷ These entitlements bear a family resemblance in that they manifest an interest in granting the owner's control over a resource.²¹⁸ Second, from an epistemological perspective, clarity about the structure of property is vital to political debates, allowing people to meaningfully discuss problems concerning the allocation of resources.²¹⁹ Clarity over the structure of property serves a crucial diagnostic purpose. It allows us to describe and diagnose how the law distributes wealth and power in contemporary postcapitalist societies.

215. For the most well-known (and criticized) version of bundle of rights nominalism, see Thomas Grey, *The Disintegration of Property*, in NOMOS XXII, PROPERTY 69, 73 (J. R. Pennock & J. Chapman eds., 1980) ("[T]he specialists who design and manipulate legal structures of the advanced capitalist economies could easily do without using the term property at all."); *see also id.* at 81 ("The substitution of a bundle-of-rights for a thing-ownership conception of property has the ultimate consequence that property ceases to be an important category in legal and political theory."). For critical discussions of Grey's nominalism, see CHRISTMAN, *supra* note 212, at 20; RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 20–24 (1985); MUNZER, *supra* note 32, at 31–36; JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 29 (1988); Merrill, *Right to Exclude*, *supra* note 102, at 738.

216. Grey, *supra* note 215, at 73–85; *see also* CHRISTMAN, *supra* note 212, at 20–22 (insisting that the difference between property rules and liability or inalienability rules is that property rules afford a different type of "control"). The point here is whatever the final contours of the structure of ownership turn out to be, their being protected primarily by property rules as opposed to (primarily) liability rules is based on the real difference in levels of control that owners have of their property compared to the control persons have in other areas of their lives that are not the object of ownership.

217. Charles Donahue, *The Future of the Concept of Property*, in NOMOS XXII, PROPERTY, *supra* note 215, at 28, 43–47. Donahue notes that, historically, the tendency to cluster proprietary entitlements is a perennial one in Western legal culture; it has little to do with "possessive individualism." Rather, Donahue explains the tendency to identify a core concept of property in terms of procedural developments, with the convenience of identifying "an owner" for dispute resolution purposes.

218. CHRISTMAN, *supra* note 212, at 22 ("If one can argue . . . that there is such a family resemblance among the prerogatives of ownership and that this manifests a moral interest that has a place in political principles and theories, then the full disaggregation view can be discarded.").

219. WALDRON, *supra* note 215, at 56 ("The idea of ownership, I have maintained, is the idea of solving the problem of allocation by assigning each resource to an individual whose decision about how the resource is to be used is final."); *see also* MUNZER, *supra* note 32, at 35; WALDRON, *supra* note 215, at 32 (describing the problem of allocation as "the problem of determining peacefully and reasonably predictably who is to have access to which resources for what purposes and when"); Jeremy Paul, *Can Rights Move Left?*, 88 MICH. L. REV. 1622, 1622 (1990).

Valuable resources are controlled by individuals, or individual-like entities, who have the entitlements to use them, to transfer them through market transactions, and to retain the income derived from their use or transfer. To completely dissolve the concept of property would deprive us of a crucial analytical tool for tracking these arrangements.

While the bundle of rights model of property considers the question of the structure of property to be meaningless, the ownership model's characterization of the structure of property is too simplistic. Ownership has exclusion at its core. But the focus on exclusion misses a big part of how property works. A structure built around exclusion fails to acknowledge that most cases of trespass arise in complex, ongoing interactions among individuals.²²⁰ Owners have engaged in *ex ante* transactions concerning particularized uses of property, and courts make fine-grained assessments of these use rights. These assessments are typical of what Merrill and Smith call a "governance strategy," rather than a simple "exclusion strategy."²²¹ This has led some proponents of the ownership model to focus on use—or better, the exclusive authority to decide how a resource will be used—rather than on exclusion.²²² More generally, property has changed. It is now

220. Mossoff, *supra* note 18, at 260.

221. *Id.* In particular, see Mossoff's discussion of *State v. Shack*, where the New Jersey Supreme Court reversed trespass charges against two aid workers who entered a camp where migrant farmworkers employed by a farmer were hosted. The farmer had granted the workers access—a license—but then objected to their activity and asked them to leave. A license is a common defense in trespass. It is, Mossoff notes, a governance strategy. It requires the court to make *in personam* assessments about the grant of the license, such as the parties' understandings of the license and its scope. Fine-grained assessments of use rights and *in personam* rights are typical of governance strategies. The court looked at the context, at the position of the parties, at the social interests involved, and reversed. The recognition that property serves human values, that property rights are not absolute, and that migrant farmworkers are a weak segment of the population justified giving the workers rights of access. *Id.* at 260–61.

222. Claeys, *Bundle-of-Sticks Notions*, *supra* note 15, at 210:

In extremely telescoped form *exclusion is a consequence of use and not the other way around*. If A has a right of access to fish, B has a profit to pick apples, and C retains all other general control over and use of a lot of land, a lawyer can predict when each may exclude the others or strangers from interfering with their uses. By contrast, if the lawyer knows only that A, B, and C all have rights to exclude, she will not be able to predict whether A has a fee simple, a right of access or so forth. Nor will she be able to predict in what circumstances or against which parties A, B, or C will be able to assert exclusionary power.

(emphasis added); Claeys, *Property 101*, *supra* note 15, at 632–33 (stating that the right of exclusive use determination focuses on external assets, and hence it explains why an employment contract does not give rise to a bundle of property rights). The rights that accrue in such contract arise by virtue of mutually enforceable promises, not by virtue of an owner's interest in setting priorities for using a lot of land or a car. It refers not to a nominalist claim about property, but to a robust and coordinated set of property rights. Exclusive use

increasingly concerned with governing relations among multiple owners and users of resources, rather than excluding nonowners. For Gregory Alexander, property has become “governance property.”²²³ Governance property describes a situation where simultaneously existing entitlements to some resource are shared between multiple owners.²²⁴ Governance property institutions are thriving in every area of social life, from the various cotenancy forms available to families, to common interest communities, to modern leaseholds, to business partnerships or close corporations. For these forms of property, excluding nonowners is only one aspect, not the most important. Rather, these forms of property require an internal governance regime that allows the multiple owners to use the resource.²²⁵

The tree concept of property accommodates the complexity of property. In this respect, it mediates between the bundle of rights concept and the ownership model. It acknowledges that property has a structure, but it emphasizes the complexity of this structure.²²⁶ By envisioning the trunk of the tree as the owner’s control over the use of the resource, it acknowledges that the core of property is more than exclusion. It is use governance. By outlining many branches of the property tree, it accounts for the fact that both the common law and

determination explains why all the various rights that go into the bundle belong there. *Id.*; see also Claeys, *Bundle-of-Sticks Notions*, *supra* note 15, at 210; Katz, *supra* note 18, at 236, 239–240; Mossoff, *supra* note 18, at 255 (“[T]he right to property secures a use-right in, agenda-setting control over, or a sphere of liberty in using this thing.”).

223. Gregory S. Alexander, *Governance Property*, 160 U. PA. L. REV. 1854, 1854–60 (2012).

224. *Id.* at 1856.

Governance property, by contrast, is multiple-ownership property. Because of the relationship between an owner’s rights and interests, GP requires governance norms—the devices regulating ownership’s internal relations. Those rights may be as robust as full ownership rights, including coterminous rights to use, possess, manage, and transfer the asset; the rights could also be more limited, such as use rights with respect to assets owned by others. The fragmentation of various sorts of coincident rights with respect to some asset is what distinguishes GP from EP and creates the need for norms that govern the exercise of those rights.

225. *Id.*

226. DAGAN, *supra* note 24, at 10. For a discussion of structural pluralism, see Alexander, *supra* note 14, at 1018 n.18 (explaining that pluralism, in a structural sense, is whether property law facilitates diverse social and resource realms—say a la Michael Walzer, the domestic realm, the commercial realm, the realm of intellectual property, the realm of residential rental property, and so on—each of which is governed by a different value or balance within a set of values). Two important examples of theories of property informed by structural pluralism are Hanoch Dagan’s and Jeremy Waldron’s theories. Hanoch Dagan conceptualizes property as a set of property institutions bearing a family resemblance but taking on different forms in different “social settings” or for different resources. DAGAN, *supra* note 24, at 3–36. Jeremy Waldron has also proposed a somewhat “structurally pluralistic” theory of property that distinguishes between one concept of property (the organizing idea that property is the right to exclusively determine by whom and how a resource will be used) and many conceptions (the many set of property rules). WALDRON, *supra* note 215, at 52–53.

the civil law accommodate a variety of resource-specific property regimes, tailored to the characteristics and interests implicated by specific resources. The tree concept of property may be seen as the progenitor of contemporary theories of structural pluralism in property. However, it differs from Hanoch Dagan's pluralistic theory of property "institutions" in two respects. First, while Dagan describes property as an umbrella for many different property institutions, the image of the trunk of the tree suggests a more robust core. Second, in Dagan's account, each property institution is "designed to match the specific balance of values suited to the specific social context (family, business, etc.)."²²⁷ By contrast, the idea of property's social context is not discussed by the theorists of the tree concept and is probably far from their cultural and methodological mindset.

B. Property and Value Pluralism

The development of the tree concept of property marks a crucial moment in the history of Western property law: the moment when value pluralism became the focus of the normative discourse of property lawyers. The theorists of the tree concept reacted to Fascist property theory, with its exclusive concern with productive efficiency, and embraced value pluralism. The ownership model is concerned with promoting one value, negative freedom. The bundle of rights model has little to say on the question of values. By contrast, the tree concept facilitates a debate over which values ownership of specific resources should promote.

The ownership model of property sees one value as fundamental: autonomy, conceived as negative freedom. The ownership model was the product of the French Revolution. The French Revolution enshrined in the constitutional documents of modern France (and Europe) the idea that full property rights foster individual liberty, which had been the central theme of seventeenth-century liberal political theory, Physiocratic economic thought, and a century-long tradition of natural law.²²⁸ French jurists of the

227. Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, COLUM. L. REV. (forthcoming 2013) (manuscript at 9), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1868198.

228. For discussion on the centrality of ownership to the revolutionary ideology, see RODOTA, *supra* note 115, chs. 1–2; Donald R. Kelley & Bonnie G. Smith, *What Was Property? Legal Dimensions of the Social Questions in France (1789-1848)*, 128 PROC. AM. PHIL. SOC'Y 200, 200–10 (1984). For more information on the idea of ownership in the Physiocratic thought, see Warren J. Samuels, *The Physiocratic Theory of Property and State*, 75 Q.J. ECON. 96 (1961) (arguing that despite the conventional reading that emphasizes the natural law foundations of ownership in Physiocratic thought, the Physiocrats' concept of property, in fact, resembled the

revolutionary period worked to translate the political and ideological model of property into actual property rules.²²⁹ They awarded the full bundle of property entitlements—as understood within the old feudal regime to be split between multiple owners (typically a lord and a user)—to one owner and renamed the various feudal charges a simple rent payment.²³⁰ The result was the full, coherent aggregate of entitlements of the ownership model of property. Since then, for two centuries, generations of European property lawyers have rehearsed the benefits of the ownership model in terms of individual freedom of action and privacy.

In the United States, the ownership model of property and its negative-freedom rationale have been a central concern.²³¹ In the Founders' world, the ownership model of property held a special place in law, republic theory, and society.²³² For the Founders of American constitutionalism, the ownership model provided the inspiration for the idea of a private sphere of individual self-determination, securely bounded off from politics by law.²³³ Today, information theorists who embrace an ownership model with exclusion at its core note that exclusion is a delineation strategy that efficiently serves values that pertain to the domain of negative freedom, such as "stability, appropriability, facilitation of planning and investment, liberty, and autonomy."²³⁴

bundle of rights approach in that it allowed for the malleability of ownership for various social purposes).

229. Paolo Grossi, *La Proprietà e le Proprietà nell'Officina dello Storico*, in 17 QUADERNI FIORENTINI PER LA STORIA DEL PENSIERO GIURIDICO MODERNO 360, 366–70 (1988).

230. For more information on the revision of property rules to reflect the new revolutionary understanding of society and the end of feudalism, see James Gordley, *Myths of the French Civil Code*, 42 AM. J. COMP. L. 459, 462–69 (1994) (arguing that the change in actual legal rules was not substantive and has been largely overstated in the literature); Kelley & Smith, *supra* note 228, at 200–12.

231. David Abraham, *Liberty Without Equality: The Property-Rights Connection in a "Negative Citizenship" Regime*, LAW & SOC. INQUIRY 1, 1–10 (1996) (arguing that the centrality of the property-liberty nexus in the American mind has contributed significantly to the thin negative concept of citizenship and to the fact that the welfare state is so poorly anchored in American law and public discourse).

232. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM (1994); Frank I. Michelmann, *Takings 1987*, 88 COLUM. L. REV. 1600, 1626–27 (1988); Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L. J. 127 130–35 (1990).

233. Michelmann, *supra* note 232, at 1627.

234. Smith, *Property Is Not Just a Bundle of Rights*, *supra* note 7, at 282.

While the ownership model is monistic in its focus on negative freedom, the bundle of rights model has little to say about values.²³⁵ It provides an analytic model, but it cannot be expected to do any normative work. To be sure, critics of the bundle of rights concept argue that the model does covert normative work.²³⁶ These critics call this the ad hoc bundle conception. The ad hoc bundle conception analogizes property as ad hoc bundles that are “transparent to purposes.”²³⁷ Judges and policy experts, the argument goes, rely on this ad hoc bundle conception for directly promoting immediate policy goals. The realist social planner of the New Deal age tweaked the property bundle to advance redistributive or regulatory goals.²³⁸ Similarly, post-Coasian law-and-economics analysts conceive of property as ad hoc lists of permitted and prohibited uses of resources, designed to promote the efficient use of those resources.²³⁹

But, in fact, the bundle of rights model cannot be expected to do any determinate normative work. It has long been taken to suggest that the bundle is malleable, and hence any time the state curbs one of the sticks, it is merely rearranging the bundle rather than taking property rights. As many have suggested, the bundle of sticks concept may be used as a trump against state regulation equally well. This idea might seem to suggest that the bundle has a coherent shape, and any time the state curbs any stick, it should pay compensation. American takings jurisprudence confirms this observation. Courts have relied on the bundle of rights concept to reach very different results. In *Loretto v. Teleprompter Manhattan CAT Corp.*, the Supreme Court held that a permanent physical occupation of property by a stranger through installation of a cable is a taking.²⁴⁰ The Court characterized the physical occupation as one that “does not simply take a single strand from the bundle of property rights. Rather it chops through the bundle, taking a slice of every strand.” By contrast, in the earlier case of *Andrus v. Allard*, the Court characterized the abrogation of the right to sell property resulting from the Eagle

235. Alexander, *supra* note 14, at 1020 (“Regardless of their understanding of values, monists make the same basic claim. There is, they claim, only one fundamental value, whether that value is framed in terms of goods or principles.”).

236. Claeys, *Bundle of Sticks Notions*, *supra* note 15, at 208; Claeys, *Property 101*, *supra* note 15, at 623–25.

237. Smith, *Property Is Not Just a Bundle of Rights*, *supra* note 7, at 279–82.

238. *Id.* at 283.

239. Claeys, *Property 101*, *supra* note 15, at 618–23; Merrill & Smith, *supra* note 15, at 368–72.

240. *Loretto v. Teleprompter Manhattan CAT Corp.*, 458 U.S. 419 (1982).

Protection Act's prohibition of commercial transactions in avian species as affecting one strand only and hence not a taking.²⁴¹

More importantly, the bundle of rights concept does not promote the type of robust normative discussion about values and the type of social relations we want to foster through property that a good system of social ordering should require. The bundle of rights model, for example, does not explain why the abrogation of the right to sell is not a taking, while the abrogation of the right to transfer property at death is a taking, as the Court held in *Hodel v. Irving*,²⁴² and later in *Babbit v. Youpee*.²⁴³ The right to sell and the right to pass property to one's heir implicate different values and interests. Also, an interest in land and artifacts made with parts of golden eagles are resources with different characteristics. However, the Court did not address these questions. As Gregory Alexander has noted, it would have been far more helpful and candid if the Court, rather than invoking the bundle of rights metaphor, had asked whether the sacrifice imposed on the owner promoted human flourishing and asked how tight the nexus between sacrifice and flourishing was.²⁴⁴

While neither the ownership model nor the bundle of rights model satisfactorily addresses the question of values, the tree concept of property placed the question of property's values front and center. The Fascist property theory's utter lack of a normative discourse encouraged the tree-concept theorists to explore the normative richness of property as a system for social ordering. By insisting that the property tree has a trunk, the owner's right to control the use of a resource, the tree concept restored the owner's negative freedom, which had been vilified in Fascist property theory, to the discourse of property. By qualifying an owner's use-control entitlements with the social function of property, the tree concept emphasized the need to balance, or fit, negative freedom with the other values of property, including equitable distribution and cooperative management of resources. Finally, by grounding the social function in the many resource-specific branches of property, it eased the problem of fitting competing values.

The pluralistic nature of the tree concept suggests two thoughts. First, from a historiographical perspective, it suggests a new answer to the question of the relationship between legal methods and the threat of totalitarianism. In recent years, a vast literature has

241. *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979).

242. *Hodel v. Irving*, 481 U.S. 704, 716–17 (1987).

243. *Babbit v. Youpee*, 519 U.S. 234, 245 (1997).

244. Alexander, *supra* note 19, at 801.

considered which method of legal reasoning, conceptualism or realism, came to the aid of European liberal judges and jurists who sought to resist the totalitarian regime's distortion of the legal system. The dominant view among Italian scholars is that the Italian private law system remained relatively immune from Fascist influence because Italian judges and jurists used old-style conceptualism as a defensive barrier against the fascistization of the private law.²⁴⁵ By contrast, in Europe, many point to realism, building on what is known as the "Radbruch thesis," from German jurist Gustav Radbruch who, in 1946, argued that it was the narrowly formalistic reasoning of European jurists that left them defenseless against the onslaught of totalitarian law.²⁴⁶

The story of the tree concept of property suggests a broader point. Framing the question in terms of method (i.e., of formalism or realism) does not fully capture it. Rather, it was by broadening the conversation on property to a plurality of values that the liberal jurists who developed the tree concept of property sought to resist the fascistization of property law.²⁴⁷ They realized that theorists of Fascist property could pay lip service to the classical-liberal ownership model, while actually subordinating individual property entitlements to the interest of the Fascist state. Hence, they turned to a conceptual model that would open up the debate over property to a richer set of values.

Second, from a normative perspective, the tree concept of property suggests some caution regarding progressives' temptation to drop the language of autonomy from property debates. The myth of autonomy, defined as negative property-based freedom, has dominated American law and politics, eroding any possibility for a robust and expansive vision of equality.²⁴⁸ The rhetoric of autonomy mandates that the state stay out of the way. It has restrained the state from acting in ways that can be characterized as either a constraint on

245. Michele Graziadei, *Legal Culture and Legal Transplants; Italian National Report*, 1 ISAIDAT L. REV. 31 (2011), available at <http://isaidat.dti.unito.it/index.php/isaidat/article/viewFile/46/53>; Monateri & Somma, *supra* note 12, at 56.

246. See generally Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, 35 CORNELL INT'L L. J. 101 (2001-2002) (discussing in general terms Radbruch's theory that methodological formalism paved the way for legal interpretations that validated totalitarian outcomes); Matthias Mahlmann, *Judicial Methodology and Fascist and Nazi Law*, in DARKER LEGACIES OF LAW IN EUROPE 232 (Christian Joerges & Navraj Singh Ghaleigh eds., 2003).

247. Curran, *supra* note 246, at 101–10.

248. Abraham, *supra* note 231, at 2–10; Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 256–62 (2010) [hereinafter Fineman, *The Vulnerable Subject*]; Martha Albertson Fineman, *The Nature of Dependencies and Welfare Reform*, 36 SANTA CLARA L. REV. 287, 287–94 (1996) [hereinafter Fineman, *The Nature of Dependencies*].

freedom of action or a form of wealth redistribution. It has resulted in both a narrow view of equal protection that focuses on identity rather than on the distribution of resources, and an absence of constitutional guarantees to basic goods such as housing, education, or healthcare.²⁴⁹ The frustration with this narrow discourse of autonomy has induced some to propose a different theory of the subject, one that focuses on the inevitability of vulnerability and dependency as a natural part of human experience.²⁵⁰ In turn, this theory of the vulnerable subject forms the basis for a claim that the state has an obligation to ensure that access to basic resources is generally open to all. The debate between the liberal theorists of the tree concept and Fascist property scholars suggests that the challenge for progressives is to rethink and thicken or expand the notion of autonomy rather than drop it.²⁵¹ In times when owners' autonomy (negative freedom) was under attack by a totalitarian state, the tree concept sought to protect negative freedom but to show that its relevance, and hence the way it fits with other values such as equal access, efficiency, or democratic or participatory management, varies for different resources.

C. Owners' Duties

The question of the nature and scope of owners' duties is the object of debate in contemporary property theory. The ownership model of property allows for minimal duties, conceived in negative terms and captured well by the old maxim *sic utere tuo ut alienum non laedas*. The bundle of rights concept does not emphasize duties. By contrast, the theorists of the tree model of property, by including the social function of property in the trunk of the tree, emphasized that property entails duties on the part of owners. These duties go beyond a merely negative duty not to harm others and include a positive duty to share certain resources.

The ownership model of property conceives of owners' duties in minimalist and negative terms.²⁵² In the modern European codes, broad definitions of property that stress the absolute nature of owners'

249. Fineman, *The Vulnerable Subject*, *supra* note 248, at 254.

250. Fineman, *The Nature of Dependencies*, *supra* note 248, at 288–94.

251. See generally di Robilant, *supra* note 124.

252. Alexander, *supra* note 19, at 753–58 (discussing two thin versions of the social obligation norm: the classical-liberal version, based on the *sic utere* maxim coupled with a weak affirmative duty to contribute to the provision of public goods such as national defense, law enforcement, and fire protection; and the law-and-economics version, whereby individuals are obligated to make contributions to the public fisc because voluntary means of financing public goods founder on the shoals of high transaction costs, holdouts, and free riders).

rights are qualified with a reference to the legislative prohibitions that ensure the harmonious coexistence of owners. For example, the French Code Napoleon, which was *the* code of property, recited that property is “the right of enjoying and disposing of things in the most absolute manner provided that they are not used in a way prohibited by the laws or the statutes.”²⁵³ These negative prohibitions included nuisance law, set back and height requirements, and the prohibition on erecting constructions on certain types of land. Also, continental European jurists developed the doctrine of abuse of rights, which many European codes included. According to the doctrine of abuse of rights, owners should not abuse their otherwise lawful rights. The abuse of rights doctrine can be variously formulated, and can vary in scope. Subjective formulations focus on the right holder’s motive or intent, while objective formulations focus on the right holder’s conduct. Objective formulations of the doctrine that focused on owners’ uses that are contrary to the socioeconomic purpose of property could have been used to impose significant duties on owners. But, by and large, continental European courts applied narrow subjective formulations of the doctrine that focused on the unreasonable or malicious nature of owners’ motives.²⁵⁴

Contemporary advocates of the ownership model conceive of owners’ duties in similarly narrow terms. Owners’ duties amount to a basic negative obligation to avoid committing a nuisance. The nuisance rule “translat[es] from private law to public law” and also determines the scope of the police power.²⁵⁵ Whenever one party can enjoin the conduct of another without compensation, the state may do so as his agent, again without compensation.²⁵⁶ This approach was adopted by the Supreme Court in the widely discussed case *Lucas v. South Carolina Coastal Council*. The Court found that a regulation prohibiting construction on the beachfront in order to protect the ecological security of the coastline (a public resource) was a taking. Justice Scalia explained that compensation is required when a regulation denies all economically beneficial or productive use of land, unless the prohibited action would have constituted a nuisance as defined by the background principles of the state’s law of property.²⁵⁷

253. CODE CIVIL [C. CIV.] art. 544 (Fr.).

254. Anna di Robilant, *Abuse of Rights: The Continental Drug and the Common Law*, 61 HASTINGS L.J. 687, 691 (2010).

255. Epstein, *supra* note 20, at 232–35.

256. *Id.* at 232.

257. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027–28, 1031 (1992). For more information on the thinness of the idea of owners’ duties in *Lucas*, see Alexander, *supra* note 19, at 755–56.

Larissa Katz has proposed an interesting variant on the ownership approach that allows for broader duties. Katz is among the critics within the ownership camp who argue that the idea of ownership is found, not in the exclusionary function of the right, but in the owner's exclusive authority to set the agenda for a resource.²⁵⁸ This definition of ownership highlights the public quality inherent in property. In other words, ownership is "the way that we publicly confer the authority on some, owners, to make decisions about things on behalf of everyone."²⁵⁹ When owners make decisions "designed just to dominate others, whatever ultimate good they have in mind, they are exceeding their jurisdiction."²⁶⁰ What is conspicuously absent from the social-responsibility objectives supported by the ownership model, progressives note, is wealth redistribution for the sake of equality of welfare.²⁶¹

The bundle of rights model is also of limited use in theorizing owners' duties. With its strong rights orientation, critics argue, it cannot sustain an adequate vision of property as shared responsibility.²⁶² For the bundle of rights model, the duties of ownership are merely the correlatives of rights held by others. For example, the owner of a shopping mall has a duty to allow protesters to distribute leaflets because protesters have a free speech right of access to property that has been opened to the public.²⁶³ This view of property as entitlements held by parties against one another does not allow for an adequate understanding of property as shared commitments to the use and management of a resource.

In recent years, progressive property scholars have developed a thick theory of the social-obligation norm in property law. Gregory Alexander's version of the social-obligation norm draws on the Aristotelian notion that the human being is a social and political animal.²⁶⁴ It holds that all individuals have an obligation to others in their respective communities to promote the capabilities that are essential for human flourishing. This obligation extends to an obligation to share property, at least in surplus resources.²⁶⁵ Some of the theorists of the tree concept of property proposed a similar notion of social function. For instance, as discussed earlier, Salvatore

258. Katz, *supra* note 18, at 240.

259. *Id.* at 241.

260. *Id.* at 242.

261. Alexander, *supra* note 19, at 753.

262. Arnold, *supra* note 22, at 303–06.

263. *Id.* at 303.

264. Alexander, *supra* note 19, at 760.

265. *Id.* at 760–73.

Pugliatti's discussion of agrarian property insisted that owners of *latifundia* have a duty not only to cultivate but also to share surplus land with landless agricultural workers. The debate over the tree concept of property is one of the earliest instances where an idea of social function that includes an obligation to share property made it into the discourse of mainstream property law scholars.

CONCLUSION

In this Article, I have retrieved from long-forgotten mid-twentieth-century European debates over the tree concept of property, a new analytical model for property. This model has important advantages over the two currently dominant models, the bundle of rights model and the ownership model. It better accounts for the peculiar, complex structure of property. It foregrounds the wide range of values and interests implicated by ownership of different resources. It suggests that, at the core of property, there is a social function that justifies a positive duty to share certain basic resources. A weakness of the tree concept, I recognize, is that it does not properly highlight that property entails coercion. This aspect remains unique to the bundle of rights model. Hohfeld's table of correlatives is not only a matter of analytical clarity. It also foregrounds the fact that the right-duty relation confers significant economic power over others to the right holder.

The retrieval of the tree concept of property is a timely contribution to property lawyers' search for new ways of conceptualizing property. In the United States, the regulatory dilemmas posed by specific resources, such as the unbounded home or ecologically sensitive natural resources, have led to an increasing specialization of property rules. This specialization also demands new analytical tools. Property lawyers have responded by proposing alternatives to the two dominant models: property as a leaky bucket of gambles,²⁶⁶ property as a web of interests,²⁶⁷ and property as a prism.²⁶⁸ The tree concept is an important addition to this menu of property concepts.

In Europe, the tree concept of property can help expand and refocus the debate over the harmonization of European property law. The need for a new conceptual model of property is one of the central themes in the debate. Property experts agree that the European

266. FENNEL, *supra* note 21, at 15–17.

267. Arnold, *supra* note 22, at 282.

268. Merrill, *The Property Prism*, *supra* note 102, at 247.

member-states share a property tradition, the classical model (i.e., the ownership model), and that a modern model of property is needed. They seem to have forgotten that, for a brief moment in the mid-twentieth century, Europe did have an alternative model. The tree concept of property is the entry point for the debate over this modern, harmonized European property.