

# EXCLUSION AND EXCLUSIVITY IN *GRIDLOCK*

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*This Essay reviews Michael Heller's book The Gridlock Economy, focusing especially on its conceptual priors. The book assumes as true the conception that follows from Calabresi and Melamed's Cathedral framework, whereby property consists of a right to exclude others and invasions of the right to exclude may be remedied by a property rule. This definition departs significantly from the conception of property that informs social practice and private law, whereby property consists of a normative interest in determining exclusively the use of an external asset. These differences lead The Gridlock Economy to make several conceptual and normative errors. In some cases (Moscow storefronts and Rhenish tolls), the book criticizes legal institutions for having too much property when in fact the problematic institutions do not actually institute property relations. In other cases (cotenancy partition and airplane overflights), the book criticizes legal institutions for creating too much property when in fact existing law already scales property's exclusivity to its tendency to encourage the free and concurrent use of the propertized asset. And in some cases (redevelopment and private eminent domain), the book favors ad hoc government administration of property disputes without being sensitive enough to the roles that moral socialization and respect for owner free action ordinarily play in property law.*

## INTRODUCTION

Michael Heller earned respect among property scholars for his 1998 article *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*.<sup>1</sup> The conception of a “tragedy of the commons” had been popularized by

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1. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998); see also Lee Anne

Garrett Hardin in a 1968 article by that name. When ranchers have open access (a commons) to grass, their cattle tend to overeat it (the tragedy).<sup>2</sup> Harold Demsetz provided the canonical economic response to tragedies of the commons: private property. Exclusive rights of control, use, and disposition (“exclusive possessory rights”) encourage owners to internalize externalities associated with the over-consumption of resources held in common.<sup>3</sup>

Heller’s conception of the “*anticommons*” provided a counterweight against any tendency that this “commons” scholarship had to prescribe property rights as a cookie-cutter prescription for resource allocation disputes. Heller made concrete one important set of economic costs usually associated with exclusive possessory rights. As a counterweight to Hardin and Demsetz’s grazing example, Heller made famous Moscow storefronts. In the decade after the United Soviet Socialist Republic collapsed, street-side kiosks sold far more goods than department stores in Moscow. This discrepancy was puzzling. As it turns out, the discrepancy existed because kiosks were not subject to as many general administrative requirements as department stores. The stores could not sell goods or services without getting prior approval of six different government agencies held over from the Communist era.<sup>4</sup> These agencies illustrated an important danger associated with private property: when too many individuals have rights to exclude in relation to a resource, the resource may be *underused*.<sup>5</sup>

Heller extended his anticommons metaphor in the centerpiece of this Symposium, *The Gridlock Economy*.<sup>6</sup> Heller’s anticommons scholarship deserves credit for making concrete in law and economic scholarship the social costs associated with the fragmentation of property. *Gridlock* attempts to make the same costs accessible to a wide lay audience. It is not the case that “governments need only to create clear property rights and then get out of the way”; in reality, “[w]ell-functioning private property is a fragile balance poised between the extremes of overuse and underuse.”<sup>7</sup>

Most of the contributors to this Symposium have focused on whether or how anticommons and *Gridlock* principles apply to particular recurring disputes in different fields of property and economic life. Yet *Gridlock* also prompts more general philosophical questions. In particular, what *is* private property anyway?

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Fennell, *Commons, Anticommons, Semicommons*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW (Kenneth Ayotte & Henry E. Smith eds., forthcoming 2011), available at <http://ssrn.com/abstract=1348267>; Stephen R. Munzer, *The Commons and the Anticommons in the Law and Theory of Property*, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 148 (Martin P. Golding & William A. Edmundson eds., 2005).

2. See generally Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

3. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348, 355–58 (1967).

4. See Heller, *supra* note 1, at 637–40.

5. *Id.* at 624.

6. MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* (2008).

7. *Id.* at 18–19.

I do not ask this question skeptically or sarcastically. Although *Gridlock* is targeted toward a popular audience, it propounds an approach toward property regulation characteristic of a prominent genre of law and economic analysis: “the *Cathedral*,” the genre of scholarship inspired by Guido Calabresi and A. Douglas Melamed’s taxonomy of property rules and liability rules.<sup>8</sup> *Gridlock* applies that taxonomy in a manner that accentuates the positives and downplays the negatives associated with ad hoc government administration of individual property disputes. It is fair to read the book as aiming to popularize both the *Cathedral*’s property/liability rule framework and a pro-liability rule preference within that framework. Readers may benefit from a review clarifying the concepts and normative preferences Heller is asking them to embrace.

This Essay’s thesis is as follows: the property conception that Heller assumes and applies is not consistent with the conception that informs ordinary social practices involving property and the private law of property. As *Gridlock* implicitly portrays social practice and private law, an owner has “property” in a thing if he has a right to exclude, understood as a legal right to blockade others from using that thing without his consent. *Gridlock* discredits that assumed conception and proposes as an alternative what this Essay calls “the pro-liability rule *Cathedral* conception.” In this conception, “property” consists of a right to exclude backed only by a *Cathedral* liability rule. The owner may not blockade others from commandeering his property, but if others do commandeer it, he is entitled to market value compensation.

As it applies to social practice and private law, *Gridlock* portrays the alternatives inaccurately. In those domains, property is conceived of as a right to determine exclusively the use of a thing. Property confers on an owner a right to exclude, but its exclusivity is configured in relation to a more fundamental interest in deciding how to use the asset. This normative domain of use determination is qualified to leave each owner with the greatest discretion to use the things in ways generally deemed valuable consistent with others’ pursuit of similar uses. So conceived, “property” is not nearly as rigid and facile as an unqualified blockade right.

If one understands the background conceptions properly, *Gridlock* presents a mixed picture. In fairly “low tech” disputes, more often in the private law of property, many of *Gridlock*’s prescriptions are quite sensible. *Gridlock* also provides a useful corrective for lay readers against construing property as a blockade right.

As I will explain, however, I doubt property practice is as diseased as *Gridlock* suggests, and there are reasons for suspecting that *Gridlock*’s cure is worse than the disease. Neither pre-theoretical social practice nor private law is as facile as *Gridlock* suggests; both already anticipate and avoid many of the problems Heller identifies. Drug-patent licensing, telecommunications, and other “high tech” disputes may present different cases on the normative merits. Even so, ordinary social practice and the private law structure property as they do to fulfill

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

some important normative imperatives. Most important, when the law makes an exception from ordinary social and private law relations to try to maximize welfare in a particular dispute, it risks jeopardizing background norms that encourage respect for property. There are reasons for wondering whether much of the *Cathedral* scholarship and many public law programs are sufficiently attuned to this concern. *Gridlock* seems not to consider the concern adequately, either. Lay readers should discount the book's argument—and the method of analysis Heller is seeking to popularize—by the extent to which both blur the relations between property, freedom, and the moral conditions of order.

### I. RESTATING *GRIDLOCK*

In *Gridlock*, Heller defines the anticommons as “any setting in which too many people can block each other from creating or using a scarce resource.”<sup>9</sup> Heller offers the anticommons as an antidote against a view by which “governments need only to create clear property rights and then get out of the way . . . . The anticommons perspective shows that the *content* of property rights matters as much as the *clarity*.”<sup>10</sup> To make the anticommons concept accessible to a broad lay audience, Heller introduces the idea of “gridlock,” which “arises when ownership rights and regulatory controls are too fragmented.”<sup>11</sup> One aim of *Gridlock* is simply to help readers to “spot and name gridlock” when it occurs in everyday life.<sup>12</sup> The other aim is to introduce readers to the wide variety of tools that might be used to “unlock the grid” and that involve “prevention,” “treatment,” or “alternative medicine” by “individual, joint, [or] state” actors.<sup>13</sup>

*Gridlock* applies this basic formula to a wide range of examples in different areas of economic regulation, especially pharmaceutical patent policy and telecommunications.<sup>14</sup> Although the observations in this Essay are relevant to those areas as well, I focus here on examples closer to the property law typically associated with a first-year property course. Since we are interested primarily in the conceptual underpinnings of *Gridlock*'s argument, it is helpful to abstract from areas that raise distracting industrial-policy complications and to focus on areas where law and scholarship make the concepts most concrete. Moscow storefronts get their day in *Gridlock*,<sup>15</sup> but so do a few other fairly simple examples.

One such example is tolls along the Rhine River. For centuries, boat traffic along the Rhine river languished because, as described in “one boatman's plaintive song[,] The Rhine can count more tolls than miles.”<sup>16</sup> “Too many tolls,” Heller concludes, “mean too little trade.”<sup>17</sup> Many reviewers conclude that this example is Heller's most vivid metaphor for gridlock. “Today,” David Bollier

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9. HELLER, *supra* note 6, at 18.

10. *Id.* at 18–19.

11. *Id.* at 19.

12. *Id.* at 187.

13. *Id.* at 18–19, 21, 187, 191.

14. *See id.* at 49, 78–79, 106.

15. *See id.* at 143–64.

16. *Id.* at 20.

17. *Id.* at 3, 20.

asserts, “there are countless ‘phantom tollbooths’ that use property rights to extract tribute from the stream of commerce while contributing very little in return.”<sup>18</sup>

Heller illustrates his argument with early twentieth-century overflight gridlock, in a section titled “The Lighthouse Beam.”<sup>19</sup> Heller explains the *ad coelum* principle to a lay audience:<sup>20</sup> “No one can mine under your land or build an overhanging structure without your permission.”<sup>21</sup> Construing this principle literally, Heller asks, “If you control the air thirty-five feet below and above the ground, why not at thirty-five thousand feet down and up?”<sup>22</sup> By that construction, any “crossing [of] each column without permission is a trespass.”<sup>23</sup> Owners would have the right to blockade lighthouse beams traveling over their properties, an airplane could not “cross innumerable columns of air” without prior consent of ground owners, “[a]ir travel would be a missing market, and all the advances flight has brought would be difficult to imagine.”<sup>24</sup>

Another example consists of “[h]eir property’ gridlock.”<sup>25</sup> The number of farm-owning African American families dropped from one million in 1920 to 19,000 today. Among other explanations, Heller identifies one legal culprit: fragmentary inheritance shares, which he calls “Share Choppers.”<sup>26</sup> Mid-century, many African American farmers “had good reason to be suspicious of local lawyers and so died without wills. With each generation, the farm split among multiple heirs.”<sup>27</sup> As co-owning descendants multiply, “people move away and family members have ever weaker ties to each other and to the land, creating practical problems that become irresolvable.”<sup>28</sup> The most likely legal response is a partition sale, in which a court compels the sale of the land and distributes the profits to the co-owning family members in proportion to their fractional shares.<sup>29</sup>

One of *Gridlock*’s most practically important examples is “block parties,” the phrase Heller uses to discuss efforts by local governments to redevelop underutilized neighborhoods. “Block parties” refer to a situation in which a minority of owners in a local urban neighborhood practice “minority tyranny” and refuse to sell their properties to a developer who wants to build a large and higher-

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18. David Bollier, *The Tragedy of the Anticommons*, ON THE COMMONS (July 22, 2008), <http://onthecommons.org/content.php?id=2088> (reviewing HELLER, *supra* note 6).

19. The “lighthouse beam” refers to a passage from a 1928 poem Heller reproduces in HELLER, *supra* note 6, at 27.

20. *Ad coelum* refers to the Latin maxim *cujus est solum, ejus est usque ad coelum et ad inferos*: “To whomever the soil belongs, he owns also to the sky and to the depths.” See THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 175 (2007).

21. HELLER, *supra* note 6, at 27.

22. *Id.* at 27.

23. *Id.* at 28.

24. *Id.*

25. *Id.* at 20.

26. *Id.* at 121–22.

27. *Id.* at 122–23.

28. *Id.* at 123.

29. *Id.* at 20, 121–23; see also Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549 (2001).

value commercial venture where their homes are.<sup>30</sup> Early in a city's life cycle, it may make sense for a neighborhood to consist primarily of apartments or residential houses. As the city matures, however, "[l]and becomes more and more fragmented, times change, and the scale of ownership no longer matches the optimal scale of use."<sup>31</sup> When a "private developer is willing to build on behalf of a shopping mall or auto factory," he offers significant benefits, but he needs a "fast timetable" and "assembled, available land right away."<sup>32</sup> "Redevelopment" occurs when the government breaks through the block party gridlock using eminent domain. The government condemns private lots and assigns ownership to the developer. To illustrate, Heller relies on *The New York Times*' efforts to acquire and redevelop a block in Times Square.<sup>33</sup> Heller presents the Times Square redevelopment as a mixed blessing. On one hand, eminent domain helped create "an architectural delight," and it helped unlock "[u]p to \$165 million in real estate assembly value" stored in the lots when they were separately owned.<sup>34</sup> On the other hand, eminent domain was a "crude solution"; it encouraged the *Times* not to negotiate with owners in the targeted site area, and it created a substantial possibility that tenants in the condemned area would get only "negligible" compensation for their property interests.<sup>35</sup> Heller ultimately concludes that redevelopment is worth the risk of abuse, however: "Until we come up with a better solution, eminent domain is the best answer cities have to the costly problem of block parties."<sup>36</sup>

## II. EXCLUSION IN *GRIDLOCK*

So *Gridlock* has a thesis that seems straightforward, and it has vivid examples accessible to a lay audience. One of the dangers of popularizing academic work, however, is that important qualifications or theoretical reservations get lost in translation to popular prose. Whenever a work makes general claims about property theory, it is imperative to ask how the work defines "property." As far as I can make out, *Gridlock* does not discuss this issue systematically.<sup>37</sup>

*Gridlock* seems to assume and consistently follow one definition of property: a right of an owner (or a partial owner) to exclude others from the thing owned. Heller has embraced this definition explicitly in his academic scholarship. In his seminal *Anticommons* article, Heller introduces the anticommons in the following passage:

In a commons, by definition, multiple owners are each endowed with the privilege to use a given resource, and no one has the right

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30. HELLER, *supra* note 6, at 113.

31. *Id.* at 111.

32. *Id.*

33. *Id.* at 110–11.

34. *Id.* at 111.

35. *Id.* at 110–11.

36. *Id.* at 110–15.

37. Although Chapter 2 sets forth a "lexicon" of relevant terminology, it does not define "property." *Id.* at 23–48. The index refers readers interested in "property rights: content of" to two page ranges, neither of which define property. *Id.* at 18–19, 147, 256.

to exclude another. When too many owners have such privileges of use, the resource is prone to overuse—a tragedy of the commons. Canonical examples include depleted fisheries, overgrazed fields, and polluted air. In an anticommons, . . . multiple owners are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use. When there are too many owners holding rights of exclusion, the resource is prone to underuse—a tragedy of the anticommons.<sup>38</sup>

In the commons, resources are underpropertized because resource users lack rights to exclude; in the anticommons, resources are overpropertized because too many resource users have rights to exclude. *Gridlock* assumes the same spectrum and understanding, though it does so using not the term of art “exclusion” but the more colloquial conception “blockade right.” Thus, in *Gridlock*’s introduction, Heller states his thesis as follows: “[s]ometimes we create too many separate owners of a single resource. Each one can block the others’ use. If cooperation fails, nobody can use the resource.”<sup>39</sup> Later, he refers to badly drawn property rights as rights to “block access to a resource” or “phantom tollbooths.”<sup>40</sup> His use of airplane overflight disputes fits the same picture.

When Heller assumes property to be an owner’s right to blockade non-owners from the thing owned, he is using a conception of property typical across a broad range of law and economic scholarship on property. In their *Cathedral* article, Calabresi and Melamed propose two alternative remedial schemes for regulating conflicts over entitlements. When Marshall has a “property rule,” “someone who wishes to remove the entitlement from [him] must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by [Marshall in his capacity as] the seller.”<sup>41</sup> In contrast, “[w]henver someone may destroy [an] initial entitlement if he is willing to pay an objectively determined value for it, [the] entitlement is protected by a liability rule.”<sup>42</sup> In other words, property rules confer on owners rights to exclude from their assets anyone who is not willing to meet their terms for alienating their assets. Liability rules confer on owners rights to exclude from their assets anyone not willing to pay market value damages as determined by a public trier of fact.<sup>43</sup> I assume those definitions for the rest of this Essay, and I call them together the “property/liability rule scheme.” Under standard *Cathedral* analysis, legal decisionmakers should assign property or liability rules to parties with interests in an asset depending on which rules are

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38. Heller, *supra* note 1, at 623–24. Larissa Katz construes the notion of an anticommons more narrowly, as an arrangement that significantly restricts owners’ freedoms to set the agendas over the assets they own. See Larissa Katz, *Red Tape and Gridlock*, 23 CAN. J.L. & JURIS. 99, 107 (2010). Katz’s argument is insightful as an interpretation of legal and social practice but not as an interpretation of Heller’s conception of the anticommons. Heller uses the anticommons idea as all *Cathedral* scholarship does—to refer “fundamentally [to] a problem of assembly.” Fennell, *supra* note 1, at 18.

39. HELLER, *supra* note 6, at 2.

40. *Id.* at 2, 4.

41. Calabresi & Melamed, *supra* note 8, at 1092.

42. *Id.*

43. See Eric R. Claeys, *The Right to Exclude in the Shadow of the Cathedral: A Response to Parchomovsky and Stein*, 104 NW. U. L. REV. 391, 406–08 (2010).

most likely to maximize the net welfare gains from coordinated use of a resource after discounting for transaction costs and other social losses associated with such use.

Many law and economics scholars apply this framework in a manner that accentuates the advantages of liability rules more than social practice and the private law of property law usually do. When Calabresi and Melamed conceived of “liability rules,” they propounded a term that intuitively fits with what lawyers understand about *some* legal entitlements and remedies, especially in the law of accidents and eminent domain. Yet “liability rules” could conceivably apply to a much broader range of property disputes, such as disputes over possession and ownership of land.<sup>44</sup> Ian Ayres, in separate collaborations with J.M. Balkin<sup>45</sup> and Eric Talley,<sup>46</sup> has stressed that liability rules have information-forcing advantages commonly associated with options. Liability rules do have these advantages, but the advantages arise most strongly in the realm of contracts, where parties bargain with each other consensually, not in the fields of property or property torts, where the law presumes the parties are strangers and one may be aggressing on the other’s property.<sup>47</sup>

In this Essay, I refer to that presumption as the “pro-liability rule *Cathedral* presumption” toward property. With apologies for the cumbersome terminology, let me explain why I use it. The pro-liability rule *Cathedral* presumption is not accepted by all. Many economists understand property in terms quite close to social practice and basic law. For example, Armen Alchian has defined property as “the exclusive authority to determine how a resource is used.”<sup>48</sup> Although Alchian is an economist and not a lawyer, as we shall see, he defines property in a manner grounded much more closely in law than have Calabresi, Melamed, or many other law and economics scholars. In addition, not even all law and economics scholars apply the property/liability rule scheme to favor liability rules more than current private law does. Richard Epstein, for example, insists on “the dominance of property rules over liability rules” in ordinary cases, “except under those circumstances where some serious holdout problem is created because circumstances limit each side to a single trading partner.”<sup>49</sup> Still, Calabresi, Melamed, Ayres, and Ayres’s co-authors all represent a significant constituency in law and economics scholarship. They assume that property rights confer blockade rights and that such rights create huge holdout

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44. See Carol M. Rose, *The Shadow of the Cathedral*, 106 YALE L.J. 2175, 2177–82 (1997).

45. Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703 (1996).

46. Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027 (1995).

47. See Rose, *supra* note 44, at 2182–88.

48. See Armen A. Alchian, *Property Rights*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS (David R. Henderson ed., 2008), available at <http://www.econlib.org/library/Enc/PropertyRights.html>.

49. Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2092 (1997); accord Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719 (2004).

risks. For different reasons, they suggest, in practice, the costs of liability rules are likely not as great as the costs of these holdout losses. To limit the extent to which blockade property rights diminish welfare, they limit the rights to trigger only liability rule remedy protections. Liability rules prevent owners from holding out by letting public officials determine independently the price at which a reasonable owner would cash out his blockade rights. The term “pro-liability rule *Cathedral* presumption” reflects that mixed conceptual and normative approach toward property.

### III. EXCLUSIVITY IN PRIVATE PROPERTY LAW

Both the property/liability rule scheme and the pro-liability rule *Cathedral* presumption are problematic in important respects. *Gridlock* may suffer from the same problems. In this Part, I propose a conception of property more representative of what we see in social practices and private law regulating property.

#### A. *Property as an Interest in Determining Exclusively the Use of a Thing*

Let me begin by restating a conceptual account of property propounded elsewhere.<sup>50</sup> This account is grounded in several observations about human social interactions that I must assume here.

In most societies in which Western legal systems are employed, social norms and legal rules apply to a class of members who regard one another as equal in important respects. They are equal in the sense that they all have individual powers of agency, choice, and planning. Each member uses those powers to pursue a mixture of different interests. Interests refer to individual goods that (psychologically) attract and (normatively) justify people to pursue them.<sup>51</sup> Some of these interests are largely self-regarding, like health. Others are both self- and other-regarding. If an individual serves as president of a private association, for example, he pursues individual interests (practicing managerial skills and enlarging his reputation) and almost certainly also social interests (taking satisfaction at his associates’ profiting from the association’s accomplishing its ends). Different societies (or, different individuals within a liberal society that tolerates a healthy degree of value pluralism) may justify interests and their pursuit

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50. The following account draws on J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 7–104 (1997); Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 *SEATTLE U. L. REV.* 617, 631–38 (2009) (reviewing MERRILL & SMITH, *supra* note 20); Katz, *supra* note 38; Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 *ARIZ. L. REV.* 371 (2003).

51. See 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 33–34 (1987); Joseph Raz, *On the Nature of Rights*, 93 *MIND* 194, 208–10 (1984). Penner explains the role of “interests” in a tradition drawing on the scholarship of A.M. Honoré and Joseph Raz. PENNER, *supra* note 50, at 32–63. I explain how their usage accords with the writings of influential medieval natural law jurists in Eric R. Claeys, *The Private Law and the Crisis in Catholic Legal Scholarship in the American Legal Academy*, 7 *J. CATH. SOC. THOUGHT* 253, 256–57 (2010) (book review).

of interests in different foundational approaches to practical normative reasoning—among others, autonomy, virtue, happiness, or utility.<sup>52</sup>

Although different individuals may justify interests with different foundations, social concepts order how members of the same society interact with one another. Social concepts lock in community conventions settling normative disputes about interests. Those conventions order individual society members' concurrent individual pursuits of individual or common interests. Assume that an interest is commonly and authoritatively held to be valid and important, that it confers on interest-bearers moral powers to pursue certain courses of action, and that it also confers on them claim rights to exclude others from interfering. Such conventions declare "rights."<sup>53</sup> Rights help order social relations by signaling how far different individuals' interests run in commonly repeating act situations.

Oversimplified somewhat, by some convention—customary, political, or otherwise—members of a community come to agree that they are all entitled to pursue interests deemed particularly important within generally set parameters, for generally agreed-on ends, in commonly repeating but generally describable factual circumstances. When a society member asserts a right within its agreed-on parameters and ends, he provides others with sufficient reason to exclude themselves from his course of action.<sup>54</sup> Thus, if a security guard wants to instruct protestors to leave a shopping mall, he does not need to determine whether their protests will jeopardize the sales of stores in the mall—or even give them any explanation at all. If, however, the right-claimant's listeners believe that his right is not grounded in an interest that requires their respect under the circumstances, they will probably refuse to exclude themselves from *their* intended actions. Thus, if the protestors believe in good faith that their constitutional free-speech rights take priority over the mall's property rights, they may refuse to obey the guard.<sup>55</sup> In such cases, legitimate disagreement and even conflict may follow.<sup>56</sup>

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52. Penner assumes that interests can further autonomy in relation to a wide range of ultimate normative foundations. See PENNER, *supra* note 50, at 49–50. Mossoff suggests that these concepts are associated more contingently to Enlightenment natural rights justifications for labor and use. See Mossoff, *supra* note 50, at 377–80.

53. In text, I use the term "right" in the sense explained in Joel Feinberg, *The Nature and Value of Rights*, 4 J. VALUE INQUIRY 243 (1979), and especially *id.* at 255–56. Penner, by contrast, assumes that a "right" refers only to a "negative liberty," "a freedom from constraint, not the provisions of a means to act." PENNER, *supra* note 50, at 50. This difference leads us to differ about the priority of exclusion and use in property. See *infra* Part III.C.

54. See PENNER, *supra* note 50, at 7–22, 48–49.

55. See *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 474 (1980).

56. I do not mean to suggest that the right-claimant's right is contingent on listeners denying his right, or that the rights deserve to be presumed valid until some listener challenges it. In principle, a right-claim may always be judged on whether the right is being abused whether or not the claimant is aggrieving anyone else in the process. See Larissa M. Katz, A Jurisdictional Principle of Abuse of Right 10–29 (Feb. 8, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1417955>. The conflict between the listeners and the claimant simply provides an extremely convenient opportunity in practice to test the claim.

If this scheme describes familiar social practices fairly accurately, in social practice and private law, property consists of a conceptual right instituted to secure a normative interest in determining exclusively the use of an external asset. Normatively, the core of property consists of *use* of an *external asset*. Different individuals may assert many legitimate normative interests in engaging purposefully with external assets—to integrate those into broader plans of action individuals set for their own lives. Individuals may appropriate land to have shelter, gather food, build a dwelling to raise and ground a family, run a club, engage in commerce, or so on. Each of these uses of land is legitimate and furthers particular individual interests. Since different individuals may pursue different interests, however, or since the same individual may pursue different interests in different situations or at different stages of his life, common norms must protect individuals' claims not only to use external assets but also to *determine* the assets' uses in relation to how they perceive their needs and interests.<sup>57</sup>

Furthermore, since property relations are social, these domains of free use determination must be *exclusive*. Property orders social relations in relation to an external asset by signaling to many whom they must approach to get permission to interact with the asset. In other words, when one individual is acting within the domain of use determination that the norm-setting authorities have deemed rightful, the legitimacy of his right gives him sufficient reason to exclude others who interfere with his rightful discretion. If Taney wants to build on Marshall's land and Marshall says, "Stay off my land," both know, or should know, that Marshall's command is sufficient reason for Taney to stay off. Ordinarily, it does not matter why Marshall wants Taney to stay off, or how Marshall means to use his land. Marshall's "property" in his land signals to Taney that Taney cannot bring the land into his interests without first convincing Marshall that doing so is in Marshall's interests.<sup>58</sup>

Yet property does not entitle owners to exclude absolutely, with no considerations for the reasons why non-owners might want to enter or engage with their land. Socially, "property" instead institutes a series of presumptions, shifting the burden depending on the circumstances. So when Marshall says, "Stay off my land," he is actually making the much more qualified social assertion: "In general, I am rightfully entitled to decide how this land is used. On that basis, I am inclined to repel your entry as a wrongful interference, unless you articulate an interest in using my land that trumps my presumptive entitlement." Taney may be able to meet that challenge. Assume Taney means to commandeer Marshall's land temporarily to take shelter from a life-threatening or property-destroying storm. Although the law ordinarily promotes general social use interests by protecting Marshall's exclusive control, use interests may and should give way when non-owners face great jeopardy to more urgent interests in preserving life or preventing the total destruction of property.<sup>59</sup> That possibility makes Marshall's right-claim implicitly defeasible.<sup>60</sup>

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57. See PENNER, *supra* note 50, at 49–51, 68–75.

58. See *id.* at 76.

59. See *Ploof v. Putnam*, 71 A. 188 (Vt. 1908); Claeys, *supra* note 43, at 401. *Ploof* confirms as much by teaching two doctrinal lessons: the boater has not only a

### *B. On Exclusivity and Bundles*

Some readers may wonder how the definition I am restating here relates to another conception of property, as a bundle of rights or sticks. “According to this view, it is misleading to talk of ownership of any object; one can only talk of owning a number of distinct rights with respect to that object.”<sup>61</sup> The bundle conception can be understood in several different ways. Although space prevents me from running down all the different usages, let me compare my exclusive use-determination conception to two representative understandings of the bundle.<sup>62</sup>

In its most ecumenical sense, the bundle conception merely states a truism: if an owner has property in a thing, the conception specifies that an owner has property in any interest lesser than the whole of his thing. If Marshall has property in a fee simple absolute in Blackacre, he has property in a term of years for two years, which he may assign in a lease. He also has the rights to demand rent or other profits for assigning such interests, the right to license guests to come onto Blackacre, and a use right for every day of the year, to decide how to use Blackacre and to prevent external trespasses or nuisances from interfering with his daily choices.

In this sense, however, the bundle does no work to determine whether a subsidiary right is a subsidiary of a *property* right. Assume we have a pie made with Italian pizza dough, ground beef, onions, cheddar cheese, tomatoes, and taco seasoning.<sup>63</sup> If we are sure that this pie belongs conceptually in the class “pizza,” a “bundle of slices” conception specifies that any slice of that pie is also pizza—no matter what shape the slice is, or how small it is. Yet the bundle of slices conception cannot answer the prior question whether that pie is quintessentially a “pizza.” Maybe this pie has all of the constitutive characteristics of a “pizza” because it has pizza dough, tomatoes, and cheese; maybe the taco seasoning and the cheddar cheese make this pie a “Mexican pizza,” in a class different from “pizza.” The same ambiguity carries forward to property law. Consider again the relation between property rights and a non-owner’s claim of necessity. Ordinarily, the right to exclude is “one of the most essential sticks in the bundle of rights that

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privilege to commandeer the land owner’s dock but also a power to commandeer, a power to repel resistance by the owner, and a right to sue him for trespass to chattels if the latter’s resistance harms his boat. *Ploof*, 71 A. at 189–90.

60. Provided also that the entrant uses the owner’s property with reasonable prudence in the emergency and pays compensation for any damage he inflicts. *See infra* note 142 and accompanying text.

61. EDWARD H. RABIN ET AL., *FUNDAMENTALS OF MODERN PROPERTY LAW* 1 (5th ed. 2006); *accord* AM. LAW INST., *A CONCISE RESTATEMENT OF PROPERTY* §§ 5–6 (2001) (declaring that owners may have many different legal or equitable interests in land comprising “varying aggregates of rights, privileges, powers and immunities”).

62. For reasons of space, the following discussion does not consider other and more elaborate defenses of the bundle conception. *See, e.g.*, STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 22–36 (1990); MARGARET JANE RADIN, *REINTERPRETING PROPERTY* 166–90 (1993); Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 *STAN. L. REV.* 455 (2010).

63. This paragraph elaborates on Claeys, *supra* note 50, at 632–33.

are commonly characterized as property.”<sup>64</sup> The bundle conception cannot explain why that right happens not to be in the bag when a non-owner asserts a privilege of necessity. The exclusive use-determination conception cannot explain completely, either, for the ultimate issues are normative and not conceptual. Yet the latter conception has at least one advantage: property’s tie to “use” helps focus the inquiries when and why property rights should be defeasible. In the necessity example, life and the preservation of some property trump control over future use of other property.

Now, many property scholars might respond that the foregoing example confirms one of the main points of the bundle—that even the seemingly sacrosanct right to exclude is qualified for normative reasons. In this view, the whole point of the bundle is to clarify that property rights are more contingent, and are contingent on a wider range of norms, than judges commonly assume. This response points to a more extreme rendition of the bundle conception, in which “property is a structural composite, i.e., that its nature is that of an aggregate of fundamentally distinct norms.”<sup>65</sup> To appreciate the problem with this conception, consider a structurally composite pizza—say, a pie that is three-quarters pizza dough, marinara sauce, and mozzarella cheese, but one-quarter lasagna noodles, hoisin sauce, and cheddar cheese. If someone claims that the whole is a pizza, she is trading on the fact that three-quarters of it clearly is pizza to obscure the fact that one-quarter clearly is not. Conceptually, it is more accurate to say that three-quarters of the pie is a pizza and the other quarter is something completely different.

In its most controversial sense, the “bundle of rights” conception leaves similar ambiguities in relation to property. To illustrate, consider the landmarks law under which just compensation was demanded in *Penn Central*.<sup>66</sup> General nuisance common law principles leave land owners free to extend their buildings as they see fit; their structures may not emit substantial pollution, but the owners are not liable if the buildings cast inconvenient shadows or are unsightly.<sup>67</sup> New York City instituted a landmarks law taking city policy in a different direction. The law gave a city preservation commission discretion to designate as a landmark any property it determined to have “a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation.”<sup>68</sup> When a property is so designated, the owner must not

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64. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

65. J.E. Penner, *The ‘Bundle of Rights’ Picture of Property*, 43 UCLA L. REV. 711, 741 (1996).

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

67. *See, e.g., Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357 (Fl. Dist. Ct. App. 1959); Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379, 1390–91 (2010).

68. *Penn Cent. Transp. Co.*, 438 U.S. at 110 (quoting N.Y.C. ADMIN. CODE ch. 8-A, § 207-1.0(n) (1976)).

only maintain its historical or aesthetic features but also submit to preapproval of any changes he proposes to make to the architectural features of structures on it.<sup>69</sup>

Conceptually, such schemes raise questions about whether the restrictions they enforce are compatible with the conception of property that informs most social practice and private law. That inquiry turns on at least two determinations. One asks whether a landmarks scheme's restraints on the use of property by some may be justified on the ground that they protect or enhance others' uses of their own property. Perhaps a landmark enlarges the powers all owners and would-be owners in a community to use and enjoy their own lands by ennobling the community in which those lands are situated. The issues here present variations on similar issues raised by aesthetic restrictions. Some have assumed that local communities may reconfigure property norms to accord with distinct local political judgments about aesthetics,<sup>70</sup> in which case "property" can cover one owner's claim to enjoy aesthetic benefits from another's lot. Others have suggested that aesthetic restrictions cannot be justified as harm-prevention measures but only as moral paternalism,<sup>71</sup> in which case "property" cannot cover those claims to aesthetic enjoyment.

Normatively, I doubt either landmarks or aesthetic restrictions lend themselves to sound policy. Such schemes end up restraining many legitimate uses of land, more often than not by poor and middle-class owners effectively excluded from a community, to make land use accord with the tastes of a few snobs.<sup>72</sup> Our focus here, however, is conceptual. Conceptually, such restrictions *may* consist of property if properly drafted—but even then, they strain the conception of property. If properly drawn, preservation restrictions restrain each local owner's active land uses, to enlarge his interest in passive uses created when he enjoys the environs created by restrictions on his neighbors' development. Yet that justification strains the normative equality latent in "property." Again, in pre-legal social practices and private law, "property" and other categories of foundational normative interests presume that citizens stand in relations of normative equality to one another. Many developers, poor individuals, and other owners prefer property's utility over its beauty. If they count as normative equals in the relevant community, "property" entitles them to parallel domains of free use choice. Their equality gives them

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69. See *id.* at 112 (citing N.Y.C. ADMIN. CODE ch. 8-A, §§ 207-4.0 to -9.0 (1976)).

70. See Scott Hershovitz, *Two Models of Tort (and Takings)*, 92 VA. L. REV. 1147, 1168 n.56 (2006).

71. See, e.g., Larry Alexander, *Plastic Trees and Gladiators: Liberalism and Aesthetic Regulation*, 16 LEGAL THEORY 77 *passim* (2010).

72. See Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1615–18 (2003); see also, e.g., *Penn Cent. Transp. Co.*, 438 U.S. at 117–18 (reporting how the New York City landmarks commission rejected the plans of Penn Central Transportation Co. to build on the grounds that the plans constituted an "aesthetic joke"). Others provide more sympathetic views of preservation schemes or other regulations protecting access to open views. See generally, e.g., Sara C. Bronin, *Modern Lights*, 80 U. COLO. L. REV. 101 (2009); Mendes Hershman, *Critical Legal Issues in Historic Preservation*, 12 URB. LAW. 19 (1980); Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473 (1981).

standing to complain if and when a landmarks law, in the name of protecting passive enjoyment of sights, restrains their choices in favor of active land uses. One way to avoid their criticisms is to deny that those active-use claims have any moral status. The easiest way to deny status is to exclude from the community developers, poor individuals, and others who prefer usefulness over beauty. In that exclusionary community, a preservation law may count as a regulation of conceptual property, but the law manages to remain a regulation of “property” only by making the political community much smaller, more economically elite, and more culturally homogeneous than social practice ordinarily assumes.

Of course, New York City’s landmarks scheme avoided these problems. It refrained from articulating general standards of preservation that applied prospectively to all buildings with the characteristics declared in the standards. In doing so, it left in most city owners the discretion property law ordinarily gives them to determine the uses of their own lots. Instead, the landmarks scheme vested discretion in a commission to designate individual buildings on a case-by-case basis.<sup>73</sup>

Here, however, the landmarks scheme ran afoul of the second minimal requirement of conceptual property: that its use restrictions be generally applicable. Another requirement of normative equality is that norms declare and enforce the same general expectations on how different individuals pursue the same normative interests. When the bundle conception declares the conceptual point that a structural composite of norms can count as property, it makes “property” seem like a composite of general development rights (embodied in nuisance law) subject to ad hoc vetoes implementing preservation and aesthetic norms (embodied in the landmarks scheme). Judging by the standards of social practice and the private law of property, the first portion counts as conceptual “property,” but the second does not. “Property” entitles an owner to decide whether and how to engage with the owned asset—even mistakenly.<sup>74</sup> When a government actor decides an owner has a privilege to engage in a particular activity at a particular level because the activity and the level contribute to the general welfare, the privilege is not property.<sup>75</sup>

### C. On Exclusivity and Exclusion

Some readers may conflate the conception I propose here with other conceptions defining property as a “right to exclude.”<sup>76</sup> This conflation is a mistake.<sup>77</sup> Oversimplifying somewhat, exclusion theories run on a continuum. At one extreme, the concept “property” states a blockade right, which may be

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73. See, e.g., *Penn Cent. Transp. Co.*, 438 U.S. at 117 (reporting that the landmarks commission stated, “[We have] no fixed rule against making additions to designated buildings—it all depends on how they are done . . .”).

74. See PENNER, *supra* note 50, at 49.

75. See *id.* at 72–73; Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 296–97 (2008).

76. See Hanoch Dagan, *Exclusion and Inclusion in Property* 6–7 (June 9, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1416580>.

77. See Claeys, *supra* note 50, at 631–38; Katz, *supra* note 75, at 279–85; Mossoff, *supra* note 50, at 375.

established to promote any policy whatsoever. For example, Thomas Merrill subscribes to the view by which “the right to exclude others is the irreducible core attribute of property.”<sup>78</sup> *Gridlock* and many other works following the *Cathedral* assume such a conception. At the other extreme, “property” states a blockade right, but the owner should know and non-owners all expect that the owner may not blockade except to exercise and protect an underlying normative interest in use. Thus, James Penner defines “the right to property” as “a right to exclude others from things which is grounded by the interest we have in the use of things. On this formulation, use serves a justificatory role for the right, while exclusion is seen as the formal essence of the right.”<sup>79</sup>

Both of these conceptual definitions differ from property conceived as a right instituted to secure a normative interest in determining exclusively the use of an external asset. Merrill’s conception misses the fact that property’s right to exclude is always grounded in a general normative interest in use. Although Penner’s conception appreciates that fact, it puts the exclusion cart before the use horse. As Adam Mossoff explains, when property consists of a right to determine exclusively the use of an external asset, “[I]nguistically, exclusion plays a role largely as an adjective of the rights of acquisition, use and disposal, and substantively, exclusion is, for the most part, only a corollary of” the normative use interests that justify the rights of acquisition and possession associated with property at law.<sup>80</sup>

Compare proprietary interests in land and water. For normative reasons,<sup>81</sup> property law recognizes in a land owner a broad “right to use” the land “whenever [he] wants.”<sup>82</sup> Conceptually, that broad use interest endows the owner with a correspondingly broad right to exclude others who may want to use the land for concrete and immediate needs. All three conceptions can explain that regime with normative arguments fleshing out the concept of property. Merrill does so with an account of why broad land rights stabilize political society, encourage investment into land, and facilitate commercial exchange with land,<sup>83</sup> Penner’s and Mossoff’s and my conception do so by explaining why a broad right to exclude facilitates different uses, which satisfy concurrent “interest[s] in trying to achieve different goals,” and ultimately satisfy a “robust interest in autonomy.”<sup>84</sup>

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78. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 734 (1999); accord Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954).

79. PENNER, *supra* note 50, at 71 (emphases removed); accord Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S467–74 (2002); Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 963–65 (2009) [hereinafter Smith, *Mind the Gap*].

80. Mossoff, *supra* note 50, at 390.

81. See *infra* Part IV.C.

82. PENNER, *supra* note 50, at 69.

83. See Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1127 (1984).

84. PENNER, *supra* note 50, at 49; see also Smith, *Mind the Gap*, *supra* note 79, at 963–64.

By contrast, in temperate climates, for normative reasons, property endows a riparian owner only with a “first come, first served” use interest,<sup>85</sup> which is then prioritized depending on how each riparian’s uses contribute to survival of people, then survival of animals, then enhancement of land uses.<sup>86</sup> Those entitlements declare and protect a legal usufruct. Merrill describes that usufruct as a “right to exclude others from interfering with particular uses” of the water.<sup>87</sup> This definition, however, obscures the fact that the riparian owner has a “right to exclude” only when the norms prioritizing his and his neighbors’ water uses give him a right to use the water. And, contrary to Penner, if the concurrent interests in *using* the water give context to the right to exclude, “use” supplies not only a “justificatory role” but also “the formal essence” of the property right.

#### *D. On Exclusivity and Inclusion*

Readers may also wonder whether the exclusivity conception I defend here is guilty of a charge Hanoch Dagan has levelled: “exclusion-centrism.” In this charge, right-to-exclude theories mistakenly obscure how property often tolerates “the right of non-owners to be included and exercise a right to entry,” especially in more fine-grained property.<sup>88</sup> Because exclusivity theory makes *use* primary, it avoids Dagan’s complaint. To engage this argument fully, I would need to stop engaging *Gridlock* and start engaging Dagan’s most recent book on property.<sup>89</sup> Let me explain briefly why the charge is inapposite, nevertheless, using the law of cotenancies, the basis for Heller’s analysis of share-chopping.

When property consists of a right to determine exclusively the use of an asset, it leaves room for inclusive subsidiary property rights. The conceptual right constrains cotenancy law in two ways. First, it clarifies relations between the cotenants on one hand and the rest of the world on the other. Even if Blackacre’s cotenants have correlative rights and responsibilities in relation to one another, the nuances in those internal relations make no difference to outsiders. Outsiders do not need to know who or how many own Blackacre to know they must not enter it without consent.<sup>90</sup>

Second, while the exclusive use-determination conception allows for “inclusionary” cotenancy interests, it imposes some constraints on the correlative rights and responsibilities among the cotenants. On one hand, the fact that cotenancy interests are “property” interests implies some expectation and obligation that each of the cotenants will have some discretion to determine the use of the owned asset, commensurate with his particular interest in using the asset. On the other hand, the same fact implies an expectation that all of the individual assets will encourage the greatest concurrent use of the asset practicable given that the

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85. PENNER, *supra* note 50, at 49.

86. See Tyler v. Wilkinson, 24 F. Cas. 472 (C.C.D. R.I. 1827) (No. 14,312); Evans v. Merriweather, 4 Ill. 492 (1842).

87. Merrill, *supra* note 78, at 747.

88. Dagan, *supra* note 76, at 3.

89. See HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS chs. 2 & 3 (forthcoming 2011) (manuscript on file with Author).

90. See Claeys, *supra* note 50, at 634 n.79. Exclusion-based accounts explain this fact just as effectively.

asset's ownership is divided among several tenants. To be sure, this second constraint is weak. As Heller's discussion of share-chopping suggests, in many situations it may not be possible to use the asset productively and satisfy all the use interests of the cotenants. In such cases, property's conceptual content requires some sort of second-best compromise but may not be able to determine which of several imperfect options is the second-best. All the same, that content imposes some determinacy on the slicing or reuniting of partial property interests.

For example, cotenancy law institutes two different regimes for ongoing use of the asset in cotenancy. Ordinarily, all cotenants have concurrent rights to use an asset and none has the right to control exclusively access to it. However, if any one of them ousts the others, he is entitled to control exclusively the possession and use of the asset. The other cotenants' use and access rights convert into more limited rights to demand an accounting.<sup>91</sup> On paper, the concurrent-use regime respects as much as possible all of the cotenants' concurrent interests in using the asset. Because of the co-ownership, however, no single owner has sole power to determine the asset's future use. The fractionation of that power can encourage long-term underuse of the asset. So, if most of the co-owners are passive and one is active, the ouster regime makes more sense. From the standpoint of the social norms binding the co-owners, the ouster regime has legitimate authority because it enlarges their concurrent normative interests in use. Behind the veil of ignorance, the passive co-owners will profit more from vesting exclusive control in the active-co-owner than they would from sharing control with him.

#### *E. Property in Social Practice, Private Law, and Public Law*

The conception of property may be may be criticized on one last ground. As my discussion of *Penn Central* suggested,<sup>92</sup> my conception defines out of "property" many public regulations that are conventionally taught as and assumed to be "property" regulations.<sup>93</sup>

Yet my definition of property is narrower: property consists of a normative interest in determining exclusively the use of things primarily *in pre-legal social practice and in private law*.<sup>94</sup> Here, I acknowledge classification problems. A few private-law decisions might be classified better as "public law" decisions. For example, *State v. Shack*<sup>95</sup> could be read as declaring a general limitation on a landowner's possessory interest in control (i.e., land owners may not prevent government-assisted lawyers and caseworkers from entering their lots to contact migrants residing on the land).<sup>96</sup> On that reading, the case accords with and does not undercut property understood as a normative interest in determining

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91. See, e.g., *Gillmor v. Gillmor*, 694 P.2d 1037, 1039–40 (Utah 1984); *Spiller v. Mackereth*, 334 So. 2d 859 (Ala. 1976).

92. See *supra* notes 66–74 and accompanying text.

93. I am grateful to David Schleicher for encouraging me to consider this objection.

94. Katz, *supra* note 75, at 288 (distinguishing between limitations internal to property and ones imposed by external areas of law).

95. 277 A.2d 369 (N.J. 1971).

96. See *id.* at 374.

exclusively the use of a thing. Yet the case could also be read as making the possessory interest in control subject to general ad hoc, case-by-case, utilitarian interest-balancing.<sup>97</sup> That construction would narrow the use determination inherent in property ownership to the point of extinction. Conversely, many public statutes and some regulatory schemes count for my purposes as “private law.” Public laws and regulatory schemes can complete the concept of property latent in social practice and the private law if they specify the use determination associated with property in a general and prospective way, and if they do so while claiming to enlarge the concurrent interests of all owners and would-be owners to determine the uses of their property. Conveyancing statutes, recordation statutes, and commercial statutes that regulate the sale of property all fit this bill. So can generally applicable restraints on the sale of property (anti-discrimination housing statutes) and generally applicable restraints on use protecting others from annoying uses (basic zoning distinctions among residential, commercial, and heavy industrial use).

However, when property is conceived as a normative interest in determining exclusively the use of a thing, a legal scheme does not embody or secure “property” when it makes an owner’s choices how to use or dispose of the asset subject to external discretionary determinations. Hence the landmarks scheme whose application triggered just-compensation litigation in *Penn Central*. Nor does a legal scheme embody or secure “property” when it limits property uses on grounds unrelated to setting general and prospective priorities that limit the use of things in relation to other legitimate normative interests.

Some might claim that the landmarks scheme litigated in *Penn Central* and other similar schemes are the rule and not the exception. My definition refers to the “Old Property,” which focuses on establishing negative liberties, the argument runs. Meanwhile, contemporary public law makes dominant the “New Property,” which creates positive entitlements to provide security to entitlement holders.<sup>98</sup> Yet “we do not revise our boundaries between bodies of law just because we can, or because doing so suits our favorite theory. We cannot decide, as it were, to drop the category of [private property] as uninteresting or unimportant just because it would be more convenient” to legitimate highly discretionary land-use regulatory programs or other public property programs.<sup>99</sup> Conceptually, the more honest approach is to admit that different fields of American “property” writ large embody different conceptions of property, and that in some cases the law writ large tolerates a healthy amount of dissonance between those conceptions. Consider how Carol Rose relates eminent domain back to the expectations owners have about ownership from the law of trespass:

The state may have an ‘option’ of sorts over your property, but any such option is so broadly but thinly applicable that perfectly sensible people may pay little attention to it in advance. . . . [I]f your property is taken by eminent domain, it is apt to be a kind of

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97. See *id.* at 373–74.

98. See generally Charles Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).

99. JULES COLEMAN, *THE PRACTICE OF PRINCIPLE* 38 (2001).

surprise, hitting you the way an accident hits you; it is not something you thought much about in advance.<sup>100</sup>

More generally, many government powers to deny or permit uses on a case-by-case basis may count as “property regulations” according to conceptions of “property” embodied in eminent domain statutes and other public law schemes touching on property. In social practice and in basic private disputes and relations, however, owners disregard the possibilities declared by these public law schemes. They assume the conception I set forth here until the government and parties who want the government to intervene establish a new regulatory scheme—and superimpose on top of the conception I present here a public law conception of “property.”

#### IV. GRIDLOCK IN PRIVATE PROPERTY LAW?

*Gridlock* suggests that there are many anticommons problems in practice, and that it is crucial that you learn to “spot gridlock” and then “feel confident tackling it in your roles as citizen, voter, advocate, and entrepreneur.”<sup>101</sup> If the previous Part described property tolerably accurately, however, social practices and private law have already hardwired “property” to anticipate and head off gridlock problems. On one hand, many disputes that seem to present property problems in fact do not, because the right to blockade in the problem is not a property right in any sense in which social practice or law understands property.<sup>102</sup> On the other, in many disputes that do involve property, property’s connection to use determination gives property built-in internal reasons to ratchet down property’s exclusion when exclusion seems likely to interfere with use.

##### A. *Phantom Tollbooths*

As an example of the first discrepancy, reconsider Rhenish tollbooths. If any blockade right is property, the toll-charging princes are asserting property interests. If property consists of a right of exclusive use determination, however, that classification states a category mistake. Rhenish princes were not excluding boat traffic to protect and assert rights of their own to make active use of the Rhine River or any other asset.

Although this criticism is conceptual and not normative, it illustrates why sound concepts matter. The Rhenish tollbooth problem states a problem of tax policy, not property policy. In economic terms, property policy focuses on how to secure investment in things, encourage gainful commercial transactions in things, and encourage optimal concurrent uses of different things when their uses conflict. By contrast, tax policy focuses primarily on how to raise revenue from an activity and how to avoid discouraging the activity while taxing it. To be sure, problems arise in both regimes when several entities assert rights to blockade or to tax. But that is another way of saying that hold-out and expropriation problems are not unique to property disputes. And a multiple-expropriation tax problem does not

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100. Rose, *supra* note 44, at 2181.

101. HELLER, *supra* note 6, at 187.

102. *Accord* Katz, *supra* note 38, at 108.

become any easier to analyze simply because one reclassifies it as a problem in property gridlock.

### *B. Moscow Storefronts*

The same discrepancy repeats itself in the Moscow storefront example. Let us assume with Heller that Moscow kiosks outperformed Moscow storefronts because of regulatory gridlock.<sup>103</sup> On that assumption, Moscow regulators were not asserting rights to exclude justified by their tendency to protect the city or anyone else's interest in using neighboring land. The situation might be different if regulators were enforcing basic zoning district boundaries. Those boundaries would embody and specify the limitations department stores must accept on the free exercise of their own property rights to make their own use interests accord with the concurrent use interests of neighboring land owners. Nor would it necessarily be damning if regulators had some administrative discretion in permitting, waiving restrictions, granting variances, or issuing one of these rulings on certain conditions, though here context would matter considerably. Regulators could still exercise such discretion if it was being exercised in the service of making the department stores' uses accord with the uses of neighbors, and if the discretion was applied in such a manner that the substantive policies being enforced were knowable and predictable in advance.<sup>104</sup> As Heller describes the actions of the Moscow regulators, however, they exercised ad hoc discretion to collect bribes.<sup>105</sup> The regulators were not enforcing property rights in any meaningful sense,<sup>106</sup> and one does not need to use terms like "anticommons," "hold-outs," or "gridlock" to conclude that it is a bad thing when a government official abuses his official discretion to collect bribes.

Because of discrepancies like these, readers must be wary of hype surrounding *Gridlock*. The book is being touted in many quarters as a knock-down refutation of private property. For example, Tim Wu interprets the Moscow storefront example to teach: "when you have too many gatekeepers—too many people whose permission is necessary to undertake a given project—that fact alone

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103. Brian Sawers has argued convincingly that the storefronts' problems were attributable to other causes, particularly shortage of capital and corruption in Moscow government offices. See Brian Sawers, *Reevaluating the Evidence for Anticommons in Transition Russia*, 16 COLUM. J. EUR. L. 233, 244–47, 251–55 (2010).

104. Such discretion would constitute an example of what has been called law administration by "precedent" or application of an "authoritative example," as opposed to administration by application of "legislation" or "authoritative general language." See H.L.A. HART, *THE CONCEPT OF LAW* 121–26 (1961). Modern American scholarship prefers to speak of standards and rules, respectively. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992). I prefer Hart's usages because the term "standard" often connotes discretion not only to proceed in the absence of a rule of action stated in general terms but also in the absence of a specific policy or precedent describing the ideal result to which the sound exercise of administrative discretion is expected to contribute.

105. See HELLER, *supra* note 6, at 152–53.

106. Accord Katz, *supra* note 38, at 112–15.

can create gridlock.”<sup>107</sup> He reads this example, and *Gridlock*’s argument generally, to destabilize “one of the strongest intuitions in Anglo-American thought: that property is a good thing, and more property is almost always better.”<sup>108</sup> Yet Anglo-American private-property law has long made the gates hinge on whether exclusion or admission better encourages the use of the asset in question. Wu’s interpretation of the storefront example is casuistic. It has the effect of making property law seem more formal and thoughtless than it really is. It also makes ad hoc administration of property seem more necessary and inevitable than it really is. Heller probably does not mean to go as far as reviews like these suggest,<sup>109</sup> but inquiring readers should take care not to overread his argument.

### C. Lighthouse Beams

Again, however, in other examples, disputes do implicate property rights, and *Gridlock* implicitly portrays those rights as broader, more brittle, and less concerned with property’s productive use than such rights really are in social practice or law. Consider *Gridlock*’s treatment of “lighthouse beams,” or the qualifications that courts made to the *ad coelum* principle to accommodate airplane overflights. Larry Lessig has used this example to create the same casuistic impression as the one which Wu tried to convey using Moscow storefronts.<sup>110</sup> It is thus worth considering the *ad coelum* principle at some length.<sup>111</sup>

The *ad coelum* principle is one of several ways property and tort law declare and embody a broad domain of exclusive use determination. Prima facie, any unconsented entry of land is a trespassory wrong to the owner’s property.<sup>112</sup> From one perspective, this cause of action does seem too broad. A home owner has no realistic hope of using the air space at 35,000 feet, while a commercial airline does.

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107. Tim Wu, *Move Over, Marx: How Too Many Property Rights Wreck the Market*, SLATE, July 14, 2008, <http://www.slate.com/id/2195158>.

108. *Id.*

109. See, e.g., Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1193 (1999) (warning that “the modern bundle-of-legal relations metaphor . . . gives a weak sense of the ‘thingness’ of private property”).

110. See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 1–3 (2004).

111. Sound analysis of the overflight problem also confirms criticisms I have made in previous scholarship of Merrill and Smith’s conception of property as a right to exclude. If taken too literally, the conception is overbroad. When Merrill and Smith recognize as much, they describe property institutions instead as a combination of exclusion rules and governance exceptions as likely to enhance social welfare. See, e.g., MERRILL & SMITH, *supra* note 20, at 29–30. The latter description, however, is not as robust conceptually as property understood as a normative interest in determining exclusively the use of a thing. Exclusion and governance state legal results on the basis of normative analyses that can be justified on the basis of an extremely wide and indeterminate range of normative judgments. The definition I defend here ties property’s exclusion and its exceptions more closely to normative judgments about use determination. See Claeys, *supra* note 50, at 639–50.

112. See PROSSER AND KEETON ON THE LAW OF TORTS § 13, at 69–77 (W. Page Keeton et al. eds., 5th ed. 1984); Claeys, *supra* note 67, at 1388–90, 1405–09.

On the ground, however, trespass to land does have a policy rationale. Every species of property comes with a domain of exclusive use determination; in relation to land, property law structures trespass's prima facie possessory interest in control to accentuate the domain's *exclusivity* over its tendency to encourage *use*. Like all other property interests in social practice and private law, land interests are justified in relation to a use interest. Land rights help many different owners deploy their lots for different uses and different life plans. Because land lends itself to many more uses than many other species of property, however, property in land requires a correspondingly broad domain of use determination. Of course, this cause of action can create a paradox in an individual case: Marshall can exclude Taney from his land even if Marshall is not using it and Taney means to use it productively. Nevertheless, across a broad range of cases, the cause of action indirectly encourages many owners concurrently to use their lots for their own chosen plans. Broad use determination helps ensure that "the [land] necessary for carrying out our plans can be kept, managed, exchanged (etc.) as the plans require."<sup>113</sup>

As the necessity privilege shows, the blockade right is defeasible when the underlying normative interest is defeasible. Yet necessity presents an easy case. In harder cases, the owner and the non-owner's interests are exercises of property or liberty rights, and both rights seem to stand on the same plane. In these cases, the law still qualifies the owner's blockade rights, but the qualifications are more textured. The qualifications aim to give all land owners the greatest free action to determine the likely intended uses of their land or liberty—considering the likelihoods that they might stand in the shoes of the owner or the non-owner.

Other things being equal, the law enlarges all owners' intended uses by protecting their rights to control not only the surfaces of their lots but also the subsurfaces beneath and the air columns above those lots. Consider the remedies for encroaching structures. Assume Taney builds a structure that overhangs onto Marshall's airspace thirty-five feet above the ground. The right extends far enough to enjoin the overhang if Taney builds it deliberately or without having first conducted due diligence, no matter how severely he suffers from removing it. Although different normative theories explain in different ways why the law punishes intentional and careless conduct worse than good faith, they all stress that only "accidents pose no danger of multiple sequential transformations of property rights."<sup>114</sup>

That said, in an encroachment dispute, involving an overhang or otherwise, the merits of the dispute are closer if Taney has encroached in the course of a careful mistake. Although Taney tortiously engaged some of Marshall's airspace for his own ends, he did so innocently, and Marshall was not using that space. Members of a society may reasonably agree that Taney's interest is legitimate, and in the right circumstances on a par with Marshall's. Marshall still deserves some benefit of the doubt to preserve the presumption that owners deserve to determine their lands' uses. Yet if the hardship to Taney is severe enough, a society may reasonably decide that Taney's use interest is innocent

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113. A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* 275 (1992).

114. Epstein, *supra* note 49, at 2100.

enough and significant enough to take normative priority over Marshall's interest in using the encroached-on but hitherto unused land. So every owner's normative interest in determining the use of land is qualified again: a land owner's right of exclusive use determination entitles him to demand compensation after the fact only if he suffers an encroachment that is the product of an innocent mistake, does not disrupt an ongoing use, and is cost-prohibitive to remove.<sup>115</sup> Again, this qualification is internal to the normative interest in property.

The law of animal trespasses deserves consideration here, for it confirms that trespassory boundaries were neither as impermeable nor as formalistic as is suggested by scholars like Lessig.<sup>116</sup> Eighteenth-century English land law qualified trespass principles to leave neighbors' rights to access others' private land for pasturage, fishing, wood-gathering, and easements for passage.<sup>117</sup> At least the pasturage rights still carry forward in several rural American jurisdictions today.<sup>118</sup> These rights of access fit the same account. In an agricultural society, land owners need exclusivity to secure control over their farm land and its cultivation. Yet the same owners need space for their animals to pasture, and they have interests in acquiring fish or wood for their own personal uses. Depending on how land, animals, and fish were all acquired and used, a society could reasonably conclude that the normative interest in determining the use of land should be qualified not to prevent others from entering temporarily to pursue interests in wood, fish, or pasturage. By contrast, in a society in which industrial and other commercial non-agricultural uses predominate, society members could reasonably conclude that these use interests do not have a high enough priority for enough members and that recognizing such interests would unduly threaten developers' interest in building higher-value buildings. Again, the general normative interest in exclusive use determination has a built-in internal limitation. That interest can adjust between formal exclusion and use depending on which is most likely to help the most members of society use their land and the animals and other chattels on it.

The *ad coelum* principle has always been understood as being subject to similar qualifications.<sup>119</sup> That principle settles policy problems associated with accession—specifically, whether the owner of enclosed ground is entitled, by virtue of owning the ground, also to own the subsurface under and the air column

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

116. I do not read *Heller* to make this assumption. See *HELLER*, *supra* note 6, at 27–29. Many careful scholars avoid this assumption. See, e.g., Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 J.L. & ECON. 393, 422–23 (1995).

117. See 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*32–36 (1766).

118. See *Claeys*, *supra* note 67, at 1423–24; see also *Katz*, *supra* note 75, at 298–99 (explaining the right of recreational access recognized in the Scandinavian custom of *Allemansratt*).

119. See, e.g., *Hinman v. Pac. Air Transp.*, 84 F.2d 755, 757 (9th Cir. 1936) (insisting that a literal construction of the *ad coelum* rule “is not the law . . . and . . . never was the law”).

over the close.<sup>120</sup> These questions are not settled formally or automatically when property ownership consists of a normative interest in determining exclusively the use of a thing. Doctrinally, the law could declare the subsurface or the air column a common public resource; an open-access resource; an unowned resource appropriable by acts of acquisition independent from the ground's enclosure; or private property whose ownership runs by accession with the over- or underlying ground. Normatively, the law should institute the regime that best encourages all owners to use the resource concurrently.

These classifications cannot be settled without gathering empirical information and making normative judgments. As for things in the subsurface, property law applies the *ad coelum* principle to assign ownership over mineral rights to the owner of the overlying ground. This assignment assumes and applies several normative and empirical presumptions. Most subsurface columns consist primarily of dirt and rocks; the dirt and rocks on their own are not particularly useful to owners or would-be owners; but they *are* useful insofar as they support the structures that surface owners build to make the surface useful for their own needs. These presumptions can be wrong. The subsurface may contain oil or gold. For oil, the law abandons the accession paradigm and reverts to the appropriation paradigm;<sup>121</sup> for gold (and other non-moving resources fixed in the ground), the law stays with the accession paradigm.<sup>122</sup> Implicitly, behind the veil of ignorance, soil does not contain valuable minerals often enough to make it worth carving out a special appropriation rule. Moreover, the *ad coelum* principle helps individuals with special skill at finding such minerals to extract them. It creates a clean and clear set of legal entitlements delineating the owners with whom they must bargain, and those property rights give the surface owners ample financial incentive to license the extraction.<sup>123</sup>

The *ad coelum* principle applies similarly to air columns. The principle declares a rough normative and empirical presumption that airspace is better assigned by the accession principle to the person who owns the ground beneath the column. Objects in that air column can fall on the surface owner or the structures he has on the ground. He may want to build in that column. He cares more than anyone else about the views he can see inside and through that column. However, these generalizations remain empirical presumptions. The presumption was never

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120. See generally 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 293–98 (2d ed. 1827); Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEGAL ANALYSIS 459 (2009).

121. See *Barnard v. Monongahela Natural Gas Co.*, 65 A. 801, 802–03 (Pa. 1907); VICTOR H. KULP, OIL AND GAS RIGHTS 511–13 (1954); Lueck, *supra* note 116, at 410–12 & tbl.1.

122. See WILLIAM. L. BURDICK, HANDBOOK OF THE LAW OF REAL PROPERTY 11–13 (1914).

123. Cf. *Goodard v. Winchell*, 52 N.W. 1124, 1125 (Iowa 1892) (“That [a meteor] may be of greater value for scientific or other purposes [than it has to a farm owner] may be admitted, but that fact has little weight in determining who should be its owner. We cannot say that the owner of the soil is not as interested in . . . the great cause of scientific advancement . . . This [meteor] is of the value of \$101, and this fact, if no other, would . . . place it in the sphere of its greater usefulness.”).

applied so rigidly that it entitled land owners to exclude any air pollution whatsoever. At common law, nuisance qualified an owner's right to blockade factory pollution from her air in a manner similar to that in which trespass qualified her right to blockade cattle from her grass. Unwanted pollution does diminish, to a palpable extent, a land owner's interest in determining how he will use and enjoy his land. Behind the veil of ignorance, however, each owner stands poised to gain greater free action to choose how to develop, use, and enjoy his own land if he waives the right to sue for "comparatively trifling" pollution and insists only on the right to prevent severe nuisances.<sup>124</sup>

These rules, conceptions, and principles provide the context into which airplane overflights fit. Technically, of course, airplanes can trespass like lighthouse beams. As long as planes are flying more than a couple thousand feet above the ground, however, airplane overflights easily justify another exception to the presumption in favor of boundary-driven blockade rights. On one hand, air travel enlarges the use interests of owners—not in their capacities as owners, but in their capacities as travelers and consumers of goods transported by air. On the other hand, as long as we are speaking of air columns higher than a few hundred feet, the penetrations wrought by airplanes do not significantly diminish owners' use or enjoyment of their enclosed lands.

Of course, if read too literally, the *ad coelum* principle could create the sort of confusion Lessig assumes. Property is often equated with "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,"<sup>125</sup> and there is some value in reminding lay readers that this description is hyperbolic.<sup>126</sup> Yet I am not aware that such hyperbole confused any court in an overflight dispute, and neither Lessig nor *Gridlock* suggests otherwise. To the contrary—courts narrowed the scope of the *ad coelum* principle to order land owners' rights with their defensible normative interests in using their land.<sup>127</sup>

#### D. Share Choppers

*Gridlock's* treatment of "share chopping" laws reinforces the same impression. Other scholarship questions whether African Americans migrated

124. See, e.g., *Bamford v. Turnley*, (1862) 122 Eng. Rep. 27 (K.B.) 32–33, 3 B. & S. 66 (opinion of Bramwell, B.) (excusing pollution justifiable if it follows from "acts necessary for the common and ordinary use and occupation of land and houses," to the extent such pollution is consistent with a "reciprocal" norm, a "rule of give and take, live and let live"); see also 2 BLACKSTONE, *supra* note 117, at \*14; Claeys, *supra* note 67, at 1421–24; Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 74–79 (1979).

125. See 2 BLACKSTONE, *supra* note 117, at \*2.

126. Cf. *id.* at \*14 (conceding, "after all, [that] there are some things, which notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had").

127. See *Smith v. New England Aircraft Co.*, 170 N.E. 385, 388–95 (Mass. 1930); Claeys, *supra* note 67, at 1424–26; Richard A. Epstein, *Intel v. Hamidi: The Role of Self-Help in Cyberspace?*, 1 J.L. ECON. & POL'Y 147, 154–55 (2005).

from southern ancestral home towns solely because of share chopping gridlock, as *Gridlock* suggests.<sup>128</sup> No matter how extensive the gridlock problem was, however, the private law of property already anticipated this problem—with “partition law.”<sup>129</sup> Tenancies in common may break down when changed conditions create gridlock that the co-owners can no longer manage. As a backstop, the law then lets any of the co-owners petition for partition of the land. On paper, most partition statutes prefer to partition property “in kind,” which is to say that they subdivide jointly owned land into smaller sections owned individually. Quite often in practice, however, subdivisions may not be practicable. Some cotenants may value the land far more than others, or the partitioned lots may be “too small to be economically useful.” In these and other situations, a court may order a partition by sale—that is, “order the entire land sold[,] and then partition the [monetary] proceeds among the co-owners.”<sup>130</sup>

Again, *Gridlock* makes the right policy analysis in many cases, but it restates what is already apparent in social practice and private law. It is telling that state legislatures spotted the gridlock potential in cotenancies long ago. As the U.S. Supreme Court explained in *Head v. Amoskeag Manufacturing*, an 1885 due process/eminent domain case:

When property, in which several persons have a common interest, cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified.

In the familiar case of land held by several tenants in common, or even by joint tenants with right of survivorship, any one of them may compel a partition, upon which the court, if the land cannot be equally divided, will order owelty to be paid, or, in many states, under statutes the constitutionality of which has never been denied, will, if the estate is such that it cannot be divided, either set it off to one and order him to compensate the others in money, or else order the whole estate to be sold.<sup>131</sup>

Indeed, cases like *Head* and the conceptual definition I provide here explain how the private law partitions better than *Gridlock*'s conceptual framework does.<sup>132</sup> If all one knows is that a family farm is gridlocked, that insight says very little about how the gridlock should be broken up. Partitions in kind and by sale seem equally plausible, and pro-liability rule *Cathedral* scholarship would

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128. Brian Sawers has convincingly questioned how many African Americans emigrated solely because of inheritance disputes as opposed to other factors, like better jobs in northern industrial cities. See Brian Sawers, *The Uncommon Anticommons* 11–12 (Oct. 4, 2010) (unpublished manuscript) (on file with Author).

129. HELLER, *supra* note 6, at 123.

130. *Id.* at 124.

131. *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 21 (1885).

132. By the same token, the analysis here provides further confirmation that the exclusive use-determination conception of property constrains to some extent the character of partial interests in absolute ownership. See *supra* Part III.C.

seem to prefer the latter. By contrast, property explains partition rules better when it consists of a domain of exclusive use determination. When property is keyed toward free and concurrent use determination, it implicitly specifies that existing property rights are badly drawn to the extent that they lead to the underuse of the propertized asset. Partition rules thus specify and effectuate a substantive limitation not external to but internal to within property. Because partitions are meant to convert co-owned domains of use determination into separate domains of use determination, however, it makes more sense to partition in kind—to let each of the subdivisions “be fully and beneficially enjoyed” individually—until the facts show that such a partition inhibits use of the asset more than it secures the use autonomy of the cotenants cashing out. When partition rules presume in favor of partitions in kind, they carry into effect a formal starting presumption that partitions by sale—liability-rule partitions—are more likely than not to encourage buyers to expropriate subjective value from forced sellers. Of course, this formal presumption may be overcome. Some co-owners may be holding out inefficiently against the buying co-owner, or it may be obvious that the buying owner has a much more active interest in the asset than the other co-owners. In these cases partitions by sale may be ordered (and, in practice, partitions by sale *are* ordered quite often). But the norms informing property can explain why the law starts with a formal presumption for property rules; the *Cathedral*’s taxonomy cannot.

## V. EXCLUSIVITY AND ECONOMIC ANALYSIS UNDER THE *CATHEDRAL*

### A. *Economic Analysis Critiqued Philosophically*

At least in bread-and-butter examples, then, *Gridlock*’s anticcommons framework does not shed any light a lawyer could not see if he grasped soundly the concepts internal to property’s social practice and private law. My argument thus far, however, has not suggested there is anything necessarily wrong with that framework. In addition, conceptual analysis is often criticized for concealing imprecise normative claims, and economic analysis is often touted as being more empirical than philosophical analysis. Perhaps these responses apply here.<sup>133</sup>

I am skeptical toward these responses, but several of my reasons for skepticism require more elaboration than I can provide here. For one thing, although it is easy to offer an economic interpretation of doctrine, it is conceptually much more difficult to provide a satisfactory causal explanation of how doctrine comes to embody efficiency as understood in a particular interpretation. Others have shown how this problem applies to law-and-economics scholarship on accident torts.<sup>134</sup> It almost certainly applies to disputes associated with the *Cathedral*, but one would need to demonstrate as much. Other concerns are normative or empirical. I will allude to these concerns as I proceed in the next two Parts, but given our focus I cannot make them central here.

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133. I am grateful to Michael Carrier and Ilya Somin for encouraging me to explore these possibilities.

134. See COLEMAN, *supra* note 99, at 13–32.

### *B. A Broad Critique of the Cathedral*

Let me start with James Penner's conceptual critique of property/liability rule analysis. According to Penner, Calabresi and Melamed's definition of "property rules" has no necessary connection to "property"—that is, interests in deciding how to use external assets.<sup>135</sup> "In Calabresi and Melamed's scheme, an order of specific performance is a property rule even if the contract does not require either party to transfer rights in external assets to the other. Similarly, an order restraining an abusive husband gives the wife a property rule even though it protects her normative interest in the autonomy of her body."<sup>136</sup> Penner can make short work of bureaucratic regulatory vetoes and tax charges. *Gridlock* gets to the same result, but it takes longer to get there because the *Cathedral* is less determinate.

Separately, and more generally, Penner, Calabresi, and Melamed's conceptions of property rules and liability rules mistakenly divorce analysis of substantive rights from remedial consequences, and they do so in ways that obscure the role liberty of action plays in shaping substantive rights.<sup>137</sup> Calabresi and Melamed's conception of a liability rule is particularly extreme in relation to ordinary property practice. Calabresi and Melamed portray liability rules as one of two or three options for resolving disputes over entitlements,<sup>138</sup> and they suggest that liability rules are more or less as legitimate in practice as property rules.<sup>139</sup> Yet there is something incongruous about the concept of a liability rule. As Penner protests, "[T]he law does not treat remedies as price-setting mechanisms for the violation of rights," just as the law commands us "not to murder people at all, not weigh our desire to do so against the objective price that has been fixed, say twenty years without parole."<sup>140</sup> Penner's broad conclusion is that the property/liability rule distinction "completely misrepresents the actual normative guidance of the law," because "[t]he normative guidance offered to legal subjects under [a] scheme of individuating [liability rules] is to measure their own wants against a set of prices, and act accordingly."<sup>141</sup>

### *C. A Conceptual Restatement of Property and Liability Rules*

On one hand, this criticism needs qualification. When an encroachment is *de minimis* and the product of a good-faith mistake, the property owner may be

135. See PENNER, *supra* note 50, at 66.

136. See Claeys, *supra* note 43, at 398.

137. On this point, see generally Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335 (1986).

138. See Calabresi & Melamed, *supra* note 8, at 1106–10 (introducing property and liability rules); *id.* at 1111–15 (inalienability rules).

139. See, e.g., *id.* at 1106 ("Because the property rule and the liability rule are closely related and depend for their application on the shortcomings of each other, we treat them together."); *id.* at 1110 ("[A] very common reason, perhaps the most common one for employing a liability rule rather than a property rule to protect an entitlement is that market valuation of the entitlement is deemed inefficient, that is, it is either unavailable or too expensive compared to a collective valuation.").

140. PENNER, *supra* note 50, at 66.

141. *Id.*

denied an equitable remedy (in Calabresi and Melamed's terms, a property rule) and limited to a monetary remedy (a liability rule). Defendants whose encroachments are justified by necessity are still required to pay for property damage even if they use the commandeered property with reasonable prudence.<sup>142</sup> Cotenants may be limited to a partition by sale,<sup>143</sup> and a cotenant who ousts his fellow cotenants owes them a monetary accounting.<sup>144</sup> On the other hand, these examples strike lay people as incongruous. As Jules Coleman and Jody Kraus ask, "It is surely odd to claim that an individual's right is protected when another individual is permitted to force a transfer at a price set by third parties. Isn't the very idea of a forced transfer contrary to the autonomy or liberty thought constitutive of rights?"<sup>145</sup>

Coleman and Kraus explain on one hand why this general implication is "ludicrous"<sup>146</sup> but on the other hand how private law reconciles partitions by sale, accountings as the exclusive remedies for ousters, and other liability rules to its general preference for liberty. According to Calabresi and Melamed, property and liability rules refer to implementation mechanisms. If economic analysis identifies a certain outcome as efficient, property and liability rules refer to the package of "injunctive relief, tort liability, some combination of the two or, perhaps, . . . criminal sanctions"<sup>147</sup> most likely to nudge parties to reorder their affairs to that outcome. Conceptually, however, that portrait is wrong, because it sets property and liability rules up as tools for *enforcing* legal mandates derived from any source.<sup>148</sup>

In sound concepts and social practice, by contrast, remedy law has more focus. Remedies are keyed to normative interests, and the law varies the remedies available as appropriate to fit the interests. The Calabresi–Melamed framework is inapt because remedies do not merely state enforcement consequences but also describe and embody the general domains of free choice whose invasions trigger the relevant enforcement mechanisms. So "property [and] liability . . . rules are best thought of as constituting a subset of the set of norms governing the transfer of lawful holdings."<sup>149</sup> Such rules *partially specify* the *content* of rights in relation to claims "that specify the conditions of lawful or legitimate transfer."<sup>150</sup> Although all normative interests endow their bearers with some domain of free action and choice, few if any make such domains totally absolute. "Property rules" refer to the general situations in which a right-bearer has broad discretion to refuse to transact with others, no questions asked. "Liability rules" refer to situations in which a non-right-bearer may force a right-bearer to transact regarding the right.<sup>151</sup>

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142. See *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 222 (Minn. 1910).

143. See *supra* Part IV.D.

144. See *supra* note 91 and accompanying text.

145. Coleman & Kraus, *supra* note 137, at 1338–39.

146. *Id.* at 1358.

147. See *id.* at 1342.

148. See *id.* at 1341–42.

149. *Id.* at 1344.

150. *Id.*

151. See *id.* at 1347–52.

When property rules and liability rules are restated in Coleman and Kraus's terms, it turns out that the Calabresi–Melamed framework compresses together many different kinds of transactions affecting normative interests.<sup>152</sup> If Marshall owns Blackacre in fee simple, he has a claim to veto virtually all intentional and otherwise-unjustified unconsented entrances onto his land. Marshall may therefore expect Taney to seek his agreement *ex ante* before Taney tries to enter Blackacre. If Taney enters Blackacre intentionally without seeking such agreement, he wrongs Marshall. For that wrong to be rectified, Marshall must get back an approximation of his lost free determination over Blackacre's entry. That approximation entitles Marshall not only to standard tort compensatory damages but also to propertized damages, disgorgement, or punitive damages.<sup>153</sup> One could call this domain “all property rule, all the time”—but the important point is that the law embodies social norms giving Marshall broad latitude to prevent transactions involving Blackacre or to direct them exclusively on his terms.

Now consider good-faith encroachments. Marshall still has a claim to prevent any such encroachments when they are significant. If an encroachment is *de minimis*, however, Marshall has a claim to veto or direct it *ex ante*, but only a claim to standard damages compensating for the value of the occupied land *ex post*. In good faith encroachments, this latter claim (the “liability rule”) declares and embodies the condemnatory judgments we associate with accident torts. If Taney accidentally and carelessly establishes a minor overhang on Marshall's property, he wrongs Marshall's property rights. The damages Taney must pay to acquire Marshall's encroached-on land rectify that wrong. Although the encroachment is tortious, however, it is not wrong in the same manner as an intentional entry—and remedy law accordingly refrains from giving Marshall injunctive, supercompensatory, or punitive remedies.<sup>154</sup>

The law sends different and subtler cues in two other sets of cases. In one set, entitlements and remedies embody a signal that a defendant has not “wronged” a plaintiff but still “infringed” his rights in a manner requiring compensation. A necessity dispute provides the paradigm case for infringements. Although Marshall ordinarily has a property rule both *ex ante* and *ex post* against unconsented intentional entries, he has no property rule *ex ante* and only a liability rule *ex post* against entries reasonably impelled by emergency conditions. Here, Marshall still

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152. The following discussion restates and generally follows *id.* at 1352–65. However, I disagree with a few of the specific conclusions Coleman and Kraus draw while applying their general framework. I will call attention to my disagreements in footnotes as those disagreements surface.

153. Coleman and Kraus suggest Marshall has a liability rule after Taney trespasses, and the liability rule corrects the wrong Taney inflicts by his trespass. *See id.* at 1357. As Gideon Parchomovsky, Alex Stein, and I have shown, however, the law gives Marshall the more robust set of remedies enumerated in text because the law declares and embodies the right to control land in broader terms. *See* Gideon Parchomovsky & Alex Stein, *Reconceptualizing Trespass*, 103 NW. U. L. REV. 1823 (2009); Claeys, *supra* note 43, at 394–401.

154. This example corresponds to Coleman and Kraus's treatment of negligent car accidents. Coleman & Kraus, *supra* note 137, at 1358.

has a right to demand compensatory payment if Taney damages his property. Yet this right embodies a social message different from the mistaken encroachment. In the necessity dispute, Taney owes neither a primary duty to refrain from entering Marshall's land, nor a secondary duty to rectify a tortious "wrong" to Marshall. Yet he must hold Marshall harmless to complete his entitlement non-tortiously to (in conceptual scholarly terms) "infringe" on Marshall's rights. In the other set, assume that Marshall and Taney are cotenants, that Taney ousts Marshall, and that Marshall then claims an accounting of Taney's profits. The "liability rule" declared by the accounting sends yet another different signal. Marshall had no claim *ex ante* to prevent the exclusion, and Taney neither wronged nor infringed Marshall's rights. Nevertheless, Marshall is still entitled to an accounting as a condition of Taney's exercising his legitimate co-tenancy interests.<sup>155</sup>

#### *D. A Precise Critique of the Cathedral*

Coleman and Kraus's taxonomy helps us sort out what is accurate and overbroad in Penner's criticisms of property and liability rules. It also helps us connect bad concepts to bad policy tendencies.

To begin with, the *Cathedral's* taxonomy misstates "property" as understood in social practice and private law when it uses the terms "property rule" and "liability rule" to refer to the institutional mechanisms by which rights are enforced. In the enforcement context, those terms sever the core of property in social practice and the private law, the bounded but still generally undelineated liberty to determine an asset's use. In the *Cathedral's* framework, the law still *could* award an owner a property rule to secure autonomy or the moral goods we usually associate with autonomy. Yet property rules could also be justified on several other grounds—say, because a regulator has forecast what the optimal uses of Marshall and Taney's lots are and he has forecast that the parties will use the lots in those manners if Marshall deserves an injunction against Taney's trespasses.

Of course, from another perspective, the *Cathedral's* taxonomy is advantageous. The property/liability rule distinction seems to provide a value-neutral vocabulary. That vocabulary seems to help policymakers abstract from differences between rights-based and welfare-based normative theories. To get that flexibility, however, policymakers must pay a normative price. By abstracting from the conceptual structure of property as a right, policymakers blur the normative reasons why rights are worth securing. As trespass liability doctrine suggests, some of those reasons relate to the connection between clear ownership on one hand and investment and commercialization on the other. As trespass

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155. See *id.* at 1352–58. I agree wholly with Coleman and Kraus's treatment of necessity. See *id.* at 1358. When Coleman and Kraus speak of damage payments as a condition of legitimate exercise of rights, they refer to blasting. See *id.* I agree with the general category in which a party must pay damages for the legitimate exercise of a normative interest. I disagree that blasting fits the category; I prefer to classify it as an activity inflicting a tortious wrong, like a good-faith *de minimis* encroachment, for which equitable relief is inappropriate. The accounting after an ouster illustrates well the class that blasting illustrates badly. I thank my Property students from the fall 2010 semester for helping me to appreciate the significance of ouster.

remedy principles show, other reasons relate to the ways in which law socializes citizens to respect other citizens' interests.

I do not mean to suggest it is impossible to account for the advantages of property in the *Cathedral's* terms. A law and economics scholar can certainly spin out an account in which coerced transfers of property are presumed welfare-diminishing until proven otherwise, because they more often than not expropriate subjective value and create cascades that demoralize owners from investing, demoralize market transactions, and encourage rent seeking.<sup>156</sup> Yet it is fair to wonder whether these economic arguments bootstrap on concepts and norms embodied in property law thanks to moral reasoning. Although "subjective value" sounds value-neutral, it can be construed and applied to refer to an owner's "freedom to determine the use of his land for his own individual interests," and it implicitly assumes all the parameters the law sets on an owner's liberty to determine use. And "demoralization" consequences and "rent seeking" explicitly borrow on moral phraseology.<sup>157</sup> Law and economics scholars who justify property in the *Cathedral's* framework also argue that their approach is more empirical. Yet the scholars who do so admit that the relevant law and economic analysis is "implicitly empirical but not capable of precise justification," and as a second-best substitute for unavailable empirical data they interpret "the very strong set of practices in legal systems."<sup>158</sup> This method gives away any advantage law and economics claim to have in empirical verification.<sup>159</sup> It may also bootstrap a second time—not only by framing interpretations of doctrine implicitly borrowing on the law's moral phraseology, but then again by citing doctrine as empirical corroboration for the interpretation.<sup>160</sup>

In any case, more relevant here, such scholars are probably in the minority among those who employ the *Cathedral's* framework. Many more law and economics scholars apply the *Cathedral's* framework with the pro-liability rule presumption described in Part III—as *Gridlock* does, Lessig does, and Wu does in his review of *Gridlock*.<sup>161</sup> I do not mean to suggest that the *Cathedral's* conceptual framing necessarily leads to *ad hoc* social engineering on economic grounds. Nevertheless, the *Cathedral* may be judged by the kinds of arguments it attracts and encourages.

Furthermore, the *Cathedral's* conceptual confusions do make it easier to legitimize the pro-liability rule *Cathedral* presumption. Because the property/liability rule distinction abstracts from basic questions about the relations between rights and welfare, or the relations between rule of law and administration, it makes liability-rule determinations seem more legitimate in policy analysis than they are in social practice or the private law. Nor do I mean to

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156. See, e.g., Epstein, *supra* note 49; Smith, *supra* note 49.

157. See, e.g., E.C. Pasour, Jr., *Rent Seeking: Some Conceptual Problems and Implications*, 1 REV. AUSTRIAN ECON. 123, 123 (1987).

158. Epstein, *supra* note 49, at 2095.

159. See Claeys, *supra* note 67, at 1442–45.

160. Compare Epstein, *supra* note 49, at 2095, with Claeys, *supra* note 43, at 405–06.

161. See *supra* notes 107–08 and accompanying text.

suggest liability rule determinations are wholly out of bounds in the private law. As we have seen, private property law leaves room for them in partitions and accountings of co-tenancies, in necessity disputes, and in disputes about good-faith and *de minimis* encroachments. Yet these doctrines are exceptions to a more general rule. When an infringement is justified by necessity, the necessity justifies and prevents the dispute from legitimizing deliberate theft of property.<sup>162</sup> Similarly, the law has more latitude to require cotenants to sell or to accept an accounting because a tenancy in common is an arrangement entered into consensually. When a *de minimis* encroachment occurs through a good-faith mistake, the good faith provides proof that the encroachment was an accident. These differences teach something revealing about the *Cathedral's* taxonomy. From a common sense perspective, necessity, accidents, and consensual arrangements gone bad present extreme situations in which the law restrains the free exercise of moral discretion much more than it usually does. By contrast, the *Cathedral's* taxonomy portrays these situations as conceptually interchangeable with a damage remedy for a deliberate or careless taking of property. When a conceptual apparatus conflates easy cases with hard emergency cases, it may be intended to or have the effect of diminishing the extent to which free moral determination is an end of the law. "Private actors have less autonomy (and public actors more) if every case presents an emergency."<sup>163</sup>

Finally, by legitimizing deliberate and turn-a-blind-eye takings of property, the *Cathedral* may have some tendency to corrode the social norms respecting property. Conceptual analysis of the private law of property builds on, articulates in law, and completes the social norms on which citizens in a community settle to respect their claims of equal rights. Those social norms presume that law does much of its work by shaming or socializing citizens. Ordinarily, when an encroacher encroaches, injunctions, punitive damages, propertized compensation, and other remedies send the encroacher two messages: "you have wronged the owner by upsetting the secure control he expected to enjoy over his land," and "you must take all steps available to rectify that wrong." When an encroacher makes a *de minimis* encroachment innocently and accidentally, the judgment and damages send two parallel messages: "you have wronged the owner by upsetting the secure control he expected to enjoy over his land," and "but you need not rectify that wrong by removing your encroachment because you innocently entangled far more of your labor and property in the encroachment than the owner has in his encroached-on land." By contrast, in the *Cathedral's* horizons, a liability rule seems to send the following signal from the legal system to the encroacher: "if you pay X dollars in damages, you may buy the owner's property with our sanction."<sup>164</sup> That message accords much more closely with the social message the law sends in a necessity dispute: "if you pay the owner X for the damage you inflicted to his property, you will convert what would otherwise be a wrong to the owner into a non-tortious act."<sup>165</sup> Thus, there is reason to wonder

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162. See Epstein, *supra* note 49, at 2105–11.

163. Claeys, *supra* note 43, at 396.

164. See Coleman & Kraus, *supra* note 137, at 1356–57.

165. See *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 222 (Minn. 1910); Coleman & Kraus, *supra* note 137, at 1358.

whether error in academic conceptual theory may legitimize and enable antisocial behavior in practice.

## VI. BLOCK PARTIES RECONSIDERED

Of course, in contemporary society, not all forms of property are governed exclusively by the norms and concepts coming from social practice and the private law. Some regulatory entitlements (say, pollution quotas, or welfare entitlements) are almost entirely creatures of the public law. As Part III.D acknowledged, other forms of property (especially land) may be subject to conflicting norms and concepts in different fields of law. In addition, the norms and concepts in question are not right simply because they are reflected in social practice or general rules of law.

By the same token, however, when law and economics scholars apply the *Cathedral's* taxonomy of entitlements and its checklist of relevant policies, they would be well-advised to ensure they have not left off the list the policies most central to social practice and the private law. Quite often, scholars who incline toward the pro-liability rule presumption do not consider those policies. Since *Gridlock* focuses primarily on high-tech disputes, the most important question to ask is whether it considers those policies adequately in such disputes. Since I am refraining from engaging those examples, readers will need to read the other reviews of *Gridlock* in this Symposium with my concerns in mind and decide for themselves.<sup>166</sup> Still, I doubt that *Gridlock* is sensitive enough to the concerns about freedom and moral formation important in social practice.

My unease comes from the book's discussion of block parties—the use of eminent domain to transfer land to private developers for redevelopment. Block parties deserve careful treatment because redevelopment is a field of public property law. More than any other field of property law, it institutes an approach radically different from the principles at work in the corresponding common law. Urban renewal and redevelopment statutes were established to justify expert administration of property, largely independent of the norms that ordinarily regulate property in trespass.<sup>167</sup>

To frame my criticisms of *Gridlock's* analysis in this context, let me make three assumptions. First, I assume there is nowhere near enough empirical evidence to say conclusively whether redevelopment policy succeeds as a social policy. I am not aware of any evidence that is conclusive,<sup>168</sup> and *Gridlock* does not

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166. See Richard A. Epstein, *Heller's Gridlock Economy in Perspective: Why There is Too-Little, Not Too Much Private Property*, 53 ARIZ. L. REV. 51 (2011).

167. See *Berman v. Parker*, 348 U.S. 26, 31–35 (1954).

168. For some of the evidence, see MARTIN ANDERSON, *THE FEDERAL BULLDOZER* 52–70 (1964); STEPHEN J.K. WALTERS & LOUIS MISERENDINO, *BALTIMORE'S FLAWED RENAISSANCE: THE FAILURE OF PLAN-CONTROL-SUBSIDIZE REDEVELOPMENT* 3, 5–9 (2008), available at <http://castlecoalition.org/images/publications/perspectivesbaltimore.pdf>; Yun-Chien Chang, *An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City, 1990–2002*, 39 J. LEGAL STUD. 201, 206–08, 216, 223–24 (2010); Terrence M. Clauretie, William Kuhn & R. Keith Schwer, *Residential Properties Taken Under Eminent Domain: Do Government Appraisers Track Market Values?*, 26 J. REAL ESTATE RES. 317, 318–325 (2004); Nicole Stelle Garnett, *The Neglected Political Economy of*

suggest otherwise. Second, to frame the issues that need to be settled in this uncertainty, I discuss the relevant policy trade-offs using the economic terms favored in *Cathedral* scholarship—on one hand, owner hold-out and transaction costs, and on the other, developer expropriation, market demoralization, and rent dissipation.<sup>169</sup>

In the absence of any policy preferences, I find it reasonable to expect a policymaker who thinks himself fairly apolitical to err on the side of ordering redevelopments that seem profitable. The costs of owner hold-out seem immediate, tangible, and significant, as do the transaction costs of coordinating many residents on a single block. By contrast, lost subjective-value costs, though immediate, are much less concrete, and a policymaker may reasonably wonder whether owners are overstating their subjective values to expropriate rent from developers. Worse, market-demoralization and rent-dissipation costs are even less concrete and more remote. To assess them, a policymaker must predict how general social norms and behavior change as citizens internalize the precedents set by political decisions in particular condemnations. In the absence of conceptual or ideological predispositions, it would still be understandable if a policymaker accentuated the concrete upsides of a project and the concrete downside of hold-outs and avoided thinking about the long-term consequences of a single private redistribution. A policymaker who did so would repeat in a single land-use decision the same tendency a driver follows when he loses his keys at night and then looks for them only under the street lights.

The crucial normative question, therefore, is: in the absence of complete empirical information, is it more reasonable to expect policymakers to decide correctly on a case-by-case basis whether the social gains from particular land assemblies outweigh the social costs, or to expect policymakers to make bad determinations thanks to incomplete information or public-choice pressures? Some property scholars<sup>170</sup> (myself included<sup>171</sup>) draw on classical liberal political or economic theory to conclude that the latter is more reasonable. I do not criticize *Gridlock* for refraining from applying our answer, but the book may fairly be

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*Eminent Domain*, 105 MICH. L. REV. 101 *passim* (2006); Krisandra Guidry & A. Quang Do, *Eminent Domain and Just Compensation for Single Family Homes*, 66 APPRAISAL J. 231, 233–35 (1998); Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 485–95 (1976); Samuel R. Staley & John P. Blair, *Eminent Domain, Private Property, and Redevelopment: An Economic Development Analysis*, REASON FOUND. (Feb. 3, 2005), <http://reason.org/files/4000a19375c0f2e656e8cda8133044e6.pdf>.

169. See *supra* notes 41–49 and accompanying text; see also Thomas Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 82–89 (1986).

170. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 161–81 (1985); Epstein, *supra* note 49, at 2111–18; Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after Kelo*, 15 SUP. CT. ECON. REV. 183, 201–04 (2007); Ilya Somin, *The Politics of Economic Development Takings*, 58 CASE W. RES. L. REV. 1185, 1186–90, 1192–97 (2008).

171. See, e.g., Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877 [hereinafter Claeys, *Public-Use Limitations*]; Eric R. Claeys, *That '70s Show: Eminent Domain Reform and the Administrative Law Revolution*, 46 SANTA CLARA L. REV. 867, 874–76 (2006).

judged by how seriously it takes the alternative and the policies our answer implements.

A classical liberal approach to redevelopment has two parts. In eminent domain, the power to condemn is limited strictly to property acquisitions actually used by the public—either by the government or by common carriers. This narrow conception of “public use” focuses on eminent domain for government services. Implicitly, it makes an indirect consequentialist prediction that, if eminent domain is not limited to public uses, developers will pressure governments to condemn in many cases where short-term subjective-value expropriation and long-term market demoralization and rent dissipation outweigh the costs of forgone land assemblies. Separately, in property regulation, government may condemn and redistribute private property on a narrow police-power ground, sketched in the 1887 *Head* case as explained in Part IV.D.<sup>172</sup> Generally, “reciprocity of advantage” regulations may reassign private property rights if it coordinates how several owners use their property concurrently to help all achieve their intended uses more effectively. In extreme cases, reciprocity of advantage principles can justify the total condemnation of land—which explains why and how *Head* upheld the redistribution of riparian rights to create water back-up for a power mill. A redistribution is not justifiable on this basis, however, unless it is “necessary” in an exacting sense—meaning that it is unavoidable but not made so by the conduct of any of the parties. If a condemnation is strictly necessary, the condemnation may proceed, but it must compensate ousted owners significantly above ordinary fair market value. (*Head* called the compensation “equitable” to distinguish it from just compensation.<sup>173</sup>) The necessity requirement reinforces the same policies in regulatory law as the narrow public-use requirement does in eminent domain. When it takes off the table the possibility that government will condemn land for a non-owner who has some realistic discretion to acquire the land he needs in markets, it preserves owners’ subjective values, prevents rent dissipation, and preserves the robustness of ordinary property markets. The supercompensation requirement then makes a good-faith effort to hold owners harmless for subjective-valuation losses when condemnations are necessary. This principle justifies qualifying the *ad coelum* principle to stop trespass from covering high-altitude overflights, and it justifies partitions by sale when partitions in kind are impracticable. In practice, however, it virtually never justifies urban renewal and redevelopment condemnations.

*Gridlock*’s analysis of block parties does not consider many of these arguments seriously when it examines the use of New York City’s eminent domain powers to redevelop a Times Square space for *The New York Times*. *The Times* convinced state and local contacts to line up government financing for a new corporate headquarters and to force tenants and business owners out of a block of Times Square to make way for the building. Heller describes the block as “consisting of many low-value parcels—parking lots, peep shows, novelty

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172. See *supra* note 131 and accompanying text. Epstein conceives of this rationale as a public use. See EPSTEIN, *supra* note 170, at 176–80. I find it better justified and conceived as a kind of reciprocity-of-advantage police-power regulation. See Claey's, *Public-Use Limitations*, *supra* note 171, at 919–28.

173. *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 21 (1885).

stores—not worthless, but a substantial underuse of some of the world’s most valuable real estate.”<sup>174</sup> The lots and leases were condemned for \$85 million. Heller estimates that the new development was worth “as much as \$250 million.”<sup>175</sup> By using eminent domain, Heller concludes, New York City “assembled” small and fragmented parcels and leaseholds to create a surplus of “up to \$165 million.”<sup>176</sup>

Heller’s cost–benefit analysis is incomplete. To begin with, Heller’s portrait may overstate the potential gains from using private eminent domain. Heller *suggests* that the gains from *The New York Times*/Times Square project *might* be as high as \$165 million, but he does not commit to that figure.<sup>177</sup> The value of *The Times*’ building could be “as much as” \$250 million, but it does not necessarily equal \$250 million.<sup>178</sup> The net dollar-value increase could be “up to” \$165 million, but again, it does not necessarily equal \$165 million. Since local authorities routinely overestimate the likely benefits of private eminent domain projects, New York City’s forecasts should be discounted significantly.<sup>179</sup>

Next, a comprehensive cost–benefit analysis would need to subtract from the \$165 million figure the subjective values of the ousted owners. For example, New York City needed to condemn the lease of Scot Cohen, proprietor of B&J Fabrics, which had done business in the condemned neighborhood for more than four decades. Eminent domain law does not normally compensate for lost goodwill, lost advantage from location, and other similar intangibles important to a business like Cohen’s.<sup>180</sup> Heller acknowledges this factor but does not discount it from his net \$165 million total. Here, the normative implications of the liability rule conception really start to bite. The owners owe a responsibility to suffer a sale if the net gain is \$165 million and if they cannot point to any specific and concrete evidence offsetting that net gain.

Furthermore, Heller does not offset for economic costs associated with market demoralization. Heller appreciates this possibility: “Why bother with voluntary market transactions when you can get the state to take the land you want?”<sup>181</sup> After making this concession, however, Heller does not discount his \$165 million net-gain figure for the possibility that future developers will bypass local real estate markets all the more quickly.

Similarly, Heller appreciates the possibility of rent dissipation and increased lobbying—but not enough. The Times Square project used eminent domain to transfer to *The Times* and its developer–landlord a whole New York City block at about a third of its value. That developer–landlord, Bruce Ratner, was one of then-mayor Rudolph Giuliani’s largest campaign donors. Ratner got another significant favor in the Times Square deal. When Heller calculates the net

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174. HELLER, *supra* note 6, at 108.

175. *Id.* at 110.

176. *Id.* at 108–11.

177. *Id.* at 111.

178. *Id.* at 110.

179. *See id.* at 108, 110, 234 n.7.

180. *See id.* at 110–11.

181. *Id.*

gain from *The Times* redevelopment project at \$165 million, he gets that figure by subtracting \$85 million from the \$250 million total gain. That \$85 million figure is for tax breaks that New York authorities promised to Ratner to minimize his risk in redeveloping the condemned neighborhood. Another developer wanted to develop that neighborhood—and did not need any special tax favors from public authorities to develop.<sup>182</sup> An ideal cost–benefit analysis would also need to tally as a rent-dissipation cost the precedent the Times Square case set for other owners or developers and businesses throughout New York City. Once they internalize the precedent set in the Times Square case, developers and business will be incentivized to lobby New York City authorities even harder to use private eminent domain for their benefit. For example, as Heller notes, state and local officials authorized Ratner to condemn and redevelop not only the Times Square project but also a project in Atlantic Yards in Brooklyn, centered around a new basketball arena designed to lure the New Jersey Nets to Brooklyn.<sup>183</sup> This and many other similar petitions for eminent domain have to be accounted into the consequences of the Times Square project.

On the other hand, owners will litigate to stop condemnations or to haggle over the compensation they stand to get. Some owners will organize politically, pulling out all the stops because they view the neighborhood as theirs. Other owners will lobby and use inside influence to persuade local officials to condemn a neighborhood with less inside influence. In a comprehensive economic analysis, all of these responses count as social costs, and therefore offsets, against the \$165 million figure. Heller alludes to such confrontations when he describes the litigation and politics associated with the Fort Trumbull project that went to the U.S. Supreme Court in *Kelo v. City of New London*.<sup>184</sup> It is all the more puzzling that Heller does not try to quantify some discounted share of these costs when he assesses the costs and benefits of the Times Square project.

Because Heller is operating with incomplete empirical data, he must use professional judgment to decide how to interpret the limited data he has. Heller assumes that New York City can create \$165 million of economic benefit and that the costs lurking in the analysis are probably not that important. Yet he never states these assumptions directly and explicitly. Heller comes closest when he asserts that “[s]tate and local legislatures . . . are the experts in discerning the interests of local voters and promoting their general welfare.”<sup>185</sup> Here, he assumes that New York City development specialists would find most of the goods and avoid most of the bads while they applied expertise to assemble a lot for *The Times*. For lawyers who know land use law, the references to experts and general welfare signal sympathy with theories of government as interventionist as the

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182. See *id.* at 114; Paul Moses, *The Paper of Wreckage*, VILLAGE VOICE, June 18, 2002, at 34, available at <http://www.villagevoice.com/2002-06-18/news/the-paper-of-wreckage/>.

183. HELLER, *supra* note 6, at 114.

184. 545 U.S. 469 (2005).

185. HELLER, *supra* note 6, at 117.

theories legitimizing both *Kelo*<sup>186</sup> and the 1954 Supreme Court decision *Berman v. Parker*.<sup>187</sup>

In the absence of complete empirical information, Heller is entitled to interpret the available data making his own legislative policy assumptions. His assumptions are not mine, but that is not my point here. My point is this: the analysis one gets of the Times Square example is the kind of analysis one might expect to follow from the conceptual and normative problems described in Part V.D of this Essay. *Gridlock* does not state fully the relevant assumptions needed to justify its conclusions. Perhaps Heller assumes that the approach he applies is the only approach worth considering in a popular treatment of property theory. If so, the Times Square case study is revealing not about the *Cathedral's* property/liability rule scheme but about *Gridlock's* openness to alternate points of view.<sup>188</sup>

I doubt this possibility, however. In the examples considered in Part IV, and in the many regulatory disputes this Essay has not covered, *Gridlock* assumes it is breaking new ground. It assumes so because it assumes “property” refers to a formal blockade right, which policymakers need at least to make more permeable or at most to override. It is reasonable to suspect that assumption follows from the *Cathedral's* portrait of exclusion and property rules unmoored from their justification in relation to use determination. In the Times Square case study, *Gridlock* treats private eminent domain as more or less equivalent to adjustments of the *ad coelum* principle and partitions by sale. It is reasonable to suspect that the book treats private eminent domain as equivalent because the *Cathedral's* portrait of liability rules makes them seem equivalent. In the Times Square case study, *Gridlock* does not give high priority to the ways in which government favors to developers in a few cases might diminish security of land owners, dampen confidence in markets, and encourage further politicization of land use in future cases. The refusal to give these concerns high priority makes sense given that the *Cathedral's* portrait presents property rules and liability rules in a manner that downplays entitlements' connection to law's socializing imperatives. These tendencies seem to follow from a certain way of applying the *Cathedral's* taxonomy without correcting for its conceptual deficiencies.

### CONCLUSION

None of my criticisms detract from *Gridlock's* many important insights. The book does a first-rate job translating economic analysis into terms a practical lay audience can follow. It helps popularize a way of thinking that may help focus attention on many situations in which resource coordination problems lead to underuse. It provides another useful reminder that property law leads to bad consequences if it is applied as a blockade right without any connection to the gainful use of the asset owned.

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186. 545 U.S. at 481, 484–85.

187. 348 U.S. 26, 33 (1954).

188. See Eric R. Claeys, *Takings: An Appreciative Retrospective*, 15 WM. & MARY BILL RTS. J. 439, 451 (2006) (reviewing EPSTEIN, *supra* note 170).

Nevertheless, readers should read *Gridlock* critically and be mindful of its questionable conceptual assumptions. Because *Gridlock* assumes property is merely a formal right to exclude, the book assumes that private-law property law creates more blockade and underuse problems than it really does. And because the book assumes that all forms of legal adjustment of property rights are more or less indistinguishable liability rules, it makes government-sponsored administration of property seem more legitimate and less problematic than it may in fact be.