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The Contested Commitments of Property

JANE B. BARON*

The means by which property organizes human behavior and social life is the subject of profound and heated debate. On one side, information theorists emphasize that property works in rem, using standardized signals to tell all the world to keep off things owned by others. On the other side, progressive theorists emphasize property’s capacity to promote human flourishing, respect for human dignity, Aristotelian virtue, or democratic governance. The divide between these two schools of thought represents the most vital dispute in a quarter-century of property scholarship, but this Article claims that this divide is not adequately understood.

Debates between informational and progressive scholars currently center on whether the right to exclude is fundamental to property law. By contrast, this Article suggests that academics’ singular focus on exclusion has obscured even deeper questions about property’s stability, its institutional mechanism for change, and its very status as a distinctive field of study. Rather than pursuing unproductive controversies over what lies at property’s “core” and “periphery,” this Article presents a different metaphorical contest as a more accurate account of the issues in modern property law. Information theorists employ the metaphor of property as a machine—a machine that, with minimal tinkering, has produced a good-enough social ordering and will generally continue to do so. This mechanical metaphor contrasts with progressive theorists’ view of property as a conversation. The conversation metaphor expresses the view that we need to continually question whether the system is good enough, that we need to openly debate the quality of the human relationships that property produces, and that we must revise property rules that fail to fulfill our underlying value commitments. This metaphorical contest is important doctrinally because it reflects conflicting views about whether we can ever unreflectively trust property rules to express our values. “Machine” and “conversation” suggest very different visions of how much faith we should have in our existing system of property and of whether we can trust ourselves to improve it.

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INTRODUCTION

Property organizes human behavior and social life. The manner or means by which it does so is currently the subject of debate more heated than one might expect in a field conventionally considered as sleepy as property. On one side of this debate, information theorists posit that property works as a social ordering system—and attains its status as a distinct area of law—by providing clear signals recognizable to all the world about how to behave with respect to things owned by others. In order to be clear, property's signals must be simple and largely standardized. On the other side of the debate, progressive theorists suggest that property encourages and reflects such attributes as human flourishing, respect for the humanity of others, Aristotelian virtue, or the rights requisite for participation in democratic governance.¹

¹ On progressivism generally, see Gregory S. Alexander et al., A Statement of Progressive Property, 94 CORNELL L. REV. 743 (2009). Along with Professor Alexander, the Statement was written by Eduardo M. Pefalver, Joseph William Singer, and Laura S. Underkuffler. For reasons described infra note 12, I include Jedediah Purdy among the progressive scholars. The specific claims of progressive scholarship are examined infra Part I.B.
Incorporating these qualities would substantially complicate property law. In the eyes of progressive theorists, this complication is a good thing, for it ensures that property will produce relationships that are qualitatively valuable.

Much contemporary property scholarship frames this basic divide in property theory in terms of exclusion. The central question for property law and theory, in this view, is whether the right to exclude is fundamental to what it means to have a property right. Certainly exclusion plays a central role in information-based theories of property; under those theories, it is in rem exclusion rights that distinguish property from other fields of law and thereby constitute property's exceptional way of ordering the social world. There is also no denying that progressive theorists, among others, have worked hard to demonstrate that exclusion does, and should not, play the central role that the information theorists advocate. Property is less about exclusion, progressive theorists argue, than about relationships and values. Excessive focus on exclusion in their view only distracts us from conversations we should be having about the quality of our social life.

Exclusion is thus currently perceived as the central fault line in property law and theory. This debate over its centrality plays out doctrinally in arguments over whether trespass is property’s paradigmatic rule, as opposed to, say, the implied warranty of habitability or other similar rules that tend to require fact-specific judgments and that were created with explicit concern over the balance of power between owners and others.


3. See infra Part I.A.

4. Progressive theorists do not argue that exclusion is irrelevant to or trivial in property law, but rather that exclusion does not play the defining role suggested by information theorists. See, e.g., Gregory S. Alexander, Reply, The Complex Core of Property, 94 CORNELL L. REV. 1063, 1070 (2009) (“The core of ownership is more complex than the right to exclude standing alone.”); Dagan, supra note 2, at 8 (“[E]xclusion or exclusivity can exhaust the meaning of property and thus be properly described at its core only if we set aside, somewhat arbitrarily, large parts of what constitutes property law . . . .”); Glazer, supra note 2; Larissa Katz, Exclusion and Exclusivity in Property Law, 58 U. TORONTO L.J. 275, 277–78 (2008); see also Joseph William Singer, No Right to Exclude: Public Accommodations and Private Property, 90 Nw. U. L. REV. 1283, 1295 (1996).

The debate also plays out in metaphor. Interestingly, information and progressive theorists alike describe property through the trope of core and periphery. But they “fill” the core quite differently. In the eyes of the information theorists, exclusion constitutes property’s core, while for the progressive theorists human relationships constitute the core. This division of views about property’s core, which parallels the doctrinal dispute, has helped keep exclusion at the front and center of property theory, where it seems likely to preoccupy scholars (and their students) over the next generation.

This Article argues that a different metaphorical contest underlies, and more accurately defines, what is and ought to be debated. Information theorists employ the metaphor of property as a machine—a machine which has long served to produce more or less on its own good-enough social ordering and which, with some restrained engineering, will continue to produce such ordering. This metaphor is inconsistent with the progressives’ metaphorical view of property as a conversation. The conversation metaphor expresses the progressive theorists’ view that we need to question whether the system in fact is good enough, that we need to debate—openly and continually—the quality of the human relationships that property produces, and that we must commit to redefine property rules that fail to fulfill the values for which the property system should stand.

The machine and conversation metaphors reveal more clearly the contested commitments of information and progressive theories with regard to the manner in which property produces social order. Information theorists are mainly interested in the mechanics of the property system, in how it works logistically. Progressive theorists are mainly interested in the outcomes the property system produces: in what social relations it constructs. Until recently, the two strands had tended to talk past their differences over the relative importance of the how as opposed to the what, but these commitments cannot be reconciled. The rich discussions of plural values that progressive theorists regard as necessary to ensure that property reflects democracy, promotes freedom, and advances human flourishing will not send the simple signals that are, in the eyes of information theorists, central to the functioning of the property system. The standardization and formality that makes the property system “go,” informationally speaking, are inconsistent with the range of conversations that progressive theorists believe should be taking place. Between the informational and progressive views of property, there is underexplored and undertheorized friction over the relative

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Cornell L. Rev. 745, 775–810 (2009) (describing a variety of property doctrines that are not based on exclusion and that instantiate social obligation norms).

6. It is not clear that progressive theorists would have chosen the core/periphery metaphor had information theorists not emphasized it so heavily. See generally Alexander. supra note 5.
importance of clear signals (and the coordination they enable) as opposed to explicit consideration of social values (and the conversations such consideration enables) in property law. This friction is important doctrinally because it reflects conflicting views about whether we can ever unreﬂectively trust property rules to express our values.

The metaphors of machine and conversation require us to judge the quality of the status quo. If, as the information theorists assert, property has worked and continues to work well enough at providing the coordination we need to live together happily and peacefully, then not much needs to change. Our existing system of exclusion-based rules, applied in a straightforward manner, will provide us all the human flourishing, freedom, and other values that we require. Here and there, we may need to pay special attention to a particularly knotty nuisance dispute or to consider how to address newer forms of property, such as property in information. But these are exceptional situations, and their solutions may only require assimilating them as best we can to existing property rules.

If, on the other hand, the progressive theorists are correct that our current system of property has the potential to create a world of injustice, then we have a problem we need to address openly and explicitly. As progressive theorists note, many people do not have much property at all; some people who used to be owners are now losing their property to foreclosure and many owners, such as landlords or members of community associations, routinely exert power over their tenants and neighbors. These issues are not, for the progressive theorists, exceptional departures from a basically good-enough baseline, but part of the baseline itself. If the baseline is problematic—if it fails to foster values about which we care, such as freedom and equality—then we need to talk explicitly about that, and to consider whether to act expeditiously to fix it. And even if the current baseline were not immediately problematic, we would still need to discuss whether it serves all the things we value; rules can never do the work of explicit conversation about the ends property achieves.

Whether our social world is good enough is not a trivial question. The machine and conversation metaphors suggest quite different answers to it. Property surely does something in our social order. What it does is the issue. This Article examines the conﬂict between the information and progressive theorists in hopes of addressing precisely that question.

After a brief survey of the principal claims of information and progressive theories, I begin the examination of property’s contested commitments by canvassing contemporary debates over the utility of the bundle-of-rights metaphor for property. Although the “bundle of rights
picture of property”\(^7\) has never been universally accepted,\(^8\) recently the “bundle of rights” metaphor has become particularly controversial. The dispute about the bundle of rights metaphor centers on whether just anything can be put in the bundle and on whether the constituent parts of the bundle can be changed at any time. For information theorists, the problem with this suggestion is that it misrepresents the way that property functions and what makes property a distinct legal category, one unlike any other field of law. For progressive theorists, in contrast, the problem with the bundle-of-rights metaphor is that it does too little to dislodge conventional notions that ownership necessarily requires consolidation of a wide range of powers in a single owner. Moreover, the bundle metaphor does not enable the right kinds of conversations about values. The debate over the bundle-of-rights metaphor thus provides a window into contested commitments over the way that property functions, over the way in which it is legally exceptional, over its stability, and over the proper institutional mechanism by which changes in property should occur.

These contested commitments lead to another previously-unexplored divide, over what might be seen as complexity. Information theorists focus on the principle known as *numerus clausus*, which posits that the universe of property forms, i.e., the estate system, is closed and that it should remain so because of the tremendous information costs that would be imposed if parties were free to create just any kind of property rights they might desire.\(^9\) While progressive theorists do not take direct issue with the *numerus clausus* principle, the values they wish to further cannot be vindicated in the standardized, stripped down form information theorists value. We see here a largely unacknowledged dispute about the optimal level of complexity in property law; the more

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8. Among other problems, it conflicts with what Bruce Ackerman calls the “Ordinary Observer’s” understanding of property, rooted in “the ordinary talk of non-lawyers,” see Bruce A. Ackerman, *Private Property and the Constitution* 10 (Yale Univ. Press 1977), and with what Joan Williams calls the “intuitive image,” which emphasizes property’s “absolutism,” see Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 280–95 (1998). It has been attacked as normatively empty, see Penner, *supra* note 7, at 714 (“[T]he bundle of rights... schema [does not] suggest any clear methodology for dealing with property issues.”), as incoherent, see Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239, 243 (1994) (“[A]lthough its proponents usually present the ‘bundle of sticks’ metaphor as an alternative to the ‘property as thing’ metaphor, the former is in fact merely a variation of the latter.”), and as dysfunctional, see Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1165 (1999) (noting the potential of the bundle theory to create overly fragmented anticommons property). Finally, as noted infra note 129, the “bundle of rights” theory potentially renders every “stick” in the bundle a separate property interest, capable of being “taken” in the Fifth Amendment sense by government regulation that reduces or eliminates it.
rights or sticks included in the property bundle, the less clear and standardized property will be. In pressing for incorporation of difficult-to-define qualities such as virtue or flourishing, progressive proponents of these qualities implicitly assert that the values of simplicity and formalism in property law do not exhaust the field.

After examining these contested commitments over the nature of property rights, I turn to rights' correlatives, i.e., to the treatment of duties in contemporary property theory. For scholars who understand property primarily in terms of information, duties are highly salient; information theorists thus deeply value property's ability to signal clearly to nonowners their duties, in effect, not to touch or enter. Progressive scholars focusing on flourishing, virtue, and democracy, in contrast, are less apt to discuss duties directly, and are more apt to find duties problematic. I argue that these divergent approaches to duties reflect disagreements about the role of distribution and about the pace of change in property theory. Information theorists argue that our existing property system has functioned in more or less the same way—and very successfully—for a very long time, and that we should be reluctant to tinker with it. Change, if it is needed at all, should come from the legislature, which is apt to change things slowly and to compensate in some way any losses such changes cause. Progressive theorists, in contrast, would debate openly whether the property system is in fact working successfully, and how "success" should be defined. Their focus on the quality of social relations that the property system creates leads them to be far more open to quick interventions to improve the system, and far less concerned with the institutional mechanism by which those improvements might be achieved.

Finally, I take up the metaphors that have structured the debate between the information and progressive theorists. "Core" and "periphery" have been openly contested. Less obvious, but perhaps more important, are competing metaphors of "machine" and "conversation." Information theorists are happy to be engineers focused on the mechanics of the property system. Progressive theorists are loathe to think or talk about property in mechanical terms, for fear of foreclosing discussions they regard as critical to ensuring that property serves all the right values all of the time. In one view, property is already working well enough as a social ordering device; in the other, the quality of the existing social order must be continually and directly challenged.

10. As explained infra Part III.A, progressive theorists focus less on the duties of nonowners to owners (which are central in information theories) and more on owners' duties to nonowners and other members of their communities. Putting this another way, information theorists tend to be concerned with "negative" duties, such as duties to "keep off." Progressive theorists are concerned, in contrast, with whether owners might owe "positive" duties, such as a duty to permit access.
Part I introduces information and progressive theory. Part II uses the dispute over the bundle-of-rights metaphor as a vehicle to unearth the contested commitments of the two theoretical strands with regard to property's functional exceptionalism and with regard to the optimal degree of complexity in property law. Part III moves to contested commitments over duties, redistribution, and the pace of change. Part IV explains why the machine/conversation metaphor reveals more accurately than the core/periphery metaphor the commitments that are contested in contemporary property theory. Machine and conversation suggest very different visions of how much faith we should have in our existing system of property, whether it is good enough, and whether we can trust ourselves to improve it.

I. INFORMATION AND PROGRESSIVE THEORIES OF PROPERTY

This Part briefly introduces the main claims of information and progressive theories of property. Information theorists argue that property works as a distinctive system by providing clear signals to all the world about how to behave with respect to property owned by others. Progressive theorists have proposed a variety of other ends around which property rights can be organized. Although the progressive theories are in some senses quite different, they have in common the attempt to ground our system of property on values other than the transaction costs and externalities of information. The range of progressives' values is extremely broad, and that breadth, as we will see, creates a potential for conflict with the relatively simple signals information theorists value.

A. PROPERTY AS INFORMATION

In a series of influential articles, Thomas Merrill and Henry Smith have outlined a theory of property based on the need for information. Put simply, "[p]roperty is a device for coordinating both personal and impersonal interactions over things. Consequently, property rights must
be communicated to a wide and disparate group of potential violators.”

The need to communicate information explains why property rights are rights in rem: “[A]n in rem right, good against the world, is more than an arbitrary bundle among many other similar bundles. It is a key shorthand method of delineating the rights that saves on the transaction costs of delineating and processing information about rights in terms of uses and users.” The message must be delivered simply, which explains why property operates through the limited number of forms recognized under the numeros clausus principle:

To avoid violating property rights, a large and indefinite class of dutyholders must know what constraints on their behavior such rights impose. If the legal system allowed in rem rights to exist in a large variety of forms, then dutyholders would have to acquire and process more information whenever they encountered something that is protected by an in rem right. If in rem rights were freely customizable—in the way in personam contract rights are—then the information-cost burden would quickly become intolerable.

The numeros clausus is best seen as a device to standardize property rights, and thereby reduce the widespread information-gathering and processing costs imposed on third parties by any system of in rem rights.

Information costs explain not only the limitation on property forms, but also why the property system so often depends on the right to exclude. In a world of zero transaction costs, it would not matter how rights were defined, for the parties would bargain to socially efficient results regardless. But “[i]n the positive transaction cost world, some shortcuts are in order.”

By giving A the right to exclude, one can economize along several margins. First, the right to exclude need not refer to any specific use. By giving A the right to exclude an unspecified group of others—all


15. Thomas W. Merrill & Henry E. Smith, What Happened to Property in Law and Economics?, 111 YALE L.J. 357, 387 (2001) [hereinafter Merrill & Smith, What Happened to Property] (footnote omitted); see also Henry E. Smith, The Language of Property: Form, Context, and Audience, 55 STAN. L. REV. 1105, 1147 (2003) [hereinafter Smith, Language of Property] (“[P]otential violators’ information costs bear on the design of the law. Property presents a simple message to the outside world. . . . [T]he dutyholder only needs to know that he does not own the asset in order to know that he must keep out. This keeps informational demands on the dutyholder to a minimum.” (footnotes omitted)). For more on the “measurement costs” faced by those seeking to avoid violating others’ property rights, see Merrill & Smith, supra note 9, at 26–42.


17. Smith, supra note 14, at 78.
the rest of the world—A's interest in a wide range of uses...is protected without the need for the one delineating the right to know anything about...these uses. Moreover, those who have to respect the right—the duty holders—need not know anything about these uses or about features of A. The duty holder need only know to keep off. Finally, the one delineating the right need not know much about or even the identity of the duty holders; the right is to exclude the rest of the world.  

Thus,  

[P]ositive transaction costs help explain why we have property at all instead of an elaborate system of contracting over much more specific use rights to resources and activities. It is because of positive transaction costs that we think in terms of things and especially in terms of in rem rights to exclude others from them—i.e. those rights known as property.  

There will, of course, be situations requiring more fine tuning than pure exclusion allows. In these cases, "governance" supplements the exclusion strategy.  The principal advantage of governance rules is that they allow society to control resources in non-standard ways that entail greater precision or complexity in delineating use rights than is possible using exclusion."  For resources such as ocean fisheries, clean air, or ideas "that are difficult to package into easily measured and monitored parcels such as are required for exclusion strategies to work," governance rules have great advantages.  But "[a]s the number of individuals whose actions could potentially impact the resource increases, it will be more costly to specify individual behavior according to a governance strategy: The information costs of specifying which individuals have the right to do what will simply become too great."  

Thus, in rem rights operating via the strategy of exclusion transmit necessary information cheaply; they "offer standardized packages of negative duties of abstention that apply automatically to all persons in the society when they encounter resources that are marked in the conventional manner as being 'owned.'" But these savings can only be...
achieved if the message is kept simple; thus the importance of the *numerus clausus* principle. We need a "small number of standard forms" imposing substantive rights that "will typically be immutable, meaning that they are not subject to revision by agreement." Moreover, the message must be clear: "substantive legal norms associated with in rem rights are more likely to be expressed as rules that turn on one or a small number of publicly observable states of fact, and thus are formalistic or bright-line in character."

**B. PROGRESSIVE THEORIES OF PROPERTY**

**1. Human Flourishing**

Gregory Alexander argues that "[a]s a matter of human dignity, every person is equally entitled to flourish. That being so, every person must be equally entitled to those things essential for human flourishing, i.e., the capabilities that are the foundation of flourishing and the material resources required to nurture those capabilities." Borrowing from the "capabilities" approach developed by Martha Nussbaum and Amartya Sen, Alexander argues that "[s]ocial structures, including distributions of property rights and the definition of the rights that go along with the ownership of property, should be judged, at least in part, by the degree to which they foster the participation by human beings in these objectively valuable patterns of existence and interaction."

No individual can acquire the capabilities or the resources necessary for human flourishing by him or herself; we require others for everything from the "physical process of human development" to the development of capacities for "freedom, practical rationality, [and] sociality." In short, "[w]e are...inevitably dependent upon communities, both chosen and unchosen, not only for our physical survival, but also for our ability to function as free and rational agents."

25. Smith, *Language of Property*, supra note 15, at 1125 ("The communication of legal relations is subject to a tradeoff between intensiveness and extensiveness of information: For the same cost, one can communicate a lot to a small, close-knit audience or a little to a large, anonymous audience.").
26. Merrill & Smith, supra note 21, at 802.
27. Id. at 803.
28. Alexander, supra note 5, at 768. The relationship between Alexander's notion of human flourishing and the notion of human flourishing famously proposed by Margaret Radin in her article *Property and Personhood*, is not entirely clear, but Alexander explicitly locates his vision in the "Aristotelian tradition." See Alexander, supra note 5, at 760-68; Margaret Jane Radin, *Property and Personhood*, 34 Stan. L. Rev. 957 (1982).
29. See Alexander, supra note 5, at 762 (citing MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000); AMARTYA SEN, COMMODITIES AND CAPABILITIES (1985); AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999)).
30. Id. at 764.
31. Id. at 765.
32. Id. at 766.
Individuals’ embeddedness in and indebtedness to community give rise to obligations:

[A]n owner is morally obligated to provide to the society of which the individual is a member those benefits that the society reasonably regards as necessary for human flourishing. These are the benefits necessary to the members’ development of those human qualities essential to their capacity to flourish as moral agents and that have some reasonable relationship with ownership of the affected land.33 Under this view, eminent domain, to take but one example, can be understood in terms of “the social obligation” to maintain the infrastructure—roads, airports, public buildings, communication systems—on which all depend.34 Other restrictions on use—including historic preservation laws, nuisance regulations, and the public trust doctrine—can similarly be understood as required by the needs of the community or its members.35 “The[se] obligation[s] imposed on owners to sacrifice their property interests in some way can often be justified on the basis of cultivating the conditions necessary for members of our communities to live well-lived lives and to promote just social relations, where justice means something more than simply aggregate wealth-maximization.”36

2. **Virtue**

Virtue constitutes a related basis from which property may be tied to obligation. The “virtue-based ethical theories in the Aristotelian tradition,” on which Eduardo Peñalver relies for his virtue theory of land use, also draw on “a substantive conception of the human good or flourishing.”37 To some extent, virtue is a characteristic of an individual person: “Virtues are acquired, stable dispositions to engage in certain characteristic modes of behavior that are conducive to human flourishing,”38 and “virtuous conduct” is “the behavior that flows from stable dispositions to use land in ways that characteristically promote human flourishing.”39 Yet, alongside its individual dimension, virtue also has an important public or social dimension related to its recognition of the importance of values in addition to those of self-interested wealth maximization.40 Thus, “virtue ethics’ recognition of a plurality of values makes it particularly well-adapted to provide a means for acknowledging and balancing an interest in the aggregate welfare or wealth of society with a concern for

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33. *Id.* at 774.
34. *Id.* at 776.
35. *Id.* at 805.
36. *Id.* at 819.
38. *Id.*
39. *Id.* at 876.
40. *Id.* at 867.
the full spectrum of the other human goods that land-use decisions implicate. This public, or social, dimension of virtue has implications for individuals’ conduct as landowners and for the government’s conduct in regulating land use. Landowners and government alike must demonstrate “the capacity to appreciate and assign the proper weight to the many subtle and incommensurable values (including economic values) implicated by their decisions.” In making land-use decisions, then, cost-benefit analyses are only one part of the much larger set of factors that owners and policymakers should consider:

Other questions, like the sustainability of the owner’s use, the possibility of irreversible or catastrophic future consequences, the proper scope of owners’ autonomy, or (most broadly) the relationship between land-use decisions and other aspects of human flourishing, may well trump a technically cost-beneficial course of action. . . . [T]he need to consider such diverse values . . . more faithfully reflects the complexity and high moral stakes of much land-use decision making.

Because human flourishing “is an unavoidably cooperative endeavor,” law plays a role in fostering human flourishing. In this role, law may—and sometimes should—override private decisions in the service of a variety of goals. The goals include “protect[ing] those, such as the poor and future generations, whose ability to flourish might be harmed by owners’ immoral decisions,” teaching owners “to act virtuously of their own accord,” and “clarify[ing] social obligations and . . . coordinat[ing] collective virtuous actions.”

Specifically in regard to land, virtue imposes obligations on owners. For example, “[b]ecause the system of private property as a whole is established in order to facilitate the ability of members of the community to flourish, owners’ rights are qualified by an obligation to share from their surplus property with those who need them in order to satisfy more fundamental needs.” In other situations, the dignity interests, needs, or dependence of third parties may obligate owners to forbear from exercising their rights to exclude. State v. Shack exemplifies the way in

41. Id. at 867–68.
42. Id. at 868.
43. Id. at 868–69 (footnotes omitted).
44. Id. at 869.
45. Id. at 876.
46. Id. at 871.
47. Id. Peñalver cites nondiscrimination norms embodied in the Civil Rights Act of 1964 as “contribut[ing] to dramatic changes in racial attitudes.” Id. at 872.
48. Id. For example, “environmental statutes or regulations . . . can help spread the word about best practices to landowners already inclined to act responsibly but lacking information about the remote consequences of their behavior.” Id.
49. Id. at 880.
50. Id. at 882.
which virtue-based obligations sometimes limit the owner's power to exclude."  

3. Freedom

Property and freedom have long been associated with one another, but the precise ways in which property can and does enhance freedom can be difficult to specify. In two recent articles, Jedediah Purdy approaches this problem anew. He identifies a "freedom-promoting conception of property" that understands property as "a dynamic institution, a set of rules evolving in response to technological and social innovation, which applies a variety of types of claims to a variety of resources." "Members of this tradition," Purdy writes, "understand property as a social institution in this sense: property regimes set the terms on which people are able to recruit each other for social cooperation."

Alongside a distinct conception of property, Purdy articulates a distinct conception of freedom, one also drawn from Amartya Sen. This concept "conceives of freedom functionally: to inquire how free people are, it asks what they are able to do, which forms of human potential they have turned into actual capabilities that they can in fact exercise." This functional approach to freedom considers property regimes in terms of their potential to "open or close practical alternatives" and in terms of whether they "promote relationships of domination and subordination, which tend to inhibit self-assertion by the subordinated, or whether, alternatively, they promote reciprocity and cultivate the habit of recognizing and pursuing one's own interests and commitments in the course of negotiating cooperation with others." Specifically, "property rights define how people can recruit one another, and the resources they

51. 277 A.2d 369, 374-75 (N.J. 1971) (holding that entry onto a farmer's land to offer services to migrant workers housed thereon was not trespass, despite the fact that the owner objected to the entry); see also Peñalver, supra note 12, at 883.
55. Id.
56. Id. at 1242 ("Today [the] theoretical underpinnings [of the freedom-promoting conception] are experiencing a revival, most prominently in the thought of Nobel laureate economist Amartya Sen.").
57. Id. at 1243.
58. Id. at 1244.
59. Id. at 1244-45.
control, for collaborative projects. . . . This relationship may be more or less reciprocal.”

Property law can enhance freedom by “directing interpersonal recruitment toward relative reciprocity rather than hierarchy. . . . [A]n important standard for assessing changes in legal regimes is whether they move the terms of recruitment toward reciprocity . . . .” Slavery represents the ultimate nonreciprocal relationship; a regime of free labor may move us towards reciprocity although, depending on the real alternatives viably available to the parties, reciprocity may or may not be attained. The achievement of this end is, however, independent of the form property rights take; “the mere form of property rights” does not guarantee freedom.

Depending on allocation and various dimensions of context, the extension or intensification of property rights may be neutral or negative in its effect on freedom. The point is to keep in view the aim of promoting freedom understood as capabilities, and not to confuse it with any particular institutional instrument that has successfully promoted it in a particular context.

4. Democracy

Joseph Singer has synthesized aspects of the models described above into what he calls a “democratic model” of property law. Like Alexander, Peñalver, and Purdy, Singer emphasizes the social quality of property rights, considered in concrete terms: “Every legal right should be understood not merely by reference to the powers and rights it gives the owner but by reference to the impacts of the exercise of those powers on others and the shape and character of the social relationships engendered by those rights and powers.” These relationships must be examined qualitatively and, when they are, it will be clear that “[i]n a free and democratic society, some relationships are out of bounds; this means that some contract terms are off the table.”

In Singer’s view, as in that of the other progressive theorists, the relational nature of property rights gives rise to obligations—particularly “an obligation of attentiveness” that requires owners to consider the effects of their actions on others. Indeed, property rules must generally

60. Id. at 1285.
61. Purdy, People as Resources, supra note 12, at 1059.
62. Id. at 1060–68.
63. Id. at 1068–79; Purdy, A Freedom-Promoting Approach, supra note 12, at 1251–65.
64. Purdy, People as Resources, supra note 12, at 1097–98.
66. Id.
67. Singer, supra note 12, at 1046–47.
68. Id. at 1047 (emphasis added).
69. Id. at 1048.
70. Id.
be evaluated for their effects: "we cannot conclude that a particular set of property rules or institutions is acceptable unless we attend to the systemic effects of exercising those property rights." 71

If our property system is to be truly democratic, Singer suggests, we will have to "consider some substantive limitations on the packages of rights property law will recognize." 72 In this regard, the common law estates system functions "not only to lower the information costs of determining who the owner is, but to shape social life in a manner consistent with the normative commitments of a democratic society composed of free and equal individuals who treat each other respectfully." 73 But the classical common law estates system is only a part of a more pervasive regulatory scheme in the realm of property—including statutes governing fair housing, zoning, mortgages, and marital property, to name a few. 74 These statutes are not mere add-ons to an established core of common law property rights. Rather, they are part of what defines the contemporary property system:

It is a mistake to think about property law in a manner that is divorced from these statutory regulations. We use a combination of common law, statutes, and social custom to define the boundaries of allowable packages of property rights, and we will better understand the function of property law in our economic and legal system if we broaden our concept of estates to include the entire social and legal structure that defines the property-rights system. 75

For information theorists, what is most interesting and important about property is how it works, practically speaking. In rem rights, operating through standardized forms, provide at low cost simple signals that effectively protect owners' rights by signaling to nonowners their duty to keep off. For progressive theorists, what is most interesting and important about property is the outcomes it produces. Property is at least capable of fostering human flourishing, virtue, freedom, and democracy and should be judged by the success with which it actually fosters these qualities. Of course, it is important not to overdraw the contrast. As developed below, 76 information theorists value in rem rights because, in their view, such rights promote freedom; in the space from which nonowners are excluded, owners pursue self-chosen ends. Information theorists focus on how the system functions to create that space, whereas progressive theorists focus directly on the system's results. As we shall see in the next Part, these differing foci give rise to differing visions of what makes property exceptional.

71. Id. at 1050.
72. Id. at 1050–51.
73. Id. at 1051–52.
74. Id. at 1052.
75. Id. at 1052–53.
76. See infra text accompanying notes 192–95.
II. Property’s Contested Exceptionalism

It has long been conventional to describe property as a “bundle of rights.” The 1936 Restatement of Property used this term, it is discussed in introductory property casebooks, and it appears prominently in mainstream scholarship and judicial decisionmaking. While never entirely uncontroversial, in recent years it has come under particularly heavy attack. This Part uses the debate over the accuracy and utility of the bundle-of-rights metaphor to unearth some of the differing substantive commitments of the two strands of property theory. My goal is not to prove that property is or is not correctly conceived as such a bundle. Rather it is to identify what is at stake in this debate for contemporary property theory.

Some aspects of the bundle-of-rights metaphor are not controversial. There is widespread agreement that owners have multiple rights with respect to what they own, that property rights in a single asset can be divided among people and divided over time, and that an individual may have a variety of separate property interests in one asset. To the extent that this is all that is meant by depicting property as a “bundle of rights,” the term is not particularly problematic. In this

77. Dagan, supra note 2, at 2 (“The bundle-of-sticks picture of property . . . had for decades been regarded as the conventional wisdom.”).
78. Restatement (First) of Property §§ 1–4 (1936).
79. See, e.g., Jesse Dukeminier et al., Property 81 (6th ed. 2006) (“[T]he abstraction we call property is multi- not monolithic. It consists of a number of disparate rights, a ‘bundle’ of them . . . .”).
80. Heller, supra note 8, at 1192 n.150 (reporting the increase in the number of cases using the term, from four state and federal cases before 1940, to 775 cases between 1980 and 1999, when Heller’s article appeared).
81. See sources cited supra note 8.
82. Dukeminier et al., supra note 79, at 81 n.40.
83. For example, owners have the power to use what they own, to exclude others from it, to sell it, to devise it, to grant others rights to use it, and so on. See, e.g., Joseph William Singer, Property Law: Rules, Policies, and Practices 505 (4th ed. 2006). (“An owner of a fee simple interest in real property has the present right to possess and use the property, to sell it or give it away, and the right to devise it by will or leave it to her heirs.”). In the sense of being an agglomeration of separable powers, property can be said to be a “bundle of rights.” In this usage, the “bundle” metaphor emphasizes the multiplicity of powers owners have. They can give and sell; they can keep others out and set the terms on which others can enter.
84. Thus, different persons might own different physical interests in the same land, with separate persons owning the mineral rights, the surface rights, or the air rights in a given parcel of land.
85. Thus, one person may own the right to present possession, and a different person own the right to possession in the future, as is true in the case of leaseholds and life estates followed by remainders. Singer, supra note 83, at 493. In addition, multiple people may own interests in the same property at the same time, via joint tenancy or tenancy in common. Id.
86. Take the example of a condominium owner who “might have a ‘fee simple’ interest in her unit’s living space, an exclusive easement in her balcony area and parking space, tenancy in common in the hallways and the swimming pool, defined participatory rights in the community’s governance, and so forth.” Carol M. Rose, Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership 280 (1994). The condo owner’s rights are the sum (or “bundle”) of these separate interests.
In large part a device for separating the various facets of property and for giving an intuitive grasp of their separateness and moveability rather than their interrelatedness and porosity.\textsuperscript{87}

As section A of this Part describes, however, matters get more tricky when the bundle-of-rights metaphor is used in a second way—to emphasize the social nature of ownership, i.e., the idea that property rights are (just) rights between or among persons. Here, the information and progressive theorists alike take issue with the metaphor, although for entirely different reasons. In the eyes of information theorists, insofar as the social view of the bundle-of-rights diverts attention from things to people, it is descriptively inaccurate and, more importantly, inattentive to the unique way that property operates in rem to produce social coordination. This objection implicates information theorists' views of property's functional exceptionalism. For progressive theorists, in contrast, the problem with the social side of the metaphor is that it is insufficiently powerful to unsettle conventional, but in their view mistaken, views of ownership as rights consolidated entirely in one person. This objection implicates progressive theorists' commitment to relentless focus on the relationships property produces.

Similar problems recur when the bundle-of-rights metaphor is used in yet a third way, to describe historical changes in the form of owned things—from tangible to intangible—that, in the eyes of some, render the rights in the bundle entirely contingent. As section B explains, the information theorists object to this view both descriptively and normatively, based on their commitment to stability over change and on institutional choice preferences for legislative rather than judicial action. Progressive theorists find less problematic the historical view of the bundle as contingent, for they are far more receptive to change and far less concerned about its source than the information theorists.

In section C, I identify yet another set of contested commitments between the information and progressive theorists. These raise issues of complexity. The functional advantages of the existing system stem, in the eyes of information theorists, from the relative simplicity of the signals that our property system uses. But the bundles of rights contemplated by the progressive theorists are not simple and, in the progressives' view,

\textsuperscript{87} Id. at 282. The metaphor might seem problematic insofar as it is inattentive to, or may even weaken, "the sense that groupings of property rights might be interconnected and interdependent." Id. at 280; see also Craig Anthony (Tony) Arnold, \textit{The Reconstitution of Property: Property as a Web of Interests}, \textit{26 Harv. Envtl. L. Rev.} 281, 282 (2002) ("In this Article, I articulate a new understanding of property as a web of interests, not a bundle of rights."). Yet, its disaggregative tendencies notwithstanding, "the bundle of sticks is not just \textit{sticks} but a \textit{bundle}," and thus "the bundle metaphor acts at least as much to 'package' the various elements as it does to give an impression of their separateness." Rose, \textit{supra} note 86, at 282.
should not be simple. Not only are the bundles of rights that the progressive theorists contemplate "fatter" than the bundles contemplated by information theorists, but they are never fixed; they are always at least potentially in flux as the result of our need to evaluate constantly whether they are serving the appropriate values.

A. PERSONS OR THINGS?

Independent of the use of the bundle-of-rights metaphor to describe property's fragmentation, the metaphor has frequently been used in connection with the assertion that property rights are social. The idea here, frequently traced to Wesley Hohfeld (who did not use the bundle-of-rights term) is that property rights are relations among persons with respect to things, not relations between persons and things themselves. Sometimes this idea is connected to historical changes in property forms; to the extent that property has over time subsisted less in tangible things (or land) and more in intangible interests, then rights to property are ever less accurately described as rights to things. More frequently the idea is used to highlight property's use as a mechanism to sort out competing claims to resources, claims that arise between persons, the resolution of which involve creating reciprocal relationships among claimants. "[E]ach time the law protects one person's security, by recognizing in that person a right (which imposes a correlative duty on others) or a privilege (which imposes on others what Hohfeld called a 'no-right'...), the law unavoidably denies others corresponding

88. See, e.g., Merrill & Smith, What Happened to Property, supra note 15, at 365 ("Hohfeld did not use the metaphor 'bundle of rights' to describe property. But his theory of jural opposites and correlative, together with his effort to reduce in rem rights to clusters of in personam rights, provided the intellectual justification for this metaphor ...."); Arnold S. Weinrib, Information and Property, 38 U. TORONTO L.J. 117, 120 (1988) ("[S]ince the writings of W.N. Hohfeld it has been generally agreed that 'property' refers to legal interests that exist only as between persons, in respect of things."

89. See, e.g., SINGER, supra note 83, at 2 ("It is sometimes thought that property concerns power over things. One problem with this definition is that many property rights do not concern 'things' at all, but intangible resources, such as copyright or interests in an ongoing business."); see also Gregory S. Alexander, Commodity & Propriety: Competing Visions of Property in American Legal Thought 1776-1970, at 381 (1997) ("Property exists in whatever resources have market value, and increasingly in American society the most valued goods are not the tangible things but the intangible interests, expectations, and promises."). Of course, intangibles can be "things." See supra note 13 and accompanying text. On historical changes in property forms and the conclusions some have drawn from those changes, see infra Part II.B.
Put more simply, if owners have rights to control assets, then nonowners have duties related to those rights.  

It is not entirely clear how the term bundle-of-rights expresses the rights-among-persons view of property rights; “bundle of relationships” might come closer.  

Hohfeld’s project was aimed less at formulating a definitive idea of property than towards achieving analytical and terminological clarity about legal interests; he was particularly anxious to attack the assumption “that all legal relations may be reduced to ‘rights’ and ‘duties.’” “Bundles of rights” were not, after all, bundles of “rights,” but rather bundles of more finely grained legal interests (“rights,” but also “privileges,” “powers,” and “immunities”) that always came paired with a reciprocal interest (or lack of an interest) held by or affecting another person. In the words of Bruce Ackerman, “each resource user is conceived as holding a bundle of rights vis-à-vis other potential users.”  

Information theorists are among the large constellation of scholars who believe that the conception of property as a bundle-of-rights between persons is simply wrong. Property may have a social dimension, these scholars argue, but the relationships with which property is concerned are relationships with respect to things, broadly conceived. Thus, in the words of J.E. Penner, “[p]roperty is a right to things .... Property is a normative relation between an individual, or co-owners, and others which has as its focus and justification the exclusive determination of the uses to which a thing may be put.” Or, in the words of Emily Sherwin, “the first task of property law is not to resolve disputes between people over resources, but to establish a relation between a person and an identifiable thing, which predates disputes between that person and others.”  

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90. ALEXANDER, supra note 89, at 320.  
91. JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 10 (2000) (“The right to exclude nonowners, for example, regulates nonowners by requiring them to stay off the owner’s property.”).  
92. See Hohfeld, supra note 88, at 21 (describing property as an “aggregate of legal relations” appertaining to a “physical object”).  
93. Property was simply a “striking example” of the “ambiguity and looseness of our legal terminology.” Id. Though many of Hohfeld’s illustrations involved property, he noted that in the field of contracts as well there was comparable “ambiguity and confusion.” Id. at 24-25.  
94. Id. at 28.  
95. ACKERMAN, supra note 8, at 26.  
96. Penner, supra note 7, at 801; see also id. at 808.  
97. Emily Sherwin, Two-and Three-Dimensional Property Rights, 29 ARIZ. ST. L.J. 1075, 1086 (1997); see also Schroeder, supra note 8, at 292 (“Unfortunately, [Hohfeld] missed the point that property is a relationship between subjects that is mediated through an object.”). Schroeder argues that “although its proponents usually present the ‘bundle of sticks’ metaphor as an alternative to the ‘property as thing’ metaphor, the former is in fact merely a variation of the latter.” Id. at 243 (footnote omitted).
Henry Smith, "core property rights attach to persons only through the intermediary of some thing."[^98]

Scholars who believe the rights-between-persons view to be inaccurate argue that it is inaccurate in a way that fundamentally misunderstands and misstates the way in which property is unique. No one has articulated this view so clearly or vehemently as Merrill and Smith:

> [P]roperty rights attach to persons insofar as they have a particular relationship to some thing and confer on those persons the right to exclude a large and indefinite class of other persons ("the world") from the thing. In this sense, property rights are different from in personam rights, such as those created by contracts or by judicial judgments.^[99]

To Merrill and Smith, the "in rem"[^100] nature of property rights differentiates property from other legal rights, especially contracts. And to the extent that the bundle-of-rights metaphor's social emphasis obscures this exceptional quality of property, it is affirmatively misleading and misguided, for it obscures how property functions. As Merrill and Smith explain, thinking of "bundles of rights" as just an aggregation of in personam social rights "misses a fundamental aspect of in rem rights. The duty to respect the property of others... has an impersonality and generality that is qualitatively different from duties that derive from specific promises or relationships."[^101] As we have seen, in the eyes of Merrill and Smith, property is fundamentally an information system, sending easy-to-understand signals to the entire world—comprised fundamentally of duty holders—to keep off what others own.^[102] "Things" are integral to the signals sent. To the extent that the bundle-of-rights metaphor suggests otherwise, it impedes the correct understanding of the exceptional manner in which property functions to create social order.^[103]

It is important to identify just what is at issue in debates over the utility of the bundle-of-rights metaphor. If property were just a bundle-of-rights between persons, then, at least in theory, those persons could individually customize the bundles they wish to have. But Merrill and Smith argue that this customization does not in fact occur. Property bundles in reality come in a limited number of standardized forms, which

[^99]: Id. at 360 (emphasis added).
[^100]: On the in rem nature of property rights, see, for example, Smith, supra note 14, at 78–79, and Merrill & Smith, supra note 21, at 786–87.
[^101]: Merrill & Smith, supra note 21, at 787. Put another way, citizens A, B, and C have exactly the same duties vis-à-vis an owner of a thing as citizens X, Y, and Z. Id.
[^102]: On the importance of exclusion, see supra text accompanying notes 16–27.
[^103]: See Merrill & Smith, supra note 21, at 787.
the parties are not free to vary. This is the way in which the *numerus clausus* principle operates.\(^{104}\)

Nor, the argument continues, *should* the parties be able to customize the bundles—at least not beyond the considerable flexibility already permitted by the common law estate system.\(^{105}\) The costs of infinite customization are not borne by the parties creating them; to reduce the burden of such externalities on outsiders, parties’ freedom to create just any bundle they choose must be curtailed.\(^{106}\) "If in rem rights were freely customizable—in the way in personam contract rights are—then the information-cost burden would quickly become intolerable."\(^{107}\)

Here we begin to see two of the key substantive commitments of the information-focused theories of property. First, property is a *system*; like any system, property is governed by a “design principle,” albeit an "unstated" one.\(^{108}\) It works in rem, and to do its work, it needs, inter alia, things. Moreover—and this is a second commitment—property is *exceptional*. It is *different* from contract or tort. To allow infinite customization would undermine or even erase property's exceptionalism, robbing it of its unique capacity to solve social ordering problems. What is at stake in this part of the debate over the bundle-of-rights metaphor, then, is the correct understanding of property’s *function* and its very *identity*.

Progressive theorists seem to agree that property is indeed distinct from contract or tort, and that, to the extent that the bundle-of-rights

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105. *Id.* at 35 (describing the way in which, like language, the standardized building blocks can be combined in complex ways).

106. *See id.* at 8.

When property rights are created, third parties must expend time and resources to determine the attributes of these rights, both to avoid violating them and to acquire them from present holders. The existence of unusual property rights increases the cost of processing information about all property rights. Those creating or transferring idiosyncratic property rights cannot always be expected to take these increases in measurement costs fully into account, making them a true externality. Standardization of property rights reduces these measurement costs.

*Id.*

107. Merrill & Smith, What Happened to Property, *supra* note 15, at 387. In a way, the information theorists' antagonism toward the "bundle of rights" metaphor seems odd, because they concede that the basic, building-block forms delineated by the *numerus clausus* principle—the common law estates—are in a real sense bundles of rights. *See, e.g.*, Merrill & Smith, *supra* note 9, at 36 (referring to common law estates as the "set of property rights bundles."). That is, even those who contend that standardization is effectively mandatory do not dispute that the standard packages are bundles. Their issue with the "bundle of rights" metaphor is mainly with its tacit or implicit suggestion that the bundles can be altered at will.

metaphor suggests otherwise, it is problematic.\textsuperscript{109} Progressive theorists also share the information theorists' view that property is a system.\textsuperscript{110} But progressive theorists do not really share the information theorists' concern with the specifics of the way that property functions exceptionally to coordinate social life. Rather, progressive theorists focus on ends, and in this respect, the two theories' commitments diverge.

In contrast to the information theorists, progressive theorists do not take issue with the proposition that property rights are social. As one progressive theorist puts it, the legal realists were "correct in analyzing property rights in terms of human relationships rather than relations between persons and things."\textsuperscript{111} The problem with the bundle-of-rights metaphor is simply that it is not powerful enough to convince others to see property that way. Nonlawyers, personified by Ackerman's "Ordinary Observer,"\textsuperscript{112} "think it meaningful to talk about owning things free and clear of further obligation."\textsuperscript{113} Precisely because it does not conform to everyday beliefs, the bundle-of-rights view is incapable of dislodging conventional understandings of ownership under which all rights are seen as consolidated in a single person.\textsuperscript{114} This understanding, progressive theorists argue, is pernicious insofar as it creates "unconscious presumptions" with respect to both who owns a particular entitlement and, more importantly, who has the burden of justifying any redistributive change in an owner's set of rights.\textsuperscript{115} Whatever ordinary people may believe, the progressive critique argues, property rights are not in fact consolidated in one person, and the sooner both lawyers and the lay public come to grips with this fact, the better.\textsuperscript{116}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{109} See, e.g., Singer, supra note 12, at 1032 ("[T]he legal realist approach had its own problems. Taken to its extreme, the bundle-of-rights idea could suggest that property has no meaning whatsoever as a legal category. . . .").
\item \textsuperscript{110} See, e.g., id. at 1049 ("[T]he democratic approach to property understands property not merely as an individual right but a social system.").
\item \textsuperscript{111} Singer, supra note 4, at 1461.
\item \textsuperscript{112} See ACKERMAN, supra note 8, at 10.
\item \textsuperscript{113} Id. at 26.
\item \textsuperscript{114} See Singer, supra note 4, at 1453 ("[T]he classical conception of property . . . is premised on the notion that property rights identify an 'owner' who has title to a set of valued resources with a presumption of full power over those resources."). In Entitlement, Singer refers to this view as the "ownership" model. See SINGER, supra note 91, at 3. Under the ownership model, we "typically presume that the owner has, not just one or two powers, but all [the] powers—a full bundle—over the property." Id.
\item \textsuperscript{115} SINGER, supra note 91, at 9; see Singer, supra note 4, at 1459-60.
\end{enumerate}
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[O]wnership of property includes a bundle of rights and it is often the case that some of those rights are limited to protect the legitimate interests of others. In effect, this means that some of those sticks in the bundle are in fact owned by others and not the person we conventionally think of as the owner of the property.

\textit{Id.}
But for the information theorists, consolidation is exactly what makes property work, functionally speaking. The in rem right to exclude all others from a thing delegates a large number of powers to (and thus consolidates these powers in) owners, and this delegation is to be celebrated in information-cost terms because it “allows owners to undertake the choice among uses without having to justify the decision to third parties” while it sends “a simple message to dutyholders—to keep off.” The information theorists’ commitment to a functional view of property—their emphasis on how it works logistically—relies on a vision of consolidation that the progressive theorists reject.

This brings us to an important way in which information and progressive theorists’ commitments diverge. The information theorists focus on how the system works, which is through exclusion rights with respect to things. Bundles of rights are not and should not be infinitely customizable, they argue, because idiosyncratically-bundled rights would be too costly to process: buyers would not know what they were acquiring, and third parties would not know what to do to avoid violating newly created rights. But the progressive theorists’ argument for limiting bundles of rights is not based on function, but on ends; the “limitations on the package of rights property law will recognize” are “substantive.” Thus, “the reason we do not allow complete freedom of contract with respect to property is because many forms of property contradict values that shape the contours of social relationships in a free and democratic society.” In other words, progressive theory holds that “our working estates system reflects ... fundamental, normative judgments about social life.”

B. CONTINGENT OR FIXED?

In another usage, the bundle-of-rights term depicts historical changes in the form of owned things. This usage posits that at some point in time, usually identified as the late-nineteenth century, value mostly resided in land and other physical objects; at such a time, property

117. Henry E. Smith, Exclusion and Property Rules in the Law of Nuisance, 90 VA. L. REV. 965, 984 (2004) [hereinafter Smith, Exclusion and Property Rules]; see also Smith, Property, supra note 13, at 1728 (“Property responds to uncertainty over uses by bundling uses together and delegating to the owner the choice of how to use the asset, thus avoiding the need to specify uses at any stage.”).

118. Singer, supra note 12, at 1051.

119. Id. at 1050; see also Hanoch Dagan, The Craft of Property, 91 CAL. L. REV. 1517, 1566-67 (2003) (arguing that communication costs do not fully explain the numeros clausus principle; rather, “limiting the number of property forms and standardizing their content facilitates the roles of property in consolidating expectations and expressing ideal forms of relationship”).

120. Singer, supra note 12, at 1050. Progressive theorists are not indifferent to how property functions. Yet they focus less on property's mechanics—its "nuts and bolts," so to speak—than on the outcomes it produces. For further development of this point, see infra text accompanying notes 146-62, 246-48.
largely consisted of tangible items, so it made sense to think of property as things (or rights to things). But over time, moving into the twentieth century, property changed forms. Rather than owning farms (land and plows and such), people owned firms—intangible interests in intangible entities (corporations or partnerships). Or they owned financial instruments, which were not physical dollars, but rights or claims to shares or profits. As property “de-physicalized,” it began to make sense to think of property not as things (or not just as things), but as bundles of rights functionally independent of the physical object (e.g., the stock certificate, the note itself) that might denote those rights. Thus, just as it was in the social ordering view of bundles of rights, in this historical account, property is again detached from ownership of or control over “things” in the ordinary sense. This sets up another contest between the information and progressive theories, implicating commitments about the importance of stability over change and about institutional choice considerations in property law.

According to the historical story, as each new intangible interest became recognized as property, the precise constellation of legal interests in the newly recognized intangible “thing” needed to be defined. The change from tangible to intangible property forms led, it is asserted, to a change in the conceptualization of property rights. Property rights were, arguably, just whatever set of interests happened to be legally recognized in any particular new form of property. Each new intangible interest involved a new, and arguably distinct, bundle-of-rights in owners and third parties. The bundle-of-rights metaphor here emphasizes the contingency of any particular grouping of rights. As one

123. John Langbein tells this story to explain changes in inheritance law. See id. As Langbein explains, “Into the eighteenth century, land was the dominant form of wealth.” Id. During this period, “wealth transmission from parents to children tended to center upon major items of patrimony such as the family farm or the family firm.” Id. But “technological forces” not only “broke up older family-centered modes of economic organization,” they also “called forth two new forms of private-sector wealth”: financial assets (“stocks, bonds, bank deposits, mutual fund shares, insurance contracts, and the like”) and human capital. Id.

This change led to a “revolution” in family wealth transmission, a revolution driven by important changes in the form in which property is held. “In today’s economic order,” Langbein writes, it is “the new human capital rather than the old physical capital, that . . . advantages a child” and rescues him “from the harsh fate of being a mere laborer.” Id. at 732–33. Relatedly, “most parental wealth (apart from the parents’ own human capital) now takes the form of financial assets,” most particularly pension wealth, which, unlike the tangible assets of old, is consumed during the parents’ own lifetimes via annuitization. Id. at 743. Since human capital is transmitted inter vivos and since most wealth remaining after the education of children is annuitized, there is now much less for the probate system to do.

124. Horwitz, supra note 121, at 156.
scholar puts it, "the term 'property' did not imply any particular set of rights over others. Rather, the particular combination of rights that comprised property in a given case would be decided according to circumstances."25

This "just-whatever" understanding of property—the idea that it is, in effect, a bundle-of-rights that change over time as circumstances warrant26—arguably has significant implications for understanding the relationship between property rights and the state. One set of potential implications concerns the extent to which the state may subject property to regulation. The argument here begins by observing that it was, after all, the law that enabled the new sets of property rights to come into being. Since state recognition/definition was essential to the creation of new intangible property rights, then it followed that the state could redefine/regulate—and alter—such new property forms.27

That is, if property rights are the product of contingent judgments as to what rights to recognize and what rights not to recognize at a given moment in time—if what is in the bundle-of-rights is not fixed and can be redefined—then it follows that it is open to the government to regulate with a variety of goals in mind, including the aim of redistributing wealth.28 The idea that property is just a contingent bundle-of-rights thus

125. Kenneth J. Vandevelde, The New Property of the Nineteenth Century, 29 Buff. L. Rev. 325, 366 (1980). As developed below, this view is often associated with legal realism. However, it is by no means confined to realists or their descendants. "Most modern economic accounts endow property with no distinctive character at all. Property rights are simply 'entitlements,' little empty boxes filled with a miscellany of use rights that operate in the background of a world consisting of nothing but in personam obligations." Merrill & Smith, What Happened to Property, supra note 15, at 385.


127. In its broadest form, the claim here emphasizes the extent to which "private" property requires and depends on the state; without public protection, no one's property rights would be secure. This idea is at the center of much of Joseph Singer's work. See, e.g., Singer, supra note 91. at 36, 68; Joseph William Singer, Things That We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society, 2 Harv. L. & Pol'y Rev. 139 (2008). This idea is often traced back to the legal realists—and Robert Hale in particular—who developed it to defend New Deal legislation against the charge that such legislation interfered with the operation of the free market. See Robert L. Hale, Bargaining, Duress, and Economic Liberty, 43 Colum. L. Rev. 603, 626 (1943). The defense posited that there was nothing "free" about the market prior to regulation; basic rules of property, even such seemingly innocuous rules as those forbidding the use of goods without the owner's consent, invisibly "regulate" in favor of those who already happen to own goods. Different background rules about who can withhold what from whom would lead to different outcomes, but those different background rules would be no more "regulatory" than the rules that happened to be in place previously. See id. The question thus is not whether the government can regulate, but in what ways or to what ends it will regulate. For a description of how this argument was meant to work, and why it has failed over time to gain the traction that might otherwise have been expected, see Baron, Expressive Transparency of Property, supra note 52, at 231–32.

128. See Merrill & Smith, What Happened to Property, supra note 15, at 365 ("[T]he motivation behind the realists' fascination with the bundle-of-rights conception was mainly political. They sought to undermine the notion that property is a natural right, and thereby smooth the way for activist state
appears to have clear political implications, justifying wholesale state interventions in economic matters.\textsuperscript{126}

The ideas that the rights contained in the property bundle are not fixed, that the rights have changed over time, and that they may continue to change, all are still quite vital in property theory.\textsuperscript{130} These ideas are a variation, in the regulatory realm, of the argument discussed in the previous section, that property rights can be more or less infinitely customized. In its political version, it is an important site of contest between information and progressive theorists.

First of all, information theorists assert that the \textit{numerus clausus} principle—best characterized as “simply a fact about the way in which the system of property rights operates”\textsuperscript{131}—demonstrates that at least the common law rights of property have not in fact been contingent and changeable over time, but rather have been remarkably stable.\textsuperscript{132} This stability has resulted not because government lacks power to change common law property rights, but because courts have chosen not to

\textsuperscript{126} See also Smith, supra note 14, at 77 (“The atomized bundle-of-rights picture of property makes the bundles the law provides look arbitrary and makes re-engineering the bundle seem attractive.”).

129. See Merrill & Smith, \textit{What Happened to Property}, supra note 15, at 365. One obvious difficulty with this view is its potential to conflict with the view of property emphasizing fragmentation. If, as earlier described, each separate “right” or “stick” in the property rights bundle is itself property (and is its own “bundle of rights”), then any regulatory action that eliminates or even just reduces the value of any individual right or stick arguably “takes” that fragmented property right. \textit{See Horwitz, supra} note 121, at 160 (“Th[e] process of abstracting the idea of property into market value was . . . dangerously over-inclusive [because] it made virtually every change in government policy that caused a decline in market value potentially a taking . . . .”). During the nineteenth century, Horwitz explains, “American courts came as close as they had ever had to saying that one had a property right to an unchanging world.” \textit{Id.} at 151. Alexander argues that, in light of this problem, “[i]the whole bundle-of-rights metaphor ought to be abandoned.” Alexander, \textit{supra} note 5, at 801.

Yet the very fragmentation that creates the potential taking problem may, ironically, solve it. Even if the government “takes” some rights or sticks, other fragments inevitably remain, and if “enough” remains, there is no taking after all. See Eric R. Claeys, \textit{Takings: An Appreciative Retrospective}, 15 Wm. & Mary Bill Rts. J. 439, 448 (2006).

130. \textit{See, e.g.,} Dagan, \textit{supra} note 119, at 1532 (“The bundle of rights metaphor captures the truism that property is an artifact, a human creation that can be, and has been, modified in accordance with human needs and values.”); Weinrib, \textit{supra} note 88, at 120–22 (emphasizing that the concept of property is “purposive” and that “it follows from the instrumental nature of property that the concept should not be a static one”).

131. Merrill & Smith, \textit{supra} note 9, at 24.

132. \textit{Id.} at 23.
exercise such power. As Merrill and Smith characterize *numerus clausus*, it operates as “a norm of judicial self-governance.” Yet *numerus clausus* itself has a regulatory character; if the government went about redefining common law estates at will, the informational benefits of our property system would be just as threatened as they would be if individuals were permitted to customize property at will via contract. But Merrill and Smith do not argue that *numerus clausus* limits government power directly. Regulatory innovation is not barred under the *numerus clausus* system. Rather, it is channeled to the legislature.

For a variety of institutional reasons, however, legislative change is unlikely to be dramatic. Just to take one example, the very expense of procuring legislative changes “tightly rations the amount of reform.” Still, as the emergence of the condominium estate proves, legislatures do sometimes create new property forms. Thus, legislative action can and will lead to “some positive level of diversification in the recognized forms of property.” But it will simply do so slowly and infrequently, under conditions that “communicate information about the legal dimension of property more effectively than judicially mandated changes.”

Here again, as with the rights-between-persons view of property as a “bundle of rights,” the information theorists’ objection to the notion that property rights are contingent is mainly directed toward the suggestion that the state can alter the bundles at will and at any time. The kind of radical contingency suggested by the “just-whatever” view of property bundles is belied, the information theorists argue, by the actual stability of property rights over time. And those theorists assert that the forces that militate against radical change are salutary.

We see in this line of objection to the bundle-of-rights metaphor some additional commitments of the information-focused theories. They value stability over change and, as a matter of institutional choice, strongly prefer legislative change to judicial action.
Progressive theorists challenge these commitments. Although they accept the descriptive accuracy of the *numerus clausus* principle with respect to common law estates in land, they share the realists' view that property requires and is suffused with state regulation. They celebrate reforms in areas as diverse as environmental or landlord tenant law that have involved state readjustments of owners' rights. Moreover, the progressive theorists' explicit concern for the substantive ends property achieves renders them far more receptive to change, in contrast to the information theorists' preference for stability. Finally, many of the changes progressive theorists most herald are the product of court decisions, suggesting far less interest in the institutional choice commitments that are so strong for the information theorists.

C. Simple or Complex?

The estates system that progressive theorists posit is not our ancestors' common law system of estates. Rather, it is one that has been expanded to include the elaborate statutory and regulatory schemes that govern contemporary property use. This is not our ancestors' common law system of estates. The expanded estates system that the progressive theorists seem to have in mind is, to state the obvious, a much "fatter" bundle of rights, stuffed with interests and obligations. These are not basic building blocks, like the estates of the *numerus clausus*, but rather complex entities, serving and encompassing multiple values. As we will see, complexity is itself a value and, accordingly, a site of contest within property theory.

Singer's bundling of rights is quite different from the bundling advocated by information theorists such as Smith. Consider in this regard Smith's description of how property operates:

Rather than being a list of use rights, property responds to uncertainty over uses by bundling uses together, often without needing to specify them at any stage. Property gives the right to exclude from a "thing," enforceable against everyone else . . . and a crude delegation to the owner avoids the costs of delineating use rights. On the dutyholder

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140. See, e.g., Singer, supra note 12, at 1023.
141. See Singer, supra note 91, at 36 ("[P]roperty requires regulation."). On the realists' views, see supra note 127.
142. See Alexander, supra note 5, at 796-801.
143. See, e.g., Singer, supra note 12, at 1026.
144. Id. at 1055 (describing, among the normative features of property law in a free and democratic society, "widespread distribution of property and realistic potential for access to ownership").
145. Id. ("[W]e value both stability and change . . . .").
146. See supra text accompanying notes 74-75.
147. Singer, supra note 12, at 1050-55 (describing the "plural values" underlying democratic property rights, including, inter alia, freedom, stability, family, autonomy, mobility, and "widespread distribution of property").
side, the message is a simple one—to "keep out"—and this simultaneously protects a reservoir of uses for the owner without officials or dutyholders needing to know what those might be.\textsuperscript{148}

The bundling accomplished by the "exclusion strategy" works by its very simplicity: "very rough signals or informational variables—such as presence inside or outside the boundary line around a parcel of land—are employed to protect an indefinite class of uses with minimal precision."\textsuperscript{149} As is true for communication generally, the more extensive and diverse the audience for a particular message about property rights, the more "stripped-down" and formal the message must be.\textsuperscript{150}

The fine-grained, nuanced notions of property elaborated by the progressive theorists hardly fit this model. There is no way that "flourishing," "virtue," "freedom," or "democracy" can be "stripped down" or formalized. Indeed, formalization is the last thing the proponents of flourishing or democracy seek. What recommends virtue theory, for example, is its capacity to make us "appreciate and assign the proper weight to the many subtle and incommensurable values (including economic values) implicated by" the decisions of landowners and government.\textsuperscript{151} So also, "[t]he democratic model of property recognizes that property serves plural values and that the law should reflect those multiple values."\textsuperscript{152} Thus, in resolving a hypothetical dispute between a tenant who wishes to post a political sign and a landlord who wishes to stop her, a decisionmaker would be required "to make substantive choices" about all of the following:

the interests at stake, the values those interests implicate, the relative strength, relevance, and cogency of those values in particular social settings, the social relationships that will result from the choice of legal rule, the opportunities that will be enabled or cut off, and the relation between property rights and political and social life.\textsuperscript{153}

The premium here is not on clear answers that would provide clear guidance to landlords and tenants in the future, but rather on asking "the

\textsuperscript{148} Smith, Exclusion and Property Rules, supra note 117, at 978.
\textsuperscript{149} Id. at 978–79.
\textsuperscript{150} Henry E. Smith, Community and Custom in Property, \textit{10 Theoretical Inquiries L.} 5, 15 (2009); see also Smith, Language of Property, \textit{supra} note 15, at 1113, 1135.
\textsuperscript{151} Peñalver, \textit{supra} note 12, at 868.
\textsuperscript{152} Singer, \textit{supra} note 12, at 1054.
\textsuperscript{153} Id. at 1058; see also Peñalver, \textit{supra} note 12, at 882 ("[A]n obligation to share one's property in kind with others might arise, for example, (1) because exclusion . . . is inconsistent with the dignity of the excluded person; (2) because of the unusually acute . . . need for access . . .; (3) because of the relationships the recipients have formed with the owner's land; or (4) because of the relationships of dependence or reliance that owners have formed with the recipients.").
right questions."\textsuperscript{154} The contrast between the clear and simple signals sought by the information theorists could not be much starker.

Applications of Alexander's social obligation norm raise similar problems. Under the social obligation norm, Alexander asserts,

the owner [of property] is morally obligated to provide the society of which the individual is a member those benefits that the society reasonably regards as necessary for human flourishing. These are benefits necessary to the members' development of those human qualities essential to their capacity to flourish as moral agents and that have some reasonable relationship with ownership of the affected land.\textsuperscript{155}

One example of this social obligation norm in operation is the right of access to beaches that some courts recognize under the public trust doctrine.\textsuperscript{156} Alexander concedes that "by diluting the right to exclude with respect to one type of publicly valuable resource, these decisions create uncertainty for present and future owners of other resources."\textsuperscript{157} Nonetheless, he argues that the cases are explained as attempts by courts to define the contours of private ownership of an increasingly valuable interest in land in a way that promotes human flourishing under "conditions of increasing congestion and social interdependency."\textsuperscript{158}

Notice that the beach access cases convert exclusion rules into governance rules, and this is true of the other "use sacrifices" (historic preservation and environmental regulations) that Alexander cites as illustrative of the social obligation norm.\textsuperscript{159} In each instance, the argument is not that the owner must, or must always, sacrifice his or her freedom to do as he or she wishes on the land. Rather, the argument is that she might; it depends on whether, in the particular circumstances, the sacrifice is required. In the beach access cases, for example, "[i]f members of the public . . . have reasonable means of gaining access to a public beach, . . . the owner's right to exclude is preserved."\textsuperscript{160}

This is, of course, exactly the sort of uncertainty that information theorists find problematic. As Merrill and Smith write, "If the rules for determining access to and use of resources required the gathering of

\begin{footnotes}
\item[154] Singer, \textit{supra} note 12, at 1061; see also Peñalver, \textit{supra} note 12, at 876 ("Virtue theory's lack of an algorithm for social decision making, far from being a fatal weakness, is actually a point of strength . . . [because] it focuses decision makers' attention exactly where it should be.").
\item[155] Alexander, \textit{supra} note 5, at 774.
\item[157] Alexander, \textit{supra} note 5, at 804.
\item[158] Id. at 807; see also id. at 806 ("I do suggest . . . that recreation is an important aspect of health, which is itself a vital dimension of the capability of life, and that providing all persons, including poor people, with reasonable access to basic modes of recreation and relaxation would materially contribute to the goal of being capable of living lives worth living.").
\item[159] Id. at 791–801.
\item[160] Id. at 807.
\end{footnotes}
detailed information...this would not produce the stability of expectation needed for widespread coordination. Yet detailed information is exactly what is required under both the democratic and the social obligation models of property. Of course, information theorists do not argue that governance rules, with their attendant higher information costs, are bad per se; to the contrary, they assert that when the interests at stake are sufficiently important, such rules are totally appropriate. But the progressive theorists’ approach treats all disputes as at least presumptively high stakes, for even commonplace exercises of commonplace property rights can implicate important values. Thus, for progressive theorists, all property cases are plausibly governance, rather than exclusion, cases. Or, putting this point another way, in the eyes of information theorists, we can never unreflectively apply even simple property rules, but must always ask whether the application of the rule in the particular circumstances presented actually furthers the values for which the rule purportedly stands.

Again, it is worth getting hold of precisely what is contested in these two visions. It is tempting to characterize the argument that property is fundamentally about information as merely an argument about form—an argument for crystalline rules as opposed to muddy standards. But that would not be entirely accurate. As we have just seen, information theorists concede that formal, easily processed exclusion rules are appropriately supplemented by more complex governance schemes in certain situations. Moreover, the values sought to be advanced by progressive theorists can in some instances be expressed in the form of rules, or at least “rule-like norms.”

It is also tempting to characterize the information theorists’ position as one about the form of property rules and to characterize the progressive theorists’ position as one about the substance of such rules.

161. Merrill & Smith, Morality of Property, supra note 13, at 1857.
162. Id. at 1859; see Smith, Exclusion and Property Rules, supra note 117, at 1024–25 (arguing that where to draw the line between exclusion and governance is an “empirical question”).
163. See Carol M. Rose, Crystals and Mud in Property Law, 40 STAN. L. REV. 577, 580 (1988). But see Merrill & Smith, supra note 21, at 803 (“Because in rem rights are binding on an indefinite class of persons, the rules must communicate information about the scope of protected rights to this large universe of interests at acceptable costs. This means that substantive legal norms associated with in rem rights are more likely to be expressed as rules that turn on one or a small number of publicly observable states of fact, and thus are formalistic or bright line in character.”).
164. See, e.g., Smith, Exclusion and Property Rules, supra note 117, at 989 (“[A]s the pressure on and value of resources rise, we often find a shift from exclusion to governance.”); Smith, supra note 14, at 79 (where “[m]ore precision in terms of who can do what” can be determined in a way that is cost-effective, a governance strategy may be appropriate).
165. Dagan, supra note 119, at 1562; see also Dagan, supra note 2, at 8–9.
166. Alexander, supra note 4, at 1064.
In recent work, Henry Smith has disputed this characterization, arguing that what divides progressive theorists such as Alexander from information theorists like himself is not that they are in pursuit of different ends, but that they focus on different means to the achievement of those ends. Alexander and his fellow progressive theorists, Smith asserts, would make “direct reference” to the end of human flourishing in each and every individual case. But, Smith argues, it may be better to address ends “only indirectly,” for “[c]onstant reference to these [end] interests would undermine property’s advantages of solving problems wholesale and coordinating the activities of often-anonymous actors.”

The in rem exclusion rights at the core of property are a way of promoting human flourishing at low cost. Without “answering to outsiders,” an owner can use the property for any number of purposes—the owner of land can live there, read a book, park his car, and grow crops, etc. These interests, Smith argues, “are why we want to have property—and they do promote human flourishing.”

The debate, then, concerns how property operates. Is it—and should it be—through “use by use, conflict by conflict” evaluation, or, alternatively, through decisions made “up front and across the board”? Information theorists argue that simple ex ante “baseline” in rem exclusion rights enable property to carry out its function to coordinate the behavior of “large numbers of anonymous and far-flung people.” And those rights, the argument continues, do so more effectively than the put-all-the-values-on-the-table approach favored by progressive theorists.

We now come to a fundamental issue. Recall that information theorists are committed to a functional view of property. Property produces coordination, and coordination is a value, a social goal worth worrying about. It is not obvious that it is any more—or any less—important than fostering flourishing, virtue, freedom, or democracy. But,

169. Id. at 964; see also id. at 965 (“Alexander and others . . . would like to see the end of flourishing more in direct view.”); Alexander, supra note 5, at 774 (calling for “open acknowledgment” of the social-obligation norm and “explicit development of its parameters”).
170. Smith, supra note 168, at 963.
171. Id. at 964.
172. Id. And in individual cases where they do not, the governance strategy is always available: “Where problems are important enough and cannot be solved better in a different way, we start to use more tailored solutions—governance—that make more direct reference to the ends that we collectively want to see served.” Id. at 964–65.
173. Id. at 965. Smith admits that “talking about ultimate ends is more glamorous than asking the more engineering-like question of how to serve them,” but argues that legal scholars excel at “institutional design,” and should “embrace our role.” Id. at 970.
174. Id. at 971; see also id. at 970 (citing “coordination in a complex world” as one of several “emergent properties of the entire property system”).
at least as the coordination goal is elaborated by information theorists, coordination requires relatively simple signals. And that requirement may be inconsistent with the demands of the progressive approaches to take account of a wide array of values in each and every decision about property.\textsuperscript{175} Information theorists concede as much, acknowledging that accomplishing coordination goals may require inattention to particulars that might otherwise seem salient, including, for example, "information about the attributes of rival claimants that might otherwise have moral relevance."\textsuperscript{176}

What is at stake, then, might be seen as not just the optimal level of standardization—or, as frequently asserted, of exclusion\textsuperscript{177}—in property, but also the optimal level of systemic complexity.\textsuperscript{178} The information theorists' claim is not just descriptive, but normative—to coordinate social behavior effectively, property should be (on the whole) simple. It is hard to provide simple signals and the coordination associated with them if you are in endless conversation. But conversation is exactly what progressive theorists want. Their claims, like those of the information theorists, are also both descriptive and normative—to promote flourishing, freedom, virtue, and democracy, property should be (on the whole) attentive to a wide array of factors and should not employ simplifying rules that are insufficiently attentive to the values at stake.

This is not an argument about the simplicity or complexity of particular property rules. Sometimes simple rules, such as those against trespassing, can protect a wide range of values.\textsuperscript{179} Likewise, sometimes complex rules, such as those protecting fair use in copyright, will have

\textsuperscript{175} See, e.g., Singer, supra note 12, at 1059 ("In defining rights and obligations with respect to property, we are obligated to consider the full range of human values we care about rather than merely thinking quantitatively about how to maximize preferences.").

\textsuperscript{176} Merrill & Smith, The Morality of Property, supra note 13, at 1857.

\textsuperscript{177} See sources cited supra note 2; supra text accompanying notes 16–27.

\textsuperscript{178} Nestor Davidson has argued that this issue of complexity does not require a resolution at all. See Nestor M. Davidson, Standardization and Pluralism in Property Law, 61 Vand. L. Rev. 1597, 1644 (2008). He asserts that property is fundamentally "pluralist" in nature, and that its standard forms "engraft a variety of (at times clashing) public regulatory goals onto the basic law of private property . . . . It is the variety and sheer messiness of the mandatory content of the forms that make the numerus clausus so interesting."\textsuperscript{Id.} The picture of property as an enormous tent, employing a stable "basic regulatory framework of forms" to encompass or express numerous conflicting values,\textsuperscript{Id.} at 1636, has enormous appeal. Yet somehow it fails to address the obvious points of disagreement within contemporary property theory.

\textsuperscript{179} Thus Alexander praises the court's holding for the landowner and against the trespasser in Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wis. 1997), as consistent with human flourishing. Jacque is usually cited as the quintessential right-to-exclude case. In Jacque, the court upheld an award of punitive damages for what was arguably a harmless, yet clearly intentional, trespass. See\textsuperscript{Id.} at 621–22. Alexander avoids the traditional reading of Jacque by emphasizing that the trespass involved the plaintiffs' home and thus their capacity for sociality. See Alexander, supra note 5, at 815–17.
distributional consequences that are not progressive. The argument is less about the rules themselves than about how much we need to discuss them and their application. In the eyes of information theorists, property rules instantiate and encode values. Trespass is a model here. The right to exclude is the way we protect autonomy, flourishing, and so forth, and what makes property work so well—the way in which it uniquely and exceptionally functions—is that exclusion rules eliminate the need to discuss autonomy, flourishing, and the like in each individual case. But for progressive theorists we can never simply trust the rules to express values. Maybe straightforward application of trespass rules will promote human flourishing in a given case, but maybe it will not. In every case, we must ask. Constant questioning makes life—and property—pretty complicated.

In this sense, not just simplicity (or exclusion), but complexity itself is a contested feature of our system of property. That is to say, isolating complexity itself as an important variable might help us understand what is contested between the information and progressive theories. Clearly, the conflict is in part a substantive conflict among the values of coordination, virtue, democracy, and so forth. This conflict is probably intractable in some circumstances. But it is important to see that the conflict is also in part about complexity. Progressive theorists affirmatively value ongoing consideration of whether, in each and every case, property rules are serving the proper values and creating appropriate relationships. Such consideration renders even the most apparently simple case potentially complex. Deriving as it does from conversations about the quality of our social life, complexity is itself a value, and it is one that is importantly, but not obviously, contested. Perhaps the optimal level of complexity will also be a matter of


181. Notwithstanding Alexander’s use of Jacque in The Social-Obligation Norm, see supra note 179, progressive theorists are, in general, far less likely to look to trespass cases as paradigmatic of property law, invoking instead the range of statutory and administrative regulations that limit common-law exclusion rights. See supra text accompanying notes 74–75, 146–47.

182. State v. Shack, 277 A.2d 369, 374–75 (N.J. 1971), is the quintessential example. In this famous casebook case, the court declined to characterize as a trespass an unconsented-to entry by government workers seeking to offer services to migrant workers housed on a farmer’s land. Id. The court found illegitimate the farmer’s attempt to use his power to exclude in a way that affected the dignity and destiny of the workers on his property. Id.

183. See, e.g., Alexander, supra note 4, at 1066 (“[T]he core of property is complex, certainly more complex than [exclusion alone] . . . .”). But see Smith, supra note 168, at 968 (“It is because the world of interactions is so complex that modular[, exclusion-based] solutions must be on the table.”).

184. Like standardization, complexity “comes in degrees.” See Merrill & Smith, supra note 9, at 38. Extreme and minimal complexity, like extreme and minimal standardization, have costs and benefits. But until we discuss complexity as an independent value, how would these costs and benefits be assessed?
Although the dispute is intractable, it must be openly discussed. But until it is openly discussed, there is no way to know.

In summary, for information theorists, the beauty of the property system is that it shortcuts discussions. Simple signals tell owners that they are free to choose how to use their property and tell nonowners to keep out. No judgments need be made, no questions need be asked, about the merit of owners' chosen uses. For progressive theorists, the beauty of the property system is that, potentially if not actually, it facilitates discussions. Any use conflict provides an opportunity to consider and reconsider whether the system is providing proper attention to the proper values. Discussion is complicated—it takes time and resources. It can be enriching, teaching us what we value and why. For progressive theorists, that very complexity is to be affirmed and embraced. For the information theorists, complexity keeps the system from working properly. Complexity is thus itself a site of contest within property theory.

* * *

Recent interest in and critiques of the bundle-of-rights metaphor provide a window on the contested commitments of information and progressive theorists. These commitments relate to property's exceptionalism, to whether it should be regarded functionally or in terms of the ends or outcomes it produces, to the importance of stability as opposed to change, and to the institution through which change should come, if change is needed at all.

A second set of contested commitments involves complexity. The \textit{numerus clausus} dovetails nicely with a theory of property as information. As that theory explains, property works as a distinctive system by providing clear signals to all the world about how to behave with respect to property owned by others. In order to be clear, property's signals must be simple. But the fact of the matter is that the kind of "property" envisioned by the progressive theories would be substantially more complicated than the simple bundles lauded by the information theorists. Moreover, in the eyes of progressive theorists, human flourishing, virtue, and the like all require constant questioning of whether property rules actually serve the values for which they were adopted, and that questioning complicates property law in a way

\footnote{For a taste of this dispute, see Smith, \textit{supra} note 168, at 969.}

Property law provides the overall structure to manage the complexity that Alexander rightly emphasizes, but the need to manage complexity points to the need, at least in theory, for a modular solution. If so, his considerations lead in practice exactly away from his skepticism toward delegation to owners.

\textit{Id.}
incompatible with the functional commitments of the informational model.

III. DUTIES, REDISTRIBUTION, AND TIME WITHIN PROPERTY THEORY

As Hohfeld teaches, property rights (and privileges, powers, and immunities) come paired with reciprocal "correlatives" (duties, no-rights, liabilities, and disabilities). In general, property scholarship has tended to focus on the positive side of these pairings, on the way in which property prevents waste, encourages trade, facilitates self-development, and so on. But in both theory and in reality, duties and no-rights (etc.) matter; it is in terms of these negative sides of property rights that nonowners experience our property system. In this Part, I explore the way in which duties return us to the contested commitments of information and progressive theories of property.

Section A explores the ways in which the two strands of property theory explicitly deal with the question of duties. For the information theorists, duties are highly salient. Indeed, one of property's main functions is to inform dutyholders of their principal obligation, the obligation to "keep off." The progressive theorists also clearly care about duties. Under their theories, the question of whether one has a property right would be resolved in part based on the duties such a right would entail. These very different—and probably incompatible—approaches to the question of the role of duties in property law reflect the divisions seen earlier between the information theorists' focus on function and the progressive theorists' focus on ends.

Rights and duties are relational, and section B focuses on the two strands' approach to the relationships that property produces. The information theorists' commitment to functionalism renders them relatively indifferent to the quality of relationships between owners, or between owners and nonowners. As long as everyone is directed to where they need to be—in or out, on or off, things owned by others—property is doing its job. In contrast, the progressive theorists' commitment to ends requires concern over the substantive character of the social relations property produces. This concern leads progressive theorists directly to questions of distributional fairness.

186. Hohfeld, supra note 88, at 30. Hohfeld also organized the interests listed above into "opposites": rights/no-rights, privileges/duties, powers/disabilities, and immunities/liabilities. Id.
187. See Baron, Property and "No Property", supra note 52, at 1445.
188. Id.
189. For convenience, unless the context requires more precision, I will use the term "duties" to include all the "negative" aspects of property interests, including no-rights, disabilities, and liabilities.
190. Of course, the system also operates to delineate rights in such a way that buyers will know exactly what they are obtaining when they acquire property. See Merrill & Smith, supra note 9, at 26–34.
Section C addresses issues connected to the pace and place of change. If, as the progressive theorists assert, redistribution is required in order to further human flourishing, freedom, or democracy, then relatively quick action is needed, and it is not terribly important whether such action comes from courts or legislatures. If, in contrast, the focus is on function, as it is for information theorists, there will be a strong preference for any proposed alteration in the existing property order to be channeled to the legislature, which is inclined to “ration” change, and produce it more slowly.

A. Duties in Information and Progressive Theories

For information theorists, duties are an explicit part of the property equation. As we have seen, information theorists argue that property rights must be rights in rem precisely in order to tell dutyholders what to do (or not to do).\textsuperscript{191} "Property gives the right to exclude from a "thing," good against everyone else. On the dutyholder side, the message is a simple one—to "keep out."\textsuperscript{192}

From the property owner's point of view, the system, working largely via rules of exclusion, delegates to an owner decisions about use (or nonuse) of land; that owner need not answer to others in choosing what to do with his or her property.\textsuperscript{193} In this respect, the information theorists' claims for property fit comfortably within the tradition that extols property for its enhancement of owners' freedom or autonomy:

Many, especially those with a libertarian orientation, have argued that property affords a sphere of liberty protected from intrusion by others, including the government. Property rules reinforce this sphere of liberty because . . . they do not require an inquiry by courts into the uses that owners have in mind for their assets.\textsuperscript{194}

As we have seen, this delegation and the sphere of freedom it affords owners are, in the eyes of information theories, important parts of the way that property promotes human flourishing.\textsuperscript{195}

But the information theorists do not focus solely on the advantages of an in rem system for owners. As information theorists see it, an in rem system has advantages for nonowners as well. The latter must respect—i.e., not violate—owners' rights. To avoid liability, they must know what

\textsuperscript{191} See \textit{supra} Part I.A.

\textsuperscript{192} Smith, \textit{Property, supra} note 13, at 1728.

\textsuperscript{193} Smith, \textit{Exclusion and Property Rules, supra} note 117, at 1023; see also Merrill & Smith, \textit{supra} note 21, at 791 ("Exclusion identifies a person or entity as the manager of a resource (the owner), and then delegates to this manager the discretion to select from among an open-ended set of potential uses."); Smith, \textit{Property, supra} note 13, at 1728 ("[T]he right to exclude . . . protects a reservoir of uses to the owner without officials needing to know what those might be."). On delegation, see \textit{supra} text accompanying note 117.

\textsuperscript{194} Smith, \textit{Property, supra} note 13, at 1772 (footnote omitted).

\textsuperscript{195} See \textit{supra} text accompanying notes 148–49, 170–72.
their duties are. Rights in rem, implemented via exclusion, obviate the need for dutyholders to acquire and process large amounts of information. Dutyholders in this system need not know anything about the owner or the range of uses to which the owner intends to devote his or her property. Nor need dutyholders know anything about an owner’s rights. They need only know that they are not themselves owners in order to understand their key obligation—to keep off.

Notice how in the information-based theory of property, the negative, or duties, side of the rights/duties pairing is offered as an affirmative justification for the property regime:

In rem rights offer standardized packages of negative duties of abstention that apply automatically to all persons in the society when they encounter resources that are marked in the conventional manner as being “owned.” Information is conserved by making these duties apply automatically to delineated resources without regard to the identity of the owner; by making the duties uniform; by restricting the duties to a short list of negative obligations, easily defined and understood by all; and by marking boundaries using easily observed proxies.

There is a certain irony in using the disabilities of nonowners—their potential vulnerability to owners, whose rights they might otherwise unwittingly violate—to justify a system that grants large numbers of powers to owners. Nonetheless, in the information-based theories of property, the duties side of property rights is central.

The information theorists’ approach to duties reflects their commitment to function in property law. For them, property coordinates behavior. Specifically, it speaks to who is allowed to be where. Nonowners are not permitted on privately owned property without the owner’s permission; they have a duty to keep off. Property’s background rules of exclusion helpfully tell them where they are not allowed to be. If, as is the case for information theory, the concern is primarily with coordination in this simple sense, none of this is problematic. To the contrary, it is all to the good, as everyone is directed to his or her proper place.

Progressive theories of property tend to be much less explicit about duties than the informational theories. On one hand, there is very little discussion of dutyholders as a group, or of dutyholding per se. On the other hand, it is integral to the progressive theorists’ arguments that right-holders have fewer rights than conventional, consolidation-based notions of ownership suggest. They also have duties to other owners

197. Smith, supra note 14, at 78.
198. Merrill & Smith, supra note 21, at 794.
199. See Baron, Property and “No Property”, supra note 52, at 1445.
200. On consolidation, see supra text accompanying notes 114–17.
and to nonowners and thus they are in a meaningful sense also dutyholders—they have obligations.\textsuperscript{201}

All of the progressive theories locate property in the realm of community, and focus on the way the exercise of rights by an owner can and does affect others within the relevant community. Thus, Singer writes that “[e]very legal right should be understood not merely by reference to the powers and rights it gives the owner but by reference to the impacts of the exercise of those powers on others and the shape and character of the social relationships engendered by those rights and powers.”\textsuperscript{202} “Because property law concerns relations among people, property owners have obligations as well as rights.”\textsuperscript{203} Specifically, as we have seen, “we have an obligation of \textit{attentiveness}. We are not free to ignore the effects of our actions on others . . .”\textsuperscript{204}

Obligation is also prominent in Peñalver’s virtue theory:

Our ability to flourish requires the presence of a material and communal infrastructure that itself depends upon the contributions of each of us. We cannot value our ability to flourish without at the same time affirming an obligation to cooperate with others in order to sustain the shared infrastructure on which that ability depends.\textsuperscript{205}

As in the case of Singer’s democratic theory, the obligation to take others’ interests into account may involve obligations that are redistributive: “Because the system of private property as a whole is established in order to facilitate the ability of members of the community to flourish, owners’ rights are qualified by an obligation to share from their surplus property with those who need them in order to satisfy more fundamental needs.”\textsuperscript{206}

Finally, Alexander’s social obligation norm is, well, obligational. Alexander writes that “property owners owe far more responsibilities to others, both owners and non-owners, than the conventional imagery of property rights suggests. Property rights are inherently relational; because of this characteristic, owners necessarily owe obligations to

\begin{footnotes}
\item[201] Putting this point another way, progressive theorists flip the question “what duties do nonowners owe to owners?” to the question “what duties do owners owe to nonowners?”
\item[202] Singer, \textit{supra} note 12, at 1047; see also Purdy, \textit{People as Resources}, \textit{supra} note 12, at 1094–98 (describing our “interdependence,” and urging emphasis not on “the abstract categories of the law,” but rather on “the concrete social world in which each person is the owner of certain resources and not of others.”).
\item[203] Singer, \textit{supra} note 12, at 1048.
\item[204] \textit{Id.} (emphasis added) (footnote omitted); see also Singer, \textit{supra} note 91, at 18 (“Owners have obligations; they have always had obligations. We can argue about what those obligations should be, but no one can seriously argue that they should not exist.”).
\item[205] Peñalver, \textit{supra} note 12, at 870 (footnote omitted).
\item[206] \textit{Id.} at 880; see also \textit{id.} at 877 (“[A] proper concern for human flourishing includes an effort to ensure that the fruits of the land’s productivity . . . are distributed in a manner consistent with that ultimate goal . . .”).
\end{footnotes}
As in the beach access cases discussed earlier, the obligations of ownership may require redistributational sacrifices in the interests of those who need access to, or use of, an owner’s property.\textsuperscript{208}

Just as the information theorists’ approach to duties reflects their commitment to function, the progressive theorists’ approach to duties reflects their commitment to evaluate property principally in terms of \textit{ends}. How property coordinates people is less important to the progressive theorists than what relationships property constructs. If those relationships are dramatically unequal—in terms of power, reciprocity, or resources—then they must be reconfigured. As part of that reconfiguration, owners may have to sacrifice. Thus, they may owe previously unrecognized duties to nonowners or to other owners.

In the end, both information and progressive theorists care about property’s impact on dutyholders, but in entirely different ways. The information theorists focus on the way that property makes dutyholders better off \textit{as dutyholders}, by more cheaply and accurately signaling what they can (and mostly cannot) do. The progressive theorists, by contrast, focus on the way that property does or could make rightholders into dutyholders, which makes dutyholders better off in a different way, as the beneficiaries of substantive obligations owed to them by owners. For the information theorists, rights define duties. If there \textit{is} a property right, then it \textit{is} a right in rem, and it is characterized by nonowners’ duties to keep off. For progressive theorists, in contrast, property rights never just \textit{are}; whether a particular property right arises or governs at all—the scope of every property right—\textit{will}, or should, always depend on the duties to which that right might give rise.

\section*{B. Redistribution in Information and Progressive Theories}

When it comes to explicit consideration of redistribution, things are reversed. Redistribution is a prominent theme in progressive theories of property, and is nearly invisible in information theories. Again, the difference derives from the contested commitments to function and ends. It also derives from differing views about property’s exceptionalism.

In both visions, property operates to organize social relations. For information theorists, property does so in ordinary cases by consolidating the use rights over a particular thing in an owner. Neither the state nor other citizens need to be concerned with owners’ identities (who they are, what they are like, whether they have means in addition to the particular property item in question) or behavior (they can live there or elsewhere, read a book, open a factory or grow crops, park a car or build...
a boat). Owners will know that they largely control the owned thing, while nonowners of that thing will know not to interfere with it.

There is not much texture in this account of the social world; individuals here are not depicted as interacting much, because for functional purposes nothing turns on interactions between them. Of course, in actuality, many social interactions may occur between owners of different properties, or between owners of properties and nonowners, and these may be rewarding or disappointing or functional or entertaining. But for the information theorists, it is not important to focus on these social interactions directly. Indeed, it may be better not to do so: "Constant reference to . . . interests would undermine property's advantages of solving problems wholesale and coordinating the activities of often-anonymous actors." Instead, the focus should be on the mechanism by which, using very simple signals, much of the social world is organized functionally at very low cost.

Conversely, the quality of social life is very much at the center of the progressive theories. Precisely because property is a social institution, we must, they argue, attend to the character of the relationships it enables. For example, we must be concerned with "the terms on which people are able to recruit each other for social cooperation." Moreover, we should understand property rights not only in terms of owners' powers and rights, but also in terms of "the shape and character of the social relationships engendered by those rights and powers." This evaluation requires "qualitative" judgment, i.e., judgments about the "qualitative character" of the relationships that property structures.

Part of the quality being evaluated in the progressive theorists' model is distributional fairness. Thus, Singer argues that among the multiple, plural values that democratic property law must reflect is the "widespread distribution of property and realistic potential for access to

209. With respect, for example, to a car:

In order to maintain a semblance of stability in [the property] system, not only must each owner recognize and exercise dominion over his own car, but virtually all members of society—owners and nonowners alike—must recognize and respect the unique claims of owners to their own particular auto. In other words, virtually everyone must recognize and consider themselves bound by general duties not to interfere with autos that they know are owned by some anonymous other.


210. Smith, supra note 168, at 963.


212. Singer, supra note 12, at 1047.

213. Id. at 1047–48; see also Purdy, A Freedom-Promoting Approach, supra note 12, at 1243 ("Property rights . . . deeply and necessarily structure interpersonal relations.").
Alexander and Peñalver both argue that human flourishing may require redistribution. Since, as Alexander puts it, "every person is equally entitled to flourish[,] . . . every person must be equally entitled to those things essential for human flourishing," including "the material resources required to nurture" foundational capabilities. Or, as Peñalver asserts, "redistribution of land rights via in-kind transfers of ownership or occupancy will, at times, be the only appropriate way of fostering human flourishing."

Except in the context of institutional choice questions, information theorists tend not to talk much about redistribution. Again, this is a product of their focus on function rather than ends; if property's essence is to provide large amounts of cooperation at low cost, then the concern is primarily with the mechanism rather than with the outcome. Indeed, in responding to Alexander's social-obligation model, Smith suggests that the informational values of property's organizing system require deferring redistribution questions to other areas of law. "Perhaps," he states, "law itself has a modular structure and manages complexity by allowing some areas to specialize in some problems without constant reference to what is going on elsewhere."

We see here again the informational emphasis on property's functional exceptionalism. It is not like other areas of law; it solves different problems. If it is to continue to do its work organizing social relations at low cost, there is a limit to the issues we can ask it to address. This is not so for progressive theorists, who put a premium on the quality of relationships property produces.

Redistribution is no more inherently inconsistent with the information theorists' vision than is a thick view of human interaction. But for them the question is whether the property system is the right place for it. Not only does that lead them to be more agnostic about whether redistribution might better be carried out through tax and transfer systems rather than by judicial alteration of rights, it also alters their gaze, forcing attention toward the possibility that the kind of case-by-case assessments that lead progressives to seek redistribution in individual cases might undermine the "wholesale" techniques that are part of property's exceptional mechanism for solving social problems.

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215. Alexander, supra note 5, at 768.
216. Peñalver, supra note 12, at 882.
217. See Merrill & Smith, supra note 9, at 66–68.
218. Smith, supra note 168, at 973.
219. Smith is somewhat ambiguous on this point. At one point he asks why "pleasing old buildings and public beaches" should be provided "at personal expense, rather than the government funding them by taxing other comparably wealthy citizens." Id. at 961. But at another point in the same piece he disclaims having an opinion on whether the redistribution sought by progressive theorists such as Alexander would better be achieved through a tax and transfer system. See id. at 973.
Here again, we see contested commitments over function and ends, and over property's exceptionalism as a legal category.

C. Change in Information and Progressive Theories

Redistribution would change our property order. How quickly should change occur? The pace of change—the issue of time in property law—is not often explicitly contested between the two theoretical strands. But the tone of the information and progressive theorists is, in this regard, notably different, suggesting divergent views about the urgency of the need for change.

Let us return to the information theorists’ discovery of the *numerus clausus* principle. The *numerus clausus*, they argue, is “simply a fact about the way in which the system of property rights operates.” Indeed, it has been a fact so long that its very existence has “penetrated the consciousness of common-law lawyers only weakly.” Although it might appear to be freedom-limiting insofar as it does not allow parties to customize property interests in idiosyncratic, individually chosen ways, it does not generally frustrate parties’ intentions because their objectives “can be realized by a more complex combination of the standardized building blocks of property.” The *numerus clausus* “imposes a brake on efforts by parties to proliferate new forms of property rights,” but it also “permits some positive level of diversification in the recognized forms of property.” Finally, under the *numerus clausus* principle, change is channeled to the legislature. Legislative change is expensive, and so “the very expense of securing such changes tightly rations the amount of reform. Fewer reforms translate into greater stability in the dimensions of property rights.” But, where needed, change has occurred: “where a significant demand for a new form of property has emerged, as with the condominium and the time-share, legislation establishing these forms has often spread very rapidly.”

There is a story here. Our property system, the story goes, has existed for a very long time, so long that we have not really noticed it. While it may seem restricting, it advances freedom. The limited forms the system permits can be combined in a wide variety of ways to achieve almost any desired end. The system has not changed much, and it does

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221. *Id.*
222. *Id.* at 35.
223. *Id.* at 40.
224. *Id.* at 58. On the information theorists’ institutional choice preference for legislative change, see *supra* text accompanying notes 135–39.
225. Merrill & Smith, *supra* note 9, at 63.
226. *Id.* at 66–67. Legislative inertia, they go on to argue, “may be more the product of a lack of consensus about the proper path of reform than of any inherent inability of legislatures to respond to demands for changes in property systems.” *Id.* at 67.
not need to change much. This is why legislative reforms are superior to judicial reforms: when we need them, as with condos and time-shares, we will get them, but otherwise change will largely be rationed, ensuring that the system will be largely stable.

As we have seen, while the progressive theorists accept the descriptive accuracy of the *numerus clausus* principle, it does not hold the same implications for them. They emphasize the way that property is a “dynamic institution, a set of rules evolving in response to technological and social innovation.”227 The question for them is whether, right now, property is promoting human flourishing, virtue, freedom, or democracy. Where it is not, it should change, even if change requires owners to “sacrifice their property interests in some way” in order to enable others “to live well-lived lives and to promote just social relations.”228 And property law has changed. The basic menu of common law estates has been extensively supplemented by statutes and regulations that adjust and readjust the benefits and burdens of social life, as well as by judge-made doctrines, such as the implied warranty of habitability, that dramatically change the balance of power between owners and nonowners.

There is a story here, too, though it is somewhat less well developed. In this story, property has changed over time, and it will (and should) continue to change. It has always limited owners’ freedom to protect the interests of others, and there is nothing wrong with that, for human flourishing, virtue, freedom, and the like require sacrifice. Legislative change is good, but so are judicial changes. The only important question is whether we have the right quality of social relations, and if we do not, then property rights must be adjusted.

These stories highlight the information and progressive theorists’ differences over the relative importance of institutional choice in property law.229 But they also highlight a different attitude toward time. The information theorists wish primarily to decelerate the pace of change; in their eyes, property has worked well over time, continues to work well, and changes when it needs to. But for the progressive theorists, property must be dynamic. Quality of relationships matters,

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229. While Peñalver, for example, admits that his virtue theory does not provide a full account “of the proper roles of legislatures, courts, administrative agencies, and individual citizens in wise land use decision making,” see Peñalver, *supra* note 12, at 888, he is clear that “exclusive reliance on an aggregated system of taxation and monetary payments will be inadequate,” see id. at 882. Alexander and Singer also do not directly address the means by which redistribution should occur, but both praise judicial, as well as regulatory, efforts to promote more just distribution of opportunities. See Singer, *supra* note 12, at 1055 (citing laws, judicial doctrines, and private agreements that promote equal opportunity); Alexander, *supra* note 5, at 775–810 (using examples from both case law and legislation).
and if property is not producing the right kind of relationships, then quick action is needed. Older is not necessarily better, and stability is not necessarily more desirable than change.

IV. CONTESTED METAPHORICAL COMMITMENTS

Let us take stock: There are large areas of agreement between information and progressive theorists—for example, that property is a system, and that it orders social relations. But there are disagreements, too. The information theorists’ understanding of how it is that property functions logistically puts a premium on simple signals, but the progressive theorists’ interest in direct consideration of plural values may be inconsistent with such simplicity. Information theorists value stability, and favor legislative over judicial changes, precisely because the former tend to come slowly. Progressive theorists, for their part, focus on ends, and they value change designed to achieve desired goals. Relatively speaking, progressive theorists are indifferent to the institution producing that change; certainly, they are far more receptive to judicial efforts aimed at redistribution than the information theorists.

Interestingly, both the information and progressive theorists currently see the central points of contention in terms of “core” and “periphery.” One might think that if the two theoretical strands could agree on the appropriateness of the core/periphery metaphor, they would agree on the content of the core, but the opposite is true. In Smith’s view, “property’s core is a right to things against the world, which is a rough cut at dealing with a wide, indefinite, and open-ended set of problems by delegating decisions over the use of property to owners who have better information about it.” At the periphery is “governance,” used “where problems are important enough” and require “more tailored solutions... that make more direct reference to the ends that we collectively want to see served.” But for Singer, for example, property’s core is “the shape and quality of human relationships,” the “qualitative character of social relationships.” This core, Alexander explains, “is

230. See, e.g., Merrill & Smith, What Happened to Property, supra note 15, at 359 (describing “core property rights”); Merrill & Smith, Morality of Property, supra note 13, at 1850 (describing exclusion as a “core aspect of property”); Smith, supra note 168, at 971 (“At its core, property draws on an everyday morality that it is wrong to steal and violate others’ exclusion rights.”). Alexander’s reply to critiques of The Social-Obligation Norm is entitled The Complex Core of Property. See Alexander, supra note 4. But see supra note 6.

231. Smith, supra note 168, at 964.

232. Id. at 964–65.

233. Singer, supra note 12, at 1050.

234. Id. at 1054; see also Alexander, supra note 5, at 748 (arguing that although “[t]he law has relegated the social obligations of owners to the margins, while individual rights, such as the right to exclude, have occupied the center stage,” this picture should be changed).
complex, certainly more complex than the simple image of the virtually absolute right to exclude.”

To both sides, this contest over the core is to some extent empirical, a question of the characteristics of property in the real world. Thus, Singer argues that “it is not really true that the estates system currently functions to simplify things.” There are few limits, he argues, on the kinds of conditions and covenants that can be imposed on land ownership. The widespread use of homeowners associations means that buyers of land must search the voluminous covenants, conditions, and restrictions contained in the recorded declaration[s], as well as the governing rules of the association, to find out what their rights will be if they buy the property.

In the end, Singer directly contradicts the information theorists by asserting that “it is not clear how our estates system actually lowers information costs at all.”

The contest over the core is also, in the theorists’ eyes, a contest about the moral vision underlying property. The information theorists have little doubt that their vision of property is moral and accords with widely held moral intuitions:

The nature of property as a coordination device among unconnected and anonymous actors, mediated through stereotyped things, requires that property rights command widespread respect. This respect can only be provided by some version of morality that treats violations of possession, theft, trespasses, and other gross interferences with property as wrongs subject to widespread disapprobation.

Here again, the core/periphery metaphor is called into play: Smith argues that “at its core, property draws on an everyday morality that it is wrong to steal and violate others’ exclusion rights.” Not so, say the progressive theorists. “[I]t may well overstate the case,” Singer states, “to identify simplification with common morality.... Common morality often sides with complexity rather than simplicity.” Alexander goes even further. He writes: “Common moral intuitions extend significantly beyond injunctions against theft and trespass. They include perceived obligations to share and conserve, at least at times. Hence, pace Smith, qualifications on the right to exclude are not deviations from core moral intuitions underlying property, but rather expressions of those moral intuitions.”

235. Alexander, supra note 4, at 1064.
236. Singer, supra note 12, at 1025.
237. Id.
238. Id. at 1026. This statement obviously qualifies Singer’s acceptance of the numerus clausus principle.
239. Merrill & Smith, Morality of Property, supra note 13, at 1852–53.
240. Smith, supra note 168, at 971.
241. Singer, supra note 12, at 1026 (footnote omitted).
242. Alexander, supra note 4, at 1066.
It is not clear how one would resolve the conflicting empirical and moral claims raised by the information and progressive theorists. What is clear is that alongside the consensus on the core/periphery metaphor, there is yet another unacknowledged dispute between the theoretical strands. This dispute concerns the proper conceptualization of what property theory should do, and returns us to the question with which this Article began, about how property organizes human behavior and social life.

Information theorists’ interest is in the functional mechanics of the property system, in the way that property operates as a means to an end. Again, recall property is a system, a “mechanism.” Systems have a design; the goal, in the eyes of the information theorists, is to understand the design and, perhaps, improve upon it. This inquiry is, in Smith’s words, an “engineering-like” question. But, he adds, “if there is anything legal scholars do better than economists, social scientists, and philosophers, it is institutional design. . . . We should embrace our role.”

But not everyone wants to be an engineer—at least, not the kind worried about the mechanics of the system. Progressive theorists care about social ordering, but to the extent that the metaphor of engineering suggests nuts-and-bolts type inquiries into systems design, it does not really capture their concerns. In their eyes, “choices about property law are choices about social and political structure” and require judgments about the degree to which ownership “fosters the participation by human beings in . . . objectively valuable patterns of existence and interaction.” Diagnosing property regimes involves “considering whether they promote relationships of domination and subordination . . . or whether, alternatively, they promote reciprocity and cultivate the habit of recognizing and pursuing one’s own interests and commitments in the course of negotiating cooperation with others.”

Perhaps these concerns could be made to fit within the “engineering” metaphor. One could see the progressive theorists as concerned with social engineering, broadly understood as the configuration of the virtuous, free, or democratic society. Yet this is clearly not the sort of engineering Smith has in mind; his concerns are practical, focusing on the management of complexity, and envisioning

243. Smith repeatedly uses the “mechanism” metaphor. See, e.g., Smith, supra note 168, at 973, 975, 976.
244. Id. at 970.
245. Id.
246. Singer, supra note 12, at 1059.
247. Alexander, supra note 5, at 764.
249. See Smith, supra note 168, at 970 (using the term “practicality”).
actual solutions. The judgments that need to be made here are empirical, not qualitative.

The information theorists’ metaphors suggest one vision of property. In this view, property is a machine, one that, as we see through the numerus clausus principle, has been running more or less on its own from long ago until now, and one that is best left alone (at least by courts) to keep on running. Property is a mechanism that promotes human flourishing; it has an “architecture” we should struggle to understand and to retain. Ultimately, property is “infrastructure.” In the eyes of the information theorists, the system is running pretty well, producing a fair amount of social order in an unseen, background sort of way, especially when compared to societies that lack this machine.

While the progressive theorists are willing to concede that the current property system prevents some social pathologies, they contest the premise that the system is working pretty well. Or perhaps it is more accurate to say that the progressive theorists would put on the table explicitly the question whether the system is working well enough. More importantly, they would also put on the table what “well enough” might mean. The idea that there might be a “mechanism” for the attainment of goals as complex as freedom, democracy, or human flourishing is one they continually reject. Whereas for the information theorists property is something—machine (“mechanism”) or system (“architecture”) or structure (“infrastructure”)—that runs to some extent independent of us, for the progressive theorists property never just is. Whether a particular property right arises or governs at all—the scope of every property right—will, and should, always depend on the social relations, the duties, the dependencies, (etc.) to which that right might give rise. From the placement of political signs to the resolution of the mortgage foreclosure crisis, the issue is not whether we obtain clear answers, but whether we “frame the issue appropriately” and “ask the right questions.”

Is property a machine or a conversation? Is it something that already is or something we create every day? Does it work on its own, or

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250. Id. at 969 (“Property law provides the overall structure to manage . . . complexity . . . , but the need to manage complexity points to the need, at least in theory, for a modular solution.”).
251. Id. (“Ultimately, what degree and kind of modularization we need is an empirical question.”).
252. Id. at 967, 973.
253. Id. at 974.
254. Id. at 970 (using the example of North Korea).
255. See Singer, supra note 12, at 1051 (“We tend to forget this fundamental purpose of the estates system [outlawing certain prohibited social and political relationships] because custom has evolved so that no one seeks to create feudal or slave relationships today.”).
256. See, e.g., id. at 1059 (“There are various ways to think through and justify alternative resolutions to difficult property questions, but “none of them gives us a mechanical decision procedure to generate an outcome.”).
257. Id. at 1061.
does it need constant attention? These questions are all metaphorical, yet they imply very different visions of how property works as a social ordering device. Both visions are attractive in some ways. It is, for example, comforting to believe that we live in a pretty good social world, while it is also natural to want to believe that we might always make that social world better (whatever "better" might mean). But the commitments underlying the two visions are hard to reconcile. One suggests our social world is already in reasonably good shape, and that changes that might destabilize existing ownership rights are perilous. The other suggests that our social world needs attention, and that the status quo—including the extant distribution of property—must continually and directly be challenged. Since we care about how property works, we need to attend to these contested commitments and the choices they require us to make. What is at stake, in the end, is whether we can trust property to make us better off.

CONCLUSION

As Carol Rose has persuasively argued, it is often the choice of rhetoric, not rule, that matters most, communicating our deeper commitments with respect to human interaction. The rhetoric of exclusion and the metaphor of core and periphery have for some time dominated thinking about property and seem likely to structure the debate well into the future. This Article has shown that a different metaphorical contest more accurately defines modern property law, the contest between the metaphors of machine and conversation.

The machine and conversation metaphors encode the commitments contested between the information and progressive theorists—commitments that connect to our fundamental understanding of how property creates social order. The commitments encoded in the machine metaphor emphasize the functional, mechanical aspects of property, the way it works nearly invisibly to produce high levels of social coordination at low cost. The commitments encoded in the conversation metaphor emphasize the ends, particularly the quality of relationships, that our property system produces, and it seeks to keep the question of the quality of these ends always in view.

This metaphorical contest is important doctrinally because it reflects conflicting views about whether we can ever unreflectively trust property rules to express our values. Machine and conversation also suggest very different visions of how much faith we should have in our existing system of property, of whether it is good enough, and of whether we can trust ourselves to improve it. Machine and conversation matter, most of all,
because they force us to choose between different visions of how property organizes human behavior and social life.