
ARTICLE

THE PERSISTENCE OF SYSTEM IN PROPERTY LAW

HENRY E. SMITH[†]

According to conventional wisdom, property has disintegrated. Property law has undergone many changes since the heyday of Legal Realism, and many of these changes were both inspired by Realism and went under the banner of the Realists' "bundle-of-rights" conception of property. However, many of the features of property law most denigrated by the Legal Realists and their successors have proved surprisingly resilient. These "doctrinal" features include the notion of property as a thing, the importance of possessory rights, and the greater degree of formalism in property than in contract law. In this Article, I argue that there is a common cause to the Realists' criticism of these features and their endurance in the face of that criticism: all of these features of property are manifestations of property law's basic architecture as a system. Because of the inherent complexity of relations—especially those that are less personalized—in private law, a system for providing a first cut at managing these relations presents problems of information costs that are unique to property. These costs, usually left out of realist analysis, are hard to ignore entirely and push property law to treat private interactions in a more modular fashion than the realist bundle-of-rights picture would lead one to expect. Moreover, the underappreciated flexibility and robustness of a modular architecture allows property law to absorb—at some cost—a great deal of change without alteration of its basic nature. I apply this analysis to

[†] Fessenden Professor of Law, Harvard Law School. Email: hesmith@law.harvard.edu.

I would like to thank Ben McFarlane, the participants at the Symposium on the New Doctrinalism at the University of Pennsylvania Law School, and at a workshop at the Max Planck Institute for Comparative and International Private Law in Hamburg for their helpful comments, and Yotam Kaplan for excellent research assistance. All errors are my own.

Realist and post-Realist approaches to asset definition, trespass and nuisance, and the standardization of property forms. The greatest engine for change from Legal Realism in certain areas of property may be simple ignorance of the complexities of earlier law.

INTRODUCTION	2056
I. SYSTEM AND ITS DISCONTENTS IN LEGAL REALISM	2059
II. THE PERSISTENCE OF SYSTEM	2064
III. NONSYSTEMIC CHANGES IN DOCTRINE.....	2070
IV. PSEUDO CHANGES IN DOCTRINE.....	2074
V. THE PARTIAL FLATTENING OF PROPERTY LAW	2080
CONCLUSION.....	2083

INTRODUCTION

Nowhere was the realist attack on formalism and classical legal thought more vehement than in the area of property. And in keeping with the idea that “we are all Realists now,”¹ it would appear that property law underwent a great deal of change starting in the Legal Realist era. From the revolution in landlord–tenant law to a greater willingness to make exceptions to a landowner’s right to exclude to the rise of new forms of contractual property, the conventional wisdom is that Realism indeed had a profound impact on property. In the process, the Realists’ preferred picture of property—the bundle of rights—became the reigning dogma and provided justification for the change. If any cluster of rights, privileges, immunities, duties, liabilities, and so on could be characterized as property, then there was no good reason why the bundle of sticks, reflecting the best of current thinking, should not be immediately and continuously implemented in the law. The Realists’ skepticism of doctrine, and in particular their hostility to property baselines, has apparently made a great deal of headway. On the conventional view, property is not merely a bundle of rights, but it has even fragmented to the

¹ LAURA KALMAN, *LEGAL REALISM AT YALE: 1927–1960* 229 (1986); *see also, e.g.*, Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 *TEX. L. REV.* 267, 267 (1997) (“[A]s the cliché has it . . . ‘we are all realists now.’”); Joseph William Singer, *Legal Realism Now*, 76 *CALIF. L. REV.* 465, 467 (1988) (reviewing KALMAN, *supra* note 1) (“All major current schools of thought are, in significant ways, products of legal realism. To some extent, we are all realists now.”).

point that there is nothing holding it together other than the state of current policy judgments or prevailing political winds.

This picture is too tidy in its untidiness. While the changes set in motion by the Realists are real, they have not come close to abolishing doctrine or fragmenting property out of existence. To the contrary, those aspects of property that the Realists saw as the greatest challenge to their program have been the most resilient, in practice if not in theory. Property is still largely a law of things.² It provides for in rem rights that show a high degree of formalism and standardization.³ This Article will argue that what the most stable parts of property share is their relatively tight integration with the basic system of property—a system that property law requires because of the problems it solves.

Property law coordinates activities and resolves conflict between members of society over external resources. To do this, it must manage the potentially intractable complexity of these interactions. Property law must also provide a system that channels information where it is needed and cuts it off where it is not worthwhile. Property divides the world of horizontal interactions into modules, largely surrounding the legal thing, which allow intensive activity inside boundaries and stereotyped interactions between modules; think of how many activities owners are privileged to take within a parcel, which are of no legal relevance to dutyholders. Legal things are not the same as actual things, and the legal things can correspond to intangible things.⁴

Fundamental to property is the spectrum running from in rem to in personam.⁵ Some aspects of property—like the basic possessory rights protected by trespass and the priority of the true owner's rights over others'

² See Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1725 (2012) (“[P]roperty is naturally and for practical purposes seen as a holistic law of things.”).

³ See generally Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 12-20 (2000) (discussing the standardization of various categories of property rights, including estates in land, personal property, and intellectual property).

⁴ See, e.g., J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 115-20 (1997) (discussing intangible legal things); Frederick Pollock, *What Is a Thing?*, 10 LAW Q. REV. 318, 319 (1894) (extending the notion of legal things to intangibles); see also Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 733 (1917) (A “right, or claim, . . . is not always one relating to a thing, i.e., a tangible object . . .”).

⁵ See, e.g., Hohfeld, *supra* note 4, at 718-33 (discussing the important differences in the nature of rights and analyzing in rem rights as congeries of in personam rights); Albert Kocourek, *Rights in Rem*, 68 U. PA. L. REV. 322, 331-35 (1920) (critiquing Hohfeld's classification of rights and offering a definition of in rem rights as those for which “the essential investitive facts do not serve directly to identify the person who owes the incident duty”); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 789-809 (2001) (explaining why it is necessary to distinguish between different types of property rights).

claims—are in rem, in that they avail against others generally. Other aspects of property are more narrowly tailored, falling toward the in personam end of the spectrum, including nuisance and lateral support between neighbors, covenants, and landlord–tenant.

This Article will argue that the changes rooted in Realism are concentrated on the more in personam–like aspects of property and at the edges of the system—and, by the same token, that the overall architecture of property has been surprisingly resilient. Or perhaps it is not so surprising; the Article will also argue that the persistence of the system or architecture in property law is no accident but follows from the function it serves. The “essential role” of property is to manage complex interactions of persons at large over resources, and the severe informational demands of this problem make some such system almost inevitable.⁶

There is an irony in this. The Realists’ slogan was that an increasingly complex society required less formal and more contextual law in many areas, including property.⁷ Although new problems did require many new solutions, the “complexity” of modern society did not remove the need for a modular system. Rather, in some ways, it increased the need to manage the greater complexity of interactions through that very system.

This Article will begin in Part I by setting out the nature of the system in property law and the Realists’ apparent attack on it. Part II will show that some of the most systematic aspects of property have proven quite resilient through the present. By contrast, Part III will show that those aspects of property that are less embedded in the architecture—either because they are in personam or can be characterized as exceptions—have been subject to the most realist-inspired change. Part IV addresses the class of changes that are more apparent than real, including the “modern” view of trespass and the scope of rights extending above and below parcels, as well

⁶ See, e.g., Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 391–93 (2000) (arguing that providing for immunity of a firm’s assets from the claims of its owners’ creditors is the “essential role” of organization law because it is generally impossible to achieve such immunity through contract).

⁷ See, e.g., THURMAN ARNOLD, *THE FOLKLORE OF CAPITALISM* 118–35 (1937) (insisting that traditional notions of private property were too simple and formal to usefully understand the complexity of the contemporary economy); JAMES E. HERGET, *AMERICAN JURISPRUDENCE, 1870–1970: A HISTORY* 147–58 (1990) (explaining the relationship between changes in legal doctrine and changes in societal values); G. EDWARD WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT* 139 (1978) (discussing the relationship between the Realists’ repudiation of formal logic and the advances in society after the Great Depression). For a present day echo of this point of view, see RICHARD A. POSNER, *REFLECTIONS ON JUDGING* 231–35 (2013) (arguing against formalism and for a new judicial Realism to deal with the increasing complexity of society).

as the supposed significance of intangibles for the notion of property as a law of things. These themes are drawn together in a Conclusion.

I. SYSTEM AND ITS DISCONTENTS IN LEGAL REALISM

The Realists themselves took aim at certain aspects of property, centering on the role of things, formalism, and the notion of an *in rem* right. Their objections had roots in earlier sociological and progressive jurisprudence but were carried much further, apparently winning the day. In this Part, I identify what the Realists found objectionable in property law before turning to what their legacy really turned out to be.

The Realists' attack on property law was of a piece with their rejection of earlier formalism in "classical legal thought." While the Realists' characterization of the earlier era can and has been questioned,⁸ it is especially problematic in the area of property. The most famous legacy of realist nominalism in property law is the bundle of rights, which eventually was accepted as conventional wisdom.⁹ The bundle of rights is a useful analytic device in that it helps to clarify the implications of a set of legal entitlements. But it is often taken as much more—as a theory of property. In an earlier article, I noted that in keeping with the Realists' professed love for shallow fact-oriented concepts (or facts themselves), the bundle of rights is like the extension of a concept—what in the world falls under it.¹⁰ But there are multiple ways ("intensions") of getting to this extension. One can pick out a set of facts in many different ways, and enumeration is often not the

⁸ See, e.g., ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* 48-112 (1998) (discussing and criticizing realist-style, antiformalist characterizations of late nineteenth and early twentieth century formalism); BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 67-90 (2010) (arguing that the core realist observations were already known and utilized before Realism was a formal idea). See generally Manuel Cachán, *Justice Stephen Field and "Free Soil, Free Labor Constitutionalism": Reconsidering Revisionism*, 20 *LAW & HIST. REV.* 541 (2002) (evaluating controversies between progressives and revisionists over Justice Field's ideology and jurisprudence). But see Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 *LEGAL THEORY* 111, 117 (2010) (criticizing Tamanaha's analysis and arguing that "[i]t is not enough to quote this or that judge or scholar saying antiformalist, protorealism things in 1880").

⁹ See, e.g., BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 26 (1977) (reporting that the bundle-of-rights conception of property is so pervasive that "even the dimmest law student can be counted upon to parrot the ritual phrases on command"); Edward L. Rubin, *Due Process and the Administrative State*, 72 *CALIF. L. REV.* 1044, 1086 (1984) ("[P]roperty is simply a label for whatever 'bundle of sticks' the individual has been granted."); Joan Williams, *The Rhetoric of Property*, 83 *IOWA L. REV.* 277, 297 (1998) ("Labeling something as property does not predetermine what rights an owner does or does not have in it.").

¹⁰ Henry E. Smith, *Emergent Property*, in *PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW* 320 (James Penner & Henry E. Smith eds., 2013).

cheapest or most useful method of doing so. Thus, while fee simple to Blackacre may involve all sorts of rights (e.g., to exclude people from entering but not from viewing, to demand lateral support from a neighbor, and to alienate), privileges of use (e.g., to build, to till, and to park), duties (e.g., to shovel snow from adjacent sidewalks), and liabilities (e.g., to eminent domain), some of these sets of relations are open-ended privileges of use in general, subject to limits from others' rights. Their open-endedness precludes enumeration of the sticks in the "bundle" accompanying the fee simple to Blackacre.

Moreover, the realist bundle of rights was built on Hohfeld's scheme of legal relations,¹¹ which itself can be understood in various ways. It is no doubt a useful analytical device, but taken as a "theory" of the structure of legal relations, it is incomplete, as Hohfeld may well have known: he died before being able to supplement his reductive theory with a theory of composite or aggregates of relations.¹²

Likewise, the Realists' vision of property was characterized by a Hohfeldian skepticism of the *in rem* aspect of property. In one famous formulation, Walton Hamilton and Irene Till declared that property is nothing more than "a euphonious collocation of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth."¹³ More extreme still was Felix Cohen, who took the reification of property as Exhibit A in his catalog of "Transcendental

¹¹ See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28-59 (1913) (setting out eight "fundamental jural relations" and their interrelations); see also Max Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1141, 1146-63 (1938) (interpreting the Hohfeldian scheme from a legal Realist's point of view).

¹² See, e.g., JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 55, 67 (1990) (adding "cluster-rights" to the Hohfeldian scheme); Pierre Schlag, *How to Do Things With Hohfeld*, 78 LAW & CONTEMP. PROBS. 185, 217-18 (2015) (pointing out that Hohfeld did in fact use the word "aggregate" when he said that the fee simple "can be broken down into 'a complex aggregate of rights (or claims), privileges, powers, and immunities' . . ."); see also Daniel B. Klein & John Robinson, *Property: A Bundle of Rights? Prologue to the Property Symposium*, 8 ECON. J. WATCH 193 (Sept. 2011), <http://econjwatch.org/articles/property-a-bundle-of-rights-prologue-to-the-property-symposium?ref=articles>, archived at <http://perma.cc/6AM6-Q8MK> (describing the history of the "bundle-of-rights" conception of property); Ted Sichelman, *Quantum Game Theory and Coordination in Intellectual Property* (San Diego Legal Studies Paper No. 10-035, 2010), available at <http://ssrn.com/abstract=1656625> (describing how Hohfeld's theory could be used in patent law). For an argument that a Hohfeldian approach leads to the primacy of the right to exclude from a physical thing, see Simon Douglas & Ben McFarlane, *Defining Property Rights*, in PHILOSOPHICAL FOUNDATIONS, *supra* note 10, at 219, 223-26, 233-37.

¹³ Walton H. Hamilton & Irene Till, *Property*, in 11 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 528, 528 (Edwin R.A. Seligman & Alvin Johnson eds., 1937).

Nonsense.”¹⁴ During this era, the First Restatement of Property adopted a Hohfeldian bundle-of-rights approach and studiously avoided the notion of an in rem right.¹⁵

Some Realists charted a more moderate course when it came to property. Llewellyn, for instance, espoused a minimal role for concepts of title despite criticism of that notion’s role in the earlier sales act.¹⁶ He was not opposed to concepts in general but rather saw concepts—like title—under the older sales act as too abstract;¹⁷ instead, Llewellyn, and Realists like him, “want[ed] to check ideas, and rules, and formulas by facts, to keep them close to facts.”¹⁸ Nevertheless, he found that the concept of title was useful precisely because it could be inserted as a unit at various points where a more tailored concept was not needed and thus that “it should be made to serve merely as the general residuary clause.”¹⁹

Llewellyn’s moderate position bears some resemblance to Roscoe Pound’s earlier suggestion that different areas of law require different degrees of formalism, with property being among those areas that benefit from the stability that formalism provides.²⁰ Not a formalist himself but in a sense a proto-Realist, Pound argued that

¹⁴ See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815 (1935) (“The circularity of legal reasoning in the whole field of unfair competition is veiled by the ‘thingification’ of *property*.”). In his first paragraph, Cohen joined Jhering in ridiculing the “heaven of legal concepts”: “In this heaven one met, face to face, the many concepts of jurisprudence in their absolute purity, freed from all entangling alliances with human life. Here were the disembodied spirits of good faith and bad faith, property, possession, laches, and rights in rem.” *Id.* at 809.

¹⁵ See RESTATEMENT OF PROP. § 7 (1936) (“The word ‘owner’, as it is used in this Restatement, means the person who has one or more interests.”); see also Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle?: The Disintegration of the Restatement of Property*, 79 BROOK. L. REV. 681, 696-701 (2014) (explaining how the Restatement was largely based on the legal concepts formulated by Hohfeld that minimized the distinction between in personam and in rem right). The move away from in rem rights in the name of maintaining rights among persons was quite conscious, as the floor discussion of the Restatement makes clear. *Id.* at 697-99.

¹⁶ See K.N. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L.Q. REV. 159, 169 (1938) (“[Title] remains, in the Sales field, an alien lump, undigested.”).

¹⁷ See Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 438-51 (1930) (distinguishing between abstract legal verbalisms and concrete empirical facts while highlighting the inherent ambiguities of concepts).

¹⁸ Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1223 (1931). Llewellyn continues: “They view rules, they view law, as means to ends; as only means to ends; as having meaning only insofar as they are means to ends.” *Id.*

¹⁹ Llewellyn, *supra* note 16, at 170. See generally Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PA. L. REV. 2097 (2012) (reevaluating the roles that legal concepts play in property and concluding that such concepts manage the complexity of interpersonal interactions and reduce information costs).

²⁰ See Roscoe Pound, *The Theory of Judicial Decision III: A Theory of Judicial Decision for Today*, 36 HARV. L. REV. 940, 951 (1923) (“[R]ules of law . . . which are applied mechanically are more

[i]n matters of property and commercial law, where the economic forms of the social interest in the general security—security of acquisitions and security of transactions—are controlling, mechanical application of fixed, detailed rules or of rigid deductions from fixed conceptions is a wise social engineering. . . . Individualization of application and standards that regard the individual circumstances of each case are out of place here.²¹

Jerome Frank vehemently faulted Pound's position as being unrealistically rule-bound when it came to property.²²

At least at the rhetorical level, the more extreme realist position became conventional wisdom among commentators in the late twentieth century. Thomas Grey offered the most famous modern formulation of the post-realist position:

In the English-speaking countries today, the conception of property held by the specialist (the lawyer or economist) is quite different from that held by the ordinary person. Most people, including most specialists in their unprofessional moments, conceive of property as *things* that are *owned by persons*. To own property is to have exclusive control of something—to be able to use it as one wishes, to sell it, give it away, leave it idle, or destroy it. Legal restraints on the free use of one's property are conceived as departures from an ideal conception of full ownership.

By contrast, the theory of property rights held by the modern specialist tends both to dissolve the notion of ownership and to eliminate any necessary connection between property rights and things. Consider ownership first. The specialist fragments the robust unitary conception of ownership into a more shadowy "bundle of rights."²³

adapted to property and to business transactions; standards where application proceeds upon intuition are more adapted to human conduct and to the conduct of enterprises.”).

²¹ ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* 153-54 (1923).

²² See JEROME FRANK, *LAW AND THE MODERN MIND* 213 (1930) (“Pound errs, that is, in too sharply differentiating between (a) one department of law which requires the application of abstract rules and (b) another department which calls for the just and painstaking study of the novel facts of the particular case. This as we have seen, is an unreal dichotomy. Every case presents the question of the extent to which the judge should adhere to settled precedents as against flexible modification of the precedents. There must be gradations and degrees of fixity and flexibility.”); see also FELIX S. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS: AN ESSAY ON THE FOUNDATIONS OF LEGAL CRITICISM* 1-8, 235-49 (1933) (arguing that the connection of any decision or element of a legal system to the rest of the law only has meaning in a social and ethical context).

²³ Thomas C. Grey, *The Disintegration of Property*, in *PROPERTY: NOMOS XXII*, at 69, 69 (J. Roland Pennock & John W. Chapman eds., 1980) (citations omitted).

Grey further argues that the notion that things are important to property cannot stand in the face of the importance of intangibles to a modern capitalist economy.²⁴ Grey then goes on to note that the bundle-of-rights conception makes property law unimportant; this was a welcome development for the Legal Realists, who “were on the whole supportive of the regulatory and welfare state, and in the writings that develop the bundle-of-rights conception, a purpose to remove the sanctity that had traditionally attached to the rights of property can often be discerned.”²⁵

The Realists’ caricature of formalists can be seen as an effort to distract from the strengths of traditional property, which they realized was an obstacle. The Realists employed mutually reinforcing rhetorical strategies to great effect. First, their criticism of earlier law as overly formal was designed to make their opponents look ridiculous and narrow-minded. As several authors have pointed out, this effort at “defining your enemy” was effective but not entirely accurate.²⁶ Indeed, the formalism of the formalist era was more pragmatic than the stereotype would have it. In addition, the Realists focused on the common law, which in the era before the fusion of law and equity was indeed more formalist than it would have been on its own because it was not freestanding.²⁷ However, equity tempered the common law, and even notorious “formalists” like Langdell spent much effort on equity and saw it as a morally based engine of reform in the legal system.²⁸ Indeed, it was Holmes who dismissed equity and focused on packing everything into the common law structure.²⁹

²⁴ *Id.* at 70. However, this logic does not follow. See Pollock, *supra* note 4, at 320 (“[O]n the whole perhaps we have good ground for saying that the ‘thing’ of legal contemplation, even when we have to do with a material object, is not precisely the object as we find it in common experience, but rather the entirety of its possible legal relations to persons. We say entirety, not sum, because the capacity of being conceived as a distinct whole is a necessary attribute of an individual thing. What the relations of a person to a thing can be must depend in fact on the nature of the thing as continuous or discontinuous, corporeal or incorporeal, and in law on the character and the extent of the powers of use and disposal which particular systems of law may recognize.”); see also PENNER, *supra* note 4, at 115-22 (analyzing intangibles in terms of exclusion and separability theses); FREDERICK POLLOCK, *A FIRST BOOK OF JURISPRUDENCE FOR STUDENTS OF THE COMMON LAW* 121 (1896) (“A thing is, in law, some possible matter of rights and duties conceived as a whole and apart from all others, just as, in the world of common experience, whatever can be separately perceived is a thing.”).

²⁵ Grey, *supra* note 23, at 81.

²⁶ See *supra* note 8 and accompanying text.

²⁷ See generally Henry Smith, *The Hidden Equitable Langdell – Henry Smith*, NEW PRIVATE L. BLOG (Aug. 10, 2015), <http://blogs.law.harvard.edu/nplblog/2015/08/10/the-hidden-equitable-langdell-henry-smith/>, archived at <http://perma.cc/6QD5-EMQF>.

²⁸ See C.C. Langdell, *A Brief Survey of Equity Jurisdiction II*, 1 HARV. L. REV. 111, 116 (1887) (“[T]he object of equity, in assuming jurisdiction over legal rights, is to promote justice by supplying defects in the remedies which the courts of law afford. . . . [T]he jurisdiction is

The Realists' characterization of their opponents as mindless formalists was accompanied by a phobia about natural rights and natural law.³⁰ Felix Cohen's *Transcendental Nonsense* is itself probably a reference to Bentham's assessment of lists of natural rights as "nonsense upon stilts."³¹ Realists saw property doctrine as an obstacle to social engineering. Natural rights thinking was in decline by the time the Realists arrived, and they saw the remnants of such an approach as an impediment to redefining entitlements. The over-constitutionalization of private law, now symbolized by the *Lochner* case,³² allowed the Realists to paint with a broad brush; they set up a dichotomy between a fully protean, context-based Realism in property and the most rigid version of classical liberalism enshrined in a hard-to-amend Constitution.

Finally, a word on what is meant by "system." The Legal Realists saw themselves as systematists, but in a functionalist sense. They saw the "what" of law as holding it together, not the "how." Thus economic, political, or sociological concepts might be relevant, but not traditional legal concepts. Nothing in the following should be taken as an argument against functionalism itself. Indeed, the system within law—made up of concepts and doctrines—can (notwithstanding the views of the Realists and their successors) be given a functionalist justification in that the system attains the benefits of complexity while also managing its costs.

II. THE PERSISTENCE OF SYSTEM

The Realists did not do justice to the system immanent in property—not that it was their intention. Indeed, Realists saw any inkling of a system

co-extensive with its object; that is, equity assumes jurisdiction over legal rights so far, and so far only, as justice can be thereby promoted."). For further evidence and discussion on equity as a vehicle for reform, see Smith, *supra* note 27.

²⁹ See O.W. Holmes, Jr., *Early English Equity*, 1 LAW Q. REV. 162, 173-74 (1885) (describing the development of equity and arguing that equity was merely a "relic[] of ancient custom," not a major reform or new doctrine). Indeed, Holmes's focus on the common law excluded equity. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) ("I hardly think it advisable to shape general theory from [equity].").

³⁰ See, e.g., Henry E. Smith, *Custom in American Property Law: A Vanishing Act*, 48 TEX. INT'L L.J. 507, 519 (2013) (discussing positivism's displacement of natural law and natural rights in the nineteenth century). See generally John M. Breen & Lee J. Strang, *The Forgotten Jurisprudential Debate: Catholic Legal Thought's Response to Legal Realism*, 98 MARQ. L. REV. 1203 (2015).

³¹ JEREMY BENTHAM, *Nonsense Upon Stilts*, in RIGHTS, REPRESENTATION, AND REFORM: NONSENSE UPON STILTS AND OTHER WRITINGS ON THE FRENCH REVOLUTION 317 (Philip Schofield et al. eds., 2002); see also Cohen, *supra* note 14, at 848 (praising Bentham's "brilliant achievements").

³² *Lochner v. New York*, 198 U.S. 45 (1905).

as a roadblock. As this Article will show, that roadblock could be removed rhetorically but not practically. It is time to consider what property does, and how it does it.

Traditional property, whether being of a natural law, natural rights, or the late nineteenth-century kind (or even a conventionalist version), did feature a system. Less recognized is its subtlety and flexibility.

In property law, things are the lynchpin of the architecture. The Realists and their successors are correct in noting the complexity of horizontal private interactions between members of society with respect to things. They are also right that property is more than the relation between an owner and a thing. Nonetheless, it is the very complexity of the problem of horizontal interactions and its interpersonal nature that requires a method of making the problem more manageable. That method is to modularize the system, starting with the definition of legal things.³³

Legal relations are not delineated from the ground up in terms of pairs of individuals, individual activities, and the attributes of the resources they involve³⁴—that is, by directly specifying the right of *A* against *B* for narrow use *C* of resource attribute *D*, and so on. Instead of a fully atomized system, property law carves up the world using notions of possession and accession into legal things.³⁵ A legal thing is related to, but distinct from, an actual thing, but there is a legal ontology that allows one to recognize pieces of reality as separable from the overall context. The owner of a thing can take many actions internal to the legal thing without it being relevant to the outside world. For example, the law of trespass, as with exclusion strategies in general, implements this basic modular setup. It creates a simple message for potential trespassers, such as to a person walking through a parking lot who knows not to take or damage cars belonging to unknown others.³⁶

³³ See Smith, *supra* note 2 and accompanying text.

³⁴ See Brian Angelo Lee & Henry E. Smith, *The Nature of Coasean Property*, 59 INT'L REV. ECON. 145 (2012) ("The real lesson of the Coase Theorem is that the presence of transaction costs in the real world makes property a sometimes essential shortcut over full contracting."); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 358 (2001) ("[T]he in rem character of property and its consequences are vital to an understanding of property as a legal and economic institution." (citation omitted)).

³⁵ See Henry E. Smith, *The Elements of Possession* ("Possession is still used when it is all we need—a rough and ready system to handle numerous, low-stakes interactions."), in *THE LAW AND ECONOMICS OF POSSESSION* 65, 96 (Yun-chien Chang ed., 2015).

³⁶ See PENNER, *supra* note 4, at 75-76 ("As I walk through a car park, my actual, practical duty is only capable of being understood as a duty which applies to cars there, not to a series of owners. . . . The content of my duty not to interfere is not structured in any way by the actual ownership relation of the cars' owners to their specific cars.").

For spillovers and collective action problems, these components of the system, “modules,” must be enriched at their interfaces with more targeted rules and standards. Thus, the law of nuisance, along with easements and covenants, is tied more closely to particular uses, and nuisance is a mixture of exclusion and a heavy dose of governance.³⁷ More complex modular separation of sets of functions (such as management or enjoyment) coupled with governance rules to contain strategic behavior leads to “entity property.”³⁸ Employing things as a starting point also makes defining in rem rights easier because communicating the boundaries of a thing—especially when that thing emerges through spontaneous possessory customs—is easier than promulgating lists of permitted and forbidden actions with respect to resources and parties. Likewise, the residual claim is defined in terms of what is left of the legal thing after more specific claims run out. And transfer is facilitated to the extent that legal things are decontextualized, especially depersonalized. These functions are enhanced by the widespread adoption of the same inventory of types of things, with network effects on the receiving side of the communication.³⁹

This role of system in property is not well captured in the bundle of rights. There is no stick corresponding to the glue that “thinghood” provides in this set-up. The Realists were accepting of the right to exclude because they viewed it as one narrow stick among others.⁴⁰ What they could not abide was the notion of property as a law of things, because then it would be answerable to the everyday morality that tracks things, and to the considerations of system that thing-based modularity provides. In a sense, Legal Realists implicitly saw “thinghood” as a threat because it fit into an alternative and competing method of addressing the complexity for which they were offering their own solutions.

³⁷ See generally Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 543 (2002).

³⁸ See *infra* note 71 and accompanying text.

³⁹ See generally Yun-chien Chang & Henry E. Smith, *An Economic Analysis of Civil Versus Common Law Property*, 88 NOTRE DAME L. REV. 1, 15-20 (2012); Merrill & Smith, *supra* note 3, at 45-49; see also Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1145 (2003) (“The network benefits from doing the same thing as others may dominate the advantages of special forms.”).

⁴⁰ See, e.g., Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 373-74 (1954) (discussing the right to exclude in the context of property law); see also Adam Mossoff, *The Use and Abuse of IP at the Birth of the Administrative State*, 157 U. PA. L. REV. 2001, 2009 (2009) (“[T]he legal realists reconceptualized property entitlements into both nominalist and positivist terms, popularizing within American property law the bundle metaphor and its attendant emphasis on the right to exclude as the essential characteristic of the legal right to property.”); Henry E. Smith, *The Thing About Exclusion*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 95, 113-17 (2014) (examining the importance of the legal thing “in the delineation of legal relations”).

* * *

If the modular system of property law solves an important problem, then it should be difficult to depart from this system. And so it is. If anything, the complexity of interactions with respect to resources has increased along with the technology for processing information.⁴¹ Thus, the expected direction of change in this area is indeterminate without more empirical information. Nevertheless, it can safely be said that the completely articulated hyper-realist version of the bundle of rights is as much of a non-starter as ever. In other words, property law performs an “essential role” by providing structures that are (still) impossible to achieve solely through contract.

Thus, it should come as no surprise that aspects of the property system most closely associated with its architecture have changed little since the realist era. Consider land records. Despite a crystals-and-mud dynamic in their early era,⁴² systems of recording have been persistent.⁴³ States that settled on notice or race-notice have remained that way. The few remaining race jurisdictions (in which the first to record has priority regardless of bad faith) have slowly adopted one of the other systems, but there has not been a lot of activity in this area. The recording system is designed to furnish notice of in rem claims to the widest possible audience of transactors and other parties, such as taxing authorities.⁴⁴ And once in place, recording systems, and to a lesser extent registration systems, which require more ongoing effort and expertise, are remarkably stable over time.⁴⁵ The major

⁴¹ See, e.g., Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350 (1967) (stating that adjustments in property rights’ “viability in the long run will depend on how well they modify behavior to accommodate to the externalities associated with important changes in technology”); Merrill & Smith, *supra* note 3, at 40-42 (discussing the relationship between technology and the *numerus clausus* principle). See generally Smith, *supra* note 37 (offering modifications to Demsetzian theory to allow for a variety of institutional responses to changes in background conditions, including technology).

⁴² Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 578 (1988) (defining “crystals” as “perfectly clear, open and shut, demarcations of entitlement” and “mud” as “fuzzy, ambiguous rules of decision”).

⁴³ See Henry E. Smith, *Rose’s Human Nature of Property*, 19 WM. & MARY BILL RTS. J. 1047, 1052-53 (2011) (examining Carol Rose’s examples in light of the alternative principle of sedimentation).

⁴⁴ The notice furnished by registration systems is more definitive and may be thought to have a more “in rem” effect.

⁴⁵ Registration systems that get backlogged become in effect recordation systems. For example, the registration system in Cook County, Illinois, fell behind and was eventually dropped in favor of recording. See BENITO ARRUÑADA, INSTITUTIONAL FOUNDATIONS OF IMPERSONAL EXCHANGE: THEORY AND POLICY OF CONTRACTUAL REGISTRIES 66 (2012) (“[F]or registries

revolution currently underway is electronic recordkeeping. This is expected to impact the search required of transactors and thus broaden the notion of constructive notice.⁴⁶ Yet, so far, the contours of the system remain the same; there has been no revolution in recording law comparable to that in landlord–tenant law.

Likewise, the system of surveying is fundamental to delineating property rights in land. As Libecap and Lueck have shown, this choice has important impacts on economic development.⁴⁷ Once such a system is chosen, it tends not to be changed.⁴⁸ Even the pattern of street layouts tends to show path dependence (figuratively and literally).⁴⁹ The rise of GPS technology may reduce errors, especially in metes-and-bounds systems, but as in the case of recording, technology is leading to improvements rather than revolution.

The system of basic forms of property has also remained stable—perhaps too stable.⁵⁰ The catalog of estates can be regarded as a loose version of the *numerus clausus*—the closed menu of forms familiar from civil law.⁵¹ In American property law, the basic vocabulary in which the forms are cast derives from feudalism, although there have certainly been some

to function properly, governments must be prepared to provide registrars with sound and strong incentives.”).

⁴⁶ See THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 927 (2d ed. 2012) (“As long as records can be searched electronically by grantor and grantee, the type of search that is cost-effective increases, which can be expected to create pressure to expand the notions of . . . constructive notice.”). See generally Emily Bayer-Pacht, *The Computerization of Land Records: How Advances in Recording Systems Affect the Rationale Behind Some Existing Chain of Title Doctrine*, 32 CARDOZO L. REV. 337 (2010) (examining in depth the impact of electronic land records on existing principles of property law).

⁴⁷ See generally Gary D. Libecap & Dean Lueck, *The Demarcation of Land and the Role of Coordinating Property Institutions*, 119 J. POL. ECON. 426 (2011) (discussing the benefits and drawbacks of two systems of property demarcation and finding the rectangular survey system superior to the metes and bounds approach).

⁴⁸ See Gary D. Libecap et al., *Large-Scale Institutional Changes: Land Demarcation in the British Empire*, 54 J.L. & ECON. S295, S321-22 (2011) (concluding that demarcation regimes persist because of the costs associated with changing such a system).

⁴⁹ See Robert C. Ellickson, *The Law and Economics of Street Layouts: How a Grid Pattern Benefits a Downtown*, 64 ALA. L. REV. 463, 484-88 (2013) (surveying the path dependence of development of various U.S. cities).

⁵⁰ The categories or labels persist despite the functional closeness of some interests as a result of changes in the rules governing alienability and destruction. See THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 115 (2d ed. 1984) (stating that “if executory interests and remainders are pretty much the same today,” this means that “their labels have become functionless”).

⁵¹ See, e.g., Bernard Rudden, *Economic Theory v. Property Law: The Numerus Clausus Problem* (“In all ‘non-feudal’ systems with which I am familiar . . . there are less than a dozen sorts of property entitlements.”), in OXFORD ESSAYS IN JURISPRUDENCE: THIRD SERIES 239, 241 (John Eekelaar & John Bell eds., 1987). See generally Merrill & Smith, *supra* note 3 (providing an in-depth discussion of *numerus clausus*).

additions and subtractions from the menu, mainly from legislation. The abolition of the fee tail and the replacement of dower and curtesy by the spousal elective forced share are prominent examples,⁵² and future interests have acquired a greater degree of alienability.⁵³ However, the basic menu has not changed much over the last one hundred years. Arguably we could adopt a more streamlined version of the system, such as the one that England achieved by legislation in 1925,⁵⁴ which also set up the first effective registration system in that country. One might even characterize it as a remodularization of the system.

Basic thing definition has also barely changed in its basic contours. In everyday life, possessory norms are largely unchanged from what they were one hundred years ago.⁵⁵ New “things” have been defined, especially in the intangible arena, to which I will return. However, the process of defining a thing, which requires separation from context and definition of violations in a binary (and thus in a sense “exclusionary”) fashion, is also remarkably stable over time. Again, we may be able to verify some of the dimensions of such assets better now with electronic records and communication, but, at one remove, the process is a familiar one.

Finally, the stability of the systemic aspects of American property law is also indicated by the affinities that so-called “exclusion theorists” in the United States have for Commonwealth property theory.⁵⁶ It is no accident that those who take the most architectural view find the most in common with that literature.

⁵² Merrill & Smith, *supra* note 3, at 66.

⁵³ See 1 AMERICAN LAW OF PROPERTY § 4.68-4.70 (A. James Casner ed., 1952) (describing alienability of rights of entry for future interests); T.P. Gallanis, *The Future of Future Interests*, 60 WASH. & LEE L. REV. 513, 515-20 (2003) (documenting the trend towards alienation of future interests and advocating its completion).

⁵⁴ Law of Property Act 1925, 15 & 16 Geo. 5 c.20.

⁵⁵ By the same token, basic possessory norms bear a great resemblance to each other across societies. See Robert C. Ellickson, *The Inevitable Trend Toward Universally Recognizable Signals of Property Claims: An Essay for Carol Rose*, 19 WM. & MARY BILL RTS. J. 1015, 1032 (2011) (“[T]here has been an inevitable trend toward a universal sign language of property claiming.”).

⁵⁶ See, e.g., J.W. HARRIS, PROPERTY AND JUSTICE 30-32, 119-61 (1996) (discussing the concept of ownership in property law). See generally BEN MCFARLANE, THE STRUCTURE OF PROPERTY LAW 132-54 (2008) (discussing the importance of exclusive control to the content of a property right); PENNER, *supra* note 4 (providing an analytical overview of property law); Penner & Smith, *Introduction to PHILOSOPHICAL FOUNDATIONS*, *supra* note 10, at xv (describing theories of property law).

III. NONSYSTEMIC CHANGES IN DOCTRINE

Despite this stability, vast swaths of property law have changed a great deal. Consistent with this Article's thesis about the importance and persistence of system in property law, these significant changes tend to be concentrated in the more in personam, less architecturally significant parts of property law. Aspects of property law that have changed the most tend to be more detachable from the rest of the field.

Susceptibility to change is inversely related to standardization. Merrill and I have argued that, in a manner consistent with the information cost theory of the standardization of in rem rights, those aspects of property that are less standardized—i.e., more customizable—tend to be less in rem.⁵⁷ The wider and more impersonal an audience that a claim has to reach, the more standardized it needs to be so that it does not impose information-cost burdens in excess of information benefits.⁵⁸ We selected four areas perched between property and contract—landlord–tenant, trusts, bailments, and security interests—and we showed that standardization exhibits the pattern we expect. The most in rem aspect of each area is the most standardized, and the in personam the least. We identified intermediate areas as those where duty bearers are either numerous (like in rem) but definite (like in personam) or few in number (like in personam) but indefinite (like in rem), and we demonstrated that, as expected, they show an intermediate degree of standardization.⁵⁹

There is a dynamic side to this story, related to the differential impact of Legal Realism. Thus, the most famous area of change in the last fifty years has been in landlord–tenant law.⁶⁰ But the changes have occurred in the more contractual aspects of the landlord–tenant relationship. Moving from independent covenants to dependent covenants brought leases into alignment with modern contract law. In more intermediate situations that might involve numerous contracts for one landlord, implied warranties of habitability and the mitigation of damages were borrowed with modification from contract and consumer protection law. Even when these doctrines look

⁵⁷ See generally Merrill & Smith, *supra* note 5.

⁵⁸ *Id.*; see also Smith, *supra* note 39 at 1148–57 (analyzing informational tradeoff and arguing that it is a partial explanation for several themes of property law).

⁵⁹ See generally Merrill & Smith, *supra* note 5.

⁶⁰ See generally Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3 (1979) (describing the emergence and evolution of the concept of warranty of habitability); Mary Ann Glendon, *The Transformation of American Landlord–Tenant Law*, 23 B.C. L. REV. 503 (1982) (examining the divergence of residential and commercial landlord–tenant law).

more like regulation than classic contract law doctrine itself, they can be regarded as regulating an in personam or intermediate relation.⁶¹

External, or in rem, aspects of the lease are much more resistant to change.⁶² For example, despite criticism, the system of assignments and subleases is largely intact, with the main reform being a more contextualized inquiry into the intent of the parties to create one or the other. The requirements of privity of estate and touch-and-concern for the running of lease covenants are highly formalistic but potentially impact more than the parties at hand; accordingly, they have been less susceptible to change than the more purely contractual aspects of leasing. The notion of a lease as property retains much of its force, despite the disparagement it receives in the process of reforming its contractual aspects; courts have proclaimed that the idea is antiquated and feudal, and often note that the modern lease is a contract for services.⁶³ Still, it remains true that the tenant is no less a possessor than ever and can invoke trespass as before. Even the inventory of tenancies—at will, term of years, periodic, and at sufferance—is largely unchanged.⁶⁴ Likewise, a few courts have experimented with loosening the requirements for a term of years, but they have not done away with the set

⁶¹ See Merrill & Smith, *supra* note 5, at 822-33 (analyzing developments of landlord-tenant law in more in personam and in rem relations).

⁶² See *id.* at 831-33 (explaining that information costs increase when any customization is permitted, regardless of the content of specific contracts).

⁶³ See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970) (“The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 or 40 feet below, or even in the bare right to possession within the four walls of his apartment. When American city dwellers, both rich and poor, seek ‘shelter’ today, they seek a well-known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.” (citing NAT’L COMM’N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. Doc. No. 91-34, at 9 (1968))). See generally Glendon, *supra* note 60, at 509 (“[T]he lease has long been a hybrid of many strains: contract and conveyance, personal and real property, promise and covenant.”).

⁶⁴ See Merrill & Smith, *supra* note 5, at 832 (identifying the types of leases and explaining that modification is not permitted as an extension of the *numerus clausus* principle). The rare counterexample helps prove the point. Thus, in *Garner v. Gerrish*, the court apparently enforced a lease for life as being no different from a life estate because seisin is outmoded. 473 N.E.2d 223, 224-25 (N.Y. 1984). The opinion abounds with references to feudalism and invokes the Holmesian cliché that it is revolting to have no better reason for a rule than it was laid down in the time of Henry IV, but the *Garner* court never bothers to mention whether landlord-tenant protections would apply. The opinion has not had much impact—and was quite possibly wrong from the point of view of tenant protection on the facts. See Bernie D. Jones, *Garner v. Gerrish and the Renter’s Life Estate: Teaching a New Concept of “Home,”* 2 FAULKNER L. REV. 1, 4 (2010) (presenting evidence that the lease was infected with unconscionability and undue influence on the landlord).

of pigeonholes that leads to problems with devices like leases “for the duration of the war.”⁶⁵

Similarly, in bailments, commentators have advocated simplifying bailment duties, and courts have tinkered with them.⁶⁶ Nevertheless, the difference between strict liability for misdelivery and reasonable care for damage and theft may be puzzling, but it is persistent. Likewise, the rules about ostensible ownership implying the very mild duty of third parties to know about the bailment have not changed much.

In trusts, as well, the internal rules have changed more than have the external ones, although there are some exceptions. The argument that trusts are like contracts—a type of third-party beneficiary contract—is invoked when changes in the fiduciary standard are in play.⁶⁷ The rules for good faith purchase from a trustee have not, however, changed much. (The exceptions have to do with tracing, to which I return.) Nor have most of the legal rights of the trustee vis-à-vis third parties.

Finally, security interests and mortgages have changed around the periphery, but the basic structure remains the same. Security interests in personal property are governed by the U.C.C. The main recent changes have been modifications to the rules for superpriority and expanding the role of possession.⁶⁸ In the area of mortgages, courts have historically used a substance-over-form approach, forcing transactions with the substance of mortgages to be treated as mortgages, with an eye to preserving the judicial protections of mortgagors. This has third party effects, and nowhere more than in mortgage law have judicial innovations had something close to in rem effects (even though they were equitable interventions). Unlike some of the Realists (other than Llewellyn), we should be on the lookout for changes that purport to be isolated but are actually more widespread than

⁶⁵ See Merrill & Smith, *supra* note 5, at 832 (“Contractual modification is not permitted; if the parties create a novel type of lease, it will be categorized as being of one of the four recognized types . . .”). Compare *Nat’l Bellas Hess, Inc. v. Kalis*, 191 F.2d 739, 741 (8th Cir. 1951) (finding lease terminating sixty days after the end of World War II to be a tenancy at will), with *Smith’s Transfer & Storage Co. v. Hawkins*, 50 A.2d 267, 268 (D.C. 1946) (finding a similar provision to be a lease for a term of years).

⁶⁶ See generally Merrill & Smith, *supra* note 5, at 811-20 (detailing developments in bailment law).

⁶⁷ See, e.g., John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 646-47 (1995) (arguing that trusts are a kind of third party beneficiary contract); see also FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 8-35 (1991) (analyzing corporations in terms of contracting); Robert H. Sitkoff, *An Economic Theory of Fiduciary Law* (discussing fiduciary duties in the context of trusts), in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 197, 202-03 (Andrew S. Gold & Paul B. Miller eds., 2014).

⁶⁸ See generally Steven O. Weise, *U.C.C. Article 9: Personal Property Secured Transactions*, 62 BUS. LAW. 1633 (2007) (discussing the effects of U.C.C. Article 9’s revision on existing property law).

intended because reformers are unaware of the interconnectedness of legal concepts. Of course, these interventions long preceded the realist era.⁶⁹

The Restatements of Property confirm the proposition that reform has concentrated in the more in personam and governance-oriented aspects of property. Unlike contracts and torts, the First Restatement did not cover the entire subject of property.⁷⁰ The Second and Third Restatements were, for the most part, self-consciously reform efforts. It is striking that they concentrated on the more in personam aspects of property, including landlord-tenant, mortgages, trusts, and servitudes. There has been a lot of attention paid to wills, which are also best seen as toward the in personam side—a transfer between two parties. Such transfers affect the rights of others in that a new owner has in rem rights, but this is equally true of any contract for the transfer of property. At the same time, the Second and Third Restatements left untouched important topics in property with a more in rem aspect, such as adverse possession and recording.⁷¹

⁶⁹ See, e.g., A.H. Feller, *Moratory Legislation: A Comparative Study*, 46 HARV. L. REV. 1061, 1062-65 (1933) (showing that moratory legislation has been passed by a variety of civilizations since the time of Ancient Greece); Rose, *supra* note 42, at 583-85 (documenting the reform of “crystalline” mortgage rules into vaguer, “muddier” mortgage rules in England during the late seventeenth century); Robert H. Skilton, *Developments in Mortgage Law and Practice*, 17 TEMP. L.Q. 315, 316 (1943) (“Mortgage law has always been subject to great changes.”); see also Sheldon Tefft, *The Myth of Strict Foreclosure*, 4 U. CHI. L. REV. 575, 576 (1937) (arguing that history shows “that English mortgagors at the beginning of the nineteenth century were better protected against overreaching than under the system which has been developed in the most liberal American institution”).

⁷⁰ See Merrill & Smith, *supra* note 15, at 681 (“Even after 17 volumes produced over 75 years, the Restatement of Property offers no treatment of adverse possession, ignores most of the law of personal property, says nothing about real estate transfers, recording acts, groundwater and mineral rights, or eminent domain, and does not touch intellectual property.”).

⁷¹ Further confirmation of this Article’s thesis comes from the work of professed latter-day Realist Hanoch Dagan. For him, judges play an important role in reshaping (predictably) each free-standing property “institution,” such as personal property, marital property, and mortgages, and issues of architecture are simply denied. See generally HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* (2011); Hanoch Dagan, *Inside Property*, 63 U. TORONTO L.J. 1 (2013). It should be noted that I emphasize the idea of governance in *Exclusion Versus Governance*, *supra* note 37, and my subsequent work. Thus, Dagan is quite wrong that it requires downplaying the significance of governance or the importance of the changes Realists wrought to note that the Realists exaggerate the architectural or systemic implications of Realism. See *id.* at S455 (arguing “that exclusion and governance are strategies that are at the poles of a continuum of methods of measurement”); see also Gregory S. Alexander, *Governance Property*, 160 U. PA. L. REV. 1853, 1855 n.3 (2012) (“Smith’s conceptions of exclusion and governance both involve managing ownership’s external dimension: the relationship between owners and nonowners.”). But see, e.g., Smith, *supra* note 37, S455 n.5 (“‘Governance’ here just refers to a high degree of delineation of rights to resources in terms of use, and governance can be supplied by norms, regulation, or contract. This dovetails with prior usage, because we often use the term ‘governance’ to refer to the norms of use in common-pool regimes, to the exercise of the power of the state, and to organization of economic activity through contractual restrictions.”). On the latter, see generally, for example,

Part of the attraction of the modular architecture based on exclusion and governance is its very flexibility where it is needed. Thus, the basic trespassory regime can retain its exclusionary aspects while accommodating exceptions for public policy and antidiscrimination.⁷² Nor is it the case that standardization and formalism favor entrenched interests: it is the well-advised and well-connected who can craft exceptions for themselves and bend official discretion in their favor. Later, I will return to the false consciousness surrounding change in the trespassory regime, but it bears emphasizing that a modular architecture is not a method of preventing change but rather of achieving it with minimal disruption to the system. Despite the rhetoric of Realism, there has been little reason to revisit the more architectural features of property law.

IV. PSEUDO CHANGES IN DOCTRINE

When considering the impact of Legal Realism on property it is important to separate rhetoric from reality. A number of changes that purport to alter the architecture of the property system do so only apparently.

Nowhere is this false appearance of change more operative than in trespass. As noted earlier, the modular architecture of property based on exclusion refined by governance is well suited to accommodating a wide variety of changes, leaving major remodularizations to rare interventions by

Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979) (analyzing institutions of governance in contractual settings); see also Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES L. 5, 18 (2009) (discussing “internal governance” in common property regimes); *id.* at 25-26 (discussing co-ownership as internal governance). Indeed, Alexander’s “governance property” is similar to what Merrill and Smith call “entity property” that allows for a shift from relative reliance on exclusion to internal governance. Compare Gregory S. Alexander, *supra* note 71, at 1856 (defining “governance property” as requiring “governance norms” as opposed to a clear right of exclusion), with THOMAS W. MERRILL & HENRY E. SMITH, *supra* note 46, at 646 (positing the category of entity property, which allows a shift from exclusion to governance). To return to Dagan, his prime example of judicial innovation is the court’s acceptance of assessment covenants in *Neponsit Prop. Owners’ Ass’n v. Emigrant Industrial Savings Bank*, 15 N.E.2d 793, 798 (N.Y. 1938). See generally Hanoch Dagan, *Private Law Pluralism and the Rule of Law* (discussing structural pluralism in private law), in PRIVATE LAW AND THE RULE OF LAW 158, 160-66 (Lisa M. Austin & Dennis Klimchuk eds., 2014). This is consistent with the notion of entity property and the architecture of property—internal governance is at stake, quite apart from the issue that common interest communities required legislation to really gain traction.

⁷² See MERRILL & SMITH, *supra* note 46, at 409-49 (discussing exceptions to the right to exclude from public policy and antidiscrimination laws); THOMAS W. MERRILL & HENRY E. SMITH, THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY 79-84 (2010) (discussing antidiscrimination laws and their implications for the right to exclude).

the legislature—or true revolutionaries.⁷³ Thus, it is in no way inconsistent with the modular architecture of property to institute a new governance rule to deal with a new externality. For example, new developments lead to judicial decisions to alter the law of nuisance, when new ways of irritating people or new technologies are introduced. Likewise, covenants and zoning were instituted to govern situations that nuisance supposedly could not deal with. Antidiscrimination laws altered the scope of public accommodations, and over time have added new protected classes, notably in Title II of the Civil Rights Act of 1964⁷⁴ and in the Fair Housing Act of 1968.⁷⁵

But the post-realist impact on trespass law purports to go further. The idea is that context is so important that whether an owner should be able to exclude should be evaluated on an ongoing basis for reasonableness. In a sense this is true, in that the common law can make room for new exceptions to trespass if they are important enough; consider, for example, the defense of necessity or various customs of access such as hunting on open land. But post-Realism often wants more; in the post-realist view, trespass should be some sort of balancing test. A symbol for this point of view is the New Jersey Supreme Court case of *State v. Shack*, which held that the law of criminal trespass did not extend to allowing a farmer to prevent aid workers from visiting migrant farm workers housed on his farm.⁷⁶ The court declared that “[p]roperty rights serve human values. They are recognized to

⁷³ See Smith, *supra* note 2, at 1724 (“The literature on modular systems suggests that they are very good at evolving through a range of environments, but they can be trapped at a local maximum. Evolutionarily, one may not be able to get to a new optimum by the kinds of tinkering that parties and courts can do to the modular structure. For major changes remodularization is necessary. In our legal system this type of change is typically channeled to legislatures.” (citations omitted)); Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 969 (2009) (arguing that the modular architecture of exclusion-based property rules, rather than elevating the market above all else, allows for a humane balance between micromanaging and decentralized reform); Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1180 (2006) (“Forming a modular system involves partially closing off some parts of the system and allowing these encapsulated components to interconnect only in certain ways. This allows work to go on in parallel and facilitates certain kinds of innovation and evolution for a simple reason: adjustment can happen within modules without causing major ripple effects. More sweeping change can call for remodularization, but much can be accomplished without altering the modular setup. Crucially, human understanding of any system is enhanced by breaking it up . . . into modules.”); see also Chang & Smith, *supra* note 39, at 52 (noting that changing the style of a property system requires large-scale intervention by legislatures and autocratic sovereigns).

⁷⁴ 42 U.S.C. § 2000a–2000a-6 (2012); see also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-62 (1964) (finding the Civil Rights Act of 1964 constitutional).

⁷⁵ 42 U.S.C. §§ 3601-3631 (2013) (Title VIII of the Civil Rights Act of 1968).

⁷⁶ 277 A.2d 369, 372-75 (N.J. 1971); see also Smith, *Mind the Gap*, *supra* note 73, at 982-84 (discussing *Shack* and its implications for the right to exclude).

that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises.⁷⁷ From this, it jumped to the conclusion that categories should not matter in property:

We see no profit in trying to decide upon a conventional category and then forcing the present subject into it. That approach would be artificial and distorting. The quest is for a fair adjustment of the competing needs of the parties, in the light of the realities of the relationship between the migrant worker and the operator of the housing facility.⁷⁸

An alternative would have been to deem the workers to be tenants who had a right under landlord–tenant law to visitors, as the Maine Supreme Court did.⁷⁹ Likewise, legislation such as that in Illinois solved the problem presented by *Shack* by providing for an exception to trespass.⁸⁰ (Further, in a civil law—rather than criminal law, context—considerations of unclean hands and tort make the farmer an unlikely claimant, either for an injunction or damages.⁸¹) *Shack* amounts to a narrow exception, but post-Realists and progressives have made the case famous for its flirtation with an ex post reasonableness test for the right to exclude.⁸²

Indeed, the New Jersey Supreme Court has engaged in fits of balancing in the context of leafleting,⁸³ and even card counting.⁸⁴ Nevertheless,

⁷⁷ 277 A.2d at 372.

⁷⁸ *Id.* at 374.

⁷⁹ See *State v. DeCoster*, 653 A.2d 891, 894 (Me. 1995) (“We conclude that . . . DeCoster’s employees are tenants under Maine law and as such have a right to quiet enjoyment, which includes a right to receive visitors in their homes.”).

⁸⁰ See 720 ILL. COMP. STAT. 5/21-3(c) (2012) (“This Section [of the criminal trespass statute] does not apply to any person . . . invited by [a] migrant worker or other person so living on such land to visit him or her at the place he is so living upon the land.”).

⁸¹ See Ronald Sullivan, *2 Poverty Aids Seized at New Jersey Migrants’ Camp*, N.Y. TIMES, Aug. 7, 1970, at 19 (“The farmer, Morris Tedesco, lunged at the reporter, striking a camera against his face. ‘I’ll smash you for this, I’m going to get you for this,’ Mr. Tedesco said. ‘This is my property. You can’t come in here looking around.’”).

⁸² See, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 808-10 (2009) (analyzing *State v. Shack*, 277 A.2d 369 (N.J. 1971), as an example of decisionmaking directly based on “human flourishing”); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 883 (2009) (“I will discuss *State v. Shack* in a bit more detail because the New Jersey Supreme Court’s decision in the case exemplifies, in many ways, the rich pluralism of the approach I am advocating.”); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 32-33 (1984) (applauding the opinion in *State v. Shack* for being forthright about its use of social context to justify its result).

⁸³ Compare *State v. Schmid*, 423 A.2d 615, 630, 633 (N.J. 1980) (using a multifactor test to hold that a private university with a policy of open access cannot exclude peaceful leafletters), with *State v. Guice*, 621 A.2d 553, 554, 556 (N.J. Super. Ct. Law Div. 1993) (applying the *Schmid* test

despite its announcement that “[p]roperty owners have no legitimate interest in unreasonably excluding particular members of the public when they open their premises for public use,”⁸⁵ New Jersey trespass law remains, much as it was before, as an exclusionary regime, especially when the entrant is not a member of the general public.⁸⁶

More generally, much commentary is wildly out of sync with case law when it comes to the law of trespass. In the parallel universe of academic writings, it might be plausible to suggest that trespass should be subject to reasonableness balancing like fair use in copyright,⁸⁷ or that intruders should not be count as trespassers until owners object explicitly or implicitly,⁸⁸ or that trespass protects the owner’s agenda-setting authority, and thus does not extend to meritorious invasions for convenience.⁸⁹ But none of these

and holding that a private trade school without a policy of open access can exclude individuals who intend to distribute political literature).

⁸⁴ See *Uston v. Resorts Int’l Hotel*, 445 A.2d 370, 376 (N.J. 1982) (rejecting a casino’s efforts to exclude an individual who employed card-counting strategies in the absence of regulations permitting casinos to do so by the state regulatory commission). The court makes reference to the idea that the right to exclude has roots in post-Reconstruction discrimination, *id.* at 374 n.4, but this theory is controversial. Compare A.K. Sandoval-Strausz, *Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 LAW & HIST. REV. 53, 62-74 (2005) (arguing that by the mid-nineteenth century, the common law imposed special duties to serve only on businesses that served travelers), with Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1312-31 (1996) (contending that before the Civil War all businesses open to the public were subject to a duty to serve). See generally MERRILL & SMITH, *supra* note 46, at 406-49 (discussing the development of public policy exceptions to the right to exclude); Smith, *Mind the Gap*, *supra* note 73, at 984-85 n.137 (arguing that the historical tie between exclusion and racial discrimination is questionable and noting that, even if the relationship were proven, “it is quite doubtful the court[s] . . . would be willing to judge other laws, such as various labor regulations, on the original motivations of their proponents”). In England, the right of business patrons was quite strong until the early twentieth century. *Wood v. Leadbitter*, (1945) 153 Eng. Rep. 351 (Exch. Div.), *overruled by* *Hurst v. Pictures Theatres, Ltd.*, [1915] 1 K.B. 1 (C.A. 1914).

⁸⁵ *Uston*, 445 A.2d at 375.

⁸⁶ See *Marzocca v. Ferone*, 461 A.2d 1133, 1136-37 (N.J. 1983) (holding that a racetrack retained the common law right to exclude, limited by public policy, and distinguishing *Uston* on the ground that it involved a member of the public); see also *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners’ Ass’n*, 929 A.2d 1060, 1072-73 (N.J. 2007) (applying the *Schmid* standard to a common-interest community and finding no free-speech violation).

⁸⁷ See, e.g., Ben Depoorter, *Fair Trespass*, 111 COLUM. L. REV. 1090, 1094 (2011) (“By developing a balancing test to assess trespass claims, the proposed doctrine seeks to protect the rights of property owners on the basis of a more explicit and predictable framework, while at the same time safeguarding the societal interests in access.”).

⁸⁸ See, e.g., Avihay Dorfman & Assaf Jacob, *The Fault of Trespass*, 65 U. TORONTO L.J., no. 1, 2015, at 48, 97-98 (advocating placing some responsibility on owners to avoid trespasses).

⁸⁹ See Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 302-03 (2008) (“[T]here is no general right to exclude; others owe the owner a duty of exclusion where her agenda for the resource requires it.”). Katz sees the famous case of *Jacque v. Steinberg Homes*,

ideas accords with the case law on the subject,⁹⁰ and I predict none of them will come to fruition.

What appears to have more traction in the caselaw is the assimilation of nuisance to trespass (or vice versa). Thus some courts have questioned whether there should be a distinction between trespass and nuisance. In cases of extreme nuisance, some litigants have tried to convince courts to apply the law of trespass, with mixed success.⁹¹ Self-consciously “modern” courts have tried this approach, sometimes claiming that it is more scientific.⁹² On that view, the consequences of an invasion should not turn on whether it is direct and tangible (visible to the naked eye) or not. Nonetheless, courts taking this approach do not apply this new trespass with strict liability or to de minimis invasions, but rather they require nuisance-like actual and substantial damages,⁹³ or even a balancing-of-interests analysis.⁹⁴

upholding a punitive damages award in a case of only nominal damages against a mobile home company that drove across the Jacque’s property over their objections to deliver a mobile home, as wrongly decided. 563 N.W.2d 154 (Wis. 1997). She contrasts *Jacque* with *Dwyer v. Staunton*, which she sees as the opposite result on “similar facts.” [1947] 4 D.L.R. 393 (Alberta Dist. Ct.); Katz, *supra* note 89, at 303. This is doubtful. *Dwyer* is a routine necessity case, because the public road was made impassible by snow. The unpassable road in *Jacque* was private, and therefore the doctrine of necessity did not apply.

⁹⁰ This is hardest to say in the case of Dorfman and Jacobs, *supra* note 88, but their approach would seem to have normative implications for the contours of trespass law different from current caselaw.

⁹¹ See, e.g., *Borland v. Sanders Lead Co.*, 369 So. 2d 523, 527-28 (Ala. 1979) (allowing trespass to be indirect); *Martin v. Reynolds Metals Co.*, 342 P.2d 790, 792-94 (Or. 1959) (sustaining finding of trespass by fluoride compounds in gas and particle forms); *Bradley v. Am. Smelting & Ref. Co.*, 709 P.2d 782, 787-88 (Wash. 1985) (allowing trespass to be indirect). However, the traditional and majority position keeps the torts distinct. See, e.g., *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215, 222 (Mich. Ct. App. 1999) (“Recovery for trespass to land in Michigan is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession.”). See generally Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 26-35 (1985) (identifying “[f]our distinct threshold tests applied by common-law courts to delimit the sphere of trespass from that of nuisance”).

⁹² See, e.g., *Martin*, 342 P.2d at 793 (justifying a “modern” approach by observing that “in this atomic age even the uneducated know the great and awful force contained in the atom and what it can do to a man’s property if it is released. In fact, the now famous equation $E = mc^2$ has taught us that mass and energy are equivalents and that our concept of ‘things’ must be reframed”). Another more mundane motivation for these rulings may be that the statute of limitations for nuisance is typically shorter than that for trespass. MERRILL & SMITH, *supra* note 46, at 947-48 (noting that the courts in *Martin* and *Borland* mentioned that the plaintiffs had passed the statutory time bar for nuisance but not for trespass).

⁹³ See *Borland*, 369 So. 2d at 529 (“[T]here is a point where the entry is so lacking in substance that the law will refuse to recognize it”); *Bradley*, 709 P.2d at 791 (“No useful purpose would be served by sanctioning actions in trespass by every landowner within a hundred miles of a manufacturing plant.”); *Martin*, 342 P.2d at 795 (“There are adjudicated cases which have refused to find a trespass where the intrusion is clearly established but where the court has

Instead, the features of nuisance tend to reappear under a new guise; this is one reason that some courts have rejected this modern approach. The change is not widespread, and under the functional pressure to have an architecture that makes some invasions count as automatic violations and others handled through fine-tuned controls—exclusion versus governance—the old structures live on.

Indeed, nuisance itself appears to be about more than balancing. As I have argued elsewhere, nuisance appears more fragmented and arbitrary than it is, because it contains within it the shift from exclusion to governance.⁹⁵ Assimilating nuisance to negligence and deemphasizing boundary crossing may be realist and Coasean on the surface, but doing so ignores the coherence lent to nuisance by the role that exclusion plays in it. Much of nuisance is mini-trespass, and otherwise it constitutes a fine-tuning of the exclusionary regime through governance.

Closely related to trespass and nuisance is the *ad coelum* rule⁹⁶—one who owns the surface owns upward and downward indefinitely. This works well most of the time, but came under pressure with the advent of airplane overflights. Because courts were worried about possible compensation claims by landowners if their trespass claims were abolished, courts implausibly denied that *ad coelum* ever was the law.⁹⁷ Merrill and I have termed

felt that the possessor's interest should not be protected."); *cf.* *John Larkin, Inc. v. Marceau*, 959 A.2d 551, 555 (Vt. 2008) (recognizing a problem with the modern view and finding that no trespass occurred because there was no "physical impact" on the plaintiff's property). *See generally* PROSSER AND KEETON ON TORTS § 13 (5th ed. 1984). Traditional trespass usually does not feature a *de minimis* exception.

⁹⁴ *Martin*, 342 P.2d at 795; *see also* *Bradley*, 709 P.2d at 787. For general discussion, *see Adams*, 602 N.W.2d at 219-21.

⁹⁵ *See* Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1023-24 (2004) (explaining how the shift from exclusion to governance is located within the law of nuisance).

⁹⁶ The full maxim is *cuius est solum eius usque ad coelum et ad inferos*, which means "whoever owns the soil owns also to the sky and to the depths." 2 WILLIAM BLACKSTONE, COMMENTARIES *18; *see also* *Brown v. United States*, 73 F.3d 1100, 1103 (Fed. Cir. 1996) ("At common law, the owner of real property was considered to own from the center of earth to the top of the sky." (citation omitted)); Andrea B. Carroll, *Examining a Comparative Law Myth: Two Hundred Years of Riparian Misconception*, 80 TUL. L. REV. 901, 907-16 (2006) (tracing the evolution of the *ad coelum* rule).

⁹⁷ *See* *United States v. Causby*, 328 U.S. 256, 260-61 (1946) ("It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus est solum ejus est usque ad coelum*. But that doctrine has no place in the modern world." (citation omitted)); *Hinman v. Pac. Air Transp.*, 84 F.2d 755, 757 (9th Cir. 1936) ("[I]f we should adopt [*ad coelum*] as being the law, there might be serious doubt as to whether a state statute could change it without running counter to the Fourteenth [A]mendment to the Constitution of the United States. If we could accept and literally construe the *ad coelum* doctrine, it would simplify the solution of this case; however, we reject that doctrine. We think it is not the law, and that it never was the law.").

this “rhetorical excess” for two reasons.⁹⁸ First, it was not necessary to go that far in order to accommodate airplanes. Rather, one could declare that public navigation has a dynamic aspect and forms a public-rights limit on private property in land (here, one expanding with technological change). Or one might invoke implicit in-kind compensation or notions of usefulness and reciprocity.⁹⁹ Or one might say that the *ad coelum* rule had no need to be more precise than it was until airplanes were invented and that courts then clarified the details. This notion of clarification is, of course, subject to abuse by opportunistic parties and judges, but it remains clarification, not abolition.

The second reason that the denial of the *ad coelum* rule is misleading is that it still operates for other types of invasions, including in lower airspace. *Ad coelum* is especially strong for subsurface invasions where there is no similar tendency to make exceptions. For example, caves have been subject to the strict rule despite the obvious bilateral monopoly problems.¹⁰⁰ Rhetoric diverges from reality in *ad coelum*, and the older architecture is largely still intact, because it is highly convenient most of the time.

V. THE PARTIAL FLATTENING OF PROPERTY LAW

What changes have occurred in areas close to the architecture of property are really half changes stemming from a flattening of private law. The modern approach sometimes stems from ignorance of a more articulated earlier law.

A prime example, again, is nuisance. The reasonableness tests of nuisance law replaced an older approach, under the banner of *sic utere*, that took the rights on both sides as presumptive and engaged in equitable-style balancing to reconcile them.¹⁰¹ Perhaps because this older law sounded in

⁹⁸ MERRILL & SMITH, *supra* note 46, at 296.

⁹⁹ See Eric R. Claeys, *On the Use and Abuse of Overflight Column Doctrine*, 2 BRIGHAM-KANNER PROP. RTS. CONF. J. 61 (2013) (arguing that common law *ad coelum* maxim based in productive labor and natural rights was able to accommodate airplane overflights); Richard A. Epstein, *Intel v. Hamidi: The Role of Self-Help in Cyberspace?*, 1 J.L. ECON. & POL'Y 147, 154-55 (2005) (arguing that some actions, such as electronic transmissions, should not qualify as trespasses or nuisances because they are reciprocal in nature across multiple property owners).

¹⁰⁰ See, e.g., *Edwards v. Sims*, 24 S.W.2d 619, 620-21 (Ky. 1929) (applying *ad coelum* to underground caves); see also *Marengo Cave Co. v. Ross*, 10 N.E.2d 917, 920-21 (Ind. 1937) (determining whether a cave was subject to an adverse possession claim and, in so doing, assuming that the land under property was subject to the owner's dominion).

¹⁰¹ See *Campbell v. Seaman*, 63 N.Y. 568, 576-77 (1876) (“It is a general rule that every person may exercise exclusive dominion over his own property. . . . But this general right of property has its exceptions and qualifications.”). The full maxim is “*sic utere ut alienum non laedas*,” or “so use your property as not to harm others’.”

natural rights (not of necessity, I would argue), and because it did not invite courts to engage in wide-ranging policymaking, courts flattened this two-stage process into an overall balancing test.¹⁰² As discussed earlier, this does not mean balancing all the time, much less detailed cost-benefit analysis.¹⁰³ Indeed, boundary crossing, violation of community norms, and the like still hold sway. But it is hard to deny that when the Realists derided the *sic utere* maxim they were up to something. At the very least, they managed to obscure the structure of the older law such that now there is much more confusion in this area. It should be noted that this is nevertheless truer in nuisance, which is less in rem, than in trespass, which is closely associated with in rem rights.

Even worse is the muddle surrounding the law of injunctions. Continuing with the theme of nuisance, notable “modern” cases like *Boomer v. Atlantic Cement* got the earlier law wrong.¹⁰⁴ There was no automatic injunction rule for nuisances; instead, courts would apply a presumption for an injunction once a violation was found that could be rebutted by the defense of undue hardship (or disproportionate hardship).¹⁰⁵ This did not mean equipoise but rather a gross disparity in hardship, in that the proposed injunction would benefit the movant far less than the hardship on the enjoined party; it is a safety valve.¹⁰⁶ This approach has been further obscured recently by the Supreme Court with its four-factor test in *eBay Inc. v. MercExchange, L.L.C.*¹⁰⁷ Despite its claimed consistency with “well-established principles of equity,”¹⁰⁸ the test does not make clear that disproportionate hardship is a defense, nor does it even mention good faith, an important consideration under the older approach to injunctions.¹⁰⁹ Ironically, the traditional

¹⁰² Often the touchstone for this proposition is the RESTATEMENT (SECOND) OF TORTS §§ 821D, 821F, 822 (1979).

¹⁰³ See Smith, *supra* note 95 and accompanying text.

¹⁰⁴ 257 N.E.2d 870 (N.Y. 1970).

¹⁰⁵ See Douglas Laycock, *The Neglected Defense of Undue Hardship (and the Doctrinal Train Wreck in Boomer v. Atlantic Cement)*, 4 J. TORT L., no. 3, 2012, at 1, 4-5 (describing the undue hardship defense); see also HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 51 (2d ed. 1948) (observing that, when “the award of specific relief would inflict a hardship on the defendant which is out of all proportion to the injury its refusal would cause to plaintiff[.], . . . the great weight of authority” holds that “equity still has discretion in adjusting the relief to be rewarded”). The right to an injunction is distinct from the right to exclude. See Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL’Y 593, 638-60 (2008).

¹⁰⁶ See generally Smith, *supra* note 27.

¹⁰⁷ 547 U.S. 388, 391 (2006).

¹⁰⁸ *Id.*

¹⁰⁹ See generally Mark P. Gergen et al., *The Supreme Court’s Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203 (2012) (arguing that *eBay*’s four-factor test is an inadvisable innovation).

approach is well suited to dealing with the “patent trolls” which were the issue in *eBay* itself.¹¹⁰

* * *

Other examples of flattening relate to unjust enrichment and tracing. In the area of private law, Kull has argued for the applicability of the Holmesian aphorism about ignorance as a law reformer.¹¹¹ As a result of changes in the curriculum and general lack of attention since the days of Legal Realism, pockets of private law, like restitution, have become simpler because litigants and judges are unaware of earlier sophisticated bodies of law. Relevant to property is the tendency to overcome property baselines in insolvencies following common scheme frauds.¹¹²

The older approach was to protect property claims (and trace into proceeds) unless there was a good reason, like a good faith purchaser, to stop. More recently, courts have floundered around with various sharing approaches. For example, if victims of a common fraud are similarly situated, they will sometimes be made to share losses even if some claimants could identify their property and trace proceeds. There is little theory to back up this intuition, and in some contexts the newer approach may be justified. But a genuine change has occurred due to ignorance. Is this architectural? It is hard to gauge its significance, but it is a move away from a very general approach to property baselines. Time will tell how far this can proceed.

* * *

Finally, a disturbing candidate for simplification from ignorance comes from the recent financial crisis. In the rush to securitize mortgages, the property aspect of the mortgage and issues of third party notice and

¹¹⁰ See *id.* at 243-49 (arguing that traditional principles of equity provide a better solution to the problems of “patent trolls” than the approach adopted by *eBay*). See generally Henry E. Smith, *Property as Platform: Coordinating Standards for Technological Innovation*, 9 J. COMPETITION L. & ECON. 1057 (2013) (arguing that traditional property principles may provide solutions to controversies in intellectual property).

¹¹¹ See Andrew Kull, *The Simplification of Private Law*, 51 J. LEGAL EDUC. 284, 290 (2001) (“Ignorance is a powerful agent of law reform: law that is too long unfamiliar will cease to be law.”); see also OLIVER WENDELL HOLMES, *THE COMMON LAW* 78 (1881) (“Ignorance is the best of law reformers. People are glad to discuss a question on general principles, when they have forgotten the special knowledge necessary for technical reasoning.”).

¹¹² See generally Andrew Kull, *Ponzi, Property, and Luck*, 100 IOWA L. REV. 291 (2014).

standardization were systematically ignored.¹¹³ Arguably, this led to the opacity in the assets that fed the panic: no one knew just how toxic the assets really were. Further, allowing for complexity in the forms leads to informational externalities that designers will not necessarily take into account.¹¹⁴ The lessons of the *numerus clausus*—and complexity externalities in particular—were not taken to heart in this area. Yes, intangible assets are more important in the modern economy and complexity has increased, but we need to be aware of how private law and property in particular can manage this complexity and the informational problems to which it gives rise.

CONCLUSION

The system of property law endures. Because property law does what contract alone cannot—furnish a modular platform for horizontal interactions with respect to things—change in property law has largely taken place within this system. Apart from the major remodularizations that legislatures and autocrats have historically undertaken, the kind of reforms that the Realists advocated—amidst misleadingly soaring antiformalist rhetoric—have largely taken place in the more in personam and intermediate areas of property rather than in its most in rem aspects. That the changes have occurred more in the areas of use—governance, personal relations, and the like—rather than in the basic exclusionary set-up or definition of a thing is no accident. The systemic aspects of property are the hardest to change because they manage complexity, promote network effects, and implicate information costs for numerous and far-flung parties. At the same time, reformists can usually achieve their goals without impacting property as a law of things (whatever they may say). Realist and post-realist changes, like those in landlord–tenant law, have been indeed important. Nevertheless, it is the strength of a modular system that it is a hybrid of formalism and contextualism, and can accommodate change while containing information costs.

¹¹³ See generally Jonathan C. Lipson, *Secrets and Liens: The End of Notice in Commercial Finance Law*, 21 EMORY BANKR. DEV. J. 421 (2005) (arguing against reducing or eliminating notice filing in financial transactions); Michael Simkovic, *Secret Liens and the Financial Crisis of 2008*, 83 AM. BANKR. L.J. 253 (2009) (same).

¹¹⁴ See Kathryn Judge, *Fragmentation Nodes: A Study in Financial Innovation, Complexity, and Systemic Risk*, 64 STAN. L. REV. 657, 672 (2012) (discussing the increased range of home loans that could be securitized, in seeming opposition to the *numerus clausus* principle). See generally Note, *The Perils of Fragmentation and Reckless Innovation*, 125 HARV. L. REV. 1799 (2012) (using property law and the *numerus clausus* principle to explain the financial crisis).