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Property, Concepts, and Functions

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# PROPERTY, CONCEPTS, AND FUNCTIONS

**ERIC R. CLAEYS**

## INTRODUCTION

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>3</td>
</tr>
<tr>
<td>A. Property Metaphors</td>
<td>3</td>
</tr>
<tr>
<td>B. Two Concepts for Property</td>
<td>4</td>
</tr>
<tr>
<td>C. Property, Artifacts, and Artifact Functions</td>
<td>5</td>
</tr>
<tr>
<td>D. Intended Contributions</td>
<td>6</td>
</tr>
<tr>
<td>E. Implications</td>
<td>6</td>
</tr>
<tr>
<td>F. The Argument</td>
<td>9</td>
</tr>
</tbody>
</table>

## I. THREE PERSPECTIVES ON PROPERTY

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Bundle Views: Property as a Bundle of Rights</td>
<td>9</td>
</tr>
<tr>
<td>B. Exclusion Views: Property as a Castle</td>
<td>10</td>
</tr>
<tr>
<td>C. Progressive Property Views: Property as a Tree</td>
<td>12</td>
</tr>
<tr>
<td>D. Four Test Cases</td>
<td>14</td>
</tr>
</tbody>
</table>

## II. TWO SUGGESTIONS FOR PROPERTY CONCEPTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Property and Ownership</td>
<td>16</td>
</tr>
<tr>
<td>B. Property and Functions</td>
<td>19</td>
</tr>
<tr>
<td>C. Implications</td>
<td>21</td>
</tr>
<tr>
<td>D. A Way Forward</td>
<td>22</td>
</tr>
</tbody>
</table>

## III. PROPERTY CONCEPTS AND WATER RIGHTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Why Water Rights?</td>
<td>24</td>
</tr>
<tr>
<td>B. Water Rights and Ditch Easements</td>
<td>25</td>
</tr>
<tr>
<td>C. The Proprietary Character of Water Rights and Ditch Easements</td>
<td>27</td>
</tr>
<tr>
<td>D. The Emergence of Riparian Rights</td>
<td>29</td>
</tr>
<tr>
<td>E. The Emergence of Appropriative Rights</td>
<td>31</td>
</tr>
</tbody>
</table>

## IV. ON CONCEPTS AND CONCEPTUAL ANALYSIS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. The Objects of Conceptual Analysis</td>
<td>34</td>
</tr>
<tr>
<td>B. Artifacts and Artifact Concepts</td>
<td>35</td>
</tr>
<tr>
<td>C. Likely Features of a Concept for Property</td>
<td>37</td>
</tr>
<tr>
<td>D. Institutional Status in Property</td>
<td>39</td>
</tr>
<tr>
<td>E. Property Studied from the Internal Point of View</td>
<td>40</td>
</tr>
</tbody>
</table>
V. A USE-FACILITATING CONCEPT OF PROPERTY ................................................................. 44
   A. The Function of Property: Facilitating Use .................................................................... 45
   B. The Subject Matter of Property: Separable Resources .................................................. 48
   C. The Conventionality of Property: Institutional Status .................................................... 49
   D. The Priority Established by Property: An In Rem and Immunized Claim-Right .......... 51
      1. The Claim-Right ........................................................................................................ 52
      2. Immunities ............................................................................................................... 52
      3. In Rem Rights and Obligations ................................................................................ 53
   E. Existence and Nondefectiveness Conditions in a Property Concept ............................ 54
   F. A Concept as a Focal Meaning (Herein of Family Resemblances, Necessary Features, and Sufficient Features) ........................................................................... 57
VI. FOUR TEST CASES RECONSIDERED ............................................................................. 58
   A. Legal Interests in Tenancies in Common ................................................................. 58
   B. Easements (and Revocable Licenses) ......................................................................... 62
   C. Running Covenants (and “Mere” Promises About Land Use) ..................................... 65
   D. Mortgages .................................................................................................................... 69
CONCLUSION AND IMPLICATIONS .................................................................................. 70
PROPERTY, CONCEPTS, AND FUNCTIONS

ERIC R. CLAEYS*

Abstract: This article makes two suggestions for ongoing debates about property concepts. First, these debates have focused too much on concepts for ownership; they have neglected concepts that cover property rights weaker than rights of ownership but still robust enough to constitute rights in relation to ownable resources. Second, these same debates have neglected the roles that artifact functions might play in property concepts. Property rights are artifacts, and functions play crucial roles in artifacts and the concepts that represent them. The Article confirms both suggestions via a close study of one particular property concept. That concept is prominent in Anglo-American property common law. In that concept’s focal sense, a property right refers to: an immunized and in rem claim-right; given institutional status in law and social morality; in relation to a separable resource; to facilitate the beneficial use of that resource and other resources commonly proximate to it. This concept gets its structure from a function, the imperative that property rights be structured to serve different people’s correlative interests in using resources for rational well-being. This concept explains why the field of property rights covers not only rights of sole ownership but also nonpossessory rights and rights in concurrent estates. To illustrate, the Article studies: legal interests in tenancies in common; easements; revocable licenses; mortgages; covenants running with the land; riparian rights; and appropriative rights and appurtenant ditch easements.

INTRODUCTION

A. Property Metaphors

For a century, scholars have assumed that property is a bundle of sticks.¹ This bundle view competes with another view whereby property
seems like a castle. And both of those views compete with a third view whereby property seems like a tree.

In this Article, I will not argue that any of these views is entirely wrong. Nor will I offer any comprehensive alternative to them. But I do want to suggest that property and property concepts can be understood better than they are now. In this Article, I propose that scholars consider two other metaphors for property concepts. In some respects, property concepts operate like concepts for representation and discovery. In other respects, property concepts operate more like concepts for chairs, clocks, or money.

B. Two Concepts for Property

This Article has two suggestions for research on property going forward; each of the analogies just offered illustrates one of them. Consider first the analogies to representation and discovery. Some words refer to several related but still-distinct concepts. Members of Congress “represent” constituents, and paintings “represent” the people and things that painters paint. Yet the word “represent” can also refer to a broader and shallower class of acts covering all of the above acts, namely acts “making present again” figuratively entities not present literally. “Discovery” can refer to the production of information during litigation, or to the identification of previously-unknown knowledge in science. Yet the word “discovery” can also refer to a broader and shallower concept. This concept encompasses all acts “removing cover” from information—i.e., removing obstacles that preventing people from grasping and understanding that information.

1 See, e.g., JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN § 55, at 43–44 (1888); Arthur Corbin, Taxation of Seats on the Stock Exchange, 31 YALE L.J. 429, 429 (1922); see also RESTATEMENT (FIRST) OF PROP. §§ 1–10 (AM. LAW INST. 1936) (defining property interests in terms of more fundamental claim-rights, powers, privileges and other analytical incidents associated with the bundle of rights metaphor).


4 See HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 8–10 (1967).

5 See Discovery, BLACK’S LAW DICTIONARY (10th ed. 2014).

In this Article, I suggest that the word “property” creates similar conceptual overlaps. In some usages, “property” refers to the sweeping rights of managerial authority and disposition we associate with property in resources like land, chattels, or money. (In this Article, I describe those sweeping rights as rights of “ownership.”) In other usages, however, “property” covers not only those rights of ownership but also a broader and shallower class of resource-related rights. In this Article, I illustrate with several prominent nonpossessory property rights—prominent water rights, servitudes, and mortgages—and also with the concurrent estates that tenants in common hold in land. I hope to show here that this second and more encompassing concept for property has been neglected.7

C. Property, Artifacts, and Artifact Functions

Now turn to the analogy between concepts for property and concepts for chairs, clocks, and money. These latter objects are all artifacts. Although it is difficult to define “artifact,” we can define the term well enough for the time being as a class covering objects made by people and used by people, to perform one or more activities constitutive of the class.8 Quite often, instances of one class of artifacts can differ quite widely in shape and operation, and yet the concepts for that class remain coherent.9 Analog, digital, or speaking clocks all differ in shapes and operation. Even so, these clocks remain instances of a single clock concept because they all constitute time-telling machines. Although bills and coins differ in their appearances and materials, they remain instances of a common concept for fiat currency. That is because bills and coins both constitute physical objects, marked with seals signifying fiat status, to facilitate commercial exchange.

In this Article, I suggest that property concepts can operate similarly. Since property rights are clearly artifacts, property concepts may derive their structure from characteristics we associate with artifacts. In particular, artifacts derive much of their structure from “functions”—combinations of

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7 I was convinced of this possibility by ADAM J. MACLEOD, PROPERTY AND PRACTICAL REASON 36–44 (2015), and Hugh Breakey, Two Concepts of Property: Ownership of Things and Property in Activities, 42 PHIL. F. 239 (2011), although I differ with Breakey and MacLeod in how I understand the broad and shallow concepts on which this Article focuses.


9 See Paul Bloom, Intention, History, and Artifact Concepts, 60 COGNITION 1, 14 (1996) (providing examples of objects that differ considerably in appearance or content but remain covered by the same concepts).
activities, ends, and means that seem characteristic of particular artifacts. In this Article, I hope to suggest that at least some prominent property concepts derive their structure from functions. This possibility has also been neglected in recent scholarship.

D. Intended Contributions

To substantiate these two suggestions, this Article conducts an extended study of one concept of a property right. In this concept, a property right refers in its focal sense to an in rem immunity and claim-right, made conventional in social morality and law, to facilitate the use of the external resource covered by the right and other resources commonly proximate to that resource. This concept has intellectual roots in natural law-based justifications for property. It makes central to property a function, namely a tendency to facilitate people’s using things in ways that contribute to their rational gratification. And perhaps because this concept makes a notion of use so central to property rights, it accounts easily for weak property rights, like the co-tenancy rights and nonpossessory rights studied in this Article.

E. Implications

If my suggestions here are on target, ongoing debates about property concepts may be overdrawn. In an old fable, six blind sages get into a silly
disagreement about what an elephant is after each feels a different part of the elephant. Now, property rights are surely much more complex than elephants are. Even so, property scholars stand to learn a lot from that fable. Let me explain briefly, with contrasts to each of the three metaphors with which we started.

The bundle metaphor illustrates skeptical views, views holding that “[w]hatever normative force we associate with the concepts” property and ownership is “illusory,” “largely the result of historical accident,” and “properly attributed to [property rights’] component parts.” I call such skeptical views “bundle” views because they are often associated with the image of a property right as a bundle of sticks.

In recent years, scholars who subscribe to bundle views have striven to show that property rights come in more forms than ownership rights. Their arguments are right as far as they go. Even so, recent arguments for bundle views seem to be missing two possibilities. First, those arguments seem to assume that, if there exists a coherent concept for property, that concept is coextensive with the concept for ownership. But maybe the field of property is coherent because it deploys several distinct but complementary concepts. And maybe much of property law is rendered coherent by property in the wide and simple sense that I discuss here. Second, both of these concepts—for ownership and property writ large—may be much more coherent than bundle theories suggest. Both concepts may get the structures they have from artifact functions.

The castle metaphor illustrates views I call “exclusion” views. Although exclusion views differ in their particulars, they focus primarily on the property concept that this Article associates with ownership. Ownership does play an important role in property law, and exclusion theorists deserve credit for explaining its structure. Because exclusion views focus on owner-

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14 Shane Nicholas Glackin, Back to Bundles: Deflating Property Rights, Again, 20 LEGAL THEORY 1, 2 (2014).

15 See, e.g., JESSE DUKEMINIER ET AL., PROPERTY 109–10 (8th ed. 2014); EDWARD H. RABIN ET AL., FUNDAMENTALS OF MODERN PROPERTY LAW 1 (6th ed. 2011); see also infra notes 29–31 and accompanying text.

16 I have discussed the implications of artifact methods for bundle theories at greater length in Eric R. Claeys, Use and the Function of Property, 63 AM. J. JURIS. 221 (2018). That article also discusses the relations between the natures of property rights and the analytical methods by which property concepts need to be studied. This Article applies the lessons from that article to contemporary debates in legal property theory.

ship, however, they abstract away from many other property rights prominent in the practice of property. By showing how ownership interacts with a wider and more encompassing concept for property rights, this Article supplies a complement and corrective to exclusion views.

The tree supplies an apt metaphor representing one last family of views about property, namely “Progressive” views. 18 Although Progressive views also differ in their particulars, they tend to portray property as a pluralistic institution. 19 Such views tend to express great concern about conflating property with ownership and exclusive possession; they stress how “[p]roperty enables and shapes community life.” 20 The tree metaphor reflects these concerns; it makes different property rights seem related but still-different branches of a common practice.

This Article offers two lessons in the alternative about Progressive property scholarship. One channel of Progressive scholarship criticizes property in sweeping terms: as a “core image . . . in the minds of most people, [in which] the owner has a right to exclude others and owes no further obligation to them.” 21 This channel suffers from one of the main problems typical of bundle views. Laypeople and lawyers seem not to have a single “core image” of property in their minds; they seem comfortable navigating between two complementary concepts of property.

Other channels of Progressive scholarship aspire to study property more holistically, as an institution advancing “the underlying human values that property serves and the social relationships it shapes and reflects.” 22 That aspiration is taken very seriously in this Article. The use-facilitating concept studied here may have the features that Progressive property scholars find valuable. This concept structures property around a social function. That social function—facilitating the beneficial use of resources—links property to values that can give people rights in resources, but it also reconciles those rights to the social relationships that Progressive works seek to justify and encourage. And even if the concept introduced seems unsatisfying to Pro-

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18 See infra notes 46–61 and accompanying text.
21 Alexander, supra note 19, at 747. The works by Dagan, Singer, Shoked, and Peñalver cited supra note 19 illustrate the concern reflected in the quotation in text.
22 Alexander et al., supra note 20, at 743.
gressive scholars in some respects, I hope that this Article’s general lessons are generative for Progressive scholarship. Perhaps the methods introduced in this Article may be repurposed, with different particular concepts that Progressives find more satisfying.

**F. The Argument**

The rest of this Article proceeds as follows. Part I recapitulates the conceptual debates surveyed in this Introduction, and it illustrates those debates with nonpossessory property rights and legal interests in tenancies in common. Part II introduces this Article’s two suggestions: that Anglo-American common law operates with two complementary general concepts for property rights, and that these concepts possess artifact functions.

Parts III through VI then turn to the case study by which I hope to confirm those two suggestions. Part III introduces the concept by way of several doctrines from common law water law—riparian rights, appropriative rights, and ditch easements. These doctrines recognize nonpossessory property rights, and those rights are in no way derivative of ownership rights. Moreover, the differences between different water rights doctrines illustrate how function-oriented practical reasoning operates in property law. Part IV explains the conceptual methods I assume and apply in this Article. Relying on those methods, Part V provides a systematic account of one particular concept, the use-facilitating concept introduced and studied here. Part VI shows how that use-facilitating concept applies to the nonpossessory property rights and the cotenancy interests recounted in Part I. The last Part concludes, and it offers some implications and suggestions for further research.

**I. THREE PERSPECTIVES ON PROPERTY**

**A. Bundle Views: Property as a Bundle of Rights**

To begin, let me recount the three perspectives on property prominent in contemporary scholarship. The bundle of sticks metaphor illustrates the first family of views, namely bundle views. In bundle views, the interesting and important features of property are the sticks. The bundle remains a bun-

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23 See infra notes 29–76 and accompanying text.
24 See infra notes 77–100 and accompanying text.
25 See infra notes 101–147 and accompanying text.
26 See infra notes 148–192 and accompanying text.
27 See infra notes 193–237 and accompanying text.
28 See infra notes 238–277 and accompanying text.
Bundle no matter what sticks are in it. Bundle views probably remain dominant both in legal scholarship and in analytical-philosophy scholarship.²⁹

When bundle views offer accounts of property concepts, those accounts are parsimonious. In one such account, Stephen Munzer argues that property involves “a constellation of . . . elements, correlatives, and opposites; a specification of standard incidents of ownership and other related but less powerful interests; and a catalog of ‘things’ . . . that are the subjects of these incidents.”³⁰ If that is the most that can be said about property not very much has been said. Not all bundle views offer positive accounts of property concepts; some deny that any such accounts can be developed. For example, Edward Rubin once described property as “simply a label for whatever ‘bundle of sticks’ the individual has been granted.”³¹

**B. Exclusion Views: Property as a Castle**

The castle metaphor illustrates the second family of views, exclusion views. In some usages, the term “property” refers to what A.M. Honoré described as “the greatest possible interest in a thing which a mature legal system recognizes.”³² In those usages, property entitles a proprietor to as much authority over an ownable thing as a lord enjoys over a castle. Sir William Blackstone described the same impression when he described property as “that sole and despotic dominion which one man claims and exercises . . . in total exclusion of the right of any other individual in the universe.”³³

The castle metaphor illustrates exclusion views only crudely, however, because the metaphor is overbroad. Blackstone’s “sole and despotic dominion” portrait begins his discussion of property, and he spends much of the next two volumes of his Commentaries qualifying that portrait.³⁴ Similarly,

³¹ Edward L. Rubin, Due Process and the Administrative State, 72 Calif. L. Rev. 1044, 1086 (1984); see supra note 14 and accompanying text (quoting Shane Glackin to similar effect).
³³ 2 William Blackstone, Commentaries *2.
³⁴ See, e.g., id. at *14 (acknowledging a limited “usufructuary” property in the use of light, water, and air); id. at *20–43 (discussing implied ways and other incorporeal hereditaments); id. at *212–14 (enumerating various justifications supplying defenses for trespass to land). For a survey of the (many) works deflating the “sole and despotic dominion” passage, see David B. Schorr, How Blackstone Became a Blackstonian, 10 Theoretical Inquiries L. 103, 104 n.2 (2009).
Honoré described the package of ownership rights he delineated as a “standard case,” valuable mainly as a heuristic situating “variants and possible alternatives.” Most exclusion theorists portray ownership and exclusive authority similarly.

We can illustrate with works from the two exclusion theorists most influential in recent American scholarship, Thomas Merrill and Henry Smith. As relevant here, Merrill makes two claims about property. One claim is analytical: The right to exclude is analytically necessary to a property right. By a “right to exclude,” Merrill does not mean a right conferring managerial authority as sweeping as Blackstone’s sole and despotic dominion. Rather, he seems to suggest that property entitles a proprietor to be at least as free from interference as the freedom to which an easement or a riparian right entitles its holder.

Merrill’s second claim is normative: Exclusive property constitutes a valuable strategy to apply to ownable resources. This strategy is valuable only presumptively. In this portrait, castle-like property rights supply a first approximation for property rights in real life. The property strategy supplies the “base” of a metaphorical pyramid, and “refined” alternatives are properly understood as “upper reaches” resting on that base.

Smith defends exclusion on normative grounds similar to Merrill’s. Smith portrays property rights as falling along “a spectrum between the poles of exclusion and governance.” “In exclusion, decisions about resource use are delegated to an owner who, as gatekeeper, is responsible for deciding on and monitoring specific activities;” governance rules “pick out uses and users in more detail [and] impos[e] a more intense informational burden on a

35 Honoré, supra note 32, at 107–08.
38 See Merrill, The Right to Exclude I, supra note 37, at 746–49.
40 Id. at 2063.
smaller audience of duty holders.”\footnote{Id. at S454–45; accord Henry E. Smith, \textit{Property as the Law of Things}, 125 HARV. L. REV. 1691, 1702–04 (2012).} For Smith, exclusion supplies a “core of [property] architecture,” a “rough first cut—and only that—at serving the purposes of property.”\footnote{Smith, supra note 42, at 1705. Indeed, Smith introduced his exclusion-governance continuum in part to discourage other scholars from “concentrat[ing] on rights of exclusion” to the neglect of common or open access strategies. Smith, supra note 41, at S454.} Exclusion works well, for example, when many individuals who do not know one another have intermittent interactions with a resource. Smith finds that strategy applicable in the law of nuisance, a field in which simple boundary rules facilitate coordination among strangers.\footnote{See Henry E. Smith, \textit{Property and Property Rules}, 79 N.Y.U. L. REV. 1719 (2004); Henry E. Smith, \textit{Exclusion and Property Rules in the Law of Nuisance}, 90 VA. L. REV. 965 (2004) [hereinafter Smith, \textit{Exclusion in Nuisance}].} As uses become more valuable and different users come to know more about one another, however, governance regimes come to be preferable.\footnote{See, e.g., Smith, supra note 42.}

\section*{C. Progressive Property Views: Property as a Tree}

The third family of views covers Progressive views on property. Throughout Progressive works one can see a few themes especially relevant here.\footnote{For helpful overviews of Progressive property, see John A. Lovett, \textit{Progressive Property in Action: The Land Reform (Scotland) Act 2003}, 89 NEB. L. REV. 739, 743–46 (2011); Ezra Rosser, \textit{The Ambition and Transformative Potential of Progressive Property}, 101 CALIF. L. REV. 107, 115–26 (2013).} Progressive works tend to assume a portrait of property they engage as a foil—the unqualified “castle” view recounted in the last section. In his book \textit{Entitlement: The Paradoxes of Property}, Joseph Singer describes and critiques an “ownership model,” a model that makes freedom to enjoy property seem primary and limits on that freedom difficult to justify.\footnote{SINGER, supra note 19, at 62.} To situate his portrait of property, Hanoch Dagan opposes it against several major views which (he says) regard “exclusion as the core of property.”\footnote{DAGAN, supra note 19, at 38.} To introduce a capabilities-based justification for property, Gregory Alexander opposed it against a lay view whereby “[t]he core image of property . . . is that the owner has a right to exclude others and owes no further obligation to them.”\footnote{Alexander, supra note 19, at 747.}

Progressive works find this castle view wanting, and they conclude that all exclusion views are similarly wanting. Analytically, exclusion sup-
plies a “misleading . . . conceptual baseline” for property.50 Normatively, exclusion also seems “inadequate” as “the sole basis . . . for designing property institutions.”51 Among other reasons, exclusive ownership is troubling because it seems likely to restrict or deny non-owners’ access to valuable resources.52

When they offer their own accounts of property, Progressive scholars tend to portray the field as complex. A prominent statement of Progressive property principles holds that property “implicates plural and incommensurable values.”53 Dagan insists that “the meaning of property is not homogeneous but varies instead with its social settings and with the categories of resources subject to property rights,”54 and he conceives of property as “an umbrella for a set of institutions.”55 Singer describes property as a field offering a menu of many different standard-issue rights.56 For Singer, the concept property incorporates one necessary element, a Hohfeldian claim-right guaranteeing the right-holder respect for justified expectations.57 Beyond that, however, the field of property offers a wide range of “paradigms that decision makers can follow.”58 In one recent work, Alexander argued that property consists not of a single one-size-fits-all form but a category with two dominant forms. One of those forms covers the exclusionary rights central to exclusion theories. The other is “governance property,” and that latter form encompasses many “fragment[ed]” or “more limited” rights including “use rights . . . to assets owned by others.”59

Finally, Progressive works tend to stress the role that property can play in facilitating interpersonal association. For example, in his article Property as Entrance, Eduardo Peñalver warns that property scholarship has “put too

50 Joseph William Singer, Property and Social Relations: From Title to Entitlement, in PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 3, 9 (Charles Geisler & Gail Daneker eds., 2000); accord Dagan, supra note 19, at 40–41 (portraying property as “a monistic institution” makes it “bear [no] resemblance to the law of property as lawyers know it or . . . as citizens experience it”).
51 Alexander et al., supra note 20, at 743.
52 See Singer, supra note 19, at 160–71; Alexander, supra note 19, at 747, 753–54; Alexander et al., supra note 20, at 744.
53 Alexander et al., supra note 20, at 743.
54 Dagan, supra note 19, at 43.
55 Id. at 42.
56 See Singer, supra note 19, at 1–5.
57 See id. at 209–12. On Hohfeld’s analytic vocabulary, see Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 YALE L.J. 16, 28–58 (1913). Hohfeld called claim-rights, duties, powers, liabilities, and the other four relations in his taxonomy “fundamental jural relations.” Id. at 28. I will follow suit in this Article.
58 Singer, supra note 19, at 86–87.
much stock in property’s isolating power and failed to acknowledge the many ways in which property actually increases owners’ social obligations.\textsuperscript{60}

No single metaphor can capture fully all of these various conceptual portraits. I suggested the image of a tree in the Introduction because it seems more representative than any other metaphor I can think of. The metaphor comes (via Anna di Robilant) from twentieth-century French and Italian jurists. Those jurists believed that property encouraged both regularity and variety. Property’s metaphorical trunk represents property’s regular and possessory core; the branches represent the “many resource-specific bundles of entitlements” that are instantiated in different property rights.\textsuperscript{61}

\textbf{D. Four Test Cases}

Scholars who subscribe to exclusion views claim that property concepts impart regular structure to property rights in practice. That claim is contested by scholars who subscribe to bundle or Progressive views. To bolster their criticisms, scholars who subscribe to bundle or Progressive views frequently cite relatively weak property rights. In this Article, I focus on possessory rights held by several co-owners concurrently and on several different nonpossessory rights.\textsuperscript{62}

The first illustrative right is the easement. An easement entitles its holder to enter a servient estate and to traverse or use that estate for one or more purposes.\textsuperscript{63} An easement constitutes a nonpossessory legal interest in

\textsuperscript{60} Peñalver, \textit{supra} note 19, at 1893; \textit{accord DAGAN, supra} note 19, at 41; SINGER, \textit{supra} note 19, at 94.

\textsuperscript{61} di Robilant, \textit{supra} note 3, at 872.

\textsuperscript{62} Progressive scholars also cite examples that seem to confound broad and exclusionary portraits of property. For example, in the 1971 case \textit{State v. Shack}, 277 A.2d 369, 375–76 (N.J. 1971), the Supreme Court of New Jersey limited the right of exclusive possession so as not to entitle a land owner to exclude a welfare caseworker or a Legal Services corporate lawyer from entering to meet a migrant worker whom they wanted to help. \textit{See} Alexander, \textit{supra} note 19, at 808–09 (praising \textit{Shack}). Or, common carrier regulations restrict the freedom of business covered by them to refuse to serve prospective customers or to charge the prices they would like for their services. \textit{See Dagan, supra} note 19, at 48–49. These examples can be dealt with by showing that the institution of ownership has one or several functions like the one I will attribute to property rights in this Article. This point has been suggested in MACLEOD, \textit{supra} note 7, at 42–44; Eric R. Claeys, \textit{Exclusion and Private Law Theory: A Comment on Property As the Law of Things}, 125 HARV. L. REV. F. 13 (2012) https://harvardlawreview.org/wp-content/uploads/pdfs/forvol125_claeys.pdf [https://perma.cc/A5TY-GMKM]; Adam Mossoff, \textit{The False Promise of the Right to Exclude}, 8 ECON J. WATCH 255 (2011). I hope to make the point more systematically in subsequent work.

property, but it is a property right.64 On that basis, easements have been cited to refute exclusion views.65

The next right is a close cousin to the easement—the covenant running with the land (hereinafter, a “running covenant”). Running covenants are promises between two landowners about the future uses of their lots. Most commonly, covenant promises commit landowners to forswear certain uses of their lots (say, non-residential uses) and/or to dedicate those lots to specific uses (say, stand-alone residential housing, with designated setbacks or types of construction).66 An ordinary contractual promise obligates promisors in their personal capacities. When a land-related promise satisfies the requirements for a running covenant, however, it binds whoever happens to own or occupy the relevant estate—whether or not she made the promise herself.67 Running covenants are also nonpossessory interests—and property rights.68 And since such covenants are property rights, they are also cited to confound exclusion views. As Amnon Lehavi argues, because “the core essence” of a running covenant lies in the right “to secure or prevent a certain use,” such a covenant undermines the primacy of “the right to exclude.”69

Next comes the mortgage. A mortgage constitutes a security interest on an asset pledged to secure a debt. Typically, a mortgage entitles the debtor to retain title to the pledged asset. If the debtor-mortgagor fails to repay the debt, however, the mortgage entitles the creditor-mortgagee to foreclose on the asset and to sell it to satisfy the debt.70 Like easements and running covenants, mortgages constitute nonpossessory rights—and property rights.71 For that reason, they have been cited to refute exclusion views. As Lehavi

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68 See id. § 6.1, at 228–31.
69 See Lehavi, supra note 11, at 49; see also Singer, supra note 50, at 1024–26.
70 See Merrill & Smith, supra note 17, at 818–19. The mortgage model described in text is the “lien” model. Another model, the “title” model, vests ownership in the creditor-mortgagee until the debt is repaid. The power described in text is not unlimited; the creditor-mortgagee owes the debtor-mortgagor a duty to deliver any profits remaining after he has repaid the debt. See Merrill & Smith, supra note 17, at 818–19.
argues, a mortgage does not entitle a creditor-mortgagee to exclude anyone from the mortgaged asset or to manage its uses in any specific ways; it only supplies the creditor-mortgagee with an enforceable right to make the asset “serv[e] as security for a debt.”

Similar arguments can be made with property rights that vest present possession of an ownable resource in several concurrent owners. For example, in a tenancy in common, all co-owners hold rights to possess the entirety of the property. In some tenancies, passive cotenants let one active cotenant occupy the whole premises for everyone’s common benefit; in others, all cotenants occupy different parts of the premises and they work out arrangements for concurrent access and use. Even though cotenancy interests are more limited than solely-held rights of ownership, they are still classified as property rights. Munzer argues that exclusion views cannot explain how or to what extent tenancies in common are property rights. Alexander argues that such cotenancies confirm his claim that there exists a category of “governance” property separate from exclusion property.

II. TWO SUGGESTIONS FOR PROPERTY CONCEPTS

I hope that the last Part surveyed the main lines of recent debate as charitably as an introductory survey can. If that survey was tolerably fair, recent debates seem disjointed in two important respects.

A. Property and Ownership

First, disputants seem to be assuming different concepts of property. Imagine an argument about concepts related to “representation.” One person claims: “Representation is a valuable institution because agents often serve principals’ interests more effectively than principals do on their own.” The second protests: “That claim is too simplistic! It can’t explain the many ways in which members of legislatures act in relation to constituents! Or the many ways in which artists can make portraits of subjects!” Or, imagine two people arguing over discovery. One person claims: “Discovery is valuable because it is good to find new lands.” And the second protests: “That claim is too simplistic! It doesn’t account for the problems in civil litigation! Or the complications that arise in science!”

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72 Leavai, supra note 11, at 49; see also Singer, supra note 65, at 1026, 1028.
73 See Singer, supra note 66, § 8.2.1, at 351.
74 See id. § 8.2, at 351–52.
75 See Munzer, supra note 30, at 295–96.
76 See Alexander, supra note 59, at 1861–62.
Or course, both of these imaginary debates are silly. In both, disputants are associating the same words with different concepts. Nevertheless, both debates illustrate a scenario in which conceptual confusion seems likely. In that scenario, one word in English refers to two or more concepts. The relevant concepts are related but distinct. The extension of the first concept is shallow and broad. (Representation as making present, or discovery as the un-covering of otherwise-inaccessible information.) The extension of the second concept is narrow and deep. (Representation as the advocacy of a principal’s interests by an agent, or discovery as the identification of new lands.) And the narrow concept refers to a specific phenomenon that is covered as one of many possible instances of the broad concept. I suspect that several concepts prominent in property relate to one another as the pairs of representation and discovery concepts just described.

Before I explain my suspicion, however, I must introduce one distinction that plays an important role in the rest of my argument—the distinction between general and particular concepts. General concepts apply universally, while particular concepts are contingent and local to particular communities or eras. In what follows, I posit that there exist general concepts representing property rights of different strengths and scopes. I assume that these general concepts could be represented by one or more particular concepts for property rights. In later Parts of this Article, I study one particular concept that represents one of the general concepts I introduce here. The general concept might be represented by other particular concepts; I do not mean to rule that possibility out. The general concept might also be represented differently in some details by different particular concepts, and I do not mean to rule that possibility out, either. For my purposes, it suffices to show that property law and practice assume some recurring distinctions between different property rights, and that at least one particular concept explains those distinctions.

With that background, we can grasp two distinct general concepts for property rights. One such concept represents the sense in which “property” evokes the image of a castle. In this sense, property refers to legal relations we associate with trespass and a right of exclusive possession, and legal

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78 Some scholarly works describe the same basic distinction by differentiating between concepts and “conceptions” that might approximate that concept. See, e.g., RONALD DWORKIN, LAW’S EMPIRE 70–72 (1986) (using the terms “concept” and “conception” to “contrast between levels of abstraction at which [an] interpretation of the practice can be studied”).
relations we associate with a right of exclusive disposition. A fee simple absolute certainly embodies this image and that concept of property.

Thanks to another general concept, however, in another sense “property” seems to refer to a wide range of rights relating to external resources. This concept covers the many weak legal interests that might be granted from a fee—like an easement, a running covenant, a mortgage, or an interest in a tenancy in common—and still seem strong and irrevocable enough to count as “rights.” Now, this concept is assumed more often than it is elaborated or defined thoroughly. Even so, many other concepts operate the same way—and a surprising number of legal distinctions hinge on lawyers’ applying this concept routinely and accurately. Courts and commentators describe easements as “interests” or “rights” in property—as opposed to, say, revocable licenses, which are called mere “privilege[s].”79 When a particular incident is classified as “property,” a “property interest,” or a “property right,” courts are quick to presume that ongoing violations of the incident deserve protection in equity.80 Property in this sense is protected by eminent-domain limitations;81 weaker incidents like licenses are not.82 In statutory law, legislatures take for granted that there exists some category of legal interests called “property,” and they make such interests attachable in court proceedings83 or assets to be administered during a bankruptcy.84

To avoid confusion, I am not going to use the term “property” to refer to castle-like rights except when context demands otherwise. When I refer to property rights conferring sweeping exclusive authority, I follow Honoré and describe the relevant concept as a general concept of “ownership.”85 I reserve the term “property” to refer to the more capacious field I have been describing here. The general concept for property in this capacious sense

79 STOEYUCK & WHITMAN, supra note 63, § 8.1, at 435, 438; accord Wehby v. Turpin, 710 So. 2d 1243, 1251 (Ala. 1998) (distinguishing licenses from easements on the ground that the former are mere “personal privilege[s]”).

80 See, e.g., Baseball Pub’g Co. v. Bruton, 18 N.E.2d 362, 364–65 (Mass. 1938) (ordering equitable relief to protect a valid easement against ongoing interference); DAN B. DOBBS, THE LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 2.9(3), at 168 (2d ed. 1993) (“Injunctions are commonly sought and appropriately issued to prevent many kinds of threatened torts to property interests, as well as to restore property already tortiously harmed.”).


82 See BRUCE & ELY, supra note 64, § 1.4 (comparing easements and licenses).


85 I will make exceptions only when I treat scholarly works and legal sources that refer to what I call “ownership” here as “property.”
encompasses all jural relations in ownable resources that seem robust enough to be called property rights. So understood, property includes not only fees simple and rights of absolute ownership but also easements. Such relations exclude jural relations that seem too weak to constitute property rights (revocable licenses again) and relations that seem to lack the requisite relation to ownable resources (contractual promises). As used here, the set of ownership rights is a subset of the set for property rights writ large. Thus, a fee simple absolute constitutes both property and rights of ownership. If a fee owner grants an easement to someone else, however, that second party would hold property but not ownership rights in the easement.

B. Property and Functions

Assume I am right that the field of property operates with two complementary but still-distinct general concepts. If I am right, another question arises: Can property scholars supply satisfying accounts of the concept for property writ large? It seems easy to supply a one-size-fits-all account of ownership; that is why the castle image is so pervasive in property scholarship.86 By contrast, it seems far more daunting to explain why and how easements, mortgages, running covenants, and cotenancy interests all belong within the same general concept.

That question takes us to the second suggestion of this Article. I think property scholars can develop satisfying accounts of property in the capacious sense on which this Article focuses. To do so, however, such scholars may need to look at property rights differently—through the lenses of philosophical scholarship on artifacts. And here is where analogies to chairs, clocks, and fiat currency become relevant. Consider chairs. At first blush, it may seem impossible to produce a satisfying one-size-fits-all list of features87 that comprise the concept by which we represent chairs. Chairs can have no, one, or several legs, they can be made of different materials, and their seats and backs can be constructed in different ways. But this strategy seems unpromising; it is pitched at too specific a level of explanation.88 One can develop a more satisfying account of a chair concept by saying that the

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86 I doubt that the concept for ownership is as determinate as is assumed by the conventional wisdom described in text. See supra note 62.

87 Such lists have been described as definitions per genus et differentiam, see H.L.A. Hart, THE CONCEPT OF LAW 14–15 (3d ed. 2012), and as lists of “universal quantified conditions,” see Mark C. Murphy, Defect and Deviance in Natural Law Jurisprudence, in INSTITUTIONALIZED REASON: THE JURISPRUDENCE OF ROBERT ALEXY 45, 46 (Matthias Klatt ed., 2012).

88 And also because it tests an account of an artifact concept with methods better suited for concepts representing natural kinds or mathematical figures. See Claeys, supra note 16, at 225, 231–33.
concept covers “artifact[s] . . . manufactured for people to sit on, with a certain typical shape or form.” 89 Similarly, it seems unpromising to account for clocks as objects with hands, numbers, and/or faces; it seems more promising to account for them as machines made to tell time.

I do not claim here that the strategy suggested in the last paragraph works for every artifact or artifact concept. Nor do I claim that it can explain every feature about property. But I do think that the strategy is extremely promising. Recent property scholarship focuses too much on the forms we associate with property concepts. That scholarship abstracts from the ways in which those forms might relate to the values that make property concepts worth having. Property might be explicable as a certain kind of jural relation, structured as seems likely to perform some activity regarded as a characteristic of property.

To see why, consider first the characteristics of artifacts. By definition, an artifact is an intention-dependent object. 90 Searle and other philosophers who study artifacts describe artifacts and the intentions they satisfy in terms of functions. A function refers to (a) a typical activity (b) that brings about a valuable (c) goal (d) that the artifact is expected to perform because it realizes the goal. 91 Thus, when we say that time-telling is the function of a clock, we mean that: it is characteristic of a clock to tell time; it is normatively valuable to know the time; knowing time constitutes a goal that people may pursue; and the desire to have the time reported reliably is a cause of the creation and use of clocks. We shouldn’t be surprised if and when people organize artifacts and artifact concepts around such functions.

To be sure, functions also complicate studies of property concepts. As social philosopher Amie Thomasson puts it, artifacts are “notoriously malleable and historical in nature,” 92 and artifacts have such characteristics because their functions are malleable and historical. We associate clocks with time-telling machines but then encounter difficulties with ornamental clocks. “Knickers” used to represent men’s breeches; now they represent loose-fitting sports shorts in some usages and women’s underwear in other

usages. And property concepts seem more susceptible to variation than these concepts do.

The concern this objection raises is a serious one. It does not make conceptual analysis impossible, but it does limit significantly the lessons that any single conceptual study can offer. To address the concern, I hope to make a general suggestion and a specific demonstration. The demonstration is as follows: One prominent particular concept in Anglo-American law seems organized around a specific function. That demonstration offers some important insights about how functions might affect property concepts. That demonstration is narrow, however, because the insights offered here may be contingent on the function central to the concept. The demonstration provides some confirmation for a broader suggestion: Scholarship needs to consider the possibility that property concepts relate somehow to artifact functions.

C. Implications

Assume that these suggestions are accurate. If they are, what is missing from current views toward property rights?

Let me start with bundle views. On one hand, such views have performed one important service: they have made clear that the practice of property probably relies on several interlocking but distinct concepts. On the other hand, once that insight is accounted for, bundle views seem unsatisfying in important respects. Recent defenses of bundle views have relied on interests in tenancies in common, easements, and other property rights weaker than ownership rights to show that property rights have “no substantive, essential connection to each other.” But these and other property rights can be reconciled to one another fairly easily. To reconcile the rights, one only needs to appreciate that they are instances of property rights and not ownership rights. This Article thus shifts the burden of persuasion. Since the examples bundle scholars have offered do not support their arguments, they need to clarify those arguments.

Now for exclusion views. If property concepts have functions, those functions may help clarify when and why exclusion gives way to property rights that exclusion theorists describe as “refined” or governance-related alternatives to exclusion. In addition, exclusion views may focus a great deal of attention on a narrow band of property rights. Rights of ownership are important in practice. But the features that define ownership may not be helpful in defining other rights that seem to constitute property rights. For

93 See Thomasson, supra note 91, at 601.
94 Glackin, supra note 14, at 4.
95 See supra notes 41 and 43 and accompanying text.
example, Smith describes nonpossessory rights and concurrent estates both as instances of governance. Yet “governance” does very little work to describe or identify the characteristics that make these rights property rights.96 Similarly, Merrill has argued that easements and other nonpossessory rights constitute property rights consistent with his (analytical) views on exclusion. “[A]lthough the holder of [such an] interest does not have a general right to exclude others from defined metes and bounds,” he argues, “such a person is given a full panoply of legal rights to protect the limited interest that they have from interference.”97 This argument contains an ambiguity. When a view makes a “right to exclude” necessary to property, that right can be broad (for Merrill, a “general right to exclude”) or narrow (for Merrill, a limited right conferring a “full panoply of legal rights”). The former understanding points toward Merrill’s portrait of exclusion and ownership; the latter one points toward a weaker and more encompassing form of property. The latter understanding is not adequately accounted for in Merrill’s work.

The same two basic implications also apply to Progressive scholarship. This Article confirms the concern, prominent in Progressive scholarship, that property cannot be reduced solely to a right to exclude. Since “it takes a theory to beat a theory,”98 however, more needs to be said in Progressive scholarship about how legal interests in tenancies in common and nonpossessory property rights constitute property. Indeed, scholars who subscribe to Progressive views should find the answers to this question helpful for their own projects. After all, when sole owners create concurrent estates and nonpossessory rights, they share their resources. Those legal interests facilitate the social interactions cherished in Progressive scholarship.

D. A Way Forward

In the Introduction, I promised I would make two general suggestions and then conduct a case study. This Part has explained both of the suggestions. To do so, however, this Part has reasoned with top-down arguments. To suggest that the field of property relies on several complementary concepts, I argued by analogy to the word meanings and concepts associated with “representation” and “discovery.” To suggest that property concepts may be organized around functions, I reasoned from characteristics that seem essential to all artifacts.

96 See supra notes 32–45 and accompanying text.
97 Merrill, Property and the Right to Exclude I, supra note 37, at 748.
Because I have explained my suggestions by simple analogies and top-down reasoning, the suggestions have only limited force. They have no more force than a finding of probable cause would have; they warrant further investigation but do not demonstrate anything conclusive about property rights. In the rest of this Article, I want to provide confirmation for the suggestions. To do so, I intend to switch course and study property from the “bottom up.” I want to show that there does exist a general concept for property distinct from the concept focusing on ownership. And I also want to show that at least one particular concept representing that general concept operates via an artifact function.

In the rest of this Article, I conduct a case study of a concept that operates primarily in Anglo-American common law—the field of property covering the cotenancy interests and nonpossessory rights introduced in Section I.D. The concept supplies an account for a property right that is both coherent and distinct from a concept covering ownership. Moreover, this concept reconciles different property rights in relation to an artifact function.

To be sure, since I focus on one single and particular concept of property, there are limits to what the following case study can teach. I focus on cotenancies and nonpossessory property rights in part because these doctrines loom large in recent property-theory scholarship, and in part because they illustrate vividly how a property concept can vary in application consistent with a function. I hope that the following study makes more sense of those rights than current accounts do. More generally, I also hope that the following study illustrates in a concrete way how artifact functions might affect property concepts. But the concept on which I rely to study those doctrines may not apply in other settings—in other common law fields of property, or in fields of public law in which statutory or regulatory duties are imposed on property. And different property concepts and functions may differ from the concept and the function studied in this Article. Readers will need to decide for themselves how much one can generalize from the particulars of the function in the concept I study.

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99 I also focus on cotenancy interests and nonpossessory rights because they illustrate the relations between functions and concepts in a straightforward manner. I suspect that concepts for stronger property rights—in other words, rights of ownership—can also be structured around functions. But I also suspect that the relationship between ownership rights and property functions is extremely indirect. See, e.g., Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959 (2009).

100 Similarly, I do not mean to suggest that the particular concept I will study is the only concept that could account for the property rights introduced in section I.D. Different particular concepts might overlap and complement one another as they apply to basic nonpossessory and concurrent property rights.
To begin the following conceptual analysis, I study closely common law property rights in a single setting—the water rights and implied easements that arise around rivers and other courses of running surface water (hereinafter, “water rights”). I start with water rights and related easements because they illustrate extremely vividly several features of property rights. Once we grasp those features, we can use them to illustrate the conceptual methods I hope to introduce in the rest of this Article.

III. PROPERTY CONCEPTS AND WATER RIGHTS

A. Why Water Rights?

Why focus first on water rights and related easements? There are a few reasons. To begin with, water rights and easements appurtenant to them illustrate the concept described in Section II.A. As prominent as fees simple and rights of absolute ownership are in scholarship, such rights are not illuminating as to the concept for property writ large. In history and practice, many communities have recognized as property not only ownership rights but also usufructs—limited property rights structured around the ongoing use of the external resource covered.101 Usufructs test the scope of that concept for property writ large, and water rights and ditch easements both constitute usufructs.

Moreover, water rights represent the broadest rights that proprietors can hold in relation to the resources they cover. In that respect, water rights differ from the property rights introduced in Section I.D: express ease-

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101 See, e.g., 2 WILLIAM BLACKSTONE, COMMENTARIES *3–10, *14 (contrasting “transient” or “usufructuary” property with rights of ownership in English law); Ellickson, supra note 36, at 1367 (surveying early human practices recognizing usufructs in land).

Throughout this Article, I use “usufruct” as a conceptual term of art. As a term of art, a usufruct refers to a property right entitling the proprietor to use and/or consume an otherwise unowned resource as long as he uses or consumes that resource regularly, subject to qualifications respecting the correlative rights of other usufruct-holders. This usage stands in some tension with a different usage whereby a usufruct refers to a property right entitling the proprietor to use and/or consume a resource owned by someone else. See, e.g., J. INST. 2.4 (J.B. Moyle trans., 5th ed. 1913). That latter usage is influential especially in civilian property law. See, e.g., A.N. Yianopoulos, Usufruct: General Principles Louisiana and Comparative Law, 27 LA. L. REV. 369 (1967). The usage I follow seems influential in Anglo-American law, as is shown by the passages from Blackstone just quoted and by this Part’s discussion of water rights. The usage I follow is also familiar to economists who study property rights (like Ellickson) and also to legal philosophers. See, e.g., John Finnis, Natural Law: The Classical Tradition, in OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 1, 51 (Jules L. Coleman et al. eds., 2004) (describing all property rights as being subject to “inchoate trust . . . or usufruct in favour of all other persons”). Thomas Jefferson popularized this latter usage when he said “that the earth belongs in usufruct to the living.” Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392 (Julian P. Boyd ed., 1950).
ments, running covenants, mortgages, and interests in tenancies in common. All of those latter property rights are all derivative. None can arise until an owner in fee or absolute ownership chooses to create and convey them. Exclusion theories can explain those latter rights to a limited extent, by portraying them all as specialized modifications of ownership rights. That limited explanation does not apply to water rights or ditch easements. As this Part shows, the property rights that appropriative rights confer on their holders constitute rights separate from and not derivative of property rights in any other resources. Although riparian rights are bundled together with property in riparian land, the specific policies that structure property in land do not affect the structure of riparian rights. As a result, riparian rights still convey the greatest interest that right-holders may hold in relation to the riparian water. Because appropriative rights and riparian rights both convey the greatest interests that private right-holders may hold in riparian water flow, they confirm that property law relies on at least one conceptual template besides the template for ownership.

Most important, water rights and ditch easements illustrate in property the sorts of variations that one sees across artifacts. Like digital and analog clocks or bills and coins, the main categories of water rights institute distinct regulatory and property systems. These categories create strikingly-different rights in relation to the flow from water courses and land appurtenant to those courses. As a result, those categories illustrate vividly how different specific property doctrines can be rendered coherent by a single function.

B. Water Rights and Ditch Easements

To set up the illustration, let us review some basic principles of the law of water rights and ditch easements at common law. Riparian rights constitute nonpossessory property rights in secure expectations to the use of riparian water. A riparian right entitles its holder to a usufructuary property

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102 Throughout this Article, when I refer to “easements,” I mean easements created by express grant. When I discuss express easements in close proximity to the easements that arise by implication in connection with appropriative water rights, to avoid confusion I will refer to easements created by express grant as “expressly-created” easements.

103 Some American states have combined aspects of both riparianism and prior appropriation in their water law. See A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT: A CASE-BOOK IN LAW AND PUBLIC POLICY 130–33 (7th ed. 2014). Even in states that adopted riparian rights or appropriative rights at common law, state legislatures have modified common law principles in many significant respects. See id. at 193–268 (recounting statutory modifications to appropriative rights systems). See generally Joseph W. Dellapenna, Regulated Riparianism, in 1 WATERS AND WATER RIGHTS § 9 (Amy K. Kelley ed., 3d ed. 2018) (recounting statutory and regulatory administration of riparian rights). I focus in text on the common law systems for ease of exposition.
right. The right is to reasonable amounts of flow from the water course; the right is accompanied by a duty not to destroy or consume the riparian water. In cases of conflict, “reasonability” is determined by analyzing all relevant circumstances. Such analysis gives highest priority to uses of water especially valuable for basic domestic uses. It then gives significant weight to how compatible one riparian’s use is with other uses of water flow by other riparians, or to preferences recognized by local statutes. This reasonable use regime makes riparian rights usufructuary. To show that some other riparian’s use interferes with his reasonable use, a riparian must first show that he is actually using some riparian flow.

Although a riparian right is technically distinct from the estate in land held by a riparian land owner, the former is appurtenant to the latter. As a result, individuals who do not own land adjacent to water courses cannot acquire property rights in the use of riparian water on their own. To access riparian flow, nonriparians need the cooperation of riparian owners.

Appropriative rights are organized differently. An appropriative right entitles a water user to appropriate a specific volume of flow she diverts and uses. In contrast with riparian rights, appropriative rights are not appurtenant to property rights in riparian land. At common law, people who divert flow from water courses establish appropriative rights in that flow; the common law makes the diversion, but not the possession of riparian land, a requirement of prior appropriation. Appropriative rights are allocated on the basis of seniority. The first appropriator gets first opportunity to divert and use water to satisfy her claim, and each successive appropriator gets an opportunity to satisfy his claim as long as enough water remains to satisfy it. Appropriative rights are subject to a requirement of beneficial use. A prospective appropriator must deploy diverted water to some beneficial use to acquire a property right, and she must continue to deploy the water she is diverting to beneficial uses to preserve her right.
When an appropriative right is perfected, the appropriator also acquires ditch easements in relation to the land crossed by the appropriated water. A ditch easement entitles the appropriator not only to a right to send water across burdened land but also to a right to “do whatever is reasonably necessary to permit full use and enjoyment of the easement[,] including the exercise of rights of ingress and egress for maintenance, operation, and repair.” Ditch easements are thus appurtenant to the appropriative rights they service. In addition, such easements make appropriative rights “dominant” or “benefiting” estates, and they make the lots subject to them “servient” or “burdened” estates. The responsibilities associated with a ditch easement run with ownership of the burdened estate, whether or not deeds conveying that estate give successors notice of the easement.

C. The Proprietary Character of Water Rights and Ditch Easements

In scholarship about property concepts, the rights introduced in the last Section are not discussed nearly as often as fees simple, rights of absolute ownership, or the rights canvassed in Section I.D. But they could be. On one hand, in law, all of these rights are regarded as being property rights. Riparian rights are described in case law as “property.” Leading cases on appropriative rights hold that there is a “right of property in water,” namely a “usufructuary” right focusing “not so much of the fluid itself as [of] the advantage of its use.” And a recent Colorado ditch easement case holds “that ditch easements are a property right that the burdened estate owner may not alter absent consent of the benefitted owner.” And all of these rights trigger legal consequences clearly associated with property—like the

109 See Roaring Fork Club, 36 P.3d at 1232 (discussing ditch easements).
111 See Roaring Fork Club, 36 P.3d at 1233–34 (citing case law describing the relationship easements create between the dominant and servient estates).
114 Adams v. Greenwich Water Co., 83 A.2d 177, 184 (Conn. 1951); Evans v. Merriweather, 4 Ill. (3 Scam.) 492, 494 (1842).
116 Roaring Fork Club, 36 P.3d at 1234; accord Stamatis v. Johnson, 224 P.2d 201, 204 (Ariz. 1950) (describing a prescriptive ditch easement as a “property right[”]).
presumption that ongoing interference with a property right entitles the proprietor to equitable protection.\textsuperscript{117}

On the other hand, water rights and ditch easements raise the same issues as those raised by the concurrent interests and nonpossessory rights discussed in Section I.D. If the “castle” metaphor is the paradigm by which property rights are measured, that paradigm does not fit riparian rights, appropriative rights, or ditch easements. But we can understand why water rights and ditch easements are property—and how they can remain property when they differ from one another—if we study them attentive to the function they have been expected to perform. In the rest of this Part, I hope to trace the role that a function seems to have played in the development of water rights and ditch easements.

As relevant here, a function serves as an ordering principle for property doctrine. In many fields of law, the most fundamental “law” is not any particular black-letter rule but one or a few principles held to be both controlling and valuable. When a particular statute or judicial opinion deviates from such principles, it seems out of alignment with the field of law and is likely to be repudiated.\textsuperscript{118} Seminal water rights decisions relied heavily on one such principle. The case most responsible for recognizing ditch easements was \textit{Yunker v. Nichols}, an 1872 case by the (then-territorial) Colorado Supreme Court.\textsuperscript{119} In his opinion, Chief Judge Hallett acknowledged that ditch easements were likely to seem novel and contrary to the law of England and already-established American states. Yet he argued: “The principles of the law are undoubtedly of universal application, but some latitude of construction must be allowed to meet the various conditions of life in different countries.”\textsuperscript{120} In the rest of this Part, I want to show how the “principles of law” Hallett assumed to be fundamental to property helped generate different property regimes for the same resources in different climatic and hydrological conditions. The principles Hallett invoked constitute a function.

\textsuperscript{117} On riparian rights, see, for example, \textit{Adams}, 83 A.2d at 183–84 (describing narrowly the circumstances in which a court of equity should refrain from entering an injunction preventing interference with riparian rights). On appropriative rights, see, for example, Farmers High Line Canal & Reservoir Co. v. City of Golden, 975 P.2d 189, 204 (Colo. 1999) (directing a lower court to enter an injunction protecting one appropriator if the facts showed that a second appropriator had expanded its use beyond its appropriative claim). On ditch easements, see \textit{Stamatis}, 224 P.2d at 204 (affirming the entry of a mandatory injunction against efforts to relocate an irrigation ditch); \textit{Roaring Fork Club}, 36 P.3d at 1234–38 (modifying a prior rule that the owner of a burdened estate may not unilaterally move a ditch easement, but still entitling the holder of a ditch easement to protection in equity subject to equitable balancing).

\textsuperscript{118} See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22–31 (1978); EDWARD HIRSCH LEVI, AN INTRODUCTION TO LEGAL REASONING 1–6 (2d ed. 2013).

\textsuperscript{119} \textit{Yunker v. Nichols}, 1 Colo. 551 (1872).

\textsuperscript{120} \textit{Id.} at 552–53 (opinion of Hallett, C.J.).
That function is one of many functions around which a property concept might be organized, and it seems influential in Anglo-American common law.

D. The Emergence of Riparian Rights

There is no scholarly consensus now about how riparianism came to predominate in nineteenth century law (in the United States or England), or about what sources contributed most to its development. As far as we know, there was no such consensus in early nineteenth century legal authorities, either. Different authorities suggested that different fundamental rules distributed access to riparian water. Nevertheless, American state and federal courts harmonized those authorities into what became the riparian rights regime. And as they did so, they assumed that the principle fundamental for their purposes was an imperative to assign water in a manner that facilitated its use and enjoyment. This imperative to facilitate use structured water rights as we would expect a function to structure different instances of an artifact.

Some early authorities suggested that riparians were entitled to natural flow. In these sources, “natural” meant “literally uninterrupted”; i.e., “any interference with th[e] flow [of water in its natural channel] was . . . ‘artificial,’ and therefore impermissible.” In an 1805 New York Supreme Court decision, Palmer v. Mulligan, Judge Livingston rejected an argument in favor of the natural flow regime. To evaluate the argument, Livingston appealed to the maxim Sic utere tuo ut alienum non laedas, or “use your own so that you don’t injure someone else’s.” Livingston insisted that the maxim be construed practically. That rule prevented mere “little inconveniences” to existing riparians, it threatened to give them “exclusive right[s]” blocking later riparians’ gainful activities, and it threatened to “deprive[ ]” the public “of the benefit which always attends competition and rivalry.” Livingston thus construed the relevant law to require analysis whether the parties’ uses

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122 MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 35 (1977); see, e.g., Merritt v. Parker, 1 N.J.L. 460, 463 (1795) (“The water flows in its natural channel . . . [and] cannot legally be diverted from its course without the consent of all who have an interest in it.”). For legal authorities on riparian relationships, see Lawrie v. Silsby, 56 A. 1106, 1108–09 (Vt. 1904) (repudiating natural flow principles and endorsing reasonable use principles); RESTATEMENT (SECOND) OF TORTS § 850 & cmt. b & reporter’s notes (AM. LAW INST. 1979).

were reasonable—“to secure [both] to individuals the free and undisturbed enjoyment of their property, as to the public the benefits which must frequently redound to it from such use.”124 In other words, Livingston regarded an imperative to facilitate the use of surface water as fundamental. Livingston relied on that imperative to decide how to construe and read authorities on natural flow.

Other early authorities suggested that water rights are acquired by prior occupancy—i.e., the principles of acquisition pointing toward the appropriative rights doctrine.125 Yet another 1818 New York decision, Platt v. Johnson, limited the scope of occupancy rules. “The elements being for general and public use,” Chief Justice Thompson reasoned, “occupancy-based appropriation rules] must be regulated and guarded, with a view to the individual rights of all who may have an interest in their enjoyment; and the [Sic utere] maxim . . . must be . . . construed with an eye to the . . . rights of all.”126 Whatever black-letter authority occupancy rules had, that authority was contingent on the rules’ respecting “the individual rights of all who may have an interest in their enjoyment.”127

U.S. Supreme Court Justice Joseph Story handed down what is now regarded as the seminal riparian rights case, the 1826 decision Tyler v. Wilkinson.128 Story began by assuming that the owner of riparian land “has a right to the use of the water flowing over [the submerged land] in its natural current, without diminution or obstruction.”129 Yet Justice Story also anticipated and rejected the natural flow principle. Because the effect of that principle “would be to deny any valuable use of” the water flow, it was more just to protect “a reasonable use.”130 Justice Story insisted that these correlative riparian rights followed as a “necessary result of the perfect equality of right among all the proprietors of that, which is common to all.”131 To establish what controlling water law held, Justice Story reconciled different lines of precedent as seemed likely to facilitate a “reasonable

124 Id. Judge Livingston’s (sole) opinion relied the least on precedents and the most on fundamental property principles of all the opinions in favor of the reasonable use rule. See id. at 315–21.
125 See, e.g., 2 WILLIAM BLACKSTONE, COMMENTARIES *402–03.
127 Id.
128 Tyler v. Wilkinson, 24 F. Cas. 472 (C.C.D.R.I. 1827) (No. 14,312); Joseph W. DELLAPENNA, The Right to Consume Water Under “Pure” Riparian Rights, in 1 WATERS AND WATER RIGHTS, supra note 103, § 7.01 (stating that Story’s opinion can be seen as “the basis of reasonable use theory of riparian rights”).
129 Tyler, 24 F. Cas. at 474.
130 Id.
131 Id.; see also Dumont v. Kellogg, 29 Mich. 420, 422–24 (1874) (same); Evans, 4 Ill. at 494–95 (same); GETZLER, supra note 121, at 274–75 (same).
use” of water on terms “common to all.” As it had for Judge Livingston and Chief Justice Thompson, that imperative gave Justice Story a function by which to review and harmonize existing water law decisions.

E. The Emergence of Appropriative Rights

Prior appropriation rights emerged in the arid American West in the second half of the nineteenth century. We can study the decisive and best-known state appropriation cases, out of Colorado: Yunker, and Coffin v. Left Hand Ditch Co. Yunker recognized ditch easements as property rights that could arise without prior creation by the owners of the estates servient to the easements. Because Yunker presented a dispute between an appropriator and the owner of land subject to an irrigation ditch, the case did not itself recognize appropriative rights. But Yunker’s decision to recognize ditch easements made no sense unless appropriative rights were already part of the law of the land. A decade later, Coffin confirmed that assumption.

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132 Tyler, 24 F. Cas. at 474.
134 For other cases instituting appropriative rights (or, recognizing appropriative rights doctrines as faits accomplis) on grounds similar to those discussed in this Section, see United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 702–04 (1899); Basey v. Gallagher, 87 U.S. (20 Wall.) 670, 683–84 (1874); Clough v. Wing, 17 P. 453, 455–56 (Ariz. 1888); Thorp v. Freed, 1 Mont. 651 (1872); United States v. Rio Grande Dam & Irrigation Co., 51 P. 674, 677–79 (N.M. 1898); Reno Smelting, Milling & Reduction Works v. Stevenson, 21 P. 317, 318–21 (Nev. 1889); Stowell v. Johnson, 26 P. 290, 291 (Utah 1891); Moyer v. Preston, 44 P. 845, 847–48 (Wyo. 1896).
135 See Coffin, 6 Colo. at 446; Yunker, 1 Colo. at 551. Coffin was decided by the Colorado Supreme Court after Colorado’s statehood.
136 In Yunker, three judges rendered three separate opinions. All agreed that the ditch easement in the case was valid, but they differed on the grounds. Chief Judge Hallett believed that the easement had been authorized pursuant to a territorial statute. Yunker, 1 Colo. at 553–55 (opinion of Hallett, C.J.). Judge Belford believed that the easement had been made irrevocable because of landowner conduct creating conditions for estoppel. Id. at 555–69 (opinion of Belford, J.). Judge Wells believed that the easement arose via the same fundamental common law principles that justify easements by necessity for landlocked parcels. Id. at 569–70 (opinion of Wells, J.). Those disagreements notwithstanding, Yunker is now read as authorizing the creation of ditch easements not granted by the owners of the estates servient to the easements. See, e.g., Roaring Fork Club, 36 P.3d at 1232 (quoting Yunker, 1 Colo. at 555 (opinion of Hallett, C.J.), for the proposition that “all lands are held in subordination to the dominant right of” appropriators).
137 See Coffin, 6 Colo. at 446–47.
The judges who decided *Yunker* and *Coffin* appreciated full well how radically they were departing from riparian rights principles. Those judges justified the shift they confirmed on the ground that Colorado differed from England and eastern states in climate and hydrology. In *Yunker*, Chief Judge Hallett granted that riparian principles seemed applicable in the humid American east on the ground that there “rain falls upon the just and unjust” alike; he found those principles inapplicable to a “dry and thirsty land” such as Colorado. Similarly, in *Coffin*, Justice Helm held appropriative rights “[i]mperative” in the arid West, on the ground that “[w]ater in the various streams . . . acquires a value unknown in moister climates.”

When these judges cited facts about climate and hydrology, however, they did so by situating those facts in relation to the imperative that had been decisive in seminal riparian cases—the imperative to facilitate use. As Chief Judge Hallett explained in his opinion in *Yunker*, “[t]he value and usefulness of agricultural lands, in [an arid] territory, depend upon the supply of water for irrigation, and this can only be obtained by constructing artificial channels through which it may flow over adjacent lands.” Similarly, in *Coffin*, Justice Helm discredited the riparian rights regime in the course of describing it—as a doctrine “giving the riparian owner a right to the flow of water in its natural channel . . . even though he makes no beneficial use thereof.” Helm argued that the appropriative rights regime was preferable because it “encourage[d] the division and use of water in this country for agriculture.”

Hallett and Helm reached the same conclusions by reasoning in terms of “necessities.” When they spoke of necessity, however, Hallett and Helm stated a conclusion that some people’s interests in using water were far stronger than others’ interests. In the humid east, nonriparians had only weak interests in riparian water because rain water gave them

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138 See *id.* (insisting that “the common law doctrine giving the riparian owner a right to the flow of water . . . is inapplicable in Colorado” on the ground that appropriative rights had “existed from the date of earliest appropriations of water” in Colorado); *Yunker*, 1 Colo. at 553–54 (opinion of Hallett, C.J.) (describing ditch easements as “withholding from the land-owner the absolute dominion of his estate”).

139 *Yunker*, 1 Colo. at 553 (opinion of Hallett, C.J.) (alluding to Matthew 5:45 (King James)).

140 *Coffin*, 6 Colo. at 446, 447.

141 *Yunker*, 1 Colo. at 553 (opinion of Hallett, C.J.).

142 *Coffin*, 6 Colo. at 447.

143 *Id.* at 446.

144 See *Yunker*, 1 Colo. at 553 (Hallett, C.J.) (arguing that the need to build canals “of great length,” created a “necessity . . . unknown” in the humid east); *id.* at 570 (Wells, J.) (arguing that ditch easements are “well sustained by force of the necessity arising from local peculiarities of climate”); accord *Coffin*, 6 Colo. at 447 (citing an “[i]mperative necessity” justifying a doctrine conflicting with riparianism).

145 *Coffin*, 6 Colo. at 447; *Yunker*, 1 Colo. at 553 (Hallett, C.J.).
sufficient access to fresh water. In arid parts of the west, water courses constituted the main sources of fresh water. There was a necessity to encourage the appropriation of water from water courses because all citizens had extremely urgent interests in acquiring fresh water for their own uses.

In *Tyler* and other seminal riparian rights cases, courts followed and harmonized earlier cases by reconciling their holdings to a fundamental principle.\(^{146}\) Under that principle, water rights needed to be structured as seemed likely to facilitate the beneficial use of water. But riparian rights doctrine remained controlling law only when it seemed likely to facilitate such beneficial use. When riparianism seemed unlikely to facilitate such use, it came to lose legal authority in arid western states—and gave way to the prior appropriation doctrine.

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Let me review what this Part has shown. Riparian and appropriative rights resemble one another in ways that different instances of a common artifact sometimes do. Analog and speaking clocks possess similar forms in that they both consist of machines; so too riparian and appropriative rights resemble one another in consisting of nonpossessory rights of some minimal strength. Analog and speaking clocks also resemble one another in telling time; so too riparian and appropriative rights resemble one another in being structured with a view toward facilitating some sort of use and/or enjoyment. Given these similarities, we should inquire whether riparian and appropriative rights seem instances of one common concept—and whether that concept accounts for other property doctrines that seem otherwise difficult to explain.

We will turn to those questions in Parts V and VI. To this point, however, I have said relatively little about conceptual analysis: how I understand it, how it proceeds, and what we can reasonably expect to learn from it. To this point, I have focused on explaining why property law and scholarship might profit from conceptual analysis on the topics raised in Part I. I hope that this and the last Part have convinced readers that conceptual analysis may indeed shed light on those topics. Yet conceptual analysis is rife with misunderstanding in the best of circumstances.\(^{147}\) Before we turn to the particular concept that I hope to introduce, then, we should step back and be clear on what we should expect to learn from the analysis conducted later.

\(^{146}\) See *Tyler*, 24 F. Cas. at 474.

\(^{147}\) See, e.g., BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 27 (7th ed. 2015) (describing analysis of law and related concepts as “muddled, confused and confusing,” because of “the lack of articulation of underlying purposes, the varying and contrary purposes, and the contested nature of conceptual boundaries”).
IV. ON CONCEPTS AND CONCEPTUAL ANALYSIS

A. The Objects of Conceptual Analysis

Let me start by explaining what I mean by a concept.\textsuperscript{148} A concept is a mental representation on which people rely as they perceive or transact with some aspect of life.\textsuperscript{149} Concepts operate between objects people encounter in life and the words by which they describe those objects. Consider the foot of an animal. That foot has a nature, and that nature can be studied (at least, in philosophy) with metaphysics. The word “foot” constitutes a term by which people refer to bodily extremities beneath legs,\textsuperscript{150} and that word can be studied with semantic analysis. In contrast with metaphysics and semantic analysis, conceptual analysis studies the mental representations on which people rely when they think, talk about, or act in relation to those extremities.\textsuperscript{151}

Because conceptual analysis focuses on representations of objects, it focuses on questions different from questions appropriate to metaphysics or semantics. When a concept of a foot represents feet incorrectly, conceptual analysis aims to understand the representation even with its mistakes. Or, when a concept of a foot focuses on some features of feet (the heel and toes) and abstracts from others (the bone structure), conceptual analysis focuses on the representation and the specific features that the representation makes salient. Conceptual analysis differs from semantic analysis because it explains not only “words alone” (as semantic analysis does) “but also . . . the practices in which [they] occur and that are designated by them.”\textsuperscript{152} Semantic analysis shows that the noun “foot” has two definitions, one for extremities beneath legs and another for the lowest part of an object.\textsuperscript{153} By contrast, conceptual analysis explains why these two definitions are related

\textsuperscript{148} This Section draws on Claeys, supra note 16, at 229–36. For other (and perhaps more) helpful explanations of the roles that concepts play in thinking about property, see PENNER, supra note 17, at 7–13; Smith, supra note 42, at 1700–06. For a helpful overview of (the many, conflicting) scholarly views about concepts, see Eric Margolis & Stephen Laurence, Concepts, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 1 (Edward N. Zalta ed., 2014) https://plato.stanford.edu/entries/concepts/ [https://perma.cc/JPP6-F23N].


\textsuperscript{151} See RAZ, supra note 149, at 20–24.

\textsuperscript{152} JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 2–3 (rev. ed. 1990).

\textsuperscript{153} See Foot, supra note 150.
and why the latter definition constitutes an extension of the former by analogy.154

As Section II.A explained, concepts are often classified as general or particular.155 Both general and particular concepts can be analyzed. At the beginning of this Section, I defined a concept as (my emphasis now) “a mental representation.” People in a community can develop many different particular concepts to represent and approximate an object, as a triangle can be represented by concepts for three-angled and three-sided figures.156

As defined here, conceptual analysis is primarily descriptive. People take concepts for granted as they think, speak, and act. Conceptual analysis aims to clarify the parameters of the concepts people assume as they think, speak, or act. Since people apply concepts intuitively, sound conceptual analysis “captures what [concept users] really had in mind . . . but [can’t] formulate explicitly”157 when they apply a concept. Concepts have intensions (the analogues for concepts of definitions for words),158 and sound conceptual analysis supplies accounts of concepts’ intensions.159 Concepts also have extensions (domains covering all the objects to which different concepts apply),160 and sound conceptual analysis describes how the application of a concept to objects in its extension “meshes in a logically coherent way.”161

B. Artifacts and Artifact Concepts

When I introduced metaphysics, conceptual analysis, and semantics in the last Section, I illustrated with feet and various concepts of feet. That illustration will surely prompt many readers to protest: The natures of and concepts for feet are simpler and more determinate than the natures of and concepts for chairs, clocks, fiat currency—or property rights. Feet constitute a natural kind, a category of objects that exist independently from human beliefs, representations, or practices.162 Artifacts do not constitute natural kinds because (by definition) they are created by people for distinct functions. As a result, many and probably most philosophers doubt that artifacts

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154 See HART, supra note 87, at 16.
155 See supra notes 77–78 and accompanying text.
156 See RAZ, supra note 149, at 21.
159 See RAZ, supra note 149, at 21–23; Mark C. Murphy, Two Unhappy Dilemmas for Natural Law Jurisprudence, 60 AM. J. JURIS. 121, 123–24 (2015).
160 See Intension and Extension, supra note 158.
161 MURPHY & COLEMAN, supra note 152, at 3.
162 See Thomasson, supra note 91, at 580.
have essences.\textsuperscript{163} Although this (mainline) skepticism has been challenged in recent scholarship,\textsuperscript{164} the natures of artifacts remain quite contested.

Although artifacts do differ from other types of objects, we can still learn valuable lessons about their natures and the structures of the concepts that people use to represent them. In evidence law, judges often reject arguments against proffered evidence on the ground that the arguments go not to the admissibility of the evidence but rather to its weight.\textsuperscript{165} Social philosophers with heterodox views about artifacts make a similar point about the natures of artifacts and the structure of artifact concepts. In my opinion, these heterodox philosophers are correct. Artifacts do not have natures or essences if we mean by “natures” or “essences” permanent features or features independent of human mental activity. But a “nature” or an “essence” could also mean a feature that explains in a satisfying and informative way why something is an instance of that which it is.\textsuperscript{166} If that is what is meant, artifacts do have essential or natural features. If nothing else, artifacts possess the functions they are expected to perform by their makers and users.

Of course, communities may decide that they no longer value a function previously associated with an artifact, and they may choose to designate a new function as that artifact’s intended and proper function. But here is where we need to take to heart the distinction in analytical philosophy analogous to evidence law’s distinction between admissibility and weight. The function-dependency of an artifact makes its features contingent; the artifact “exists” as a particular combination of function and form to the extent that people continue to designate the relevant function as that artifact’s intended and proper function. From the fact that artifacts’ natures are contingent on functions, however, it doesn’t follow that they lack natures. We learn informative and illuminating lessons about clocks when we grasp that they are expected to tell time—even if those lessons are contingent on people’s refraining from regarding them as time-telling objects at some later date. In other words, this contingency should make analysts modest in what they should expect from metaphysical study or conceptual analysis. But that contingency does not make such study or analysis worthless.


\textsuperscript{164} See, e.g., Preston, supra note 163, § 2.1 (criticizing “the baleful anti-metaphysical influence of logical positivism” and noting contrary trends); see also sources cited supra notes 7, 9.


\textsuperscript{166} See, e.g., RAZ, supra note 149, at 21–24; Murphy, supra note 159, at 139–41.
The same contingency also reinforces a point made in the last Section—that analysis of artifact concepts is primarily descriptive or explanatory. To be sure, because artifacts are made to perform specific functions, one cannot (descriptively) explain them or their concepts without showing how those functions (normatively) guide their use. Nevertheless, as just explained, when one focuses only on analyzing artifact concepts, the normative implications can only be contingent. If a conceptual analysis demonstrates that a concept for chairs is much clearer and coherent than is commonly believed, the demonstration makes the concept seem at least a little more legitimate than it seemed before. But it does not follow that readers are obligated to respect or embrace the concept. When a conceptual account reconciles speaking clocks to a concept covering all clocks, the account does not obligate people to agree that clocks are valuable objects unless it is accompanied by a satisfying argument why time-telling is a valuable activity.

So too for property. Readers may and should reserve judgment on the concept of property I present in what follows. The concept is valuable only if its function is valuable. In what follows, I say enough to explain how the function operates and why it might promote valuable goals, but I do not claim to have offered a comprehensive argument that it does promote such goals. My main intention is to illustrate, in explanatory terms, why functions may impart more structure to property concepts than contemporary property scholars now appreciate.

C. Likely Features of a Concept for Property

In the last Section, I suggested that artifacts can have at least a few essential or natural features. For any given artifact, the most important of those features is the function deemed intended for and proper to it. As Jonathan Crowe explains, an artifact can be understood as “comprising the characteristic function of the artifact plus other features salient to that kind.” Such “other features might include characteristic properties related to matters such as appearance, structure, method of creation and mode of operation.” Even when those features are essential to an artifact, however, they

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167 See John Finnis, Natural Law and Natural Rights 16–18 (2d ed. 2011); Joseph Raz, Practical Reason and Norms 10 (2d ed. 1990).
168 In recent scholarship, critics of exclusion views have complained that such views have unstated normative agendas. See, e.g., Glackin, supra note 14, at 2–3 (suggesting that “stipulating [exclusion-based] accounts of property and ownership amounts in some cases to trying to acquire redistributive justice on the conceptual cheap”). I disclaim any intention to making the sort of argument that provokes such criticisms.
170 Id.
are explanatorily posterior to the function. The artifact constitutes an instrument, and the people in some community all understand the instrument as a formal tool for performing the function. Since they understand the artifact’s forms in light of the function, the function explains why specific nonfunctional features seem necessary.\footnote{See Murphy, supra note 87, at 45–47 (giving examples of how nonfunctional features seem necessary).}

Crowe’s basic account may apply only with difficulty to concepts for a field such as property. Different communities may choose to organize the field of property around different specific functions. They may also differ in how they understand the general coverage of property—what objects are covered by property rights, or what kinds of Hohfeldian jural relations suffice to establish property. That is one of several reasons why I study (only) one particular concept of property in this Article; I hope that the study of one well-entrenched concept provokes scholars to consider which features seem necessary to any concept of property and which ones seem merely contingent.

In the concept we’ll study here, there are four features. I enumerate them here in the order in which they are discussed in Part V. I also explain those four features by (loose) analogy to the features people associate with fiat currency. First and most fundamental is (a) the function. Fiat currency facilitates exchange by providing a government-approved medium of value; property rights must perform one or more functions relating to the distribution and use of ownable resources. Next comes (b) the subject matter. Fiat currency is made of several different typical substances, most often metal, cloth, or paper. By rough analogy, property rights apply at least to resources that are \textit{not} people or faculties or attributes of people.\footnote{I emphasize the “at least” in text; property \textit{can} be applied to people or personal faculties or attributes. See infra notes 205–206 and accompanying text.} Next comes (c) property’s conventionality or institutionality. Like fiat currency, property rights perform artifact functions by being accepted as instruments that coordinate behavior in furtherance of those functions. And last comes (d) the form by which property is made obligatory. Fiat currency comes with a government seal, and this seal expresses an obligation that the currency must be accepted as having its designated commercial value. By rough analogy, property rights embody obligations for people not to interfere with others’ rights of prior access to and use of resources.

Three of these features will probably seem familiar to this point: (a) the function; (b) the relevant subject matter; and (d) the obligation necessary to constitute a property right. Feature (c), the conventionality or institu-
tionality, may not seem so familiar. Let us consider that feature more closely in the next Section.

D. Institutional Status in Property

In what follows, I refer to the conventionality I associated with feature (c) in the last Section as “institutional status.” Institutional status is crucial to the operation of any system of property rights. Different concepts of property may differ about the functions they attribute to property or the precise forms and coverage to which they apply. Yet all systems of property operate assign institutional status to the obligations they recognize.

The term “institutional status” comes from philosophical scholarship on artifacts and social life. Those philosophical fields differentiate so-called “institutional” artifacts from so-called “ordinary” artifacts. Ordinary artifacts perform their intended and proper functions without anyone’s accepting or believing that they are meant to perform a certain role. By contrast, institutional artifacts perform their functions by coordinating behavior. An institutional artifact supplies a point of reference. People are obligated to accept an institutional artifact as an authoritative symbol for some function. An institutional artifact requires people to behave in designated ways, but it entitles them to rely on others’ behaving in similar ways. By participating in coordinated activity, people perform the artifact’s function.

Searle illustrates the distinction between institutional and ordinary artifacts via a wall. Any large wall can operate as an ordinary artifact, simply by keeping outsiders outside of the territory walled off. That tendency constitutes an “ordinary” function, because no one needs to believe that the wall has any symbolic or social meaning for the wall to repel outsiders. Yet a wall can also serve as an institutional artifact. In the right circumstances, residents near a wall may come to regard it as a boundary marker. When people perceive a wall as declaring a “boundary,” outsiders recognize an obligation not to traverse the wall and insiders assume they are entitled to repel others who do traverse it. When people come to assume that an object symbolizes social obligations like these, the object possesses institutional status. Fiat currency also possesses institutional status. Social philosopher John Searle asks readers to think about all the concepts about which a traveler from one country and a waiter in a café in another country need to meet.

173 See, e.g., Crowe, supra note 169, at 744–46 (summarizing and applying Searle’s insights on artifacts’ institutional status). The following discussion relies on Claeys, supra note 16, at 233.


175 See SEARLE, supra note 10, at 39–41.
minds before the traveler can buy a beer from the waiter. In Searle’s scene, the customer and waiter both need to accept the currency as having commercial value. To drive the point home, Searle asks readers to imagine a counterexample in which a dog owner trains his dog to bring a dollar bill every time it wants to be fed. Concepts of dog food, order, and money do not inform the dog’s behavior—or make that behavior anywhere near as deliberate, self-reflective, or social as the behavior of the customer and the waiter.

Property rights resemble boundaries and fiat currency in possessing institutional status. Property rights perform whatever functions are designated for them by being accepted and by instituting correlative obligations relating to resources. And institutional status makes property rights institutional artifacts.

E. Property Studied from the Internal Point of View

By now, many readers may be wondering: Why add vocabulary from artifact and social philosophy scholarship to property law? And why might that vocabulary illuminate features of property law or concepts? The short answer: the vocabulary introduced here helps focus attention on the relationship between a social concept and its claims to legitimate authority. Social concepts raise a naïve but extremely serious question: whenever a social concept prevails in a community, why should any of that community’s members be obligated to use it? To say the same thing in a more pointed way, if some members of a community refuse to accept and use a concept, under what authority may other members who do accept and use the concept demand that the deniers use it anyway—and sanction them if they do not use it? These legitimacy issues subtly shape how social concepts operate in practice. And a conceptual analysis is unsatisfying if it does not account for issues this fundamental.

Unfortunately, for a variety of reasons, these themes do not get the attention they deserve in contemporary American property law scholar-

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176 See id. at 3.
178 In my opinion, two factors contribute more than most: the analytical positivism reflected in bundle views, and the influence of law and economics on American property scholarship. On the former, see Claey, supra note 16; on the latter, see, for example, Claey, supra note 62; Thomas W. Merrill & Henry E. Smith, What Happened to Property in Law and Economics?, 111 YALE L.J. 357 (2001).
I address these themes, if only briefly, in this Section. As I do, I will introduce three more terms relevant to the conceptual account that follows: “legitimate authority,” “reasons,” and “interests.”

When one studies social concepts from the perspective of a social or political theorist, they should seem problematic. On one hand, most people find it advantageous most of the time to have access to shared social concepts. Social concepts provide common points of mental reference. Those shared points of reference simplify thinking, communicating, and acting. This is the most powerful lesson of Searle’s café scene.

On the other hand, it might not always be advantageous to any person to be bound by a shared concept. When people in a community choose one particular representation for a particular object or a field of activity, they forego alternative representations. These choices matter very much when dealing with controversial social and political topics. The concepts that communities settle on can legitimate some normative choices raised by an object or activity and delegitimize other possible choices. Imagine that people in a community struggle over a concept for insurance as applied to health care. Some people favor market-provided health care, and they insist that insurance be represented as a contractual relation in which one party voluntarily agrees to compensate specified losses suffered by the other party. Other people favor universal health care, and they insist that insurance be represented as a relation in which one party is entitled to initiate such a compensation relation unilaterally. The first concept delegitimizes compulsory private insurance, the second legitimizes it, and we shouldn’t be surprised if partisans in the community struggle with one another to entrench the particular concept each favors.

Nevertheless, in health insurance, property, and many other fields of life, people in any community need to establish shared concepts. When a concept is shared, however, “shared” is a polite way to say that it is compulsory. The compulsion can be social. In any community, some people may deputize themselves as social-norm enforcers and then shame or ostracize people who refuse to use a concept. The compulsion can also be political. If

179 With emphasis on “American” property law. Commonwealth scholarship is far more receptive to these issues. See, e.g., HARRIS, supra note 17; PENNER, supra note 17; Essert, supra note 36; Katz, supra note 36; Ripstein, supra note 36. Trends may be changing in American scholarship as well. See, e.g., PETER M. GERHART, PROPERTY LAW AND SOCIAL MORALITY (2014); MACLEOD, supra note 7.

180 See David Plunkett & Tim Sundell, Disagreement and the Semantics of Normative and Evaluative Terms, PHILOSOPHERS’ IMPRINT, Dec. 2013, at 1, 4 (describing such struggles as “metalinguistic negotiations”).
someone refuses to follow a concept established in law, he exposes himself to criminal prosecution or civil litigation.

These threats—of shaming, ostracism, jail, or liability—raise what I called the legitimacy problem and is more commonly called a problem of legitimate authority. On what grounds may communities establish some concepts and not others? And on what grounds may communities apply social sanctions or legal compulsion to people even when they conscientiously object to the concepts those communities want to adopt?

This legitimacy problem might be studied in different ways. Many philosophical analyses of social and legal concepts have studied the problem relying on an analytical vocabulary focusing on interests. Although the word “interest” itself means different things in different contexts, one meaning should be familiar. This is the sense in which a partner has a stake in a partnership, or in which any individual has a stake in any common enterprise. This sense can be broadened to describe the interests that we have in our lives, our free use of resources, our friendships, our associations, and so forth. In this sense, an “interest” constitutes a distinguishable component of a person’s well-being. Since an interest contributes to a person’s well-being, it identifies something that its holder desires and pursues without any additional motivation. Social obligations possess legitimate authority when they serve the interests of the people whom they obligate.

Yet interests are not merely self-centered; they connect their holders to broader communities. Among other things, a claimant does not have a real interest unless she can convince others that the object of the interest is worthy of respect. And for an interest to be worthy of respect, it must be justifiable to others on objective and critical grounds. So discussions of interests are often complemented in analytical philosophy by discussions of reasons—justifications for practical courses of action that are rationally defen-

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182 See, e.g., PENNER, supra note 17, at 9–11; see also UNDERKUFFLER, supra note 19, at 64–84.
183 See, e.g., JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW VOLUME ONE: HARM TO OTHERS 33 (1984) (discussing senses in which “interest” refers to the money paid for the use of borrowed money or excited curiosity); see also RESTATEMENT (FIRST) OF PROP. § 5 (AM. LAW INST. 1936) (defining an “interest” to “include varying aggregates of rights, privileges, powers and immunities and distributively to mean any one of them”).
184 See FEINBERG, supra note 183, at 33–34 (discussing interests in a company as providing “stakes” in the “well-being” of the enterprise).
185 See id.
186 See RAZ, supra note 149, at 32–34.
sible and obligatory.187 In what follows, I rely on both terms; I refer to “reason-based” interests.188 The “interests” in reason-based interests capture the ways in which social institutions need to consider the priorities of individuals; the “reasons” tied to those interests capture the ways in which individual priorities need to be reconciled with one another and with common goals by rational moral standards. And a social obligation seems even more likely to possess legitimate authority if it serves subjects’ interests consistent with objective reasons that a mature observer would find obligatory.

When we analyze a social institution in light of reasons, interests, and legitimacy, we study it from what is called in jurisprudence an “internal point of view.” H.L.A. Hart deserves pride of place for introducing this “internalist” perspective on legal and social concepts.189 As Hart explained, even when an analyst focuses on describing and explaining an institution regulating a group’s behavior, her analysis will not be complete without an “account [of] the way in which the group regards its own behavior.”190 That account requires an account of the precise senses in which the institution is rendered obligatory. But since the people in the group are free individuals, the obligations must be linked to their interests; since they are also rational agents, those obligations must also be justified by persuasive reasons.191

Institutional artifact theory helps illuminate the same problems. The distinct contribution of that theory is to focus attention on the ways in which particular artifacts serve specific reason-based interests. For example, when the Soviet Union was collapsing in the late 1980s and early 1990s, Moscow residents started using Marlboro cigarettes as black-market currency.192 In internalist terms, this example raises fascinating questions about legitimate authority. Why do people normally accept fiat currency? Why did Muscovites choose to disregard the ruble and switch to Marlboros? On what basis might they have insisted that other Muscovites inclined to use rubles accept Marlboros? An internalist answer runs as follows. People have a rea-

187 See MACLEOD, supra note 7, at 20–23.
188 “Reason-based” comes from RAZ, supra note 149, at 34. This nomenclature brings the interests on which I will focus in text into close alignment with the “reasons” MacLeod makes primary in his analytical vocabulary, supra note 7, at 22–23.
189 See HART, supra note 87, at 88–91. The scholars who deserve the most credit for transplanting internalist methods into property scholarship are HARRIS, supra note 17, at 176–77, and PENNER, supra note 17, at 66–67.
190 HART, supra note 87, at 90.
192 See SEARLE, supra note 10, at 43.
son-based interest in having a reliable and secure medium of commercial value. That interest serves more general interests people have in entering into promises and in acquiring resources likely to improve their lives. Normally, a reliable currency enjoys legitimate authority because it serves such interests. In 1990-vintage Moscow, however, the ruble ceased to serve those interests and Muscovites ceased to accept it as their currency. Artifact theory completes this internalist answer, by connecting the relevant interests to the relevant function. When a fiat currency facilitates exchange, it serves people’s individual and reason-based interests in exchanging. So when rubles ceased to seem reliable as currency, they lost their connection to the interests that usually give them the authority that justifies their use in exchange.

In short, artifact theory and terminology help us analyze social institutions in a manner extremely sensitive to the tension between those institutions and their obligatory characters. As fiat currency shows, an institutional artifact establishes social and/or legal conventions to perform some designated function. One does not grasp all or the most important dimensions of such conventions unless one understands that they work by being obligatory. And one cannot understand why they might seem obligatory without understanding whether or how they serve users’ interests. It seems overwhelmingly likely, then, that the functions that institutional artifacts are expected to perform are structured to serve the reason-based interests of the people expected to accept them.

And since property constitutes an institutional artifact, we now know what to look for in any particular property concept. As Section B explained, such a property may possess a function; as Section D explained, all property rights operate via institutional status. Although different functions may lead different property concepts to differ in their structures, as Section C explained functions can still justify and explain the distinct jural relations that particular property concepts establish. And now that we know what to look for, we can study the particular concept of a property right at work in Part III.

V. A USE-FACILITATING CONCEPT OF PROPERTY

In what follows, I refer to the particular concept under study as a “use-facilitating” concept of property. This concept makes fundamental a reason-based interest people have in acquiring things for uses likely to promote survival or rational human flourishing. That interest applies (only) to resources separate from the people capable of asserting rights and holding property—resources I describe here as “separable” resources. In some circumstances, that interest gives some claims of access and use with priority higher than anyone else. That priority-claim has a specific strength and
character; it constitutes an *in rem* and immunized claim-right. The concept studied here enforces that claim-right by conferring institutional status on it. Because use-facilitation constitutes a function, it supplies normative guidance to prospective owners and non-owners. In short, in the concept introduced in this Section, a property right refers in its focal sense to: an *in rem* and immunized claim-right, in relation to a separable resource, vested with institutional status in legal and social conventions, and structured as seems likely to facilitate the use of the separable resource and related resources.

### A. The Function of Property: Facilitating Use

In the concept under study, the function of property rights is to facilitate the use of resources on terms that are beneficial for all. The function presumes that people find acceptable one or more natural law theories. The relevant natural law theories make fundamental flourishing, *i.e.*, rational happiness. Such theories identify a distinctive goal for property systems. As John Finnis puts it, since “[t]he world’s resources pre-exist all of us, and since we are all fundamentally each other’s equals as persons the only reasonably normative baseline is that all those resources are to be treated at all times as for the benefit of everyone.”\(^{193}\) When that baseline is fundamental, the function of property rights is to facilitate the beneficial use of resources, on terms giving all people reasonable opportunities to acquire access to resources of their own.

The “use” in this function needs to be understood precisely to avoid confusion. As a word in English, the primary meaning of “use” is probably something like “deploy something . . . to a particular purpose”—as in “the use of scissors to cut shapes out.”\(^{194}\) In prominent secondary meanings, however, “use” has several meanings more capacious than this primary sense.\(^{195}\) “Use” can refer to an entitlement to deploy something. (The use of someone else’s car.) It can refer to a deliberate pattern of deploying something in a productive way. (Making good use of spare time.)\(^{196}\) In the concept under study, the “use” meant runs consistent with these secondary and more capacious senses.

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195 To appreciate those meanings and relevance fully, one would need to understand how “use” (and its closest translations in Latin, Greek, and other languages prominent in Western legal sources) have been understood in legal writings and in major treatises on law or the political morality of property. For a list of major sources, see Claey, *supra* note 16, at 243–45.
196 *See* Use, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/use [https://perma.cc/H6H3-7TZ7].
“Use” has these capacious senses because it constitutes an activity in which people have a reason-based interest. When rational flourishing is fundamental to a moral theory, people have reason-based interests in engaging in activities likely to produce flourishing. Among other interests, people have reason-based interests in acquiring resources likely to help them flourish and in using those resources for their own particular projects for flourishing. “Use” encompasses any purposeful, beneficial, and justifiable engagement a person can have with an ownable resource.197 In what follows, when context requires I refer to this sense as “purposeful, beneficial, and sociable use.”

Because use must be “purposeful,” a person who claims property in a resource must incorporate the resource into some serious project. A person cannot claim a right in a resource merely by playing with it or passing it by, and the claim one makes in a resource must “show enough seriousness of purpose to overbalance the community of things” that sets the background baseline against which property rights are measured.198

Because use must also be “beneficial,” it requires that a user produce some minimal rational flourishing. Recall how, in Coffin v. Left Hand Ditch Co., the Colorado Supreme Court discredited the riparian rights as a doctrine “giving the riparian owner a right to the flow of water . . . even though he makes no beneficial use thereof.”199 In context, the court evaluated the riparian rights doctrine by whether it helped people derive some minimal level of rational gratification from the water they diverted. Recall also how, in the riparian rights case Palmer, one judge construed relevant property rules by whether they seemed likely “to secure to individuals the free and undisturbed enjoyment of their property, as to the public the benefits which must frequently redound to it from such use.”200 The sense of use described here explains why that judge treated “use” and “enjoyment” interchangeably. In this capacious sense, a person can derive use from flowing river wa-

197 The understanding of “use” set forth in text is informed by natural law and rights moralities. See, e.g., Eric R. Claeys, Productive Use in Acquisition, Accession, and Labour Theory, in PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW, supra note 30, at 13 (discussing use in Lockean labor theory); Finnis, supra note 101, at 51–52 (discussing use in Thomas Aquinas); Adam Mossoff, What Is Property? Putting the Pieces Back Together, 45 ARIZ. L. REV. 371, 378–85 (2003) (examining use in Cicero, Grotius, and Pufendorf). Needless to say, the semantic and conceptual meanings attributed to “use” in the text are justifiable only if and to the extent that these or other similar moralities seem normatively justifiable.


200 Palmer v. Mulligan, 3 Cai. 307, 314 (N.Y. Sup. Ct. 1805) (opinion of Livingston, J.); see supra note 124 and accompanying text.
ter not only by drinking it or operating a mill but also by enjoying it for recreational purposes.

Finally, the use in this concept is “sociable” use. When the function under study allocates access to resources, this sociability requirement ensures that distributive concerns are considered. After all, when property rights are measured against a background baseline in which resources are *prima facie* for the benefit of everyone, the interest any one person can claim in using a resource needs to be reconciled with the correlative interests of others. Recall how, in the riparian rights case *Platt v. Johnson*, one judge argued that because “[t]he elements [are] for general and public use,” it followed that water rights “must be regulated and guarded, with a view to the individual rights of all who may have an interest in their enjoyment; and the [*Sic utere*] maxim . . . must be . . . construed with an eye to the . . . rights of all.”\(^{201}\) The judge linked riparian rights to use and enjoyment, but specifically use and enjoyment consistent with “the rights of all.” Or, recall how, in *Yunker v. Nichols*, one judge contrasted the western U.S., where rain is scarce, with the eastern U.S., where “rain falls upon the just and unjust alike.”\(^{202}\) In context, that judge was saying that water rights were subject to implicit and inchoate distributive limitations. These limitations recognized the correlative claims of all state citizens to access to fresh water. In the humid east, those claims could justly be disregarded. Rainwater gave nonriparians adequate access to fresh water. In the arid west, however, those correlative claims were extremely pressing. Given their pressing character, riparians’ rights in riparian water could justly be modified to recognize the stronger claims of nonriparian appropriators.

To this point, we have clarified the sense in which, in the concept under study, property rights are expected to facilitate the use of ownable resources. But property rights are expected to facilitate the use not only of the resource specifically implicated by a property right; they are also expected to facilitate the use of resources commonly proximate to that resource. Here is another reason why water rights cases are so instructive. The seminal appropriative rights cases make clear that property in water and land are related to one another. Riparian rights are classified as incidental or appurtenant to property in land. That classification reflects a few implicit judgments. Most important, if nonriparians had any sort of proprietary interests in riparian water, they would need ditch easements, and ditch easements would jeopardize all the uses of land facilitated by exclusive possession of land. Conversely, in appropriative

\(^{201}\) *Platt v. Johnson*, 15 Johns. 213, 218 (N.Y. Sup. Ct. 1818); *see supra* note 126 and accompanying text.

\(^{202}\) *Yunker v. Nichols*, 1 Colo. 551, 553 (1872) (opinion of Hallett, C.J.); *see supra* note 151 and accompanying text.
rights regimes, appropriators do have ditch easements, notwithstanding their effects on nonriparian land. That classification reflects a distributive judgment that appropriative rights cases made explicit: that “the value and usefulness of agricultural lands . . . depend on the supply of water for irrigation.”\(^{203}\) In other words, the choices how to structure water rights implicated property rights in land. And better to qualify exclusive property rights in land, if such qualifications seemed likely to facilitate the gathering and distribution of fresh water making the land usable.

When use-facilitation guides practical reasoning, it justifies and explains why property rights possess the nonfunctional features they possess. Since it is valuable to facilitate commercial exchange, it is justifiable to assign to some ordinary objects institutional status such as money. As for fiat currency so too for property. The function of use-facilitation justifies property rights’ possessing certain nonfunctional features.

### B. The Subject Matter of Property: Separable Resources

The first nonfunctional feature consists of the subject matter of property. For any artifact or artifact concept, a function constitutes a rule of thumb. When a community accepts some function as the intended and proper function for an artifact, it presumes that the function’s goal is valuable and that a particular activity seems a reliable means to advance that goal. When such a rule of thumb is instituted as a conventional norm, however, the convention marks off bounds within which the rule seems reasonably likely to realize the goal. That is what the subject matter does for the concept under study; it delineates the domain over which the concept of property applies.

James Penner has provided a helpful definition articulating that domain, and I rely on his definition here. In Penner’s formulation, property covers the field of separable resources. A resource is “separable” if it is associated only contingently or non-essentially with the person exercising the right in relation to the resource.\(^{204}\) This requirement assumes a more fundamental distinction between persons who are capable of exercising and claiming rights and objects separate from those persons. People are capable of claiming rights in various attributes of their persons—e.g., their identities, their bodies, or various faculties they possess. Because those attributes are essentially associated with the people exercising them, they give rise to “personality rich” rights—e.g., rights of reputation and identity, rights of bodily autonomy, and freedom of contract. By contrast, when a resource is

\(^{203}\) *Yunker*, 1 Colo. at 553; see *supra* note 139 and accompanying text.

\(^{204}\) *Penner*, *supra* note 17, at 111–12.
not tied essentially to the person intending to deploy it, the resource is an appropriate candidate for a property right.

Separability supplies a rough-and-ready test marking off the domain of the concept under study. As the last Section explained, in the concept under study, property rights need to be structured to give individuals reasonable opportunities to acquire and use resources, each for her own rational flourishing. This imperative seems reasonable enough as it applies to “resources” to which people are not already entitled. It does not seem reasonable as applied to attributes tied up with the identities of the people capable of pursuing their individual well-beings freely and rationally. Separability keeps the field of property away from the persons and focused on non-personal resources.²⁰⁵

Separability illuminates why we find it clear that water rights and ditch easements fall in the field of property. These rights assign access to water and land, separable resources under any criterion for separability. Separability also illuminates why some rights that are property rights in black-letter doctrine seem problematic property rights. Even though the right to control the use of one’s identity in endorsements (or, the “right to publicity”) is often treated as a property right,²⁰⁶ it seems an odd property right because it protects holders’ rights over outgrowths of their personas.

C. The Conventionality of Property: Institutional Status

Now that we grasp the field to which property rights apply, we can grasp the precise means by which property rights perform the use-facilitating function described in Section A. In the concept under study, property rights facilitate use by establishing a conventional pre-commitment system. The field of property generates rights of a certain type when such rights seem reasonably likely to perform the function recounted in Section B. Property’s function is performed thanks to conventions, in law and social morality, that obligate people to respect the rights.

Those legal and social obligations give property institutional status as explained in Section IV.C. By some combination of legal fiat and social ac-

²⁰⁵ As Penner explains, separability illuminates conflicting intuitions we might have about slavery and property. On one hand, from the perspective of any one person, any other person’s body and intelligence are separable resources and fitting candidates for property. On the other hand, because slavery is inconsistent with interpersonal equality, it undermines norms that supply fundamental justifications for property rights. See id. at 123–25.

²⁰⁶ See, e.g., Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988). Similarly, some communities have instituted systems of personal slavery using property law. Arguments have been made (more often than not without success) to recognize property rights in body parts. See, e.g., Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Cal. 1990).
ceptance, a property right establishes an institutionalized norm. Such a norm obligates non-proprietors to recognize and respect others’ property rights, and it obligates proprietors to recognize and abide by the limitations on their rights. As long as the rights are structured as seems likely to facilitate use of the resources covered, these obligations coordinate people to perform property’s function.

Water law also illustrates how much traction institutional status has throughout property law. The systems recounted in Part III provide two different systems for coordinating interpersonal behavior in relation to land and river water. Although both of these systems get tested from time to time, most residents in riparian and appropriative communities follow the applicable legal principles most of the time. That is a powerful testament to the role that rules of property play in coordinating collectively intentional behavior.

But water law also provides examples analogous to the cigarettes-for-rubles story recounted in Section IV.E.207 Mid-nineteenth century, there were good reasons for believing that riparian principles were controlling law in many western territories before statehood. In any territories subject originally to English jurisdiction, the common law provided the fundamental law and the common law embraced riparian principles.208 And many early western territorial laws and state statutes did not “sound all that different from those applied” in riparian states.209 Yet miners and other early settlers came to believe that riparianism was wholly inappropriate for their local needs. As Yunker and Coffin showed, that judgment gave local residents a reasonable basis for arguing that “imperative necessity” justified applying property rules different from those applied in common law jurisdictions.210 And as local residents came to settle on appropriative principles, those principles “practically swept away the common-law doctrine of riparian rights . . . long before a case actually arose between an appropriator of water . . . and a riparian claimant along the natural stream.”211 When courts

207 See infra note 192 and accompanying text. For non-water law examples, see ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAWS OF OWNERSHIP (2011).


209 MERRILL & SMITH, supra note 17, at 335 (referring to Colorado statutes cited in Coffin, 6 Colo. at 450–51).

210 Coffin, 6 Colo. at 447; see also Yunker, 1 Colo. at 553 (opinion of Hallett, C.J.) (arguing for applying different black-letter rules to effectuate “principles of law . . . of universal application . . . to meet the various conditions of life in different countries”).

211 J. WARNER MILLS, MILLS’ IRRIGATION MANUAL FOR LAWYERS, IRRIGATION OFFICERS, ENGINEERS AND WATER USERS 34 (1907).
faced cases of first impression about access to riparian water, they concluded that local residents had instituted customs long acquiesced in—and that those customs had superseded riparian principles.212 Or (as in Coffin) they construed statutes that seemed to authorize riparian rights in ways that seemed inconsistent with the statutory language.213

In short, before appropriative rights principles became entrenched, riparian rights had partial institutional status thanks to the common law, while appropriative rights had partial institutional status via local customs and overwhelming popular support. The conflict between these two regimes needed to be settled. Once Coffin and other cases sided with appropriative rights, the appropriative rights regime possessed the complete institutional status expected of a paradigmatic property right.

D. The Priority Established by Property: An In Rem and Immunized Claim-Right

As the last Section suggested, since the concept under study establishes a rule of thumb, it facilitates use by assigning to one or more people a right of a certain presumptive strength and character. The right needs to be good against everyone else in the community, and it needs to be structured as seems reasonably likely to facilitate the relevant resource’s use.

This claim of priority needs to be described more clearly than it has in recent scholarship. As Section II.C explained, I doubt that descriptions such as “exclusion,” “right to exclude,” “governance,” “institution,” or “right protecting a justified expectation” are as informative or illuminating as we should expect. We can do better, relying primarily on Hohfeld’s two-by-four taxonomy of jural relations.214 In analytical terms, the formal “right” necessary for a property right consists of an in rem and immunized claim-right. When such a right is institutionalized, it also establishes correlative in rem duties and disabilities on non-proprietors.215

213 In The Colorado Doctrine, SCHORR, supra note 133, at 37–38, argues that the relevant statutes repudiated riparian principles, by authorizing land owners who were not riparians to appropriate water as long as they owned land in the same watershed as the stream from which they were appropriating. Even if Schorr’s interpretation of the statutory language is correct, the doctrine announced in Coffin was not consistent with the language. Again, Coffin entitled anyone to divert water from streams—whether or not they were riparians, and whether or not they owned land in the relevant watershed. See Coffin, 6 Colo. at 446–47.
214 See supra note 57 and accompanying text.
215 In conceptual scholarship, exclusion theorists and theorists like me are sometimes assumed to be opposed to Hohfeldian analysis root and branch. We are not. We find Hohfeld’s taxonomy helpful for elaborating the jural relations established by property rights. Yet Hohfeld’s taxonomy
1. The Claim-Right

The claim-right should be easy enough to appreciate. A property right confers some “claim against someone whose recognition as valid is called for by some governing rules or moral principles.”216 Within the activities covered by the right, the holder is entitled to be free from interference without her authorization. The authority and the zone of non-interference can be quite wide, as they are in sole and absolute ownership of land or chattels. But neither the authority nor the zone of non-interference needs to be that wide. The authority and the zone of non-interference only need to be strong enough to say that the person entitled to both has a right to demand that others “recognize them as valid.”217

Water rights and ditch easements illustrate how a weak property right can be while still remaining a “right” in the requisite sense. In a riparian rights state, riparians have rights that no one interfere with their uses of riparian flow consistent with reasonable use norms. In an appropriative rights state, appropriators have rights not to be interfered with as they divert water consistent with their claims’ priorities. And appropriators also have rights not to be interfered with as they enter servient estates to inspect and maintain their irrigation ditches. To be sure, all of these claim-rights facilitate uses of land and water. Yet the uses are Hohfeldian privileges or liberties, and they are not recognized directly. They are instead protected indirectly, to the extent that they are consistent with (in riparian states) reasonable use norms or (in appropriative rights states) priority norms and the norms regulating access to ditch easements. Those norms establish claim-rights and correlative duties.

2. Immunities

A claim-right is necessary but not sufficient to entitle someone to priority in access and use of a resource. For priority to be meaningful, the person asserting priority needs security that the claim-right cannot be extinguished or undermined. Interferences with water rights and ditch easements are ordinarily protected in equity. That equitable protection makes it signifi-
cantly more difficult for a non-proprietor to have a property right modified or destroyed than if the claim-right were unprotected and subject to change. In Hohfeld’s taxonomy, the claim-right is not subject to a liability (modification or destruction by third parties) but rather protected by an immunity. That is why the “right” in a property right consists of an immunized claim-right.

3. In Rem Rights and Obligations

Not only is the relevant claim-right immunized, it is also structured in rem. To explain in remness, we must supplement Hohfeld’s analytical vocabulary. Hohfeld tried to define in rem rights as rights availing against a large and indefinite class of people. But that definition does not capture the normative guidance provided by in remness. The definition seems consistent with a right-holder enjoying thousands of individual claim-rights against a wide range of individual duty-holders, and yet such rights would not be in rem rights. In some quarters, in remness is understood to describe a characteristic whereby a right is held in relation to a general and impersonal class of duty-holders. That characteristic describes one consequence of in remness but not in remness itself.

In the sense relevant here, an obligation is an in rem obligation in a sense described by Peter Birks in terms of “exigibility.” “Exigibility” is a term of art describing whether a norm may be validly invoked and enforced. In Birks’s formulation, an obligation is in rem if its exigibility “is defined by reference to the existence and location of a thing, the res to which it relates.” Birks introduced this requirement to describe obligations in restitution; Penner applied it to property law. As Penner explained, a right is not in rem, and is instead in personam, if its exigibility requires “some reference to the actions, the intentions, or personal histories of the beneficiaries who are the correlative right-holders.”

The rights canvassed in Part III are in rem rights. When an appropriative right exists, other water prospectors owe a duty to respect appropriations

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218 See Hohfeld, supra note 57, at 55–59.
219 And the duties and disabilities correlative to these claim-rights and immunities are also in rem.
220 See Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 YALE L.J. 710, 718 (1917).
222 See Merrill & Smith, supra note 178, at 360–63.
223 PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 49 (1985).
224 PENNER, supra note 17, at 28–29. But see Webb, supra note 215, at 257–63 (questioning Birks’s account of exigibility on the ground that it conflates separate usages of in rem).
consistent with the appropriative claim. When a ditch easement exists, land owners owe a duty to abide by crossings consistent with the scope of the easement. Duty-holders do not need to know anything about the intentions, activities, or personal histories of the right-holders to grasp the duties they hold. Riparian rights may seem more difficult to classify, because no riparian can discharge her duty of reasonable use without knowing what uses other riparians are making of water. Nevertheless, a riparian right and correlative duties are still in rem. Someone potentially subject to a duty correlative to riparian rights does not need to know personal information about particular riparians to know whether he owes the duty. The right-holder’s uses can only be relevant in a secondary sense, to determine whether the duty has been performed or violated.225

E. Existence and Nondefectiveness Conditions in a Property Concept

In short, in the concept under study, a property right possesses four features. First, the right is expected to perform the function of facilitating use of the resource covered and other proximate resources. The right (second) establishes obligations in relation to one or more separable resources. The right performs its function (third) by being established with institutional status in law and social morality and (last) by consisting of at least one in rem and immunized claim-right.

This account can be misunderstood, however, because the use-facilitating function constitutes a kind of “feature” different from the three nonfunctional features. To see why, consider a criticism Thomas Merrill recently lodged against the concept under study here. Merrill denies that use-facilitation constitutes a necessary requirement for a property right. To the extent that property rights facilitate use, Merrill argues, they do so only “by giving owners the right to exclude others from the thing.”226 In other words, a right to exclude is necessary to property, and rights of use are derivative because they are protected if at all by rights to exclude.

This criticism mistakenly attributes to the concept under study two features that it does not possess. To an extent, the criticism treats the “use” in the concept as equivalent to the uses protected by conventional rights of use, in fields of law like nuisance or water rights. As Section A should have

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225 Duties of reasonable use in riparian law resemble duties of reasonable care to a person and property in the tort of negligence. As Penner explains, these negligence-based duties are in rem duties, see PENNER, supra note 17, at 29, and riparian duties are in rem for similar reasons.

226 Merrill, The Right to Exclude II, supra note 37, at 4. Variations on this argument have also been presented by LEHAVI, supra note 11, at 48–9; Merrill, The Right to Exclude I, supra note 37, at 741; and Ripstein, supra note 36, at 157–58, 173–74, 178–80.
made clear, however, use serves a different role in the concept under study. Use identifies a valuable interest, one capable of justifying an individual right. That interest does not mandate any particular conventional right; it facilitates practical reasoning about property.

Separately, the criticism assumes that a feature involving use must be necessary to a property right in the same sense in which three-sidedness is necessary to a triangle. Merrill calls the right to exclude a “sine qua non,” and perhaps he assumes that any analytically-necessary feature must be necessary in the sense of being a sine qua non. Not so. When an object of metaphysical or conceptual analysis has a function, it is better to separate its constitutive features into two categories. Some features constitute sine qua non features—existence conditions, or features without which a particular instance cannot belong to the class for the object of study. But other features can be necessary in the sense of supplying a nondefectiveness condition for an object or concept. A nondefectiveness condition identifies the point of an object. (The point of a clock is to tell time mechanically.) That point, in turn, supplies practical guidance to decision makers as they determine how to design particular instances of the concept for particular resources and uses. (One or two-person seat-facilitation gives guidance to chair-makers as they design potential seats.) And that point supplies a measure, inherent in the concept, for evaluating whether a particular object is a successful or defective instance of the concept. (Whether a currency seems reliable enough and free enough of depreciation to facilitate exchange.)

Now that we have addressed both of the misunderstandings in Merrill’s argument, we can appreciate precisely how use-facilitation informs property in the concept under study. Merrill assumes that I deny that exclusion is necessary to property. I do not; the in rem and immunized claim-right explained in the last Section constitutes a right to exclude of a sort. I claim, and Merrill seems to disagree, that a function is a constitutive feature of property concepts and that use-facilitation is constitutive of the concept under study here. Yet use-facilitation is necessary not as a sine qua non but rather as a nondefectiveness condition for property. Indeed, because it supplies property with a nondefectiveness condition, use-facilitation is more important than the exclusion or claim-right necessary for property. When a concept is organized around a function, the function is explanatorily prior to the concept’s nonfunctional features. Merrill may even agree about this priority. Recall that he argues that property encourages use “by giving owners

227 Merrill, The Right to Exclude I, supra note 37, at 730; accord LEHAVI, supra note 11, at 49.
228 See Murphy, supra note 87, at 46, 58–59 (discussing how nondefectiveness conditions operate in concepts).
the right to exclude others from the thing.”229 That is exactly what a function would be expected to do for a property concept. The function of a property concept guides people’s practical reasoning how to tailor the formal exclusion that a property right provides.230

And once again, water rights doctrines illustrate. Because rain satisfies people’s interests in fresh water in humid states, no one has strong interests in access to water courses. By default, the use-interests that seem valuable in such states are the interests of riparian landowners in security of land and the interests that all state residents have in keeping water courses intact for any public uses. That is why riparian rights tie property in riparian rights to property in riparian land. By contrast, in arid states, no one has easy access to fresh water and everyone has an urgent interest in seeing to it that fresh water gets collected. Because the practical guidance is different, the claim-rights are stronger, nonriparians get equal opportunity to appropriate water on a par with riparians, and the property in water rights is severed from property in riparian land.

It is also extremely telling that riparian and appropriative legal systems institute only enough exclusion to establish usufructuary property rights. When a resource is susceptible to a dominant use and a secondary use, a usufruct provides a reliable instrument by which to protect and encourage the secondary use without jeopardizing the dominant use. In some cases, the dominant use may be a public use carried on in a public commons. By protecting (mere) usufructuary private property in riparian flow, riparian rights do not interfere with navigation and other valuable public uses of navigable rivers.231 In other cases, the dominant use may be a second private use. That possibility explains the structure of ditch easements. An appropriator’s interest in transporting water may take priority over a neighbor’s interest in privacy and all the uses that privacy interest protects. But the former interest doesn’t entitle the appropriator to ignore all the interests neighboring land owners have in their lots. Ditch easements respect appropriators’ interests without extinguishing the interests of the holders of servient estates. Again, water rights and ditch easements constitute property rights because they rec-

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229 Merrill, The Right to Exclude II, supra note 37, at 4.
230 Similar things could be said about James Penner’s exclusion thesis, whereby “the right to property [as] a right to exclude others from things which is grounded by the interest we have in the use of things.” Penner, supra note 17, at 71 (emphasis removed). Since Penner calls the right to exclude a “formal essence” for the right to property and the interest in use as a factor playing a mere “justificatory role,” he suggests that property consists of a form without a function. Id.
231 See, e.g., 3 James Kent, Commentaries on American Law 344–57 (1828) (recounting public rights and private property rights in the use of navigable water courses); cf. Rio Grande Dam & Irrigation Co., 174 U.S. at 703–08 (holding that state-based prior appropriation doctrines had not and by law could not take priority over federal jurisdiction of navigable water courses).
ognize and protect in rem and immunized claim-rights. But the claim-rights are structured as seems reasonably likely to perform the function of facilitating use as described in Section A. The claim-rights facilitate use of the water by giving appropriators secure expectations that they will have access to the water they have appropriated; the claim-rights facilitate use of the servient estates by not sweeping as broadly as the rights that establish fees simple.

F. A Concept as a Focal Meaning (Herein of Family Resemblances, Necessary Features, and Sufficient Features)

Before we close our survey of the concept under study, some readers may wonder about its scope. Scholars often assume that there are two main ways to account for concepts. One is to identify in a concept features necessary and/or sufficient to designate instances of it; the other is to situate different objects that relate to a concept in reference to family resemblances and dissimilarities. Am I then claiming that the features recounted in Sections A through D are strictly necessary for property rights—in all their applications?

No. The question just posed assumes a false dichotomy. Conceptual analysis can also proceed by way of other analytical methods. One of the alternatives consists of analysis of “focal meaning.” As Section II.B showed, when Merrill and Smith propose their (normative) accounts of exclusionary property, both rely on so-called core-periphery methods. Similar methods have been called (by Hart) “central case” methods, and (by Joseph Raz) definition in relation to “typical cases.” Finnis describes the same basic method as specification in relation to a “focal meaning,” and I follow Finnis’s terminology here.

We shouldn’t be surprised that the concepts representing artifacts often are structured around a focal meaning. When a concept supplies a shorthand reference for a presumptive strategy, it obligates only when the conditions justifying the strategy seem applicable. When someone wants a chair solely for decorative purposes, she wants an object that isn’t consistent with the intended proper function for chairs as understood by most chair-users. A focal meaning approach keeps the assessments we make of ornamental chairs coherent with the assessments we make about ordinary chairs.

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232 See, e.g., DAGAN, supra note 19, at 42; Munzer, supra note 30, at 307–09.
233 This subsection relies on Claeys, supra note 16, at 253–58.
234 HART, supra note 87, at 81.
235 RAZ, supra note 167, at 150.
236 FINNIS, supra note 167, at 9–11.
237 See MACLEOD, supra note 7, at 39–63 (discussing Finnis’s conceptual analysis of focal meaning); see also Claeys, supra note 16, at 253–58.
So too for the property concept under study. The three nonfunctional features recounted in Sections A through D are all focal features of a property right only if and to the extent that it seems desirable to facilitate the use of external resources by maintaining in rem and immunized claim-rights over those resources. Contingent on that normative premise, if and when rights of publicity are regarded as property rights, they seem borderline or defective property. This conceptual classification helps us make a quick normative presumption: it seems troubling to assign property rights over personal identity. Property norms may not adequately protect nonconventional rights of personality, and they may also undermine such rights by encouraging people to view one another’s personas as objects of commercial exploitation. Similarly, while it was uncertain whether riparian rights common law norms or appropriative rights customs had priority in Colorado and other states, water rights were borderline property rights. In that period of uncertainty, no water rights possessed full institutional status.

For this Article’s purposes, however, we do not need to dwell very long on focal meanings and borderline cases. As Section I.D suggested, in recent debates, scholars who favor bundle and Progressive views have relied heavily on easements, mortgages, running covenants, and legal interests in tenancies in common. We do not need to dwell overlong on borderline cases to analyze these doctrines. In the right conditions, all four of these property rights constitute focal instances of the concept introduced in this Part. In the next Part, I explain why.

VI. FOUR TEST CASES RECONSIDERED

A. Legal Interests in Tenancies in Common

Consider first legal interests in tenancies in common. The best inroad to studying cotenancy interests comes from a discussion of them in a recent chapter by Munzer. Imagine that an estate called Crosswinds is held by Amy and three sisters as tenants in common. Munzer asks readers to compare two statements: “Crosswinds is the property of Amy and her three sisters,” and “Amy has the right to exclude others from Crosswinds.” An “acute” lawyer, Munzer argues, would “immediately pick out an ambiguity,” namely that the right to exclude in the latter statement does not specify which people Amy may exclude.

This hypothetical illustrates perfectly why property scholars need to explore both of this Article’s main suggestions. Munzer uses the hypothet-

238 Munzer, supra note 30, at 295–96.
239 Id. at 296.
ical to challenge an exclusion view. He seems to assume that, if he refutes exclusion views, he restores the scholarly status quo ante, the “dominant[ing]” view whereby “property is a bundle of sticks.” But Munzer’s conclusion does not follow from his argument. Even if Munzer has refuted exclusion views, he has not demonstrated that property rights consist only of bundles of thing-related rights. Property law could operate with two or more general organizing concepts. Munzer has only proven that one relevant concept does not apply to legal interests in tenancies in common. He has not even considered whether there exists a second concept covering cotenancy interests and nonpossessory property rights.

Second, since Munzer does not consider that there might be a second general concept for property, he does not consider the specific possibility that such a concept might be organized around an artifact function. This oversight is unfortunate, because such a concept can supply exactly the normative guidance Munzer finds missing from exclusion views. Munzer argues that an “acute” lawyer intuitively applies the term of art “property” differently in different contexts. Yet an artifact function could supply Munzer’s lawyer with the practical guidance Munzer believes she needs.

To see why, insert into Munzer’s hypothetical the concept introduced in the last Part. In any community in which that concept prevails, Munzer’s hypothetical expresses in lay English something like the following: “Crosswinds consists of a collection of in rem and immunized claim-rights, held by Amy and her three sisters as tenants in common, and structured as seems likely to facilitate their and others’ beneficial uses of the co-owned estate.” Since the person in Munzer’s hypothetical is a lawyer, however, she may read the hypothetical using terms of art more familiar to property lawyers: “Crosswinds consists of rights of exclusive use held by Amy and her sisters as tenants in common.” Both interpretations signal that Amy and her sisters have claim-rights that are irrevocable to a certain degree. The immunized claim-rights confirm as much in the analytical rendition of the statement; the terms “rights” and “exclusive” supply the same confirmation in the legal rendition. Crucial here, however, both statements signal that the irrevocable rights are contingent on some interests in use. Both signal that the rights and irrevocability need to be tailored—as seems likely to perform property’s use-facilitating function. That signal supplies the normative guidance that bundle views claim property concepts do not supply. In the

240 See id. at 289 & n.1 (citing PENNER, supra note 17, and Penner, supra note 215).
241 Id.
242 But see James E. Penner & Henry E. Smith, Introduction to PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW, supra note 30, at xv, xxvi (disputing that Munzer’s criticism refutes their exclusion theories when the scopes of those theories are specified carefully).
process of supplying that guidance, that signal also performs the sort of social function cherished by scholars supportive of Progressive property.

To see why, we need to consider the institutional details of tenancies in common more closely than we have to this point. In practice, tenants in common most often make decisions about the management and use of their co-owned land by discussion and agreement.243 When they do so, they hold and exercise over their co-owned lot the rights that a sole owner holds in a lot held in fee simple sole ownership. When cotenants use lots separately, most often they do so consistent with a model I call here the “ordinary” model of tenancy in common. In an ordinary cotenancy, every cotenant “has the right to use and enjoy the entire property as if he or she were the sole owner, limited only by the same right in the other cotenants.”244 In such a cotenancy, no cotenant may eject the others, and no cotenant has claims on the benefits the other cotenants extract from the premises. In a few cases, however, one cotenant occupies the premises exclusively and denies the other cotenants reentry. Such occupancy and denial is called “ouster,” and I describe the rights and obligations that emerge when one cotenant ousts others as an “ouster model.” In the ouster model, the cotenant in possession is not obligated to readmit the cotenants out of possession, but he is obligated to provide the ousted cotenants with an accounting and with profits prorated to their cotenancy interests.245

A use-facilitating concept explains why all three regimes exist and why each makes a distinct contribution to property practice. The fee simple held in sole ownership, the ordinary regime, and the ouster regime all institute property rights with the features recounted in Part V. Cotenancy rights satisfy the institutional status requirement; they do so simply by constituting a familiar class of property interests with distinct attributes and consequences. Furthermore, even though various cotenancy rights differ from one another, they all constitute in rem and immunized claim-rights. These rights are all in rem interests because they all run with the land held in common. These rights also include claim-rights. Rights to occupy and use some of the premises or (in the alternative) to receive profits via accounting—are claim-rights. And these rights are immunized. Cotenants lack authority to extinguish one another’s rights to an accounting or to occupancy and use. If co-

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243 See SINGER, supra note 66, § 8.4, at 363 (reporting that “[c]otenants have to work out among themselves how the property will be used”).
244 7 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 50.03 (Michael Allan Wolf ed., 2009).
tenants choose to exit a tenancy in common, governing law entitles them to easy access to a partition; if they want to take some of the co-owned land as they exit, under governing principles of equity the premises are partitioned in kind and not by sale unless such a partition is unworkable.\textsuperscript{246}

Finally, not only do the rights that arise in ordinary and ouster regimes possess the forms we expect of typical property rights, they seem structured in ways likely to perform the function typically associated with those forms. The solely-owned fee simple facilitates use for people who want to deploy property to their own individual projects. By contrast, cotenancies facilitate use among people who find it conducive to their rational well-being to associate with one another in close quarters. Members of the same family may derive gratification from associating with one another. So may people who are not related to one another but still share common religious, ideological, aesthetic, or other views about the desirability of common living. The living out of a shared way of life on a lot constitutes a purposeful and beneficial use of land, and a cotenancy arrangement facilitates such use.

An ouster arrangement seems a sensible arrangement for a third scenario. In this scenario, many cotenants hold joint interests, only a few of them are interested in managing the premises actively, and the rest are interested only in deriving passive benefits. In such a scenario, it may be appropriate to structure cotenancies as trusts structure the rights and obligations between trustees and beneficiaries. And the triggering condition for this arrangement—that other cotenants be absent and one cotenant oust them—seems a rough but reasonable proxy for the conditions in which cotenants seem comfortable accepting such an arrangement.\textsuperscript{247}

Of course, as Section V.A stressed, use needs to be understood socially. In tenancies in common, then, the uses of cotenants may not jeopardize interests that outsiders have in the premises held in common. Here, the main interests are those of lenders, insurers, prospective buyers, and other parties who need notice that land is owned jointly and concurrently. Yet these interests can be accommodated through recording requirements.

\textsuperscript{246} See, e.g., Delfino v. Vealencis, 436 A.2d 27, 30 (Conn. 1980); Eli v. Eli, 557 N.W.2d 405, 408 (S.D. 1997); STOEBUCK & WHITMAN, supra note 63, § 5.13, at 222–23.

\textsuperscript{247} In practice, of course, an ouster arrangement may be indefensible. In some situations, an ouster arrangement may not serve the interests of ousted cotenants; it may instead give ousting cotenants a powerful weapon with which to exclude them and use the premises while disregarding their claims. See, e.g., Hanoch Dagan & Michael A. Heller, The Liberal Commons, 110 YALE L.J. 549, 611–12, 612 n.244 (2001). But that is a practical judgment to be assessed on the basis of information available about particular contexts and users. Furthermore, the judgment is framed by asking whether ouster arrangements facilitate use by all cotenants—\textit{i.e.} by the function central to the concept under study.
B. Easements (and Revocable Licenses)

As the last Section showed, legal interests in tenancies in common highlight features of property rights that bundle views seem incapable of explaining. Servitudes highlight features of property rights that exclusion views seem incapable of explaining.

Consider easements first. On one hand, Merrill and Smith recognize that “[e]asements have always been regarded as a type of property right.”248 On the other hand, they say that “the exact significance of this appellation [is] . . . somewhat unclear,” and they recast the normative relations created by an easement as being “functionally like a contract in which an owner agrees to waive his or her right to exclude.”249 These tensions are understandable given Merrill and Smith’s starting premises. If one regards as a “basic principle . . . that property at its core entails the right to exclude others from some discrete thing,”250 an easement seems not a property right but a borderline property right.251 Yet easements are focal instances property rights, and the concept introduced in Part V explains why. Even better, that concept also explains why and how easements differ from bare licenses.

Expressly-created easements and bare licenses are both created by grant from someone who owns land in fee simple. But these two legal arrangements implicate different individual interests. Bare licenses do not seriously threaten the interests of neighbors, lenders, insurers, or people who do not yet own but might consider buying the license-grantor’s estate. Because such licenses are revocable, when a particular license threatens the interests of one of these third parties that party can press those interests against the grantor of the license. By contrast, because an easement is meant to be irrevocable, and irrevocable specifically throughout the community, it does implicate the interests of third parties.

The use-facilitating concept introduced in the last Part explains why easements are property rights and bare licenses are not. Both interests perform the function of the concept introduced in the last Part. Both facilitate use by owners and non-owners. Indeed, the uses facilitated by easements and licenses facilitate social uses, of the sorts cherished by Progressive scholars.

When fee simple ownership is legitimate, easements and bare licenses facilitate the use of land by non-owners. Both expressly-created easements

248 MERRILL & SMITH, supra note 17, at 983.
249 Id.
250 Id. at vii.
and licenses give non-owners familiar instruments in law by which to use land to which they might otherwise be denied access. And easements and bare licenses also facilitate the use of land by fee owners. Licenses and easements both give owners instruments by which to forge relations with neighbors. Or coordinate the activities of workers and business partners. Or earn rents or royalties in return for granting access to their lots. And because owners set the terms on which easements and licenses are granted, they enable owners to grant non-owners access on terms that do not threaten owners’ core land uses. In the process, then, easements and licenses facilitate social interactions cherished by Progressive scholars.

Although those use-interests justify creating two separate instruments in law and social morality, they justify only one property right consistent with the concept introduced in the last Part. When nonowners need secure and reliable access to an owner’s land, an easement supplies it to them. An easement supplies such access specifically by granting easement holders an in rem and immunized claim-right. Easements: consist of claim-rights protecting their holders from interference with uses within their scopes; and immunity protecting those claim-rights equitably from revocation; and operate in rem. And these claim-rights facilitate easement-holders’ use of land. (Indeed, easements are sometimes called “uses,” and the term “easement” itself comes from the word aïement, an old French word for “use” or “enjoyment.”) But such claim-rights are also limited to protect the uses of fee owners of their lots. Easements are usufructs because they provide a reliable vehicle for protecting secondary uses by non-owners on terms consistent with owners’ primary uses of their lots. And because easements institute in rem rights, they implicate the interests of third parties. And those concerns justify formalities giving third parties adequate notice that easements exist.

By contrast, licenses belong in property understood as a field of practice without being property in the sense on which we have focused through-

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254 Among other things, easements impose duties on third parties not in privity with the easement or the servient estate. See, e.g., Cedar Beach/Cedar Island Supporters, Inc. v. Gables Real Estate, 145 A.3d 1024, 1029–30 (Me. 2016); BRUCE & ELY, supra note 64, § 8.33. And the responsibilities associated with an easement may not be transferred separately from ownership of the servient estate. See BRUCE & ELY, supra note 64, § 9.2.
out this Article. Licenses belong in an encompassing field of property because they constitute one of the ways in which an owner can exercise her rights of ownership. Yet bare licenses are not property rights. Licenses do not include immunities because they are revocable. They are not in rem because they obligate only if and to the extent that the owners granting licenses decide not to revoke them.

Although there are exceptional cases, they also confirm the basic distinctions described here. Exceptional cases arise when a licensee argues that the license-granting owner has induced reliance making the license irrevocable by estoppel. When courts determine that a license should be irrevocable, it is not clear whether or not the license is a property right, and if so why or why not. Irrevocable licenses fall at the borders of being property rights. Such licenses possess the immunities necessary for property rights. But courts are somewhat conflicted on whether estoppel licenses bind third parties and on whether their burdens and benefits run with ownership of the relevant dominant and servient estates.

Because of these conflicts, irrevocable licenses may not be property rights, and if they are they seem odd or borderline property rights. And the account provided here explains why. Formally, if a court holds that a license-granting owner should be estopped from revoking the license, it doesn’t obviously follow that the judgment of estoppel ought to be enforced in rem beyond the licensee and the owner. And these formal deficiencies express in shorthand important functional concerns. Black-letter estoppel doctrine focuses on the behavior of the parties involved: did one party do or say things justifiably to induce another to expect that a specific state of affairs would stay the same way? By contrast, property law and policy focus primarily on a different question: does one person’s claim of priority in use seem structured to be consistent with the use-claims of everyone else in the community? When we view estoppel licenses as dubious property rights, our intuitions carry into effect our expectations that estoppel and property doctrines accomplish different goals.

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257 See, e.g., Richardson v. Franc, 182 Cal. Rptr. 3d 853, 858, 864 (Ct. App. 2015); Kelly, supra note 65, at 896–97 (discussing the different interpretations of easements in the courts).

258 See, e.g., Blackburn v. Lefebvre, 976 So.2d 482, 493–94 (Ala. Civ. App. 1997) (surveying conflicting cases); BRUCE & ELY, supra note 64, § 11.9; see also Franc, 182 Cal. Rptr. 3d at 858, 864 (regarding irrevocable licenses as functionally equivalent to easements but not actual easements).

259 See RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1979).
C. Running Covenants (and “Mere” Promises About Land Use)

As the last Section explained, Merrill and Smith portray all servitudes as “[c]ontracts that bind successors in ownership.”260 And when they focus specifically on running covenants, they say that such covenants are “less ‘property like’ than easements and lie closer to the contract end of the property-contract spectrum.”261 Yet running covenants constitute property rights just as easements do. And if we understand why, we will appreciate even better how property concepts order private law. The last Section showed how property concepts help lay people and lawyers maintain familiar distinctions between in personam, revocable permissions for entry and in rem rights of entry. If we understand how land-related contracts and running covenants differ from one another, we’ll understand how property concepts order legal relations at the interface of property and contract.262

A running covenant constitutes a property-based solution to problems left unresolved by contract concepts. If there were no doctrine for running covenants, neighboring landowners could only restrain one another’s land uses by contract. Normally, rights in contract run in personam, and contractual obligations are usually not enforced as strictly as property rights are.263 In most circumstances, both of these legal presumptions make practical sense. Because contractual promises involve two or more parties, changes in circumstances can make it unexpectedly harder for one or both parties to perform than either side anticipated at contract formation. To be sure, such changes do not justify releasing parties from their contracts. But such changes can and often do justify limiting the remedies available for breach of contract.

But this contract-based template may not satisfy the wishes of people who live in a common development. When people buy into a development, they often want assurances that the neighborhood will not change. Because contractual obligations run in personam, ordinary contracts bind only parties to those contracts and not the successors who acquire lots from the parties who sign those contracts. And because it is relatively difficult to get

260 MERRILL & SMITH, supra note 17, at 983; see supra notes 251–254 and accompanying text.
261 MERRILL & SMITH, supra note 17, at 1028.
262 See Merrill & Smith, supra note 251, at 778 (drawing attention to the distinction between contractual relationships that run with the land versus those that run with life of the parties to the contract).
263 In particular, it is easier for a property holder to obtain an injunction to prevent ongoing interference with a property right than it is for the holder of a contract to obtain specific performance of the contract. Compare DOBBS, supra note 80, § 2.9(2)–(3), at 165–68 (injunctions against interferences with property), with id. § 12.8(2)–(3), at 808–10 (specific performance for breaches of contract).
specific performance of a contract, parties to a development restriction could not be totally assured that the restriction would be enforced if it were guaranteed only by an ordinary contract.

Running covenants overcome these problems. And they do so by converting land use-related contractual obligations into proprietary obligations. And once again, when the concept under study guides the conversion of contractual obligations into covenants, it facilitates social interactions of the type cherished in Progressive scholarship.

Concepts for contracts and property supply different normative guidance to obligations. When contract law makes promises enforceable, it focuses on the interests of the promisors. By contrast, property law focuses more on whether it seems desirable for the land uses covered by a covenant to be enforced after the parties who made the promised have relinquished their rights in the lots covered. As a result, property law abstracts from the specific parties who entered into the contract. It focuses instead on hypothetically-reasonable successors to the interests of the original covenanting parties. And since property rights institute in rem obligations, property law focuses more than contract law does on the effects of obligations on people who are not parties to the contract.

With that background, we can understand why and how running covenants constitute property rights. Running covenants facilitate use in the sense explained in Section V.A. Lehavi disagrees; he argues that a running covenant “seeks to secure or prevent a certain use” but does not enhance “the use of the asset.” Here, however, Lehavi assumes that use is the kind of use by which someone uses scissors to cut paper; he does not consider the possibility that use encompasses all purposeful and beneficial engagement with a resource. Yet an owner can derive rational gratification from living in a community designed in an artistic style he finds beautiful. An owner can also derive rational gratification from living in a community that is organized around a common plan of development. Historical sites, works by famous architects, and other landmarks can give a neighborhood a distinct character. An owner can derive rational gratification from living in a community with such a character. When someone deploys land to pursue one or more of these sources of gratification, she deploys the land for a use in this Article’s terms. To be sure, these uses are more passive than the uses one makes of land by growing crops on it or living on it. Nevertheless, use encompasses all purposeful and beneficial activity. Use covers not only active

265 LEHAVI, supra note 11, at 49; accord Merrill, The Right to Exclude II, supra note 37, at 4–5.
deployment or consumption but also passive enjoyment. More specifically, use encompasses (consistent with Progressive goals) enjoyment of a neighborhood maintained to encourage social interaction in a neighborhood made a community by owners’ coordinated land uses.

While we are considering whether running covenants facilitate the use of covered land, we need to reason practically. And practical reasoning considers not only the ways in which covenants might facilitate land use but also the ways in which it might restrict land use. Two concerns stand out. For prospective residents in a community, the main danger of a covenant is that it restricts their land uses. But that danger seems easy enough to avoid—with freedom of contract, notice requirements, and privity requirements. Since running covenants need to be opted into, any owner who buys into a neighborhood subject to such covenants believes that they have the “practical effect . . . to benefit the burdened land.” As long as prospective buyers have notice of covenants, they can decide for themselves whether they think they derive more use from the passive uses that covenants facilitate than the more active uses they restrict.

Since use is only justifiable when it is sociable, however, we need to consider also the effects of covenants on everyone outside the development covered by them. Running covenants create several concerns for the community at large. Such covenants may ossify land use; in the course of locking in land uses popular in the short term, they may make it harder for neighborhoods to keep up with changing tastes in the long term. Running covenants may also deny prospective buyers effective access to land; they may lock land into uses favored by some and render it inaccessible to others. Yet concerns like these do not undermine the case for running covenants. Such concerns require communities and their leaders to exercise further practical reason. Such concerns could justify limitations on the scope or duration of such covenants. The ossification problem can be addressed by a defense for termination in light of neighborhood change, and land-distribution problems can be addressed by public policy limitations.

When the concerns just described do not undermine running covenants, such covenants can enhance the use of land. When it does, the use-facilitating concept introduced in the last Part supplies a rough and ready formal strategy for enhancing such use. That concept focuses lawyers and decision-makers on an important question: when a person makes a promise involving the use of land, should the obligations that arise be regulated by rules of thumb and categories associated with interpersonal promises or

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266 STOEBUCK & WHITMAN, supra note 63, § 8.13, at 470.
with land? Running covenant doctrine addresses that question. To make clear that a land-related promise belongs more in property law than in contract law, it must be intended to run with the land, and it must also touch and concern the affected lots. The intent to run requirement ensures that the parties subjectively prefer that the obligations remain not in their personal capacities but instead run with ownership of the relevant land. The touch and concern requirement ensures that the substance of the promise seems objectively to relate not to the promisors but instead to the future use and enjoyment of the land affected.

Once a land-related promise seems a fitting candidate for a property right, the concept under study identifies the formal features that need to be added to the promise. An ordinary contractual promise constitutes a claim-right. Running covenant doctrine adds to that promise an immunity, because the holder of a running covenant is entitled to equitable protection stronger than the protection provided by contract law. And since running covenants are conceived of as obligations held by people in their capacities as the owners of the subject estates, it makes perfect sense that these immunized claim-rights are in rem rights. And to facilitate the kinds of land uses that running covenants promote, running covenant doctrine confers onto these proprietary rights institutional status. That status signals to neighbors that they are bound to common land uses not by contract but by more binding principles of property law.

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268 See STOEBUCK & WHITMAN, supra note 63, §§ 8.15 –.16, at 475–82.
269 Some authorities propose to do away with the touch and concern requirement. See, e.g., RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 3.1–.2 (AM. LAW INST. 2000); Susan F. French, Can Covenants Not to Sue, Covenants Against Competition, and Spite Covenants Run with Land? Comparing Results Under Touch and Concern Doctrine and the Restatement Third, Property, 38 REAL PROP., PROB. & TR. J. 267 (2003). Since this Article is analytical, I do not contend here that those authorities are wrong. But the account in the text identifies justifications for the touch and concern requirement that critics have not adequately considered.
271 See STOEBUCK & WHITMAN, supra note 63, § 8.13, at 469–73. To support their view that running covenants are not property rights, Merrill and Smith argue that such covenants are not in rem because “covenants impose no duties of forbearance on third parties.” MERRILL & SMITH, supra note 17, at 1028. I maintain that running covenants are in rem. Merrill, Smith, and I may disagree about whether running covenants are in rem because we attribute different meanings to in remness. For Merrill and Smith, in remness describes a characteristic whereby a right is held in relation to a broad and impersonal class of duty-holders. In my understanding (and Penner’s, and Birks’s), in remness focuses on how much or little information a prospective duty-holder needs to know about the prospective rights-holder and his conduct before she can determine whether she owes that rights-holder a duty. See supra section V.D.3. The running of covenantal burdens and benefits confirms my understanding of in remness but not Merrill’s and Smith’s.
D. Mortgages

The last Section showed how contract and property concepts differentiate the domains of contract and property. The principles at work in the last Section apply with equal force to mortgages. Functionally, a mortgage addresses a pre-commitment problem in contract law. The solution is to give parties a more credible pre-commitment device—via a property right.

At bottom, a mortgage constitutes a security interest for “performance of some obligation.” The lender/mortgagee has a preexisting claim-right to performance of the obligation. The mortgage “authorizes the lender[/mortgagee] to arrange for the sale of the [mortgaged] property if the borrower defaults on the loan . . . to recover the unpaid debt.”

These legal rights can perform the use-facilitating function recounted in Section V.A. Lehavi objects to this suggestion as well; he argues that a mortgage neither helps its holder use the resource nor exercise broad managerial authority to determine that resource’s uses. Yet mortgages give owners a new way to use their assets—as collateral expanding their borrowing power. Since expanded borrowing capacity expands the range of reasonably-gratifying life goals they can pursue, the use of an asset as collateral constitutes use in the purposeful and beneficial sense explained in Section V.A. Relatedly, mortgages facilitate the use of mortgaged resources by lenders—by empowering them to secure their loans more effectively than they could have in the absence of collateral. Of course, mortgages implicate use-interests in a third class of stake-holders, namely the third parties threatened by fragmentation or hidden encumbrances on property rights. But these concerns can be mitigated by appropriate doctrines—especially formalities rules notifying third parties that properties have mortgages on them.

Then, in the parameters in which mortgages seem likely to perform the function attributed to property rights, the concept introduced here supplies a template for performing that function. Because the collateral for a mortgage constitutes a separable resource, laypeople and lawyers may reasonably expect law and social morality to create proprietary obligations with it. And a mortgage constitutes such a proprietary obligation—because it constitutes an in rem and immunized claim-right.

The most important Hohfeldian relation created by a mortgage is a power, to foreclose upon default. But that power is protected by a claim-

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273 SINGER, supra note 66, § 11.5.1, at 560.
274 See LEHAVI, supra note 11, at 49.
right not to be interfered with in the exercise of the power of foreclosure. This claim-right is in turn reinforced by an immunity. When parties agree to a mortgage in a free bargain and the borrower/mortgagor defaults, the lender/mortgagee is entitled to foreclose. Although courts do consider equitable undue hardship arguments, those arguments constitute exceptions to a more basic rule. Ordinarily, “the role of the . . . court is to enforce the agreement between the parties [and] . . . not . . . intrude its substantive judgment as to whether or not the terms of that agreement were too severe,” and that rule entitles a mortgagee to an immunized claim-right. And the power, claim-right, and immunity all obligate in rem, as is shown by the fact that mortgages remain enforceable even when the mortgaged assets are transferred. And when a mortgage is recognized as a distinct and legitimate instrument in lending law, it acquires institutional status and performs the function expected of property.

CONCLUSION AND IMPLICATIONS

I have now completed the case study I promised to conduct. That study supplies an account of one particular property concept, prominent in Anglo-American common law. The intension of that concept can be delineated: In its focal sense, a property right refers to an in rem and immunized claim-right; given institutional status in law and social morality; in relation to a separable resource; to facilitate the productive, beneficial, and sociable use of that resource and other resources commonly proximate to it. Further study will need to be conducted to see whether this concept applies uniformly throughout Anglo-American law, whether in common law or beyond. But the concept does extend coherently to water rights and to four property doctrines frequently cited to show that property rights lack regular conceptual structure.

I hope that the foregoing study highlights the strengths and limitations of the conceptual views most prominent in contemporary property scholarship. Bundle methods are most helpful when delineating the precise obligations generated by property rights in specific recurring act-situations. Such views, however, also suggest that property concepts do not organize people’s dealings with rights in resources in recurring situations. That suggestion seems wrong. Revocable licenses and contracts restricting land use relate to things, but they are not property rights, and bundle views cannot explain why. Easements and legal interests in cotenancies are property rights,

275 See Restatement (Third) of Prop.: Mortgages § 8.2.
277 See Restatement (Third) of Prop.: Mortgages §§ 5.1–2.
and property concepts shape our judgments to this effect. Yet bundle views cannot account for these judgments—even though these doctrines have been cited as doctrines confirming bundle views. Scholars who favor bundle views need to clarify further why property can only be accounted for as a bundle of thing-related jural relations.

This Article has confirmed what it suggested at the outset about the castle metaphor and exclusion views. Not that the point needed confirming, but property rights come in many varieties besides rights as sweeping as the authority a lord enjoys over a castle. Leading exclusion views recognize as much, but this Article has identified other limits that apply even to carefully-specified exclusion views. Exclusion views are extremely valuable for studying ownership—as associated with land, chattels, or wealth. But ownership is not the only general concept influential in property law. Because exclusion views focus on ownership, they necessarily abstract from nonpossessory property rights and property law interests that (like revocable licenses) are not property rights. The concept and the methods introduced here offer a different perspective on those rights and relations. This concept and methods help us appreciate better: why easements and running covenants are property rights; why revocable licenses and contractual land-use restrictions are not such rights; and why normative goals associated with property might be furthered by regarding concurrent estates and nonpossessory rights even though they confer less authority than fees simple do.

This Article has also offered what I hope are helpful guides for further studies in Progressive property. It seems unproductive to argue that exclusive ownership is the only or the dominant institution for property in Anglo-American law. As this Article has shown, Anglo-American law seems to operate via at least two complementary general concepts: one for ownership, and another for property rights including not only ownership rights but also concurrent and nonpossessory rights. That latter concept of property needs to be studied far more than it has been to date. And in such studies, scholars who sympathize with the themes of Progressive property scholarship should consider whether property concepts can possess social functions. Of course, the particular concept studied in this Article is only one of many concepts that could be instituted to facilitate Progressive goals toward resource distribution and use. Different particular concepts could incorporate functions different from the ones in the concept introduced here. By the same token, different concepts may apply to classes of resources, and institute jural rights, different from the classes and rights applied by the use-facilitating concept studied here. Even with those qualifications, however, I hope that this Article’s case study has performed a valuable service. Even if Progressive scholars find unsatisfying some of the specific elements in the
concept studied in this Article, they may accept that property concepts must possess some features corresponding to those elements.

I also hope that all of the foregoing lessons provoke property theorists to explore further this Article’s two suggestions. Scholars need to consider far more seriously than has been done to date the possibility that there exists a general concept covering property rights weaker than ownership rights. Analytically, can other particular concepts, arising from different normative justifications for property, represent property rights like water rights, servitudes, and legal cotenancy interests? This Article focused on common law property rights for ease of exposition. Analytically, what happens when one resource in real life is subject to conflicting property concepts and regimes—in common law, in statutes or regulations authorized by statutes, and possibly in constitutional protections as well? Normatively, most of the heat in contemporary property scholarship comes from defenses for and critiques of ownership property. More light needs to be shed on how different normative justifications for property apply to rights like the limited, in rem and immunized claim-right traced in this Article.

I also hope that the foregoing case study confirms this Article’s second suggestion: at least some and maybe all concepts of property possess artifact functions. This suggestion also deserves further study. Do any particular concepts of property rights lack an artifact function? As this Article recognized, the function central in the concept studied here is just one of many possible functions around which property concepts might be organized. For similar reasons, different concepts of property may possess different features because they perform different functions. But around what specific functions are other extant concepts organized? How might the coverage of property and the jural relations it protects vary with the functions it makes central? In addition, as Section IV.E stressed, to be morally legitimate a property concept needs to serve the reason-based interests of the people who accept the concept. If other concepts of property possess different functions, do those functions supply the relevant concepts with legitimate authority, and if so how?

In case it needs saying, this Conclusion has raised more questions than this Article has answered. But one of the Article’s main suggestions is that current debates about property concepts need further clarification and better direction. This Article’s lessons should help clarify what prominent views on property need to do to engage with one another. Those lessons should also help delineate the most important aspects of property concepts. I will be satisfied if I have convinced readers that projects like these need to be pursued in further conceptual studies of property.