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EXCLUSION AND EXCLUSIVITY IN GRIDLOCK

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Exclusion and Exclusivity in *Gridlock*

Review Essay of
Michael Heller, *The Gridlock Economy:
How Too Much Ownership Wrecks Markets, Stops Innovations, and Costs Lives*
(New York: Basic Books, 2008).

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INTRODUCTION

Michael Heller earned respect among property scholars in his 1998 article *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*.¹ The conception of a “tragedy of the commons” had been popularized by Garrett Hardin in a 1968 article by that name. When ranchers have open access (a commons) to grass, their cattle tend to overeat it (the tragedy).² Harold Demsetz provided the canonical economic response to tragedies of the commons: private property. Exclusive rights of control, use, and disposition (“exclusive possessory rights”) encourage owners to internalize externalities associated with the overconsumption of resources held in common.³

Heller’s conception of the “*anticommons*” provided a counterweight against any tendency that this “commons” scholarship had to prescribe property rights as a cookie-cutter

* Professor of Law, George Mason University. Thanks to Tom Hazlett and Adam Mossoff for inviting me to prepare this Essay, and thanks to Adam Mossoff, David Schleicher, and Josh Wright for extremely perceptive criticisms of earlier drafts. This Essay benefited from being presented at the Levy Workshop on Law and Liberty at George Mason University and the 2010 conference of the Association of Law, Property, and Society at Georgetown University.

¹ 111 Harv. L. Rev. 621 (1998). See also Lee Anne Fennell, Commons, Anticommons, Semicommons, in *Research Handbook on the Economics of Property Law* (Kenneth Ayotte & Henry E. Smith eds., 2009); Stephen R. Munzer, The Commons and the Anticommons in the Law and Theory of Property, in *The Blackwell Guide to the Philosophy of Law and Legal Theory* 148 (Martin P. Golding & William A. Edmundson eds., 2005).

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

³ See Harold Demsetz, *Toward a Theory of Property Rights*, 57 *Amer. Econ. Rev.* 347, 348, 355-58 (1967).

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prescription for resource allocation disputes. Heller made concrete one important set of economic costs economists usually associate with exclusive possessory rights. As a counterweight to Hardin and Demsetz's grazing example, Heller made famous Moscow storefronts. In the decade after the U.S.S.R. collapsed, streetside kiosks sold far more goods than department stores in Moscow. This discrepancy was puzzling. The discrepancy existed because kiosks were not subject to as many general administrative requirements as department stores. The stores could not sell goods or services without getting prior approval of six different government agencies held over from the Communist era.⁴ These agencies illustrated an important danger associated with private property: When too many individuals have rights to exclude in relation to a resource, the resource may be *underused*.⁵

Heller extended his anticommons metaphor in the centerpiece of this Symposium, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives* [here, "*Gridlock*"].⁶ Heller's anticommons scholarship deserves credit for making concrete in law and economic scholarship the social costs associated with the fragmentation of property. *Gridlock* attempts to make the same costs accessible to a wide lay audience. It is not the case that "governments need only to create clear property rights and then get out of the way" (p. 18), Heller aims to show; in reality, "[w]ell-functioning private property is a fragile balance poised between the extremes of overuse and underuse." (P. 19.)

Most of the contributors to this Symposium have focused on whether or how anticommons and *Gridlock* principles apply to particular recurring disputes in different fields of

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

⁵ See *id.* at 624.

⁶ Citations to *Gridlock* will be provided in parentheses, and in text except when the cited text also makes assertions that need other citations.

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property and economic life. Yet *Gridlock* also prompts more general philosophical questions. In particular, what *is* private property, anyway?

I do not ask this question skeptically or sarcastically. Although *Gridlock* is targeted toward a popular audience, it propounds an approach toward property regulation characteristic of a prominent genre of law and economic analysis—"the *Cathedral*," the genre of scholarship inspired by Guido Calabresi and A. Douglas Melamed's taxonomy of property rules and liability rules.⁷ *Gridlock* applies that taxonomy in a manner that accentuates the positives and downplays the negatives associated with ad hoc government administration of individual property disputes. It is fair to read the book as aiming to popularize both the *Cathedral*'s property/liability rule framework and a pro-liability rule preference within that framework. Readers may benefit from a review clarifying the concepts and normative preferences Heller is asking them to embrace.

This Essay's thesis is as follows: The property conception that Heller assumes and applies is not consistent with the conception that informs ordinary social practices involving property and the private law of property. As *Gridlock* implicitly portrays social practice and private law, an owner has "property" in a thing if he has a right to exclude understood as a legal right to blockade others from using that thing if they do not acquire his consent. *Gridlock* discredits that assumed conception and proposes as an alternative the pro-liability rule *Cathedral* conception. In this conception, "property" consists of a right to exclude backed only by a *Cathedral* liability rule. The owner may not blockade others from commandeering his property, but if others do commandeer his property, he is entitled to market-value compensation for their occupation or dispossession.

⁷ Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972).

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

If one understands the background conceptions properly, *Gridlock* presents a mixed picture. In fairly "low tech" disputes, more often in the private law of property, many of *Gridlock's* prescriptions are quite sensible. Yet neither pre-theoretical social practice nor private law is as facile as *Gridlock* suggests. They already anticipate and avoid many of the gridlock problems Heller identifies.

Now, *Gridlock* seems far more interested in drug-patent licensing (pp. 49-78), telecommunications (pp. 79-106), and other "high tech" disputes. Such programs might present different cases on the normative merits, and the public law programs that address such disputes often apply to such assets conceptual priors markedly different from those found in ordinary social practice and the private law. Even so, ordinary social practice and the private law structure property as they do to fulfill some important normative imperatives. There are several, but the most important trade-off is this: When the law tries to maximize welfare, it risks jeopardizing background norms socializing people to respect others' free discretion to decide how to use their own assets. There are reasons for wondering whether much *Cathedral* scholarship and many public law programs are sufficiently attuned to this concern. *Gridlock*

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seems not to consider the concern adequately, either. Lay readers should discount the book's argument—and the method of analysis Heller is seeking to popularize—by the extent to which both blur out of focus the relations between property, freedom, and the moral conditions of order.

I. RESTATING *GRIDLOCK*

Let me begin by restating *Gridlock's* basic argument and a few representative illustrations. In *Gridlock*, Heller defines the anticommons as “any setting in which too many people can block each other from creating or using a scarce resource.” (P. 18.) Heller offers the anticommons as an antidote against a view by which “governments need only to create clear property rights and then get out of the way. . . . The anticommons perspective shows that the *content* of property rights matters as much as the clarity.” (Pp. 18-19.) To make the “anticommons” concept accessible to a broad lay audience, Heller introduces the idea of “gridlock,” which “arises when ownership rights and regulatory controls are too fragmented.” (P. 19.) One aim of *Gridlock* is simply to help readers to “spot and name gridlock” when it occurs in everyday life. (P. 187.) The other aim is to introduce readers to the wide variety of tools that might be used to “unlock the grid” – involving “prevention,” “treatment,” or “alternative medicine” (p. 191), by “individual, joint, [or] state” actors. (P. 21.)

Gridlock applies this basic formula to a wide range of examples in different areas of economic regulation, especially pharmaceutical patent policy (pp. 49-78) and telecommunications (pp. 79-106). Although the observations that follow in this Essay are relevant to those areas as well, let me focus here on examples closer to the property law typically associated with a first-year property course. Since we are interested primarily in the conceptual underpinnings of Gridlock's argument, it is helpful to abstract from areas that raise distracting

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industrial-policy complications and to focus on areas where law and scholarship make the concepts most concrete. Moscow storefronts get their day (pp. 143-64), but so do a few other fairly simple examples.

One consists of tolls along the Rhine River. For centuries, boat traffic along the Rhine river languished because, as put in “one boatman’s plaintive song, The Rhine can count more tolls than miles.” (P. 20.) “Too many tolls,” Heller concludes, “mean too little trade.” (P. 3.) Many reviewers conclude that this example is Heller’s most vivid metaphor for gridlock. “Today,” David Bollier asserts, “there are ‘countless ‘phantom tollbooths’ that use property rights to extract tribute from the stream of commerce while contributing very little in return.”⁸

Heller illustrates his argument with early 20th-century overflight gridlock, in a section titled “The Lighthouse Beam.” (P. 27.⁹) Heller explains the *ad coelum* principle to a lay audience:¹⁰ “No one can mine under your land or build an overhanging structure without your permission.” (P. 27.) Construing this principle literally, Heller asks, “If you control the air thirty-five feet below and above the ground, why not at thirty-five thousand feet down and up?” (P. 27.) By that construction, any “crossing [of] each column without permission is a trespass.” (P. 28.) Owners would have the right to blockade lighthouse beams traveling over their properties, an airplane could not “cross innumerable columns of air” without consent. “Air travel would be a missing market, and all the advances flight has brought would be difficult to imagine.” (P. 28.)

⁸ David Bollier, “The Tragedy of the Anticommons (reviewing *The Gridlock Economy*) (<http://onthecommons.org/content.php?id=2088>).

⁹ The “lighthouse beam” refers to a passage from a 1928 poem Heller reproduces p. 27.

¹⁰ *Ad coelum* refers to the Latin maxim *cuius est solum, eius est usque ad coelum et ad inferos*: “To him to whom the soil belongs also belongs up to heaven and down to the depths.” See Thomas W. Merrill & Henry E. Smith, *Property: Principles and Policies* (175 (2007)).

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Another example consists of “[h]eir property’ gridlock.” (P. 20.) The number of farm-owning African American families dropped from 1 million in 1920 to 19,000 today. (P. 122.) Among other explanations, Heller identifies one legal culprit: fragmentary inheritance shares, which he calls “Share Choppers.” (P. 121.) Mid-century, many African American farmers “had good reason to be suspicious of local lawyers and so died without wills. With each generation, the farm split among multiple heirs.” (P. 123.) As co-owning descendants multiply, “people move away and family members have ever weaker ties to each other and to the land, creating practical problems that become irresolvable.” (P. 123.) The most likely legal response is a partition sale, in which a court compels the sale of the land and distributes the profits to the co-owning family members in proportion to their fractional shares.¹¹

One of *Gridlock*'s most practically important examples is “block parties,” the phrase Heller uses to discuss efforts by local governments to redevelop underutilized neighborhoods. “Block parties” refer to a situation in which a minority of owners in a local urban neighborhood practice “minority tyranny” and refuse to sell their properties to a developer who wants to build a large and higher-value commercial venture where their homes are. (P. 113.) Early in a city's life cycle, it may make sense for a neighborhood to consist primarily of apartments or residential houses. As the city matures, however, “[l]and becomes more and more fragmented, times change, and the scale of ownership no longer matches the optimal scale of use.” (P. 111.) When a “private developer is willing to build on behalf of a shopping mall or auto factory (or the Times),” he offers significant benefits, but he needs a “fast timetable” and “assembled, available land right away.” (P. 111.) “Redevelopment” occurs when the government breaks through the

¹¹ See Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 *Yale L.J.* 549 (2001).

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block party gridlock with eminent domain. The government condemns private lots and assigns ownership of them to the developer. To illustrate, Heller relies on the New York Times' efforts to acquire and redevelop a block in Times Square, Manhattan. (See pp. 110-11.) Heller presents the Times Square redevelopment as a mixed blessing. On one hand, eminent domain helped create "an architectural delight," and it helped unlock "[u]p to \$165 million in real estate assembly value" stored in the lots when they were separately owned. (P. 111.) On the other hand, eminent domain was a "crude solution," it encouraged the Times not to negotiate with owners in the targeted site area, and it created a substantial possibility that tenants in the condemned area would get only "negligible" compensation for their property interests. (Pp. 110-11.) Heller ultimately concludes that redevelopment is worth the risk of abuse, however. Some owners held out against all the assemblers, and assemblers held out against one another. "Until we come up with a better solution, eminent domain is the best answer cities have to the costly problem of block parties." (P. 115.)

II. EXCLUSION IN *GRIDLOCK*

So *Gridlock* has a thesis that seems straightforward, and it has vivid examples accessible to a lay audience. One of the dangers of popularizing academic work, however, is that important qualifications or theoretical reservations get lost in translation to popular prose. Whenever a work makes general claims about property theory, it is imperative to ask how the work defines "property." As far as I can make out, *Gridlock* does not discuss this issue systematically.¹²

¹² Although Chapter 2 sets forth a "lexicon" of relevant terminology, it does not define "property." See pp. 23-48. The index refers readers interested in "property: content of" to two page ranges, neither of which define property. See pp. 18-19, 147.

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

In a commons, by definition, multiple owners are each endowed with the privilege to use a given resource, and no one has the right to exclude another. When too many owners have such privileges of use, the resource is prone to overuse—a tragedy of the commons. Canonical examples include depleted fisheries, overgrazed fields, and polluted air. In an anticommons, . . . multiple owners are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use. When there are too many owners holding rights of exclusion, the resource is prone to underuse—a tragedy of the anticommons.¹³

In the commons, resources are underpropertized because resource users lack rights to exclude; in the anticommons, resources are overpropertized because too many resource users have rights to exclude. *Gridlock* assumes the same spectrum and understanding, though it does so using not the term of art “exclusion” but the more colloquial conception “blockade right.” Thus, in *Gridlock*'s Introduction, Heller states his thesis as follows: “Sometimes we create too many separate owners of a single resource. Each one can block the others' use. If cooperation fails, nobody can use the resource.” (P. 2.) Later, he refers to badly-drawn property rights as rights to “block access to a resource” or “phantom tollbooth[s].” (P. 4.) His use of airplane-overflight disputes certainly fits the same picture.

When Heller assumes property to be an owner's right to blockade non-owners from his thing, he is using a conception of property typical across a broad range of law and economic scholarship on property. In their *Cathedral* article, Calabresi and Melamed propose two alternative remedial schemes for regulating conflicts over entitlements. When Marshall has a

¹³ Heller, *supra* note 1, at 623-24.

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“property rule,” “someone who wishes to remove the entitlement from [him] must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by [Marshall in his capacity as] the seller.”¹⁴ By contrast, “[w]henver someone may destroy [an] initial entitlement if he is willing to pay an objectively determined value for it, [the] entitlement is protected by a liability rule.”¹⁵ In other words, property rules confer on owners rights to exclude from their assets anyone who is not willing to meet their terms for alienating their assets. Liability rules confer on owners rights to exclude from their assets anyone not willing to pay market value damages as determined by a public trier of fact.¹⁶ I assume those definitions for the rest of this Essay, and I call them together the “property/liability rule scheme.” Under standard *Cathedral* analysis, legal decision makers should assign property or liability rules to parties with interests in an asset depending on which rules are most likely to maximize the net welfare gains from coordinated use of a resource after discounting for transaction costs and other social losses associated with such use.

In scholarship, many law and economics scholars apply this framework in a manner that accentuates the advantages of liability rules more than social practice and the private law of property law usually do. When Calabresi and Melamed conceived of “liability rules,” they propounded a term that intuitively fits with what lawyers understand about *some* legal entitlements and remedies, especially in the law of accidents and eminent domain. Yet “liability rules” could conceivably apply to a much broader range of property disputes, for example

¹⁴ Calabresi & Melamed, *supra* note 7, at 1092.

¹⁵ *Id.* at 1092.

¹⁶ See Eric R. Claeys, *The Right to Exclude in the Shadow of the Cathedral: A Response to Parchomovsky and Stein*, 104 *Nw. U. L. Rev.* 391, 406-08 (2010).

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disputes over possession and ownership of land.¹⁷ Ian Ayres, in separate collaborations with J.M. Balkin¹⁸ and Eric Talley,¹⁹ has stressed that liability rules have information-forcing advantages commonly associated with options. Liability rules do have these advantages, but the advantages come through most strongly in the realm of contracts—where parties come to bargain with each other consensually—not in the fields of property or property torts—where the law presumes the parties are strangers and one may be aggressing on the others' property.²⁰

In this Essay, I refer to that presumption as the “pro-liability rule *Cathedral* presumption” toward property. With apologies for the cumbersome terminology, let me explain why I use it. The pro-liability rule *Cathedral* presumption is not accepted by all. Many economists understand property in terms quite close to the conception quite close to social practice and basic law. For example, Armen Alchian has defined property as “the exclusive authority to determine how a resource is used.”²¹ Although Alchian is an economist and not a lawyer, for reasons we shall see he defines property in a manner grounded much more closely in law than have Calabresi, Melamed, or many other law and economics scholars. In addition, if we move from economists to law and economics scholars, not all of the latter apply the property/liability rule scheme to favor liability rules more than current private law does. Richard Epstein, for example, insists on “the dominance of property rules on liability rules” in ordinary cases, “except in those circumstances where some serious holdout problem is created because circumstances limit each

¹⁷ See Carol M. Rose, *The Shadow of the Cathedral*, 106 *Yale L.J.* 2175, 2177-82 (1997).

¹⁸ Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 *Yale L.J.* 703 (1996).

¹⁹ Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 *Yale L.J.* 1027 (1995).

²⁰ See Rose, *supra* note 17, at 2182-88.

²¹ See Armen A. Alchian, *Property Rights*, in *The Concise Encyclopedia of Economics* (David R. Henderson, 2008), <http://www.econlib.org/library/Enc/PropertyRights.html>.

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side to a single trading partner.”²² Still, Calabresi, Melamed, Ayres, and Ayres’ co-authors all represent a significant constituency in law and economics scholarship. They assume that property rights confer blockade rights and that such rights create huge holdout risks. For different reasons, they suggest, in practice, the costs of liability rules are not likely as great as the costs of these holdout losses. To limit the extent to which blockade property rights diminish welfare, they limit the rights to trigger only liability rule remedy protections. Liability rules prevent owners from holding out by letting public officials determine independently the price at which a reasonable owner would cash out his blockade rights. The term “pro-liability rule *Cathedral* presumption” reflects that mixed conceptual and normative approach toward property.

III. EXCLUSIVITY IN PRIVATE PROPERTY LAW

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

A. Property As an Interest in Determining Exclusively the Use of a Thing

Let me begin by restating here a conceptual account of property propounded elsewhere.²³ This account is grounded in several observations about human social interactions that I must assume here.

²² Richard A. Epstein, A Clear View of *The Cathedral*: The Dominance of Property Rules, 106 Yale L.J. 2091, 2092 (1997); accord Henry E. Smith, Property and Property Rules, 79 N.Y.U. L. Rev. 1719 (2004).

²³ The following account draws on J.E. Penner, The Idea of Property in Law 7-104 (1996); Eric R. Claeys, Property 101: Is Property a Thing or a Bundle?, 32 Seattle U. L. Rev. 617, 631-38 (2009) (reviewing Merrill & Smith, *supra* note 10); Larissa Katz, Exclusion and Exclusivity in Property Law, 58 U. Toronto L.J. 275 (2009); Adam Mossoff, What Is Property? Putting the Pieces Back Together, 45 Ariz. L. Rev. 371 (2004).

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In most societies in which Western legal systems are employed, social norms and legal rules apply to a class of members who regard one another as equal in important respects. They are equal in the senses that they all have individual powers of agency, choice, and planning. Each member uses those powers to pursue a mixture of different “interests.” Interests refer to individual goods that (psychologically) attract and (normatively) justify people to pursue them.²⁴ Some of these interests are largely self-regarding, like health. Others are both self-and other-regarding. If an individual serves as president of a private association, he pursues individual interests (practicing managerial skills and enlarging his reputation) and almost certainly also social interests (taking satisfaction at his associates profit from the association's accomplishing its ends). Different societies (or, different individuals within a liberal society that tolerates a healthy degree of value pluralism) may justify interests and their pursuit of interests in different foundational approaches to practical normative reasoning—among others, autonomy, virtue, happiness, or utility.²⁵

Although different individuals may justify interests with different foundations, social concepts order how members of the same society interact with one another. Social concepts lock in community conventions settling normative disputes about interests. Those conventions order individual society members' concurrent individual pursuits of individual or common interests. When a society member thinks he has an interest commonly and authoritatively held to be valid,

²⁴ See Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* 33-34 (1984); Joseph Raz, *On the Nature of Rights*, 93 *Mind* 194, 208-10 (1984). Penner explains the role of “interests” in a tradition drawing on the scholarship of A.M. Honoré and Joseph Raz *supra* note 23, at 32-63. I explain how their usage accords with the writings of influential medieval natural law jurists in Eric R. Claeys, *The Private Law and the Crisis in Catholic Legal Scholarship in the American Legal Academy*, 7 *J. Catholic Soc. Thought* 253, 256-57 (2010) (book review).

²⁵ Penner assumes that interests can further autonomy in relation to a wide range of ultimate normative foundations. See Penner, *supra* note 23, at 49-50. Mossoff suggests that these concepts are associated more contingently to Enlightenment natural rights justifications for labor and use. See Mossoff, *supra* note 23, at 377-80.

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he feels entitled to assert it and expect others to get out of his way while he does. Others, by contrast, recognize that they are obligated to get out of the way.²⁶

Social concepts order social relations by signaling how far different individuals' interests run in commonly-repeating act situations. Oversimplified somewhat, by some convention—customary, political, or otherwise—members of a community come to agree that they are all entitled to pursue interests within generally-set parameters, for generally-agreed-on ends, in commonly-repeating but generally-describable factual circumstances. Such conventions are “rights.” When a society member asserts a right within its agreed-on parameters and ends, he expects that he need not provide normative reasons to others why he is entitled to behave as he is or why they must refrain from interfering with him. Rather, simply by asserting his right, he provides others with sufficient reason to exclude themselves from the course of action he intends to satisfy the interest grounding his right. If, however, the right-claimant's listeners believe that he lacks an interest, or he is pursuing it in a context in which neither the interest nor the right takes priority, they will probably find the right asserted insufficient as a reason for excluding themselves from the actions they were contemplating. They will probably resist, and legitimate disagreement and conflict will arise between the right-claimant and the right-denier.²⁷

If this scheme describes familiar social practices tolerably accurately, in social practice and private law, property consists of a conceptual right instituted to secure a normative interest in

²⁶ At least, if those others want to remain in good standing in the community. I do not mean to suggest that all individuals in a society always respect others' interests. Here, the commonsense saying “Hypocrisy is the tribute vice pays to virtue” teaches a great deal. Assume an aggressor beats up a victim. If he claims nothing obligated him to refrain from attacking his victim, public authorities will deem him a sociopath or the most culpable sort of wrongdoer. More often than not, aggressors intuit as much, pay lip service to authoritative norms, but deny they violated them. So the aggressor claims instead that he acted in self-defense or in response to provocation.

²⁷ See Penner, *supra* note 23, at 7-22, 48-49.

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determining exclusively the use of an external asset.²⁸ Normatively, the core of property consists in “use” of an “external asset.” Different individuals may assert many legitimate normative interests in engaging purposefully with external assets—to integrate those into broader plans of action individuals set for their own lives. Individuals may appropriate land to have shelter, gather food, build a dwelling to raise and ground a family, run a club, engage in commerce, or so on. Each of these “uses” of land is legitimate and furthers particular individual interests. Since different individuals may pursue different interests, however, or since the same individual may pursue different interests in different situations or at different stages of his life, it is necessary that common norms protect individuals’ claims not only to *use* external assets but also to *determine* the assets’ uses in relation to how they perceive their needs and interests. And since property relations are social, these domains of free use determination must be *exclusive*.

In other words, property serves several concurrent social functions. When one individual is acting within domain of use determination that the norm-setting authorities have deemed rightful, the legitimacy of his right gives him sufficient reason to exclude others who interfere with his rightful discretion. If Taney wants to build on Marshall’s land and Marshall says “Stay off my land,” both know or should know that Marshall’s command is sufficient reason for Taney to stay off. Ordinarily, it does not matter why Marshall wants Taney to stay off, or how Marshall means to use his land; Marshall’s “property” in his land signals to Taney that Taney cannot bring the land into his interests without first convincing Marshall that doing so is in Marshall’s interests.

²⁸ See *id.* at 49-51, 68-75.

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Yet property does not entitle owners to exclude absolutely, with no considerations for the reasons why non-owners might want to enter or engage with their land; “property” instead institutes a series of presumptions, shifting the burden depending on the circumstances. So when Marshall says “Stay off my land,” in more elaborate terms Marshall is saying something like the following: “I am rightfully entitled to decide how this land is used, and I am inclined to repel your entry as an interference unless you have a generally-respected interest in using my land trumping my ordinary entitlement.” Taney might be able to satisfy that challenge.

Assume Taney means to commandeer Marshall's land temporarily to take shelter from a life-threatening or property-destroying storm. Unconsented-entry norms are not designed for claims like Taney's. General social norms prescribe a general settlement holding that the general domain of control ordinarily associated with private property gives way. That domain furthers use interests, but use interests should give way when non-owners face great jeopardy to more urgent interests in preserving life or preventing the total destruction of property.²⁹ So the use interest to which Marshall appeals is implicitly defeasible. It gives way for Taney to pursue his more urgent interests in life, bodily security, and the preservation of his property from total destruction.³⁰

²⁹ See *Ploof v. Putnam*, 71 A. 188 (Vt. 1908); Claeys, *supra* note 16, at 401. *Ploof* confirms as much by teaching two doctrinal lessons: The boater has not only a privilege to commandeer the land owner's dock but also a power to commandeer, a power to repel resistance by the owner, and a right to sue him for trespass to chattels if the latter's resistance harms his boat.

³⁰ Provided also that the entrant uses the owner's property with reasonable prudence in the emergency and pays compensation for any damage he inflicts. See *infra* note 80 and accompanying text.

The understanding I set forth in this paragraph may differ substantially from Penner's account of property, which stresses exclusionary reasons for actions with fewer qualifications than I have suggested here. See Penner, *supra* note 23, at 7-22. Those differences will need to be explored elsewhere.

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B. On Exclusivity and Bundles

Some readers may wonder how the definition I am restating here relates to another conception of property, as a bundle of rights or sticks. “According to this view, it is misleading to talk of ownership of any object; one can only talk of owning a number of distinct rights with respect to that object.”³¹ The bundle conception can be understood in several different ways. Although space prevents us from running down all the different usages, let me compare my exclusive use-determination conception to two representative understandings of the bundle.³²

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

In this sense, however, the bundle does no work to say whether a subsidiary right is a subsidiary of a *property* right. Assume we have a pie made with Italian pizza dough, ground beef, onions, cheddar cheese, tomatoes, and taco seasoning.³³ If we are sure that this pie belongs conceptually in the class “pizza,” a “bundle of slices” conception specifies that any slice of that

³¹ Edward H. Rabin et al., *Fundamentals of Modern Property Law* 1 (5th ed. 2006). Accord American Law Institute, *A Concise Restatement of Property* §§ 5-6 (2001) (declaring that owners may have many different legal or equitable interests in land comprising “varying aggregates of rights, privileges, powers and immunities”).

³² For reasons of space, the following discussion does not consider other and more elaborate defenses of the bundle conception. See, e.g., Stephen R. Munzer, *A Theory of Property* 22-36 (1990); Margaret Jane Radin, *Reinterpreting Property* 166-90 (1993); Richard A. Epstein, “The Disintegration of Intellectual Property? A Classical Response to a Premature Obituary,” 62 *Stan. L. Rev.* 455 (2010); Hanoch Dagan, “Property: Values and Institutions” (forthcoming 2011) (chs. 2 & 3, manuscripts on file with author).

³³ Elaborating on Claeys, *supra* note 23, at 632-33.

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pie is also pizza—no matter what shape the slice is, or how small it is. Yet the bundle of slices conception cannot answer the prior question whether that pie is quintessentially a “pizza.”

Maybe this pie has all of the constitutive characteristics of a “pizza” because it has pizza dough, tomatoes, and cheese; maybe the taco seasoning and the cheddar cheese make this pie a “Mexican pizza,” in a class different from “pizza.”

The same ambiguity carries forward to property law. Consider again the relation between property rights and a non-owner's claim of necessity. Ordinarily, the right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”³⁴ The bundle conception cannot explain why that right happens not to be in the bag when a non-owner asserts a privilege of necessity. The exclusive use-determination cannot explain completely, either, for the ultimate issues are normative and not conceptual. Yet the latter conception *does* have an advantage. If property consists of a socially- and legally-recognized normative interest in determining the use of a thing, the interest is presumptively general but—by its own internal justification—it is also defeasible when other norms take priority. If an emergency threatens to kill Taney or destroy his property, Marshall's presumptive interest in determining the use of Blackacre gives way. Even though the comparison of Marshall and Taney's interests is normative, the exclusive use-determination conception integrates the normative into the conceptual. The most ecumenical version of the bundle conception, by contrast, does no work to explain how the necessity exception is justified by or relates to the normative interest that grounds property.

³⁴ *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

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Now, many property scholars might respond that the foregoing example confirms one of the main points of the bundle—that even the seemingly-sacrosanct right to exclude is qualified for normative reasons. In this view, the whole point of the bundle is to clarify that property rights are more contingent, and contingent on a wider range of norms, than judges commonly assume. This response points to a more extreme rendition of the bundle conception, in which “property is a structural composite, *i.e.*, that its nature is that of an aggregate of fundamentally distinct norms.”³⁵ To appreciate the problem with this conception, consider a structurally-composite pizza—say, a pie that is three-quarters pizza dough, marinara sauce, and mozzarella cheese, but one-quarter lasagna noodles, hoisin sauce, and cheddar cheese. If someone claims that the whole is a pizza, she is trading on the fact that three-quarters of it is to cover over the fact that one-quarter clearly is not. Conceptually, it is more accurate to say that three-quarters of the pie is a pizza and the other quarter is something completely different.

In its most controversial sense, the “bundle of rights” conception leaves similar ambiguities in relation to property. To illustrate, consider the landmarks law under which just compensation was demanded in *Penn Central*.³⁶ General nuisance common law principles leave land owners free to extend their buildings as they see fit; their structures may not emit substantial pollution, but the owners are not liable if the buildings cast inconvenient shadows or are unsightly.³⁷ New York City instituted a landmarks law taking city policy in a different direction. The City's landmarks law gave a preservation commission discretion to designate as a landmark any property it determined in its discretion to have “a special character or special historical or

³⁵ Accord J.E. Penner, The ‘Bundle of Rights’ Picture of Property, 43 UCLA L. Rev. 711, 741 (1996).

³⁶ See *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

³⁷ See, e.g., *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So.2d 357 (Fl. D. Ct. App. 1959); Eric R. Claeys, Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights, 85 Notre Dame L. Rev. 1379, 1390-91 (2010).

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aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state, or nation.”³⁸ When a property is so designated, the owner must not only maintain its historical or aesthetic features but also submit to preapproval of any changes he proposes to make to the architectural features of structures on it.³⁹

Set aside momentarily the normative merits of landmark schemes. Conceptually, such schemes raise questions about whether the restrictions they enforce are compatible with the conception of property that informs most social practice and private law. That inquiry turns on at least two determinations. One asks whether a landmark scheme may be justified as a *property* regulation of property—specifically, on the ground that the law’s aesthetic interests can be understood as enlarging the powers all owners and would-be owners in a community to use and enjoy their own lands in an environment ennobled by distinguishing landmarks. Some have assumed that local communities may reconfigure property norms to accord with distinct local political judgments about aesthetics,⁴⁰ in which case “property” can cover one owner’s claim to enjoy aesthetic benefits from another’s lot. Others have suggested that aesthetic restrictions cannot be justified as harm-prevention measures but only as moral paternalism,⁴¹ in which case “property” cannot cover those claims to aesthetic enjoyment. Conceptually, I incline toward the former view. A well-drawn set of preservation restrictions can be pigeonholed as property regulations. If properly drawn, such restrictions restrain each local owner’s active land uses, to enlarge his interest in passive uses created when he enjoys the environs created by restrictions on his neighbors’ development. Normatively, I doubt such restrictions lend themselves to sound

³⁸ N.Y.C. Admin. Code, ch. 8-A, § 207-1.0(n) (1976), quoted in *Penn Central Transp. Co.*, 438 U.S. at 110.

³⁹ See N.Y.C. Admin. Code, ch. 8-A, §§ 207-4.0 to -9.0, cited in *Penn Central Transp. Co.*, 438 U.S. at 112.

⁴⁰ See Scott Hershovitz, *Two Models of Tort (and Takings)*, 92 Va. L. Rev. 1147, 1168 n.56 (2006).

⁴¹ See, e.g., Larry Alexander, *Plastic Trees and Gladiators: Liberalism and Aesthetic Regulation*, 16 *Legal Theory* 77 (2010).

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policy. Such schemes end up restraining many legitimate uses of land, more often than not by poor and middle-class owners effectively excluded from a community, to make land use accord with the tastes of a few snobs.⁴² Yet an unjust property regulation still belongs in the family of property regulations.

The second determination, however, requires that a landmarks scheme be properly drawn in the sense that it be specific and generally-applicable. Again, in pre-legal social practices and private law, “property” and other categories of foundational normative interests presume that citizens stand in relations of normative equality to one another. One of the requirements of normative equality is that norms declare and enforce the same general expectations on how different individuals pursue the same normative interests. So for a landmarks scheme meaningfully to enforce “property” norms that owners claim in the aesthetic “use” of their neighbors’ properties, it must delineate generally-acceptable and specifically-harmful uses of property prospectively and tolerably clearly. In practice, I doubt most landmarks schemes satisfy that test. As in the scheme challenged in *Penn Central*, most landmarks schemes allow landmarks officials to make *ad hoc* decisions.⁴³ Now, when the bundle conception declares the conceptual point that a structural composite of norms can count as property, it makes seem “property” a composite of general development rights (embodied in nuisance law) subject to *ad hoc* vetos implementing preservation and aesthetic norms (embodied in the landmarks scheme).

⁴² See Eric R. Claeys, Takings, Regulations, and Natural Property Rights, 88 Cornell L. Rev. 1549, 1615-18 (2003); see, e.g., Penn Central Transp. Co., 438 U.S. at 117-18 (reporting how the New York City landmarks commission rejected the plans of Penn Central Transp. Co. to build on the grounds that the plans constituted an “aesthetic joke”). For more sympathetic views of preservation schemes, see Carol M. Rose, Preservation and Community: New Directions in the Law of Historic Preservation, 33 Stan. L. Rev. 473 (1981); Mendes Hershman, Critical Legal Issues in Historic Preservation, 12 Urb. Law. 19 (1980).

⁴³ See, e.g., Penn Central Transp. Co., 438 U.S. at 117 (reporting how the landmarks commission stated, “[We have] no fixed rule against making additions to designated buildings-- it all depends on how they are done.”).

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Judging by the standards of social practice and the private law of property, however, the first portion counts as conceptual “property” but the second does not.

C. Property in Social Practice, Private Law, and Public Law

As the discussion of *Penn Central* suggested, the foregoing analysis may be criticized on another ground: My definition of property defines out of “property” many public regulations that are conventionally taught as and assumed to be “property” regulations.⁴⁴

Yet my definition of property is narrower: Property consists of a normative interest in determining exclusively the use of things primarily *in pre-legal social practice and in private law*. Here, I acknowledge there are classification problems. A few private-law decisions might be classified better as “public law” decisions. For example, *State v. Shack*⁴⁵ could be read as declaring a general limitation on a landowner's possessory interest in control (i.e., land owners may not prevent government-assisted lawyers and caseworkers from entering their lots to contact migrants residing on the land).⁴⁶ On that reading, the case accords with and does not undercut property understood as a normative interest in determining exclusively the use of a thing. Yet the case could also be read as making the possessory interest in control subject to general *ad hoc* case by case utilitarian interest-balancing.⁴⁷ That construction would narrow the use determination inherent in property ownership to the point of extinction. Conversely, many public statutes and some regulatory schemes count for my purposes as “private law.” Public laws and regulatory schemes can complete the concept of property latent in social practice and the private law, if they specify the use determination associated with property property in a

⁴⁴ I am grateful to David Schleicher for encouraging me strenuously to consider this objection.

⁴⁵ 277 A.2d 369 (N.J. 1971).

⁴⁶ See *id.* at 374.

⁴⁷ See *id.* at 373-74.

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general and prospective way, and do so while claiming to enlarge the concurrent interests of all owners and would-be owners to determine the uses of their property. Conveyancing statutes, recordation statutes, and commercial statutes regulating the sale of property all fit this bill. So can generally-applicable restraints on the sale of property (anti-discrimination housing statutes) and generally-applicable restraints on use protecting others from annoying uses (basic zoning distinctions between residential, commercial, and heavy industrial use).

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

Some might claim that the landmarks scheme litigated in *Penn Central* and other similar schemes are the rule and not the exception. My definition refers to the “Old Property,” which focuses on establishing negative liberties, the argument runs, while contemporary public law makes dominant the “New Property,” which creates positive entitlements to provide security to entitlement holders.⁴⁸ Yet “we do not revise our boundaries between bodies of law just because we can, or because doing so suits our favorite theory. We cannot decide, as it were, to drop the category of [private property] as uninteresting or unimportant just because it would be more convenient” to legitimate highly-discretionary land-use regulatory programs or other public

⁴⁸ Charles Reich, *The New Property*, 73 *Yale L.J.* 733 (1964).

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property programs.⁴⁹ Conceptually, the more honest approach is to admit that different fields of American “property” writ large embody different conceptions of property, and that in some cases the law writ large tolerates a healthy amount of dissonance between those conceptions. Consider how Carol Rose relates eminent domain back to the expectations owners have about ownership from the law of trespass: “The state may have an ‘option’ of sorts over your property, but any such option is so broadly but thinly applicable that perfectly sensible people pay little attention to it in advance. . . . [I]f your property is taken by eminent domain, it is apt to be a kind of surprise, hitting you the way an accident hits you; it is not something you thought about in advance.”⁵⁰ More generally, many government powers to deny or permit uses on a case-by-case basis may count as “property regulations” according to conceptions of “property” embodied in eminent domain statutes and other public law schemes touching on property. In social practice and in basic private disputes and relations, however, owners disregard the possibilities declared by these public law schemes. They assume the conception I set forth here until the government and parties who want the government to intervene intrude public law conceptions of “property” to preempt pre-legal and private law relations.

IV. GRIDLOCK IN PRIVATE PROPERTY LAW?

Gridlock suggests that there are many anticommons problems in practice, and that it is crucial that you should learn to “spot gridlock” and then “feel confident tackling it in your roles as citizen, voter, advocate, and entrepreneur.” (P. 187.) If the previous Part described property tolerably accurately, however, social practices and private law have already hardwired “property” to anticipate and head off gridlock problems. On one hand, many disputes that seem

⁴⁹ Jules Coleman, *The Practice of Principle* 36 (2001).

⁵⁰ Rose, *supra* note 17, at 2181.

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to present property problems do not, because the right to blockade in the problem is not a property right in any sense in which social practice or law understands property. On the other, in many disputes that do involve property, property's connection to use determination gives property built-in internal reasons to ratchet down property's exclusion when exclusion seems practically likely to interfere with use.

A. Phantom Tool Booths

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

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

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B. Moscow Storefronts

The same discrepancy repeats itself in the Moscow storefront example. Let assume with Heller that Moscow kiosks outperformed Moscow storefronts because of regulatory gridlock.⁵¹ On that assumption, Moscow regulators were not asserting rights to exclude justified by their tendency to protect the city or anyone else's interest in using neighboring land. The situation might be different if regulators were enforcing basic zoning district boundaries. Those boundaries would embody and specify the limitations department stores must accept on the free exercise of their own property rights to make their own use interests accord with the concurrent use interests of neighboring land owners. Nor would it necessarily be damning if regulators had some administrative discretion in permitting, waiving restrictions, granting variances, or issuing one of these rulings on certain conditions, though here context would matter considerably. Regulators could still exercise such discretion if it was being exercised in the service of making the department stores' uses accord with the uses of neighbors, and if the discretion was applied in such a manner that the substantive policies being enforced were knowable and predictable in advance.⁵² As Heller describes the actions of the Moscow regulators, however, they exercised *ad hoc* discretion to collect bribes. (See pp. 152-53.) The regulators were not enforcing property rights in any meaningful sense, and one does not need to use terms like "anticommons," "hold-

⁵¹ Brian Sawers has argued (convincingly, in my judgment) that the storefronts' problems were attributable to other causes, particularly shortage of capital and corruption in Moscow government offices. See *Reevaluating the Evidence for Anticommons in Transition Russia*, 16 *Colum. J. Eur. L.* 233 (2009).

⁵² Such discretion would constitute an example of what has been called law administration by "precedent" or application of an "authoritative example," as opposed to administration by application of "legislation" or "authoritative general language." See H.L.A. Hart, *The Concept of Law* 123-26 (1964). Modern American scholarship prefers to speak of standards and rules, respectively, see, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *Duke L.J.* 557 (1992). I prefer Hart's usages because the term "standard" often connotes discretion not only to proceed in the absence of a rule of action stated in general terms but also in the absence of a specific policy or precedent describing the ideal result to which the sound exercise of administrative discretion is expected to contribute.

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outs,” or “gridlock” to conclude that it is a bad thing when a government official abuses his official discretion to collect bribes.

Because of discrepancies like these, readers must be wary of hype surrounding *Gridlock*. The book is being touted in many quarters as a knock-down refutation of private property. For example, Tim Wu interprets the Moscow storefront example to teach: “[W]hen you have too many gatekeepers—too many people whose permission is necessary to undertake a given project—that fact alone can create gridlock.” He reads this example, and *Gridlock*'s argument generally, to destabilize “one of the strongest intuitions in Anglo-American thought: that property is a good thing, and more property is almost always better.”⁵³ Yet Anglo-American private-property law has long made the gates hinge depending on whether exclusion or admission better encourages the use of the asset in question. Wu's portrait of private property is casuistic. It has the effect of making property law seem more formal and thoughtless than it really is, and *ad hoc* administration of property seem more necessary and inevitable than it really is. *Gridlock* may not go as far as reviews like these, but inquiring readers should take care not to overread its argument.

C. Lighthouse Beams

Again, however, in other examples, disputes do implicate property rights, and *Gridlock* implicitly portrays those rights as broader, more brittle, and less concerned with property's productive use than such rights really are in social practice or law. Consider *Gridlock*'s treatment of “lighthouse beams,” or the qualifications that courts made to the *ad coelum* principle to accommodate airplane overflights. Larry Lessig has used this example to create the

⁵³ Tim Wu, “Move Over, Marx: How Too Many Property Rights Wreck the Market,” *Slate*, Monday, May 14, 2008, <http://www.slate.com/id/2195158>.

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same casuistic impression as the impression Wu tried to convey using Moscow storefronts.⁵⁴ It is thus worth considering the *ad coelum* principle at some length.⁵⁵

The *ad coelum* principle is one of several ways property and tort law signal that the doctrine for trespass to land declares and embodies a broad domain of exclusive use determination. Prima facie, any unconsented entry of land is a trespassory wrong to the owner's property.⁵⁶ From one perspective, this cause of action does seem too broad. A home owner has no realistic hope of using the air space at 35,000 feet, while a commercial airline does.

On the ground, however, trespass to land does have a policy rationale. Every species of property comes with a domain of exclusive use determination; in relation to land, property law structures trespass's prima facie possessory interest in control to accentuate the "exclusive." Like all other property interests in social practice and private law, land interests are justified in relation to a use interest. Land rights help many different owners deploy their lots for different uses and different life plans. Because land lends itself to so more uses than many other species of property, however, property in land requires a correspondingly broad domain of use determination. Of course, this cause of action can create a paradox in an individual case:

Marshall can exclude Taney from his land even if Marshall is not using it and Taney means to

⁵⁴ See Larry Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* 1-3 (2004).

⁵⁵ There is another reason to consider the overflight problem at length. In previous scholarship, I have suggested that Thomas Merrill and Henry Smith's conception of property as a right to exclude is inaccurate. If taken too literally, the conception is overbroad. When they recognize as much, they describe property institutions instead as a combination of exclusion rules and governance exceptions as likely to enhance social welfare. See, e.g., Merrill & Smith, *supra* note 10, at 29-30. The latter description, however, is not as robust conceptually as property understood as a normative interest in determining exclusively the use of a thing. Exclusion and governance state legal results on the basis of normative analyses that can be justified on the basis of an extremely wide range of normative judgments. The definition I defend here ties property's exclusion and its exceptions more closely to normative judgments about use determination. See Claeys, *supra* note 23, at 639-50. The overflight and other trespass and encroachment problems discussed in this section confirm my previous criticisms. Compare Merrill & Smith, *supra* note 10 at 9-16 (using airplane overflight disputes to question property's relation to exclusion).

⁵⁶ See Prosser and Keeton on the Law of Torts § 13, at 69-77 (W. Page Keeton et al. eds., 5th ed. 1984); Claeys, *supra* note 37, at 1388-90, 1405-09.

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use it productively. Nevertheless, across a broad range of cases, the cause of action indirectly encourages many owners concurrently to use their lots for their own chosen plans. Broad use determination helps ensure that “the [land] necessary for carrying out our plans can be kept, managed, exchanged (etc.) as the plans require.”⁵⁷

As the necessity privilege shows, the blockade right is defeasible when the underlying normative interest is defeasible. Yet necessity presents an easy case. No one would question why Taney's interest in his life and the preservation of his boat take priority over Marshall's momentary loss of control over his dock. In harder cases, the owner and the non-owner's interests are exercises of property or liberty rights, and both rights seem to stand on the same plane. In these cases, the law still qualifies the owner's blockade rights, but the qualifications are more textured. The qualifications aim to give all land owners the greatest free action to determine the likely intended uses of their land—considering the likelihoods that they might stand in the shoes of the owner or the non-owner.

The *ad coelum* principle signals that, other things being equal, the law enlarges all owners' intended uses if it protects their rights to control not only the surfaces of their lots but also the subsurfaces beneath and the air columns above those lots. Consider the remedies for encroaching structures. Assume Taney builds a structure that overhangs onto Marshall's airspace thirty-five feet above the ground. The right extends far enough to enjoin the overhang if Taney builds it overhang deliberately or without having first conducted due diligence, no matter how severe the hardship to Taney. Although different normative theories explain differently

⁵⁷ A. John Simmons, *The Lockean Theory of Rights* 275 (1992).

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why the law punishes scienters worse than good faith, one way or another they all stress that only “accidents pose no danger of multiple sequential transformations of property rights.”⁵⁸

That said, in an encroachment dispute, involving an overhang or otherwise, the merits of the dispute are closer if Taney has encroached in the course of a careful mistake. Although Taney tortiously engaged some of Marshall's airspace for his own ends, he did so innocently, and Marshall was not using that space. Members of a society may reasonably agree that Taney's interest is legitimate, and in the right circumstances on a par with Marshall's. Marshall still deserves some benefit of the doubt, to preserve the presumption that owners deserve to determine their lands' uses. Yet if the hardship to Taney is severe enough, a society may reasonably decide that Taney's use interest is innocent enough and significant enough to take normative priority over Marshall's interest in using the encroached-on but hitherto-unused land. So every owner's normative interest in determining the use of land is qualified again: A land owner's right of exclusive use determination entitles him only to demand compensation after the fact if he suffers an encroachment that is the product of an innocent mistake, does not disrupt an ongoing use, and is cost-prohibitive to remove.⁵⁹ Again, this qualification is internal to the normative interest in property.

The law of animal trespasses deserves consideration here, for it confirms that trespassory boundaries were neither as impermeable nor as formalistic as is suggested by scholars like Lessig.⁶⁰ Eighteenth-century English land law qualified trespass principles to leave neighbors

⁵⁸ Epstein, *supra* note 22, at 2100.

⁵⁹ See *Heaton v. Miller*, 391 P.2d 653 (N.M. 1964); *Golden Press, Inc. v. Rylands*, 235 P.2d 592 (Colo. 1951); *M.T. Van Hecke, Injunctions to Remove or Remodel Structures Erected in Violation of Building Restrictions*, 32 *Tex. L. Rev.* 521, 530 (1954).

⁶⁰ I do not read *Heller* to make this assumption, see pp. 27-29. Many careful scholars avoid this assumption. See, e.g., Dean Lueck, *The Role of First Possession and the Design of the Law*, 38 *J.L. & Econ.* 393, 422-23 (1995).

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rights to access others' private land for pasturage, fishing, wood-gathering, and easements for passage.⁶¹ At least the pasturage rights still carry forward in several rural American jurisdictions today.⁶² These rights of access fit the same account. In an agricultural society, land owners need exclusivity to secure control over their farm land and its cultivation. Yet the same owners need space for their animals to pasture, and they have interests in acquiring fish or wood for their own personal uses. Depending on how land, animals, and fish were all acquired and used, a society could reasonably conclude that the normative interest in determining the use of land should be qualified not to prevent others from entering temporarily to pursue interests in wood, fish, or pasturage. By contrast, in a society in which industrial and other commercial non-agricultural uses predominate, society members could reasonably conclude that these use interests do not have a high-enough priority for enough members and that recognizing such interests would unduly threaten developers' interest in building higher-value buildings. Again, the general normative interest in exclusive use determination has a built-in internal limitation. That interest can adjust between formal exclusion and use as most likely to help most members of society use their land and the animals and other chattels on it.

The *ad coelum* principle has always been understood as being subject to similar qualifications.⁶³ That principle settles policy problems associated with accession—specifically, whether the owner of enclosed ground is entitled, by virtue of owning the ground, also to own the subsurface under and the air column over the close.⁶⁴ These questions are not settled

⁶¹ See 2 William Blackstone, *Commentaries on the Laws of England* *32-*36 (1766).

⁶² See Claeys, *supra* note 37, at 1423-24.

⁶³ See, e.g., *Hinman v. Pac. Air Transp.*, 84 F.2d 755, 757 (9th Cir. 1936) (insisting that a literal construction of the *ad coelum* rule “is not the law . . . and . . . never was the law”).

⁶⁴ On accession, see Thomas W. Merrill, *Accession and Original Ownership*, 1 *J. Leg. Analysis* 459 (2009); 2 James Kent, *Commentaries on American Law* 293-98 (1827).

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formally or automatically when property ownership consists of a normative interest in determining exclusively the use of a thing. Doctrinally, the law could declare the subsurface or the air column be common public resources, open-access resources, unowned resources that may be appropriated by acts of appropriation independent from the ground's enclosure, or private property whose ownership runs by accession with the over- or underlying enclosed ground. Normatively, the law should make these classifications as are most likely to enlarge the use interests of all members of society.

These classifications cannot be settled without gathering empirical information and making normative judgments. As for things in the subsurface, property law applies the *ad coelum* principle to assign ownership over mineral rights to the owner of the overlying ground. This assignment assumes and applies several normative and empirical presumptions: Most subsurface columns consist primarily of dirt and rocks; the dirt and rocks are not particularly useful on their own to owners or would-be owners; but they *are* useful insofar as they support the structures that surface owners build to make the surface useful for their own needs. These presumptions can be wrong: The subsurface may have oil or gold. For oil, the law abandons the accession paradigm and reverts to the appropriation paradigm;⁶⁵ for gold (and other non-moving resources fixed in the ground), the law stays with the accession paradigm. Implicitly, behind the veil of ignorance, soil does not contain valuable minerals often enough to make it worth carving out a special appropriation rule. Moreover, the *ad coelum* principle helps individuals with special skill at finding such minerals to extract them. It creates a clean and clear set of legal

⁶⁵ See *Barnard v. Monongahela Nat. Gas Co.*, 65 A. 801, 802-03 (Pa. 1907); Victor H. Kulp, *Oil and Gas Rights* § 10.5, at 511-13 (1954); Lueck, *supra* note 60, at 410-12 & Table 1.

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entitlements delineating the owners with whom they must bargain, and those property rights give the surface owners ample financial incentive to license the extraction.⁶⁶

The *ad coelum* principle applies similarly to air columns. The principle declares a rough normative and empirical presumption that airspace is better assigned by the accession principle to the person who owns the ground enclosed beneath the column. Things in that air column can fall on the surface owner or the structures he has on the ground. He may want to build in that column. He cares more than anyone else about the views he can see inside that column. However, these generalizations remain empirical presumptions. The presumption was never applied so rigidly that it entitled land owners to exclude any air pollution whatsoever. At common law, nuisance qualified an owner's right to blockade factory pollution from her air similarly to the manner in which trespass qualified her right to blockade cattle from her grass. Unwanted pollution does diminish, to a palpable extent, a land owner's interest in determining how he will use and enjoy his land. Behind the veil of ignorance, however, each owner stands poised to gain greater free action to choose how to develop, use, and enjoy his own land if he waives the right to sue for "comparatively trifling" pollution and insists only on the right to prevent severe nuisances.⁶⁷

These rules, conceptions, and principles provide the context into which airplane overflights fit. Technically, of course, airplanes can trespass like lighthouse beams. As long as

⁶⁶ Cf. *Goddard v. Winchell*, 52 N.W. 1124 (Iowa 1892) ("That [a meteor] may be of greater value for scientific or other purposes [than it has to a farm owner] may be admitted, but that fact has little weight in determining who should be its owner. We cannot say that the owner of the soil is not as interested in . . . the great cause of scientific advancement . . . This [meteor] is of the value of \$101, and this fact, if no other, would . . . place it in the sphere of its greater usefulness.").

⁶⁷ See, e.g., *Bamford v. Turnley*, 122 Eng. Rep. 27, 32-33 (1862) (opinion of Bramwell, B.) (excusing pollution justifiable if it follows from "acts necessary for the common and ordinary use of land and houses," to the extent such pollution is consistent with a "reciprocal" norm, a "rule of give and take, live and let live"); see 2 Blackstone, *supra* note 61, at *14; Claeys, *supra* note 37, at 1422-24; Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. Leg. Stud. 49 (1979).

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

In short, the *ad coelum* principle may be a little hyperbolic. If read too literally, it could create the sort of confusion *Gridlock* hints at and Lessig assumes. Yet I am not aware that the hyperbole confused any court in an overflight dispute, and neither Lessig nor *Gridlock* suggests otherwise. To the contrary—courts narrowed the scope of the *ad coelum* principle to order land owners' rights with their defensible normative interests in using their land.⁶⁸

D. Share Choppers

Gridlock's treatment of “share chopping” laws reinforces the same impression. We may wonder how many African-Americans migrated from southern ancestral home towns solely because of share chopping gridlock⁶⁹ to acknowledge that this gridlock created a significant problem for them and their relatives. Nevertheless, as *Heller* recognizes, the private law of property already anticipates this problem, with “partition law.” (P. 123.) Tenancies in common may break down when changed conditions create gridlock that the co-owners can no longer

⁶⁸ See *Smith v. New England Aircraft Co.*, 170 N.E. 385 (Mass. 1930); Claeys, J&C, *supra* note 37, at 1424-26; Richard A. Epstein, *Intel v. Hamidi: The Role of Self-Help in Cyberspace?*, 1 J.L. Econ. & Pol'y 147, 154-55 (2005).

⁶⁹ Brian Sawers has questioned (again, in my judgment, convincingly) how many African-Americans emigrated solely because of inheritance disputes as opposed to other factors, like better jobs in northern industrial cities. See Brian Sawers, “The Uncommon Anticommons,” at 11-12 (manuscript on file with author).

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manage. As a backstop, the law then lets any of the co-owners petition for partition of the land. On paper, most partition statutes prefer to partition property “in kind,” which is to say that they subdivide jointly-owned land into smaller sections owned individually. If a court finds, however, that subdivisions are not practicable (because the resulting lots are “too small to be economically useful”), it may order a partition by sale, “order the entire land sold and then partition the [monetary] proceeds among the co-owners.” (P. 124.)

Again, *Gridlock* makes the right policy analysis in many cases, but it restates what is already apparent in social practice and private law. It is telling that state legislatures spotted the gridlock potential in cotenancies long ago. As the United States Supreme Court explained in *Head v. Amoskeag Manufacturing*, an 1887 due process/ eminent domain case:

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

In the familiar case of land held by several tenants in common, or even by joint tenants with right of survivorship, any one of them may compel a partition, upon which the court, if the land cannot be equally divided, will order owelty to be paid, or, in many states, under statutes the constitutionality of which has never been denied, will, if the estate is such that it cannot be divided, either set it off to one and order him to compensate the others in money, or else order the whole estate to be sold.⁷⁰

Indeed, cases like these and the conceptual definition I am providing explain how the private law partitions better than *Gridlock*. If all one knows is that a family farm is gridlocked, that insight says very little about how the gridlock should be broken up. Partitions in kind and by sale seem both equally plausible, and pro-liability rule *Cathedral* scholarship would seem to

⁷⁰ *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 21 (1885).

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prefer the latter. By contrast, property explains partition rules better when it consists of a domain of exclusive use determination. When property is keyed toward free choice how to use an asset productively, it implicitly specifies that existing property rights are badly drawn to the extent that they lead to the underuse of the propertized asset. Partition rules are therefore not external to the property system; they specify and effectuate a substantive limitation already hardwired into property. But because partitions are meant to convert co-owned domains of use determination into separate domains of use determination, it makes more sense to partition in kind—to continue to “be fully and beneficially enjoyed”—until the facts show that such a partition inhibits use of the asset more than it secures the use autonomy of the cotenants cashing out. When partition rules presume in favor of partitions in kind, they carry into effect a legislative presumption that partitions by sale—liability-rule partitions—are more likely than not to encourage buyers to expropriate subjective value from forced-sellers. Of course, if the facts show that the co-owners are holding out inefficiently against the buying co-owner, this presumption can be reversed and a partition by sale ordered. But the norms informing property can explain why the law starts with a formal presumption for property rules; the *Cathedral's* taxonomy cannot.

V. EXCLUSIVITY AND ECONOMIC ANALYSIS UNDER THE *CATHEDRAL*

A. Economic Analysis Critiqued Philosophically

So, at least in bread-and-butter examples, *Gridlock's* anticommons framework does not shed any light a lawyer could not see if he grasped soundly the concepts internal to property's social practice and private law. My argument thus far, however, has not suggested there is anything necessarily wrong with that framework. In addition, conceptual analysis is often

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criticized for concealing imprecise normative claims, and economic analysis is often touted as being more empirical than philosophical analysis. Perhaps these responses apply here.⁷¹

I am skeptical, but several of my reasons for being so require more elaboration than I can provide here. For one thing, although it is easy to offer an economic interpretation of doctrine, it is conceptually much more difficult to provide a satisfactory causal explanation how doctrine comes to embody efficiency as understood in a particular interpretation. Others have shown how this problem applies to law-and-economic scholarship on accident torts;⁷² it almost certainly applies to disputes associated with the *Cathedral*, but one would need to demonstrate as much. Other concerns are normative or empirical. I will allude to such reasons as I proceed in the next two Parts, but given our focus I cannot make those concerns central here.

B. A Broad Critique of the *Cathedral*

Consistent with my argument, let me elaborate my conceptual reservations about property/liability rule analysis. As James Penner explains, Calabresi and Melamed's definition of "property rules" has no necessary connection to "property" — that is, interests in deciding how to use external assets.⁷³ In Calabresi and Melamed's scheme, an order of specific performance is a property rule even if the contract does not require either party to transfer rights in external assets to the other. Similarly, an order restraining an abusive husband gives the wife a property rule even though it protects her normative interest in the autonomy of her body.⁷⁴ Penner can make short work of bureaucratic regulatory vetoes and tax charges. *Gridlock* gets to the same result, but it takes longer to get there because the *Cathedral* is less determinate.

⁷¹ I am grateful to Michael Carrier and Ilya Somin for encouraging me to explore these possibilities.

⁷² See Coleman, *supra* note 49, at 13-32.

⁷³ See Penner, *supra* note 23, at 66.

⁷⁴ See Claeys, *supra* note 16, at 398.

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Separately, and more generally, according to Penner, Calabresi and Melamed's conceptions of property rules and liability rules mistakenly divorce analysis of substantive rights from remedial consequences, and they do so in ways that obscure the role that liberty of action plays in shaping substantive rights.⁷⁵ Calabresi and Melamed's conception of a liability rule is particularly extreme in relation to ordinary property practice. Calabresi and Melamed portray liability rules as one of two or three options for resolving disputes over entitlements,⁷⁶ and by their portrait they suggest that liability rules are more or less as legitimate in practice as property rules.⁷⁷ Yet there is something incongruous about the concept of a liability rule. As Penner protests, "[T]he law does not treat remedies as price-setting mechanisms for the violation of rights," just as the law commands us "not to murder people at all, not weigh our desire to do so against the objective price that has been fixed, say twenty years without parole."⁷⁸ Penner's broad conclusion is that the property/liability rule distinction "completely misrepresents the actual normative guidance of the law," because "[t]he normative guidance offered to legal subjects under [a] scheme of individuating [liability rules] is to measure their own wants against a set of prices, and act accordingly."⁷⁹

⁷⁵ On this point, see also Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 *Yale L.J.* 1335 (1986).

⁷⁶ See Calabresi & Melamed, *supra* note 7, at 1106-10 (introducing property and liability rules); *id.* at 1111-15 (inalienability rules).

⁷⁷ See, e.g., *id.* at 1106 ("Because the property rule and the liability rule are closely related and depend for their application on the shortcomings of each other, we treat them together."); *id.* at 1110 ("a very common reason, perhaps the most common one, for employing a liability rule rather than a property rule to protect an entitlement is that market valuation of the entitlement is deemed inefficient, that is, it is either unavailable or too expensive compared to a collective valuation").

⁷⁸ Penner, *supra* note 23, at 66.

⁷⁹ *Id.*

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C. A Conceptual Restatement of Property and Liability Rules

On one hand, this criticism needs qualification. When an encroachment is *de minimis* and the product of a good-faith mistake, the property owner may be denied an equitable remedy (in Calabresi and Melamed's terms, a property rule) and limited to a monetary remedy (a liability rule). Defendants whose encroachments are justified by necessity are still required to pay for property damage even if they use the commandeered property with reasonable prudence.⁸⁰ Co-tenants may be limited to a partition by sale,⁸¹ and if one co-tenant ousts the others the latter may demand an accounting but not reentry to the land.⁸² On the other hand, there remains something strange about these examples. As Jules Coleman and Jody Kraus explain, "[i]t is surely odd to claim that an individual's right is protected when another individual is permitted to force a transfer at a price set by third parties. Isn't the very idea of a forced transfer contrary to the autonomy or liberty thought constitutive of rights?"⁸³

Coleman and Kraus agree that this idea is "ludicrous,"⁸⁴ but to explain why they supply a subtler conceptual account of property and liability rules, which reconciles the exceptions to their general rules. In Calabresi and Melamed's portrait, property and liability rules state consequences. If economic analysis identifies a certain outcome as efficient, property and liability rules refer to the package of "injunctive relief, tort liability, some combination of the two or, perhaps, . . . criminal sanctions"⁸⁵ most likely to nudge parties to that outcome.

⁸⁰ See *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910).

⁸¹ See *supra* section IV.D.

⁸² See, e.g., *Gillmor v. Gillmor*, 694 P.2d 1037 (Utah 1984). I thank my Property students fall 2010 for helping me to appreciate the significance of ouster.

⁸³ Coleman & Kraus, *supra* note 75, at 1338-39.

⁸⁴ *Id.* at 1358.

⁸⁵ See *id.* at 1342.

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Conceptually, however, that portrait is wrong, because it sets property and liability rules up as tools for *enforcing* legal mandates derived from any source.⁸⁶

In sound concepts and social practice, by contrast, remedy law has more focus. Remedies are keyed to normative interests, and the law varies the remedies available as appropriate to fit the interests. The Calabresi-Melamed framework is inapt because remedies do not merely state enforcement consequences but also describe and embody the general domains of free choice invasions of which trigger the relevant enforcement mechanisms. So “property [and] liability . . . rules are best thought of as constituting a subset of the set of norms governing the transfer of lawful holdings.”⁸⁷ Such rules *partially specify* the *content* of rights, in relation to claims “that specify the conditions of lawful or legitimate transfer.”⁸⁸ Although all normative interests endow their bearers with some domain of free action and choice, few if any make such domains totally absolute. “Property rules” refer to the general situations in which a right-bearer has broad discretion to refuse to transact with others, no questions asked. “Liability rules” refer to situations in which a non-right-bearer may force a right-bearer to transact regarding the right.⁸⁹

When property rules and liability rules are restated in Coleman and Kraus's terms, it turns out that the Calabresi-Melamed framework compresses together many different kinds of transactions affecting normative interests.⁹⁰ Let me illustrate using basic incidents of land ownership. If Marshall owns Blackacre in fee simple, he has a claim to veto virtually all

⁸⁶ See id. at 1341-42.

⁸⁷ Id. at 1344.

⁸⁸ Id. at 1344.

⁸⁹ See id. at 1347-52.

⁹⁰ The following discussion restates and generally follows id. at 1352-65. However, I disagree with a few of the specific conclusions Coleman and Kraus draw while applying their general framework. I will call attention to my disagreements in footnotes as those disagreements surface.

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intentional and otherwise-unjustified unconsented entrances onto his land. Marshall may therefore expect Taney to seek his agreement *ex ante* before Taney tries to enter Blackacre. If Taney enters Blackacre intentionally without seeking such agreement, he wrongs Marshall. For that wrong to be rectified, Marshall must get back an approximation of his lost free determination over Blackacre's entry. That approximation entitles Marshall not only to standard tort compensatory damages but also to propertized damages, disgorgement, or punitive damages.⁹¹ One could call this domain all property rule all the time—but the important point is that the law embodies social norms giving Marshall broad latitude to prevent transactions involving Blackacre or to direct them exclusively on his terms.

Now consider good faith encroachments. Marshall still has a claim to prevent any such encroachments when they are significant. If an encroachment is *de minimis*, however, Marshall has a claim to veto or direct it *ex ante*, but only a claim to standard damages compensating for the value of the occupied land *ex post*. In good faith encroachments, this latter claim (the “liability rule”) declares and embodies the condemnatory judgments we associate with most torts. If Taney accidentally and carefully establishes a minor overhang on Marshall's property, he wrongs Marshall's property rights. The damages Taney must pay to acquire Marshall's encroached-on land rectify that wrong. Although the encroachment is tortious, however, it is not

⁹¹ Coleman and Kraus suggest Marshall has a liability rule after Taney trespasses, and the liability rule corrects the wrong Taney inflicts by his trespass. See *id.* at 1357. As Gideon Parchomovsky, Alex Stein, and I have shown, however, the law gives Marshall the more robust set of remedies enumerated in text because the law declares and embodies the right to control land in broader terms. See Gideon Parchomovsky & Alex Stein, *Reconceptualizing Trespass*, 103 Nw. U. L. Rev. 823 (2010); Claeys, *supra* note 16, at 394-401.

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wrong in the same manner as an intentional entry—and remedy law accordingly refrains from giving Marshall injunctive, supercompensatory, or punitive remedies.⁹²

The law sends different and subtler cues in two other sets of cases. In one set, entitlements and remedies embody a signal that a defendant has not “wronged” a plaintiff but still “infringed” his rights in a manner requiring compensation. A necessity dispute provides the paradigm case for infringements. Although Marshall ordinarily has a property rule both *ex ante* and *ex post* against unconsented intentional entries, he has no property rule *ex ante* and only a liability rule *ex post* against entries reasonably impelled by emergency conditions. Here, Marshall still has a right to demand compensatory payment if Taney damages his property. Yet this right embodies a social message different from the mistaken encroachment. In the necessity dispute, Taney owes neither a primary duty to refrain from entering Marshall’s land, nor a secondary duty to rectify a tortious “wrong” to Marshall. Yet he must hold Marshall harmless to complete his entitlement non-tortiously to (in conceptual scholarly terms) “infringe” on Marshall’s rights. Alternatively, assume that Marshall and Taney are co-tenants, that Taney ousts Marshall, and Marshall then claims an accounting of Taney’s profits. The “liability rule” declared by the accounting sends yet-another different signal. Marshall had no claim *ex ante* to prevent the exclusion, and Taney neither wronged nor infringed Marshall’s rights—but Marshall is still entitled to an accounting as a condition of Taney’s exercising his legitimate co-tenancy interests.⁹³

⁹² The example I am providing in text corresponds to Coleman and Kraus’s treatment of negligent car accidents, *supra* note 75, at 1358.

⁹³ See *id.* at 1352-58. I agree wholly with Coleman and Kraus’s treatment of necessity, see *id.* at 1358. When Coleman and Kraus speak of damage payments as a condition of legitimate exercise of rights, they refer to blasting. See *id.* I agree with the general category in which a party must pay damages for the legitimate exercise of a

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D. A Precise Critique of the *Cathedral*

Coleman and Kraus focus primarily on clarifying the right way to understand property and liability rules as used in social practice and law—not only in property but anywhere else the property/liability rule scheme arguably may apply. Nevertheless, their clarifications help us sort out what is accurate and overbroad in Penner's criticisms of property and liability rules. They also help us connect bad concepts to bad policy tendencies.

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

Of course, from another perspective, the *Cathedral's* taxonomy is advantageous. The property/liability rule distinction seems to provide a value-neutral vocabulary. That vocabulary seems to help policy-makers abstract from differences between rights-based and welfare-based normative theories. To get that flexibility, however, policy-makers must pay a normative price. By abstracting from the conceptual structure of property as a right, policy-makers blur out of

normative interest. I disagree that blasting fits the category; I prefer to classify it as an activity inflicting a tortious wrong, like a good faith *de minimis* encroachment, for which equitable relief is inappropriate.

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focus the normative reasons why rights are worth securing. As trespass liability doctrine suggests, some of those reasons relate to the connection between clear ownership on one hand and investment and commercialization on the other. As trespass remedy principles show, other reasons relate to the ways in which law socializes citizens to respect other citizens' interests.

I do not mean to suggest it is impossible to account for the advantages of property in the *Cathedral's* terms. A law and economics scholar can certainly spin out an account in which coerced transfers of property are presumed welfare-diminishing until proven otherwise, because they more often than not expropriate subjective value and create cascades demoralizing owners from investing, demoralizing market transactions, and encouraging rent seeking.⁹⁴ Yet it is fair to wonder whether these economic arguments bootstrap on concepts and norms embodied in property law thanks to moral reasoning. Although "subjective value" sounds value-neutral, it refers to an owner's "freedom to determine the use of his land for his own individual interests," and it implicitly assumes all the parameters the law sets on an owner's liberty to determine use. And "demoralization" consequences and "rent seeking" explicitly borrow on moral phraseology.⁹⁵ Law and economics scholars who justify property in the *Cathedral's* framework also argue that their approach is more empirical. Yet the scholars who do so admit that the relevant law and economic analysis is "implicitly empirical but not capable of precise justification," and as a second-best substitute for unavailable empirical data they interpret "the very strong set of practices in legal systems."⁹⁶ This method gives away any advantage law and

⁹⁴ See, e.g., Epstein, *supra* note 22; Smith, *supra* note 22.

⁹⁵ See, e.g., E.C. Pasour, Jr., *Rent Seeking: Some Conceptual Problems and Implications*, 1 *Rev. Austrian Econ.*, 123, 123 (1987)

⁹⁶ Epstein, *supra* note 22, at 2095.

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economics claims to have in empirical verification.⁹⁷ It may also bootstrap a second time—not only by framing interpretations of doctrine implicitly borrowing on the law's moral phraseology, but then again by citing doctrine as empirical corroboration for the interpretation.⁹⁸ In any case, more relevant here, such scholars are probably in the minority among those who employ the *Cathedral's* framework. Many more law and economics scholars apply the *Cathedral's* framework with the pro-liability rule presumption described in Part III—as *Gridlock* does, Lessig does, and Wu does in his review of *Gridlock*.⁹⁹ The *Cathedral* may be judged by the kinds of arguments it attracts and encourages.

And the *Cathedral's* conceptual confusions make it easier to legitimize the pro-liability rule *Cathedral* presumption. Because the property/liability rule distinction abstracts from basic questions about the relations between rights and welfare, or the rule of law and administration, it makes liability-rule determinations seem more legitimate in policy analysis than they are in social practice or the private law. I do not mean to suggest liability rule determinations are wholly out of bounds in the private law. As we have seen, private property law leaves room for them in partitions and accountings of co-tenancies, in necessity disputes, and in disputes about good faith and *de minimis* encroachments. Yet these doctrines are exceptions to a more general rule. When an infringement is justified by necessity, the necessity justifies and prevents the dispute from legitimizing deliberate theft of property.¹⁰⁰ Similarly, the law has more latitude to require cotenants to sell or to accept an accounting because a tenancy in common is an arrangement entered into consensually. When a *de minimis* encroachment occurs through a

⁹⁷ See Claeys, *supra* note 37, at 1442-45.

⁹⁸ Compare Epstein, *supra* note --, at 2095 with Claeys, *supra* note 16, at 405-06.

⁹⁹ See *supra* notes 53-54 and accompanying text.

¹⁰⁰ See Epstein, *supra* note 22, at 2105-11.

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good-faith mistake, the good faith provides proof that the encroachment was an accident. These differences teach something revealing about the *Cathedral's* taxonomy. From common sense's perspective, necessity, accidents, and consensual arrangements gone bad present extreme situations in which the law restrains the free exercise of moral discretion much more than it usually does. By contrast, the *Cathedral's* taxonomy portrays these situations as conceptually interchangeable with a damage remedy for a deliberate or careless taking of property. When a conceptual apparatus conflates easy cases with hard emergency cases, it may be intended to or have the effect of diminishing the extent to which free moral determination is an end of the law. Private actors have less autonomy (and public actors more) if every case presents an emergency.¹⁰¹

Finally, by legitimizing deliberate and turn-a-blind-eye takings of property, the *Cathedral* may have some tendency to corrode the social norms respecting property. Conceptual analysis of the private law of property builds on, articulates in law, and completes the social norms on which citizens in a community settle to respect their claims of equal rights. Those social norms presume that law does much of its work by shaming or socializing citizens. Ordinarily, when an encroacher encroaches, injunctions, punitive damages, propertized compensation, and other remedies send the encroacher two messages: "You have wronged the owner by upsetting the secure control he expected to enjoy over his land," and "You must take all steps available to rectify that wrong." By contrast, in the *Cathedral's* horizons, a liability rule seems to send the following signal from the legal system to the encroacher: "If you pay X dollars in damages, you

¹⁰¹ See Claeys, *supra* note 16, at 396.

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may buy the owner's property with our sanction."¹⁰² That message accords much more closely with the social message the law sends in a dispute where a partition by sale is warranted, a dispute about a good faith *de minimis* encroachment, or a necessity dispute, especially the last: "If you pay the owner *X* for the damage you inflicted to his property, you will convert what would otherwise be a wrong to the owner into a non-tortious act."¹⁰³ There is thus reason to wonder whether error in academic conceptual theory may legitimize and enable anti-social behavior in practice.

VI. Block Parties Reconsidered

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

By the same token, however, when law and economics scholars apply the *Cathedral's* taxonomy of entitlements and its checklist of relevant policies, they would be well-advised to make sure they haven't left off the list the policies most central to social practice and the private law. Quite often, scholars who incline toward the pro-liability rule presumption do not consider those policies. Since *Gridlock* focuses primarily on high tech disputes, the most important question to ask about it is whether it considers those policies adequately in such disputes. Since I am refraining from engaging those examples, readers will need to read the other reviews of

¹⁰² See Coleman & Kraus, *supra* note 75, at 1356–57.

¹⁰³ See *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910); Coleman & Kraus, *supra* note 75, at 1358.

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Gridlock in this Symposium with my concerns in mind and decide for themselves.¹⁰⁴ Still, I doubt that *Gridlock* is sensitive enough to the concerns about freedom and moral formation important in social practice.

My unease comes from the book's discussion of block parties—the use of eminent domain to transfer land to private developers for redevelopment. Block parties deserve careful treatment because redevelopment is a field of public law property law. More than any other field of property law, it institutes an approach radically different from the principles at work in the corresponding common law. Urban renewal and redevelopment statutes were established to justify expert administration of property, largely independent of the norms that ordinarily regulate property in trespass.¹⁰⁵

To frame my criticisms of *Gridlock*'s analysis, let me make three assumptions. First, I assume there is nowhere near enough empirical evidence to say conclusively whether redevelopment policy succeeds as a social policy. I am not aware of any evidence that is conclusive,¹⁰⁶ and *Gridlock* does not suggest otherwise. Second, to frame the issues that need to be settled in this uncertainty, I discuss the relevant policy trade-offs using the economic terms

¹⁰⁴ See especially [*editors please insert cite to Epstein's contribution to the Symposium.*]

¹⁰⁵ See *Berman v. Parker*, 348 U.S. 26, 31-35 (1954).

¹⁰⁶ For some of the evidence, see Martin Anderson, *The Federal Bulldozer* (1964); Yun-Chien Chang, *An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City 1990-2002*, 39 *J. Leg. Stud.* 201 (2010); Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 *Mich. L. Rev.* 101 (2006); Terrence M. Claurette, William Kuhn & R. Keith Schwer, *Residential Properties Taken Under Eminent Domain: Do Government Appraisers Track Market Values?*, 26 *J. Real Estate Research* 317 (2004); Krisandra Guidry & A. Quang Do, *Eminent Domain and Just Compensation for Single Family Homes*, 66 *Appraisal J.* 231 (1998); Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 *J. Pol. Econ.* 473 (1976); Stephen J.K. Walters & Louis Miserendino, *Baltimore's Flawed Renaissance: The Failure of Plan-Control-Subsidize Redevelopment* (2008), <http://castlecoalition.org/images/publications/perspectivesbaltimore.pdf> (downloaded Nov. 4, 2010); Samuel R. Staley & John P. Blair, *Private Property, and Redevelopment: An Economic Development Analysis* (2005), <http://reason.org/files/4000a19375c0f2e656e8cda8133044e6.pdf> (downloaded Nov. 4, 2010).

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avored in *Cathedral* scholarship—on one hand, owner hold-out and transaction costs, and on the other, developer expropriation, market demoralization, and rent dissipation.¹⁰⁷

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

So the crucial normative questions are as follows: In the absence of complete empirical information, is it more reasonable to expect policy-makers to decide correctly on a case-by-case basis whether the social gains from particular land assemblies outweigh the social costs, or to expect policy-makers to make bad determinations thanks to incomplete information or public-

¹⁰⁷ See *supra* notes 14-22 and accompanying text; see Thomas Merrill, *The Economics of Public Use*, 72 *Cornell L. Rev.* 61, 82-89 (1986).

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choice pressures? Some property scholars¹⁰⁸ (myself included¹⁰⁹) draw on classical political or economic theory to say the latter. I don't criticize *Gridlock* for refraining from applying our answer—but the book may fairly be judged by how seriously it takes the alternative and the policies our answer implements.

A classical liberal approach to redevelopment has two parts. In eminent domain, the power to condemn is limited strictly to property acquisitions actually used by the public—either by the government or by common carriers. This narrow conception of “public use” focuses on eminent domain on government services. Implicitly, it makes an indirect consequentialist prediction that, if eminent domain is not limited to public uses, developers will pressure governments to condemn in many cases where short-term subjective-value expropriation and long-term market demoralization and rent dissipation outweigh the costs of forgone land assemblies. Separately, in property regulation, government may condemn and redistribute private property on a narrow police-power ground, sketched in the 1887 *Head* case as explained in section IV.D.¹¹⁰ Generally, “reciprocity of advantage” regulations may reassign private property rights if it coordinates how several owners use their property concurrently to help all achieve their intended uses more effectively. In extreme cases, reciprocity of advantage principles can justify the total condemnation of land—which explains why and how *Head* upheld the redistribution of riparian rights to create water back-up for a power mill. A redistribution is

¹⁰⁸ See, e.g., Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 161-81 (1985); Ilya Somin, *The Political Economy of Economic Development Takings*, 58 *Case W. Res. L. Rev.* 1185 (2008); Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after Kelo*, 15 *Sup. Ct. Econ. Rev.* 183 (2007); Epstein, *supra* note 22, at 2111-18.

¹⁰⁹ See, e.g., Eric R. Claeys, *That '70s Show: Eminent Domain Reform and the Administrative Law Revolution*, 46 *Santa Clara L. Rev.* 867, 874-76 (2006); Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 *Mich. St. L. Rev.* 877.

¹¹⁰ See *supra* note 70 and accompanying text. Epstein conceives of this rationale as a public use. See Epstein, *Takings*, *supra* note 108, at 176-80. I find it better justified and conceived as a kind of reciprocity-of-advantage police-power regulation. See Claeys, *supra* note 109, at 919-28.

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not justifiable on this basis, however, unless it is “necessary” in an exacting sense—unavoidable and not made so by the conduct of any of the parties. If a condemnation is strictly necessary, the condemnation may proceed, but it must compensate ousted owners significantly above ordinary fair market value. (*Head* called the compensation “equitable” to distinguish it from just compensation.¹¹¹) The necessity requirement reinforces the same policies in regulatory law as the narrow public-use requirement does in eminent domain. When it takes off the table the possibility that government will condemn land for a non-owner who has some realistic discretion to acquire the land he needs in markets, it preserves owners’ subjective values, prevents rent dissipation, and preserves the robustness of ordinary property markets. The supercompensation requirement then makes a good-faith effort to hold owners harmless for subjective-valuation losses when condemnations are necessary. This principle justifies qualifying the *ad coelum* principle to stop trespass from covering high-altitude overflights, and it justifies partitions by sale when partitions in kind are impracticable. In practice, however, it virtually never justifies urban renewal and redevelopment condemnations.

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

¹¹¹ 113 U.S. at 21.

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and leases were condemned for \$85 million total. Heller estimates that the new development was worth “as much as \$250 million.” By using eminent domain, Heller concludes, New York City “assembled” small and fragmented parcels and leaseholds to create a surplus of “up to \$165 million.” (Pp. 108-10.)

Heller's cost-benefit analysis is incomplete, and it does not cover all of the relevant factors. To begin with, Heller's portrait may overstate the potential gains from using private eminent domain. Heller *suggests* that the gains from the *New York Times*/Times Square project *might* be as high as \$165 million, but he does not commit to that figure. The value of the Times building could be “*as much as*” \$250 million, but it does not necessarily equal \$250 million. The net dollar-value increase could be “*up to*” \$165 million, but again, it does not necessarily equal \$165 million. Since local authorities routinely overestimate the likely benefits of private eminent domain projects, New York City's forecasts should be discounted significantly. (See pp. 108, 110, 234 n.7.)

Next, a comprehensive cost-benefit analysis would need to subtract from the \$165 million figure the subjective values of the ousted owners. For example, New York City needed to condemn the lease of Scot Cohen, proprietor of B&J Fabrics, which had done business in the condemned neighborhood for more than four decades. Eminent domain law does not normally compensate for lost goodwill, lost advantage from location, and other similar intangibles important to a business like Cohen's. (See pp. 110-11.) Heller acknowledges this factor but does not discount it from his net \$165 million total. Here, the normative implications of the liability rule conception really start to bite. The owners owe a responsibility to suffer a sale if

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the net gain is \$165 million and they cannot point to any specific and irrefutable evidence offsetting that net gain.

Furthermore, Heller does not offset for economic costs associated with market demoralization. Heller appreciates this possibility: “Why bother with voluntary market transactions when you can get the state to take the land you want?” (Pp. 110-11.) After making this concession, however, Heller does not discount his \$165 million net-gain figure for the possibility that future developers will bypass local real-estate markets all the more quickly.

Similarly, Heller appreciates the possibility of rent dissipation and increased lobbying—but not enough. The Times Square project used eminent domain to transfer to the *Times* and its developer-landlord a whole New York City block at about a third of its value. That developer-landlord, Bruce Ratner, was one of then-mayor Rudolph Giuliani's largest campaign donors. Ratner got another significant favor in the Times Square deal. When Heller calculates the net gain from the *Times* redevelopment project at \$165 million, he gets that figure by subtracting from the \$250 million total gain \$85 million. That \$85 million figure is for tax breaks New York authorities promised to Ratner to minimize his risk in redeveloping the condemned neighborhood. Another developer wanted to develop that neighborhood—and did not need any special tax favors from public authorities to develop.¹¹²

Although Heller deserves credit for deducting Ratner's tax break from his cost-benefit assessment, he does not go far enough. An ideal cost-benefit analysis would also need to tally as a rent-dissipation cost the precedent the Times Square case set for other owners or developers and businesses throughout New York City. Once they internalize the precedent set in the Times

¹¹² See p. 114; Paul Moses, *The Paper of Wreckage*, Village Voice, June 25, 2002, at 34.

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Square case, developers and business will be incentivized to lobby New York City authorities even harder to use private eminent domain for their benefit. For example, as Heller notes, state and local officials authorized Ratner to condemn and redevelop not only the Times Square project but also a project in Atlantic Yards, Brooklyn, centered around a new basketball arena designed to lure the New Jersey Nets to Brooklyn. (P. 114.) This and many other similar petitions for eminent domain have to be accounted into the consequences of the Times Square project.

On the other hand, owners will litigate to stop condemnations, or to haggle over the compensation they stand to get. Some owners will organize politically, pulling out all the stops because they view the neighborhood as theirs. Other owners will lobby and use inside influence to persuade local officials to condemn a neighborhood with less inside influence. In a comprehensive economic analysis, all of these responses count as social costs and therefore offsets against the \$165 million figure. Heller alludes to such confrontations when he describes the litigation and politics associated with the Fort Trumbull project that went to the U.S. Supreme Court in *Kelo v. City of New London*.¹¹³ It is all the more puzzling that Heller does not try to quantify some discounted share of these costs when he assess the costs and benefits of the Times Square project.

Because Heller is operating with incomplete empirical data, he must use professional judgment to decide how to interpret the limited data he has. Heller assumes that New York City can create \$165 million of economic benefit, and that the costs lurking in the analysis are probably not that important. Yet he never states that assumption directly and explicitly. He

¹¹³ 545 U.S. 469 (2005).

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comes closest when he asserts that “[s]tate and local legislatures . . . are the experts in discerning the interests of local voters and promoting their general welfare.” (P. 117.) Here, he assumes that New York City development specialists would find most of the goods and avoid most of the bads while they applied expertise to assemble a lot for the *Times*. For lawyers who know land-use law, the references to experts and general welfare signal sympathy with theories of government as interventionist as the theories legitimizing *Kelo*¹¹⁴ and also the 1954 Supreme Court decision *Berman v. Parker*.¹¹⁵

In the absence of complete empirical information, Heller is entitled to interpret the available data making his own legislative policy assumptions. His assumptions are not mine, but that is not my point here. My point is this: The analysis one gets of the Times Square example is the kind of analysis one might expect to follow from the conceptual and normative problems described in section V.D. *Gridlock* does not state fully the relevant assumptions needed to justify its conclusions. Perhaps Heller assumes that the approach he applies is the only approach worth considering in a popular treatment of property theory. If so, the Times Square case study is revealing not about the *Cathedral*'s property/liability rule scheme but about *Gridlock*'s openness to alternate points of view.¹¹⁶

I doubt this possibility, however. In the examples considered in Part IV, and in the many regulatory disputes this Essay has not covered, *Gridlock* assumes it is breaking new ground. It assumes so because it assumes “property” refers to a formal blockade right, which policy-makers need at least to make more permeable or at most to override. It is reasonable to suspect that

¹¹⁴ See *id.* at 481, 484-85.

¹¹⁵ See 348 U.S. 26, 33 (1954).

¹¹⁶ See Eric R. Claeys, *Takings: An Appreciative Retrospective*, 15 *Wm. & Mary L.J.* 439, 451 (2006) (reviewing Epstein, *supra* note 108).

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assumption follows from the *Cathedral's* portrait of exclusion and property rules unmoored from their justification in relation to use determination. In the Times Square case study, *Gridlock* treats private eminent domain as more or less equivalent to adjustments of the *ad coelum* principle and partitions by sale. It is reasonable to suspect that the book treats private eminent domain as equivalent because the *Cathedral's* portrait of liability rules makes them seem equivalent. In the Times Square case study, *Gridlock* does not give high priority to the ways in which government favors to developers in a few cases might diminish security of land owners, dampen confidence in markets, and encourage further politicization of land use in future cases. The refusal to give these concerns high priority makes sense given that the *Cathedral's* portrait presents property rules and liability rules in a manner that downplays entitlements' connection to law's socializing imperatives. These tendencies seem to follow from a certain way of applying the *Cathedral's* taxonomy without correcting for its conceptual deficiencies.

CONCLUSION

None of my criticisms detract from *Gridlock's* many important insights. The book does a first-rate job translating economic analysis into terms a practical lay audience can follow. It helps popularize a way of thinking that may help focus attention on many situations in which resource coordination problems lead to underuse.

Nevertheless, readers should read *Gridlock* critically and mindful of its questionable conceptual assumptions. Because *Gridlock* assumes property is merely a formal right to exclude, the book assumes that private-law property law creates more blockade and underuse problems than it really does. And because the book assumes that all forms of legal adjustment of property

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rights are more or less indistinguishable liability rules, it makes government-sponsored administration of property seem more legitimate and unproblematic than it may in fact be.