



# The Regulative Function of Property Rights

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[LINK TO ABSTRACT](#)

Historically, philosophers who thought at all about the significance of property rights generally agreed on the conceptual structure of property as a right to exclude but were deeply divided on the *point* of property theory. Instrumentalists like Bentham and Hume understood property rights as a means to social wealth and stability while Kant and Hegel and their followers were engaged in a fundamentally different project, rationalizing property rights in terms of individual freedom.<sup>2</sup> By contrast, contemporary property theory is overwhelmingly instrumentalist.<sup>3</sup> Property theorists today may have fierce debates about the concept of property but broadly speaking agree on the *point* of property theory: it is to work out the morally best way to manage our collective goods, by which I mean those resources that in a state of nature we would think of as available to everyone. Many, if not most, contemporary property theorists thus share a common cause: uncovering the limits and potential of private property rights as an instrument for managing scarce resources. This common cause is not as clear as it might be. Too often, debates

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2. On the dominance of exclusion theory in the history of the philosophy of property, see Merrill and Smith (2001a).

3. Contemporary libertarians constitute an important minoritarian position in property theory. See, e.g., Epstein (1985) and Claeys (2003). Lockeans generally straddle the fence between libertarians and instrumentalists. Some think of property rights as natural rights that we acquire by mixing our labor with things while others think that property is subject to fundamental reallocation within civil society in service of a collective goal. See Tuckness (2011) comparing Robert Nozick's libertarian interpretation of Locke with James Tully's reading, according to which property rights do not constrain government in civil society because civil society operates in conditions of scarcity.

among property theorists are tied to controversies that are better worked out off-stage, through more general moral theorizing and democratic deliberation (Smith 2009). Property theory cannot tell us very much about what our priorities should be, e.g., efficient markets, a healthy environment, stable communities, or individual freedom. But it can tell us quite a lot about how a system of property rights can function as a strategy for regulating our conduct with respect to things in the world.

In this paper, I want to consider three different models of how we manage our common resources through a system of private property rights.<sup>4</sup> All three models see property rights as ways that we allocate power over things to individuals. One way is to allow owners to have the right to do just as they please but to allow them to take profits when things go well. This is the exclusion model. Another is to set out specifically what people can or cannot do with a thing. This is the bundle-of-rights model.

A third model, not as familiar as the other two, is to restrict the class of question that the owner may consider when dealing with the thing rather than the substantive answers that owners come up with. On this model, owners have the jurisdiction just to resolve the question of what is a worthwhile agenda for a thing. I will call this the “Basic Question.” Owners exceed their authority when their decisions are made for reasons that have nothing to do with resolving the Basic Question. Thus, when an owner wields her power just in order to pressure others to conform to her wishes, e.g., refusing to allow cranes to sail over her air space just in order to harm the neighboring developer’s interest (*Levvest v. Scotia* 1981), she abuses her right. This is true whether her ultimate plan is a valuable one, e.g., to maintain the neighborhood’s character by keeping big developers out, or simply opportunistic, e.g., to sell an easement at ransom prices. In such cases, the owner’s decision is not an answer to the Basic Question but rather an answer to some other question altogether, e.g., how best to use her position as owner to get the neighbor to come to heel. This model emerges from my own view of ownership as a position of exclusive agenda-setting authority (Katz 2008).

There will inevitably be an affinity between some modes of regulating conduct and some preferred outcomes, e.g., a right to exclude that shapes owners’ conduct indirectly by inviting market discipline may well lead to better and more efficient outcomes or enhanced individual freedom. Is this affinity between certain modes of regulation and certain desirable outcomes reason for preferring one view of property rights over another? I will argue not. It would not do to start in with the question “how should we structure property rights to achieve our preferred ends?” as if any and all options were open to us. This is because we are conferring a certain kind of authority on the owner, the authority to manage our collective

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4. Some of what follows is taken from Katz (2010).

goods on everyone's behalf. The political foundations of ownership create certain preconditions for the legitimacy of private decisions about what are otherwise common goods: these decisions must be capable of standing as decisions made on behalf of us all. We have good reason to let one person act on her own opinion about what is a worthwhile use of a thing. This is after all how private property rights serve as a strategy for managing scarce resources without the costs of collective decision-making. Even if everyone acted reasonably in a state of nature, the potential for discord is very high, as there are many possible "good" uses of a thing.

A system of private property avoids the potential for conflict by delegating the authority to decide what constitutes a worthwhile agenda to owners. But that justifies only a very limited kind of authority to resolve the Basic Question. It is not enough that the owner maximize value by acting selfishly (the unseen hand taking care of the rest), as exclusion theorists suggest, for this is not acting *on our behalf* but only acting in our interest. And the same weakness is true of the realists' bundle-of-rights model: placing restrictions on the pursuit of selfishness does not change the nature of the position to reflect the public quality of the decision-making. But my model of regulation does. Whereas the other two models focus their attention on the substance of owners' decisions, my model is focused on the Basic Question owners are charged with resolving. It thus rules out the use of ownership as a general tool for the domination of others.

### Three Ways of Regulating Conduct

Bundle-of-rights and exclusion theories connect up with two familiar strategies for regulating conduct: (i) specifying substantive limits on what people can and cannot do; and (ii) letting owners do as they like and keep their winnings, leaving it to markets to discipline their decisions. Let me begin by taking these two dominant ideas of ownership in turn. Bundle-of-rights theories of ownership are normatively and methodologically diverse. American legal realists and law and economics scholars as well as analytic jurists like Honoré have all subscribed to some version of a bundle-of-rights approach (Merrill and Smith 2001a). This approach breaks ownership down into a bundle of individual use-rights. Bundle-of-rights theorists generally acknowledge that owners' bundles are defined *ex post*, rather than *ex ante*: property on this view is seen not as an input but as "the output of a judicial balancing of uses, the sticks that a court has handed out in a particular case after comparing the efficiency or utility of conflicting uses" (Katz 2008, 276).<sup>5</sup>

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5. See also Merrill and Smith (2007) (the bundle-of-rights metaphor suggests the content of rights mutates case by case) and Smith (2004a).

This strategy for managing resources leaves a lot of control over the specific uses of a thing in the hands of the state, through judicial decision-making or legislative action.

Exclusion theories point to a second way in which property rights regulate conduct with respect to scarce resources. For all the variety of methodological and normative commitments among exclusion theorists, there is agreement on the core idea of ownership: “The standard property right, on an exclusion-based or boundary approach, consists in a norm that protects the boundaries around a space or object so as to exclude the whole world but the owner” (Katz 2008, 281).<sup>6</sup> The owner controls access to the attributes of the resource within the boundaries, which are hers in virtue of the exclusion of others; thus, “[a]n owner has, in effect, a gate-keeping function” (Katz 2008, 281).<sup>7</sup> While there are important natural law accounts of property as a right to exclude, the instrumentalist strands of exclusion theory dominate property theory today.<sup>8</sup> The most influential contemporary writers in this group are Thomas Merrill, Henry Smith, and James Penner. Penner analyzes the nature and structure of property rights in terms of our interest in determining the use of things (Penner 1997). The exclusion of others is just how the law goes about protecting this interest. Merrill and Smith have developed an information-cost account for the exclusion approach, which, they argue, is typical<sup>9</sup> of property rights (Merrill and Smith 2001a).<sup>10</sup> Exclusion is the form that property rights take because of the wide audience for the information that property rights impart. A simple “keep out message” minimizes information costs for the third parties who have an interest in figuring out the content of the right, e.g., market participants, potential trespassers, and even judges in property cases.

These exclusion accounts of ownership point to a simple market-based strategy for regulating owners’ conduct. The right itself protects the boundaries of a thing but does not specify the kinds of decisions owners can make within those boundaries. The category of uses that owners can make of a thing is open-ended

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6. See also Merrill and Smith (2007, 1891) (an understanding of harm to a property right is “conditioned in property law on spatial boundaries and things”) and Smith (2002) (boundaries are created by grouping complementary attributes of a resource together or by following natural boundaries).

7. See also Penner (1997 and 2006) and Merrill and Smith (2001b, 790) (property specifies which person acts as gate-keeper).

8. Many natural rights theories of property conceive of ownership as a right to exclude too. See Perry (1997, 364–365). Kantian and Hegelian accounts of property in particular stress the nature of property as a right to exclude. See, e.g., Ripstein (2006, 1406 and 2009). For the purposes of this paper, I focus my attention on the instrumentalist strands of exclusion theory that dominate the bundle of rights/exclusion debate in contemporary writing in property theory.

9. “[F]or reasons of information cost it is often advantageous and almost inevitable that rights will be delineated by . . . an ‘exclusion strategy’” (Smith 2004b, 1753).

10. Smith emphasizes the role of governance rules in refining the exclusionary core of property rights. See Merrill and Smith (2007, 1891) and Smith (2002). See also Merrill (2000, 971–974).

because the right is defined just in terms of the duties others have to keep out. How then does an exclusion-based right regulate owners' conduct? Exclusion can be seen as an indirect strategy to manage the *substance* of decisions that owners make. A simple right to exclude facilitates market exchanges by reducing information costs. It also puts owners in a position to respond to market incentives by allowing them a sphere of discretion free from interference by others and leaving them free to reap the benefits of their decisions.<sup>11</sup> Owners thus face significant market pressure to make decisions that the market values. Property rights on this account are designed to attract market discipline.

There is a third way of regulating conduct that emerges from my own exclusivity-based approach to the idea of ownership. I have argued elsewhere that the idea of ownership is found not in the exclusionary function of the right but in the owner's exclusive authority to set the agenda for a resource: "Ownership requires not that others keep out so much as that they fall in line with the agenda the owner has set. The law preserves the exclusivity of ownership not by excluding others but by harmonizing their interests in the object with the owner's position of agenda-setting authority" (Katz 2008, 278). The crucial feature of ownership is the authoritative nature of owners' decisions: owners make decisions about things that command deference from others. Thus, "[o]wnership, like sovereignty, relies on a kind of notional hierarchy, in which the owner's authority to set the agenda is supreme, if not absolute, in relation to other private individuals" (Katz 2008, 278). The nature of an owner's decisions concerns the thing itself but the position is importantly relational insofar as an owner's decision binds the rest of us and so determines the uses that others can or cannot make of the thing.

On this exclusivity-based approach, property rights are not defined so as to specify the kinds of uses owners can or cannot make of a thing. Nor is the definition of rights especially oriented toward markets: information costs undoubtedly are higher when rights signal anything more complicated than simply "keep out". How then do rights on my account regulate owners' conduct? Rights regulate owners' conduct through built-in constraints on the class of *question* that owners may consider. Owners are limited to resolving what I call the "Basic Question": what, in their view, is a worthwhile use of a thing.

In its emphasis on the kind of question owners are authorized to consider, this third model departs from both bundle-of-rights approaches and exclusion approaches. Unlike bundle-of-rights approaches, which micromanage owners' decisions by tinkering with the content of their rights, my approach says little about the substantive outcomes that owners should produce. The very point of

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11. Showing how it does so, by reducing information costs, was Merrill and Smith's major contribution. See, *inter alia*, Merrill and Smith (2000 and 2001a).

private property as a strategy for managing resources is to provide an alternative to collective deliberation about how a thing ought to be used. When we employ a system of private property, it is because we *want* individuals to take over the business of deciding what constitutes a worthwhile use of a thing. This of course means that some objectionable answers get through. The worst of these we regulate from the outside (that is, not through the definition of property rights themselves but through criminal, tort, or administrative law), but for the most part we simply tolerate the plurality of answers that private decision-making produces.

So, my account departs from bundle-of-rights approaches in that it refrains from regulating the answers that owners come up with. But it also parts ways with conventional exclusion accounts in that it insists that property rights restrict the class of question that owners can consider. Exclusion approaches regulate neither the answers nor the questions that owners take themselves to be responding to but rather just the *kind* of protection that owners can claim against others: owners can insist that others exclude themselves from the thing (but cannot require other forms of protection, e.g., the ideal conditions within which to exercise their right or the absence of competition from others). Exclusion approaches are generally silent on the nature of owners' authority within the boundaries of their rights.

Let me explain why I think it is so important to control the *kind of question* that owners can consider. If we see private property as a strategy for managing what start in a state of nature as common goods, we can begin to see why. Under what circumstances can individuals legitimately claim authority with respect to scarce resources that, in the absence of property rights, are available to all? In a state of nature, individuals taking charge of common goods run into what I think is quite an intuitive problem about standing. No matter how expert *A*'s opinions are, no matter how good or altruistic a manager he is, he must show what business it is of his to make decisions for the rest of us about these collective goods. This problem about standing is a function of our interest in autonomy: we all have an interest in good decisions about the use of things, but we also have an interest in making decisions for ourselves about our collective resources. The law is a very effective instrument for resolving such problems about standing. Ownership is the way that we publicly confer the authority on some, owners, to make decisions about things on behalf of everyone. By delegating the authority to make decisions about collective resources to owners, we effectively rule autonomy-based objections out of court. The political foundations of ownership thus imply a limit on the kind of question that owners are authorized to resolve on behalf of everyone else. Owners' decisions have a public quality only insofar as they are answers owners are charged with making on behalf of others, that is, answers to the Basic Question. This public quality is the source of their legitimacy. There are of course many other questions that control over things would enable us to resolve. A brute power over

things could be a very effective tool to dominate others in service of one's larger plans, e.g., to create a family-friendly neighborhood, a clean environment, etc. But owners are not charged with creating these goods for the rest of us by any means possible. This explains why courts sometimes refuse to protect owners whose decisions do not reflect what owners actually think are worthwhile uses of a thing but rather reflect their views about how best to exert pressure on someone else (Katz 2010). When owners do not even take themselves to be setting what they think is a worthwhile agenda for a thing but rather make decisions designed just to dominate others, whatever ultimate good they have in mind, they are exceeding their jurisdiction.

This approach to abuse of power is much more familiar to us in the public law context. A famous Canadian constitutional law case from 1959 illustrates the point well.<sup>12</sup> Maurice Duplessis, the Premier of Quebec at the time, used his position to ensure that the liquor licence of Roncarelli, a restaurateur and Jehovah's Witness, was cancelled (*Roncarelli v. Duplessis* 1959). At the time, there was a general hysteria about Jehovah's Witnesses sweeping the dominantly Catholic province. Numerous Jehovah's Witnesses were arrested for distributing and selling pamphlets without a licence. Roncarelli used the profits from his restaurant to bail out hundreds of Jehovah's Witnesses detained by police. In seeing to it that Roncarelli was denied a liquor licence, Duplessis himself thought, and many agreed, that he was performing a public service by limiting the influence of Jehovah's Witnesses in Quebec. At one point, Duplessis is quoted as saying: "A certain Mr. Roncarelli has supplied bail for hundreds of witnesses of Jehovah. The sympathy which this man has shown for the Witnesses, in such an evident, repeated and audacious manner, is a provocation to public order, to the administration of justice and is definitely contrary to the aims of justice" (*ibid.*, 122). The Supreme Court of Canada held that Duplessis' actions in seeing to it that Roncarelli lost his licence was an abuse of power. Duplessis may have had the power to make decisions of the sort he made but not for the reasons he made it. How to limit the influence of Jehovah's Witnesses simply was not a question that his ministerial power was meant to resolve. Abuse of property right has very much the same structure as abuse of public power in this case.

Seen one way, this approach is quite restrictive. Ownership is a position of authority that cannot be used in any manner that the holder sees fit. Owners are free to use their position to resolve the Basic Question, and must act for reasons that are adequate and appropriate to answering this kind of question. On this model of regulation, owners are free to ignore the opinions and even the interests of others

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12. I am grateful to David Dyzenhaus for suggesting this case as an illustration of the point I am making here.

so long as they do not act just in order to hurt the interests of others.<sup>13</sup> This is not to say that owners must personally value every agenda they set. The law legitimately allows owners to act as a clearinghouse of ideas by substituting the opinions of others about what constitutes a worthwhile use of a thing for their own genuinely held view. Thus, a developer acts within his jurisdiction as owner when he builds a subdivision that he thinks is an appalling use of an environmentally sensitive piece of land but that tracks the interests of others, such as the future buyers of his homes. As long as he does not deliberately set out to harm the interests of others so as to gain leverage over them or to spite them, he has not abused his right.

We can imagine more restrictive approaches. Property theorists like Gregory Alexander and Eduardo Peñalver insist that owners are bound to consider how their decisions affect the interests of others and to ensure that the decisions they reach conform to the demands of virtue—the so-called “social responsibility norm” (Alexander 2009; Peñalver 2009). French philosophers have argued for an objective approach to abuse of right, according to which owners would be required to track the interests of society and to act in conformity with the social or economic values that justified the grant of authority in the first place (e.g., Josserand 1927). These sound much more like the demands that we might place on public officials in the exercise of their authority. It would hardly be controversial to require public officials to track the public interest and to avoid advancing their own interests. Nor would it be unusual to require that officials arrive at a decision that they genuinely think resolves the question they have been charged with answering rather than substituting the opinion of others, however genuinely held. So what accounts for the coarse-grained approach of property law to the regulation of owners’ authority?

Why are we satisfied with simply requiring that owners do what they think is worthwhile? The answer, I think, is one part principled and one part pragmatic. The liberty interests of owners limit the kinds of demands we can place on them to serve the interests and to listen to the opinions of others. If we want to delegate collective decision-making about things to private individuals, we need to make some accommodation for the moral limits that people in their private capacity have. It is one thing to require that owners genuinely pursue what they think is worthwhile. It is quite another to require that every decision they make in fact track the interests and opinions of others. Owners are not public officials but rather private individuals charged with making decisions about things that can stand on behalf of the rest of us. There is no more private sphere to which they can retreat than the world made up of things they control. We would suffer moral exhaustion

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13. See Waldron (1991, 295) on moral exhaustion that would result if we constantly had to consider the interests and opinions of others.

if we were constantly required to attend to the interests and opinions of others. Liberty concerns should incline us to favor the coarse-grained approach I argue for.

The other problem with more fine-grained moral regulation is as much pragmatic as it is principled. Owners should not be counted on or expected to make distributively just decisions because they do not have the access to the necessary information on the moral merits of others that would make this possible.<sup>14</sup> Owners may well be experts about the asset itself and its potential uses. Many indeed have argued that private individuals have relatively greater ability in this regard than officials.<sup>15</sup> But distributively just decisions about things require much more than information about the thing: they require information about others. Owners are simply not in a position to gather and act on information about how best to use a thing *all things considered*. That would require access to information about the larger moral and economic context of the decision. What we are left with then is a form of coarse-grained regulation that restricts the class of questions owners are authorized to answer but not the answers themselves. The public quality of owners' decisions, and so their legitimacy, depend not on the substance of their answers but rather on the kind of question they take themselves to be answering. This third approach to regulating owners' conduct may or may not produce "better"<sup>16</sup> ownership decisions, but it is importantly consistent with, and indeed required by, the political foundations of ownership.

## Conclusion

A system of property rights may serve as a means to an end, but it is not an infinitely flexible instrument. We can be instrumentalist about property rights while also acknowledging that there are certain preconditions to legitimately using a system of private property rights to manage our common goods, those resources initially open to all in a state of nature. What I have done in this paper is to present three models of how we manage goods through property rights. The advantage of my exclusivity-based approach is that it is consistent with the political foundations of property, and so provides a better starting point for discussion of the roles property rights can legitimately play in support of our favored moral outcomes.

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14. See Nozick (1974, 158), where he discusses Hayek's view that we can never know enough to distribute to each according to his moral merits and questions whether justice would require us to do so if we did have that knowledge.

15. See, e.g., Smith (2004b, 1729, 1754) ("[p]lausible and widely accepted assumptions about the relative abilities of owners, takers, and officials to generate information about assets—and, as I emphasize, assign them to actuarial classes—provide a clear rationale for protecting owners with property rules").

16. Using efficiency, fairness, or any other value as a metric.

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