BUNDLES OF FREEDOM

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ABSTRACT

Property law is undergoing a paradigm shift. Traditionally, property rules were thought to be held together by a negative account of freedom—"freedom from" interference by our neighbors and by the state, however well-intentioned. Property rules, in broad strokes, were thus characterized as absolute, exclusionary entitlements. Energy-related property jurisprudence currently is undoing this primacy of negative freedom and the absolutist right to exclude. What is more, in the last five years, state supreme courts have increasingly followed suit in a host of different, non-energy-related contexts. In doing so, state supreme courts appear to threaten one of the axiomatic features of the common law: the difference between absolute property rules on the one hand and flexible liability rules on the other.

I argue that this new jurisprudence is a welcome development. It links the current property case law to a core value of property law prevalent at America's founding: property law serves to mobilize society through reasonable, coordinated resource use to overcome novel, serious physical, economic, and political challenges. I argue that this understanding of reasonable coordinated resource use is behind the doctrines employed in case law today to bring about the current jurisprudential shift. I show that an understanding of property rules as serving reasonable coordinated resource use re-ties together the bundle of property law sticks by means of a different conception of freedom dominant in early American thought: freedom as civic republican non-domination. I conclude that property rules, in this reconception, play a central and constructive role alongside

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liability rules in deploying law to meet today's crucial policy challenges.

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Property law is often associated with basic and absolute binaries. Nowhere is this absolute more on display than in the right to exclude.[1] Courts and scholarship traditionally treat the right to exclude as the most important right in the "bundle of sticks" of property law and definitional of property rules as such.[2] This absolute nature of property rules, classically, is what distinguishes them from liability rules. As Judge Guido Calabresi and Douglas Melamed canonically put it in *One View of the Cathedral*, "[a]n entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller."[3] Put differently, "a property rule involves two elements: the grant of an entitlement to either the victim or the injurer and absolute protection of that entitlement."[4]

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1. *See e.g.*, Slade v. Caesars Ent. Corp., 373 P.3d 74, 76–77 (Nev. 2016) (discussing the narrow and broad view of the common law right to exclude).

2. *See* United States v. Craft, 535 U.S. 274, 283 (2002); Dolan v. City of Tigard, 512 U.S. 374, 384, 393 (1994); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); State v. Rebo, 482 P.3d 569, 575 (Idaho 2020); State *ex rel.* New Wen, Inc. v. Marchbanks, 146 N.E.3d 545, 553 (Ohio 2020); Severance v. Patterson, 370 S.W.3d 705, 709 (Tex. 2012); Reed v. Toyota Motor Credit Corp., 459 P.3d 253, 258 (Or. Ct. App. 2020). For a classic exposition of the centrality of the right to exclude to property law, see generally Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998). For an even more classic exposition, see 2 WILLIAM BLACKSTONE, COMMENTARIES *209.

3. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

4. Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 723 (1996).

On the other hand, "under a liability rule, the injurer is permitted to cause harm but must compensate the victim for the harm."[5]

In this Article, I submit that property law today is beginning to abandon these binaries in one of its key areas of application: energy law. It does so precisely with regard to situations that traditionally triggered the application of the right to exclude: the knowing intrusion of an unauthorized party upon a sub-surface estate over the express objection of the sub-surface estate holder.[6] In each of these cases, the respective trespass claim—and the right to exclude—was overridden by reasonable use concerns and other sticks in the property bundle.[7]

This change suggests a broader theoretical realignment within property law as a whole. Most markedly, property law no longer gives clear primacy to the right to exclude as its defining characteristic.[8] Rather, the right to exclude cedes its definitional primacy within property law to the right to use, and more particularly to a flexible understanding of coordinated use.[9] This realignment will have fundamental consequences not just for the law of property. It also redefines what "property rules" are and do. As such, it alters our understanding of the functions of, and inter-relationship between, property rules and liability rules. Critically, property law—and energy law—are achieving this change internally by altering our understanding of what makes a "property rule," even as normative calls for such an external change to property law to account for climate emergencies begin to be forcefully raised.[10]

The preference for the right to exclude, and the classical binary of property rules this preference sets up, at heart, is about answering the question "why property law?"[11] This classic account anchors its answer

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5. *Id.*

6. *See* Regency Field Servs., LLC v. Swift Energy Operating, LLC, 622 S.W.3d 807, 820 (Tex. 2021); Lightning Oil Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39, 47–48 (Tex. 2017); Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 4 (Tex. 2008).

7. *See* sources cited *supra* note 6.

8. *See* Merrill, *supra* note 2, at 734–37, 754–55.

9. *See* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 42–45 (Canto Classics ed., 2015) (noting the need for entitlement roles to solve collective supply, credible commitment, and mutual monitoring problems).

10. *See, e.g.*, Rashmi Dyal-Chand, *Sharing the Climate*, 122 COLUM. L. REV. 581, 585 (2022).

11. Calabresi & Melamed, *supra* note 3, at 1093 ("What are the reasons for deciding to entitle people to pollute or to entitle people to forbid pollution, to have children freely or to limit procreation, to own property or to share property? They can be grouped under three headings: economic efficiency, distributional preferences, and other justice considerations.").

in a specific conception of freedom. Thus, an interest protected by a property rule "is the form of entitlement which gives rise to the least amount of state intervention: once the original entitlement is decided upon, the state does not try to decide its value."[12] Such a property-rule-based account of freedom limits state intervention and, by implication, collective intervention. In terms of the well-worn dichotomy of positive and negative accounts of freedom, property law follows the "negative" ideal of "freedom from."[13] Famously, "I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is simply the area within which a man can act unobstructed by others."[14] The function of non-intervention in property rules (and property law) and non-interference in political theory are reasonably close analogues.[15]

In the context of property law scholarship, the idea of negative freedom does not stand alone. Negative freedom and the right to exclude are firmly allied to utilitarian justifications.[16] Strong, publicly enforced negative freedom protections for entitlements by means of property rules lower transaction risks and costs, thus allowing for the most efficient use of resources in a private marketplace.[17] Utility and autonomy remain the theoretical glue for the legal protection of property entitlements by means of property rules in the common law.[18]

If property law is no longer secure as the definitional home of negative freedom, as I will argue, then two significant problems arise. The first is reasonably simple: "untethering" property law rules from the ideals of negative freedom creates a fundamental impression of arbitrariness; negative freedom and the right to exclude hold the bundle of sticks that is property law together. Ostensible trespass cases that do not give precedence to the right to exclude therefore appear wrongly

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12. *Id.* at 1092.

13. ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 121–22 (1969).

14. *Id.* at 122.

15. *See* Calabresi & Melamed, *supra* note 3, at 1092; BERLIN, *supra* note 13, at 122.

16. *See* Calabresi & Melamed, *supra* note 3, at 1093.

17. Notably, *View of the Cathedral* is a foundational piece for the economic analysis of property law. *See* Adam Davidson, *Guido Calabresi's "Other Justice Reasons"*, 88 U. CHI. L. REV. 1625, 1625 (2021); *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 4.1 (9th ed. 2014) (arguing along similar lines).

18. This utility-based understanding is already present in Blackstone. BLACKSTONE, *supra* note 2, at *5. It also underpins Lockean accounts. JOHN LOCKE, TWO TREATISES OF GOVERNMENT: A CRITICAL EDITION 305–06 (Peter Laslett ed., 1988).

decided.[19] In fact, the Texas Supreme Court has been the subject of such criticism in the recent past, albeit deferentially expressed.[20]

Such criticism can most forcefully be rebutted to the extent that the new jurisprudence can be made to fit with a different balancing of the underlying values already latent in property law. Drawing on the foundational work of Carol Rose, and its application to the energy law in the literature, the answer to this first challenge is to look more firmly to the idea of correlative rights within property law and the softening effect of correlative rights and doctrines like the accommodation doctrine on seemingly absolute entitlements.[21] It turns out the jurisprudence in question is not in fact wrongly decided but rather picks up on, and reweighs, relationships that were always inherently important to property rules themselves.[22]

Yet, this first question naturally leads to a second. It is certainly true that property law can look to relationships between rightsholders as a means to justify previously unanticipated outcomes. That does not change the fact that the results remain facially surprising.[23] It is a deployment of property law inconsistent with our understanding of "property rules." Something is decidedly going on to bring about the

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19. *See, e.g.*, Keith B. Hall, *Ruminations on the Continuing Evolution of Trespass Law in the Context of Mineral Development*, 8 LSU J. ENERGY L. & RES. 505, 531–32 (2020).

20. *See id.* at 531 ("This result is in tension with the general rule that an owner and possessor of property has a trespass action even when the trespass causes no harm. Several factors likely contribute to this result."). These cases are reconcilable under a utility-balancing nuisance analysis. Joseph A. Schremmer, *Getting Past Possession: Subsurface Property Disputes as Nuisances*, 95 WASH. L. REV. 315, 363 (2020) (arguing that the court employed a nuisance analysis rather than its stated trespass analysis).

21. CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 165–89 (1994); Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 179 (1998); *see also* Monika U. Ehrman, *Hidden Resources*, 13 U.C. IRVINE L. REV. 563, 609 (2023); Joseph A. Schremmer, *Pore Space Property*, 2021 UTAH L. REV. 1, 38–42 (2021); David E. Pierce, *Carol Rose Comes to the Oil Patch: Modern Property Analysis Applied to Modern Reservoir Problems*, 19 PENN ST. ENV'T L. REV. 241, 245–46 (2011). A different way to get at the same point is by way of the accommodation doctrine. *See, e.g.*, Tara Righetti et al., *Capture or Convert*, 34 PROB. & PROP. 26, 31 (2020); Laura Falco, *Texas's Surface Rights, Mineral Rights, and* Lyle v. Midway Solar, LLC, 58 ROCKY MTN. MIN. L. FOUND. J. 231, 234 (2021); Jason A. Newman & Cornelius M. Sweers, *Get Off My Lease: Predicting How Texas Courts Will Resolve Off-Lease Drilling Disputes Under* Lightning Oil v. Anadarko, 13 TEX. J. OIL, GAS, & ENERGY L. 103, 116–17 (2018). The issue also has salience in the water context. *See* Burke W. Griggs, *Interstate Water Litigation in the West: A Fifty-Year Retrospective*, 20 U. DENV. WATER L. REV. 153, 199–200 (2017).

22. *See* sources cited *supra* note 21.

23. *See* James W. Coleman, *The Third Age of Oil and Gas Law*, 95 IND. L.J. 389, 422–23 (2020) (noting the fault lines in the jurisprudence and Texas's arguable outlier status).

change in focus in the first place.[24] So, is property law at an inflection point of fundamental theoretical realignment in what holds "property" together or what liberty interest "property" seeks to protect? Is what makes a property rule distinctive potentially about to change? Tellingly, the correlative rights perspectives developed by Carol Rose, and applied by others, reject the simple binaries so engrained in our view of property as negative freedom—the near absolute protection against any external intervention or interference by the recognition of property entitlements.[25] This would undercut much of what the literature has identified as essential and distinctive about "property rules" in the common law.[26]

I will argue that the correlative rights perspective supplanting the traditional understanding of the right to exclude indeed cannot be reconciled with negative freedom. The best attempt at reconciling correlative rights with the idea of negative freedom is the traditional saying that "my hand's freedom of motion ends at the tip of your nose."[27] Still, this is a poor, and ultimately failed, attempt at reconciliation. Correlative rights perspectives focus on the fact that, most frequently, the enjoyment by property rightsholders of their entitlements has the potential to intervene in, and interfere with, the enjoyment of entitlements by third parties as well as the general public.[28] A correlative lens sees "noses" everywhere. What I may or may not do, and what freedom must mean, is defined by reference to a collective and to the shared understandings of that collective justifying the curtailment of individual entitlements.[29] This "nose-first" understanding of permissible action flies too close to the philosophical counter-piece to negative freedom—positive freedom—to remain plausible. In positive freedom, "the real self may be conceived as something wider than the individual (as the term is normally understood), as a social 'whole' of which the individual is an element or aspect."[30] A "nose-first" approach gives the social whole precisely the kind of primacy that is irreconcilably ill at ease with individualistic utilitarian views of freedom.[31]

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24. *See id.*

25. *See* Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 272 (1996).

26. *See, e.g.*, Merrill, *supra* note 2, at 730; Calabresi & Melamed, *supra* note 3, at 1092.

27. *See* Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919).

28. *See* Rose, *supra* note 25, at 272.

29. Carol M. Rose, *Property in All the Wrong Places?*, 114 YALE L.J. 991, 1019 (2005) ("Property is one of the most sociable institutions that human beings have created, depending as it does on mutual forbearance and on the recognition of and respect for the claims of others.").

30. BERLIN, *supra* note 13, at 132.

31. *See* ALASDAIR MACINTYRE, AFTER VIRTUE 198–99, 260–61 (3d ed. 2007).

With negative freedom removed from its definitional pedestal of what makes property rules distinctive as "property rules" in the common law, the question becomes if another understanding of freedom can credibly take its place and thus provide an alternative account of the nature of property rules. Importantly, this definitional question goes not just to the question of primacy of negative freedom and the traditional understanding of the right to exclude *itself*. It also goes to its underlying utilitarian assumptions, i.e., that increased utility should serve as the chief organizing feature of conceptions of freedom underpinning property rules.[32] I argue that there indeed is an alternative conception of freedom that can take this place—the idea of freedom as non-domination in civic republicanism.[33] Notably, this conception does in fact break with utilitarian justification of freedom in property, linking property instead to human capabilities and development, as opposed to economic growth or concerns.[34]

The development we are observing in energy law property cases has significant repercussions.[35] Correlative rights have stopped being a communitarian exception in a world of individualistic property entitlements centered in negative freedom and the right to exclude. The logic of correlative rights is knocking at the door of becoming the logic of property rules in general. Correlative rights on their face are supplanting the most basic of ideals of negative freedom: the idea of trespass and the absolute right to exclude. If this most basic example of the absolute understanding of property rules as negative freedom is giving way, we must fundamentally rethink what property rules, property law, and property relationships are about. The argument that I will outline in this Article is that property rules are no longer just about facilitating economic maximization by utility-seeking individuals focused on what is "mine." Property rules are about facilitating reasonable use and private coordination of critical, scarce resources in light of community standards and community needs.[36] The right to use—and the right to use in a

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32. POSNER, *supra* note 17, § 4.1.

33. *See* QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM 22 (1998); PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 17 (1997); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT, FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 59 (2d ed. 2003).

34. PETTIT, *supra* note 33, at 111–13; *see also* MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 123–42 (2011).

35. *See* sources cited *supra* note 6.

36. For a theoretical account of the need for such a switch in perspective in political economy, see OSTROM, *supra* note 9, at 42–45 and ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY 260–70, 281–86 (2005).

coordinated social context—now stands at the side of the right to exclude as the central and distinctive feature of property rules.

This switch allows property rules to take a far more central place in the private governance of collective action.[37] Importantly, to return to the distinction between property rules and liability rules that started our discussion, property rules now provide an *ex ante* and organically problem-solving alternative to resource allocation compared to *ex post* liability rules.[38] The understanding of property rules I argue for has significant effects on the common law more broadly. It begins to invert the classical understanding that liability rules are a more flexible—and therefore frequently desirable—tool to coordinate social ends through law.[39] Liability rules, I will argue, are in fact the potentially problematic tool if left to operate alone as a means of social coordination because they do not "govern up" towards constructive, collective use. They "govern down" to the establishment and policing of minimum standards.

As society faces the challenge of energy transition, this understanding of property rules provides an important and necessary alternative to a paradigm premising climate and environmental law in liability rules.[40] Currently, the concerns dominating many energy transition policy arguments in the United States are Chinese emissions and China's reliance on coal-fired generation.[41] Such a framing dangerously threatens the success of transition because it focuses on minimum standards (and fault-based liability rules). It does not focus on coordinated use of energy resources to achieve the best attainable global outcomes. A revitalized understanding of property rules provides such an alternative lens—a lens that further supports dynamic innovation capable of supporting exponentially increasing and measurable development and climate outcomes.[42]

This Article has six parts. In Part I, I introduce the classic view of property law and its roots in an understanding of negative freedom. In Part II, I set out two examples of how this classic understanding of

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37. *See* sources cited *supra* note 36.

38. *See* Calabresi & Melamed, *supra* note 3, at 1092.

39. *See* Guido Calabresi, *Torts—The Law of the Mixed Society*, 56 TEX. L. REV. 519, 534 (1978).

40. *See* EDITH BROWN WEISS, ESTABLISHING NORMS IN A KALEIDOSCOPIC WORLD 202–03 (2020) (discussing the polluter-pays principle as means to implement the no-harm principle).

41. *See Do You Believe China Builds a Coal Plant Every Day?*, CLIMATE CAPITALIST (July 9, 2023), https://theclimatecapitalist.com/articles/do-you-believe-china-builds-a-coal-plant-every-day.

42. *See* FRÉDÉRIC G. SOURGENS & LEONARDO SEMPERTEGUI, PRINCIPLES OF INTERNATIONAL ENERGY TRANSITION LAW (2023).

property law is challenged today in energy-related property law cases. In Part III, I provide the correlative rights-based reconciliation of these cases within the broader property law discourse. I show how a correlative-rights perspective replaces the primacy of the right to exclude with a primacy of the right to coordinate use. I also show that such a perspective is fundamentally inconsistent with negative freedom. In Part IV I get to the heart of my argument—property is only possible if it is held together by an account of freedom. As I will explain in Part IV, correlative rights understandings of property law do not clearly follow such an understanding of freedom, thus endangering the property law exercise as a whole. In Part V, I argue that these problems should be overcome by returning the correlative rights approach to a civic republican understanding of freedom as non-domination in its stead and show that this civic republican understanding is consistent with the development of liberty interests in the common law. In Part VI, I briefly sketch the repercussions of this shift in relation to the classic distinction between property and liability rules.

I. THE NEGATIVE FREEDOM PARADIGM OF PROPERTY LAW

Our starting point is that the right to exclude, and with it negative freedom, traditionally defines what distinguishes property rules from other areas of the common law.[43] As I will discuss in this Part, the relationship between negative freedom and property rules is not straightforward because the dominant account of property rules conceives of property rights as a "bundle of sticks."[44] In this bundled account, property law cannot logically derive all other property rules from the right to exclude.[45] Instead, the primacy of the right to exclude and negative freedom is functional. Something needs to bind the different "sticks" (property rights) together into a bundle. As I will outline, that tie is negative freedom. Because negative freedom is principally a "freedom from" it is most clearly present in the right to exclude. The right to exclude therefore appears as the first property right among equals in the bundle of property rights. As I will explain, this functional preference for negative freedom and the right to exclude is historical and thus contingent rather than logical or essential. This leaves room for different

43. *See* Calabresi & Melamed, *supra* note 3, at 1092.
44. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).
45. *See* Anthony M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 113 (Anthony G. Guest ed., 1961).

ways to hold together the "bundle of sticks" of property law and the development of the law detailed in the next Parts of this Article.

The U.S. Supreme Court most recently confirmed in 2021 that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[46] From 2012 to 2022, state supreme courts in Idaho, Illinois, Iowa, Massachusetts, North Dakota, Ohio, Texas, Utah, and Virginia have made similar statements.[47] The primacy of the right to exclude in property law therefore appears to be alive and well.

To understand both the traditional standing of the right to exclude and current developments in property law, we must first unpack the idea of this "bundle of sticks."[48] The treatment of property rights as a "bundle of sticks" communicates that there is no single, essential right or entitlement that defines all of property law.[49] Property law is pluralist: property is defined by "sticks," plural—by multiple rights.[50] Each of these rights is independent of the others. Still, these sticks are part of a "bundle" that groups and holds them together; together, they make up the different incidences of what makes property.[51] None does so alone.[52]

The idea of a bundle also implies that something external binds the different components together.[53] To form a bundle, there is a string or rope that goes *around* the sticks.[54] That means that no one *stick* can claim be more important because it can somehow hold the other sticks together. That is not how bundles work. Consequently, the metaphor

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46. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021) (quoting *Kaiser*, 444 U.S. at 176)); *see also* Dolan v. City of Tigard, 512 U.S. 374, 384, 393 (1994); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982); United States v. Craft, 535 U.S. 274, 278 (2002).

47. State v. Rebo, 482 P.3d 569, 575 (Idaho 2020); People v. McCavitt, 185 N.E.3d 1192, 1206 (Ill. 2021); State v. Paye, 865 N.W.2d 1, 6 (Iowa 2015); Mass. Port Auth. v. Turo Inc., 166 N.E.3d 972, 982 (Mass. 2021); Sauvageau v. Bailey, 973 N.W.2d 207, 214 (N.D. 2022); State *ex rel.* New Wen, Inc. v. Marchbanks, 146 N.E.3d 545, 553 (Ohio 2020); Severance v. Patterson, 370 S.W.3d 705, 709 (Tex. 2012); Utah Stream Access Coal. v. VR Acquisitions, LLC, 531 P.3d 195, 216–17 (Utah 2023); Palmer v. Atl. Coast Pipeline LLC, 801 S.E.2d 414, 418 (Va. 2017).

48. *Cedar Point Nursery*, 141 S. Ct. at 2072.

49. *See* Honoré, *supra* note 45, at 113.

50. *See id.*

51. *See id.*

52. *See id.*

53. *See Bundle*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/bundle (last visited Feb. 8, 2024) (defining "bundle" as "a group of things fastened together for convenient handling").

54. *Compare id.* ("fastened together"), *with Fasten*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/fasten (last visited Feb. 8, 2024) (defining "fasten" as "to attach especially by pinning, *tying*, or nailing" (emphasis added)).

works only if we accept that there are multiple independent rights, none of which can be logically prior or structurally more significant to the whole than any other.

That means that we can already identify an ambiguity in the jurisprudence about the primacy of the right to exclude. The jurisprudence refers to the right to exclude as "one of the most essential sticks in the bundle."[55] But how is the right to exclude "most essential?"[56]

One might be tempted to think of the right to exclude as more essential because it is the lowest common denominator of all property rules (i.e., it defines the essence of property law).[57] If one takes the "bundle of sticks" metaphor seriously, the right to exclude cannot be more "essential" in this sense.[58] There is not one property tree or tree limb with many smaller branches.[59] Instead, there are multiple property "sticks."[60] Sticks in a bundle are next to each other and distinct from one another. These sticks cannot be reduced to each other.

This means that the core property rights in the common law must be incommensurate with each other (e.g., using something is not a special case of excluding someone else).[61] It is only when the rights are seen *together* that they make up the incidences of property (e.g., right to exclude, use, alienate, bequeath, etc.).[62] No one right alone suffices, meaning that each is meaningfully additive to the other.[63] Once one looks

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55. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

56. *Id.*

57. *See* Merrill, *supra* note 2, at 734–37, 754–55.

58. The point is made very well in Merrill's essentialist defense of the right to exclude and its identification of the bundle metaphor as inconsistent with that understanding. *See id.* Merrill may have been too quick in thinking that any pluralist understanding of property completely surrenders the content of the definition of property law to historical or cultural accident. Honoré's point is directly to the contrary— all incidences of property must be present to make up a modern, Western "property" regime. *See* Honoré, *supra* note 45, at 108. It thus appears that to a certain extent, Merrill mislabels pluralism as realism. *See generally* Merrill, *supra* note 2.

59. There are of course arguments for reconceptualizing property law as a tree. *See generally* Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869 (2013). That, however, is not the dominant account of property law as these arguments themselves make plain. *See, e.g.*, *id.* at 873 (attempting to "reviv[e] the tree concept of property").

60. *Cedar Point Nursery*, 141 S. Ct. at 2072.

61. This is not the only account. Thus, Merrill argues for an essentialist preference of the right to exclude. *See* Merrill, *supra* note 2, at 734–37, 754–55. He does note that the bundle of sticks conception would stand to contradict that understanding. *Id.* Honoré confirms as much. *See* Honoré, *supra* note 45, at 134.

62. *See* Honoré, *supra* note 45, at 112–13.

63. *See id.*

at property law as a bundle of sticks, none of the different rights in the bundle can be more essential in the sense of being prior in logic to the others.

We therefore have to understand the claim that the right to exclude is "most essential" in a more colloquial sense.[64] It is more important—or a sort of first among equals.[65] This primacy does not mean that it can always and entirely displace the other rights. Further, this primacy is not a matter of absolute logical necessity. It instead expresses a value preference—a value preference that in turn reflects a continuation of sociohistorical choices.[66]

Despite the nuance introduced into the law of property by treating property as a bundle of sticks (introduced in the first-year property curriculum),[67] our scholarly understanding of property rules at first blush appears to invite a simpler essentialism. Calabresi and Melamed's discussion surrounding "property rules" as a counterpoint to "liability rules" simplifies the value pluralism within property law.[68] Their account is exclusively concerned with the right to exclude.[69]

What distinguishes property rules from liability rules in Calabresi and Melamed's account is that they "give[] the seller a veto if the buyer does not offer enough."[70] A veto is "an authoritative prohibition."[71] The right to exclude—and only the right to exclude—fits this description. The other principal "sticks," i.e., rights in the "bundle of sticks," do not. The other sticks typically included in the property bundle are use, possession, income, control, and disposition.[72] Each of these rights concerns "powers to" rather than an ability to prohibit. None involve a veto right over others (tenants in common have precisely those rights because they cannot impose such a veto on each other's use, possession, income,

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64. *See* cases cited *supra* notes 46–47.

65. *See Essential*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/essential (last visited Feb. 8, 2024) (defining "essential" as "of the utmost importance").

66. *See* JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 47–53 (1991). Waldron has since noted that he has somewhat changed his mind in a manner more consistent with a pluralist rather than a realist understanding of property law. *See* Jeremy Waldron, *Supply Without Burthen Revisited*, 82 IOWA L. REV. 1467, 1483 (1997).

67. JESSE DUKEMINIER ET AL., PROPERTY 183–85 (10th ed. 2022).

68. *See* Calabresi & Melamed, *supra* note 3, at 1092–93.

69. *See id.*

70. *Id.* at 1092.

71. *Veto*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/veto (last visited Jan. 17, 2024).

72. *See* Richard Epstein, *Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property*, 8 ECON. J. WATCH 223, 224 (2011).

control, and disposition of their undivided interest in the property).[73] "Property rules" thus appear to be reduced to a single property entitlement: exclusion.[74]

This apparently essentialist understanding of property law remains wildly popular in the academic understanding of property rules. Quantitatively, Calabresi and Melamed's account of property rules remains among the most heavily cited property law articles.[75] It also remains the standard account of property rules in recent scholarship.[76] Qualitatively, their work on the liability rule vs. property rule distinction has been adopted in jurisprudence.[77] To the extent that there is scholarly work on the nature of property critiquing a dominant account, it further begins with Calabresi and Malamed, again cementing their status as having written the field.[78]

This raises the obvious question: why does this somewhat essentialist sounding approach to property law remain so inherently popular even as it appears to brush over the inherent pluralism of property rules? The answer is that the purely legal lens employed so far is short of the mark in an important respect. Calabresi and Melamed's argument is not about property law in a vacuum as an object of intellectual study.[79] They analyze how law structures power relationships between the state and

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73. *See* Wells v. Hollenbeck, 37 Mich. 504, 506 (1877); Upchurch v. Upchurch, No. SC-2022-0478, 2023 WL 2818554, at *6 (Ala. Apr. 7, 2023) (discussing entitlement to proceeds upon sale after death).

74. *See* Calabresi & Melamed, *supra* note 3, at 1092–93.

75. *See* Davidson, *supra* note 17, at 1625.

76. *See, e.g.*, James Toomey, *Property's Boundaries*, 109 VA. L. REV. 131, 134 (2023) (equating it with "conventional legal wisdom"); Dyal-Chand, *supra* note 10, at 592 ("The fault-lines in traditional property law that even this brief sampling of crisis response reveals are cracks in the foundation of exclusion. At the same time, however, exclusion, buttressed by the underlying norm of autonomy, remains the starting point in regulation of property rights in the face of crisis."); Christopher Serkin, *What Property Does*, 75 VAND. L. REV. 891, 904 (2022) ("[Calabresi and Melamed's] view pervades property law and theory more generally and is lurking at the heart of any conventional account of property today."); Tara K. Righetti & Joseph A. Schremmer, *Waste and the Governance of Private and Public Property*, 93 U. COLO. L. REV. 609, 662 (2022) (discussing injunctive relief); Katrina M. Wyman & Adalene Minelli, *Propertizing Environmental Attributes*, 39 YALE J. ON REG. 1391, 1411 (2022) (discussing the allocative role of property rules).

77. *See, e.g.*, Proctor v. Huntington, 238 P.3d 1117, 1119 (Wash. 2010) (en banc) ("Property rules are characterized by all-or-nothing relief afforded to the party who is deemed to have the legal right."); Unity Real Est. Co. v. Hudson, 178 F.3d 649, 659 (3d Cir. 1999); Marblegate Asset Mgmt. v. Educ. Mgmt. Corp., 75 F. Supp. 3d 592, 606 (S.D.N.Y. 2014).

78. For some such scholarship, see Dyal-Chand, *supra* note 10, at 592; Serkin, *supra* note 76, at 904; di Robilant, *supra* note 59, at 874.

79. *See* Calabresi & Melamed, *supra* note 3, at 1092–93.

individuals directly (i.e., where can the individual keep the state out) and indirectly through private law regimes (i.e., where can the individual resist unwanted transfers brought about through liability rules).[80] Calabresi and Melamed anchor property law in a broader discourse about how property law empowers or limits certain actors (e.g., owners, neighbors, putative buyers, regulators, the courts, etc.) as a part of larger forces achieving *de facto* distributive outcomes.[81]

The point of property rules as a veto must be seen in this broader context. Here, Richard Epstein provides an important additional observation. The point of property law—and the point captured by Calabresi and Malamed's account—is to stand as a bulwark against an overweening state.[82] The point of the account of property rules is not principally a point about property. It is a point about why property law is needed in the first place.[83] The answer is straightforwardly simple—property rules protect individuals against the reach of the state by keeping the state out.[84] Richard Epstein argues that even in a bundled account of property rules, this feature fundamentally stays the same even if its mechanism changes somewhat (there are now more rights theories, more rights, and ultimately more rightsholders against which the state would have to proceed to assert dominion).[85]

Seen through this lens, Calabresi and Melamed advance a case about a certain value that ties the property bundle together. They do not make a claim about what right is most essential *within* the bundle.[86] Rather, they make a claim about what must be seen to hold these rights together externally.[87] This value holding the bundle together is negative freedom: a property interest "is the form of entitlement which gives rise to the least amount of state intervention: once the original entitlement is decided upon, the state does not try to decide its value."[88]

The political philosopher Isaiah Berlin revitalized this idea of negative freedom, and its importance in a democratic society, in his writing in the late 1960s.[89] Berlin posited that "I am normally said to be

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80. *See id.*
81. *See id.* at 1093.
82. Epstein, *supra* note 72, at 230–31.
83. *See id.* at 233–34.
84. *See id.* at 230–31.
85. *See id.*
86. *See* Calabresi & Melamed, *supra* note 3, at 1092.
87. *See id.*
88. *Id.*
89. John Rawls gives Berlin's work as the post-World War II reference for this debate in his seminal work, *A Theory of Justice*. *See* JOHN RAWLS, A THEORY OF JUSTICE 201–02 n.3 (1973).

free to the degree to which no [human being] or body of [humans] interferes with my activity. Political liberty in this sense is simply the area within which a man can act unobstructed by others."[90] Berlin argued for the primacy of this ideal of freedom by drawing expressly on the difference between democratic societies and fascist and communist societies (Berlin was an émigré to England who had experienced persecution at the hands of the nascent Soviet Union and the hands of antisemitic agitators in Latvia).[91] It is this negative freedom that is critical to Calabresi and Melamed's understanding of property rules and what makes them distinctive in the common law.[92]

The account that property law is a tool to limit the power of the state also makes historical sense in the context of the development of the common law of property. The common law of property traces the outcomes of the power struggle between the Crown and landed aristocracy in England from the Norman conquest through its formative period in the seventeenth century.[93] This struggle was about limiting regal power (and thus sovereign intervention) and solidifying aristocratic power bases against the Crown.[94] In this sense, the common law of

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90. BERLIN, *supra* note 13, at 122.

91. Berlin described it as follows:

> For Constant, Mill, Tocqueville, and the liberal tradition to which they belong, no society is free unless it is governed by at any rate two interrelated principles: first that no power, but only rights, can be regarded as absolute, so that all men [sic], whatever power governs them, have an absolute right to refuse to behave inhumanely; and, second, that there are frontiers, not artificially drawn, within which men should be inviolable, these frontiers being defined in terms of rules so long and widely accepted that their observance has entered into the very conception of what it is to be a normal human being, and, therefore also of what it is to act inhumanly and insanely . . . .

BERLIN, *supra* note 13, at 165. For a biography, see Joshua Cherniss, *Isaiah Berlin*, STAN. ENCYC. PHIL. (Feb. 12, 2022), https://plato.stanford.edu/entries/berlin/. The overlap between Calabresi and Berlin's thought is not accidental. Calabresi studied and excelled at Berlin's Oxford as a student and left Oxford steeped in its ethos. Laura Kalman, *Some Thoughts on Yale and Guido*, 77 L. & CONTEMP. PROBS. 15, 18–19 (2014). Like Berlin, Calabresi, was a refugee (in his case from Italian fascists). *Id.* at 15. While Berlin is not cited in *One View of the Cathedral*, it is fair to suggest that the common experience that binds both men fairly places Berlin's work within the scope of the *Cathedral*. *See generally* Calabresi & Melamed, *supra* note 3.

92. *See generally* Calabresi & Melamed, *supra* note 3.

93. *See* E. M. Yates, *On the Ownership of Land*, 26 GEOJOURNAL 265, 268 (1992). For a discussion of later social clashes and the importance of property law, see generally J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY (1987) and CHRISTOPHER HILL, THE WORLD TURNED UPSIDE DOWN: RADICAL IDEAS DURING THE ENGLISH REVOLUTION (1972).

94. *See* POCOCK, *supra* note 93, at 110–20.

property and the idea of negative freedom came of age together in the English legal experience.[95] It therefore makes historical sense that negative freedom should hold together the idea of property rights more generally and give primacy to the right to exclude as a default rule when rights clash.

This account further resonates with the Lockean conception of property. Locke's account transforms things and places in the state of nature into property by my right to exclude others.[96] The thing or place is mine in that it is not yours to use in nature.[97] And it is mine because of the labor I have expended upon it.[98]

This labor and improvement must be protected because it greatly increases *utility*, particularly in agriculture (the main mode of production in Locke's England).[99] The fact that I can exclude you increases my motivation and ability to improve what is now "mine."[100] Here, negative freedom facially keeps out my neighbor rather than the Crown.[101] Yet, Locke's account was intentionally political—as a pamphleteer for and with his patron the Earl of Shaftesbury—Locke advanced a theory of anti-royalist collective governance premised in (land) ownership and freedom.[102]

The same link also appears in Blackstone. Again, the definition of property is about the exercise of dominion and sovereignty—and the right

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95. It is interesting to see the very Anglo-American derivation of negative freedom in Berlin. *See* BERLIN, *supra* note 13, at 122–31. The parliamentary struggles and English and American history are very much front of mind in the concept of negative freedom. In this sense, the political theory in Berlin is also a crystallization of political history that was etched in the law of property, thus explaining the intuitive explanatory power of Berlin's work for the law of property.

96. *See* LOCKE, *supra* note 18, at 306.

97. *Id.*

98. *Id.* Notably, this theory was a natural-rights-based rather than a positive-rights-based approach. 2 QUENTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT 153 (1978).

99. *See* LOCKE, *supra* note 18, at 306–09. On the feudal economy and its essentially zero-sum-game nature, see PHILIPPE AGHION ET AL., THE POWER OF CREATIVE DESTRUCTION: ECONOMIC UPHEAVALS AND THE WEALTH OF NATIONS 1–39 (Jodie Cohen-Tanugi trans., 2021).

100. LOCKE, *supra* note 18, at 306. On the importance of property right protection, and the right to exclude, for agricultural development, see VICTOR DAVIS HANSON, THE OTHER GREEKS: THE FAMILY FARM AND THE AGRARIAN ROOTS OF WESTERN CIVILIZATION 50–90 (1995).

101. LOCKE, *supra* note 18, at 306.

102. *See* 2 SKINNER, *supra* note 98, at 239–40; RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 169 (1979). On the relationship between the treatises and Shaftesbury, see generally Peter Laslett, *The English Revolution and Locke's* Two Treatises of Government, 12 CAMBRIDGE HIST. J. 40 (1956).

to exclude others.[103] The justification similarly sounds in the protection of utility (premised again in the necessities of an agricultural economy).[104] What defined property was the ability to keep others out and to establish sovereignty (a claim that implicitly limits the rights of the Crown over private property).[105] Negative liberty premised in utility thus was not only the starting point for the most influential theoretical account of property, it was also the starting point for one of the foundational legal accounts in the common law.[106] The reason for property rights is to make the owner sovereign and keep others (including the state) from interfering with that sovereignty.[107] Negative freedom is therefore of functional significance in light of the historical context in which property rules came to be developed.

The focus on negative freedom as premised in property ownership continued to have significant purchase through the recent past. The confrontation between the United States and the Soviet Union gave rhetorical force to the idea of private ownership as keeping out an overpowering state.[108] The prevailing political discourse within the United States made this discourse relevant domestically, as well, in light of the increasing role of the federal government in the U.S. economy not only through the welfare state but also by means of the administrative state.[109] Property and negative freedom here come full circle to the economic understanding of appropriate means of distribution of entitlements already outlined by Calabresi and Melamed and placed on steroids by conservative economists like Milton Friedman.[110] The ability to keep the state at arm's length, in other words, is not a relic of the distant past. Rather, it is functional centerpiece of a reasonably recent property ideal capable of giving a cohesive meaning to property rules in

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103. BLACKSTONE, *supra* note 2, at *2.

104. *Id.* at *5.

105. *Id.* at *2, *8–*9.

106. *See* DAVID J. BEDERMAN, THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION: PREVAILING WISDOM 10–12 (2008) (discussing Blackstone's influence on the common law in general); *see also* Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 281–82 (1998) (discussing the influence of Blackstone's property law theory).

107. On Blackstone's larger project, see POCOCK, *supra* note 33, at 236.

108. *See* John O. McGinnis, *A New Agenda for International Human Rights: Economic Freedom*, 48 CATH. U. L. REV. 1029, 1030 (1999); *see also* John G. Sprankling, *The Global Right to Property*, 52 COLUM. J. TRANSNAT'L L. 464, 465–66 (2014).

109. *See* McGinnis, *supra* note 108, at 1030–31.

110. *See generally* Calabresi & Melamed, *supra* note 3; BINYAMIN APPELBAUM, THE ECONOMISTS' HOUR: FALSE PROPHETS, FREE MARKETS, AND THE FRACTURE OF SOCIETY (2019) (discussing the rise of prominence of Friedman's approach to economics in U.S. conservative policy circles).

a broader constitutive framework of how the common law can fairly and efficiently allocate resources.[111]

This does not mean that there is anything necessary about this particular way of bundling together property rights or that the common law's value preferences are frozen in amber.[112] It is true that value preferences, like the preference for negative freedom, can have an odd longevity in the common law due to the power of path dependencies—a solution, once adopted for a specific historical reason is difficult to change simply because of the social cost of undoing past efforts.[113] (For example, the QWERTY keyboard is not the most efficient keyboard configuration but the cost of teaching all past QWERTY typists the new layout prevents adoption of a better solution simply because the QWERTY keyboard came first.[114]) Still, this longevity is not perennial.[115]

The classical example of such path dependence in property law is the oft-dreaded rule against perpetuities.[116] The rule grew out of the litigation about a trust indenture seeking to protect a barony of a Royalist Earl against the insanity of a first-born son in republican seventeenth century.[117] The case played out against the backdrop, and indeed "marked the climax of[,] a long struggle between the conveyancers who wanted more freedom for the landed classes to control their estates and the royal judges who stood firm against these efforts for centuries."[118] In other words, the rule against perpetuities is part of the broader power struggle that gave rise to negative freedoms.[119] In this fight, "[t]he conveyancers and their clients, not the judges, were the ultimate victors."[120] To an experienced conveyancer, the rule left significantly greater tools to achieve the intent of the grantor than was previously available, thus keeping estates locked up longer rather than for a shorter duration.[121] In other words, the rule "seems to be the work not of incipient capitalists but of landed gentlemen anxious to preserve the positions of

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111. *See* Calabresi & Melamed, *supra* note 3, at 1093.

112. *See* Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 605 (2001).

113. *See id.* at 603–04.

114. *Id.* at 611–12.

115. *Id.*

116. *Id.* at 634–35; *see also* Walter H. Anderson, *The Modern Rule Against Perpetuities*, 77 U. PA. L. REV. 862, 862 (1929).

117. George L. Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19, 19–20 (1977).

118. *Id.* at 21.

119. *See id.*

120. *Id.*

121. *See id.* at 21–22.

their families in a society that had recently passed through a turbulent period."[122]

Much of the social backdrop giving rise to the rule would have been of questionable relevance in post-colonial America (outside of limited areas in the U.S. Northeast as well as arguably some areas in the South) even at the founding.[123] In fact, post-colonial America was more concerned with the utilities of improving property rather than its feudal maintenance.[124] This difference led American courts to reject the English common law of waste in favor of a more economically efficient solution.[125] Still, the rule against perpetuities persevered in the early U.S. common law (be it with a stated justification that was ultimately at odds with its origins).[126] It did so due to path dependence.[127] This did not stand in the way of the robust development of a view of U.S. property law along the lines of economic efficiency and free competition.[128] It further did not stand in the way of a reinterpretation of the rule that better fit the ethos of this competitive property paradigm.[129]

Despite the rule's contemporary application in a near Shakespearean confrontation between a state governor and a corporate grandee, the rule is currently in a clear retreat.[130] The rule finds less and less application

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122. *Id.* at 27.

123. *See* Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 CORNELL L. REV. 653, 676 (2006) (discussing the early adoption of a utility-maximizing approach to the law of waste in the United States to avoid "potentially locking the tenant into existing land-use patterns"); *see also* Sally Brown Richardson, *Reframing Ameliorative Waste*, 65 AM. J. COMP. L. 335, 374 (2017) ("Purdy asserts that the republican, anti-feudal desire in the United States aided in the creation of the current waste law.").

124. *See* Purdy, *supra* note 123, at 676.

125. *See id.*

126. Haskins, *supra* note 117, at 21. *See generally* W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938).

127. *See* Hathaway, *supra* note 112, at 634–35.

128. POSNER, *supra* note 17, § 4.1.

129. W. Barton Leach described these developments as follows:

> Graduated estate and income taxes have largely eliminated any threat to the public welfare from family dynasties built either on great landed estates or on great capital wealth. If there were at this present date no Rule against Perpetuities it seems unlikely that there would be a clamor for such a rule either in the legislatures or in the courts

W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 727 (1952). Given today's political environment, Leach's pronouncement did not age well.

130. *See* Shirin Ali, *What's This About Disney and King Charles III? And How Does It Relate to Ron DeSantis' Beef with the Mouse?*, SLATE (Apr. 1, 2023, 11:00 AM), https://slate.com/news-and-politics/2023/04/disney-king-charles-iii-ron-desantis-rule-of-

and permits settlors to convey property in a manner that would run afoul of the compromise struck in the rule (flexibility, yes—complete conveyancing control, no).[131] Still, neither the adoption nor the rejection of the rule has led to a collapse of property law. Solutions like the rule against perpetuities have significant staying power even when they are ill-fitted to their surroundings without threatening the whole of the law of property.

More generally, what this example shows is that the common law—and the common law of property—is capable of change.[132] When this change comes, it evolves from within the law itself by way of reinterpretation.[133] The law remains consistent with itself as a whole and is nevertheless changed (see the example of the rule against perpetuities above).

At the same time, this kind of change in the law that would displace something as "essential" as the primacy of negative freedom in property law tends to be far reaching and functional.[134] Significant social events demand a much broader re-evaluation of the purpose of a particular branch of law as was the case of the rejection of caveat emptor principles in favor of greater consumer protections in the common law of contracts, for example, in the early twentieth century.[135] What I will argue in the remainder of this Article is that we are on the cusp of such an internal change with property law and that the place we see this change erupting to life is the classic trespass action that should be—but no longer remains—the bulwark of negative freedom and the primacy of the right to exclude.

II. THE CHALLENGE TO NEGATIVE FREEDOM

The classic primacy of negative freedom and the right to exclude is currently under challenge. In this Part, I will focus on two Texas Supreme Court cases that illustrate this development. I will first

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perpetuities-royal-lives-clause.html. On the retreat of the rule, see generally *Jason Oil Co. v. Littler*, 446 P.3d 1058 (Kan. 2019) (limiting the application of the rule against perpetuities).

131. *See* Jesse Dukeminier & James Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1304 (2003) (discussing the slow decline of the rule against perpetuities more generally).

132. *See* Hathaway, *supra* note 112, at 614–17.

133. *See id.* at 641.

134. *See id.*

135. *See* Robert S. Summers, *Pragmatic Instrumentalism in the Twentieth Century*, 66 CORNELL L. REV. 861, 882–83 (1981).

introduce *Coastal v. Garza* and *Lightning Oil Co. v. Anadarko*.[136] I will then explain why these cases present a fundamental challenge to the traditional understanding of property rules. I will conclude by pointing out the potential consequences of *Garza* and *Lightning* for solar and wind development.

Before introducing *Garza* and *Lightning*, I need to explain why and how I am using both cases. One way to see if the primacy of the right to exclude faces headwinds is to look at whether arguments relying on this primacy shape dissenting opinions rather than majorities in state supreme courts. As one might expect, references to the primacy of the right to exclude—that the right to exclude is "of the most essential" property rights—in state supreme court dissents is historically sparse: charitably, it supports a dissent all of one time between 1978 and 2003.[137] In the next decade, it appears twice in dissents.[138] Then, the trend takes off.

In the last ten years, justices in Alabama, Delaware, New York, Pennsylvania, and Wisconsin relied upon the primacy of the right to exclude in their dissents.[139] These recent cases stretched the gamut from striking down gun regulations in state parks,[140] the acquisition of pipeline easements,[141] railroad conveyance of right-of-way easements for recreational trails,[142] the grant of an easement by necessity without proof of impossibility of alternative access,[143] and the computation of valuation of temporary limited easements needed for the construction of a highway bypass.[144] The primacy of the right to exclude therefore is generally more

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136. *See generally* Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1 (Tex. 2008); Lightning Oil Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39 (Tex. 2017).

137. *See* Van Ness v. Borough of Deal, 393 A.2d 571, 578 (N.J. 1978) (Mountain, J., dissenting).

138. *See* Celentano v. Oaks Condo. Ass'n, 830 A.2d 164, 192 (Conn. 2003) (Zarella, J., dissenting); *see also* Benson v. State, 710 N.W.2d 131, 165 (S.D. 2006) (Meirhenry, J., dissenting).

139. *See* Monroe Cnty. Comm'n v. Nettles, 288 So. 3d 452, 465 (Ala. 2019) (Parker, C.J., dissenting); Bridgeville Rifle & Pistol Club, Ltd. v. Small, 176 A.3d 632, 690–91 (Del. 2017) (Strine, C.J., dissenting); Nat'l Fuel Gas Supply Corp. v. Schueckler, 150 N.E.3d 1192, 1204 (N.Y. 2020) (Rivera, J., dissenting); Bartkowski v. Ramondo, 219 A.3d 1083, 1102 (Pa. 2019) (Mundy, J., dissenting); Backus v. Waukesha County, 976 N.W.2d 492, 504 (Wis. 2022) (Grassl Bradley, J., dissenting).

140. *See Bridgeville Rifle & Pistol Club*, 176 A.3d at 636; *see also* GeorgiaCarry.Org, Inc. v. Atlanta Botanical Garden, Inc., 834 S.E.2d 27, 39 (Ga. 2019) (Peterson, J., concurring) (addressing a related issue).

141. *See Schueckler*, 150 N.E.3d at 1195.

142. *See Nettles*, 288 So. 3d at 454.

143. *See Bartkowski*, 219 A.3d at 1092.

144. *See Backus*, 976 N.W.2d at 495.

on the defensive than it has been previously, including in bellwether jurisdictions like Delaware and New York, as well as Texas.

Garza and *Lightning* are part of this bigger picture.[145] They are uniquely suited "test subjects" for this move. First, the articulation of the reasoning in *Garza* and *Lightning* is highly telling of a different way to bind the property bundle, as I will discuss in Parts IV through VI.[146] Second, as I will discuss in Part III, *Garza* and *Lightning* have been noted in the literature in a manner that other erosions of the primacy of negative freedom and the right to exclude have not.[147] I use *Garza* and *Lightning* as a particularly apt illustration to bring the bigger picture of the development away from the primacy of the right to exclude and negative freedom in property law to life.

While the Texas Supreme Court addressed multiple different issues in *Garza*, the key claim for current purposes concerned a subsurface trespass.[148] The Salinas family had granted a lease to Coastal Oil to develop gas in Share 13 of the Vicksburg T gas formation in Hidalgo County, Texas, receiving a royalty interest as part of the lease.[149] Coastal Oil also held leases in adjacent shares in the same gas formation and became the outright mineral owner of some of them, including, relevantly, Share 12.[150] The Salinases asserted that Coastal Oil trespassed on their royalty interest in the Share 13 lease because Coastal Oil developed its adjacent Share 12 interests by means of hydraulic fracturing in a way that intruded under the Share 13 area.[151]

Hydraulic fracturing purposefully destroys rock formations in order to free gas trapped within the formation to flow to the well.[152] The process of hydraulic fracturing is a meticulously planned and well-calibrated engineering task.[153] The Salinases asserted that Coastal Oil intentionally used hydraulic fracturing so as to drain gas from Share 13 in order to avoid paying royalties under the Share 13 lease.[154] Specifically, the parties agreed that Coastal Oil's hydraulic fracturing approach from

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145. *See generally* Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1 (Tex. 2008); Lightning Oil Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39 (Tex. 2017).

146. *See infra* Parts IV–VI.

147. *See infra* Part III. The scholarship discussing *Bridgeville Rifle & Pistol Club* is focused on the right to bear arms rather than property law. *See, e.g.*, Shawn E. Fields, *Second Amendment Sanctuaries*, 115 NW. U. L. REV. 437, 454 (2020). There are no law journal articles discussing *Nettles*, *Schueckler*, *Bartowski*, or *Backus*.

148. *Garza*, 268 S.W.3d at 4–5.

149. *Id.* at 5.

150. *Id.*

151. *Id.* at 6–7.

152. *Id.*

153. *See id.*

154. *Id.*

Share 12 exceeded the length of the distance between the well site on Share 12 and Share 13.[155]

The Texas Supreme Court nevertheless rejected the Salinases' trespass claim.[156] It did so because "Salinas's only claim of injury—that Coastal's fracking operation made it possible for gas to flow from beneath Share 13 to the Share 12 wells—is precluded by the rule of capture."[157] The court supported this conclusion with four reasons. First, the rule of capture gives recourse to the injured party by allowing that party to drill an offset well and produce itself.[158] Second, regulation of oil and gas production (and production methods) is the prerogative of the Texas Railroad Commission.[159] Third, valuation of the gas would prove difficult to ascertain in litigation.[160] "Fourth, the law of capture should not be changed to apply differently to hydraulic fracturing because no one in the industry appears to want or need the change."[161]

The *Garza* court included an important but short final proviso to limit its holding. It noted that "[i]t should go without saying that the rule of capture cannot be used to shield misconduct that is illegal, malicious, reckless, or intended to harm another without commercial justification, should such a case ever arise."[162] It added, "[b]ut that certainly did not occur in this case, and no instance of it has been cited to us."[163] That is, Coastal Oil's approach to fracking the Share 12 well was commercially reasonable to exploit the Share 12 area.[164] Put differently, the frack was not the equivalent to a spite fence, the sole purpose of which was to harm the Salinases.[165] In short, the Salinases could not rely on the primacy of the right to exclude to prevent Coastal Oil from its hydraulic fracturing approach even though Coastal Oil knew or must have known that its development of the well would physically intrude under Share 13.[166] In fact, the *Garza* court's proviso radically cut back on the absolute power

155. *Id.* at 7.
156. *Id.* at 4–5.
157. *Id.* at 12–13.
158. *Id.* at 14.
159. *Id.* at 15.
160. *Id.* at 16.
161. *Id.*
162. *Id.* at 17.
163. *Id.*
164. *See id.*
165. *See* Nadav Shoked, *Two Hundred Years of Spite*, 110 NW. U. L. REV. 357, 394–95 (2016) (arguing that spite law introduces public policy limitations on otherwise apparently absolute powers under property law).
166. *See Garza*, 268 S.W.3d at 13–17.

of property owners to exclude by requiring property owners to prove that the conduct to be excluded otherwise offended public policy.[167]

Lightning, too, involved a subsurface trespass claim.[168] In *Lightning*, Lightning Oil claimed against Anadarko for subsurface trespass of Lightning Oil's mineral estate.[169] Anadarko sought to develop a mineral estate adjacent to Lightning Oil's leased area.[170] Anadarko had received permission from the surface owner, Briscoe Ranch, to cross the subsurface.[171] Anadarko did not, however, have Lightning Oil's permission to cross its mineral estate.[172] Anadarko's well would in fact cross the mineral estate as it would remove some oil and gas due to the drilling of the well and impede some potential future development by Lightning of its mineral estate.[173] Anadarko's planned well did not interfere with Lightning Oil's ongoing oil and gas activities in the lease area.[174]

The *Lightning* court rejected Lightning Oil's trespass claim.[175] It reasoned that "an unauthorized interference with the place where the minerals are located constitutes a trespass as to the mineral estate only if the interference infringes on the mineral lessee's ability to exercise its rights."[176] Because the well did not interfere with ongoing activities, Lightning Oil's claim was impermissibly speculative.[177]

The *Lightning* court further relied on the accommodation doctrine as between the mineral and surface owner.[178] The court reasoned that well-spacing rules adequately protected Lightning Oil's interest.[179] It continued that subsurface access like the one requested by Anadarko fell

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167. The court explained that:

> The spite prohibition moderated that freedom through a requirement that the structure built be socially useful. The prohibition did not serve to punish ill-meaning owners; it served to enable land use regulation in an era that knew little such regulation. As the concept of property evolved, and as spite doctrine's idea—the idea that social regulation is imperative—overthrew land use law's devotion to owners' freedom, spite doctrine itself became an afterthought. A doctrine that had heralded property's redefinition in American law became, due to its success, a body of law dedicated to divining what is a fence.

Id. at 46–47; *see also* Shoked, *supra* note 165, at 398.

168. Lightning Oil Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39, 43 (Tex. 2017).
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *See id.* at 47, 49–50.
174. *Id.* at 49–50.
175. *Id.* at 49.
176. *Id.*
177. *Id.*
178. *Id.* at 50.
179. *Id.* at 49–50.

within the scope of the accommodation doctrine, meaning that such subsurface access rights could be obtained from the surface owner even over the objection of the mineral estate owner.[180] In short, Lightning Oil could not rely on the primacy of the right to exclude and prevent Anadarko from traversing its mineral estate even though Anadarko's well physically intruded on the mineral estate for purposes of developing a neighboring mineral estate.[181]

Both *Garza* and *Lightning* directly implicate the right to exclude. In *Garza*, Coastal Oil knew that its Share 12 operations would displace previously trapped gas from Share 13.[182] In *Lightning*, Anadarko intentionally entered Lightning Oil's mineral estate.[183]

At first blush, *Lightning* may appear easier to reconcile with the right to exclude: Lightning Oil was not the only property owner with a property interest in the subsurface at issue.[184] Rather, Briscoe Ranch, as surface owner, had a servient estate touching the subsurface.[185] Anadarko's permission from Briscoe Ranch thus means that at least someone with some facial property right in the subsurface consented to the well.[186]

This rationale does not stand up to scrutiny under a traditional understanding of property rules.[187] Lightning Oil's right to exclude third parties (as opposed to Briscoe Ranch) should be absolute even if its right to exclude Briscoe Ranch is not absolute. It is uncontested that Anadarko and not Briscoe Ranch would indeed touch Lightning Oil's estate.[188]

This problem becomes more apparent when examining the *Lightning* court's invocation of the accommodation doctrine: Briscoe Ranch's permission for Anadarko to cross the subsurface is not a relevant use to be "accommodated" under the doctrine.[189] The cases cited by the *Lightning* court make this plain. The court cites to *Merriman v. XTO Energy, Inc.* and *Coyote Lake Ranch, LLC v. City of Lubbock*.[190] *Merriman* looks to interference by the mineral estate owner with a pre-existing use of the surface by the surface estate owner and requires the mineral estate owner to accommodate such pre-existing use.[191] *Coyote Lake Ranch, LLC*

180. *Id.* at 50.
181. *Id.*
182. Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 5–7 (Tex. 2008).
183. *Lightning*, 520 S.W.3d at 43.
184. *Id.*
185. *Id.*
186. *See id.* at 43–44.
187. *See supra* Part I.
188. *Lightning*, 520 S.W.3d at 43.
189. *See id.* at 44.
190. *Id.* at 50.
191. Merriman v. XTO Energy, Inc., 407 S.W.3d 244, 249 (Tex. 2013).

extends the same rationale to groundwater estates as well as mineral estates, i.e., it requires proof of interference by the groundwater estate owner with a pre-existing use of the surface by the surface owner.[192] In *Lightning*, Briscoe Ranch apparently granted rights including an easement to Anadarko after Lightning Oil had obtained its lease and after Lightning had expressed its veto to Anadarko's planned drilling activities through its mineral estate.[193] Lightning Oil could not have had a duty to accommodate Briscoe Ranch under the circumstances as: (1) Briscoe Ranch itself did not make relevant use of the subsurface,[194] (2) its grant of rights to Anadarko did not pre-date the Lightning Oil lease,[195] and (3) the use in question, in any event, did not concern the surface but the subsurface.[196]

It may be more apt to say that the *Lightning* court instead required Lightning Oil to accommodate Anadarko's ability to develop an adjacent oil and gas interest. Anadarko, and not Briscoe Ranch, was the true party needing access to the subsurface as Anadarko's lease effectively prevented Anadarko from making use of the surface estate servient to its own mineral rights.[197] Even then, however, the analogy would have to be stretched significantly as Anadarko's interest arose after Lightning Oil's and concerned the subsurface rather than the surface.[198]

A similar problem arises in *Garza*. The issue here is the relationship of the rule of capture to injury from trespass.[199] Like the treatment of the accommodation doctrine, a crucial timing element is missing. The rule of capture applies to fugitive substances.[200] As the *Garza* decision makes clear, the gas at issue was not in fact fugitive at the relevant time (just prior to the alleged trespass): it was trapped in a rock formation.[201] It was the alleged trespass that rendered the gas in question fugitive.[202] To apply the rule of capture to deny the presence of an injury under these circumstances is somewhat bizarre. Assume I trespass on a zoo enclosure

192. Coyote Lake Ranch, LLC v. City of Lubbock, 498 S.W.3d 53, 64 (Tex. 2016).
193. *Lightning*, 520 S.W.3d at 43–44.
194. *See id.*
195. *See id.*
196. *See id.*
197. *Id.* at 43.
198. *Id.* at 43–44; *see* Merriman v. XTO Energy, Inc., 407 S.W.3d 244, 249 (Tex. 2013).
199. *See* Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 13–14 (Tex. 2008).
200. *See* Brown v. Humble Oil & Refin. Co., 83 S.W.2d 935, 940 (Tex. 1935). For an interesting terminological disagreement as to the fugitive or fugacious nature of oil and gas, see *Ryan Consol. Petroleum Corp. v. Pickens*, 285 S.W.2d 201, 213 (Tex. 1955) (Wilson, J., dissenting).
201. *Garza*, 268 S.W.3d at 5–7.
202. *Id.*; Hannah J. Wiseman, *Coordinating the Oil and Gas Commons*, 2014 B.Y.U. L. REV. 1543, 1558 (2014).

to free a tiger. *Garza* would allow me to use the rule of capture to deny that a zoo suffered a loss from my trespass so long as I catch said tiger when it wanders onto my property.[203] Something here is amiss.[204]

The rejoinder is to point me to the proviso made by the *Garza* court that commercially unreasonable conduct would preclude a party from invoking the rule of capture (my zoo trespass would obviously be that).[205] But that tends to confirm rather than resolve the underlying logical problem. The rule of capture is used to deny the presence of an injury.[206] There either is an injury from the fracturing of sediment rock (or letting loose a tiger) or there is not. My reasons for freeing a beast or substance in logic does not affect the beast's or substance's properties. If the rule of capture does not apply in some circumstances it therefore should not apply in any geologically analogous circumstances short of introducing a public policy limitation on the right to exclude. The rule of capture therefore logically cannot apply to the act of hydraulic fracturing from a traditional understanding of property rules.

In both *Garza* and *Lightning*, the Texas Supreme Court's reasoning placed the cart before the horse. It did so with a common result: it displaced the right to exclude in order to benefit the right to use.[207] In *Garza*, what was at issue is the practice of hydraulic fracturing.[208]

A different result likely would have meant that working interest owners would need to limit their practice to make sure that they did not trespass on a neighboring estate (something that is already hinted at in the decision).[209] This would waste natural resources in the name of the right to exclude. Similarly, in *Lightning*, it would have meant that Anadarko may not have been able to access its own mineral interests.[210] Again, the right to exclude would have produced potentially significant waste.

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203. *See Garza*, 268 S.W.3d at 13–14; *see also* State v. Mallory, 83 S.W. 955, 959 (Ark. 1904) (noting the exclusive right of the owner of the soil to capture animals while they are located there).

204. *See* Ehrman, *supra* note 21, at 587 ("These rulings seem incongruous with doctrinal tort law, which requires no damage for the trespass tort—only an intentional act to cross the property of another without consent."); Hall, *supra* note 20, at 531; Tara K. Righetti et al., *The New Oil and Gas Governance*, 130 YALE L.J.F. 51, 66–67 (2020).

205. *Garza*, 268 S.W.3d at 14.

206. *See id.* at 29–30.

207. *See generally id.*; *see also* Lightning Oil Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39, 53 (Tex. 2017).

208. *Garza*, 268 S.W.3d at 14.

209. *See id.* at 6–7 (referencing the fact that "mother nature" directs where a fracture goes).

210. *See Lightning*, 520 S.W.3d at 43.

In both *Garza* and *Lightning*, this concern with waste is made express. The Texas Supreme Court refers to the role of the regulator in achieving an efficient use of natural resources.[211] It further relies expressly on the view of the oil and gas law community in supporting the *Garza* decision.[212] The concern is thus with the protection of regulatory schemes that are themselves dedicated to prudent extraction and management of natural resources consistent with industry practice. The focus begins to be on coordinated use rather than on exclusion.

This outcome is fundamentally inconsistent with the ideal of negative liberty. The ideal of negative liberty worked to keep out the state and community ideals.[213] Veto powers exist to protect spheres of untrammeled personal sovereignty against the state and society.[214] That veto power is overridden so as to permit a regulator to assist in the optimal exploitation of resources.[215] The Texas Supreme Court invites the regulator and the community in precisely where negative freedom would insist on their exclusion.

The *Garza* and *Lightning* decisions are far reaching in potential future application. They change how resource communities should exploit resources. They do so when there is existing privity between different estate holders.[216] They do so when there is no such privity.[217] They do so even when the only legal relationship is one of being neighbors without a property law tie in an otherwise regulated space.[218]

These decisions in particular can lead to requirements by adjacent owners to accommodate or not to interfere with other forms of energy projects beyond oil and gas. They could apply to wind rights by preventing the development of upwind land that would affect wind speeds.[219] They could apply to solar rights by preventing development of adjacent properties that would block sunlight from reaching solar cells.[220] They shift the focus from absolute rights to exclude and absolute rights

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211. *Id.* at 49; *Garza*, 268 S.W.3d at 13–16.
212. *Garza*, 268 S.W.3d at 16–17.
213. Calabresi & Melamed, *supra* note 3, at 1092–93; BERLIN, *supra* note 13, at 127.
214. BERLIN, *supra* note 13, at 127.
215. *Lightning*, 520 S.W.3d at 43–44; *Garza*, 268 S.W.3d at 13–16.
216. *Lightning*, 520 S.W.3d at 43.
217. The trespass analysis in *Garza* assumed an absence of privity even though there was privity. *Garza*, 268 S.W.3d at 13–17.
218. The logic of *Garza* has been so extended in *Briggs v. Sw. Energy Prod. Co.*, 224 A.3d 334, 339 (Pa. 2020).
219. *See also* K.K. DuVivier, *Preventing Wind Waste*, 71 AM. U. L. REV. 1, 16–21 (2021). *See generally* Troy Rule, *A Downwind View of the Cathedral: Using Rule Four to Allocate Wind Rights*, 46 SAN DIEGO L. REV. 207 (2009) (discussing wind rights).
220. *See* Sara C. Bronin, *Solar Rights*, 89 B.U. L. REV. 1217, 1219–20 (2009) (discussing the protection of solar rights with ancient lights implied easements).

to develop to a focus on reasonable use and reasonable exercises of one's property rights. This is a paradigm changing shift for the law of property precisely because it shifts the relative roles of owner and community from the traditional understanding of negative liberty. As the next Part will discuss, the literature already sees this potential. As I will argue, it has not sufficiently developed the ramifications of the change done by *Garza* and *Lightning* in light of the context of an increasingly beleaguered right to exclude in an increasing number of jurisdictions.

III. THE CORRELATIVE TURN

Despite the impression from the last Part, *Garza*, *Lightning*, and other cases like them are not arbitrarily or even wrongly decided. Even though they are decided inconsistently with the traditional understanding of the primacy of the right to exclude and negative freedom, they are decided in keeping with a correlative-property-rights focus. In this Part, I will introduce the idea of correlative rights as an alternative to the traditional understanding of property rules. I will then outline how this idea of correlative rights has been used in energy law in general in the lead up to *Garza* and *Lightning*. I will then explain how this correlative rights approach makes sense of not just *Garza* and *Lightning* but of broader developments in property law as a whole. Thus, while *Garza* and *Lightning* are inconsistent with the traditional primacy of the right to exclude, they are fully consistent with and further develop this broader move in the field towards a correlative-rights understanding of property relationships and property rules.[221] This correlative-rights based understanding requires significant additional work to appropriately account for liberty interests in a newly communitarian property law world.

Correlative rights reverse the starting point from the traditional understanding of property rules. As discussed in Part I, the traditional understanding of property rules defined the purpose of property rules by

221. Here, it may be too quick to jump to an attempt to reconcile jurisprudence to provide a doctrinal reconciliation. *See, e.g.*, Joseph A. Schremmer, *A Unifying Doctrine of Subsurface Property Rights*, 46 HARV. ENV'T L. REV. 525, 541–42 (2022). Doctrinal arguments in a time of fundamental realignment mask some of the deeper structural shifts in the law. These shifts in turn are both extrinsic to the law in that the triggers or irritations bringing them about are external and internal to the law in that they utilize existing building blocks and potentialities within the law to respond to the external irritation. *See* 1 NIKLAS LUHMANN, THEORY OF SOCIETY 67 (Rhodes Barrett trans., 2012). Doctrine will insist on continuity where there is a reinterpretive break as to how reasoning is put together.

focusing on the right of a property entitlement holder to veto.[222] The traditional understanding of property rules thus focused on "mine" much in the way the seagulls in the Pixar movie *Finding Nemo* do—"not yours."[223] Correlative rights invert this perspective.

A correlative-rights perspective defines property entitlements not by reference to an individual but by reference to a community relevant to the property right.[224] This perspective is particularly prevalent in the context of water law, specifically the use of water used for energy generation.[225] As Carol Rose classically developed the concept, correlative rights result from a "progression from absolute rights at the outset to equally shared but vaguely defined group property rights thereafter."[226] Rose developed this account as a particularly apt "way to manage a partial public good, similar to many other environmental resources."[227] Furthermore, Rose identifies that correlative rights are functionally appropriate in cases with particularly high transaction costs.[228]

Still, the logic of correlative rights premised in a reasonable use can be more than an exception fit only for certain kinds of entitlements or contexts.[229] It is a potential "normative 'deep structure'" capable of being

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222. *See supra* Part I; Calabresi & Melamed, *supra* note 3, at 1092–93.

223. FINDING NEMO (Walt Disney Pictures 2003); *Finding Nemo–MINE*, YOUTUBE https://youtu.be/H4BNbHBcnDI?si=eFCF8kvnBUWM_TVp (last visited May 14, 2024).

224. CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 165 (1994); Tyler v. Wilkinson, 24 F. Cas. 472, 474 (C.C.D.R.I. 1827).

225. ROSE, *supra* note 224, at 165.

226. *Id.* at 166.

227. *Id.* at 167.

228. Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897, 1922–23 (2007) [hereinafter Rose, *Moral Subject*].

229. Rose's work here may be seen as potentially inconsistent. In some instances she seems to suggest a narrower application only of correlative rights tied to the specific context giving rise to a need for a correlative-rights approach to solve particular allocative problems. *See id.* In other instances, she suggests that a similar logic can serve a more far-reaching purpose. *See* Carol M. Rose, *Given-Ness and Gift: Property and the Quest for Environmental Ethics*, 24 ENV'T L. 1, 28 (1994) [hereinafter Rose, *Given-Ness*]. These two points do not have to contradict each other. Property law is pluralist, as the bundle metaphor makes plain. Honoré, *supra* note 45, at 113. In a bundle-of-sticks world, the need for a correlative-rights approach as an organizing principle will always be driven by outside circumstances—the law will be able to solve problems more ably through an interpretation of the law consistent with such a point of view. The role of correlative rights can be deeper or shallower, depending upon the circumstances. When Rose advances a narrower view, I take her to mean that a position that there is nothing inherently better about any organizational feature of property law—such value is always extrinsic in that property law is better able to achieve needed outcomes. *See* Rose, *Moral Subject*, *supra* note 228, at 1922.

applied to property law as a whole.[230] It is in this sense that a correlative-rights logic offers a tantalizing alternative to the classical understanding of property rules.

While the traditional account of property rules focuses on trespass and the right to exclude as the primary rule, the correlative-rights perspective focuses on nuisance.[231] As familiar from a nuisance frame, the appropriate exercise of correlative rights is to use the resource reasonably.[232] "Reasonable" use protects the resource community against destruction from overuse.[233] Specifically, it allows suit only in the context of non-trifling actual injuries.[234] It further develops and enforces community standards within the resource community to improve resource use.[235] That is, what makes use reasonable is that it is coordinated use in a manner that allows the joint enjoyment of the resource by correlative rightsholders.[236]

This reasonable use obligation applies even when multiple owners have property rights in fee. For example, oil and gas leases create entitlements in fee simple determinable.[237] Still, oil and gas leases do not track resource boundaries—private mineral estates habitually abut in the same oil and gas reservoir.[238] That is why there is a need for the rule of capture as multiple entitlement holders can extract the same resource from different access points.[239]

Correlative rights in the oil and gas law context are arguably more "hidden" than they are in the water context because rightsholders hold

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230. Rose, *Given-Ness*, *supra* note 229, at 28.

231. ROSE, *supra* note 224, at 165.

232. *Id.* at 166–67, 182; Tyler v. Wilkinson, 24 F. Cas. 472, 474 (C.C.D.R.I. 1827).

233. ROSE, *supra* note 224, at 179, 186; Palmer v. Mulligan, 3 Cai. 307, 313–14 (N.Y. Sup. Ct. 1805); *see also* JAMES KENT, COMMENTARIES ON AMERICAN LAW 26 (11th ed. 1867).

234. *Palmer*, 3 Cai. at 313–14; *Tyler*, 24 F. Cas. at 474.

235. ROSE, *supra* note 224, at 181; *Tyler*, 24 F. Cas. at 474.

236. For a slightly different catalogue, see ROSE, *supra* note 224, at 180 ("[F]irst, riparian owners enjoyed limited but more or less equal rights to use the stream; second, their various uses could cause some inconvenience to other owners; and, third, those inconveniences were not actionable if they were merely minor.").

237. Nat. Gas Pipeline Co. of Am. v. Pool, 124 S.W.3d 188, 192 (Tex. 2003) ("In a typical oil or gas lease, the lessor is a grantor and grants a fee simple determinable interest to the lessee, who is actually a grantee.").

238. Pierce, *supra* note 21, at 247; Schremmer, *supra* note 20, at 332; Tara K. Righetti, *Correlative Rights and Limited Common Property in the Pore Space: A Response to the Challenge of Subsurface Trespass in Carbon Capture and Sequestration*, 47 ENV'T L. REP. NEWS & ANALYSIS 10420, 10421–22 (2017).

239. *See* Brown v. Humble Oil & Ref. Co., 83 S.W.2d 935, 940 (Tex. 1935).

in fee.[240] The reservoir creates a *de facto* community.[241] This *de facto* community in the ordinary course does not create a legal co-ownership relationship.[242] In fact, one of the most assiduous tasks of energy laws in practice is to avoid creating or entering into co-tenancy relationships.[243] Correlative rights relationships in the energy space therefore frequently are not facially visible.[244] These rights nevertheless condition permissible resource exploitation.

The correlative dimension of resource ownership in the energy space was originally protected by way of regulation.[245] Specifically, regulators impose well-spacing rules and other technical means to prevent the premature destruction of oil and gas resources through overuse.[246] This regulatory prerogative was to prevent waste through individual overexploitation of a shared resource.[247]

This regulatory intervention has private, property law consequences. It recognizes and protects correlative rights in a reservoir community.[248] Or in terms of the bundle of sticks metaphor, "[i]ndividual rights will be qualified by the fact that the 'sticks' they own conceptually have roots connected to sticks owned by others in the reservoir community."[249] That is, "[t]hese roots give rise to affirmative rights and negative limitations on each owner as to what they can, in fact, do with their interconnected sticks."[250] Individual rights are "rooted" in community and bestow rights and obligations through the community.

The significance of this move cannot be overstated. The primacy of the right to exclude was premised in negative freedom that set the

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240. *Pool*, 124 S.W.3d at 192. On the hidden nature of oil and gas property interests more generally, see Ehrman, *supra* note 21, at 608.

241. *See* Pierce, *supra* note 21, at 247; Schremmer, *supra* note 20, at 332; Righetti, *supra* note 238, at 10421–22.

242. Caleb A. Fielder, *Blood and Oil: Exploring Possible Remedies to Mineral Cotenancy Disputes in Texas*, 50 TEX. TECH L. REV. 173, 176 (2017) ("A cotenancy results any time two or more people concurrently own a possessory interest in the same real property. This is different than a scenario involving two people owning two different tracts embracing the same reservoir."); *see also* Pierce, *supra* note 21, at 253 (noting correlative-rights language in early jurisprudence like *Ohio Oil Co. v. Indiana*, 177 U.S. 190, 209 (1900)).

243. Fielder, *supra* note 242, at 184.

244. *See id.* at 176.

245. Pierce, *supra* note 21, at 245.

246. *Id.*; Joseph A. Schremmer, *A Unifying Doctrine of Subsurface Property Rights*, 46 HARV. ENV'T L. REV. 525, 575 (2022); Tara K. Righetti, *The Incidental Environmental Agency*, 2020 UTAH L. REV. 685, 706 (2020).

247. *See* sources cited *supra* note 246.

248. Pierce, *supra* note 21, at 247; Schremmer, *supra* note 20, at 332; Righetti, *supra* note 238, at 10421–22.

249. Pierce, *supra* note 21, at 254.

250. *Id.*

individual apart from the community.[251] Its counterpart, positive freedom, defined freedom by defining the individual through community.[252] When one roots individual property rights in community, negative freedom cannot serve as justification for property rights.[253] The community defines individual freedom and not the other way around.

The metaphor that the sticks of property rights are "rooted" in community is apt because it forecloses the argument that correlative rights simply mean that my freedom ends when my actions harm another.[254] Correlative rights may sound like a simple expression of the no-harm principle.[255] What differentiates correlative rights from a simple "no-harm" rule is the positive obligation in correlative rights to maintain the resource and the resource community.[256] Not acting in such a way would typically meet the no-harm rule.[257] Correlative rights require more—they require the facilitation of harm prevention.[258]

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251. *See* discussion *supra* Part I.

252. *See* BERLIN, *supra* note 13, at 127.

253. *See id.* Some have gone so far as to argue that the bundle should be put to the side altogether. *See* Ehrman, *supra* note 21, at 614.

254. *See* Schremmer, *supra* note 221, at 570–71. I understand Schremmer to advance such a more limited understanding of correlative rights.

255. *See* Tyler v. Wilkinson, 24 F. Cas. 472, 474 (C.C.D.R.I. 1827).

256. *See* ROSE, *supra* note 224, at 179, 186; Palmer v. Mulligan, 3 Cai. 307, 313–14 (N.Y. Sup. Ct. 1805); KENT, *supra* note 233, at 571.

257. *See* MICHAEL SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 21 (2009). Sandel here introduces the "trolley problem" of a trolley that has malfunctioned through no fault of the driver. The driver can choose not act—in which case the five people die—or choose to act—in which case a completely different person dies. *See id.* The driver would not harm anyone if she did nothing (the harm would be caused by an event beyond the control of the driver). The driver would harm someone if she does something (the person killed was not previously in harm's way and was killed because of the driver's choice.). For a view that adopts a position closer to the no harm principle, see Schremmer, *supra* note 221, at 564 ("A defendant is not liable if it merely failed to act, such as when the invasion and harm to the plaintiff resulted from natural conditions or occurrences outside of the defendant's control."). Even here, however, Schremmer seems to weaken this conclusion somewhat in his treatment of waste. *Id.* at 588–89; *see also* Laura Spitz & Eduardo M. Peñalver, *Nature's Personhood and Property's Virtues*, 45 HARV. ENV'T L. REV. 67, 91 (2021) (adopting a no-harm approach).

258. *See* SANDEL, *supra* note 257, at 21. Now inaction becomes problematic because it is morally relevant that one could have saved five people by causing the death of one. Correlative rightsholders are treated as acting in the same position as the state in public trust cases involving water. As the Indiana Supreme Court stated:

> [I]n the case of navigable rivers and public highways, the state, in behalf of the public, has the right to protect them from injury, misuse, or destruction. But in the case of natural gas there are reasons why the right to protect it from entire destruction while in the ground should be exercised by the owners of the land who are interested in the common reservoir. From the necessity of the case, this right

A correlative-rights lens perfectly explains *Lightning*. To recall, *Lightning* was deemed not a trespass because the present injury to Lightning Oil was minimal and the future injury was speculative.[259] Focus on the lack of a real injury is one of the key factors of a correlative-rights property analysis.[260] Permitting Anadarko its use would prevent waste by allowing Anadarko to produce oil and gas that would otherwise likely have remained undeveloped.[261] Correlative rights prevent waste by limiting the absolute invocation of rights inconsistent with community standards.[262] A correlative-rights lens therefore has no problem concluding that Lightning Oil, under the circumstances, must accommodate its "co-riparian" Anadarko (as opposed to the surface owner, Briscoe Ranch).[263] In fact, failure to do so would risk giving Lightning Oil a windfall by preventing Anadarko from developing its share of what is implicitly a shared reservoir.[264] Early correlative-rights cases in the water power context precisely sought to avoid such opportunistic invocation of rights because they amounted to an abuse of the right.[265]

A correlative-rights lens also perfectly explains *Garza*. Again, the key to such an understanding of *Garza* is to focus on waste—Coastal Oil's approach to hydraulic fracturing was commercially reasonable to exploit

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> ought to reside somewhere, and we are of the opinion that it is held, and may be exercised, by the owners of the land, as well as by the state.

See Mfrs.' Gas & Oil Co. v. Indiana Nat. Gas & Oil Co., 57 N.E. 912, 915 (Ind. 1900). This suggests a far more stringent harm-prevention obligation. For a contrary reading of the case, see Schremmer, *supra* note 221, at 589, and see also Bruce M. Kramer & Owen L. Anderson, *The Rule of Capture—An Oil and Gas Perspective*, 35 ENV'T L. 899, 913–14 (2005) (discussing the Indiana correlative-rights approach). International environmental law arguably has undergone a switch from a no harm to a harm-prevention logic. *See* JUTTA BRUNNÉE, PROCEDURE AND SUBSTANCE IN INTERNATIONAL ENVIRONMENTAL LAW 13 (2020).

259. *See* Lightning Oil Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39, 49–50 (Tex. 2017).

260. *See* Palmer v. Mulligan, 3 Cai. 307, 313–14 (N.Y. Sup. Ct. 1805); *Tyler*, 24 F. Cas. at 474.

261. *See Lightning*, 520 S.W.3d at 43.

262. *See* ROSE, *supra* note 224, at 181; *Tyler*, 24 F. Cas. at 474; Ehrman, *supra* note 21, at 609–10.

263. *See* ROSE, *supra* note 224, at 181; *Tyler*, 24 F. Cas. at 474; Schremmer, *supra* note 221, at 574–75.

264. *See Lightning*, 520 S.W.3d at 43; Schremmer, *supra* note 221, at 574–75.

265. *See* ROSE, *supra* note 224, at 181; *Tyler*, 24 F. Cas. at 474. Common law cases tend not to use the terminology of abuse of right in this setting. French civil law on the other hand does. Both are reasonably concerned with the same underlying conduct. *See* Shael Herman, *Classical Social Theories and the Doctrine of "Abuse of Right"*, 37 LA. L. REV. 747, 747 (1977); Frédéric G. Sourgens, *Cyber-Nuisance*, 42 U. PA. J. INT'L L. 1005, 1061 (2021).

its Share 12 interest.[266] There is thus no injury to the Salinases because the Salinases' best remedy is the rule of capture and to hydraulically fracture Share 13 in a commercially reasonable manner.[267] The injury from Coastal Oil's hydraulic fracturing is factually de minimis because Coastal Oil stays within the limits of community standards.[268] If Coastal Oil cannot use its proposed hydraulic fracturing approach, it is likely to under-develop its Share 12 interest, thus causing waste.[269] The Salinases' insistence that Coastal Oil not intrude—its veto—is similarly akin to abuse of right.[270] There may well be a trespass. But, as the Texas Supreme Court articulated, suing on this trespass is to prevent the recovery of value without suffering an injury-in-fact as measured against reasonably prudent oilfield practices.[271] Parties like the Salinases must coordinate their use to efficiently exploit oil and gas without causing another to incur a loss by their choice not to develop.[272]

Garza, *Lightning*, and cases like them, think this development through to a logical conclusion. Property imposes an obligation on property owners not to impede reasonable coordinate use of resources.[273] Use of property becomes primary.[274] Such use is never use in a vacuum. It is always use in a broader community—whether this community is a river, an oil reservoir, a forum, an agora, or a marketplace.[275] Property

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266. *See* Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 17 (Tex. 2008); Owen L. Anderson, *Lord Coke, the Restatement, and Modern Subsurface Trespass Law*, 6 TEX. J. OIL, GAS, & ENERGY L. 203, 217 (2011).

267. *Garza*, 268 S.W.3d at 13–14.

268. *Id.* at 17.

269. *See id.* at 5–6.

270. *See id.*

271. *See id.* at 13–17; Owen L. Anderson, *Subsurface "Trespass": A Man's Subsurface Is Not His Castle*, 49 WASHBURN L.J. 247, 259 (2010).

272. *See* ROSE, *supra* note 224, at 181–82; Tyler v. Wilkinson, 24 F. Cas. 472, 474 (C.C.D.R.I. 1827).

273. *See Garza*, 268 S.W.3d at 17; Lightning Oil Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39, 49–50 (Tex. 2017).

274. *See* Honoré, *supra* note 45, at 116. The primacy of use is not new. *See id.* Rather, it has always been a leading champion vying for primacy with the right to exclude. As Honoré notes:

> The right (liberty) to use at one's discretion has rightly been recognized as a cardinal feature of ownership, and the fact that, as we shall see, certain limitations on use also fall within the standard incidents of ownership does not detract from its importance, since the standard limitations are, in general, rather precisely defined, while the permissible types of use constitute an open list.

See id.

275. *See* ROSE, *supra* note 224, at 181; *Tyler*, 24 F. Cas. at 474; Pierce, *supra* note 21, at 253; Ohio Oil Co. v. Indiana, 177 U.S. 190, 196 (1900); ARISTOTLE, *Politics: Book 1*, *in* 2 THE

law protects property entitlements to see them used in a sustainable manner—i.e., without destruction of an unreasonable portion of the shared resource.[276] The right to exclude must yield when it is inimical to the best use of another's property entitlement.

It is noteworthy that cases like *Garza* and *Lightning* are leaving behind the limitation for the usefulness of correlative rights in the water context originally identified by Carol Rose: high transaction costs created by a large number of parties using resources flexibly over time.[277] The transaction costs in *Lightning* would have been low given that the transaction would have been simple and the object was certain (an access easement), the parties were limited and known (Lightning Oil, Anadarko, and potentially Briscoe Ranch), and the transaction would not have required long-term monitoring.[278] In fact, the only transaction cost factor in *Lightning* appears to be opportunism.[279] The current move of property towards correlative rights thus moves beyond their classical use.

It further would be a mistake to limit *Garza* and *Lightning* to the energy context or the subsurface rights context. It is certainly true that an oil reservoir is a tangible resource community.[280] Still, the "pore" in "pore space" does little to no work to distinguish the sub-surface from any other space. Certainly, pore space can be permeable and gases and liquids can travel between property lines.[281] But anyone who has ever lived close, or even not so close, to a smelter or industrial facility (or Canadian wildfires), knows that gas-emissions travel across property lines and even state lines above ground, too.[282] Climate change requires

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COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION 1986, 1994 (Jonathan Barnes ed., 1984).

276. *See* ROSE, *supra* note 224, at 179, 186; Palmer v. Mulligan, 3 Cai. 307, 313–14 (N.Y. Sup. Ct. 1805); KENT, *supra* note 233, at 571; Mfrs.' Gas & Oil Co. v. Indiana Nat. Gas & Oil Co., 57 N.E. 912, 915 (Ind. 1900).

277. *See* ROSE, *supra* note 224, at 184; Rose, *Moral Subject*, *supra* note 228, at 1922.

278. *Lightning*, 520 S.W.3d at 43, 49–50.

279. *See* Oliver E. Williamson, *The Economics of Organization: The Transaction Cost Approach*, 87 AM. J. SOCIO. 548, 553 (1981).

280. Pierce, *supra* note 21, at 253; *Ohio Oil Co.*, 177 U.S. at 196.

281. Pierce, *supra* note 21, at 247; Schremmer, *supra* note 20, at 332; Righetti, *supra* note 238, at 10421–22.

282. Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905, 1923 (Trail Smelter Arb. Trib. 1938 & 1941). While an international law case, the *Trail Smelter* arbitration applied, in part, U.S. nuisance law. *Id.* at 1965. For a discussion of *Trail Smelter*, see BRUNNÉE, *supra* note 258, at 56–64.

a global response in part because greenhouse gases do not affect the climate only locally above one state but do so globally.[283]

The reality is that the concerns playing out with regard to sub-surface rights play out in above-surface property conflicts as well.[284] The recent state supreme court dissents insisting in vain on the primacy of the right to exclude show that similar concerns are clearly present in the context of any other easement or servitude.[285] The gun-related cases in this context vividly highlight the value conflicts that can arise when the right to exclude is replaced with a community-based property right primacy—we can no longer use "mine" as a reason to keep conduct to which we object out as easily as before *above ground*, too.[286] We live in world communities, in which access to air (wind), light, water, dataflows, electricity, or just plain physical access, are increasingly connected along long value chains.[287] What happens in *Garza* and *Lightning* is a general trend. It is not resource- or location-specific.[288]

IV. CORRELATIVE TYRANNY?

The move towards correlative rights may have won the battle of defending cases like *Garza* and *Lightning*, but without more they are in danger of losing the war. Without an idea of freedom to hold the bundle of property sticks together, a correlative-rights conception of property rights as a whole risks to completely obliterate the idea of private property. In this Part, I will show why the currently predominant utility-based justification for correlative rights presents a threat to property law as a whole. I will then explain that this threat reveals a structural feature

283. *See International Action on Climate Change*, CLIMATE CHANGE COMM., https://www.theccc.org.uk/international-action-on-climate-change (last visited Jan. 28, 2024).

284. *See* Dyal-Chand, *supra* note 10, at 603–05.

285. *See* Monroe Cnty. Comm'n v. Nettles, 288 So. 3d 452, 465 (Ala. 2019) (Parker, C.J., dissenting); Bridgeville Rifle & Pistol Club, Ltd. v. Small, 176 A.3d 632, 691 (Del. 2017) (Strine, J., dissenting); Nat'l Fuel Gas Supply Corp. v. Schueckler, 150 N.E.3d 1192, 1204 (N.Y. 2020) (Rivera, J., dissenting); Bartkowski v. Ramondo, 219 A.3d 1038, 1102 (Pa. 2019) (Mundy, J., dissenting); Backus v. Waukesha County, 976 N.W.2d 492, 504 (Wis. 2022) (Grassl Bradley, J., dissenting); *see also* GeorgiaCarry.Org, Inc. v. Atlanta Botanical Garden, Inc., 834 S.E.2d 27, 39 (Ga. 2019) (Peterson, J., concurring).

286. *Bridgeville Rifle & Pistol Club, Ltd.*, 176 A.3d at 691 (Strine, J., dissenting); *GeorgiaCarry.Org, Inc.*, 834 S.E.2d at 39 (Peterson J., concurring).

287. *See generally* SOURGENS & SEMPERTEGUI, *supra* note 42.

288. *See* Dyal-Chand, *supra* note 10, at 610–11 ("Arguably the largest theoretical and doctrinal shift proposed in this Article is to recognize rights to share among those who have equal rights to exclude."). As outlined here, the law of property is in fact already undergoing precisely that shift by relegating the right to exclude to less than primary importance.

about the property bundle: it can only be held together by an idea of freedom. Property law can only be a "bundle of sticks" if it is held together by such an idea of freedom. Else, it risks falling into an essentialist and illiberal trap as the defenders of negative freedom have assiduously warned.[289]

The lens of correlative rights does create significant potential problems if we want property law to protect freedom in any meaningful way. *Garza*, *Lightning*, and other similar natural resources cases maintain that the original utility-based understanding that underpinned property rules before continues (and should continue) to guide property law.[290] The reason to follow a correlative-rights approach in situations like *Garza* and *Lightning* is that it increases utility: enforcing the negative-freedom veto of the Salinases or Lightning Oil strands resources.[291] It is therefore better to override their veto and use available resources fully so long as the parties exercising their veto had a fair opportunity to participate.[292] To a point, this same utility-based understanding also underpins Carol Rose's original work on correlative rights in the water law context.[293]

This view creates problems precisely because correlative rights are communitarian in nature.[294] When utility requires us not just to avoid doing harm but demands that we actively contribute our property to a collective pursuit (as correlative rights do), the idea of personal property rights begin to buckle.[295] Making utility the measure of the realization of that collective pursuit creates an even greater threat: it provides a measurable unit that brooks no dissent.[296] Correlative rights risk becoming despotic.[297]

The problem of "single-measure correlativity" is that it heavily flirts with a centrally planned approach to property use in the name of minimizing waste and increasing efficiency through greater

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289. *See* Epstein, *supra* note 72, at 230–31.

290. *See* Schremmer, *supra* note 221, at 537–38, 582–83. Schremmer is appropriately skeptical of the purely economic arguments advanced by the *Garza* court. *See id.* at 537. *See generally* Righetti & Schremmer, *supra* note 76, at 617 (discussing related concepts in the law of waste).

291. Anderson, *supra* note 271, at 259.

292. *See* Schremmer, *supra* note 221, at 574.

293. ROSE, *supra* note 224, at 189–90.

294. *See id.* at 165.

295. *See* discussion *supra* Part III.

296. On the tyranny of measures, see MARTHA NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 96 (2001). On the dangers of making utility this measure, see AMARTYA SEN, THE IDEA OF JUSTICE 239 (2011).

297. *See* DARON ACEMOGLU & JAMES A. ROBINSON, THE NARROW CORRIDOR: STATES, SOCIETIES, AND THE FATE OF LIBERTY 113 (2019).

collectivization and planning.[298] This push towards collectivization is not an external threat to the common law, a vision of Soviet or Chinese central planners.[299] It is already a feature of the U.S. common law of correlative rights—the common law already requires a forced pooling of resources in certain circumstances on precisely such collectivist grounds.[300] Arguably the only thing holding back this part of the common law is the primacy of negative freedom.[301] As the primacy of negative freedom has fallen, or in any event is under severe threat, there is nothing to block a broader, private law move towards the deployment of property toward a now measurable common good.[302] The stronger this move, the more such planning takes place, the less a property owner will actually be able to use property at their discretion (never mind excluding others).

Such an approach would make any continued sense of property as a "bundle of sticks" impossible—and indeed undo the modern property regime, as such. The original articulation of property as a bundle of rights prudently noted that the sticks or incidences in the private property bundle were "liberties."[303] This makes inherent sense—property entails the ability to make some choices and particularly those choices that accept risk to achieve a reward.[304] The risk of correlative rights is not only that it undercuts the right to exclude. Without a strong ideal of

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298. *See id.* at 117.

299. *See id.* at 113.

300. Schremmer, *supra* note 221, at 592 (noting in the context of carbon storage that "arrangement of the cases reveals something like a common law scheme of compulsory unitization, which exists independently of any statute").

301. Justice Opala of the Oklahoma Supreme Court noted as much:

> The line of demarcation to be drawn for separation of issues within the district court's cognizance from those which fall within the Corporation [Commission's] jurisdiction lies along that often-difficult-to-chart boundary location where the statutory limit of the Commission's regulatory power over the oil-and-gas industry meets with the periphery of the law's still-preserved freedom to govern one's actions by contract alone.

MM Res., Inc. v. Huston, 710 P.2d 763, 766 (Okla. 1985) (Opala, J., concurring); *see also* Emeka Duruigbo, *Small Tract Owners and Shale Gas Drilling in Texas: Sanctity of Property, Holdout Power or Compulsory Pooling?*, 70 BAYLOR L. REV. 527, 533 (2018) ("Focus group participants complained bitterly about how the legal regime simultaneously empowered energy companies and disempowered mineral owners in the sense that these owners had little input into the decision-making process regarding the development of their natural resources.").

302. *See* discussion *supra* Part III.

303. Honoré, *supra* note 45, at 113.

304. *See id.*

freedom to guide it, correlative rights risk undercutting the right to use, to manage, to consume, and to alienate.[305]

As leading economists have put it, "sustained economic growth necessitates not just secure property rights, trade, and investment, but more critically, innovation and continual productivity improvements."[306] Centrally, "[i]nnovation needs creativity and creativity needs liberty—individuals to act fearlessly, experiment, and chart their own paths with their own ideas, even if this is not what others would like to see."[307] This is precisely what the common law of property and its bundle of sticks achieved ahead of any other regime of property rights—it protected innovative property entitlements by protecting free use.[308]

To put the point differently, the "why-do-I-care" of property sticks is my discerning use of them. My use of them allows me to pursue my own values and ideas. That is in fact why I need multiple sticks—different ideas require different tools. It is therefore not tautological or trivial to say that my use of property is not somebody else's use of that property. The law of property as a bundle of entitlements allows me a large number of options for how to deploy "property" and thus to innovate.[309] If somebody else can force me consistently to use my property to achieve their values their way, property has lost its point. And it lost its point even if I have more of stuff or "property." (A person with a Midas touch may have more gold but no immediate ability to spend the gold to enjoy a meal, etc.).[310]

This concern is not a strawman. Climate change and energy transition place an existential strain on economic and natural resources.[311] To marshal an appropriate response to the challenge of adaptation to climate change and mitigation of its worst potential outcomes, repeated calls have been made to lean heavily on aggressive central planning and override private property and individual

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305. *See id.* (these others are additional sticks in the bundle).

306. ACEMOGLU & ROBINSON, *supra* note 297, at 118.

307. *Id.*

308. *See* AGHION ET AL., *supra* note 99, at 36. The fact that the admission comes from a French group of economists drives home how high this praise must be understood to be.

309. Notably, I can do so by financing innovation or by innovating myself. Property rights support all these different avenues of innovation. *See id.* at 37. *See generally* CARLOTA PEREZ, TECHNOLOGICAL REVOLUTIONS AND FINANCIAL CAPITAL: THE DYNAMICS OF BUBBLES AND GOLDEN AGES (2003).

310. OVID, METAMORPHOSES, BOOK XI 48–49 (G.M.H. Murphy ed., 1972).

311. *See generally* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY (Hans-Otto Pörtner et al. eds., 2022), https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf.

freedom.[312] These calls come not just from academics but from policymakers.[313] And calls have become action—action that is precisely aimed to denude property rightsholders of existing legal protection against extrajudicial takings.[314] So far, these calls and policies may well feel like action consistent with one's own policy goals. Still, to echo the original concern raised by the advocates of negative freedom, once the right to stand up to the state is gone, it may be gone for good.[315] Dismantling property protections to quite this extent therefore may give one serious pause.

Property—the bundle of sticks—is a bundle of freedom or it ceases to be "property." Property as a bundle of freedom critically supports private social coordination in an open marketplace.[316] Property is central to what Acemoglu and Robison call the "Red Queen effect," an effect that permits economic, social, and personal growth.[317] For that, we need a state with strong regulatory capacity and a society that is able and equipped to stand up to the state when it is necessary to rein it in.[318] Critically, the state will always feel that it has to expand its public governance capacity as economies and societies grow more complex.[319] This creates a race between society and the state to keep up with each other: the "Red Queen effect refers to a situation where you have to keep on running just to maintain your position, like the state and society running fast to maintain the balance between them."[320]

Correlative rights in other words certainly must support *some* utility-based coordinated decision-making.[321] Else, society cannot hope to keep up with the state in providing private counterpoints to command

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312. *See* PETER DRAHOS, SURVIVAL GOVERNANCE: ENERGY AND CLIMATE IN THE CHINESE CENTURY 49–54 (2021).

313. INT'L ENERGY AGENCY, NET ZERO BY 2050: A ROADMAP FOR THE GLOBAL ENERGY SECTOR 3 (2021), https://iea.blob.core.windows.net/assets/deebef5d-0c34-4539-9d0c-10b13d840027/NetZeroby2050-ARoadmapfortheGlobalEnergySector_CORR.pdf.

314. *See* Kate Abnett, *Brussels Says EU Exit from Energy Charter Treaty 'Unavoidable'*, REUTERS (Feb. 7, 2023, 7:45 AM), https://www.reuters.com/world/europe/brussels-says-eu-exit-energy-charter-treaty-unavoidable-2023-02-07/.

315. *See* discussion *supra* Part I.

316. *See, e.g.*, ACEMOGLU & ROBINSON, *supra* note 297, at 136–42 (demonstrating how definite property rights contributed to a commercial revolution in thirteenth century Europe).

317. *See id.* at 49, 72–73.

318. *See id.* at 49.

319. *See* FRANCIS FUKUYAMA, POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY 174–87 (2014).

320. ACEMOGLU & ROBINSON, *supra* note 297, at 49.

321. *See* Dyal-Chand, *supra* note 10, at 584–85.

solutions to crisis management.[322] Correlative rights must allow for a meaningful way to coordinate resources and use property to stand up to the daunting economic, ecologic and existential challenges of the next fifty years.[323] Conservation—prevention of waste—is an imperative property law cannot ignore. Still, contrary to the understandable path dependence in the jurisprudence supporting a deeper shift towards correlative rights and away from negative freedom, utility cannot be the only such measure without risking undoing the balance that "private property" had introduced into the broader constitutive forces holding together a free polity.[324]

To fit the bill, the decision-making approach must be put in the service of an understanding of freedom that is in fact consistent with the development of the common law to be able to bind the different sticks of the property bundle together. It would not do to try to hold an actual bundle of brush cleared from the woods together with a string of confetti. The tie must fit the sticks or risk losing the bundle. I will develop this conception of freedom in the next Part.

V. CORRELATIVE FREEDOM

So what conception of freedom can a correlative-rights approach to property support? As we have seen, correlative rights are anchored in community rather than in the individual.[325] Still, it would be a mistake to treat correlative rights as interested in removing personal choice from property ownership. As I will argue in this Part, correlative rights are about coordinated use and not about collective use. This distinction leaves more than ample room for a conception of freedom that prizes initiative (or, more classically, audacity or valor), innovation and personal agency.[326] This freedom is tied to a realization of human capabilities. Such realization requires social action and coordination. Importantly, such coordination must not dominate any person by arbitrarily displacing their will and choices by the will and choices of any other person or community. This account of freedom is consistent with

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322. *See id.*

323. *See id.* at 608–09. *See generally* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 311.

324. *See* ACEMOGLU & ROBINSON, *supra* note 297, at 49.

325. *See* discussion *supra* Part III.

326. *See* NICCOLO MACHIAVELLI, DISCOURSES ON THE FIRST DECADE OF TITUS LIVIUS 192-96 (Ninian Hill Thomson trans., 1883) (discussing the relationship between valor and fortune at Rome); NICCOLO MACHIAVELLI, THE PRINCE 129 (Rufus Goodwin trans., 2003); 1 QUENTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT: THE RENAISSANCE 121 (1978).

the republican tradition of civic humanism.[327] Civic humanism, in turn, deeply influenced the public law and private common law tradition, i.e., civic humanist freedom as non-domination is already embedded in the normative memory of common law correlative rights and American public law rather than representing merely an external rationalization of its functioning.[328]

The key to understanding which conception of freedom underlies correlative rights is to realize one common feature to their application: correlative rights demand a *mutual* due regard from property owners towards each other.[329] Put differently, they require neighborliness.[330] This mutual regard does not permit any one property owner to dictate the property use of any other owner.[331] I will argue in this Part that the freedom underlying correlative rights differs from negative freedom because a veto can be just as powerful an intrusion into another's use of property as a trespass. Vetoes can be arbitrary and as such dominate another's enjoyment of their property.[332] The insight of correlative rights is that to allow a third party to dominate me is to undercut freedom, meaning that a truly "liberal" conception of property law must override arbitrary—but only arbitrary—vetoes and uses of property.[333]

This begs the question of how to distinguish arbitrary from nonarbitrary vetoes and uses of property. *Garza*, *Lightning*, and the scholarly doctrinal scholarship surrounding them identify five factors that allows us to draw precisely that distinction.

The ***first*** factor is the most obvious or glaring holding in *Garza* and *Lightning*: purporting to exercise a veto without a cognizable and sizeable injury caused by another's use of property (as opposed one's own disuse of property) is arbitrary.[334] I wish to interdict another from doing something with what is hers even though her conduct does me no

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327. PETTIT, *supra* note 33, at 6–12.

328. POCOCK, *supra* note 33, at 340–41; BEDERMAN, *supra* note 106, at 84–94.

329. Kovanda v. Vavra, 633 N.W.2d 576, 585 (Neb. Ct. App. 2001) (stating that when property owners "enjoy correlative rights to use the subject property," then "the owners must have due regard for each other, and should exercise that degree of care and use which a just consideration for the rights of the other demands"); City Mill Co. v. Honolulu Sewer & Water Comm'n, 30 Haw. 912, 927 (1929), *overruled in part by In re* Water Use Permit Applications, 9 P.3d 409 (Haw. 2000).

330. Dyal-Chand, *supra* note 10, at 605–10.

331. *See id.*

332. *Kovanda*, 633 N.W.2d at 585.

333. *See* PETTIT, *supra* note 33, at 55.

334. Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 13–17 (Tex. 2008); Lightning Oil Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39, 49–50 (Tex. 2017); Anderson, *supra* note 271, at 247–48, 259.

harm.[335] Yes, she impacts my property with her use. But I cannot formulate a straightforward and universalizable reason why I would object.[336] What is it to me if someone uses their property without inflicting an injury on mine?

It is true that I may have to act as a prudent property owner to avoid the conceptual injury.[337] Still, this does not help my cause.[338] My veto is simply an insistence that another should follow me in my imprudence. Imprudence is hardly the stuff of good reasons to object.[339]

The ***second*** factor is expressly part of *Garza* and implicit in *Lightning*: my use of property—whether it is by my employment of the property or my attempted exercise of a veto over your use—must be sensible to the resource community.[340] The *Garza* court noted expressly as one of its reasons for ruling against the Salinases that the oil and gas community supported Coastal Oil's use of their property even though it facially intruded on the Salinases' property.[341] The relevant resource community would thus suggest that the veto by the Salinases was arbitrary in that the community would expect parties in the position of the Salinases to protect themselves differently.[342] If I have no current injury and my neighbors do not accept my pleas that conduct by one or more of them reduces my potential future enjoyment of my property, my veto (or use) of property again seems arbitrary.

The ***third*** factor is implicit in *Garza* and *Lightning* and made express by correlative-rights logic: my use or veto must support a sustainable use of the property pool.[343] I must do my part to prevent harm to our neighborhood, including by taking affirmative action to maintain it.[344] My veto here may simply reflect my unwillingness to do my part to improve the neighborhood in accordance with the collective wishes of my neighbors. If I can show no injury to my property from my neighbor's use

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335. *See* Anderson, *supra* note 271, at 247–48.

336. *See id.*

337. *See* Schremmer, *supra* note 221, at 570–83; *see also* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 70 (2022).

338. *See* Schremmer, *supra* note 221, at 570–83.

339. *See id.*

340. *See* Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 17 (Tex. 2008); Lightning Oil Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39, 45 (Tex. 2017); *see also* VERMEULE, *supra* note 337, at 63.

341. *See Garza*, 268 S.W.3d at 15–17.

342. *See id.* at 17–19.

343. *See id.* at 15–16; *Lightning*, 520 S.W.3d at 43; Mfrs.' Gas & Oil Co. v. Ind. Nat. Gas & Oil Co., 57 N.E. 912, 915 (Ind. 1900); Kramer & Anderson, *supra* note 258, at 913–14; *see also* VERMEULE, *supra* note 337, at 61–62 (discussing regulation of property for the public good).

344. *See* sources cited *supra* note 343.

of their property, my use or veto seems an arbitrary unwillingness to do my part.[345]

In extreme circumstances, this unwillingness may justify that I lose the right to control and manage my property so that another can do the necessary neighborhood upkeep.[346] This, in the end, is the rationale for forced pooling discussed above.[347] Holdouts use their power to prevent reasonable use of a property community by refusing to do their share or by acting in a manner that would destroy the neighborhood. [348] Here, it is prudent for courts to step in and override the veto to protect the resource community.

This is an exceptional step. It is nevertheless justified because an owner cannot point to nonarbitrary reasons for refusing to participate or for halting the intrusion. One potential future application of such a refusal may be a claim that proposed forced pooling would impair wind or solar or geothermal developments.[349] Short of such an objection, my objection is an arbitrary imposition on the property rights of my neighbor.

The correlative-rights logic developed so far does appear to look to the utility of proposed uses of property.[350] This impression is partly correct. The utility concern is not a concern for utility-maximization as such. Rather, it is an attempt to reduce as much as, ***fourth***, the possible waste of the property in question.[351] It is thus a concern that is rooted in conservation of a specific property community. It is not an external imposition that property must always be used for the most economically productive purpose. It is a weaker protection than that—it protects community-sanctioned use of property.[352] My neighbors all have to agree that a different use of our neighborhood is better.[353] If I am a holdout against my neighbors, I might marshal a utility-based argument to

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345. *See* OSTROM, *supra* note 9, at 82–86 (discussing the importance of mutual upkeep obligations in the context of *zanjeras* in the Philippines).

346. *See* Schremmer, *supra* note 221, at 592.

347. *See id.*

348. *See id.*

349. For a discussion of similar problems, see generally Alexandra B. Klass, *Property Rights on the New Frontier: Climate Change, Natural Resource Development, and Renewable Energy*, 38 ECOLOGY L.Q. 63 (2011).

350. *See supra* notes 231–236 and accompanying text.

351. Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 15 (Tex. 2008); Lightning Oil Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39, 49–50 (Tex. 2017).

352. In *Garza* and *Lightning*, the relevant community is the oil and gas community. *See Garza*, 268 S.W.3d at 16–17; *Lightning*, 520 S.W.3d at 45 n.1.

353. *See* Jill M. Fraley, *Liability for Unintentional Nuisances: How the Restatement of Torts Almost Negligently Killed the Right to Exclude in Property Law*, 121 W. VA. L. REV. 419, 421–23, 451–56 (2018).

justify my use. If I do, my use or objection to their use would not be arbitrary. Utility alone can never oust me if my neighbors agree with me that my use of my property is appropriate.

This leaves the question: what to do in a close case? What if I am a holdout owner putting my property to a pre-existing use but my neighborhood changed? Is it arbitrary for me to insist on my continued use? I certainly have a cognizable reason to provide. Here, we get to the rub of what correlative-rights liberty interests are for.

All in all, correlative rights focus on use. Use in turn is valuable because it improves. "Improves" is a normative judgment. Here, correlative rights come down on the side of improving the "human good" as the point of correlative rights is to act with mutual due regard for one's neighbor.[354] We use property in order to live a good life.[355] Though a catalogue of what we need for a good life is difficult to put together, it is clear that property use must support life, bodily health, bodily integrity (including shelter), thought, imagination and reason, be part of a community, play, and environmental agency.[356] Therefore, ***fifth***, a use of property that would displace the means to secure basic human capabilities tends to fall to a use that secures it.[357]

The law of nuisance provides two canonical examples here.[358] One of these examples hails from Arizona, the other from Israel. The Arizona example, *Spur Industries, Inc. v. Del E. Webb Development Co.*, pitted a pre-existing feedlot use against expanded residential use in the same area.[359] The new residential use was impaired by the feedlot activity due to the smells.[360] Despite the fact that the feedlot use pre-existed the residential use, residential use ended up trumping (be it with the requirement to pay for the moving expense of the industrial property).[361]

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354. *See* Kovanda v. Vavra, 633 N.W.2d 576, 585 (Neb. Ct. App. 2001); City Mill Co. v. Honolulu Sewer & Water Comm'n, 30 Haw. 912, 927 (1929); ARISTOTLE, *supra* note 275, at 1994; CICERO, DE OFFICIIS bk. I, at 22–25 (Walter Miller trans., 1913).

355. *See* ARISTOTLE, *supra* note 275, at 1994.

356. NUSSBAUM, *supra* note 34, at 126–28.

357. *See id.* at 126–28; VERMEULE, *supra* note 337, at 59–60.

358. On the idea of why "deep canonicity" matters, see J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 984–995 (1998). Their argument is the more compelling in the common law compared to constitutional adjudication—the common law does not have the same kind of national precedent as constitutional adjudication. The teaching of property law therefore molds how one "thinks like a lawyer" through canons even more profoundly than is the case.

359. *See generally* Spur Indus. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972). The case is a core part of the 1L property law curriculum. *See* DUKEMINIER ET AL., *supra* note 67, at 747; THOMAS MERRILL ET AL., PROPERTY: PRINCIPLES AND POLICIES 970 (4th ed. 2022); JOHN CRIBBET ET AL., PROPERTY: CASES AND MATERIALS 685–88 (9th ed. 2007).

360. *Spur Indus.*, 494 P.2d at 705.

361. *Id.* at 705–08.

The property arguably became more valuable as residential property, suggesting a utility-based explanation for the outcome of the case.[362] But there is a more fundamental reason for the outcome—health and shelter are simply more important to human capabilities and particularly so when industrial activity can take place elsewhere.[363] Correlative rights come down on the side of human capabilities in hard cases.

The canonical Israeli nuisance case, *Ata Textile Co. Ltd. v. Schwartz*, confirms the same reading.[364] Here, a factory was located next to a residential neighborhood.[365] The factory made significant noise at nighttime.[366] One of the residents sued in nuisance.[367] He won.[368] He won despite the fact that the factory owners did not act negligently (i.e., employed state of the art technology).[369] He won despite the fact that the factory made more economically productive use of the property.[370] He won for the same reason as Del Webb: human capabilities—shelter and control of one's environment—are more important than economic production.[371]

The idea of freedom underlying correlative rights is an ideal of freedom through coordinated use. As we discussed in the previous section, the "Red Queen effect" is one of the key requirements for a sustainably free society.[372] That "Red Queen effect" means that the state and society continuously improve their respective governance capacities to propel each other forward.[373] The "Red Queen effect" allows a society to balance the power of the state against the power of society.[374] This balance avoids the dangers of despotism and of an overwhelming power

362. *See* Osborne M. Reynolds, Jr., *Of Time and Feedlots: The Effect of* Spur Industries *on Nuisance Law*, 41 WASH. U. J. URB. & CONTEMP. L. 75, 90–91 (1992).
363. *Id.* at 90.
364. CivA 44/76 Ata Textile Co. Ltd. v. Schwartz, 30(iii) P.D. 785 (1976) (Isr.). On the canonical status of *Ata Textile Company*, as well as the history of Israeli law and its relationship to the common law of nuisance, see Aharon Barak, *The Codification of the Civil Law and the Law of Torts*, 24 ISR. L. REV. 628, 642 n.90 (1990) (discussing the paradigmatic nature of the case) and Ronen Perry, *Law of Torts*, *in* THE ISRAELI LEGAL SYSTEM 87, 109 (Christian Walter et al. eds., 2019).
365. David Kretzmer, *Judicial Conservativism v. Economic Liberalism: Anatomy of a Nuisance Case*, 3 ISR. L. REV. 298, 304 (1978).
366. *See id.* at 304–05.
367. *Id.* at 305.
368. *Id.*
369. *Id.*
370. *Id.*
371. Spur Indus. v. Del E. Webb Dev. Co., 494 P.2d 700, 708 (Ariz. 1972).
372. ACEMOGLU & ROBINSON, *supra* note 297, at 49.
373. *Id.*
374.. *Id.*

of social norms freezing members of society in an amber of complex and rigid taboos.[375]

The idea of freedom underlying correlative rights supports sustaining a "Red Queen effect." It supports the expansion of social capability through coordinated property use. Coordinated property use gives rise to community standards. These community standards in turn condition the possible improved future use of neighboring properties.[376] The stronger coordination towards new use, the stronger community standard. The stronger the community standard, the greater its ability to render future vetoes by holdout property owners arbitrary and as such ineffective.[377] Coordinated property use therefore can set new private governance standards through shaping neighborly property use from the bottom up.

Correlative rights also overcome the problem of too much social constraint. Pre-existing use alone is not enough to prevent new property uses.[378] Rather, pre-existing use must be other regarding to permit the fruitful use of surrounding property.[379] New residential use has displaced inconsistent older agricultural and industrial use.[380] The focus on property as a means to achieve human development therefore also softens the potentially despotic tendencies of traditional constraint.[381]

Correlative rights thus are a constitutive factor in supporting the expansion of social power as well as economic growth. This coordinated property use is a means of private social governance to achieve coordinated results. It is a tool to expand economic uses of property and social coordination that is independent of the administrative capacity of the state. It is thus a means to propel social power as a counterbalance to the state.

In other words, correlative "freedom" may not be the negative freedom of Locke, Blackstone, Calabresi, and Melamed.[382] But it still fulfills the same function of securing property as a means to resist the power of the state.[383] It arguably does so better by allowing property to become a tool of coordinated action in competition with the state rather than merely a final refuge of absolute exclusion.

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375. *See id.* at 36–39.
376. Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 17 (Tex. 2008).
377. *See id.*
378. ROSE, *supra* note 224, at 180.
379. *Id.*
380. Spur Indus. v. Del E. Webb Dev. Co., 494 P.2d 700, 708 (Ariz. 1972).
381. *See* ACEMOGLU & ROBINSON, *supra* note 297, at 18–23.
382. *See generally* Calabresi & Melamed, *supra* note 3, at 1092–93; LOCKE, *supra* note 18, at 306; BLACKSTONE, *supra* note 2, at *2.
383. *See* ACEMOGLU & ROBINSON, *supra* note 297, at 40.

This conception is in fact deeply embedded in the common law. It has a longer historical pedigree than the concept of negative liberty within the common law tradition even as it became displaced by the negative concept of negative liberty in the seventeenth century.

This correlative-rights conception of freedom is "civic republican" freedom.[384] This civic republican freedom has roots in the fully fledged rediscovery of political and legal thought of (and about) the high Roman republic (Cicero, Livy, Polybius, etc.) in the Italian renaissance.[385] Even as this conception "rediscovered" the political and legal concepts of republican freedom in the fifteenth century, it was inherently latent in European thought due to the historical staying power and direct and indirect influence of Roman culture and latinity even in the middle ages.[386]

In its contemporary version in political philosophy, civic republican freedom is quintessentially about nondomination as opposed to the non-interference (right to exclude) of negative freedom.[387] Freedom as nondomination means that a person is free because they are not subject to arbitrary rule.[388] Rule is arbitrary if it can be contested and the reasons for a decision affecting a person cannot be formulated in a manner that the person themselves would hypothetically accept as an apt course of conduct if they were not personally affected by the decision.[389] As both actions and omissions can affect people, it is not enough for an action to meet the requirements of negative freedom not to intrude.[390] They require us to act with mutual regard for each other.[391] In other words, the concept of civic republican freedom overlaps reasonably well with the conception of freedom inherent in correlative rights.

The reason for this overlap is fairly straightforward. The idea of correlative rights themselves became popular in English and American common law around the same time that the idea of civic republicanism

384. PETTIT, *supra* note 33, at 6–12.
385. *Id.* at 5.
386. POCOCK, *supra* note 33, at 25, 56.
387. PETTIT, *supra* note 33, at 23–27, 47–48.
388. *Id.* at 66–67.
389. *See id.* at 183–85.
390. *See id.* at 23–27.
391. *See id.* at 91–92.

had currency in legal discourse.[392] Civic republicanism was a prevalent philosophical discourse influencing American independence.[393]

The development of correlative rights took flight in U.S. water rights jurisprudence between 1805 and 1827.[394] Civic republicanism was at its classical heyday in the young Republic around the 1790s.[395] It continued to flourish in the first generation of the new Republic.[396]

Importantly, civic republican thinking still relevantly marked the writings of Joseph Story in the 1830s.[397] And it was Joseph Story who authored the opinion which "propelled the doctrine of reasonable use into the American standard for water law."[398] Joseph Story's account then became part of Chancellor Kent's *Commentaries*, which in turn influenced and moved the English common law.[399] The key early correlative-rights decisions were written by what one might, perhaps anachronistically, call civic republican authors.[400] To bookend Blackstone's account so central to the right to exclude above, this understanding of republican freedom underlying correlative rights was at the heart of the thinking of "the American Blackstone" and "the trinity of great judges in the formative era of American law."[401] The juxtaposition of the "American Blackstone" to Blackstone is one that in important respects is about this different understanding of republican freedom.[402]

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392. *See* Erin Ryan, *A Short History of the Public Trust Doctrine and its Intersection with Private Water Law*, 39 VA. ENV'T L.J. 135, 138 (2020).

393. POCOCK, *supra* note 33, at 506–45; BEDERMAN, *supra* note 106, at 84–94.

394. ROSE, *supra* note 224, at 179–81.

395. POCOCK, *supra* note 33, at 530–33.

396. *See* Gregory Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 280–82 (1991).

397. *See, e.g.*, 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 214, 466–67 (1833) (focusing on the dangers of arbitrary rule as domination).

398. ROSE, *supra* note 224, at 182.

399. *Id.* at 175, 182.

400. Notably, Kent and Story were friends and both are associated with the civic republican tradition. *See* Steven Wilf, *The First Republican Revival: Virtue, Judging, and Rhetoric in the Early Republic*, 32 CONN. L. REV. 1675, 1677 n.14, 1692–93, 1695–96 (2000). Inclusion of *Tyler v. Wilkinson* in the *Commentaries* therefore is not coincidental. Nor is it trivial. Rather, property ownership (and the ownership of real property) was at the heart of citizenship and voting rights debates at the time. *See id.* at 1682–83. The idea of correlative rights therefore should be seen as impacting a larger constitutional picture.

401. *Id.* at 1677. The three in the "trinity" are Kent, Story, and John Marshall. *Id.* On the role of Marshall on the republican link between property and liberty (and civil rights), see Alexander, *supra* note 396, at 332 n.246.

402. *See* Wilf, *supra* note 400, at 1677; *see also* VERMEULE, *supra* note 337, at 64 (discussing Blackstone's views on liberty and the public good).

The idea of freedom developed in this Part therefore appears reasonably congruent with the development of the common law—and congruent enough to allow it to hold together the bundle of sticks. It can cogently answer the question of "why property" with "to achieve freedom through coordinated use of resources." Or, as Joseph Story put it, "[o]ne of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such administration, when all property is subject to the will or caprice of the legislature, and the rulers."[403] The "Red Queen" could not have said it better.[404]

VI. TURNING THE COMMON LAW KALEIDOSCOPE

It should now be clear that the traditional dichotomy between absolute property rules premised in the right to exclude and negative freedom and flexible liability rules with which we began this Article must be reexamined, as well.[405] A full reexamination of what a conception of property rules premised in republican freedom does to this relationship will be the subject of a future article. Still, it should be reasonably clear that the relationship indeed must change.

The key point of this change, as I will now sketch below, is that property rules premised in republican freedom flexibly "govern up." They create conditions for the improvement of private governance as measured against their impact on human development through coordinated use. Liability rules work in tandem with property rules to "protect down." Liability rules hold the line against an erosion of meaningful minimum standards created through social action.

This change, in the first place, accounts for the fact that property rules, as well as liability rules, are now flexible. Reasonable use in property law is not an absolute concept—it is in fact as malleable as a classic liability rule (negligence).[406] It can require property owners to yield to uses of their own property without selling the property entitlement—that was at the very heart of *Garza* and *Lighting*—the "intrusion" into the Salinases' and Lightning Oil's mineral estate was

403. STORY, *supra* note 397, at 661.
404. *See* ACEMOGLU & ROBINSON, *supra* note 297, at 114.
405. *See* Calabresi & Melamed, *supra* note 3, at 1092–93.
406. *See* ROSE, *supra* note 224, at 165 ("Riparian law centers on the 'reasonable' rights to water enjoyed correlatively by all the riverbank owners; this regime is a kind of model for the more general property law doctrine of nuisance and arguably also for the general tort law doctrine of negligence.").

precisely not paid for as part of a traditional property transaction.[407] The common law of property therefore does precisely what Calabresi and Melamed posited it shouldn't—the transfer of a property entitlement "is allowed on the basis of a value determined by some organ of the state rather than by the parties themselves."[408]

This leaves the key question—how do these two regimes now interact with each other? Carol Rose posits—correctly, as I will argue—that reasonable use "is a kind of model for the more general property law doctrine of nuisance and arguably also for the general tort law doctrine of negligence."[409] My argument now goes further—"reasonable use is a kind of model for the more general property law doctrine and for the general tort doctrine," period.[410] This should not be read to collapse nuisance into negligence, or property into torts. Rather, both must be seen as flipsides of the same coin.

The tort side is in many ways easier to see. The flexibility that "reasonableness" provides to liability rules, in a certain sense, "governs down." I do not intend "governing down" in a pejorative sense. To the contrary, liability rules are foundational in an architectural sense: they anchor our "legal edifice" against extreme movements in its environs.[411] Liability rules hold the line. They do so "flexibly" because they move the line upwards when there is strong community agreement toward the improvements of standards by increasing duties of care.[412] At the same time, they also do so "flexibly" because they do not stand in the way of parties assuming risks so long as they adequately make victims whole for the harm such risk-taking causes them.[413]

We intuitively understand that tort law governs down. In most instances, what holds it together is that a tortfeasor is a person who has

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407. Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 6 (Tex. 2008); Lightning Oil Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39, 43 (Tex. 2017).

408. Calabresi & Melamed, *supra* note 3, at 1092.

409. ROSE, *supra* note 224, at 165.

410. *See id.*

411. Kathleen Kuiper, *Foundation*, ENCYC. BRITANNICA, https://www.britannica.com/technology/foundation-construction (last visited May 13, 2024).

412. Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 380–81 (2012) (discussing the key role of responsiveness in reasonableness in tort law). I agree with Miller and Perry's view that there must be some normative anchor to reasonableness. *See id.* at 391–92. Indeed, my view is there must be multiple and do not think Miller and Perry would discard that possibility. *See id.* Notably, without such a normative anchor, tort law could not hold the line or act as foundation as it would shift simultaneously to the ground beneath it.

413. Calabresi, *supra* note 39, at 522–23.

done wrong or acted with fault.[414] Indeed, the word "tort" is a cousin of the French "*il a tort*"—"he is wrong or blameworthy."[415] When we expect that a person not act wrongfully or in a blameworthy manner, we set a floor for their action. A doctor or lawyer who does not act wrongfully in the sense of incurring tort liability is not thereby an excellent doctor or lawyer. They are just acceptable doctors or lawyers.

The flexibility in property rules must "govern up." The Salinases and Lightning Oil did not act in a blameworthy manner when they sought to exercise their veto right to exclude Coastal Oil and Anadarko, respectively.[416] Nor did not they act in a blameworthy manner because of how they developed their own mineral rights.[417] (In fact, mineral owners would be perfectly within their rights not to develop for purported moral or commercial reasons.[418]) The Salinases and Lightning Oil therefore did not get the wrong end of the property stick because their conduct was wrongful.

The flexibility in property rules therefore drives in a different direction. Innovations lead to vast social improvements, particularly when these innovations fundamentally change how we can connect to each other.[419] The implementation of such innovations is resource intensive.[420] The flexibility in property rules permits for the coordinated implementation of innovative solutions—that is what accounts for the results in *Garza* and *Lightning*.[421] It drives towards better use of property through the coordination by property owners. This drive

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414. *Tort*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/tort (last visited May 13, 2024). This indeed is the point when one considers joint tortfeasors. *See* Artibee v. Home Place Corp., 71 N.E.3d 1205, 1207 (N.Y. 2017); Glassman v. Friedel, 265 A.3d 84, 96 (N.J. 2021).

415. *See Il la Tort*, REVERSO, https://context.reverso.net/translation/french-english/il+a+tort (last visited May 13, 2024); *Tort*, DICTIONNAIRES LE ROBERT, https://dictionnaire.lerobert.com/definition/tort (last visited May 13, 2024). The requirement of fault remains one of the key defining features of the civil law of delict. *See Tort*, *supra* note 414.

416. Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 13–17 (Tex. 2008); Lightning Oil Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39, 49–50 (Tex. 2017).

417. *See* cases cited *supra* note 416.

418. Monika U. Ehrman, *A Call for Energy Realism: When Immanuel Kant Met the Keep It in the Ground Movement*, 2019 UTAH L. REV. 435 (2019); Irina Ivanova, *U.S. Producers Reluctant to Drill More Oil, Despite Sky-High Gas Prices*, CBS NEWS (Mar. 25, 2022, 3:15 PM), https://www.cbsnews.com/news/oil-production-prices-us-companies-wont-increase-2022-dallas-fed-survey/.

419. *See* AGHION ET AL., *supra* note 99, at 13–14; PEREZ, *supra* note 309, at 157.

420. *See* sources cited *supra* note 419.

421. *See Garza*, 268 S.W.3d at 13–17; *Lightning*, 520 S.W.3d at 49–50.

encourages coordination towards excellence and best practices as opposed to policing against blameworthy conduct.

The flexibility in both liability rules and property rules leaves one important question unanswered: what counts as "improvement?" Only the idea of freedom we have discussed so far can answer this question. We have seen that freedom holds together the bundle of property sticks to give property law purpose and direction. Freedom is critical to understanding why a victim would have to suffer the conduct that injured him in the first place.[422]

A civic republican concept of freedom is inextricably linked to the idea of human development. We have seen already in the discussion of freedom in correlative rights that human development and human capabilities were a tie-breaking factor in the application of correlative rights in property law.[423] The concept of republican freedom is about agency. It protects human agency as far as is possible against arbitrary domination. That also means that it empowers meaningful choice towards a good life. Or, as one of the classic texts of the human development approach put it, human development "is focused on choice or freedom, holding that the crucial good societies should be promoting for their people is a set of opportunities, or substantial freedoms, which people then may or may not exercise in action: the choice is theirs."[424]

What is "better" or "improvement" is not a matter of a single value like economic efficiency. To the contrary, it is "resolutely pluralist about value" as value choices are themselves at the heart of human agency.[425] What is "better" or "improvement," then, is what increases the material means needed to make such choices. It is to increase human capabilities and human agency writ large.[426]

We can now give a more definite meaning to what it means to "hold the line" and to "improve" in our new, civic-republican paradigm of the relationship between liability and property rules. To "hold the line" means to protect the social progress made towards minimum agreed standards providing for human capabilities. What gives objective force to what constitutes backsliding in this context is an understanding of what an alternative ordering would do to human capabilities.[427] That is what

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422. *See* Calabresi, *supra* note 39, at 528–29.
423. *See* discussion *supra* Part V.
424. NUSSBAUM, *supra* note 34, at 18 (emphasis omitted).
425. *Id.*
426. *See id.* at 33–34.
427. *See* Miller & Perry, *supra* note 412, at 391–92 (insisting on a normative measure of reasonableness and thus wrongfulness).

makes such potential backsliding blameworthy and wrongful in the first place.[428]

At the same time, human development is not complete. Capabilities yet need to be developed. We still need to empower, to extend the reach of human capabilities (and in the context of energy law, quite literally so).[429] Liability rules and property rules maintain this space in which social action, as opposed to legislative or administrative action, can contest for increasing human capabilities. Critically, they do so within the state and without the state by relying on an independent judiciary to protect the bargains and progress so struck against the jealous intrusion of other branches of government.[430]

CONCLUSION

In this Article, I have argued that property law is in the process of undergoing a radical paradigm shift. Property law, as we saw, is a bundle of multiple sticks.[431] This bundle of sticks must be held *together* by something to cohere or make sense. As we have seen, this something is an idea of freedom.

We have also seen that the idea of freedom holding together property law is changing. The classical understanding of freedom canonically holding together the bundle of sticks is the idea of negative freedom and the right to exclude others.[432] It was this idea of negative freedom that gave property rules their apparently absolute character.[433] This idea is no longer the dominant idea within property law.[434]

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428. *See* NUSSBAUM, *supra* note 34, at 32.

429. *Affordable & Clean Energy: Why It Matters*, U.N. DEV. PROGRAM (Aug. 7, 2016), https://www.un.org/sustainabledevelopment/wp-content/uploads/2016/08/7_Why-It-Matters-2020.pdf.

430. STORY, *supra* note 397, at 214, 466–67.

431. Honoré, *supra* note 45, at 113.

432. Calabresi & Melamed, *supra* note 3, at 1092–93; BERLIN, *supra* note 13, at 127.

433. Calabresi & Melamed, *supra* note 3, at 1092.

434. *See* Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 13–17 (Tex. 2008); Lightning Oil Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39, 49–50 (Tex. 2017); Monroe Cnty. Comm'n v. Nettles, 288 So. 3d 452, 465 (Ala. 2019) (Parker, C.J., dissenting); Bridgeville Rifle & Pistol Club, Ltd. v. Small, 176 A.3d 632, 691 (Del. 2017) (Strine, C.J., dissenting); Nat'l Fuel Gas Supply Corp. v. Schueckler, 150 N.E.3d 1192, 1204–05 (N.Y. 2020) (Rivera, J., dissenting); Bartkowski v. Ramondo, 219 A.3d 1083, 1102 (Pa. 2019) (Mundy, J., dissenting); Backus v. Waukesha County, 976 N.W.2d 492, 504 (Wis. 2022) (Grassl Bradley, J., dissenting); GeorgiaCarry.Org, Inc. v. Atlanta Botanical Garden, Inc., 834 S.E.2d 27, 39 (Ga. 2019) (Peterson, J., concurring).

Instead, as we have seen, there is now an advanced move towards an idea of freedom as reasonable use, non-domination, or neighborliness in property law.[435] This move renders once unyielding property rules flexible. This flexibility looks to the mutual effect of property usage on property ownership communities.[436] This move allows property law to govern up by giving teeth to the coordinated use efforts of resource communities.

This governing up, critically, is a governing up towards human development and increasing the reach of human capabilities.[437] The idea of freedom as reasonable use utilizes freedom towards a broader social goal of human empowerment through coordinated use. As we have seen, property law is increasingly focused on this kind of empowerment and coordination.

This move radically upends how we think about the relationship between liability rules and property rules.[438] It does so in a constructive way. It helps to balance social capacity against regulatory capacity and thus support social growth.[439] Property rules and liability rules work together to protect progress towards human development—liability rules holding the line against backsliding and property rules moving upwards towards greater coordination to expand capabilities.[440] Property law, in other words, is beginning to bundle freedom in a substantive sense. Rather than breaking property into Blackstone's separate and distinct sovereign domains, it bundles, concentrates, and deploys resources towards the achievement of the urgent collective tasks to come with much the vigor of legal discourse at America's founding.[441]

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435. *See* ROSE, *supra* note 224, at 165–85; Pierce, *supra* note 21, at 247; Schremmer, *supra* note 20, at 332; Schremmer, *supra* note 221, at 541–42; Righetti, *supra* note 238, at 10421–22.

436. *See* sources cited *supra* note 434.

437. NUSSBAUM, *supra* note 34, at 33–34.

438. *See* Calabresi & Melamed, *supra* note 3, at 1092–93 (describing the classic dichotomy).

439. ACEMOGLU & ROBINSON, *supra* note 297, at 40, 114.

440. *See* NUSSBAUM, *supra* note 34, at 33–34.

441. BLACKSTONE, *supra* note 2, at *2; *see* KENT, *supra* note 276, at 571; POCOCK, *supra* note 33, at 340–41; BEDERMAN, *supra* note 106, at 84–94; Wilf, *supra* note 400, at 1677, 1682–83, 1692–93, 1695, 1696.