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Sharing the Cathedral

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Sharing the Cathedral

RASHMI DYAL-CHAND

Sharing is an indispensable part of American property law, often mediating the harsh implications of ownership rights. Yet sharing is also a hidden component of this legal structure. In both theory and doctrinal manifestations, sharing is overshadowed by the iconic property right of exclusion. This Article argues that property law suffers a critical loss from its under-recognition of sharing because it fails to use sharing to correct distributional failures in a world of increasingly scarce resources. Sharing could be the basis for developing a rich range of outcomes in common property disputes. Instead, as described by Calabresi and Melamed in their famed article on remedies, outcomes are tagged to exclusion in the form of blanket property rules and “keep out” signs. As a result, sharing currently functions merely to create very narrow exceptions to broad rights of ownership. To correct this failure, this Article presents a model for sharing as a preferred outcome in property disputes. Sharing as an outcome is a powerful means of addressing property inequalities, limiting harmful externalities, preserving efficiency, and harnessing the extraordinary potential of outcomes in property law.

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Sharing the Cathedral

RASHMI DYAL-CHAND*

I. INTRODUCTION

Sharing is a core feature of American property law. Implied easements, such as those of prescription or estoppel, are one example.¹ They appear in the interstices of property rights, at times when the hard edges of ownership overly limit what parties actually want to do with their property.² In such cases, courts require landowners to share their land by creating rights of way for use by others.³ Indeed, servitudes of many kinds, both those imposed by courts and those voluntarily assumed by owners,⁴ are living examples of property sharing. So are nuisance cases, in which courts require owners to provide support,⁵ access to light,⁶ or even

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¹ For examples of prescriptive easements, see *Warsaw v. Chi. Metallic Ceilings, Inc.*, 676 P.2d 584, 586–87, 590 (Cal. 1984); *Houghton v. Johnson*, 887 N.E.2d 1073, 1081 (Mass. App. Ct. 2008); and *Algermissen v. Sutin*, 61 P.3d 176, 181–84 (N.M. 2002). For examples of easements by estoppel, see *Pinkston v. Hartley*, 511 So. 2d 168, 169–70 (Ala. 1987); *Stoner v. Zucker*, 83 P. 808, 810 (Cal. 1906); and *Prospect Dev. Co. v. Bershader*, 515 S.E.2d 291, 297–300 (Va. 1999). See generally JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND* (2013) (presenting an in-depth explanation of the law of easements).

² See *infra* Part II.B.

³ See BRUCE & ELY, *supra* note 1, § 4:1 (“Courts are willing to graft an easement onto a land transaction in order to do justice in a particular case.”).

⁴ Express easements and covenants originate as agreements between private parties, though they may of course be enforced by courts. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES intro. note §§ 1.1–1.2 (2000) (defining servitudes as including easements, profits, and covenants, which are created by both landowners and the courts).

⁵ See, e.g., *Sprecher v. Adamson Cos.*, 636 P.2d 1121, 1127–28 (Cal. 1981) (holding that an uphill landowner had a duty of care to a downhill landowner); *Thurston v. Hancock*, 12 Mass. 220, 228–29 (1815) (holding that there is an obligation to provide lateral support); *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21, 30 (Tex. 1978) (finding an obligation to provide adjacent support).

in a sense, clean air.⁷ In copyright law, the venerated doctrine of fair use protects sharing.⁸ Future interests in estates embody sharing.⁹ The list of examples is almost endless.

As ubiquitous as sharing is, it is decidedly not the thematic foundation of property law. Instead, the conceptual opposite of sharing, exclusion, has that distinction.¹⁰ Although such a connection is by no means intrinsic, property theory has quite successfully positioned exclusion as perhaps the defining characteristic of property ownership.¹¹ The consequence is an overarching view of property law as protecting owners by excluding non-owners. Both property theory and property practice appear to rely on this view as a presumptive means of enhancing property's role as a stable basis for market transactions.¹² Property theory does so by emphasizing title as the first-order decision in property law.¹³ Property practice aligns itself

⁶ *Prah v. Maretti* is the paradigmatic case that recognized such a right. 321 N.W.2d 182, 191 (Wis. 1982). *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.* represents the strong majority rule where such a right is not recognized. 114 So.2d 357, 359 (Fla. Dist. Ct. App. 1959).

⁷ A very recent decision exploring this question is the Second Circuit's opinion in *Connecticut v. American Electric Power Co.*, in which the court held that the plaintiff states and private nonprofit organizations had stated a claim against the defendant power companies for harms related to climate change under the federal common law of public nuisance. 582 F.3d 309, 358, 366, 369, 371 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011).

⁸ For a paradigmatic example discussing the doctrine of fair use, which promotes the sharing of ideas, see *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263–64, 1267–68 (11th Cir. 2001).

⁹ See A.W.B. SIMPSON, AN INTRODUCTION TO THE HISTORY OF THE LAND LAW 195 (1961) (“[L]andowners . . . abuse[d] the power of free alienation of land, by imposing upon that land forms of settlement which made it impossible for their successors in title (usually their children) to deal with it as freely as they themselves had been able to do.”).

¹⁰ See J.E. PENNER, THE IDEA OF PROPERTY IN LAW 68–74 (1997) (“[P]roperty rights can be fully explained using the concepts of exclusion and use.”); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730–31 (1998) (stating that the right to exclude is the “*sine qua non*” of property); Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1857 (2007) (“[T]he core of property is the simple right of an owner to exclude.”); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1728 (2004) (stating that property rules use an “‘exclusion’ strategy”). Professor Penner especially has acknowledged the complementarity of exclusion and sharing, but he argues that although it is important, sharing cannot occur without a strong right of exclusion. James E. Penner, *Ownership, Co-Ownership, and the Justification of Property Rights*, in PROPERTIES OF LAW 166, 166–67 (Timothy Endicott et al. eds., 2006).

¹¹ For an influential example, see Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1693–94 (2012), stating that “property defines things using an exclusion strategy of ‘keep off’ or ‘don’t touch’ and then enriches the system of domains of owner control with interfaces using governance strategies.” Compelling examples of quite alternative definitions of ownership exist in property scholarship. For a prominent example, see Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 753 (2009).

¹² See GARY D. LIBECAP, CONTRACTING FOR PROPERTY RIGHTS 10–11 (1989) (stating that property rights help structure and determine the economic system).

¹³ SIMPSON, *supra* note 9, at 35. The emphasis on entitlement and ownership is so ubiquitous in modern property law as to appear immovable. Indeed, even the iconic piece of legal scholarship questioning the pragmatic value of ownership, Calabresi and Melamed’s *Cathedral* article, began with the assumption that entitlements are the first-order decision. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089,

with theory in much the same way. The paradigmatic property disputes may well be those in which a decision about ownership determines the outcome and that outcome amounts to exclusion. Adverse possession, with its test for deciding who has exclusive rights to a disputed property, is a prominent example.¹⁴

As a result, sharing appears as the exception to the rule of exclusion. It is understated, and often implicit, in its effects. Implied easements are exemplary in this respect too. They are, broadly speaking, an exception to trespass. Trespass is the rhetorical darling of property law; implied easements have no rhetorical force.¹⁵ Similarly, even as they facilitate the marketability of property by policing private agreements about sharing,¹⁶ restrictive covenants carry the rhetorical banner of being “disfavored” in the law.¹⁷ Affirmative covenants, which may be seen as the most aggressive examples of sharing within the law of servitudes, are doctrinally the most disfavored.¹⁸ Fair use is the exception to copyright’s monopoly.¹⁹

Additionally, in practice, sharing appears as an exception not just to the rule of exclusion, but also to the *right* of exclusion. It is to the sense of Blackstonian title that courts typically create inroads. When courts recognize that enforcing rights of exclusion will derogate from the intentions, expectations of fairness, or sense of reliance by either or both

1090 (1972). For a response to Calabresi and Melamed, arguing that even this acknowledgement does not adequately capture the importance of entitlements in property law, see Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1347 (1986).

¹⁴ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.12, at 78–80 (7th ed. 2007) (discussing adverse possession and its impact); Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1122–26 (1985) (outlining the test for adverse possession); Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 56, 60 (1987) (discussing easements by prescription, the requirements of which parallel adverse possession).

¹⁵ Merrill, *supra* note 10, at 747; Penner, *supra* note 10, at 166–67.

¹⁶ See EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 48–49, 51, 55 (1994) (discussing some of the ways restrictive covenants are used to police agreements and mollify parties).

¹⁷ See, e.g., *Blevins v. Barry-Lawrence Cnty. Ass’n for Retarded Citizens*, 707 S.W.2d 407, 408 (Mo. 1986) (en banc) (“It is a well-established rule that restrictive covenants are not favorites of the law . . .”).

¹⁸ See, e.g., *Oceanside Cmty. Ass’n v. Oceanside Land Co.*, 195 Cal. Rptr. 14, 17 (Cal. Ct. App. 1983) (noting that precedent established that a “covenant which *burdens* property does not run with the land”); *Nicholson v. 300 Broadway Realty Corp.*, 164 N.E.2d 832, 834, 836 (N.Y. 1959) (explaining that the long-standing rule, which provided that affirmative covenants do not run with the land, was based on “a desire to prevent burdensome incumbrances upon title”). The *Restatement (Third) of Property* reflects this discomfort with affirmative covenants by placing temporal limits on them. See *RESTATEMENT (THIRD) OF PROP.: SERVITUDES* § 7.12(1) (2000) (“A covenant to pay money or provide services terminates after a reasonable time if the instrument that created the covenant does not specify the total sum due or a definite termination point.”).

¹⁹ See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264–68 (11th Cir. 2001) (“The exceptions carved out for [criticism, comment, news reporting, teaching, scholarship, and research] are at the heart of fair use’s protection of the First Amendment, as they allow later authors to use a previous author’s copyright to introduce new ideas or concepts to the public.”).

parties, they veer instinctively in the direction of sharing. A striking example is trespass. Time and again, courts have created exceptions to owners' rights to exclude on the basis of competing rights, such as racial equality²⁰ or free speech,²¹ or even more broadly in the name of the public interest.²² This too is not preordained. Courts could leave ownership in a more absolute state and instead require sharing through their fashioning of remedies. Thus, in trespass disputes, courts could avoid searching for an equal and opposing right, and instead evaluate whether the alleged trespasser demonstrated a need to use the owner's property and whether such a need could be answered by a limited opportunity to share.

Indeed it is somewhat ironic that courts recognize sharing by creating exceptions to rights rather than by more actively fashioning remedies to enforce sharing. In doing so, they regularly fail to respond to the core problem of exclusion that they are drawn to redressing. They may recognize a right of a non-owner that compels limiting the property rights of the owner. But because ownership is so determinative of outcome, courts are terribly constrained in the remedies they can provide. The right of free speech can only provide very limited opportunities to share property owned by another, and only when that right is compelling enough to overcome the owner's property right in the first instance.²³ In nuisance cases, even in the face of significant harm, damages may be awarded rather than injunctions that require the sharing of space, air, and peace when the offending owner exercises her rights in a manner that is deemed more "socially valuable."²⁴

In these examples, sharing exemplifies a broader problem of impoverished outcomes in property law. A glaring example is the doctrine of adverse possession. While there are many cases in which the parties could reasonably be required to share, such as by sharing use, by leaving

²⁰ See, e.g., *Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427, 434–36 (4th Cir. 2006) (holding that a salon owner could not exclude a customer based on race because doing so constituted a refusal to perform a contract for hair styling services); *Washington v. Duty Free Shoppers, Ltd.*, 710 F. Supp. 1288, 1288, 1290 (N.D. Cal. 1988) (denying a defendant's motion for summary judgment and stating there was a genuine issue as to whether a store owner discriminated against the plaintiffs by refusing entry based on race).

²¹ See, e.g., *State v. Schmid*, 423 A.2d 615, 628–33 (N.J. 1980) (holding that under the state constitution, speech could receive protection on certain private property and the university could be restricted from excluding students based on political speech).

²² See *State v. Shack*, 277 A.2d 369, 374 (N.J. 1971) ("[W]e see no legitimate need for a right in the farmer to deny the worker the opportunity for aid available from federal, State, or local services, or from recognized charitable groups seeking to assist him.").

²³ Consider, for example, the extraordinary limitations on the right of the canvassers in the famous *Pruneyard* case. See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 82–84 (1980) ("Pruneyard may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions.").

²⁴ See RESTATEMENT (SECOND) OF TORTS § 826(b) & cmt. f (1979) (discussing payment for the harm as a remedy rather than stopping the activity causing such harm).

use with the adverse possessor and the power to transfer with the “true” owner, or by dividing ownership over time, the remedy in these cases is “all or nothing”—either completely bundled ownership or ejection for the adverse possessor.²⁵ In a context of increasingly scarce resources and ever more inequality of distribution, the blunt power of “keep out” injunctions leaves decisions about resource use and allocation entirely in the hands of private owners.²⁶ This occurs despite the instinct of courts to achieve broader distribution. Property outcomes have the potential to address acute problems of fairness and distributive justice to a much greater extent than they currently do. By the same token, a richer palette of property outcomes could alleviate the harsh externalities that result from ignoring the uses of property made by non-owners. It is a current and compelling problem in property law that the impulse to share often remains inchoate and, more broadly, that injunctions are often equated with “keep out” signs.

This Article provides a basis for responding to the impulse to share. Although a rich and vibrant literature has explored the power of outcomes in property law,²⁷ this Article argues that a few foundational assumptions undergirding this literature have obscured what would otherwise be plain. This literature builds upon Judge Guido Calabresi and A. Douglas Melamed’s famed legal realist article on remedies, which recognizes that the definition of a property entitlement changes markedly when it is assigned a value and remedied by means of a liability rule (typically in the form of damages or compensated injunctions) instead of a property rule

²⁵ See *infra* Part II.B.

²⁶ Smith, *supra* note 10, at 1728.

²⁷ See Calabresi & Melamed, *supra* note 13, at 1092 (focusing on the “decisions [that] go to the manner in which entitlements are protected,” which “shape the subsequent relationship between the winner and the loser”); see also Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1032 (1995) (discussing the ability of liability rules to “catalyze consensual trade”); Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2091–93, 2096 (1997) (attempting to clarify “whether legal protection via a property or a liability rule should be conferred to holders of particular sorts of assets,” and in doing so examining the outcome of choosing one “legal rule that minimizes the transactional imperfections that occur in securing the transfer of assets from one person to another”); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 715, 718 (1996) (applying a “systematic economic analysis” to argue that liability rules are superior to property rules contrary to paradigms on property and liability rules); John A. Lovett, *A Bend in the Road: Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes*, 38 CONN. L. REV. 1, 6–9 (2005) (proposing that the “overall servitude regulation framework” can be improved through “three significant pliability rule refinements” to section 4.8(3) and an additional revision to section 4.11 of the *Restatement (Third) of Property*); Carol M. Rose, *The Shadow of the Cathedral*, 106 YALE L.J. 2175, 2175–77 (1997) (arguing that the interplay between remedies and entitlements is deeply influenced by the common law context—of torts, contracts, or property—in which that interplay is embedded); Smith, *supra* note 10, at 1728 (arguing that property rules are, in general, superior to liability rules as a consequence of property’s exclusion strategy).

(typically in the form of an injunction or the denial of liability).²⁸ Even the most rhetorically Blackstonian vision of property ownership can look a good deal less absolutist and a good deal more relational when remedied by something less than an injunction to keep out.²⁹

What the literature does not dwell on is the potential for property injunctions to achieve sharing. Using a vantage point provided by another realist, Oliver Wendell Holmes,³⁰ this Article explores that potential.³¹ By adapting a basic prescription propounded by Holmes largely in the realm of contract law,³² this Article develops a model for enhancing property outcomes and, in particular, for promoting sharing as a preferred outcome in core doctrinal areas, such as those involving claims of nuisance, adverse possession, implied easements, and trespass. The model is intended for use in cases where legitimate interests to disputed property exist on more than one side of the dispute. In such cases, a determination of title should not be determinative of outcome. The model provides a basic template for evaluating the legitimate interests of parties in a dispute over property, not initially for the purpose of determining rights, but rather to pursue an outcome involving sharing. By doing so, the Article argues, legal decision makers can produce a much richer range of outcomes.

This Article advances two central claims, one theoretical and one pragmatic, followed by a prescription. It is organized accordingly. First, at the level of theory, it matters a great deal whether property law is grounded in a sharing model or in a model focused on exclusion. A system of property law that relies on exclusion orients attention toward the question of which *one* party has formal title, and away from an inquiry into what interests underlie any given dispute over property. The result often is

²⁸ See Calabresi & Melamed, *supra* note 13, at 1106–1110 (discussing the effects of shifting from a property rule to a liability rule).

²⁹ See LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 1–5 (2003) (explaining that the idea of property remains grounded in the notion of sacrosanct monopolies held by the owner when in reality property is regulated, albeit more or less in certain instances). Compare 2 WILLIAM BLACKSTONE, *COMMENTARIES* *2 (stating that property allows for total exclusion of others), with JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 6–18 (2000) (stating that the current ownership model is “misleading and morally deficient” because it conceives a condition in which a property owner believes she can use her property without regards to others when in fact property is subject to governmental regulation).

³⁰ See Oliver Wendell Holmes, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 167, 173–74 (1920) (providing a pragmatic perspective when comparing eminent domain and wrongful conversion by inquiring, “[w]hat significance is there in calling one taking right and another wrong from the point of view of the law?”).

³¹ I should note here that there are other powerful frameworks for exploring exactly this issue. For an example of a framework besides the ownership model, see AJ VAN DER WALT, *PROPERTY IN THE MARGINS* 12–15 (2009).

³² See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 215 (45th prt. 1923). In Part II.C, I discuss in detail this two-part prescription, in which Holmes proposes to allocate a remedy on the basis of defining a group by a common set of facts.

that the party who is judged to have title wins a broad “keep out” injunction, and it is more difficult to think of solutions that require sharing even if those solutions ought to be evident. Although examples of sharing are all around us, our over-focus on the exclusion model makes it hard for us to see their ubiquity, pervasive quality, and importance to our system of law. Moreover, the particular focus of this Article is that over-reliance on the exclusion model limits our imagination in developing superior outcomes in property disputes that have the potential to protect more legitimate interests in valued resources.

Part II develops this claim first by examining an alternative to an exclusion model that existed (perhaps surprisingly) in medieval times. At a basic level, the medieval system of writs in property law focused directly on outcome and on property use, paying scant attention to who had formal title.³³ As ownership developed into the adjudicatory starting point in property law, however, the sharing inherent in the medieval writ system was replaced by a model centering on exclusion.³⁴ As Part III then discusses, by recognizing the importance of outcomes in property law, Calabresi and Melamed and the many scholars who so creatively built upon their work could have reclaimed sharing as a critical component of property law. But partly because they accepted the predominance of title over outcome, and partly because they equated title with exclusion, they ignored the potential for injunctions in property disputes to accommodate sharing. To explore this potential as a theoretical matter, Part IV then presents an alternative theoretical framework for an outcome-focused approach grounded in the Holmesian view of the law through a “bad man’s” eyes. Finally, Part V explicates and develops the model proposed here, the “interest-outcome approach,” discussing both the theoretical grounding and the pragmatic potential of the model to better resolve core property disputes.

Second, as a pragmatic matter, this Article claims that in core doctrinal areas, courts express the quite respectable instinct to require property sharing. But because they lack the vocabulary and remedial building blocks to prioritize sharing as a practice and norm, they miss opportunities to develop outcomes in property disputes that would require sharing. This is true despite the fact that in many such disputes sharing solutions would be superior, both from a fairness and efficiency standpoint, to the “winner takes all” kinds of outcomes that prevail in a system grounded in the exclusion model. Think again of adverse possession: courts recognize the right of the adverse possessor to use an owner’s property, effectively recognizing that sharing is occurring, but they remedy the situation by

³³ SIMPSON, *supra* note 9, at 34–35.

³⁴ *See id.* at 35 (stating that today title is rooted in possession, which by nature means exclusion).

giving the adverse possessor either full ownership or nothing. One striking feature of these cases is that at some point in the courts' inquiry, the instinct to protect and direct sharing is formalistically cabined by the pressure to find "the owner." As a result, more parties lose than is necessary or normatively desirable. A second result is that we have an underdeveloped range of outcomes in property disputes.

The heart of this Article is its presentation of a model that provides both a modern and specific template for enriching outcomes in property law and, in particular, for promoting property sharing. In developing and applying this model, Part IV turns from critique to prescription. By reviewing the cases discussed in Part III through the lens of Holmes's "bad man," Part IV considers the much broader range of legitimate interests at play and outcomes that could have been achieved. Relying in part on negotiation theory, which prioritizes "interests" over "positions;" in part on Holmes's exploration of an outcome-first approach in contract law; and in part on recent scholarship that disassembles the concept of ownership, Part IV develops the interest-outcome approach. As this Part demonstrates, by no means does the model dispose entirely of the inquiry into entitlement. Instead, the model elaborates on the ways in which property use in particular can elucidate a range of outcomes.

By concentrating scholarly attention on property interests and outcomes, this Article challenges us to recognize what courts implicitly acknowledge all the time: property sharing is integral to property law. But sharing is also an inchoate feature of our system, with far more potential than has thus far been fulfilled. By proposing a sharing model for property law, which would require surprisingly small adjustments in key doctrinal areas, this Article presents a means for fulfilling some of that potential. As the experiences of so many courts show, what stands in the way of these adjustments is rhetoric more than substance. By promoting property sharing as an outcome, this Article seeks to expand a middle space between exclusive ownership and a commons. Property sharing can be a very modern means of addressing distributional concerns. We need only follow the instincts of judges to learn how.

II. SHARING AS OUTCOME? FROM WRITS TO REALISTS

This Part demonstrates how and why sharing is fundamental to property law by explicating the connection between sharing and remedies. In short, when a property law system is focused on outcomes in any given dispute, it is more likely to recognize opportunities to share. On the other hand, such opportunities are obscured when the system is focused on the question of who has proper title, because the imperative then is to ensure full protection of that title by granting broad rights to exclude.

To elucidate what it means to focus on outcomes, this Part presents two examples of systems that have done just that, one historical and the

other theoretical. Section II.A briefly describes the early writ system, in which property disputes were resolved not by declaring rights of ownership, but rather by determining who ought to receive possession of the land in dispute. By separating the question of title and possession, the early writ system had an inherent mechanism for sharing that was lost when the early writs were replaced with claims of ownership. Sections II.B and II.C then turn to an ongoing discussion in property theory about the relationship between property rights and remedies, which builds on Calabresi and Melamed's famous legal realist article. The purpose of these sections is to further explore the relationship between property outcomes and property sharing. One way to pose the central question in these sections is this: Why are outcomes so limited in property law? More specifically, to what extent can property theory explain the relatively limited use of injunctions other than as blunt instruments of exclusion?

The answer, as Section II.B discusses, appears to be that a very influential literature on property outcomes has provided a powerful explanation for the centrality of exclusive ownership in property disputes, namely that exclusion is the basis for efficient market transactions. Section II.C discusses an alternative legal realist approach to property outcomes, propounded by Holmes, that makes ownership much more marginal. Finally, Section II.D proposes a new approach to enriching the link between sharing and outcomes. This approach, the interest-outcome model, draws on features of the early writ system, Holmes's framework, and more modern progressive property scholarship to capitalize on the benefits of sharing that inhere in an outcome-focused approach.

The remainder of this Article is intended to demonstrate both the feasibility and the intuitive appeal of the interest-outcome framework. By reconnecting with the early writ system's comfort with sharing, the interest-outcome approach better explains important features of existing doctrine and, more importantly, expands the range of potential outcomes that promote legitimate interests and protect important values in our legal system.

A. *Real-Actions in the Early Common Law: A Question of Seisin*

The notion that shared outcomes, rather than title, could be the primary focus in resolving legal disputes is not new. Indeed, the common law system of writs providing rights of actions to real property operated by defining rights implicitly and within the context of explicitly defining remedies.³⁵ The operative legal concept in these writs was that of

³⁵ See CHARLES DONAHUE, JR., ET AL., *CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION* 92–94 (2d ed. 1983) (looking at the right of entry); SIMPSON, *supra* note 9, at 34–43 (“[I]t is never quite clear whether the rules of law were

possession.³⁶ The writs functioned fundamentally to protect the claim of better possession.³⁷ It was also, therefore, the proof of better possession that led to success in such actions.³⁸ The focus on possession rather than ownership created a natural space for sharing. Indeed, the entire feudal hierarchy rested on a system of shared interests in land.³⁹

The paradigmatic example is the assize of novel disseisin, in which the plaintiff claimed that the defendant “unjustly and without judgment hath disseised him of his freehold,” resulting in a command to the sheriff to cause “that tenement to be re-seized.”⁴⁰ The writ required the plaintiff to have been in possession of the land earlier than the defendant,⁴¹ but it does not appear to have required any claim of right to the land—leave alone any claim of “propriatorship” or anything akin to absolute ownership.⁴² As described by Professor Simpson, “[w]hatever the real action, the end product is the same.”⁴³

The point of the writ appears, more than anything, to have been to provide immediate relief to a party who believed himself⁴⁴ unjustly dispossessed of land.⁴⁵ The immediacy of remedy alleviated the difficulties that ensued when the dispossessed party engaged in self-help to regain possession of the land.⁴⁶ In a very real sense, the question of who had greater rights to the land was simply too abstract and extraneous to the dispute to matter much. The plaintiff sought the court’s attention principally because he sought possession, not because he sought a declaration, adjudication, or opinion about whether the land was rightfully

sanctioned by an appropriate procedure, or whether the rules were developed to explain the existing procedure; the truth no doubt in many cases was that law and procedure grew together.”). For a differing view on the origins and functions of these writs that focuses more on the integration of substance and process to solve legal problems, see S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 119–32 (1969).

³⁶ DONAHUE ET AL., *supra* note 35, at 93 (“In the twelfth century, the concept of seisin was virtually identical to actual (or *de facto*) possession.”).

³⁷ See SIMPSON, *supra* note 9, at 35–37 (“For many purposes seisin and possession need not be distinguished In the writ of right it is not *ownership* of land, but *seisin* of land, which is sought . . .”).

³⁸ DONAHUE ET AL., *supra* note 35, at 93.

³⁹ *Id.*; SIMPSON, *supra* note 9, at 35–37.

⁴⁰ ANTHONY FITZ-HERBERT, *THE NEW NATURA BREVIVM* 177 (9th ed. 1794).

⁴¹ See DONAHUE ET AL., *supra* note 35, at 92 (emphasizing possession of the land); SIMPSON, *supra* note 9, at 35–37 (“[T]he person who can base his title upon the earliest seisin is best entitled to recover seisin.”).

⁴² DONAHUE ET AL., *supra* note 35, at 92.

⁴³ SIMPSON, *supra* note 9, at 35. Similarly, as described by Professors Donahue, Kauper, and Martin, “[t]he question of ultimate right never came up.” DONAHUE ET AL., *supra* note 35, at 93.

⁴⁴ This Section uses the male pronoun to acknowledge the historical context. The remainder of the Article will use gender inclusive pronouns.

⁴⁵ SIMPSON, *supra* note 9, at 28–29.

⁴⁶ See *id.* at 30 (discussing how a dispossessed party only had four days to engage in self-help and after that time the party had to seek a remedy by bringing a writ of right).

his.⁴⁷ Obviously, the feudal system of land tenure quite meaningfully diluted the ultimate question of right,⁴⁸ but by no means did it have to dilute it entirely. Greater, though not ultimate, title could have driven the outcome. It could also have symbolized interests and consequences beyond that of possession, as indeed happened over time as new writs developed.⁴⁹ Under the early writ system, it did neither. Instead, plaintiffs focused directly on the ultimate question of outcome in the form of immediate possession.

But it was not just in the arguably unique context of seeking immediate possession that the focus on outcome was evident. For example, the writ of right, though closer in aim to an action for a declaration of right of ownership, focused on the same question of seisin and the same scope of proof. Thus, as Simpson has discussed, it would be misleading to describe this and other real actions of that time as addressing the question of proprietorship.⁵⁰ Indeed, despite its name, it would even be misleading to describe the writ of right as primarily addressing questions of right. The focus, as with the other writs of that era, was on the desired outcome of access to and use of land even while that land was, in important respects, shared with others.

As Simpson and others have described, the writ system developed in such a way as eventually to emphasize title over outcomes.⁵¹ Simpson attributes this development to the difficulty of using the older writs just described.⁵² They evolved over time into technical and complicated devices that, contrary to their original straightforward intent and function, became unwieldy and inefficient to use.⁵³ New forms of action, such as actions in trespass and for ejectment, developed in their stead, providing means of recovering land that were capable of easier proof and more efficient administration.⁵⁴

Most importantly for the purposes of this Article, there is a feature about these new actions that appears to have been incidental rather than

⁴⁷ See *id.* at 35 (“In the writ of right it is not *ownership* of land, but *seisin* of land, which is sought, and the same is true of novel disseisin at the other end of the scheme of writs.”).

⁴⁸ See EDGAR BODENHEIMER ET AL., AN INTRODUCTION TO THE ANGLO-AMERICAN LEGAL SYSTEM 42–43 (4th ed. 2004) (discussing writs in the thirteenth century that were concerned not only with establishing a right, but also with regaining possession of land).

⁴⁹ SIMPSON, *supra* note 9, at 35–36.

⁵⁰ *Id.* at 35.

⁵¹ See DONAHUE ET AL., *supra* note 35, at 94–96 (describing the transformation of the writ system to focus on the legalistic concept of title).

⁵² SIMPSON, *supra* note 9, at 39–41.

⁵³ See *id.* at 39–42 (explaining how the law of seisin grew to be a complicated body of law); see also DONAHUE ET AL., *supra* note 35, at 94–95 (describing seisin as “transform[ing] . . . from a simple concept to a virtual mystery”).

⁵⁴ See SIMPSON, *supra* note 9, at 42 (describing the development of trespass and other personal actions).

fundamental to their ascendance. Though disputed, Professor Holdsworth has described these newer actions as replacing the older focus on better possession with a notion of absolute ownership.⁵⁵ What became important was for the plaintiff to prove his right of ownership (and the defendant's defect in title).⁵⁶ Such proof would entitle the plaintiff to broad injunctive relief rather than the more limited opportunity to possess, the latter of which was constrained both temporally and by the rights of use of others under the older system of writs.⁵⁷ In the course of this transformation, remedies were relegated to a secondary level of inquiry intended to protect those rights, namely the more absolute rights of ownership that judges determined to be worthy.⁵⁸

Following this view of the ascendance of the new forms (of trespass and ejectment) over the old (of seisin), it appears that it was not considerations of more efficient resource allocation and management that resulted in a more absolute understanding of ownership. Rather, it was perhaps, more than anything, the problem of proof.⁵⁹ Proof of ownership was easier to produce than proof of better or more worthy possession.⁶⁰ Proof of ownership did not require evidence of use, productivity, length of tenure, or even possession. Over time, it simply required a statement concerning title.⁶¹ Moreover, it resulted in much less potential for conflicting claims of right or interest because ownership, unlike possession, was treated in a hierarchical manner.⁶² Although the early writs very often gave possession just to one party, it was possible for two parties to have equal rights of possession.⁶³ But title was a question of exclusivity.⁶⁴ Ownership thus became a much more crystalline means of

⁵⁵ 7 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 63–64 (2d ed. 1937).

⁵⁶ *Id.*

⁵⁷ DONAHUE ET AL., *supra* note 35, at 94.

⁵⁸ *See id.* (“[T]he law concerning the title to land was ‘elaborated to serve the needs of policy and justice,’ and, since seisin lay at the root of all title, the concept was correspondingly refined, modified and elaborated.” (quoting SIMPSON, *supra* note 9, at 38)).

⁵⁹ *See* SIMPSON, *supra* note 9, at 42 (“[T]he real actions did become grossly unsatisfactory. In the fifteenth century considerable use was made of trespass and other person actions to try title to land.”).

⁶⁰ *See* DONAHUE ET AL., *supra* note 35, at 92 (explaining that the burden of proof was difficult in an action for writ of entry which led to the development of other actions that focused on the question of title).

⁶¹ SIMPSON, *supra* note 9, at 42.

⁶² *Compare* DONAHUE ET AL., *supra* note 35, at 94 (discussing the “relativistic nature” of seisin), *with id.* at 96 (noting that seisin was replaced with a “notion of absolute ownership”), and SIMPSON, *supra* note 9, at 42 (discussing the ascendance of the concept of “best title”).

⁶³ *See* SIMPSON, *supra* note 9, at 35 (explaining that “any person who acquires seisin acquires thereby a title,” thus suggesting that two people could have established title to the same land).

⁶⁴ *See* HOLDSWORTH, *supra* note 55, at 79 (showing that in an action for ejectment, a person was required to prove that he had an “absolute right,” which suggests that title was proven by displaying exclusive ownership).

supporting one's claim to property.⁶⁵ Crucially, once title was determined, it also dictated remedy,⁶⁶ thereby lightening the entire decision-making burden. Given the importance of administrative efficiency to the very concept of justice and the rule of law,⁶⁷ these virtues of ownership cannot be overstated, nor can they be relegated to the past. Problems of proof and efficient administration are entirely modern problems.

Leaving proof to the side for now, however, it is worth pausing over what was lost in the transition to the newer forms of action. The medieval experience with property-related writs does not suggest that allocating property on the basis of possession rather than ownership was either unnatural or wasteful of property resources. Indeed, as experience with such writs as that of novel disseisin suggests, it appears to have been more natural to address the question of possession directly because it was the ultimate question that concerned the parties.⁶⁸ It was the use of an important resource that mattered, not the question of what title to that resource symbolized.⁶⁹ In the early days of the writ system, then, there was a very robust connection between property use and efficiency. The legal system was structured in such a way as to monitor directly the ways in which property was used so as to ensure efficiency. Critically, as courts of equity developed nuanced injunctions over the next several centuries, these remedies replaced the early writs as a means of maintaining that connection.⁷⁰ Over time, as title became a proxy for more and more interests and, ultimately, outcomes, that close connection between legal rules (or writs) and productive property use became more attenuated. Eventually, more legal rules in property law were structured so owners could determine the best uses of the property.⁷¹ One influential view in modern property law is that the reframing of property rules in favor of owners' determinations about uses was advantageous as a matter of

⁶⁵ See Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577 (1988) (explaining that property rules are "hard-edged" like crystals).

⁶⁶ See DONAHUE ET AL., *supra* note 35, at 94 (explaining that forcible entry as a remedy became illegal unless ordered by a judge after title was determined).

⁶⁷ See, e.g., RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 3 (2002) ("A thin theory [of rule of law] stresses the formal or instrumental aspects . . . that any legal system allegedly must possess to function effectively as a system of laws.").

⁶⁸ See DONAHUE ET AL., *supra* note 35, at 92 (explaining that plaintiffs sought to recover the seisin of land); SIMPSON, *supra* note 9, at 35–37 (explaining that in the writ of right, the parties were concerned with seisin of land and that seisin and actual possession are interchangeable concepts).

⁶⁹ See DONAHUE ET AL., *supra* note 35, at 92 (noting that plaintiffs sought to recover seisin of the land and not a right to ownership).

⁷⁰ See SINGER, *supra* note 29, at 101 (crediting the equity courts with inventing the doctrines of easement by estoppel and constructive trusts); Charles Donahue, Jr., *What Happened in the English Legal System in the Fourteenth Century and Why Would Anyone Want to Know?*, 63 SMU L. REV. 949, 954, 957 (2010) (discussing the expansion of the writ of trespass and the development of the predecessor to the modern trust).

⁷¹ Smith, *supra* note 10, at 1728.

administrative and economic efficiency.⁷²

But with that reframing, a second connection became more attenuated, and it is a connection that is hauntingly familiar in modern property law. In the medieval writ system, the direct manipulation of uses produced broad access to and use of land at a time when land oligarchy was quite obviously an exceptional burden.⁷³ Although ultimate ownership could not be the subject of adjudication, use and possession could be, and by distributing such uses more broadly, property law was able to achieve much distributive justice.⁷⁴ When rights were defined and consolidated in the form of proprietorship claims, and information costs reduced thereby,⁷⁵ property law surrendered its capacity to directly accomplish broad distribution of uses. As Section II.D discusses, then and now, this new balance produced new externalities, some of them negative.⁷⁶

Finally, while proof of property claims became easier with the turn to absolute ownership, the possibility of shared property interests became much more remote. Although it was largely implicit, the imperative to share property undergirded the entire medieval system, given the ultimate right of the crown.⁷⁷ As freeholds transitioned to fee simple estates, the convergence of factors that produced a system of broad sharing was dismantled. Much has been written of the efficiencies gained from enclosure of the commons.⁷⁸ But, as even this brief discussion should remind us, sharing took many more forms than that of a commons. What we lost in the actual and symbolic deconstruction of the commons was the latent opportunity to explore the full potential of property sharing in a

⁷² See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.1, at 33 (4th ed. 1992) (asserting that an owner's exclusive right to land is necessary for the land's efficient use); see also Smith, *supra* note 10, at 1728 ("Property responds to uncertainty over uses by bundling uses together and delegating to the owner the choice of how to use the asset, thus avoiding the need to specify uses at any stage.").

⁷³ See BODENHEIMER ET AL., *supra* note 48, at 42 (explaining that a lessee for years had broader access to land upon the development of new writs in the thirteenth century because he or she had a new right to recover possession).

⁷⁴ See *id.* (describing the development of writs which allowed lessees to recover possession of land). Of course the modern concern over the question of muddying ownership is that it impedes alienability and efficiency. But as Part III demonstrates, shared uses can be just as efficient as exclusive title. See *infra* Part III. Moreover, recent scholarship has provided us with excellent and numerous examples in which limiting alienability can be normatively desirable. See, e.g., Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1451–57 (2009) (presenting circumstances in which restricting alienability "might work better than placing pressure on (or only on) property's other margins—acquisition, use, and exclusion").

⁷⁵ Smith, *supra* note 10, at 1728.

⁷⁶ See *infra* Part II.D (showing that proprietorship claims that focus on formal title do not address the legitimate interests of both parties).

⁷⁷ See BODENHEIMER ET AL., *supra* note 48, at 48–49 (discussing the ultimate power of the king to decide disputes over land).

⁷⁸ See, e.g., Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1074 (2005) (explaining how the enclosure movement was economically efficient).

system grounded in widely distributed fee simple ownership.⁷⁹

B. *Calabresi and Melamed: Built-In Assumptions in a Binary Framework*

In their engagement with remedies, the legal realists were the theoretical counterparts to the early writ system. Therefore, this Section and the next explore the extent to which the realists' exploration of legal outcomes recognized the value of sharing. Given their influence on property law, this discussion begins with Calabresi and Melamed, concluding that their particular focus on outcomes did not capture the possibility of sharing. Section II.C then turns to an alternative realist approach that has far greater potential to promote sharing.

In writing their 1972 article on remedies in property law, Calabresi and Melamed elaborated on a core legal realist point made largely in discussions of contract law by Oliver Wendell Holmes and Karl Llewellyn.⁸⁰ They argued that while entitlements are clearly the first order decisions to be made in a given property dispute, the choice of remedies fundamentally shapes the very nature of the entitlement.⁸¹ Calabresi and Melamed's contribution to property theory cannot be overstated. The introduction of a legal realist perspective into discussions about the distributional effects of remedies in property disputes has influenced the development of doctrines at the heart of property law, including nuisance,⁸² takings,⁸³ concurrent ownership,⁸⁴ and servitudes.⁸⁵ Their contribution is

⁷⁹ We also thereby lost the opportunity to develop legal mechanisms that might help to solve alienability problems in the presence of shared rights. The *Restatement (Third)* provides excellent examples of the possibilities here. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES, § 7.10 cmts. a–c (2000) (allowing for modification, rather than termination, as a means of preserving servitudes in the face of new circumstances).

⁸⁰ See Karl N. Llewellyn, *A Realistic Jurisprudence: The Next Step*, in JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 3, 10–11 (1962) (exploring the importance of remedies in contract law); K.N. LLEWELLYN, *THE BRAMBLE BUSH* 83 (1951) (underscoring the notion that in either contract or property law, an individual has a “primary right” for performance of the contract or exclusive control of the land and the “secondary right” of the individual is in the form of damages); see also *infra* Part II.C (discussing Holmes and his emphasis on determination of remedy before a determination of entitlement).

⁸¹ See Calabresi & Melamed, *supra* note 13, at 1090–91 (discussing how the law first establishes a right to entitlement, but this entitlement is shaped by the state's choice to intervene and enforce that right in the form of a remedy).

⁸² See, e.g., Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1, 38–39, 77 (2002) (applying the concept of “pliability rules” to nuisance cases); James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 470–71 (1995) (discussing remedies in a nuisance dispute).

⁸³ See, e.g., Bell & Parchomovsky, *supra* note 82, at 59–60 (discussing a property owner's rights when the government exercises its power of eminent domain and the owner is left only with “the right of ‘just compensation’” as a remedy); *id.* at 75–77 (applying a pliability rule analysis to an exercise of eminent domain, in which property is taken and then transferred to a private party).

⁸⁴ See Ayres & Talley, *supra* note 27, at 1096–97 (discussing concurrent ownership).

noteworthy, in part, because it has inspired such substantial thinking about remedies on the basis of what amounts to a set of rich descriptive observations.

As many scholars have noted, however, Calabresi and Melamed's particular view of the cathedral is also limiting.⁸⁶ Although much has been written about how Calabresi and Melamed have shaped remedies analyses in property law, the literature (somewhat surprisingly) does not examine the extent to which Calabresi and Melamed's particular view of the cathedral has affected the development of approaches in property law that privilege outcome over title. In truth, the authors' interpretation of what it means to focus on outcomes in resolving disputes is just one interpretation, and as descriptive as their framework appears to be, it superimposes a quite significant layer of meaning about what remedies do and how they can be categorized. While the assumptions embedded in the authors' framework are significant in their own right, the dominant interpretations of the authors' framework that exist in property law scholarship are even more powerful constraints on the development of an outcome-focused mode of dispute resolution that incorporates sharing.

Three of the authors' own assumptions are of particular importance here. First, Calabresi and Melamed's framework is binary in the sense that the authors described two levels of decisionmaking for a given dispute.⁸⁷ The first level of decisionmaking is to determine who has an entitlement.⁸⁸ It is only once an entitlement is set that the second level of decisionmaking, that of determining the appropriate outcome, occurs.⁸⁹ The remedy, as Calabresi and Melamed described it, is a second order choice, an important one with distributional consequences, but nonetheless a switch that is turned on upon the setting of the entitlement.⁹⁰ Moreover, the choice of remedy is a one-time decision, which is not revisited over time or as circumstances between the parties change.⁹¹

Of course, the ordering of these two decisions is a substantial nod to the title-dominating view of property.⁹² By designating entitlement as the

⁸⁵ See Lovett, *supra* note 27, at 77 (promoting the view of servitudes "not as inflexible property rights, but as evolving relationships between parties with concurrent interests in the same land").

⁸⁶ See, e.g., Bell & Parchomovsky, *supra* note 82, at 15–25 (reviewing scholarship presenting normative and descriptive challenges to claims made by Calabresi and Melamed).

⁸⁷ Calabresi & Melamed, *supra* note 13, at 1090–91.

⁸⁸ *Id.* at 1090.

⁸⁹ *Id.* Of course, such a remedy could be no liability.

⁹⁰ *Id.* at 1090–91.

⁹¹ This is one of the shortcomings that Bell and Parchomovsky seek to address with the introduction of their "pliability rules." Bell & Parchomovsky, *supra* note 82, at 38–39.

⁹² As will be discussed, it is also a meaningful divergence from Holmes, who argued that a decision maker ought to begin by defining a set of facts that delimit a remedial need. See HOLMES, *supra* note 32, at 215 ("There are always two things to be asked: first, what are the facts which make up the group in question; and then, what are the consequences attached by the law to that group.").

switch that turns on remedies, Calabresi and Melamed effectively concluded that an outcome cannot be set unless and until an entitlement is defined or redefined.⁹³ Outcomes, in other words, cannot exist in the absence of pre-defined entitlements, even though it is also the case that outcomes have the effect of activating a redefinition of entitlements in light of the chosen outcome. In these respects, entitlements act as on/off switches for triggering remedies.

Indeed, several of the most influential critiques of Calabresi and Melamed's original framework suggest modifications that effectively create "glider switches" allowing for adjustments in compensation over time,⁹⁴ or transitions from injunctions to damages or vice versa.⁹⁵ These modifications allow the framework to fit more comfortably in contexts where access to and ownership of land is contested. In such contexts, the creation or enforcement of an easement over the course of time, for example, can act as a glider switch that effectively transfers ownership while softening the effects of such a transfer by temporal means.⁹⁶ Similarly, the allowance of a certain "activity level," for example, dumping up to a certain level of pollution but not beyond it, can provide for partial or gradual transfer of ownership.⁹⁷

Though it is not their apparent intent, such glider switches also accomplish sharing, though typically only along temporal lines or by softening the harsh effects of a blunt injunction by an award of damages. These limited leanings toward sharing reflect a reality that may well differ from that which Calabresi and Melamed purported to describe. The original cathedral was glimpsed at a moment when the surrounding conversation centered on the ramifications of Coase's insights about the importance of individual ownership and wealth maximization and their relationship to exclusion.⁹⁸ In this context, protecting entitlements with property rules meant rewarding injunctive relief to one individual. As diverse views of the cathedral are cataloged, it has become clearer that such a limited use of injunctions is unduly constraining and harsh.

Calabresi and Melamed's framework is also binary in another significant respect, and this is the second assumption underlying the

⁹³ Calabresi & Melamed, *supra* note 13, at 1092–93.

⁹⁴ See Ayres & Talley, *supra* note 27, at 1080–82 (providing an example of temporal division of property and its effect on bargaining).

⁹⁵ Bell & Parchomovsky, *supra* note 82, at 38–39.

⁹⁶ See *id.* at 67–68 (describing the versatility of pliability rules in determining the most efficient and just outcomes).

⁹⁷ Ayres & Talley, *supra* note 27, at 1078–80.

⁹⁸ See Bell & Parchomovsky, *supra* note 82, at 8–11 (recognizing Coase's intellectual contribution to the discussion of transaction costs as a catalyst "for all subsequent law and economics scholars," but acknowledging that Coase's article fell short by not discussing "how entitlements should be protected after the initial allocation").

framework. The binarism here is in the categorization of remedies: After determining who is owed an entitlement, Calabresi and Melamed claimed that a decision maker can choose to protect that entitlement with either a property rule or a liability rule.⁹⁹ Property rules enforce the court's decision about who receives an entitlement by requiring one who wishes to take the entitlement to buy it from the holder by means of a voluntary transaction.¹⁰⁰ Liability rules allow others to remove the entitlement from its holder by paying a predetermined price.¹⁰¹ Calabresi and Melamed also introduced a third type of remedial rule, inalienability rules, which preclude the holder from selling the entitlement.¹⁰² However, this Article adopts the prevailing perspective that the theoretical force of Calabresi and Melamed's framework is in its binary division between property and liability rules.¹⁰³

Despite being binary in this respect, the authors' original framework was indisputably capacious, allowing the authors to categorize virtually all remedies as either property rules, liability rules, or some hybrid of the two.¹⁰⁴ The binarism of the framework was not limiting in the sense that certain remedies were left out and at risk of underuse as a result. But, of course, categorization adds meaning, and in this case the authors called a property rule a "collective decision as to who is to be given an initial entitlement but not as to the value of the entitlement."¹⁰⁵ How then would they categorize an injunction requiring a certain amount of sharing? Such an outcome would presumably fit within the category of liability rules, but not comfortably so, given the authors' equation of liability rules with damages.¹⁰⁶ Without such a categorization it seems entirely possible that injunctive relief could easily have involved more nuanced grants of rights of access, use, and even exclusion, allowing for the separation of property interests that are currently bundled.

Obviously the first, but probably also the second of these two

⁹⁹ Calabresi & Melamed, *supra* note 13, at 1092.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 1092–93. Recent scholarship has clarified that inalienability rules play an important role in property law. *See, e.g.*, Fennell, *supra* note 74, at 1406 (exploring the potential of inalienability rules to help achieve efficiency).

¹⁰³ *See, e.g.*, Bell & Parchomovsky, *supra* note 82, at 4–5 (“[T]he analytical structure devised by Calabresi and Melamed, and in particular, the foundational distinction between property and liability rules, has been accepted by virtually all the commentators.”); Smith, *supra* note 10, at 1720 n.1 (explaining that while Calabresi & Melamed also discussed inalienability rules, the article would focus on their framework concerning property and liability rules).

¹⁰⁴ And the authors characterized the few that were neither property rules or liability rules as inalienability rules. Calabresi & Melamed, *supra* note 13, at 1092–93.

¹⁰⁵ *Id.* at 1092.

¹⁰⁶ *See id.* at 1116 (describing the calculation of damages as difficult for courts to determine, because often the injuries suffered are not easily measurable).

assumptions, appears to be holdovers from a title-focused perspective. Even as Calabresi and Melamed were describing the powerful redefinitional effect of remedial choices, they were affirming that the choice of remedies still must follow a determination of which party has the entitlement. In these respects, their own assumptions narrowed the space in which an outcome-focused approach could develop. The third assumption underlying the authors' framework is likely more attributable to the authors' apparent interest in tracking the economic consequences of their framework rather than in tracking the development of the common law.

The third assumption is the authors' claim that, among the different reasons for choosing entitlements, the primary reasons are economic efficiency or distributional preferences.¹⁰⁷ Here again, the authors' categorization, though descriptive and capacious, is also quite normative.¹⁰⁸ As to this aspect of their framework, the authors have received attention for failing to consider adequately the pluralistic values that motivate individuals to seek outcomes or protect rights.¹⁰⁹ While Calabresi and Melamed focused on the distribution of wealth and "merit good[s],"¹¹⁰ recent scholarship has elaborated substantially on other important goals. For example, the broader notions of individual and community economic development provide a palette of values underlying the notion of fair distribution. These include concepts of human capabilities and democratic ideals, among other important features.¹¹¹

¹⁰⁷ *Id.* at 1102. The authors mention a third category, "other justice reasons," but "admit that it is hard to know what content can be poured into that term, at least given the very broad definitions of economic efficiency and distributional goals." *Id.*

¹⁰⁸ As with other aspects of their framework, the authors' purportedly equal treatment of efficiency and distributional issues has been overshadowed over time by a focus on the efficiency considerations inherent in their framework. See Bell & Parchomovsky, *supra* note 82, at 25 ("Calabresi and Melamed's call to consider distributive and other justice considerations in determining the allocation of entitlements has been all but ignored by subsequent law and economics scholars. Although Calabresi and Melamed put the various considerations on equal footing, economic efficiency somehow eclipsed the two other values.").

¹⁰⁹ See, e.g., Jeanne L. Schroeder, *Three's a Crowd: A Feminist Critique of Calabresi and Melamed's One View of the Cathedral*, 84 CORNELL L. REV. 394, 469 (1999) ("[Calabresi and Melamed's concept] does not describe any remedial regime that does or could exist under any legal system . . . in which there are more than two parties."); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 48–49 (1998) (discussing shortcomings of the Calabresi and Melamed model).

¹¹⁰ Calabresi & Melamed, *supra* note 13, at 1098–101.

¹¹¹ See, e.g., MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 70–86 (2000) (arguing that human capabilities should help determine political ideals and formulate the rights guaranteed to every citizen); AMARTYA SEN, *COMMODITIES AND CAPABILITIES* 1–7 (1985) (describing how a person's well-being is directly related to the fundamental concern of economics, and one's capabilities help assess this well-being); Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRES L. 127, 134–38 (2009) (discussing certain human capabilities, including life, freedom, practical reason, and affiliation); Joseph William

Additional goals include cultural values and community norms about long-term land use, both of which inform our collective sense of fairness in property relationships.

This Article adds modestly to these critiques by noting that the primacy of economic efficiency in the authors' model presumptively drives the choice of remedies toward efficiency-focused entitlements. If reasons for preferring entitlements were recognized as being more various and pluralistic in nature, we might well expect that choices of outcomes would reflect that variety. Thus, we might see less coalescence of property bundles than we see where the most efficient outcome is presumed to be the best outcome and, as the next Section discusses, where exclusive ownership is presumed to be most efficient.

Consider the example of shared uses. Such uses are not just a matter of most effectively internalizing the externalities of property ownership and use; they also can increase the "size of the pie," providing more individuals with access to property for the purpose of productive use. A failure to provide such access detracts from this goal. Moreover, the exclusive nature of use in the ownership-dominated remedial framework limits the extent to which cultural values associated with group-based norms can be realized. The same could be said for long-term planning. In short, the notion of use exclusivity renders social and cultural context largely irrelevant, or at least only affirms dominant (rather than pluralistic) values in this regard.

While Calabresi and Melamed's particular view of the cathedral has shaped an outcome-focused approach in meaningful ways, the more significant effect of their framework is the extraordinary influence it has had on property scholarship in that regard. In short, property scholars have interpreted the binarisms within the framework, combined with the emphasis on economic efficiency, to mean that entitlements that rise to the level of ownership should be remedied with broad property rules. By this interpretation, the limitations on ownership are enforced with narrow exceptions to these rules. This is quite a significant extension of the original framework, which claimed that property rules work best where there are low transactions costs, while liability rules are more effective in the presence of high transactions costs.¹¹² The overlay that some scholars add to Calabresi and Melamed's original interpretation is that low

Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1045–46 (2009) (sympathizing with the approach to property that focuses on identifying capabilities in the context of determining property rights).

¹¹² Calabresi & Melamed, *supra* note 13, at 1106–10. In exploring the connection between entitlement and outcome, Calabresi and Melamed employed what appeared to be an elastic notion of an entitlement that could easily accommodate rights to property that are less absolute than the full bundle of rights idealized by Blackstone. For example, an entitlement could simply be to "make noise." *Id.* at 1090.

transaction costs exist where an exclusive notion of ownership can be discerned in the name of one of the parties. It is thus only where exclusive ownership is difficult to discern that liability rules or narrow exceptions to broad property rules are more appropriate.

These extensions of Calabresi and Melamed's original framework are nowhere more evident than in Professor Henry Smith's defense of property rules.¹¹³ In his article, he undertakes to develop a theory of property rules that "allow[s] an explanation of why property rules tend to be associated with entitlements that we label 'property,'"¹¹⁴ and concludes that such rules often are paired with rights of exclusion,¹¹⁵ the "*sine qua non*" of property ownership.¹¹⁶ As he states:

Property responds to uncertainty over uses by bundling uses together and delegating to the owner the choice of how to use the asset, thus avoiding the need to specify uses at any stage. . . . On the duty holder side, the message is a simple one—to "keep out."¹¹⁷

Smith's point is straightforward. Without the broad injunction (or property rule) to "keep out," the information costs associated with the exploitation of resources would be too high.¹¹⁸ It would be unnecessarily costly for those other than the owners themselves to identify appropriate uses of a given resource and then to allocate those uses among different owners and non-owners.¹¹⁹ Professor Smith reinforces this analysis by detailing the connection between property rules and the *in rem* understanding of property rights.¹²⁰

By contrast, as Smith describes here and elsewhere, there are categories of property disputes in which decision makers cannot avoid more directly regulating "use conflict[s],"¹²¹ and it is largely on these disputes that this Article concentrates. Smith describes such disputes as falling within what he terms "governance regimes."¹²² In these cases, decision makers must "pick out more specific activities for

¹¹³ See generally Smith, *supra* note 10 (arguing that property rules have advantages over liability rules).

¹¹⁴ *Id.* at 1723.

¹¹⁵ *Id.* at 1724; see also *id.* at 1754–74 (describing in great detail the necessary interrelatedness of property rules and the right to exclude).

¹¹⁶ Merrill, *supra* note 10, at 730.

¹¹⁷ Smith, *supra* note 10, at 1728.

¹¹⁸ See *id.* at 1724–30 ("Property rules benefit from the savings in information costs that are made possible by rights to exclude as opposed to more tailored use rights.").

¹¹⁹ *Id.* at 1754–55, 1763–64.

¹²⁰ *Id.* at 1724.

¹²¹ *Id.* at 1756.

¹²² *Id.* at 1751–53, 1757.

measurement.”¹²³ Such governance regimes have long existed, often having been used with respect to common resources, but they are also evident in other core areas of the common law.¹²⁴ In contrast to “exclusion” regimes, where rights of use are bundled together under the owner’s control without being individually delineated and regulated, governance regimes directly manage specified uses.¹²⁵

Professor Smith’s arguments about property rules fall within a broader scholarly conversation that has emerged, arguing that the most accurate legal description of property law is that it is about the right to exclude.¹²⁶ Although this conversation may not always reference Calabresi and Melamed’s cathedral framework, it does much to contribute to the equation of entitlement with exclusive ownership in property law. In this view, property rights ought to remain bundled wherever the potential for reducing information costs exists.¹²⁷

One of several problems with this perspective is that it preconceives a conclusion that begins the analysis of any given property dispute by considering the “right” of an owner to the “thing” owned.¹²⁸ Such a beginning point encourages decision makers to search for the “thing” and then to label it as being absolutely owned by one of the parties. Professor Merrill, Professor Smith, and other “exclusion scholars” who support this view describe it as a more accurate description of how property law operates in the real world. Parts III and IV of this Article dispute this claim, at least in certain core areas of property law, one of which (trespass) the exclusion scholars claim as falling within their regime. For now, it is necessary to say only that the exclusion literature contributes further to a particular interpretation of the cathedral framework in which entitlements are bundled and broadly protected, leaving very little conceptual room for sharing.

¹²³ Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S455 (2002). See generally Gregory S. Alexander, *Governance Property*, 160 U. PA. L. REV. 1853 (2012) (drawing a distinction between exclusion property and governance property and recognizing the importance of internal relationships among property owners).

¹²⁴ Smith, *supra* note 123, at S455.

¹²⁵ Smith, *supra* note 10, at 1755–56.

¹²⁶ See, e.g., PENNER, *supra* note 10, at 72 (“The exclusion thesis is a statement of the driving analysis of property in legal systems. It characterizes property primarily as a protected sphere of indefinite and undefined activity, in which an owner may do anything with the things he owns.”); Merrill, *supra* note 10, at 730 (“Give someone the right to exclude others from a valued resource, . . . and you give them property. Deny someone the exclusion right and they do not have property.”); see also Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 275–77 (2008) (proposing that ownership is most concerned with the owner’s position as the exclusive controller of her property).

¹²⁷ See, e.g., Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property*, 110 YALE L.J. 1, 31–34 (2000) (arguing that standardization of property rights will lower the “external costs of measurement to third parties” such as information costs).

¹²⁸ Smith, *supra* note 11, at 1691.

The exclusion scholars are not the only ones who have contributed to the conflation in property law of entitlement with ownership and property rules with “keep out” orders. Professors Kaplow and Shavell arrive at a similar, though more limited, extension of Calabresi and Malamed’s original framework by concluding that property rules are appropriate to remedy what they label “possessory interests,” which they equate with the low transaction cost scenarios in which the original framework would tend toward property rules.¹²⁹ More limited examples such as this are still important to include here because of the assumptions embedded in the labels used. What exactly are possessory disputes? The answer may well depend on whether a decision maker begins by defining rights or begins by considering remedies. In sum, while the literature on Calabresi and Malamed develops sophisticated interpretations and extensions of the framework, a more basic theme that emerges is the drift from a broader notion of entitlement that can be remedied by property or liability rules depending on transaction costs to a narrower notion of bundled ownership to be remedied by property rules.

Although it is by no means preordained, the prevailing understanding of the bundle-of-rights view of property in some respects amplifies the association between entitlement and ownership. The modern legal view is that the use of land is something that can be independently owned; one can be independently entitled to use land.¹³⁰ Because use has become capable of independent ownership and transfer, it has taken on the attributes of ownership. Of particular interest here, the “right to use,” as in the case of an easement, has assumed a mantle of exclusivity. It is a right that only the owner may define, unless of course such a right is overridden by a new prescriptive right or by condemnation.¹³¹ Thus, the owner of a “right to use” has the right to determine who may use and, often, how much and for how long. This is not to say that the bundle view of property is not also

¹²⁹ Kaplow & Shavell, *supra* note 27, at 716.

¹³⁰ See, e.g., Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1606–09 (2008) (providing a brief overview of the forms of property contemplated by American property law); Daphna Lewinsohn-Zamir, *More Is Not Always Better than Less: An Exploration in Property Law*, 92 MINN. L. REV. 634, 688 (2008) (highlighting the independence of the right to use from title to land by discussing the rent-seeking opportunities opened up to tenants, servitude, holder, and others via exercise of the right *not* to use); see also Daphna Lewinsohn-Zamir, *Compensation for Injuries to Land Caused by Planning Authorities: Towards a Comprehensive Theory*, 46 U. TORONTO L.J. 47, 122 (1996) (discussing the bundle-of-rights conception of property and arguing that the law currently views restrictions on the right to use (among other sticks in the bundle) as *prima facie* injuries to an independent property right).

¹³¹ See Larissa Katz, *A Powers-Based Approach to the Protection of Ideas*, 23 CARDOZO ARTS & ENT. L.J. 687, 720–23 (2006) (pointing out that the exclusivity of the right to use also encompasses a right to share); Katz, *supra* note 126, at 309 (stating that “[I]imits in property law on what qualifies as an easement amount to exclusivity rules that preserve the supremacy of the owner’s position” to determine the uses of the easement within its bounds).

quite useful in considering the pragmatic possibility of an outcome-focused approach. It is, however, to say that the bundle view has itself become infused with basic assumptions about ownership that are not necessary to a robust version of that view nor, more broadly, to sensible dispute resolution.

C. *Holmes: Outcome Before Ownership*

The purpose of this Section is to present a theoretical conception of an outcome-focused approach that is not saddled with the assumptions embedded in Calabresi and Melamed's framework (and its extended versions as developed by other scholars). Most importantly, given my claim that the binarisms in the framework limit the real world possibilities for diverse outcomes, the objective here is to present a framework that actually begins by considering outcomes before rights and that does not presumptively categorize injunctions as broadly defined "property rules." Though rudimentary, the framework proposed by Holmes in his review of the common law avoids both of these binarisms and thus, I argue, serves as a more promising foundation for an efficacious outcome-focused approach in modern property law that creates space for sharing. By not implicitly favoring efficiency goals, Holmes's framework also avoids the third assumption that inheres in the cathedral framework. This Section describes Holmes's framework and its latent potential for property law. Section II.D and Part III develop Holmes's framework for modern application.

Given his realist orientation, Holmes's effort was to replace the abstract morality that had infused the common law with an inquiry into how individuals actually respond to legal rules.¹³² In *The Path of the Law*, for example, Holmes attacked the notion that legal "rights" and "duties" exist in any abstract, moral, or independent sense by making three basic observations about them in operation. First, Holmes argued that legal rights and duties are nothing but predictions "that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court."¹³³ Second, he claimed that it is in this respect that legal rights are different from moral rights, the latter of which may have meaning independent of the extent to which they are enforced and the means of enforcing them.¹³⁴ Third, Holmes argued that it typically does not matter if

¹³² See Holmes, *supra* note 30, at 168–69 (claiming a confusion between law and morality and proposing the idea that legal rights and duties are merely a system of predictions).

¹³³ *Id.* at 169. Holmes put it even more strongly in his discussion of the common law of possession: "A legal right is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force." HOLMES, *supra* note 32, at 214.

¹³⁴ Holmes, *supra* note 30, at 170–71.

a legal duty is described in terms of “praise” or “blame” if the consequence is the same.¹³⁵ In this basic sense, the precise definition of the duty, for example as a “fine[]” or a “tax[],”¹³⁶ does not matter. Holmes concluded: “You see how the vague circumference of the notion of duty shrinks and at the same time grows more precise when we wash it with cynical acid and expel everything except the object of our study, the operations of the law.”¹³⁷

In these observations, Holmes recognized that a more expansive understanding of duties might exist in the case where courts grant injunctions and enforce them by putting the defendant in prison or “otherwise punishing him unless he complies with the order of the court.”¹³⁸ He emphasized that these circumstances ought to be the exception from a general theory of the relationship between rights and remedies rather than the rule.¹³⁹

Nevertheless, given this Article’s focus on property law, the vagueness of Holmes’s claims about injunctions is confusing until one observes the same basic argument in his discussion of possession and ownership in property law.¹⁴⁰ In that discussion, Holmes emphasized that there was no legal distinction between de facto possession and the legal right to possess.¹⁴¹ More profoundly, he argued that the facts constituting possession and those constituting ownership generate essentially the same set of legal rights, though the latter are slightly more extensive than the former.¹⁴² This was so because the remedies available to both the “mere” possessor and the owner were largely the same.¹⁴³ These observations are a perhaps startling echo of the basic reality in the early system of writs for real actions.¹⁴⁴ What makes the comparison startling is that Holmes was observing a reality in a system that purported to be so very engrossed with the question of rights and duties.

As Holmes recognized, the assumed primacy of rights in legal thinking made it difficult even to conceive of a world in which remedies could be assigned without first resolving the question of whether one or another

¹³⁵ *Id.* at 174.

¹³⁶ *Id.* at 173.

¹³⁷ *Id.* at 174.

¹³⁸ *Id.* at 175–76.

¹³⁹ *Id.* at 176.

¹⁴⁰ See HOLMES, *supra* note 32, at 206–46 (analyzing possession as understood by the common law and its relationship to ownership and title).

¹⁴¹ *Id.* at 238–39.

¹⁴² *Id.* at 239, 246. Holmes made the same point about the legal equivalence of different kinds of contract, given the reality that enforcement could never include compelling performance to any extent that could amount to servitude. *Id.* at 300.

¹⁴³ See *id.* at 245–46 (enumerating the remedies available to both the owner and the possessor).

¹⁴⁴ See *supra* Part II.A (discussing the predominant focus on outcomes in resolving legal disputes in the early common law).

party is entitled to a remedy.¹⁴⁵ The very dictates of logic seemed to require that a remedy could only be available to one who is entitled to it.¹⁴⁶ Thus the first hurdle to overcome in assessing the feasibility of an outcome-first norm was a conceptual one: it required a replicable and freestanding account of when a situation warrants a remedy. Here again, Holmes provided the building blocks to overcome this hurdle.

On the basis of his observations about the primacy of remedy, Holmes developed a prescription for the astute jurist—one who recognized that legal rights exist and are defined only by and to the extent of their enforcement.¹⁴⁷ In essence, his prescription amounted to two questions that he argued must always be asked about a dispute: “[F]irst, what are the facts which make up the group in question; and then, what are the consequences attached by the law to that group.”¹⁴⁸ With respect to the first question, Holmes emphasized the definition of a particular group by a set of characteristics that warranted legal action. In his property example, that of possession, these characteristics included “a certain physical relation to [an] object and to the rest of the world” and “a certain intent.”¹⁴⁹

Notably, these are not characteristics that necessarily define title, as Holmes made clear when spinning out such scenarios as when a small child and a ruthless robber share the same intent vis-à-vis a found object.¹⁵⁰ Nevertheless, they are all that is required prior to answering the second question, namely what remedies are available to the particular group defined by these characteristics.¹⁵¹ It is, Holmes suggested, superfluous to consider what right, if any, that group shares,¹⁵² though as a practical matter it is probably more accurate to say that in Holmes’s world, the outcome would define the right rather than render it irrelevant. The allocation of remedy is based on a replicable set of facts which, when present, should always warrant the same remedy. Holmes was able to reduce the inquiry to just these two questions because of his equation of “right” with “consequence.”¹⁵³ Once a jurist recognized the basic

¹⁴⁵ See, e.g., Holmes, *supra* note 30, at 174–75 (discussing the “mystic significance” that contract law invests in “rights and duties”). Of course, many scholars have argued that it is only right to analyze entitlements first. See, e.g., Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 *YALE L.J.* 1335, 1347 (1986) (“Conflating this distinction between right and remedy is commonplace within the realist tradition that so dominates American Jurisprudence.”).

¹⁴⁶ *But see* Holmes, *supra* note 30, at 184, 198 (emphasizing that normative considerations, what he describes as questions of “social advantage,” ought to guide legal decisions rather than an abstract sense of logic).

¹⁴⁷ HOLMES, *supra* note 32, at 214–15; Holmes, *supra* note 30, at 184.

¹⁴⁸ HOLMES, *supra* note 32, at 215.

¹⁴⁹ *Id.* at 216.

¹⁵⁰ *Id.* at 235.

¹⁵¹ *Id.* at 215.

¹⁵² *Id.* at 214–15.

¹⁵³ *Id.* at 214.

irrelevance of rights independent of the remedy (or consequence) that protected them, he or she was justified in avoiding an examination of the “rights” of the parties as a separate inquiry (or, if you will, a third question).¹⁵⁴ This, of course, is in sharp contrast with the binary in the cathedral framework in which a determination of the entitlement is still the “first issue.”¹⁵⁵ Here, Holmes dispensed with the question entirely, a move which the model adapting his framework in Part III does not go so far as to make. Also absent from the basic property examples that Holmes explored is a predisposition toward broadly enjoining others from interfering with property rights. The outcome would depend on the surrounding circumstances, whether involving age, infirmity, theft, temporary needs of access or use, or myriad other criteria.

In short, what makes Holmes’s framework so refreshing is the opportunity it presents to avoid designating “rights,” “owners,” and “things” that fall within the value-laden category of “title” or “ownership” before determining what about a given resource each party wants and *could have*. At the level of theory, this would avoid a preoccupation with what “progressive property” scholars sometimes refer to as the ownership model of property and what exclusion scholars refer to as gate-keeping. As Section II.D discusses, such a reorientation acknowledges that while information costs might be reduced in an exclusion model of property law, exclusion from packaged rights produces negative externalities and transaction costs that a focus on outcomes could avoid. The key example supporting this observation is that of sharing. In a world in which access to resources is increasingly constricted to fewer owners, an exclusion perspective on trespass law leaves many non-owners dependent on more limited public resources when the alternative could have left non-owners with limited opportunities to share private property.

And this possibility of property sharing, along with a greater openness to diverse outcomes among owners and non-owners, is precisely the greatest pragmatic potential of adapting Holmes’s framework. As Part III will show, Holmes’s framework presents a means to produce actual benefits from what property judges intuitively are drawn to do. It is a means of acting upon judges’ intuitions where those intuitions reflect deep experience with the needs of parties vis-à-vis limited resources. In this respect, it is a theory that closely fits the reality of modern property jurisprudence. As the case analyses below demonstrate, what was lost in the progression from outcomes to entitlements and ultimately to bundled ownership was the (perhaps largely inchoate) possibility of sharing in

¹⁵⁴ *See id.* (“Every right is a consequence attached by the law to one or more facts which the law defines, and whenever the law gives any one special rights not shared by the body of the people, it does so on the ground that certain special facts, not true of the rest of the world, are true of him.”).

¹⁵⁵ Calabresi & Melamed, *supra* note 13, at 1090.

ancient property law.

D. *The Interest-Outcome Approach*

The progression in the conceptualization of property interests from writs to realists provides the foundation for a rich alternative to thinking about property as a tightly bundled set of rights that justifies blunt exclusion. This approach, which I label here as the interest-outcome approach, captures important features of the different approaches developed in each of these periods. From the medieval writ system, the key feature that contributes to the interest-outcome approach is the notion that possession and use are more salient interests to protect than a formal designation of title. The medieval system embodied a second dichotomy, that of outcome versus right or title. By rewarding possession, the system implicitly prioritized outcome over formal title. The legal realists, from Holmes and Llewelyn to Calabresi, seized upon this second dichotomy as a way of understanding the scope, value, and extent of rights. Holmes stretched it so far as to present a basic jurisprudential preference for remedy over right, where the imperative to remedy could be ascertained by determining need rather than right.¹⁵⁶ Property theorists who have explored the cathedral more recently have labeled the dichotomy somewhat differently, adding their own layers of meaning to it. Thus, Smith has emphasized that the choice is really between governance regimes focusing on use on the one hand and title-centered regimes focusing on exclusion on the other.¹⁵⁷

As Part III will discuss in detail, the different dichotomies represented in these approaches are supplemented by the business of judging, a business that was iconically captured by Carol Rose's description of the judicial muddying of crystalline rules.¹⁵⁸ This classic process of layering exceptions to prevent unfairness began in the Fourteenth Century by, for example, the addition of injunctive relief as a remedy for a person bringing a claim of disseisin.¹⁵⁹ As Professor Singer has described, the basic dichotomy between equity and law continues to animate decisions in property cases.¹⁶⁰ We also see a version of this dichotomy in judicially created exceptions based on the particular facts of a case despite the

¹⁵⁶ See *supra* Part II.C (presenting Holmes's theoretical framework, which considers the outcomes of property disputes before rights and emphasizing Holmes's focus on remedies).

¹⁵⁷ Smith, *supra* note 123, at S453, S455.

¹⁵⁸ Rose, *supra* note 65, at 578–80.

¹⁵⁹ See Donahue, *supra* note 70, at 954–57 (recounting the establishment of courts of equity during the fourteenth century).

¹⁶⁰ See SINGER, *supra* note 29, at 98–105 (presenting the interplay between law and equity and the importance of both in cases involving property).

apparent applicability of one or more clear rules.¹⁶¹ We see another version in judicial and scholarly claims that the morality of a given situation dictates a certain result in support of,¹⁶² or even in the face of,¹⁶³ clear-cut rules.

The interest-outcome approach is a means of resolving property disputes where more than one legitimate interest exists concerning use, possession, or access to a piece of property and where such interests are represented in the form of conflicting positions concerning the property. In such a situation, Professor Smith's recommendation of an exclusion regime with bundled title would not be of much use in recognizing and resolving legitimate interests on both sides of a dispute. Someone would have to lose in Smith's world, and unnecessarily so.¹⁶⁴ Instead, the interest-outcome approach would begin the process of dispute resolution by having the court recognize and define the legitimate interests on both sides of a dispute. This would decidedly not be a process of searching out who has formal title. Rather, the task would be to determine each party's interests vis-à-vis the property. The heart of the interest-outcome approach would be the second step, which would require the court to consider outcomes that could best accommodate each party's legitimate interests. It would only be at the third and final step that formal title, and entitlements more broadly defined, would come back into the picture, requiring the court to consider the extent to which they are relevant to a given dispute.

While resonating with each of the dichotomies described above, the interest-outcome approach draws its main inspiration from negotiation theory, which—at its core—protects interests over positions. As Professor Robert Mnookin and his coauthors argued in *Beyond Winning*, by concentrating on interests, the parties in a given conflict can negotiate to create value in a given dispute.¹⁶⁵ The present Article applies that core insight to property law by arguing that in many disputes, formal title is the equivalent to the starting positions that parties take in a dispute, which if pursued doggedly would result in one party winning everything and the

¹⁶¹ *Id.*

¹⁶² See Merrill & Smith, *supra* note 10, at 1850 (arguing that property rights cannot exist unless a moral significance is attached to property ownership).

¹⁶³ See, e.g., Kevin Gray, *Equitable Property*, 47 CURRENT LEGAL PROBS. 157, 207 (1994) (identifying that a new type of equitable property will develop in order to supplement rules of law); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 863–64 (2009) (asserting that a more normative theory of property would allow purely economic analysis to be situated within a moral framework).

¹⁶⁴ In this respect, the interest-outcome model resonates with the “split-the-difference” outcomes favored by Professors Parchomovsky, Siegelman, and Thel, in their discussion of windfalls, see Gideon Parchomovsky et al., *Of Equal Rights and Half Wrongs*, 82 N.Y.U. L. REV. 738, 757–62 (2007), but this Article advocates for such outcomes in a much broader range of disputes.

¹⁶⁵ ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 35–37 (2000).

other losing.¹⁶⁶ By contrast, if the court and parties focus on the parties' legitimate interests, they can more easily innovate outcomes that protect a broader range of those legitimate interests.¹⁶⁷

The negotiation-grounded focus of the interest-outcome approach thus emphasizes outcome far more than title. As in the many examples provided by Mnookin and his coauthors, when the dispute resolution process begins by focusing on the interests "at the table," the main focus of the process is in fact on the outcomes—or "trades"—that could be used to protect those interests.¹⁶⁸ This approach also recognizes the importance of use and possession over and, at times, in lieu of formal title, because use and possession are often legitimate interests that can serve as the basis for finding more equitable outcomes or trades. Similarly, a focus on interests picks up on Holmes and other legal realists' attention to the parties' needs rather than simply to their rights.¹⁶⁹

Comparing this approach to more contemporary views of the cathedral, this Article endorses and provides further support for Gregory Alexander's and Joseph Singer's arguments that many more property disputes are about governance than Professor Smith might believe.¹⁷⁰ Thus, certainly in the contexts where the interest-outcome approach would most naturally apply (but quite possibly in the vast majority of property disputes), use must be evaluated for the purpose of determining who has been harmed, how much, and in what respect. Indeed, in his analysis of the circumstances in which, counter-intuitively, the delineation of uses can be the lowest-cost method for resolving disputes, Professor Smith also presents a response to those who would argue that this model is too costly to take seriously. Where this is the case, the evaluation of use for remedial purposes likely adds no cost at all.¹⁷¹ In addition to disagreement concerning the ubiquity of governance regimes, this Article also disputes Professor Smith's views on remedies. Smith proposes that remedies in "governance" disputes should center on liability rules.¹⁷² By contrast, this Article argues that the outcome-centered analysis required by the interest-outcome approach should normatively lead to a broad array of outcomes, involving both damages and injunctions.

The vision of property disputes presented in this Article also adds a

¹⁶⁶ *Id.* at 24, 125–26.

¹⁶⁷ *Id.* at 35–37.

¹⁶⁸ *See, e.g., id.* at 227 box 17 (comparing the net-expected-outcome approach to the interest-based approach to negotiation).

¹⁶⁹ *See supra* Part II.C (discussing the outcome-based approach of Holmes).

¹⁷⁰ Alexander, *supra* note 123, at 1858, 1860; *see also* Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1375, 1380 (2013) (illustrating the ways in which standards and governance are essential to the system of property rights).

¹⁷¹ Smith, *supra* note 10, at 1757–58.

¹⁷² *Id.* at 1751–52.

perspective on the dichotomies that judges experience in the course of judging. It is true that focusing on legitimate interests, or justified expectations (as Professor Singer advocates),¹⁷³ will muddy crystalline rules that prioritize formal title and exclusion. A focus on such things as outcomes and reliance interests also could add mud.¹⁷⁴ Judicial analysis under this approach will look more like that seen in traditional courts of equity than of law, centering on detailed inquiries into the particular facts (interests) and even the moral positions of the parties in given cases. But the interest-outcome approach does nothing to add to the fact that mud would inevitably result in such difficult cases. The question of how many disputes are ultimately muddy is a descriptive one that can be answered by empirical research. The question that the interest-outcome approach addresses is where in the dispute the muddying should occur—whether in defining entitlements or rights or in defining outcomes. This Article argues that by spending time on examining outcomes, judges using the interest-outcome approach will more easily be able to imagine and innovate a range of outcomes that will protect more of the legitimate interests of parties in any given dispute.

The theoretical groundings for the interest-outcome approach also inspire a basic definition for “sharing” as this Article uses that term. The most important feature of sharing under the interest-outcome approach is that it results in outcomes that represent compromises of some sort between the parties’ varying interests. Thus, under this approach, the opposite of sharing is the kind of all-or-nothing outcomes for which litigating parties typically advocate in their pleadings. Instead, sharing would be accomplished by court-imposed or settled outcomes that give each party something—but not everything.¹⁷⁵ Whose interests and judgments would define whether sharing has resulted? The answer would necessarily be that each party’s interests and judgments would be relevant to that question. Under this definition, some types of sharing would be at

¹⁷³ See SINGER, *supra* note 29, at 212 (stating that the norm of justified expectations “invites critical inquiry into when expectations are justified, . . . from the standpoint of justice and from that of utility” and “invites conversation about the circumstances under which it is fair to impose obligations on individuals to respect the interests and property rights of others”).

¹⁷⁴ See Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 663–701 (1988) (discussing the relevance of social relations in determining interests in property and arguing that such relations have been marginalized by the free market model). While the interest-outcome model pays close attention to reliance interests, the expansive understanding of “legitimate interests” in my model incorporates *prospective* uses as well. *Id.* at 679–92.

¹⁷⁵ The model’s theoretical connection to standards, as distinguished from rules, is particularly relevant here, given the literature on bargaining in the shadow of vague standards. See, e.g., Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027 (1995); Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121, 137–38 (1999); Jason Scott Johnston, *Bargaining Under Rules Versus Standards*, 11 J.L. ECON. & ORG. 256 (1995); Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93 (2002).

the core of the interest-outcome model. These would include uses of property that are simultaneous or perhaps even require ongoing collaboration or coordination. But by requiring transfers of property and other forms of sharing *over time*, the model also encompasses sharing that does not require an ongoing relationship. In these latter examples of sharing, arguably the most important contribution of this model is at the conceptual level: the model creates space for courts and individuals to think about property through the lens of sharing rather than through the lens of exclusivity.

While the primary support for this model is in its application, as Part III will demonstrate, it is already possible at this stage of the analysis to call attention to some of the theoretical and practical implications of the interest-outcome approach.

1. *Theoretical Implications*

First, the interest-outcome approach to resolving property disputes lends additional validation to the bundle of rights conception of property law that became increasingly well-received during the twentieth century.¹⁷⁶ The bundle conception regards property as comprising a number of entitlements, not just one monolithic entitlement denoted by the term “ownership.” According to such a conception, it is entirely possible to distribute rights within the bundle to different people. For example, implied easements cases embody the bundle conception by distributing the right to use to one party, while reserving ownership of the underlying land to another.¹⁷⁷

Though the bundle conception has been the subject of recent criticism,¹⁷⁸ the implied easements cases provide some evidence that this conception is quite richly descriptive of core types of property disputes. In such cases, rights to exclude are not nearly as relevant to dispute resolution as the ability to distribute limited aspects of property “ownership” to more than one party. Aside from adding evidence that courts lean toward this type of unbundling all the time and in the context of deploying a variety of doctrines, the interest-outcome model demonstrates that the ability to develop more meaningful outcomes in property cases is greatly enhanced by a perspective that views property as multi-stranded, rather than monolithic, and pluralistic, rather than monistic.¹⁷⁹

Indeed, another way to advance the abstract claim of this Article is to

¹⁷⁶ Daniel B. Klein & John Robinson, *Property: A Bundle of Rights?*, 8 *ECON J. WATCH* 193, 195 (2011).

¹⁷⁷ See *Stoner v. Zucker*, 83 P. 808, 809–10 (1906) (providing an example of an implied easement, where the court found the defendant had the right to enter the plaintiff’s land to maintain an irrigation ditch that served the defendant’s property).

¹⁷⁸ Klein & Robinson, *supra* note 176, at 195–96 (2011).

¹⁷⁹ Hanoch Dagan, *Remedies, Rights, and Properties*, 4 *J. TORT L.* 1, 25–26, 29 (2011).

argue that property law currently embodies too narrow a view of property entitlements. And, in fact, this is a predominant theme in an important cross-section of current property law scholarship.¹⁸⁰ The argument here is that property law would benefit from a more varied and broader understanding of entitlements,¹⁸¹ one that incorporates, for example, obligation as well as right.¹⁸² As will be clear in Part III, the interest-outcome approach incorporates this broader understanding of entitlement, as distinguished from the conflation of entitlement with title by some of the cathedral literature, and also as distinguished from Calabresi and Melamed's original use of entitlement which, though broader than simply title, was still efficiency-focused.

A second observation about ownership viewed from an interest-outcome perspective is that it is much less integral to resolving these cases than many property lawyers might presume. In contrast to the cathedral framework, in the Holmesian conception of *outcome first*, the particular rights in the bundle truly are derivative of the outcomes. At times, decision makers may not really know what will happen with those rights, to whom they will be distributed, and to what extent, until after they determine basic outcomes. Yet, as application of the model to a range of property doctrines will demonstrate, disputes are quite capable of resolution without starting with a determination of who owns what. These two lessons about ownership add meaningfully to our contemporary understanding about the instrumental role of ownership in property law. Stripped of its moral force, ownership accomplishes less than we may assume.

2. Potential Costs

Perhaps the biggest challenge to the model is the claim that it would create uncertainty about property rights, which would translate into uncertainty in market transactions. The uncertainty could result from indeterminacy about legal claims and entitlements, since the initial focus under this model would be on interests and outcomes. It could also result from consideration of the needs of non-parties. Finally, and perhaps most importantly, it could result in ad hoc decisionmaking that would lead to unpredictability in the determination of rights over key resources. Under this scenario, the result would be less efficient market transactions, a

¹⁸⁰ See generally SINGER, *supra* note 29.

¹⁸¹ Another intriguing example of the differences that could flow from a broader understanding of entitlements is the approach suggested by Professor James Smith in his development of a "law of neighbors." See James Charles Smith, *Some Preliminary Thoughts on the Law of Neighbors*, 39 GA. J. INT'L & COMP. L. 757, 762–63, 785 (2011) (proposing a "friend model" that recognizes special rights and obligations of neighbors).

¹⁸² See Alexander, *supra* note 11, at 774–75, 778–79 (suggesting an alternative understanding of ownership that includes "an aspect of the social obligation inherent in private ownership").

conclusion that challengers might draw on the basis of empirical research on tragedies of the commons.¹⁸³

The most effective response to this challenge would be to use it as a basis for carefully defining the scope of the model. Most importantly, the model is not intended to eliminate claims and entitlements in property law. The model would still operate in a context in which one or more parties filed suit against one or more defendants on the basis of one or more legal causes of action. These claims would be the basis for a determination about whether it was even appropriate in the lawsuit to begin with a consideration of appropriate remedies. In some lawsuits involving adverse possession, trespass, implied easement, and nuisance, the answer could well be yes. In many others falling outside of contexts typically regulated by Professor Smith's "governance regimes," the answer would very often be no.¹⁸⁴ This traditional means of filing suit would also cabin the extent to which non-parties to the lawsuit could influence the development of remedies.

A second response to the challenge of market uncertainty is, of course, that enormous uncertainties already exist in the key doctrinal areas in which the model is proposed as an alternative. These uncertainties are often a direct result of the "muddying" of property rights in an effort to accomplish more equitable distributive results. For example, the nuisance claim depends on a highly fact-specific balancing test of five or more factors.¹⁸⁵ Similarly, implied easements are notoriously muddy, confusing, and inconsistent.¹⁸⁶ These are not areas in which bright lines determine legal rights. To the contrary, the very question of ownership depends on nuanced questions of intent, reliance, and expectation. If anything, an

¹⁸³ See, e.g., Gary D. Libecap, *Common Property*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 317–23 (Peter Newman ed., 1998) (describing the problems of common property as a common pool resource, including the fall of resource values because of limited exchange and ineffective allocation of common-property resources); Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244–45 (1968) ("Freedom in a commons [will result in] ruin to all."); Clifford G. Holderness, *A Legal Foundation for Exchange*, 14 J. LEGAL STUD. 321, 339–40 (1985) ("[S]uch a legal doctrine would assign rights to an open class and, of course, destroy alienability.").

¹⁸⁴ See Smith, *supra* note 123, at S453, S455 (defining "governance rules" as those that "pick out uses and users in more detail, imposing a more intense informational burden on a smaller audience of duty holders").

¹⁸⁵ RESTATEMENT (SECOND) OF TORTS § 822 (1979); see also JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 378 (5th ed. 2010) (describing the numerous factors courts must look at when evaluating the gravity of harm in a nuisance claim).

¹⁸⁶ See Susan F. French, *Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification*, 73 CORNELL L. REV. 928, 928 (1988) (summarizing the feelings of some of those familiar with the law of servitudes by stating, "Others have described it more colorfully 'as an unspeakable quagmire,' . . . and an area of the law full of 'rigid categories, silly distinctions, and unreconciled conflicts over basic values'" (quoting E. RABIN, FUNDAMENTALS OF MODERN REAL PROPERTY LAW 480 (2d ed. 1982), and C. HAAR & L. LIEBMAN, PROPERTY AND LAW 909 (2d ed. 1985))).

interest-outcome approach could leave ownership itself more clear.

Professors Alexander and Peñalver have provided a third response in their review of New Jersey case law on trespass, a jurisprudence that proponents of a more monolithic theory of ownership might criticize for its “ad hoc-ery.” As they demonstrate, predictability has developed relatively quickly and uncomplicatedly in this jurisprudence.¹⁸⁷ There is no reason to think that the same could not be expected of the interest-outcome model proposed here. The proposed model has no more criteria for evaluation than those encountered by courts in nuisance cases; nor are the criteria any more nebulous than the reasonableness standard and similar touchstones. (Indeed, they are probably far less so.) Moreover, there is no reason to think that such an approach would not be capable of ripening into legislation over time.¹⁸⁸

A second, and somewhat related, challenge to the model is that it would go too far in the direction of redistribution, particularly to the extent that remedies could be based more on prospective uses than on reliance interests.¹⁸⁹ Here again, the most effective response would be to clarify the extent to which future uses would be affirmed in remedial grants. The model is decidedly not arguing in favor of granting remedies on the basis of completely prospective uses. In such circumstances, the potential claim or counterclaim would be so abstract as to make a remedy virtually impossible to grant. Rather, the relevance of future uses is more in the crafting of the scope of remedy than in the decision about whether to grant one in the first place. The point of considering future uses is to garner the most benefit from use as a remedial tool, but not to incorporate prospective behavior as a basis for determining need. This is a critical basis for distinguishing this model from overtly redistributive schemes.

III. THE IMPULSE TO SHARE IN MODERN PRACTICE

The purpose of this Part is to demonstrate that, in core areas of property law, judges are drawn to sharing. For example, in nuisance cases, judges rely on balancing tests to acknowledge that both parties have rights.¹⁹⁰ In adverse possession cases and implied easements, judges

¹⁸⁷ GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 141–42, fig.7.1 (2012).

¹⁸⁸ *Id.* at 140.

¹⁸⁹ *Cf.* Singer, *supra* note 174, at 679, 692 (discussing instances in which property rights are redistributed from the owner to the non-owner thereby protecting the legitimate interests of the more vulnerable party in relying on access to certain resources and the relationships that such access makes possible).

¹⁹⁰ *See, e.g.,* Page Cnty. Appliance Ctr. v. Honeywell, 347 N.W.2d 171, 175 (Iowa 1984) (recognizing that in nuisance claims “[o]ne’s use of property should not unreasonably interfere with or disturb a neighbor’s comfortable and reasonable use and enjoyment of his or her estate” and that “[a] fair test of whether the operation of lawful trade or industry constitute a nuisance is the reasonableness

evaluate the uses made by parties, and on that basis, they recognize rights.¹⁹¹ Even in trespass cases, judges create exceptions to the absolute right to exclude.¹⁹² The core insight from this analysis is that judges often lean toward exactly what this Article claims as the core benefit of a Holmesian approach to dispute resolution.

However, because these same judges operate in a title-focused system, they tend not to act on their instinct toward sharing other than by recognizing relatively metaphysical “rights” to share. Were they to begin with the question of interests and outcomes, these judges could actualize their intuitions by granting parties the core benefit of property sharing. Instead, at the point of granting remedies, they default to a more formalistic affirmation of bundled ownership. In nuisance, that remedial turn to formalism takes the form of damages for plaintiffs (rather than property sharing) where the defendants’ uses are socially beneficial. In adverse possession, the remedy is a blunt injunction recognizing complete ownership in the adverse possessor. By allocating rights to use, remedies in cases recognizing implied easements are the most reflective of the sharing impulse. But as this Part shows, they still formalistically bundle such use rights into a form of limited ownership.

A. Nuisance (and Negative Easements)

In the late 1970s, Glenn Prah built a house that reflected the national energy consumption crisis by incorporating solar panels on the roof.¹⁹³ The panels collected enough energy to provide heat and hot water to Prah’s house.¹⁹⁴ Prah’s was one of the first houses in a subdivision, the zoning for which at the time did not appear to contemplate the shadowing and other effects that improvements on individual lots might have on the solar panel systems on other houses in the subdivision.¹⁹⁵ Some time later, Richard Maretti bought the lot next door to Prah’s lot and planned to build a house

of conducting it in the manner, at the place, and under the circumstances shown by the evidence”).

¹⁹¹ See, e.g., *Granite Props. Ltd. P’ship v. Manns*, 512 N.E.2d 1230, 1237 (Ill. 1987) (stating that in implied easements cases “courts find particular facts suggestive of intent on the part of the parties” and that “proof of the prior use is evidence that the parties probably intended an easement, on the presumption that the grantor and the grantee would have intended to continue an important or necessary use of the land known to them that was apparently continuous and permanent in its nature”).

¹⁹² See, e.g., *State v. Shack*, 277 A.2d 369, 371–72 (N.J. 1971) (providing an example of an exception to the absolute right to exclude, and explaining that “the ownership of real property does not include the right to bar access to governmental services available to migrant workers” before finding that “there was no trespass”). While this Part focuses largely on doctrines described by Professor Smith as falling within governance regimes, it makes the same observations about the law of trespass, which exclusion theorists hold up as a paradigmatic example of the value of exclusion theory in explaining the real world.

¹⁹³ *Prah v. Maretti*, 321 N.W.2d 182, 184 (Wis. 1982).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 198–99 (Callow, J., dissenting).

on it. When Prah learned of Maretti's plans, he informed Maretti that his proposed construction would cause a shadow to fall across Prah's solar panels, possibly compromising his heating system.¹⁹⁶ The solution, according to Prah, was for Maretti to move his house a few feet back from its proposed location.¹⁹⁷ Maretti refused to change his plans to respond to Prah's concerns, and he began construction.¹⁹⁸ Both parties' improvements complied with local zoning and building requirements.¹⁹⁹

Prah sued Maretti on three grounds,²⁰⁰ two of which are relevant to this discussion. Aside from a statutory claim, he claimed that Maretti's construction constituted a private nuisance and also that he had acquired a solar easement by prior appropriation over Maretti's property.²⁰¹ In the face of a zealous dissent arguing (with good reason) that the building of an ordinary single family home could not constitute a private nuisance,²⁰² the majority held that Prah had stated a claim for private nuisance under which relief could be granted.²⁰³ In so doing, the majority relied on a number of sources of law, none of which were binding on the court.²⁰⁴ These included the English common law doctrines recognizing express easements as well as negative prescriptive easements to receive sunlight (the so-called doctrine of "ancient lights"),²⁰⁵ spite fence laws prohibiting neighbors from blocking each other's light out of spite,²⁰⁶ and a Wisconsin case adopting the reasonable use rule with respect to surface water.²⁰⁷

Primarily, however, the court relied on three policy reasons that in large measure embody the prescriptive model advocated for in this Article. First, the court found that use of property is increasingly regulated for the benefit of the "general welfare."²⁰⁸ Second, the court recognized that Prah's use of sunlight as energy was part of a new social and economic trend that contributed to economic development and welfare.²⁰⁹ Finally, the court balanced such a use against the competing use of land for unrestricted development.²¹⁰

Although *Prah* does not represent the majority rule on the question of

¹⁹⁶ *Id.* at 184 (majority opinion).

¹⁹⁷ *Id.* at 185.

¹⁹⁸ *Id.* at 184.

¹⁹⁹ *Id.* at 184–85.

²⁰⁰ *Id.* at 186.

²⁰¹ *Id.*

²⁰² *Id.* at 196–97 (Callow, J., dissenting).

²⁰³ *Id.* at 191 (majority opinion).

²⁰⁴ *Id.* at 187–89.

²⁰⁵ *Id.* at 188.

²⁰⁶ *Id.* at 188–89.

²⁰⁷ *Id.* at 190 (citing *State v. Deetz*, 224 N.W.2d 407 (Wis. 1974)).

²⁰⁸ *Id.* at 189.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 189–90.

whether people can have rights to light and air beyond the boundaries of their own land,²¹¹ it is fairly typical of nuisance cases in one key respect. In *Prah*, as in so many nuisance cases, the court recognized, affirmed, and even produced shared rights.²¹² In this core area of property law, the instinct exists among decision makers to recognize more than one party's interests to the same parcel of land. Perhaps this is so because courts view these cases as involving two landowners with conflicting rights.²¹³ Perhaps also the pull toward sharing is easier in the overlapping space between torts and property, represented by the factors listed in the Restatement of Torts for consideration in balancing harm against utility of conduct claimed to be a nuisance.²¹⁴ By relying on a broadly inclusive balancing test, nuisance claims seem more adaptable to an interest-outcome approach than much of property law.

For example, by focusing on *Prah*'s limited interest in sharing Maretti's property, the court recognized *Prah*'s reliance on access to sunlight.²¹⁵ It explicitly contemplated the national context in which the use of alternative energy sources was becoming increasingly imperative.²¹⁶ In so doing, the court gave more opportunity, for longer-term considerations of planning and coordination.²¹⁷ By balancing these considerations, the

²¹¹ See SINGER, *supra* note 185, at 409 ("The vast majority of courts in the United States would hold that, in the absence of an agreement to the contrary, owners have absolute rights to develop their property without liability for any interference with their neighbor's interests in light and air.").

²¹² See, e.g., *Osborne v. Power*, 908 S.W.2d 340, 345 (Ark. 1995) (enforcing an injunction against homeowners enjoining them from placing massive Christmas light displays on their property); *Locklin v. Lafayette*, 867 P.2d 724, 756 (Cal. 1994) (affirming judgment for plaintiff property owners for damage to their creek side properties through storm water runoff, entering judgment against city, county, flood control district, and other public entities); *Westland Skating Ctr., Inc. v. Gus Machado Buick, Inc.*, 542 So. 2d 959, 964 (Fla. 1989) (recognizing that damage caused by interference with surface waters flowing from improved property can constitute a legal claim for which relief can be granted); *Rodrigue v. Copeland*, 475 So. 2d 1071, 1080 (La. 1985) (granting a neighbor's injunction that enjoined a homeowner from operating a display consisting of lights and music during the Christmas season); *Armstrong v. Francis Corp.*, 120 A.2d 4, 10 (N.J. 1956) (affirming a judgment requiring a contractor to complete drainage piping to prevent further water damage to a landowner's property); *Fancher v. Fagella*, 650 S.E.2d 519, 523 (Va. 2007) (holding that encroaching trees and plants may be regarded as a nuisance when they cause actual harm or pose an imminent danger of actual harm to adjoin property); see also RESTATEMENT (SECOND) OF TORTS § 826(a) (1979) (stating that "an intentional invasion of another's interest in the use and enjoyment of land is unreasonable if . . . the gravity of the harm outweighs the utility of the actors conduct" which recognizes the shared rights of the land owner as well the rights of a person invading that land).

²¹³ *San Diego Gas & Elec. Co. v. Superior Court*, 920 P.2d 669, 696 (Cal. 1996). We will, however, see this in doctrines resolving conflicts between claimants to a single parcel too.

²¹⁴ When considering the gravity of the harm, these factors include the social value of the use invaded and the suitability of such use to the character of the locality. *Prah*, 321 N.W.2d at 192 n.16.

²¹⁵ *Id.* at 191.

²¹⁶ *Id.* at 189.

²¹⁷ Indeed, all three of the policy reasons presented by the court, especially when taken together, reflect such an interest. See *id.* at 190 ("The law of private nuisance is better suited to resolve land owners' disputes about property development . . .").

court effectively balanced individual economic considerations, including the marketability of each party's property, with and against broader societal concerns. Moreover, the court's analysis was forward-looking, considering the harms that could result from a failure of Prah's solar energy system and the benefits that could accrue from his future use of that system.²¹⁸

Of course, this instinct in favor of sharing can only go so far in mainstream nuisance law. This is most easily demonstrated by considering the question of doctrinal plausibility: as the dissent points out, it is difficult to swallow the claim that the construction of a single-family house could be a nuisance.²¹⁹ This complication and the difficulty of providing adequate notice to those who may interfere with access to light are the two primary reasons why the majority of jurisdictions refuse to recognize rights to light and air.²²⁰

But although courts produce shared rights quite regularly in these cases, at the point of allocating remedies, courts disrupt the natural repercussions of these shared rights by formalistically affirming a more bundled notion of ownership. Ironically enough, while *rights* are relatively less hard-edged in nuisance law, resulting in more rhetorical and doctrinal recognition of the need for accommodation among "neighbors," courts effectively snap back to attention and formalistically affirm ownership as the ultimate right at the *remedial* stage. In nuisance cases, this particular remedial turn takes the form of a grant of damages where the "socially beneficial" nature of the defendant's ownership warrants protecting its bundled form.²²¹ The preference for damages in cases such as this exalts bundled ownership by limiting the extent to which parties can, practically speaking, share property. It may be the case that both parties have "rights" to a given property, but if a party receives damages in recognition of its rights, that party's ability to use, transfer, and access the property will be nonexistent. By contrast, an interest-outcome approach would make clear whether damages would be of any real value to the plaintiff.

The facts of the *Prah* case provide an archetypical template for such a move. Given the veneration of the single-family home in American law,²²²

²¹⁸ The same considerations ought to come into play in cases dealing with other doctrines. *See, e.g.,* *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 164–66 (Wis. 1997) (explaining that the inquiry into trespass ought to have considered the cost and danger of using the icy road that was available for transporting a mobile home).

²¹⁹ *Prah*, 321 N.W.2d at 196–197 (Callow, J., dissenting).

²²⁰ SINGER, *supra* note 185, at 409–11.

²²¹ *See* RESTATEMENT (SECOND) OF TORTS § 826(b) (1979) (acknowledging the possibility of damages as compensation for nuisance).

²²² *See* A. Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership Is Not Always a Good Thing*, 84 IND. L.J. 189, 189–90 (2009) (noting that "[h]ome ownership is part of the American dream because of the economic security it gives homeowners" and that being a homeowner carries "culturally significant status"); Rachel D. Godsil & David V. Simunovich, *Protecting Status:*

it would be reasonable to expect courts adopting *Prah*'s holding to find conduct like Maretti's to be socially beneficial. Such a conclusion would confound the multi-textured use analysis undertaken by the majority opinion in determining the question of appropriate use in the first place. Indeed, Calabresi and Melamed's central point is particularly apt in a case like *Prah*. The distributive effect of damages in place of injunctive relief would be quite significant. What use would money damages really be to Prah if Maretti could go on building, thereby effectively destroying the function and value of Prah's energy system? Perhaps even more importantly, how would such an outcome uphold the broader social concerns raised by the Court?

The challenge in cases such as *Prah* is to find a basis for balancing outcomes without being bound by some of the constraints of nuisance doctrine. For example, in a nuisance case, the question of what uses may occur on a particular parcel is initially answered by who owns it.²²³ It is not typical for a plaintiff claiming a nuisance to receive a remedy allowing the plaintiff access to the defendant's property for the purposes of monitoring the defendant's use or sharing in certain types of use. Rather, the contest is viewed as one between two landowners with conflicting interests about freedom versus security, in which each cannot access or use the other's property.²²⁴

B. *Adverse Possession, Trespass, and Implied Easements*

1. *Adverse Possession*

Contrast with nuisance the doctrine of adverse possession, first in its atypical application in a case where a formalist recognition of ownership runs amuck, and then in its more typical manifestation, where ownership still results in a formalistic divestment of one party's property interests in favor of bundling ownership in the other. Briefly stated, by focusing on property use, adverse possession doctrine provides a rich doctrinal mechanism to promote sharing. However, in current adverse possession doctrine, that potential is utterly inchoate because, at the remedial stage, courts do the opposite of creating opportunities to share and instead grant fully bundled ownership to either the true owner or the adverse possessor.²²⁵

First, the atypical case: In 1982, Elizabeth and Mark Whitcombe took

The Mortgage Crisis, Eminent Domain, and the Ethic of Homeownership, 77 FORDHAM L. REV. 949, 952–53 (2008) (noting that homeowners are “currently privileged within our society” and are “afforded both significant monetary benefits and social capital”).

²²³ RESTATEMENT (SECOND) OF TORTS §§ 821D, 822; 1 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 64.02[3][a] (2011).

²²⁴ SINGER, *supra* note 29, at 36.

²²⁵ SINGER, *supra* note 185, at 281.

up residence at 98 Ditmars Street, a single family house in the City Island area of the Bronx.²²⁶ At the time they moved in, the house was “empty and overgrown and [the Whitcombes] believed it to be abandoned.”²²⁷ The Whitcombes were artists at the time, and they had a child.²²⁸ By their own account, having just had difficulties with their landlord, they felt “desperation” in their need to find housing.²²⁹ Upon moving into the house, the Whitcombes cleaned, repaired, and added “improvements” to the exterior and the surrounding lot; acquired telephone and electric services in their name; and directed their mail to that address.²³⁰ They also set up an artists’ studio in the house and put a sign in the front yard advertising their art.²³¹ The Whitcombes lived in and maintained the house for almost twenty years.²³² In short, they made physical use of the property like any long-term homeowner.

In 1998, Crystal Waterview Corporation bought the property in a mortgage foreclosure action, and in 1999, it sold the property to Haim Joseph.²³³ Joseph filed an action for ejectment, and the Whitcombes counterclaimed that they had acquired ownership of the property by adverse possession.²³⁴ When asked why they had moved into a house they knew was not theirs, Mark Whitcombe answered that he had assumed the house was abandoned because it was in a floodplain and very difficult to “reclaim” and maintain.²³⁵

On appeal, the court granted the plaintiff’s motion for summary judgment and rejected the Whitcombes’ claim of adverse possession.²³⁶ The court held that, despite engaging in “open conduct consistent with ownership,”²³⁷ the Whitcombes did not enter the property under “claim of right,” but rather as mere “licensees.”²³⁸ In making use of the property, according to the court, there was nothing more that the Whitcombes ought to have done.²³⁹ The problem was with their expectation of ownership. As the court expressed a number of times, because they were mere

²²⁶ Joseph v. Whitcombe, 719 N.Y.S.2d 44, 45 (N.Y. App. Div. 2001).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* They did not, however, pay taxes on the property. *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 45–46.

²³⁶ *Id.* at 48.

²³⁷ *Id.* at 46.

²³⁸ *Id.* at 47.

²³⁹ *See id.* (“The present case, in which an urban lot, improved by a residential dwelling in a community occupied by a population that seems to be more settled than transient, and where people tend to know who owns what property, is unusual in that defendants managed to live, rent free, as long as they had in the subject dwelling.”).

“squatters,”²⁴⁰ they possessed no legitimate expectation of lawful “possession” when they entered the property, and their use of the property thus never “ripen[ed]” into a claim of right.²⁴¹

The *Joseph* case is exceptional in the law of adverse possession for making an issue out of the concept of “claim of right,” a requirement in adverse possession doctrine that is quite underdeveloped, if not even pro forma.²⁴² Subsequent commentary on the case suggests that the court invoked this rather empty concept for the purpose of dealing expansively with the growing concern over squatters in New York City.²⁴³ More importantly for the purposes of this Article, the case is also exceptional in adverse possession jurisprudence because it exalts a formalistic notion of ownership—while using a doctrine known for undermining at least some aspects of formalism—in favor of recognizing ownership on the basis of use and reliance. Contrary to the vast majority of adverse possession case law, which finds a claim of right on the basis of treatment of the property as an ordinary owner would,²⁴⁴ *Joseph* held that even when someone uses the property extensively over a long period of time and in a manner that is typically privileged as appropriate use, a more formal and subjective concept of ownership takes priority over such use.²⁴⁵

In this respect, *Joseph* is an exaggerated, almost unfair, example of the problem identified in this Article. To the extent that adverse possession is the best (if still imperfect) example of use as a remedial force, *Joseph* is a dramatic case for demonstrating how the bundled view of ownership can cause mischief. *Joseph* and indeed many adverse possession cases are excellent candidates for remedies involving sharing because conflicting use interests are often absent. As in *Joseph*, the true owner is often physically

²⁴⁰ *Id.* at 46–48. The court used the term “squatter” seven times in the opinion. *Id.*

²⁴¹ *Id.* at 47.

²⁴² See SINGER, *supra* note 185, at 299 (stating that the majority of states collapse the “claim of right” element into the adversity element, simply requiring that adverse possessors act toward the property “as an average owner would act” while a small number of states impose a test requiring that the adverse possessor intentionally dispossess the record owner).

²⁴³ See Robert E. Parella, *Real Property*, 51 SYRACUSE L. REV. 703, 720 (2001) (noting the anomalous nature of the *Joseph* court’s focus on squatters and opining that this may be due to a judicial hostility toward “wrongdoer[s],” which “may be reinforced when the property is urban rather than rural land, as the First Department explicitly acknowledged in *Joseph*”).

²⁴⁴ See, e.g., *Bearden v. Ellison*, 560 So. 2d 1042, 1044–45 (Ala. 1990) (“An adverse possessor need only use the land ‘in a manner consistent with its nature and character—by such acts as would ordinarily be performed by the true owners of such land in such condition.’” (quoting *Hand v. Stanard*, 392 So. 2d 1157, 1160 (Ala. 1980))); *Almond v. Anderegg*, 557 P.2d 220, 223 (Or. 1976) (“Under our decisions plaintiff must show that she occupied or used the land as would the ordinary owner of the same type of land, taking into account the uses for which the land was suitable.”); *Burkhardt v. Smith*, 115 N.W.2d 540, 544 (Wis. 1962) (“Actual occupancy means the ordinary use to which the land is capable and such as an owner would make of it.”).

²⁴⁵ See *Joseph*, 719 N.Y.S.2d at 47 (holding the defendants’ long-term use of the property did not ripen into a claim of right).

absent from the property²⁴⁶ and may well be interested instead in using it for purposes of investment or future transfer. Thus, cases like *Joseph* have the potential for allowing so-called squatters to improve abandoned properties and produce other benefits, both private and social, from their uses.²⁴⁷ But the remedies in such cases fail to recognize that potential.

Joseph aside, the more standard adverse possession doctrine is a convenient illustration of this point and more broadly of the same double-minded response to conflicting interests to property that is apparent in nuisance doctrine. In the more typical adverse possession cases, courts flirt with the possibility of sharing by investigating the uses made by the non-owning adverse possessor.²⁴⁸ These analyses serve the important purpose of demonstrating that use of property can have major distributive consequences. Moreover, given its long and successful history in American jurisprudence, adverse possession doctrine proves that our legal system can easily accommodate doctrines that allocate remedies on the basis of use. At the remedial phase, however, courts again devolve to ownership formalism, though the remedial affirmation of ownership takes a different form than it does in nuisance. Rather than award damages to the adverse possessor or—for that matter—to the true owner, courts reward use that rises to the level of adverse possession with a blunt injunction. The remedy is fully bundled ownership for the party who made the appropriate use of the property. Anything less than such a complete level of use is rewarded with no recognition of rights at all.

Van Valkenburgh v. Lutz is a fairly typical example. In that case, the dissenting opinion engaged in a more familiar adverse possession analysis by considering whether the totality of the Lutzes' actions—namely, the clearing of an unmaintained and overgrown lot, gardening, raising poultry, cutting timber, operating a “truck farm,” and keeping a very small dwelling on it—qualified as sufficient use to warrant ownership by adverse possession.²⁴⁹ Given the testimony by neighbors that the Lutzes were overspreading their property with “junk, rubbish and debris,”²⁵⁰ it is not surprising that the court rejected the Lutzes' claim of ownership by adverse possession.²⁵¹

As the dissent pointed out in *Van Valkenburgh*, the majority opinion drew a disturbingly narrow picture of “appropriate” use that favored

²⁴⁶ *Id.* at 45.

²⁴⁷ See Eduardo M. Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191, 211–12 (2010) (arguing that the rule against abandonment of real property embodied by the doctrine of adverse possession serves important reconstructive and marketability-enhancement functions).

²⁴⁸ See, e.g., *Van Valkenburgh v. Lutz*, 106 N.E.2d 28, 28–30 (N.Y. 1952) (analyzing the various ways the possessors used the land and if it sufficiently established adverse possession).

²⁴⁹ *Id.* at 31 (Fuld, J., dissenting).

²⁵⁰ *Id.* at 30 (majority opinion) (internal quotation marks omitted).

²⁵¹ *Id.*

aesthetics over subsistence, a move that is only partly surprising given the classic uses (farming and small business) that the Lutzes were making of the disputed property.²⁵² One has to wonder whether the all-or-nothing remedial scheme raises the stakes in cases such as this, especially where neighborhood opposition exists. Could *any* part of the Lutzes' use have been allowed by the court, especially if that more limited use would not have drawn the opposition of the neighbors or even the true owner? Such a question is completely irrelevant in adverse possession doctrine.

Even when adverse possession cases do protect use and reliance interests to a greater extent than *Van Valkenburgh* and *Joseph*, the remedial extremism in adverse possession doctrine produces several failures. First, because the ultimate question is whether to completely dispossess the true owners, rather than whether to allow sharing of property, most courts do not consider the relevance of the adverse possessor's use to neighborhood social and economic relations. In *Van Valkenburgh*, for example, it was immaterial for the Court to balance the neighbors' disgust over the unsightliness of the Lutzes' business against the contributions that the business was making to the neighborhood and local economy. The Lutzes did not really have the option within the adverse possession *prima facie* case to present evidence about whether some neighbors benefited from or appreciated their occupation of the property. The question was narrowly construed as one of "actual occupation" as demonstrated by how an ordinary person would make use of such a property.²⁵³ Thus, the neighbors' disgust was purportedly relevant only to show that an ordinary user would not keep junk and rubbish on her property.²⁵⁴

Second, despite the blight of having "wild,"²⁵⁵ "overgrown,"²⁵⁶ and apparently abandoned lots in the neighborhood in both of these cases, the particular role played by the adverse possessor in salvaging abandoned property was ignored, and understandably so given its irrelevance to the inquiry in adverse possession claims. This is a significant loss because so much of the value of property use relates to the information it can provide about an individual's position in a broader social phenomenon. In these cases, the phenomenon is that of property abandonment, or at least of owner absenteeism, but it is by no means the only example. Adverse possession and trespass cases provide a rich array of other examples, including dispossession of Native Americans' land,²⁵⁷ protection of privacy

²⁵² See *id.* at 33 (Fuld, J., dissenting) (asserting the occupants' failure to use the entire property should not prohibit a claim of adverse possession).

²⁵³ *Id.* at 30 (majority opinion).

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 31 (Fuld, J., dissenting).

²⁵⁶ *Id.*; *Joseph v. Whitcombe*, 719 N.Y.S.2d 44, 45 (N.Y. App. Div. 2001).

²⁵⁷ See, e.g., *Nome 2000 v. Fagerstrom*, 799 P.2d 304, 307 (Alaska 1990) (evaluating an ejectment claim on a parcel of land that was included in a native allotment application).

and free speech rights,²⁵⁸ and the aspiration of putting land to more productive use.²⁵⁹ But again, positioning the individual in a broader social context is irrelevant when the inquiry focuses on complete, rather than shared, occupation.

A third failure is the length of time that is required for such use to ripen into ownership. Typically, the time periods required in cases of prescription measure in terms of decades;²⁶⁰ indeed, they are often longer in cases of intentional dispossession.²⁶¹ Although the passage of time has served as a convincing theoretical justification for the radical transfer of ownership that adverse possession produces, it imposes significant costs. When the adverse possession is viewed as part of a social phenomenon, the length of time required for rights to ripen creates instability as parties wait to assert rights and to develop land in explicit coordination with neighbors, local government, and others. The *Joseph* case presents another cost of the lengthy time period: the possibility that a bona fide purchaser could accidentally acquire the property, thereby presenting a more sympathetic conflict for a court to have to resolve.²⁶² Of course, such lengthy time periods would not be necessary if sharing, rather than ripening, was the end result of adverse possession analyses.

In practical effect, adverse possession doctrine thus limits the range of outcomes that ought to be possible in these cases in a number of key respects. First, it precludes the possibility of shared or group rights, because ownership by groups is harder to define, manage, and protect.²⁶³ Second, it precludes consideration of proposed uses that have not yet been

²⁵⁸ See, e.g., *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 76–77 (1980) (evaluating a property owner's right to eject individuals exercising their free speech and petition rights); *State v. Shack*, 277 A.2d 369, 370–71 (N.J. 1971) (evaluating a property owner's trespass claim against attorneys seeking to speak with clients in private living quarters on property).

²⁵⁹ See Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2435 (2001) (asserting that adverse possession forces lazy owners to use their land in a productive manner).

²⁶⁰ See, e.g., SINGER, *supra* note 185, at 300 (summarizing the statutes of limitation in different states). They are, however, much shorter in some western states. RICHARD H. CHUSED, *CASES, MATERIALS AND PROBLEMS IN PROPERTY* 79 (2d ed. 1999).

²⁶¹ See SINGER, *supra* note 185, at 300 (comparing state statutes of limitation for good faith possession with those for bad faith possession).

²⁶² *Joseph v. Whitcombe*, 719 N.Y.S.2d 44, 45 (N.Y. App. Div. 2001).

²⁶³ Modern manifestations of this ancient doctrine are, however, far more comfortable with defining group rights. For example, it is much more possible today for the public to acquire a prescriptive easement in land. See, e.g., *Weidner v. Alaska Dep't of Transp. & Pub. Facilities*, 860 P.2d 1205, 1209 (Alaska 1993) (holding that a public way may be created by public use of private property for ten years); *Fears v. Y.J. Land Corp.*, 539 N.W.2d 306, 308 (N.D. 1995) (stating that public roads may be established by prescription under state law). In addition, environmental resources are often managed on the basis of group rights. See generally ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990) (discussing problems of collective action faced by individuals using common-pool environmental resources and analyzing various group-based solutions).

acted upon by either party.²⁶⁴ Finally, it limits the possibility of hybrid uses that take advantage of the sophistication in long-term land use planning that has developed in the last few decades.²⁶⁵

2. *Trespass*

A brief exploration of the flipside of adverse possession, namely the doctrine of trespass, reveals much the same pattern, although it is arguably more noteworthy here because exclusion theorists use trespass doctrine to demonstrate the value of exclusion theory. Consider *State v. Shack*,²⁶⁶ another iconic case. In that case, Shack and Tejas, a legal services lawyer and field worker for a poverty alleviation organization respectively, entered Tedesco's farm to find two migrant workers who both worked and lived on the farm.²⁶⁷ Tedesco confronted them and agreed to let Tejas meet with one worker in order to provide basic medical aid.²⁶⁸ However, upon learning that Shack wished to see a worker for the purpose of providing legal services, Tedesco refused to allow Shack to meet with the worker except in Tedesco's presence.²⁶⁹ When Shack rejected this condition, Tedesco brought a complaint for criminal trespass against both Shack and Tejas.²⁷⁰

The discussion of rights in *State v. Shack* reminds us that there are important exceptions to trespass rules that in practice allow people to enter and use property that they do not own.²⁷¹ But that is indeed the point: the exceptions and transfers apply to the absolutist definition of ownership, with the baseline for exception-making always being ownership by the plaintiff. For example, teachers of first-year property courses in law

²⁶⁴ Indeed, there is often a long period of prescription and/or a requirement of a reliance interest. See SINGER, *supra* note 185, at 307 (describing a moral basis of protecting reliance by an adverse possessor as a justification for adverse possession doctrine).

²⁶⁵ See, e.g., GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 9–10 (1999) (defending the values of decentralization); PATSY HEALEY, COLLABORATIVE PLANNING: SHAPING PLACES IN FRAGMENTED SOCIETIES 156 (2d ed. 2006) (highlighting the complex “contemporary reality of land and property markets”); Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 58 (2004) (advocating for the adoption of mixed-use environments to encourage the improvement of many urban communities).

²⁶⁶ 277 A.2d 369 (N.J. 1971).

²⁶⁷ *Id.* at 370.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 370–71.

²⁷¹ See, e.g., *People v. Roberts*, 303 P.2d 721, 723 (Cal. 1956) (holding that unauthorized entry was privileged when police officers heard moaning coming from inside and knew a sick man lived in the residence); *Rossi v. DelDuca*, 181 N.E.2d 591, 593 (Mass. 1962) (holding that trespasser was privileged to do so when the need to escape a dangerous dog required her to cross the property of another and carving out an exception to a statute providing immunity from liability for dog bites to property owner); *Ploof v. Putnam*, 71 A. 188, 189–90 (Vt. 1908) (holding that plaintiff's need to moor a boat to defendant's dock during a sudden storm deprived defendant of the right to exclude).

schools often use *Shack* to make a meal of the “public interest” exception to trespass.²⁷² The most common manifestations of the public interest in trespass cases include anti-discrimination imperatives,²⁷³ the rights of the public vis-à-vis private owners who have opened their property to the public,²⁷⁴ and notions of necessity.²⁷⁵ As much as they shock new law students, with their relatively more Blackstonian views of property rights, these exceptions have more rhetorical than practical value in the wide arc of trespass cases. At the metaphysical level, they claim that owners must share property, but at the practical level, they produce only limited sharing. In general, the opportunity to share is specifically and carefully defined, while the backdrop right of ownership encompasses a default right of use that is both broad and general. Thus, in the case of discrimination, only certain categories of people are protected; owners are at liberty to exclude arbitrarily anyone who does not fall within those categories.²⁷⁶ Similarly, in the case of access to businesses, the majority rule remains that only

²⁷² See, e.g., *Shack*, 277 A.2d at 374 (holding that government workers have a privilege to enter property so as to provide migrant workers with legal and medical services).

²⁷³ See, e.g., *Runyon v. McCrary*, 427 U.S. 160, 170–72 (1976) (holding that 42 U.S.C. § 1981 prohibits privately operated non-religious schools from excluding qualified children on the basis of race); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 171 (1970) (holding that application of a state-enforced custom of refusing service to whites in the company of African-Americans violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968) (holding that 42 U.S.C. § 1982 prohibits racial discrimination in the market for selling or leasing real property).

²⁷⁴ See, e.g., *State v. Tauvar*, 461 A.2d 1065, 1067 (Me. 1983) (holding that a church could not revoke its invitation to the general public to come to its meeting hall unless it had a justification); *In re S.M.S.*, 675 S.E.2d 44, 45–46 (N.C. Ct. App. 2009) (“When premises are open to the public, ‘the occupants of those premises have the implied consent of the owner/lessee/possessor to be on the premises, and that consent can be revoked only upon some showing the occupants have committed acts sufficient to render the implied consent void.’” (quoting *State v. Marcoplos*, 572 S.E.2d 820, 821–22 (N.C. Ct. App. 2002))); *Commonwealth v. Tate*, 432 A.2d 1382, 1389 (Pa. 1981) (holding that outdoor grounds on a private college campus were open to the public within the meaning of a trespass statute such that the defendants who were arrested for distributing leaflets on those grounds in violation of the statute were absolved of liability for trespass).

²⁷⁵ See, e.g., *United States v. Schoon*, 955 F.2d 1238, 1239–40 (9th Cir. 1991), *amended and superseded on other grounds*, 971 F.2d 193, 195 (9th Cir. 1991) (concluding that the necessity defense “justifies criminal acts taken to avert a greater harm, maximizing social welfare by allowing a crime to be committed where the social benefits of the crime outweigh the social costs of failing to commit the crime”); *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 221–22 (Minn. 1910) (holding the defendant not liable for trespass because it had a self-protection privilege to tie its ship to the plaintiff’s dock in order to avoid its ship being damaged badly by a tremendous storm); *Hager v. Tire Recyclers, Inc.*, 901 P.2d 948, 952 n.3 (Or. Ct. App. 1995), *adhered to as modified on other grounds on reconsideration*, 906 P.2d 842, 844 (Or. Ct. App. 1995) (noting that “[t]he privilege of public necessity is limited to action necessary to avert an impending public disaster”).

²⁷⁶ See, e.g., *Keck v. Graham Hotel Sys., Inc.*, 566 F.3d 634, 640 (6th Cir. 2009) (noting that “[a]n inference of discrimination arises where a plaintiff is deprived of services ‘while similarly situated persons outside the protected class were not’” (quoting *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 872 (6th Cir. 2001))).

innkeepers and common carriers have no right to arbitrarily exclude.²⁷⁷ It is certainly not the case that anyone who pays a predetermined (or determinable) amount may enter and use the plaintiff's property.

Thus, in *Shack*, the relevance of the migrant workers' labor on Tedesco's land to the economic and social structure of the surrounding area was not considered, perhaps partly because they were not claiming any rights by prescription. Nor was the broader social phenomenon of migrant worker exploitation a basis for allowing them to remain on and use Tedesco's property.²⁷⁸ The case was one of access to those workers, but even the broadest interpretation of the opinion would not read into it a continuing right to remain on the land. In short, because Tedesco's rights of ownership were incontestable, the migrant workers' use of the land served no doctrinal function. Their use of the land was extensive, productive, and vigorous. But, *in a case about trespass*, their status as workers earned them no opportunities vis-à-vis continued use of the land.²⁷⁹

Described differently, the remedies in these core areas of property law fail to take full advantage of the many possibilities that inhere in the equitable concept of injunctive relief. The practical result is that access to and use of property remain bundled within the unitary concept of ownership without opportunity for nuanced development. In *Shack*, as well as in *Joseph* and *Van Valkenburgh*, the law could not contemplate an outcome that directly protected shared use among the owner, the possessor(s), and non-owners. The courts implicitly recognized a limited right to share by holding that the workers had a right to receive visitors, but the right was abstractly defined, leaving open questions about what that right encompassed and its extensiveness. Had such opportunities existed, the results could have been far less severe and thus less radical than the results in each of these three cases. Instead, the absolute nature of ownership prevented the courts from contemplating less radical solutions, some of which could have resulted in fairer distribution and an even

²⁷⁷ See, e.g., *Doe v. Bridgeton Hosp. Ass'n, Inc.*, 366 A.2d 641, 646 (N.J. 1976) (analogizing hospitals to common carriers and holding that they can only exclude where there is a rational basis for doing so); see also Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1448-49 (1996) (arguing that the current law's majority limitation of public accommodation rules to inns and common-carriers is unjustifiable and should be extended to all businesses that hold themselves out as open to the public).

²⁷⁸ The Court discussed the exploitation of the workers at relatively great length, but not for that purpose. *State v. Shack*, 277 A.2d 369, 372-73 (N.J. 1971).

²⁷⁹ As Professor Singer discusses in his analysis of *Local 1330, United Steel Workers v. United States Steel Corp.*, there are clear bases in current law for granting such opportunities. Singer, *supra* note 174, at 614-18 (citing *Local 1330, United Steel Workers of Am. v. U.S. Steel Corp.*, 631 F.2d 1264, 1265 (6th Cir. 1980)). Moreover, it is also the case that they may have been able to raise wage and other labor claims if they had filed suit based on their employment status. My point here, however, is that such claims ought to have been relevant to this property lawsuit as well.

greater level of doctrinal stability.

3. *Implied Easements*

To a very profound extent, such remedies do exist in property law, and not just at the margins. They exist in the form of implied easements that crop up to remedy injustices in a range of circumstances, for example, where an adverse possessor merely “uses” property rather than “fully occupying” it;²⁸⁰ where a party relies on the right to continue using property as a result of permission once extended;²⁸¹ where a party has a stark necessity to continue using property;²⁸² or even where a less stark necessity exists, so long as the use was sufficiently open, obvious, and continuous.²⁸³

The 1906 case of *Stoner v. Zucker*²⁸⁴ is a classic example. In that case, the defendants, with the plaintiff’s permission, invested seven thousand dollars to build a ditch on the plaintiff’s land for the purpose of carrying water for irrigation from a nearby river to their own land.²⁸⁵ Despite the plaintiff’s revocation of that permission just one year later, the defendants “continuously entered upon plaintiff’s land, making repairs upon the ditch and restoring the same where it was broken and washed away.”²⁸⁶ Moreover, they “threaten[ed]” to continue to do so.²⁸⁷ The court applied the traditional doctrine of easement by estoppel, holding that where either money, labor, or both are expended in reliance upon a “mere parol license,” such:

[L]icense becomes irrevocable, [and] the licensee will have a right of entry upon the lands of the licensor for the purpose of maintaining his structures or, in general, his rights under his license, and the license will continue for so long a time as the nature of it calls for.²⁸⁸

Stoner and the other implied easements cases are perhaps the most unmistakable examples of courts creating shared interests in property. In a wide range of circumstances where parties claim rights to access and use of

²⁸⁰ See, e.g., *Cnty. Feed Store, Inc. v. Ne. Culvert Corp.*, 559 A.2d 1068, 1071 (Vt. 1989) (holding that where a claimant marshals enough evidence to prove “the general outlines consistent with the pattern of use” of a prescriptive easement throughout the relevant period, “it has met its burden on that issue”).

²⁸¹ See, e.g., *Stoner v. Zucker*, 83 P. 808, 809–10 (Cal. 1906) (easement by estoppel).

²⁸² See, e.g., *Othen v. Rosier*, 226 S.W.2d 622, 625 (Tex. 1950) (easement by necessity).

²⁸³ See, e.g., *Granite Props. Ltd. P’ship v. Manns*, 512 N.E.2d 1230, 1237 (Ill. 1987) (easements implied from prior use).

²⁸⁴ 83 P. 808.

²⁸⁵ *Id.* at 809.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 810.

“rights of way” over the land of others, including where permission was initially granted and revoked *and* where permission was never given, where the need was great, where the parties relied on access for their own economic gain, and where parties relied on informal mores or assumptions of neighborliness, courts have required landowners to share their property with others. These cases are so compelling in part because of the extent to which they seamlessly fill gaps between the hard edges of ownership rights. Moreover, they do so relatively unobtrusively, applying fact-specific tests that recognize the commonplace behavior of property owners and non-owners vis-à-vis each other, without much pomp about the importance of upholding rights.

These cases are highly successful in this respect because, in contrast to the nuisance, adverse possession, and trespass cases, the entitlements in implied easements cases much more closely complement the outcomes. Such remedies avoid the bundling effects of damages and blunt injunctions to keep off another’s land, instead granting limited rights of access and use to non-owners. The remedies, in other words, require the tangible sharing of land.

Yet, even in these cases, the potential for sharing is hampered by the formalistic capitulation to ownership norms. For reasons that have no apparent connection to the real needs of the parties, courts hold that implied easements are “owned” by those interested in access and use of rights of way.²⁸⁹ Moreover, these determinations of ownership are not merely symbolic. They produce a surprisingly bundled right of ownership to rights of way, which allows their owners to transfer them in connection with the sale of the dominant estates or to devise them.²⁹⁰ While it may be argued that such rules promote efficiency in much the same way that bundled ownership does in other contexts, it could also be argued that any additional incremental efficiency gain is irrelevant compared to the inefficiency created by implied easements in general. Efficiency, at least defined in terms of bright-line ownership, is not the point of these easements.²⁹¹

For purposes of this Article, the other obvious limitation of these easements is that they are generally limited to rights of way. One way to describe the core normative argument in this Article is to say that the

²⁸⁹ 4 POWELL ON REAL PROPERTY § 34.03 (2013) (Michael Allan Wolf ed., 2000) (stating that “an easement is a property right in the land of another,” ordinarily subject to the Statute of Frauds).

²⁹⁰ See generally *id.* at § 34.12 (discussing the extent of easements and stating that “[t]he resulting aggregation of privileges held by a dominant owner takes its basic framework from the kind of easement in question [t]he most significant factor concerning the extent of an easement is the manner in which the easement is created”).

²⁹¹ The *Restatement (Third)* supports my analysis. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.10 cmts. a–c (2000) (applying the changed conditions doctrine to easements and allowing for their modification rather than termination in the face of new circumstances).

remedial impulse underlying implied easements should be exercised well beyond disputes over rights of way. Part IV advances that argument.

C. Remedies Redux

The most striking means to demonstrate the ways in which these core doctrines eliminate basic remedies that ought to be available in property law is to transpose Calabresi and Melamed's four remedial rules into a context more removed from the case of nuisance, which was the doctrinal palette for Calabresi and Melamed's framework. In the nuisance context, the four rules break down as follows:²⁹²

TABLE 1
REMEDIES IN NUISANCE

Remedy	Result in Pollution Control Context
Injunction	Defendant must stop polluting
Damages	Defendant may pollute, but must pay damages
No Liability	Defendant may pollute
Purchased Injunction	Defendant must stop polluting so long as Plaintiff compensates Defendant for doing so

Now consider the four rules in the context of a trespass case. By focusing on the italicized language in the following table, it quickly becomes obvious that in the trespass context, two of the rules appear absurd. Specifically, it appears nonsensical to remedy a trespass case with damages in the absence of an injunction.

TABLE 2
REMEDIES IN TRESPASS

Remedy	Result in Trespass Context
Injunction	Defendant must stay off Plaintiff's property
Damages	<i>Defendant may enter Plaintiff's property, but must pay damages</i>
No Liability	Defendant may enter Plaintiff's property
Purchased Injunction	<i>Defendant must stay off Plaintiff's property so long as Plaintiff compensates Defendant for doing so</i>

The notion of ownership as an entitlement precludes the possibility that an owner claiming trespass would ever have to share use of the property with the defendant, *as a remedial matter*. The right in question automatically determines who may use the property and in what respects.

²⁹² Calabresi & Melamed, *supra* note 13, at 1115–19.

It would be too much of an imposition on the right of ownership to allow a defendant to enter a plaintiff's property so long as she or he paid damages for the opportunity to do so. Such an imposition would derogate too much from the absolutist, and even Blackstonian, nature of ownership.²⁹³ The remedy is an on-off switch either in favor of the plaintiff requiring the defendant to stay off, or in favor of the defendant allowing the defendant to enter.

IV. A MODEL FOR SHARING THE CATHEDRAL

The purpose of this Part is to provide a model for making good on the intuitions of the many judges who instinctively seek ways to allow parties to share access to and use of private resources. Using Holmes's outcome-first framework as the starting point, the model proposes refocusing decision makers' attention on property outcomes rather than on property ownership. The goal is to transform what is currently a more philosophical recognition of "rights to share" into pragmatic opportunities to share private property. More broadly, the purpose of the model is to stimulate the development of a much broader range of property outcomes than those produced by recognizing rights of bundled ownership. The heart of this Part is in Section IV.B, which develops the interest-outcome model for enhancing sharing and other outcomes in certain core areas of property law, including nuisance, adverse possession, trespass, and implied easements. By reanalyzing the cases discussed in Part III, first using a Holmesian approach in Section IV.A, and then in Section IV.C using the model developed here, this Part provides evidence of the interest-outcome model's efficaciousness.

A. *The Cathedral as Seen by Holmes: A New View of Prah*

The purpose of this Section is to demonstrate that Holmes's perspective on outcomes allows much more opportunity to develop outcomes that involve property sharing and other means of more fairly distributing property resources. By avoiding the question of who has a

²⁹³ See, e.g., Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593, 598 (2008) ("For quite some time, the right to exclude in the context of both tangible and intangible property has come to be associated with an entitlement to exclusionary (injunctive) relief."); Merrill, *supra* note 10, at 747 (presenting "historical evidence [which] suggests that the right to exclude . . . is more basic to the institution of property than are other incidents of property recognized in mature property systems"); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 361–62 (2001) (noting that Blackstone's essential conception of property was grounded as a right in rem); Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 605–07, 618–21 (1998) (noting that Blackstone's need to justify absolutist conceptions of the right to exclude via reference to utilitarian concerns continues to be felt in law and economics scholarship).

right or owes a duty, Holmes's basic prescription avoids the conflation of ownership with exclusion. The best illustration of Holmes's different perspective on an outcome-centered approach is to apply it. In contrast to the approaches taken by the *Prah* majority and minority, as well as by Calabresi and Melamed, Holmes would simply have skipped over the question of whether a "nuisance" was committed or an "easement" was acquired—whether someone had violated a duty or secured a right.²⁹⁴ To Holmes, these questions would be merely metaphysical, or as Holmes described it, "moral,"²⁹⁵ and it would be a distraction to squeeze the resolution of the dispute into the categories of rights imposed by nuisance and easement laws.²⁹⁶ Instead, by his own description, Holmes would have looked first at "the facts which make up the group in question,"²⁹⁷ an analysis that would have considered the parties' "physical relation" to a resource "and to the rest of the world" and their "intent."²⁹⁸ Holmes then would have considered "the consequences attached by the law to that group."²⁹⁹

Returning to Holmes's property discussion about possession and ownership in *The Common Law*, Holmes would have concluded that the "facts" making up "the group in question" would not look much different between owner and mere possessor, because both would bear largely the same "physical relation" to the property "and to the rest of the world."³⁰⁰ To equate owner with possessor in such a way would necessitate concentrating analytical attention first and foremost on the ways in which the parties used the property in dispute. Thus, the first question would likely have prompted Holmes to consider each party's needs concerning the property at issue and the ways in which those needs could be met by access to and use of that property.

In *Prah*, there was a high level of accord between the needs and uses that Prah and Maretti each intended for Maretti's lot.³⁰¹ If one sets aside the dissent's rhetoric that Maretti, as a property owner, should have had complete freedom to make whatever physical use of the lot he wished,³⁰² it appears that he could have built a perfectly serviceable single family home on the lot in such a manner as to give Prah continued use of the sunlight

²⁹⁴ See HOLMES, *supra* note 32, at 213–14 (distinguishing possession as a legal right from possession as a fact and divorcing the notion from morality).

²⁹⁵ Holmes, *supra* note 30, at 170–71.

²⁹⁶ See, e.g., *Prah v. Maretti*, 321 N.W.2d 182, 191–92 (Wis. 1982) (referring to the rights at issue both in terms of "nuisance" and "easements").

²⁹⁷ HOLMES, *supra* note 32, at 215.

²⁹⁸ *Id.* at 216.

²⁹⁹ *Id.* at 215.

³⁰⁰ *Id.* at 215–16.

³⁰¹ See *Prah*, 321 N.W.2d at 191 ("Private nuisance law . . . has the flexibility to protect both a landowner's right of access to sunlight and another landowner's right to develop land.").

³⁰² *Id.* at 193–94 (Callow, J., dissenting).

shining in from above his lot.³⁰³ It is a stretch to argue that by failing to do so, he committed a nuisance. But it is by no means a stretch to say, as a remedial matter, that each party deserved protection for his intended use.

On Prah's side, the inquiry would consider the fact that Prah used his own property next door for a single family home that contributed to energy conservation efforts during a time when energy use was of paramount national concern.³⁰⁴ Thus, Prah's position within the broader social context would be completely relevant to the needs he sought to meet. It is also important that Maretti intended a use that is highly respected and indeed venerated³⁰⁵ and further that he complied with local zoning and building laws intended to contribute to longer-term planning and development.³⁰⁶ But that importance can be overstated to the point of having unnatural influence. Holmes may well conclude that if Maretti's use could do all these things *and* not conflict with Prah's intended use, then a court should require Maretti to build in a non-conflicting manner regardless of whether doing so would constitute a nuisance. For the same reasons, a court would have a good basis for requiring such accommodations in uses even when unneighborly behavior was not in evidence (as it may have been on Maretti's part).³⁰⁷ In other words, sharing would be a much more obvious and natural outcome in the absence of a mandate to determine ownership.

So far, Holmes's conclusions would not have differed much from the majority's. And indeed, in *Prah*, in contrast to many nuisance cases, they may not have differed at the stage of determining remedies either.³⁰⁸ But it is important to note that in the typical nuisance case, it would be at the point of determining remedies that Holmes's approach would likely differ substantially from that of many courts because ownership would not inform Holmes's determination. In the typical case, an outcome involving shared use could easily have been derailed by a remedial decision to award damages to Prah rather than an injunction. For Holmes, by contrast, even if a property owner's use were socially beneficial, the fact of ownership would not prioritize this factor in determining remedies.³⁰⁹ As an adjudicatory matter, Holmes's orientation might require the parties to state

³⁰³ *Id.* at 185 (majority opinion). The court indicated that the exact location and feasibility of different construction plans on Maretti's lot were disputed, but it did not appear that his chosen location was the only alternative. *Id.*

³⁰⁴ *Id.* at 189; *see also* Sara C. Bronin, *Solar Rights*, 89 B.U. L. REV. 1217, 1218–19 (2009) (discussing the American legal debate over the importance of solar rights in the last quarter century).

³⁰⁵ *See* Godsil & Simunovich, *supra* note 222, at 951 (arguing that homeownership is of paramount importance).

³⁰⁶ *Prah*, 321 N.W.2d at 192.

³⁰⁷ *See id.* at 185 (noting that Maretti simply ignored Prah's request to locate his home away from the plot line dividing their properties).

³⁰⁸ *Id.* at 191–92.

³⁰⁹ *See* HOLMES, *supra* note 32, at 241–42 (noting that nature of ownership generally does not influence remedies).

public reasons why their behavior was reasonable as a precondition for certain outcomes.

This would open up a range of additional remedial options. Most obviously, by evaluating remedy before ownership, Holmes might have tailored the injunctive reach, thereby giving Prah incentive to provide an ongoing social benefit through his particular property use. For example, Holmes might have chosen to protect Prah's use only so long as he maintained the solar panels on his home. This is something courts are familiar with enforcing in the context of applying the law of easements,³¹⁰ and which the Restatement (Third) on Servitudes would push even further.³¹¹ Doing so as a remedial matter, however, would give the advantage of flexibility in managing uses over time, including changing uses prospectively in light of long-term planning efforts. The nuisance case of *Armstrong v. Francis Corp.*,³¹² is one of a number of examples representing the inchoate remedial potential in these cases. Before the nuisance suit was filed in that case, the parties had mapped out a quite detailed and context-specific remedy during settlement discussions, which the court ultimately imposed.³¹³

The possibilities for flexible injunctions are even more apparent in the pollution example used by Calabresi and Melamed. By removing the conceptual hurdle of ownership, Holmes may well have suggested an approach that could lead to more efficient results or to better distributive outcomes using Calabresi and Melamed's own metrics, than the authors argued could be accomplished by using liability rules such as the purchased injunction.³¹⁴ In the original analysis, a wealthy neighborhood full of homeowners could pay a coal company to install filters that would reduce the pollution emanating from the factory.³¹⁵ The authors argued that such a remedy would be better as a distributive matter, because the hypothetical factory employed many lower-income workers.³¹⁶ A framework following Holmes would add to the remedial options by more directly managing the uses made of the coal factory. Such a remedy could operate by requiring that the workers be given more opportunity to choose uses that would protect their own health. Alternatively, it could be a directive from the court that the subsidy provided by the rich neighboring landowners be used by the factory owners to transition to a cleaner form of energy than a coal plant. The first alternative would protect the workers'

³¹⁰ In particular, abandonment is a basis for terminating an easement. 4 POWELL ON REAL PROPERTY § 34.18 (Michael Allan Wolf ed. 2013).

³¹¹ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.10 (2000).

³¹² 120 A.2d 4 (N.J. 1956).

³¹³ *Id.* at 7.

³¹⁴ Calabresi & Melamed, *supra* note 13, at 1120–21.

³¹⁵ *Id.* at 1121.

³¹⁶ *Id.*

health as well as their economic welfare. The second would internalize harmful externalities by imposing intergenerational protections for non-parties to the case. With their interest in all-or-nothing “property rules,” however, Calabresi and Melamed did not focus on this traditional tool of injunctive relief developed by the courts of equity.³¹⁷

The point is that injunctions that avoid all-or-nothing results are far more likely to require all the parties in the dispute to share in both the benefit and in the responsibility associated with property possession, use, and ownership. Such remedies can be more closely linked to the parties’ needs vis-à-vis the property. Even the short list of additional outcomes provided here ought to hint at the possibilities for distributional justice. Given the costs invested in applying the muddy nuisance test, it is only fitting that better tailored outcomes are among the benefits that accrue.

B. *Holmes Translated: The Interest-Outcome Model Developed*

At this stage, it is important to acknowledge that Holmes’s two-part prescription is really only a beginning point. It is an important one, but it can nevertheless be difficult to imagine what exactly could replace an inquiry into ownership in a framework where questions of title are deferred. In fact, however, much of the work accomplished by recent scholarship in searching for a more expansive concept of property entitlements is particularly effective in answering Holmes’s first question. Specifically, notions of social obligation,³¹⁸ capabilities,³¹⁹ personhood,³²⁰ democratic community,³²¹ positive rights,³²² and interconnectedness³²³ all can and should be relevant considerations in determining what facts make up the group in question. By importing these concepts into Holmes’s basic

³¹⁷ *Id.* at 1118–19.

³¹⁸ See Alexander, *supra* note 11, at 752 (arguing that a “robust version of the social-obligation norm explains many of the most controversial legal practices in which owners have been required to sacrifice either some use of their entitlement or the entitlement itself”).

³¹⁹ See NUSSBAUM, *supra* note 111, at 70–86 (arguing that human capabilities should help determine political ideals and formulate the rights guaranteed to every citizen).

³²⁰ See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 958 (1982) (considering “how the personhood perspective can help decide specific disputes between rival claimants”).

³²¹ See Singer, *supra* note 111, at 1059 (noting that “the allocation and exercise of property rights imposes externalities on others and on social life in general” and “property owners have obligations to use their rights in ways that are compatible with the basic norms of our society”).

³²² THOMAS MEYER, *THE THEORY OF SOCIAL DEMOCRACY* 57–59 (2007).

³²³ See UNDERKUFFLER, *supra* note 29, at 163 (“Whether the case involves a physical interdependence or other interconnectedness (of an ecological, biological, economic, or other nature) between the interests that the dueling claims assert . . . the foundational assumption that a right deserves presumptive power because of the uniquely worthy nature of the values that it asserts fails across a wide range of property cases.”); Singer, *supra* note 111, at 1047 (“[P]roperty law concerns not just relations between persons and things but *relations among persons* with respect to valued resources.”).

prescription, this Section adapts it for use in resolving modern property disputes. Moreover, as the following description of the model should make clear, the major adjustment for property theory and doctrine is conceptual rather than substantive. Courts regularly do the basic things this model proposes, but not for the purpose this model proposes. By adjusting both the purpose for which courts should evaluate property use and the timing of such evaluation, this model opens a path to expanding the range of outcomes in property law and, in particular, to recapturing the inchoate power of sharing.

1. “[W]hat are the facts which make up the group in question[?]”³²⁴

Recall that this was the only question Holmes proposed asking prior to determining the appropriate outcome in a given dispute. In applying this question to his property example, Holmes observed that in property law, a basic consideration in defining a group that ought to receive a remedy is that group’s particular “physical relation to [an] object and to the rest of the world.”³²⁵ Holmes’s interest in the physicality of the relationship suggests that he shared a common understanding with adjudicators involved in the early writ system that the physical use of the property mattered a great deal in determining outcomes in disputes over the property.

There are three respects in which the interest-outcome approach proposed here differ quite meaningfully from Holmes’s basic prescription. In adapting Holmes’s first question to modern property disputes, this model seeks both to modernize and to make more specific the common insight shared by the early writ system and Holmes. Understanding use is still central to the task of understanding how parties relate to property, but in this modern world use is no longer the only basis for understanding that relationship. Nor in contemporary relationships is use defined so much by physicality. Finally, while it may be argued that Holmes’s “bad man” would be concerned only with the economic consequences of his actions, the model proposed here would require a consideration of social context well beyond quantifiable economic consequences. Although the model proposed here concurs fully with Holmes’s basic point that formal title ought to be much less important normatively in determining access to and use of property than it currently is, the model does not go so far as to agree with Holmes that it makes no difference whether the party seeking a remedy is a “child” or a “powerful ruffian” so long as she demonstrates the requisite interest in possession.³²⁶ In the interest-outcome approach proposed here, that difference would be completely relevant, because the

³²⁴ HOLMES, *supra* note 32, at 215.

³²⁵ *Id.* at 216.

³²⁶ *Id.* at 235.

first step in determining the facts making up the group in question would be to apply the core lesson from negotiation theory by determining what legitimate interests to the property are demonstrated by each of the parties.³²⁷

While there are disputes in which one party enters upon or uses an owner's property without any legitimate basis for doing so, as the literature on "governance property" discusses, there are many more situations where the non-owner has a legitimate interest that may justify some level of access or use. Where there is no legitimate interest conflicting with the owner's claim of formal title, Professor Smith's exclusion paradigm, relying on designations of formal title and broad rights of exclusion,³²⁸ is appropriate both on fairness and efficiency grounds. But where parties other than the formal owner have legitimate interests to the property, the exclusion paradigm is not of much help, once again on both fairness and efficiency grounds.

How then does a legal decision maker go about the task of determining whether a party has a legitimate interest in the property, in the vein of negotiation theory, as distinguished from the position of being a titleholder or not? One way to do so is to determine whether the party has formal title. Such an inquiry creates a clear rule, but, for all the reasons discussed in this Article, if the decision maker stops there she ignores many interests that could and should be protected in a sharing world. A second way is to evaluate "entitlements," more broadly defined as Professor Singer has done, to include specific legal rights even if those rights do not rise to the level of full, formal rights of ownership.³²⁹ Such an evaluation makes sense as a starting point for the interest-outcome approach, both because entitlements are so often associated with and representative of legitimate interests and because they recognize that different people and relationships can coexist with respect to different rights in the property bundle.³³⁰ However, the cases with which this Article is most concerned are the cases in which uses overlap, and, as shown in Part III, such cases often involve interests that can be described as "legitimate" where the party has no "entitlement," even when the latter term is broadly defined.

Thus, this Article proposes that in such cases, the question of whether a party has a legitimate interest should also be investigated by answering three questions about the use such party is making or proposes to make of the property. The first question that ought to be asked about use is what

³²⁷ See MNOOKIN ET AL., *supra* note 165, at 35–37 (advising that parties in a negotiation should identify each other's interests).

³²⁸ See *supra* notes 113–25 and accompanying text.

³²⁹ SINGER, *supra* note 29, at 14.

³³⁰ *Id.* at 94.

exactly the various parties to the dispute—both owners and non-owners—are doing with the property. The second question would ask how the rest of the world perceives such uses. The third question would seek information about the parties' intent vis-à-vis the property, both their intended uses and their intent concerning the myriad other interests that define property ownership. These three questions would be asked for the quite specific purpose of investigating possible outcomes, including how the disputed property could be shared. A moment's comparison with the evaluation of use in adverse possession ought to make clear how this model is different. In such a context, use is evaluated, but neither using the same terms, nor with such specificity, nor—most importantly—for the same end. Adverse possession ends in exclusion. This model evaluates use for the purpose of sharing.

Consider each question in turn. As concerns the first question, it should suffice to say that the inquiry would not perform the relatively crude task of sifting and protecting appropriate uses, as in the case of adverse possession. Rather, it would classify uses as a first step in determining the appropriate remedy for any given class of use. Most prominently, it would evaluate uses for signs of compatibility which could lead to sharing along one or more dimensions or at least to injunctions that would not exclude one or more parties completely as a means of protecting the “full” property rights of another.

The second question would consider such uses as perceived by the “rest of the world.” Thus, the model considers these uses in the broader social context surrounding the parties, taking into consideration the needs of the community concerning property of the type at issue,³³¹ the trends in development of such property,³³² and the ways in which such property has or has not supported local and regional economic development.³³³ Additionally, the model considers the needs of each party to access and use the property, including the capabilities that could be thereby enhanced.³³⁴ As a related matter, the model considers each party's moral connection to

³³¹ There are many examples of this outward-looking perspective in adjudicating property disputes. One particularly effective one, because of the balance drawn between breadth and specificity, is a recent model proposed to address cultural property disputes. See Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022, 1028–29 (2009) (arguing that “legal claims to indigenous cultural property” need to take into consideration the rights of non-owners).

³³² See, e.g., FRUG, *supra* note 265, at 9–12 (arguing that city services should be transformed into vehicles for community building); Garnett, *supra* note 265, at 4 (discussing the “relationship between property regulation and order-restoration efforts”); Peter Pollock, *A Comment on Making Sustainable Land-Use Planning Work*, 80 U. COLO. L. REV. 999, 1001 (2009) (discussing “barriers to effective implementation of local land-use planning tools for sustainable development”).

³³³ This type of inquiry advocates, and owes a debt to, the social obligation approach proposed by Gregory Alexander as well as the democracy-enhancing approach proposed by Joseph Singer. Alexander, *supra* note 11, at 748–52; Singer, *supra* note 111, at 1057–61.

³³⁴ NUSSBAUM, *supra* note 111, at 70–74.

the property. Such an inquiry could encompass the personhood (and peoplehood) perspectives advocated by Professor Radin and others.³³⁵ But it would also be more basic, considering, for example, whether favoring one party would promote speculation,³³⁶ absentee ownership, abandonment or dis-use, loss of freedom and subsistence, spite, or un-neighborly behavior.

Much of this inquiry would also elucidate relevant facts about the third question of intent, which Holmes suggests is also relevant in a property dispute.³³⁷ The point of such an inquiry would be first to determine the extent to which the parties' intents (and needs) were compatible, without the gratuitous insertion of ownership predetermining the answer. In *Joseph*, for example, it seems entirely conceivable that such an inquiry would find a continuing interest on the Whitcombes' part in maintaining the property as a family home and passing it on to their children, while the bona fide purchaser may well have been satisfied with a monetary remedy.³³⁸ Even in *Shack*, it seems quite possible that granting the workers a more permanent right to use the property could have provided a meaningful protection for their subsistence while not intruding overmuch on Tedesco's ownership rights.³³⁹ To the contrary, it could have provided Tedesco a very stable source of income. Where the decision maker did find the parties' intent to be incompatible, an inquiry into intent could provide valuable information about appropriate remedies. In such a circumstance, the model proposed here would not shy away from making basic judgments about the broader impacts of use. Rather, the model would urge a strong correlation between the parties' intent and the social implications of the uses made of the property.

³³⁵ Radin, *supra* note 320; *see also* Carpenter et al., *supra* note 331, at 1028–29 (arguing that “legal claims to indigenous cultural property” need to take into consideration the rights of non-owners); David L. Rosendorf, Comment, *Homelessness and the Uses of Theory: An Analysis of Economic and Personality Theories of Property in the Context of Voting Rights and Squatting Rights*, 45 U. MIAMI L. REV. 701, 709 (1990) (“The basic premise of the personality approach is that the close interrelation between certain forms of property and personhood justify, to some extent, the creation of property rights.”).

³³⁶ I acknowledge the possibility that speculation can produce beneficial land development, but here I refer to a subcategory that produces the opposite effects. *See* C.E. Elias, Jr. & James Gillies, *Some Observations on the Role of Speculators and Speculation in Land Development*, 12 UCLA L. REV. 789, 793–94 (1965) (noting that when a speculator lacks information, fluctuations in land prices will increase, average prices over time may increase, “orderly city growth will be hindered, and urban sprawl will be promoted”).

³³⁷ HOLMES, *supra* note 32, at 216.

³³⁸ *See Joseph v. Whitcombe*, 719 N.Y.S.2d 44, 45–48 (N.Y. App. Div. 2001) (holding that a family that openly occupied a bungalow for an extended time period but failed to establish an initial claim of right did not acquire the property through adverse possession).

³³⁹ *See State v. Shack*, 277 A.2d 369, 375 (N.J. 1971) (holding that a field worker and an attorney who entered private property to aid migrant farm workers employed and housed there were not trespassing).

Additionally, an inquiry into intent would perform the important remedial function of ascertaining and assessing proposed future uses by the parties in a dispute. In this respect, the model would move beyond doctrines such as adverse possession, which do important work in protecting the reliance interest. However, such doctrines only indirectly attempt to privilege more beneficial uses of property.³⁴⁰ Their ability to perform any real level of long term, large scale planning is seriously impaired by their backward-looking orientation.

Before moving to the model's second stage of analysis, it is worth pausing over the question of why an inquiry into use is so helpful here. The answer to this question is that it is not really any more helpful to consider use than the other interests associated with property. The point rather is to consider something more than exclusion. By concentrating on property use, this model seeks to disrupt the connection between ownership and exclusion. By rendering use relevant, indeed coequal with exclusion, this model argues that the fact of ownership should not automatically dictate the outcome of exclusion. Other interests could substitute for use in accomplishing this purpose. Indeed, this model concentrates on use in part because of its flexibility in incorporating aspects of these other interests.

It is appropriate to acknowledge here that this first step in the interest-outcome approach requires a normative judgment about the legitimacy of a party's interest to the disputed property and further that such an inquiry may often require evaluation of formal entitlements, more broadly defined. However, title and entitlements would not be the sole focus of the inquiry. Moreover, such an inquiry would intentionally be a relatively brief and quite inclusive inquiry precisely to allow a greater consideration of interests for the purpose of fashioning remedies in the second step in this approach.

Finally, it is important to note the vivid contrast between the inquiry proposed here and the individualized model of inquiry imposed by the exclusion model. In the interest-outcome approach, the position of the individual vis-à-vis a similarly situated group grounds the question of what remedy is due. Is the individual a member of a group experiencing similar challenges in use of property? If so, how does that affect the type and scope of use that the individual seeks? These are the key questions in the model proposed here. By contrast, they are often largely irrelevant when a court begins by considering who owns the disputed property.

This is one of a number of respects in which starting with ownership gets in the way. Obviously, the inquiry proposed in this model could be performed either in the context of determining rights of ownership or as a

³⁴⁰ Stake, *supra* note 259, at 2435–36.

second order question in the manner proposed by Calabresi and Melamed. Indeed, some of the substance that gives meaning to the interest-outcome model has been developed as a means of expanding the ownership or entitlement question in order to make it more useful to more people.³⁴¹ Doing so, however, dilutes the effect of the inquiry by prematurely cutting off certain remedial options and, more indirectly, by rendering parts of the inquiry less relevant. In these respects, the model proposed here offers an application of negotiation theory to property law as a means of giving recent critiques of the ownership model more potency. Moreover, given the reality that in the particular doctrinal areas addressed by this Article courts routinely engage in muddy, fact-based investigations of use, this model would maximize the benefits flowing from the costs of more extensive investigations.

2. “[W]hat are the consequences attached by the law to that group[?]”³⁴²

The second and ultimate question for Holmes was to determine the appropriate outcome or “consequence” in a given dispute, though it is the penultimate stage of inquiry in the model proposed here. The imperative at this stage of the inquiry would be to translate the information about legitimate interests and use obtained in the first stage of the analysis into a range of viable outcomes (or, in the terminology of negotiation theory, “trades”).³⁴³ Such an inquiry would potentially—indeed hopefully—produce a broader range of nuanced and specific outcomes. In the case of *State v. Shack*, for instance, the particular outcome may well depend on the extent to which the migrant workers who worked on Tedesco’s farm contributed to Tedesco’s income, the local economy, and their families in other countries. These facts would define the compatibility of legitimate interests between the workers and Tedesco.

A second imperative under this model would be to match injunctive relief to the legitimate interests of each of the parties. Indeed, the greatest contribution of this model could well be to tie such interests, including the extent, type, scope, and quality of uses, directly to injunctive relief—thereby allowing the natural consequences to flow from the instincts judges express in their search for more a fair distribution. The object here would be, quite explicitly, to take advantage of the breadth of property injunctions, thereby recognizing both the uniqueness of property and the

³⁴¹ Singer, *supra* note 111, at 1022–23; *see also* Alexander, *supra* note 11, at 749 (“Property rights and their correlative obligations are cognizable as social goods, worthy of vindication by the state, only insofar as they are consistent with community and human flourishing more generally.”).

³⁴² HOLMES, *supra* note 32, at 215.

³⁴³ *See* MNOOKIN ET AL., *supra* note 165, at 35–37 (advising that parties in a negotiation should “identify each other’s interests, resources, and capabilities” in order to create value).

unique positions of each of the parties vis-à-vis the property at issue.

It should be plain by now that this model proposes that use is not just an analytical tool in the search for richer property outcomes, but also a primary *form* of remedy. There are two aspects of use as a remedy in this model that warrant special attention. The first is that this model encourages legal decision makers to resolve disputes by promoting sharing. The rental of residential property in a jurisdiction such as New Jersey provides a good example of how to accomplish sharing in contexts well beyond rights of way. In that state, the rights of tenants to remain on the property are so highly protected that the law substantially limits the landlord from deciding whether to discontinue renting her property.³⁴⁴ As a consequence, although an owner can initially decide whether or not to rent property, once that decision has been made in favor of rental, it requires sharing by the landlord as owner of an investment property with the tenant as occupier of a home.³⁴⁵

This model advocates for legal protections of the types afforded to tenants in New Jersey to be provided in a much wider array of disputes, that is, in doctrinal areas well beyond the area of landlord-tenant law. One basic example is the adoption of hybrid models that close the gap between home ownership and rental of the types proposed by Professor Lee Anne Fennell and others.³⁴⁶ In the employment context, this could result in hybrids that allow workers greater rights to use a property for their livelihoods, while the rights of shareholders are limited to the opportunity to receive income rather than decisions about whether and when to close down a property's use for a particular business purpose.³⁴⁷ It is important to note in these two contexts the difference between the models proposed by others that focus on hybrid forms of ownership as contrasted with the model proposed here. The point would not be to transfer or even really transform ownership, but rather to expand opportunities to access and use. Moreover, the simultaneity of uses is possible in more settings than those involving investors on the one hand and those making physical use of the

³⁴⁴ James E. Tonrey, Jr., Comment, *Protecting Tenants from Foreclosing Mortgagees: New Jersey's Anti-Eviction Act in the Post-Guttenberg Era*, 23 SETON HALL L. REV. 1006, 1022–23 (1993); Donna Rolando, *N.J. Renters Mostly Safe from Foreclosure*, THE RECORD (Bergen Cnty., N.J.), May 11, 2008, at R02; see Creola Johnson, *Renters Evicted En Masse: Collateral Damage Arising from the Subprime Foreclosure Crisis*, 62 FLA. L. REV. 975, 991–94 (2010) (evaluating New Jersey's tenant protections as a model for other jurisdictions).

³⁴⁵ Johnson, *supra* note 344, at 991–94.

³⁴⁶ Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047, 1129–32 (2008); see also Dickerson, *supra* note 222, at 190 (arguing that “existing homeowner subsidies should be replaced with targeted subsidies that encourage people to make rational and socially beneficial housing choices that are not based on any idealized notion of the importance of achieving the status of homeowner”).

³⁴⁷ Professor Singer discusses similar possibilities in considering the reliance interest. See Singer, *supra* note 174, at 739 (arguing that “judges should change certain common law rules . . . that allow businesses to ignore the workers' reliance interests”).

property on the other. Even in the case of an owner with a strong moral connection to a particular parcel of land, it is quite likely that such an owner would not require the use of her property down to the “center of the earth,”³⁴⁸ and that a court could find ways in which to accommodate other uses beyond the limitations imposed by traditional implied easements.³⁴⁹

The second noteworthy aspect of use as a remedial option would be that such use would be detached from the trappings of ownership. By contrast with easements, for example, uses bestowed as remedies could be non-exclusive and non-transferable, yet also quite permanent.³⁵⁰ Such uses could change over time, or in response to the changing behaviors of the parties involved. Or they could change in response to changes in local land use and development. They could be shared between owners, non-owners, and groups. The point is that the concept of ownership would not cabin them into a known package of rights and expectations.

By turning use behaviors and expectations into remedies, this Article seeks to extract the greatest efficiency as well as distributive benefit from the costs already sunk into evaluating uses for the purpose of determining who has experienced what types of harms. In effect, the model expands upon a basic device employed in regulation of commons such as fishing grounds, where uses are regulated by amount per individual over time.³⁵¹ By exploring the compatibility of different uses to different (though at times complementary) resources, rather than the same use to a single resource (namely a commons), this Article expands the utility of the device well beyond its original setting.

3. *Whither Ownership? Deferring Without Denying*

At some level, entitlements and duties are inevitably intertwined with remedies. At some point in the analysis, an outcome-centered approach must include considerations of whether a particular remedy imposes unfairly or disproportionately on any given entity, especially if such an entity has not contributed substantially to the claimed harms. Indeed, such an approach would likely falter more over the problem of evaluating who owes the remedy rather than the question of who has a right to it. The problem of duty is really a more difficult one than the problem of entitlements.

The model proposed here does not claim that legal decision makers

³⁴⁸ Blackstone appears to have been an early proponent of the assumption that ownership goes this far. 2 WILLIAM BLACKSTONE, COMMENTARIES *18.

³⁴⁹ Indeed, the new *Restatement* on Servitudes appears to go exactly in that direction. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.8(3) (2000).

³⁵⁰ In some respects, then, they could be seen as licenses. The point would be that the court would involve itself in shaping the remedy rather than in defining the right of ownership on the one hand and the license on the other.

³⁵¹ Smith, *supra* note 123, at 453–56.

should dispense entirely with questions of duty, ownership, and entitlement. In this respect, this Article parts company with Holmes's rather casual dismissal of the concept of duty.³⁵² This also is a basis for distinguishing the central argument here from the prescriptive notion of usufructory rights in determining claims over water and other environmental resources.³⁵³ The argument is not that rights of use ought to trump rights of ownership, nor that ownership is irrelevant. The model proposed here does not seek simply to achieve relatively permanent rights of use.

Rather, under the interest-outcome model, formal entitlements would first enter the inquiry as a first step in determining legitimate interests. Then, under the model, neither formal title nor formal entitlements (more broadly defined) would enter into the inquiry until after some of the basic choices about remedy have been made. Entitlements (including formal title) ought to inform decisions about remedial source, administration, and sometimes even form, rather than about the availability of a remedy in the first instance. Calabresi and Melamed demonstrated the benefits of prioritizing remedy over entitlement quite effectively when they argued that a neighborhood of rich homeowners ought still to be entitled to a remedy as a result of pollution from a factory using cheap coal but employing many low-income workers.³⁵⁴ The question was not whether the homeowners lost all hope of a remedy when faced with compelling and countervailing distributional considerations. Instead, they argued, both the distributional and efficiency considerations should inform the shape and source of the remedy in such a case.³⁵⁵

The question then is when and how in the interest-outcome model to return to the inquiry about ownership and formal entitlements. This is an important question indeed, because a careful answer can accomplish much in balancing the benefits gained from physical access to and use of property with those gained from more abstract means of investment in property that accompany the "right" of ownership, including the gains to be made from its rental, collateralization, or sale. Without achieving such a balance, this model would justifiably be criticized for eliminating the marketability of title, which is surely one of the most powerful benefits of ownership.

³⁵² Holmes, *supra* note 30, at 174–75.

³⁵³ See Lynton K. Caldwell, *Rights of Ownership or Rights of Use?: The Need for a New Conceptual Basis for Land Use Policy*, 15 WM. & MARY L. REV. 759, 766 (1974) (explaining "the principle of stewardship, under which ownership or possession of land is viewed as a trust, with attendant obligations to future generations as well as to the present"); Eric T. Freyfogle, *Water Justice*, 1986 U. ILL. L. REV. 481, 508 (arguing that water usage rights should be allocated by a government permit system).

³⁵⁴ Calabresi & Melamed, *supra* note 13, at 1121.

³⁵⁵ *Id.*

The answer proposed by this model is that the expansive inquiry into use promoted here would expose each party's moral connection to the property in dispute, and that this moral connection could and should be the basis for determining how ownership and other formal entitlements ought to shape the remedy. Here again, the model builds on the recognition in recent scholarship that the "moral" nature of human interaction with property is both important as a legal matter and currently under-recognized.³⁵⁶

The two contributions that this Article makes to this scholarship are first to draw attention to the ways in which property use can expose such moral connections and make them relevant to the remedial inquiry. Such an inquiry ought to be detailed enough to provide basic and replicable information about the parties' moral relationship to the property at issue. Upon exposing this relationship, the decision maker can then determine the extent to which ownership and other formal entitlements represent and protect it. To the extent that the connection is weak, this model would accord such formal rights less priority in shaping the remedy in a given dispute. By justifying adverse possession on exactly these grounds, Holmes again is the originator of this feature of the model.³⁵⁷ Secondly, property use can be a basis for building upon Professor Radin's basic argument that "personal" property deserves (and often receives) greater protection than "fungible" property.³⁵⁸ Thus, in the case of personal property, the owner would have more complete rights of use, while an owner of fungible property may well have to share use rights with non-owners or may lose aspects of her property's use to others.

In relying on the moral connection as a means of determining the relevance of ownership to remedial outcomes, this model emphasizes a core feature of traditional property doctrines that has become undervalued in contemporary property law with its veneration of the property owner's

³⁵⁶ See PENNER, *supra* note 10, at 2–3 (describing a legal system of property rights acting as a moral system as well); Carpenter et al., *supra* note 331, at 1125 (arguing indigenous people have inherent moral rights in cultural property); Nestor M. Davidson, *Property's Morale*, 110 MICH. L. REV. 437, 476–77 (2011) (discussing "moral intuition" as a source of property rights); Peñalver, *supra* note 163, at 859–60 (demonstrating moral bases for ownership beyond wealth maximization); Radin, *supra* note 320, at 978, 983 n.91 (applying Hegel's "community morality" concept to personhood rights in property and describing the manifestation of property rights through moral consensus); Ernest J. Weinrib, *Poverty and Property in Kant's System of Rights*, 78 NOTRE DAME L. REV. 795, 806 (2003) (defining property-right boundaries through a "concept of right"); Rosendorf, *supra* note 335, at 709–11, 731–32 (discussing Radin's "personhood" approach as a moral basis for property rights in the homeless).

³⁵⁷ *Tioga Coal Co. v. Supermarkets Gen. Corp.*, 546 A.2d 1, 5 (Pa. 1988) (quoting a Holmes letter stating that an adverse possessor "shapes his roots to his surroundings, and when the roots have grown to a certain size, cannot be displaced without cutting at his life").

³⁵⁸ Radin, *supra* note 320, at 987.

ability to transfer property.³⁵⁹ By tying the parties' moral connection to property to their future opportunities to use it, the model reminds us that equitable remedies in property law have long existed to allow owners to take advantage of the uniqueness of their land.³⁶⁰ Moreover, this Article argues that legal decision makers can more fully recognize land's uniqueness by adding options and nuance to the spectrum of remedies than they can simply by protecting ownership with a blunt Blackstonian hammer. Relatedly, the inquiry into moral connections can invoke the additional question, often relevant in considerations of equity, about the extent of "fault" attributable to either party.

Finally, note that the interest-outcome approach leaves space for the definition of entitlements after outcome is defined. This, then, is the third way in which entitlements remain relevant to this model. Rather than looking for owners and assigning outcomes on that basis, this model proposes that judges look for outcomes and then assign entitlements to match those outcomes.

C. *The Model Applied to Adverse Possession, Trespass, and Implied Easements*

The purpose of applying the interest-outcome model to the cases discussed in Part III is to demonstrate that these relatively minor adjustments in the substantive analysis can produce a profoundly richer and broader array of potential outcomes in property disputes, many of which involve property sharing. To the extent there is a barrier to adopting this model, it is not a problem of pragmatism.

1. *Adverse Possession*

Returning first to the *Joseph* case, the court began, as in any adverse possession case, with the question of whether the parties claiming adverse possession had satisfied the elements necessary to wrest ownership from the so-called "true owner."³⁶¹ These elements required that the Whitcombes' possession be adverse, actual, open and notorious, hostile, exclusive, continuous, and asserted under a claim of right.³⁶² In assessing

³⁵⁹ Rashmi Dyal-Chand, *Useless Property*, 32 CARDOZO L. REV. 1369, 1378 (2011).

³⁶⁰ See Nancy Perkins Spyke, *What's Land Got to Do with It?: Rhetoric and Indeterminacy in Land's Favored Legal Status*, 52 BUFF. L. REV. 387, 420–22 (2004) (surveying the long history of heightened legal regard for property in land predicated on its uniqueness and its importance to personal and cultural identity); Will Hendrick, Comment, *Pay or Play?: On Specific Performance and Sports Franchise Leases*, 87 N.C. L. REV. 504, 512–13 (2009) (arguing that specific enforcement of contracts for sale of land by courts is justified because of the unique geophysical identity of each parcel, the subjective value attached to non-investment residential, as opposed to commercial, property, and also possibly the connection in American legal thought between real property and personhood).

³⁶¹ *Joseph v. Whitcombe*, 719 N.Y.S.2d 44, 46 (N.Y. App. Div. 2001).

³⁶² *Id.*

especially the elements of adverse, actual, exclusive, and continuous possession, the court would have to evaluate particular aspects of the use made by the Whitcombes; but of course, it would have done so to determine whether to transfer ownership to them.

By contrast, this model would evaluate legitimate interests as a basis for determining what outcome, if any, was appropriate for the Whitcombes, as well as for the bona fide purchaser who had bought the property from the purchaser at a mortgage foreclosure sale.³⁶³ It would do so by applying the three-part test developed in Section IV.B. First, the model would require an assessment of the legitimate interests of each of the parties. Given the basic disutility of formal title as a basis for determining legitimate interests in a case like this, the first real question would be whether either party had a formal entitlement (broadly defined) to the property.³⁶⁴ In most jurisdictions, even if not in New York, it would be reasonable to expect a court to conclude that the Whitcombes' extensive use, combined with the effective abandonment by the owner who preceded the bona fide purchaser, might create a formal right of continued use. But, without expanding the inquiry into interests beyond formal entitlements, it would be difficult to examine what interests Joseph, the bona fide purchaser, might have had to the property. In a case like *Joseph v. Whitcombe*, this is where the very expensive inquiry into legitimate interests could add value that we might not find in a model focusing on rights.

Again, in determining what legitimate interests exist beyond formal rights, this model asks three questions about use. The first question would ask about the use made by each of the parties. On the Whitcombes' part, that use consisted of reclaiming the property from flooding, rehabilitating it so that it was no longer "overgrown," fixing and maintaining both the interior and exterior, and, in short, treating it for twenty years as an ordinary homeowner would.³⁶⁵ As a result, the objective evidence strongly indicated that the Whitcombes had developed a deep moral connection both to the property at issue and to the neighborhood in which it was located.³⁶⁶ On the other hand, Joseph's use of the property was prospective,³⁶⁷ and the court did not pursue the facts that would satisfy this model's requirements for purposes of comparing uses. Perhaps Joseph planned to use the property as a residential home as well, and indeed

³⁶³ *Id.* at 45.

³⁶⁴ SINGER, *supra* note 29, at 91–94.

³⁶⁵ *Joseph*, 719 N.Y.S.2d at 45–46.

³⁶⁶ *See id.* at 45 (describing the neighborhood's general acceptance of the Whitcombes' occupation).

³⁶⁷ The court did not describe Joseph's intended uses of the property because they were irrelevant to the question of whether the Whitcombes had acquired the property by adverse possession. *Id.* at 46.

perhaps his subsistence needs were greater than the Whitcombes' needs. Or perhaps he intended to use the property for conservation purposes, or for purposes of redevelopment or sale. In any of these cases, the point of this inquiry would not be to rank the uses in order of preference, but rather to consider whether and how the uses could be protected.

In this first step, a further inquiry would involve considering the impact of each party's use on the "rest of the world."³⁶⁸ Thus, in contrast to an adverse possession analysis, it would be central to the inquiry in the interest-outcome model that the Whitcombes had occupied and improved property that was abandoned and overgrown, that they had integrated the property back into the neighborhood, and that they had advanced their own livelihoods as well as provided a welcome product to the local community.³⁶⁹ The model would go even further in developing the facts in this line of inquiry. Specifically, did the Whitcombes' activities contribute to or detract from conservation efforts in the neighborhood? What were the trends in housing development in the neighborhood? To what extent was homelessness a problem in that place and at that time, and what was the overall effect of "squatting" in the area? From an economic perspective, what would be the value in leaving the property idle, and how would such value compare to the value of immediate use by a needy family? The model would, of course, ask these same types of questions regarding Joseph's intended uses of the property, and the answers may well produce a conflict if those intentions were quite similar to the Whitcombes'.³⁷⁰ The final consideration at this first stage would be to examine the parties' intent concerning future use of the property. Note again the irrelevance of this question in determining ownership by adverse possession.³⁷¹ But under this model, the answer could open up the possibility of sharing that could largely satisfy the needs of all the parties, while also contributing to longer-range planning within the neighborhood structure.

The second step under the interest-outcome model would be to determine the appropriate remedies for the parties. Again, one of the claimed virtues of this model is that it would likely lead to fewer all-or-nothing outcomes. Given the involvement of a business in the purchase of the disputed property in *Joseph*,³⁷² for example, there is a hint of a possibility that the true owner would have been satisfied with a remedy

³⁶⁸ HOLMES, *supra* note 32, at 216.

³⁶⁹ *Joseph*, 719 N.Y.S.2d at 45–46.

³⁷⁰ Note here the different balance established by this model: it would respect the Whitcombes' efforts in reclaiming abandoned property, but it would also consider Joseph's plans in that regard.

³⁷¹ A minority of jurisdictions still require subjective intent, but most do not. SINGER, *supra* note 185, at 299.

³⁷² *Joseph*, 719 N.Y.S.2d at 45.

that protected his investment in the property, but not necessarily the right to live in it. If the court found this to be true, one remedial means of acknowledging it would be by the use of a relatively traditional liability rule awarding damages to Joseph, while allowing the Whitcombes to keep the property.³⁷³

By contrast, since the Whitcombes had apparently never had the expectation of complete ownership,³⁷⁴ the court may well have been able to protect their primary interest in the property by giving them a long-term opportunity to live in the property but not to transfer it by sale, will, or other means. This could be accomplished by giving Joseph the limited right to dispose of it by sale after the Whitcombes had completed a long-term tenancy in the property. Or it could be accomplished by a traditional future interest in Joseph rather than a fee simple interest in the Whitcombes. Alternatively, the court could have granted Joseph part of the net profit from sale when (if ever) the Whitcombes disposed of the property. Or, instead, it might have granted Joseph an option to purchase the property if the Whitcombes ever put it up for sale.

The point is that the range of outcomes is much broader than current adverse possession doctrine allows and it is by no means apparent that efficiency or other gains justify those remedial limitations. Moreover, the examples demonstrate the much greater opportunity for sharing by dividing the interests in the bundle, by dividing them over time, or—more familiarly—by awarding damages to Joseph, in short, by dividing both the rights and the responsibilities. Of course if Joseph had the intention of living in the property himself, simultaneous use-based remedies would have been much harder to achieve. But one goal of this model is to avoid such examples of true use conflicts by giving parties like the Whitcombes the opportunity to claim a remedy before the advent of a bona fide purchaser with similar intentions.

The third step would be to consider the relevance of ownership. In this case, the Whitcombes, who were not the “true owners” of the property, demonstrated as deep a moral connection to it as is imaginable.³⁷⁵ Here too, the moral connection acted as a challenge to the monolithic fact of ownership. Adverse possession law, both as applied by the *Joseph* court and even more generally, evaluates the moral connection through the

³⁷³ While such a result might be surprising in the context of an adverse possession claim, it is common in a quite similar context, namely that of the mistaken improver. See Kelvin H. Dickinson, *Mistaken Improvers of Real Estate*, 64 N.C. L. REV. 37, 74–75 (1985) (noting that to provide relief in claims of mistaken improver, courts must evaluate both parties’ equities then fashion a flexible, imaginative remedy).

³⁷⁴ *Id.* at 47.

³⁷⁵ For example, their connection to the property clearly satisfies Professor Radin’s notion of “personal” property. Radin, *supra* note 320, at 960–61.

“claim of right” element,³⁷⁶ as well as through the typically more objective requirement of adverse and hostile behavior toward the true owner.³⁷⁷ By contrast, the interest-outcome model would use a completely objective test of use as a means of determining the connection. Thus, under the model, the Whitcombes would have a very strong claim of a moral connection, which, unless the court concluded that they were also the owners by means of adverse possession,³⁷⁸ would limit the influence of ownership in shaping the form and source of remedy. In this part of the test, Joseph’s status as a bona fide purchaser would not help him a great deal.³⁷⁹ But by considering entitlement last, the court could more likely arrange for Joseph and the Whitcombes to each get something. Sharing would be a more viable possibility.

An analysis of the *Van Valkenburgh* facts would proceed along quite similar lines under the interest-outcome model, though it should also be clear that the balance could be different both because the Lutzes’ “truck farm” seemed to be less well received as a social and economic contribution to the neighborhood,³⁸⁰ and also because the “true owner” appeared to be completely absent and its intentions concerning future use of the property may not have been possible to uncover.³⁸¹ Given the court’s more standard treatment of use as something to be encouraged by an award of ownership so long as such use is appropriate, it is helpful to use *Van Valkenburgh* to highlight the difference between adverse possession doctrine and the model proposed here. In *Van Valkenburgh*, the Lutzes lost all access to the property that they had reclaimed from abandoned status for their own subsistence and shelter.³⁸² In the model proposed here, it is possible that questions about their contributions to the community as well as the conflicting interests of the true owner might have resulted in less complete use opportunities for the Lutzes than the Whitcombes may have received. Nonetheless, this model would likely conclude that the Lutzes should get something. This softening of the harsh effects of ownership is a critical feature of the model, and indeed one of its main virtues. It retrieves sharing from the shadows and promotes a

³⁷⁶ *Halpern v. Lacy Inv. Corp.*, 379 S.E.2d 519, 521 (Ga. 1989); *Carpenter v. Ruperto*, 315 N.W.2d 782, 785–86 (Iowa 1982); *Petsch v. Widger*, 335 N.W.2d 254, 259–60 (Neb. 1983); *Ellis v. Jansing*, 620 S.W.2d 569, 572 (Tex. 1981); *Grappo v. Blanks*, 400 S.E.2d 168, 171 (Va. 1991).

³⁷⁷ See Richard Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 339 (1983) (pointing out the majority shift away from the subjective Maine rule and toward the objective Connecticut rule).

³⁷⁸ Note that this model would not remove a standard adverse possession analysis in the context of determining ownership after determining whose use warranted some sort of remedy.

³⁷⁹ It would be helpful in other parts of the test, specifically in establishing his expectations concerning use.

³⁸⁰ *Van Valkenburgh v. Lutz*, 106 N.E.2d 28, 31 (N.Y. 1952) (Fuld, J., dissenting).

³⁸¹ *Id.* at 30–33.

³⁸² *Id.* at 30 (majority opinion).

broader middle ground between all and nothing.

2. *Trespass*

Next, consider the facts of *Shack* under the interest-outcome approach. Because Shack and Tejeras's claims were based on the implicit right of the migrant workers to remain on the property,³⁸³ this model would argue that such an implicit right ought really to be analyzed as a remedial response to a claim of exclusive ownership. In other words, in either typical or less typical trespass cases, property law should be more conceptually open to claims of sharing by non-owners. Trespass ought not to be a presumptive bar to such claims. The question ought to be what the distributional effect of any given remedy is on both the owner and non-owners, on both the party bringing a claim and the parties defending against it. To promote such a concept, this analysis will treat the migrant workers as having made such a claim.

Beginning again with an analysis of the formal entitlements of each party, Professor Singer's model would go a long way toward capturing the reality of relationships among the parties and the property in this case. Using his model, a court could well conclude that the workers had formal rights both as tenants and as employees. Thus, at the first stage of analysis, the interest-outcome model may not add much more by virtue of its three additional questions about use. In short, both the interest-outcome model and an entitlement-centered model would capture the facts that the migrant workers used the property both for farming, a means of livelihood, and for shelter.³⁸⁴ It is true that both of these uses were temporary, given the expectation that the workers would return to more permanent homes outside the country during the colder months.³⁸⁵ Yet their use of the land and their physical and psychological needs for shelter and support from it were presumably deep and extensive.³⁸⁶ By the same token, as the farmer who owned the land and from it earned his livelihood, Tedesco had a connection to the property that was also deep and abiding.³⁸⁷ Indeed, the interest-outcome model would urge a court to take Tedesco's moral connection into consideration in determining the relevance of ownership in shaping the remedy. In these respects, both sets of parties had strong and quite complementary intentions, as well as moral and physical connections to the property.

The complementarity of the relationship was also likely what the "rest

³⁸³ *State v. Shack*, 277 A.2d 369, 374 (N.J. 1971) (noting that the centrality of Shack and Tejeras's interest is especially evident in the argument grounded in landlord-tenant law).

³⁸⁴ *Id.* at 370.

³⁸⁵ *Id.* at 372.

³⁸⁶ The opinion assumes as much in its discussion of the policy reasons to reject the trespass argument. *Id.* at 372-73.

³⁸⁷ *Id.* at 370.

of the world” perceived. Tedesco and the migrant workers acted as an economic unit, contributing substantially to the local and regional economy.³⁸⁸ The problem, of course, was that the monolithic right of ownership protected Tedesco’s needs vis-à-vis the property, but not those of the workers. Even *Shack*’s broad holding did not change the basic fact of impermanence in the connection between the workers and the property. In this critical respect, the decision could not contribute a great deal to enhancing the workers’ “capabilities,” as defined by Professor Nussbaum.³⁸⁹ In this respect also, the position of the individual workers within a larger group that badly needed protections was a critical piece of the story—as the court recognized but could only partially defend.³⁹⁰

We have repeatedly seen courts recognize these types of interests and yet fail to protect them.³⁹¹ As this Article has hypothesized, one reason courts refuse to protect such strongly articulated interests is their continuing discomfort with creating “rights” that conflict with those of the formal owner. In a case such as *Shack*, the interest-outcome approach provides a tool for courts to create such protections while leaving ownership rights in place. As was suggested in the previous Part, a very effective remedy in this case could have been to make more permanent the reciprocal relationship between the farmer and workers *while still leaving Tedesco’s ownership rights intact*.³⁹² Such a remedy could have accomplished the enhancements to the workers’ civil and political rights (and freedoms) that were effectuated by the decision in *Shack*.³⁹³ But it could also have protected the economic needs of the workers by giving them a direct and continuing right to use the land.

Moreover, by focusing on outcomes to protect all legitimate interests, the interest-outcome model could have recognized Tedesco’s rights using a range of outcomes that ought to assuage the unease that some readers may feel about the effect of this model on employment relationships. By combining use-based remedies with more traditional liability rules, for example, courts could quite effectively and creatively protect owners who use their property in part to employ others. In the *Shack* case, the court could impose a liability rule in the form of a set fee that workers would

³⁸⁸ See *id.* at 372 (describing the enormous economic impact provided by the migrant workers’ labor, as well as the large numbers of workers involved).

³⁸⁹ NUSSBAUM, *supra* note 111, at 80; see also Alexander, *supra* note 123, at 1855–56 (suggesting that the right to exclude gives property owners almost total control over their assets).

³⁹⁰ *Shack*, 277 A.2d at 372–73.

³⁹¹ See *Local 1330, United Steel Workers of Am. v. U.S. Steel Corp.*, 631 F.2d 1264, 1265 (6th Cir. 1980) (describing tragic consequences to families, cities, and regions if a steel mill ceased operations); *Shack*, 277 A.2d at 372 (describing migrants as “rootless and isolated” and in need of assistance on multiple fronts, but failing to grant an ownership interest in land worked).

³⁹² See *supra* text accompanying note 339.

³⁹³ *Shack*, 277 A.2d at 374–75.

have to pay for the opportunity to farm property on a more permanent basis. Such a rule would protect the workers' ability to use the property while at the same time recognizing the "cost" to the owner of not having the freedom to exclude workers at will.

3. *Implied Easements*

Finally, the model proposed here ought to diversify outcomes for the better even in implied easements cases. In *Stoner v. Zucker*, for example, where the court held that the defendants were "owners" of an implied easement,³⁹⁴ the court quite possibly could have promoted a more efficient and fairer outcome by requiring both parties to share the use of the right of way as well as the cost of maintaining it. Such an outcome may well have balanced out distributive imbalances that easements by estoppel doctrine currently cannot accomplish. Alternatively, or in addition, the court could have limited the plaintiff's ownership of the right of way based on a range of circumstances that could accomplish a more nuanced investigation of legitimate interests than current doctrine allows. Again, the costs of investigating use are already invested in these cases. Given that reality, the granting of bundled ownership of rights of way, in which the owner owns the right to exclude others, to transfer, and so on, seems particularly contrived. Instead, it makes eminent sense for outcomes in these cases to reflect, to the greatest extent possible, a more nuanced picture of efficiency, fairness, and distributional considerations.

V. CONCLUSION

Although this Article has claimed a number of benefits for the interest-outcome model proposed here, ranging from ease of administration due to the objective nature of the inquiry to better connections with social and cultural context, the key benefits claimed are the greater potential for property sharing and for more diverse and better outcomes in core doctrinal areas. It is well, then, to end by elaborating the claimed benefits of property sharing. In large part, such benefits are pragmatic in nature. In a world where resources are increasingly scarce, legal decision makers have no choice but to consider the larger-scale effects of property laws. Core doctrines in property law wrestle with this reality by creating exceptions, balancing tests, and implied rights. Although they muddy the boundaries of property rights, these doctrinal moves acknowledge that property laws cannot ignore the real-world effects of resource allocation on those with few resources.

Theories focused on minimizing information costs are ineffective in performing this task. Such theories work to reduce the costs invested in

³⁹⁴ *Stoner v. Zucker*, 83 P. 808, 809 (Cal. 1906).

allowing current owners to exploit resources by allowing those owners to determine the best uses for the resources. But often such theories do not acknowledge the externalities resulting from the broad injunctions to “keep out” that are required in order to minimize transaction costs. In addition, such theories typically do not account for distributional injustices, focusing as they do on reducing costs for current owners.³⁹⁵

Not surprisingly, given its orientation toward the impulses of the many judges who observe the real-world effects of the externalities associated with broad property rules, this model is an answer to the criticisms of theories focusing on information costs. It is precisely the question of equitable outcomes and fairer distributions that this model addresses as a primary matter, demonstrating that in core doctrinal areas such a focus is both possible and desirable. Importantly also, given the impulse toward balancing tests and more nuanced considerations of use and access in these areas, the model may well be equally as cost-effective a mode of dispute resolution as that embodied in the ownership model that currently predominates in these doctrines.³⁹⁶ In these respects, the interest-outcome approach presented here uses an ancient mechanism to respond to a compelling contemporary problem.

³⁹⁵ See *supra* text accompanying notes 109–11.

³⁹⁶ See *supra* Part III.