

***Nationbuilding 101: Reductionism in Property, Liberty,  
and Corporate Governance***

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**Abstract:**

Nationbuilders in less developed countries need to understand how Western legal systems with "property" at their center have materially accounted for Western prosperity and liberty, but legal definitions of property are so abstruse that explication of this vital concept is made difficult. **This paper finds an historical definitional essence to property in the right to exclude and maintains that liberty and property both share this essential meaning.** The problems of corporate governance are then placed in the context of the exclusionary concept of property/liberty.

...In Roman civil law property related only to tangible things, 48 but in common law, perhaps dating to the recognition of the lease right in English feudal land practices, property also applied to things intangible. 49 It is also true that in common and civil law new tangible and intangible things came to be protected by property. For instance Mozart and Beethoven had no property in the copying of their music 50 whereas today 2 Live Crew and the estate of Roy Orbison do have a property in theirs. 51 If property is *whatever* things that are owned, and the things that are owned are subject to change and do change, then the concept is a shifting one from which nationbuilders can take little guidance. On the other hand, if the emphasis of property is not on things (or resources), but on ownership, then the essential meaning of property relates to a right rather than to things, and if the right can be elucidated, nationbuilders can grasp the asserted basis for William Davidson Institute Working Paper 528

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why some nations have a pronounced lead over others in resource production. **The difficulty is that much legal analysis of property/ownership regards it as a bunch of "stick-like rights" rather than as a single right. 52 Whatever the analytical virtues of the rights-splitting approach to common law legal scholarship, it is misleading to those seeking what in Western property law provides the greatest incentive to resource production. The essence of property over time has not been that it is a bunch of sticklike, mostly positive rights but that it is a single right: the right to**

**exclude. 53 Property is the legal right enforced by the state that permits the owner of a resource to prevent others from interfering with it. 54**

If an owner of a resource (one who has a property in it) can legally exclude others from it, the owner can possess it, control it, consume it, destroy it, or exchange it. <sup>55</sup> **The single negative right of exclusion unifies the disparate positive rights of property, which can now be thought of ways of using a resource, i.e., one can use it for personal possession, use it for consumption, use it in exchange for other resources, or use it as a gift. The single negative right of exclusion captures the right to exercise all of the positive uses of a resource, 56 and if the state limits or prohibits some particular use of a resource, it does not mean that no property exists in that resource — or that a new or different *kind* of property exists — for the property is not the resource but the right.** For example, if the state prohibits patients who buy prescription drugs from reselling or transferring them, it does not mean that these owners have no property in the drugs. The right of exclusion still applies to keep others from interfering with the owners' consumption or destruction of the drugs; the state has simply removed the right as it would allow the owners to exclude the state itself from interfering with the sale or other William Davidson Institute Working Paper 528

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transfer of prescription products. Likewise, in an important sense one has property in one's body in the right to exclude others from interfering with it, which ownership allows the positive sale of replaceable body parts like blood or hair but not of irreplaceable body organs like kidneys and corneas. However, the exclusive owner does control whether or not to pass ownership of a kidney or cornea by gift. The point is not to advocate the selling of body organs but to explain the nature of property as the right of exclusion, which right does *not change in meaning* (only in *application*) when society forbids or limits a certain type of resource development, e.g., marketplace trade in kidneys and corneas. <sup>57</sup>

**The sociologist Emile Durkheim sought a cross-cultural criterion for the definition of property and concluded that it was the right of exclusion: “[P]roperty is the right of a given individual to exclude other individuals and collective entities from the usage of a given thing.” <sup>58</sup> Authorities from the U.S. Supreme Court <sup>59</sup> to William Blackstone, <sup>60</sup> Oliver Wendell Holmes, Jr., <sup>61</sup> and Thomas Hobbes <sup>62</sup> have asserted that the essence of property is the right of exclusion.** Even if property also connotes things that are owned or a bundle of separable positive rights, its essential meaning understood through Western history is that an owner can exclude others from interfering with owned resources. <sup>63</sup> As Professor Merrill maintains: “Give someone the right to exclude others from valued resources . . . and you give them property. Deny someone the exclusion right and they do not have property.” <sup>64</sup> **Thus, when**

**commentators observe that “property” provides maximum incentive for resource development, they may be taken as referring to the legal right to exclude others from interfering with one’s resources, which right was protected and enforced through the early common law action for trespass. 65**