

Property, Fast and Loose

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Katrina M. Wyman, *The New Essentialism in Property*, 9 **J. Legal Analysis** 183 (forthcoming 2018), available at [SSRN](#)

What's the best model for property – a sack of LEGO bricks or a heap of sticks?¹ For those with a formalist view of property that emphasizes a stable set of characteristics and a distinctively self-contained architecture, the LEGOs win hands down.² The blocks are standardized, free of rough edges and irregularities, and they snap cleanly together while maintaining their individual integrity. The sticks, by contrast, lack any obvious organizing principle or irreducible core. The bundles they form are loose and contingent, vulnerable to endless unbundling and rebundling.³ Yet the choice of bricks over sticks becomes far less clear on a functional vision of property that focuses on making property rights work well in the messy, interdependent modern world. For a functionalist, the question of optimal property structure must depend on the challenges and pressures presented by the surrounding conditions, and on what one is trying to build.

In *The New Essentialism in Property*, Katrina Wyman spotlights the incongruity between the formalist and functionalist facets of what she terms “the new essentialism.” Her primary focus is the influential scholarship of Henry Smith and Thomas Merrill, who are presently working on the American Law Institute’s fourth restatement of property (Smith is the lead reporter; Merrill is an associate reporter). Their vision of property as a boundary controlled, thing-based, *in rem* system of delegated control is steeped in formalism. Yet it also lays claim to functionalist justifications, most notably in the form of information cost savings. Opening the door to functionalism, however, requires reconciling property’s purportedly fixed core with social and economic conditions that are far from static. The resulting brand of essentialism is, as Wyman puts it, “highly malleable.” This malleability has two implications, as Wyman observes. On the one hand, it offers a response to critics who accuse the new essentialist project of neglecting important interests. On the other, it makes the new essentialism less essentialist.

New essentialism accommodates functionalism, for example, when it recognizes that an owner’s right to exclusion must sometimes yield to greater social objectives (such as nondiscrimination or airplane overflights), and that it must also be supplemented by governance mechanisms that operate through modes other than boundary exclusion (such as nuisance law). The tension between formalism and functionalism also emerges in deciding what counts as a “thing.” Merrill and Smith’s vision of property maintains that certain standard property attributes fit together well, and that keeping them intact is essential in a world of high transaction costs.⁴ But these attributes are only strongly complementary to each other under certain social and economic conditions. Moreover, there are today many competing complementarities that involve combining rights associated with many different parcels. Just as forming a contiguous path or highway requires assembling pieces of land held by multiple people, putting together limits on the rights of many owners may prove essential to controlling negative externalities or harnessing positive externalities. If we delineate property’s “things” based on the most important complementarities in the picture, we may end up with something very different than the traditional exclusion-based vision of property rights.

Of course, what functionalism demands of property in any given time and place is an empirical question, as well as a normative one (what functions do we have in mind, anyway?). Nonetheless, the notion embeds an openness to adaptation that is at odds with a formalism that assumes there is an immutable answer to the question of how property should be structured. This theoretical inconsistency between formalism and functionalism can be safely ignored so long as we focus on stylized contexts where the formalist model retains most of its functional power—family farms and isolated single-family homes. But if we take seriously the interdependence that prevails in the urban places where most human beings now live, giving functionalism free rein presents a more serious threat to formalism.

To be clear, Wyman does not frame matters so starkly, nor would she agree that changing conditions require a thoroughgoing revamping of property forms.⁵ Instead, she examines two modern examples that push at the bounds of property—hydrofracking as a form of trespass, and the dilution of the value of taxi medallions—to illustrate the challenges new essentialists face in navigating changes surrounding resource access. Yet, her analysis carries implications beyond these situated examples, and artfully queues up an important decision point for property theory.

If formalism makes property a fast-fish – contained and fixed – functionalism frees it from those points of adhesion as social and economic realities demand.⁶ The new essentialists cannot abide a loose-fish vision of property, but neither can they reasonably pretend that conditions will always replicate the agrarian past in which form and function aligned in a particular manner. Will they respond by prioritizing formalism where it conflicts with property’s functioning on the ground, or do the opposite, ceding more and more of what they claim makes property so distinctively itself? Eventually, they—and we—will have to decide whether the term “property” should denote a formal or a functional category. Do we want our property fast or loose?

1. See Thomas W. Merrill, *Property as Modularity*, 125 **Harv. L. Rev. F.** 151, 156 (2012) (responding to Henry E. Smith, *Property as the Law of Things*, 125 **Harv. L. Rev.** 1691 (2012)) (characterizing Smith’s paper as addressing whether “property as Legoland . . . provides a better model for understanding property systems than the bundle of rights”).
2. Henry Smith has repeatedly used the LEGO analogy for property. See Smith, *supra* note 1, at 1708; Henry E. Smith, *On the Economy of Concepts in Property*, 160 **U. Pa. L. Rev.** 2097, 2119 (2012); see also Ezra Rosser, *Destabilizing Property*, 48 **Conn. L. Rev.** 397, 412-19 (2015) (discussing Smith’s use of the “LEGO analogy”).
3. See Smith, *supra* note 1, at 1697-1700 (criticizing the “bundle of sticks” metaphor).
4. See generally Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 **J.L. & Econ.** S77 (2011).
5. See generally Katrina M. Wyman, *In Defense of the Fee Simple*, 93 **Notre Dame L. Rev.** 1 (2017).
6. See Herman Melville, **Moby-Dick**, ch. 89 (1851).

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