

NYU School of Law
Engelberg Center on Innovation Law & Policy

Faculty Talk

Rethinking the Ontology of IP

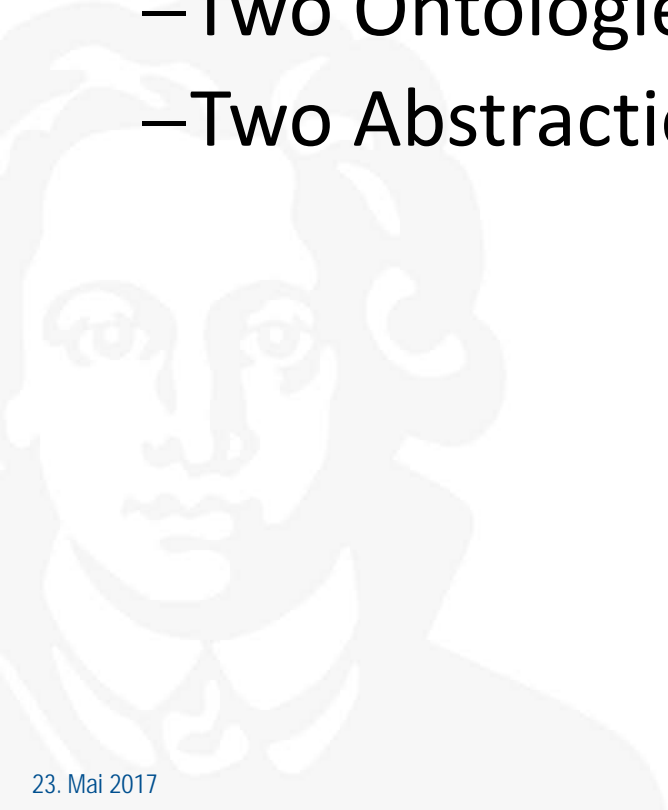
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- The dominant paradigm
 - IP is an abstract object (a type) embodied in books etc. (tokens)
 - that is owned by the right holder
 - just like real property

- But IP differs from real property
 - Philosophical justification
 - Economic analysis
 - Law

- Why?
 - Not because of the law, which is to be explained
 - But because of a fundamentally different subject matter
 - Ontological, legal realist project

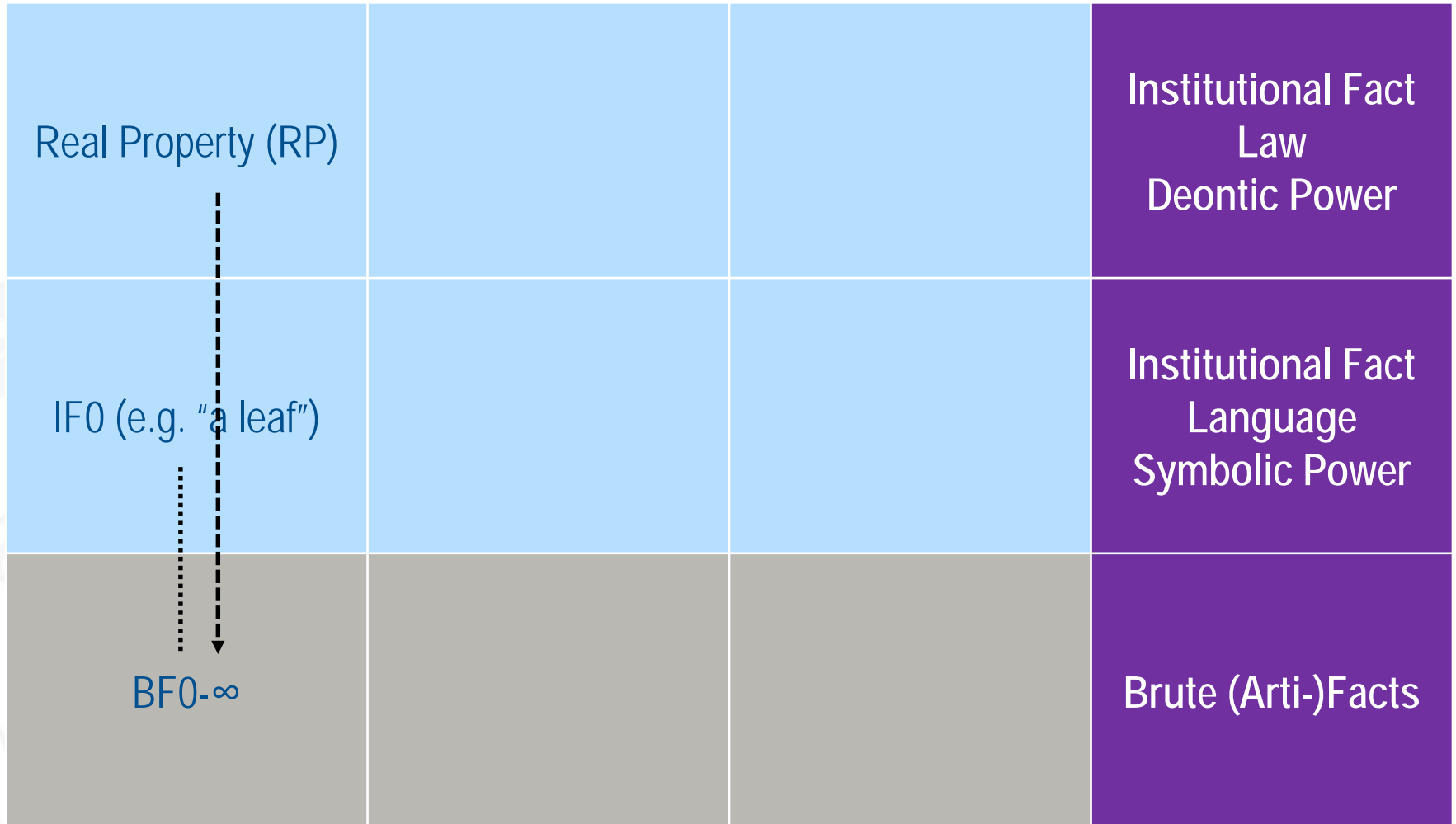
- The argument
 - Two Ontologies
 - Two Abstractions

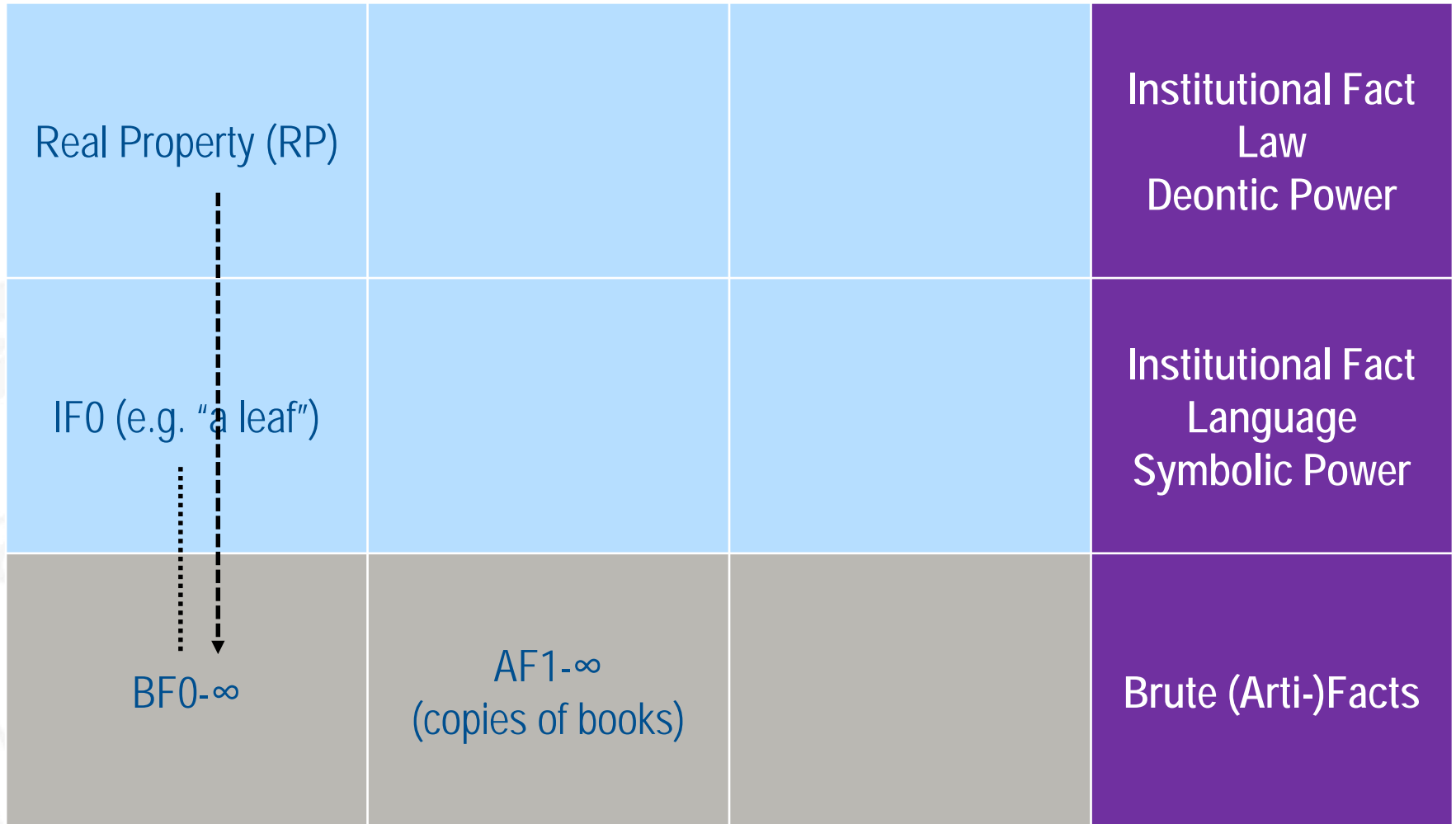


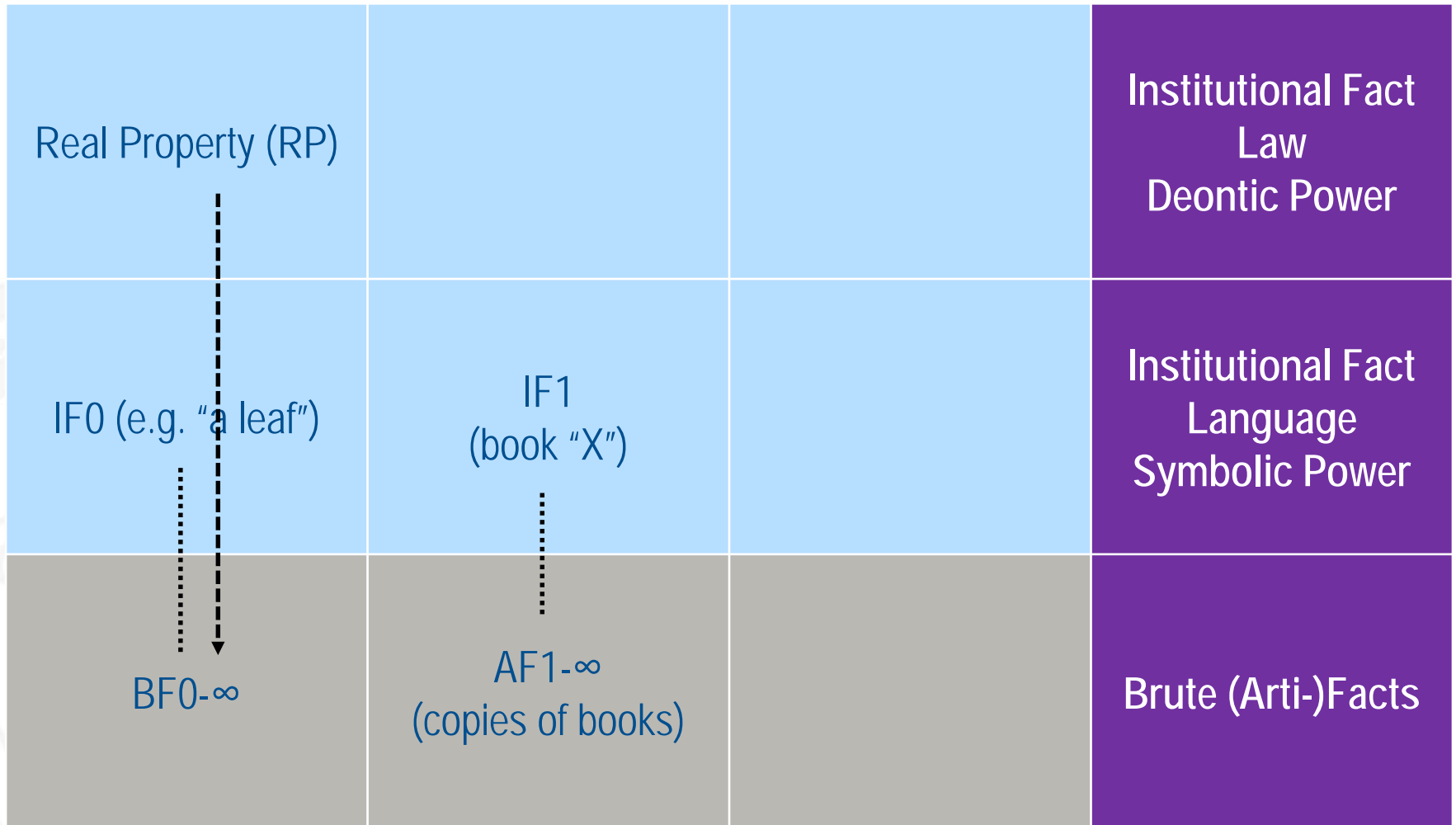
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			Institutional Fact Language Symbolic Power
			Brute (Arti-)Facts

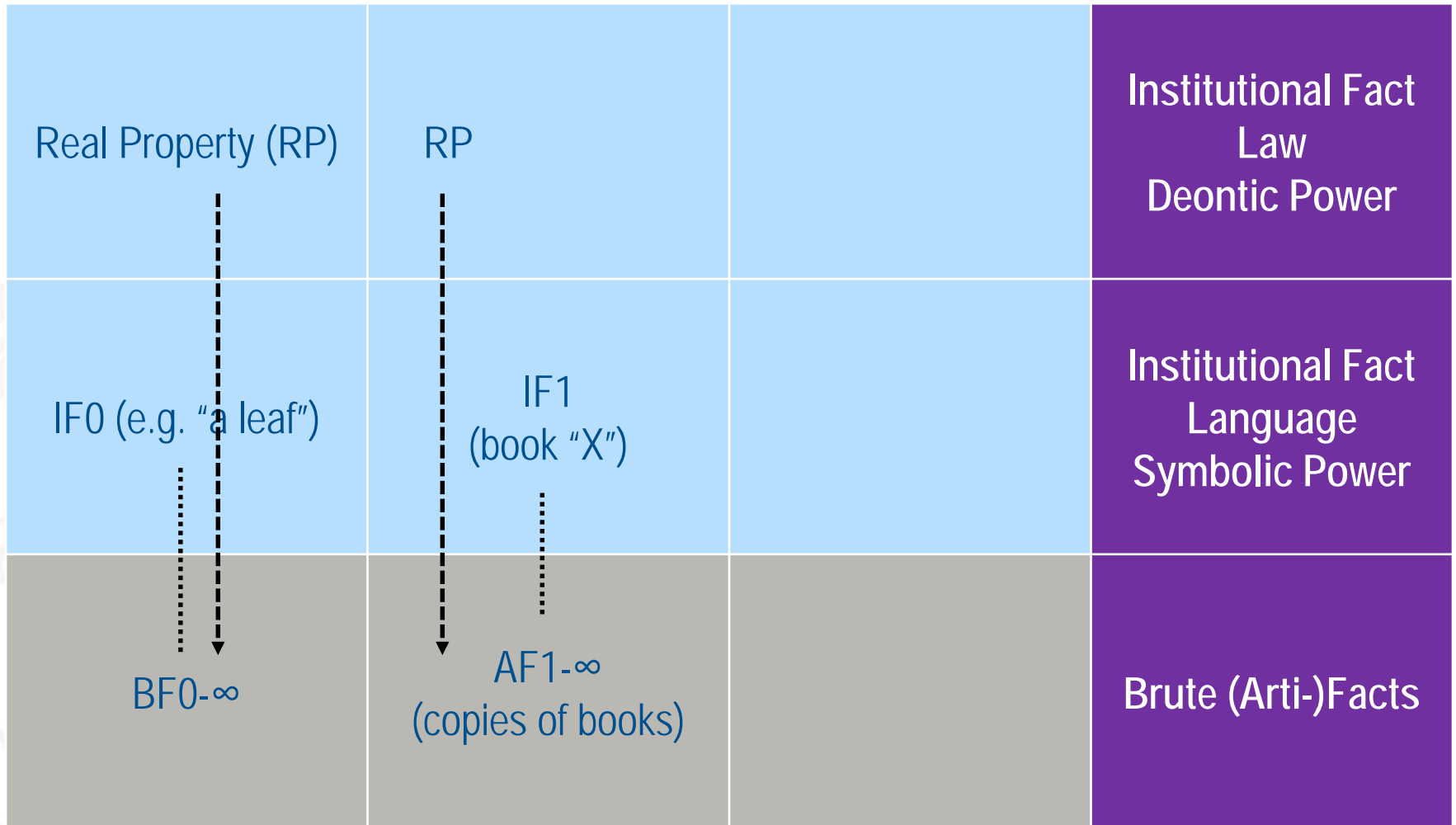
			Institutional Fact Law Deontic Power
			Institutional Fact Language Symbolic Power
BF0-∞			Brute (Arti-)Facts

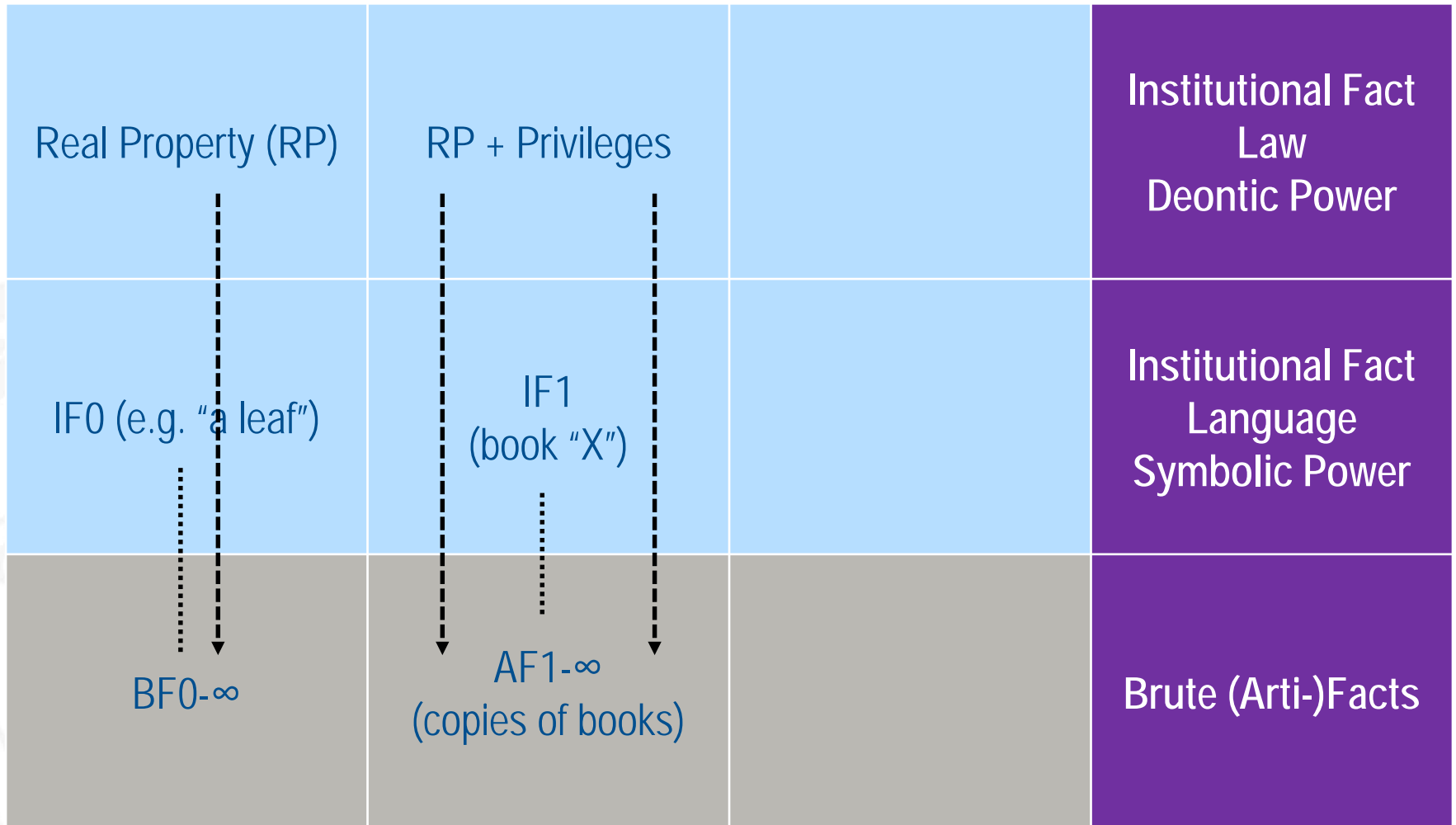
			Institutional Fact Law Deontic Power
IF0 (e.g. "a leaf")			Institutional Fact Language Symbolic Power
BF0-∞			Brute (Arti-)Facts

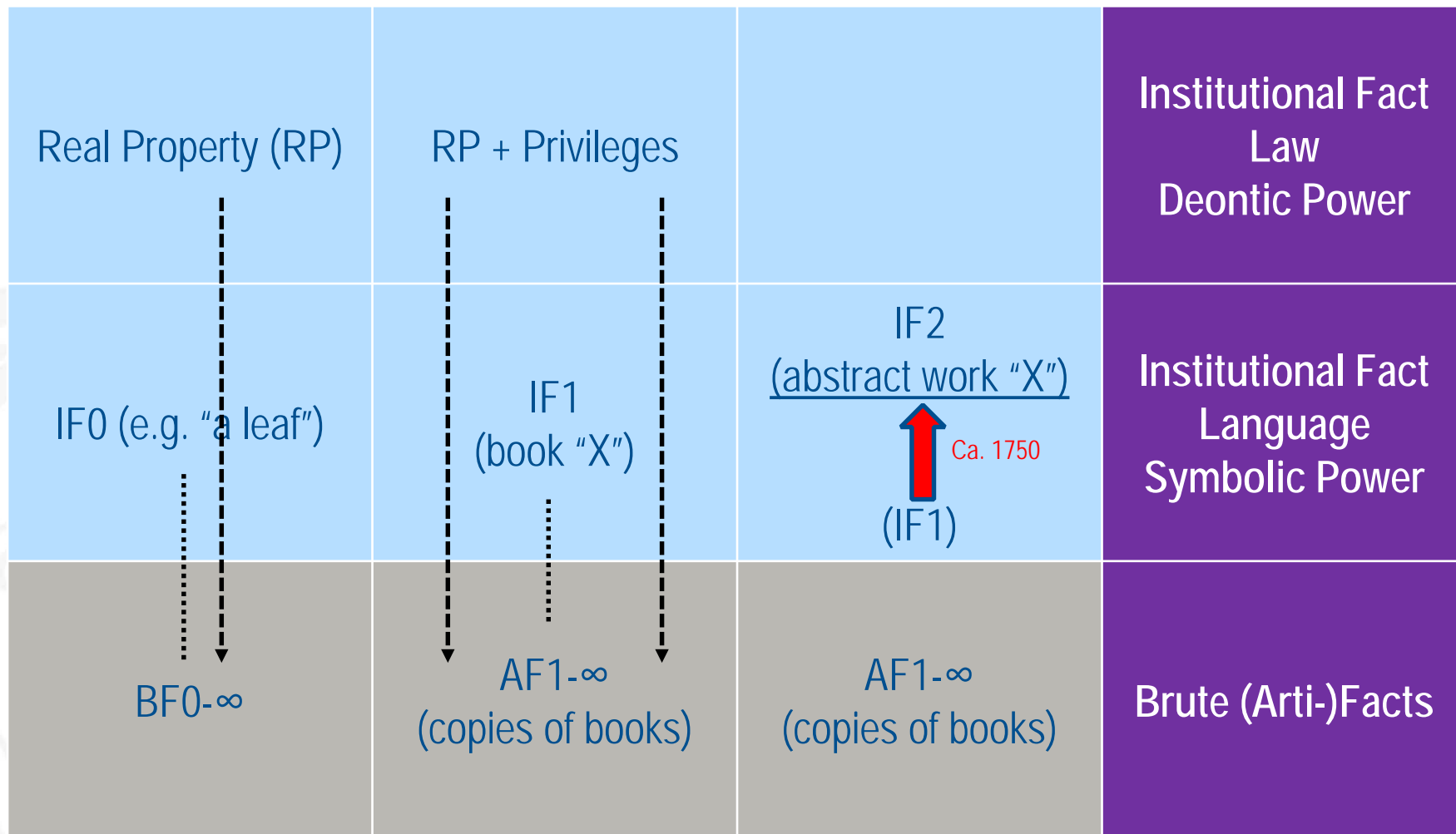


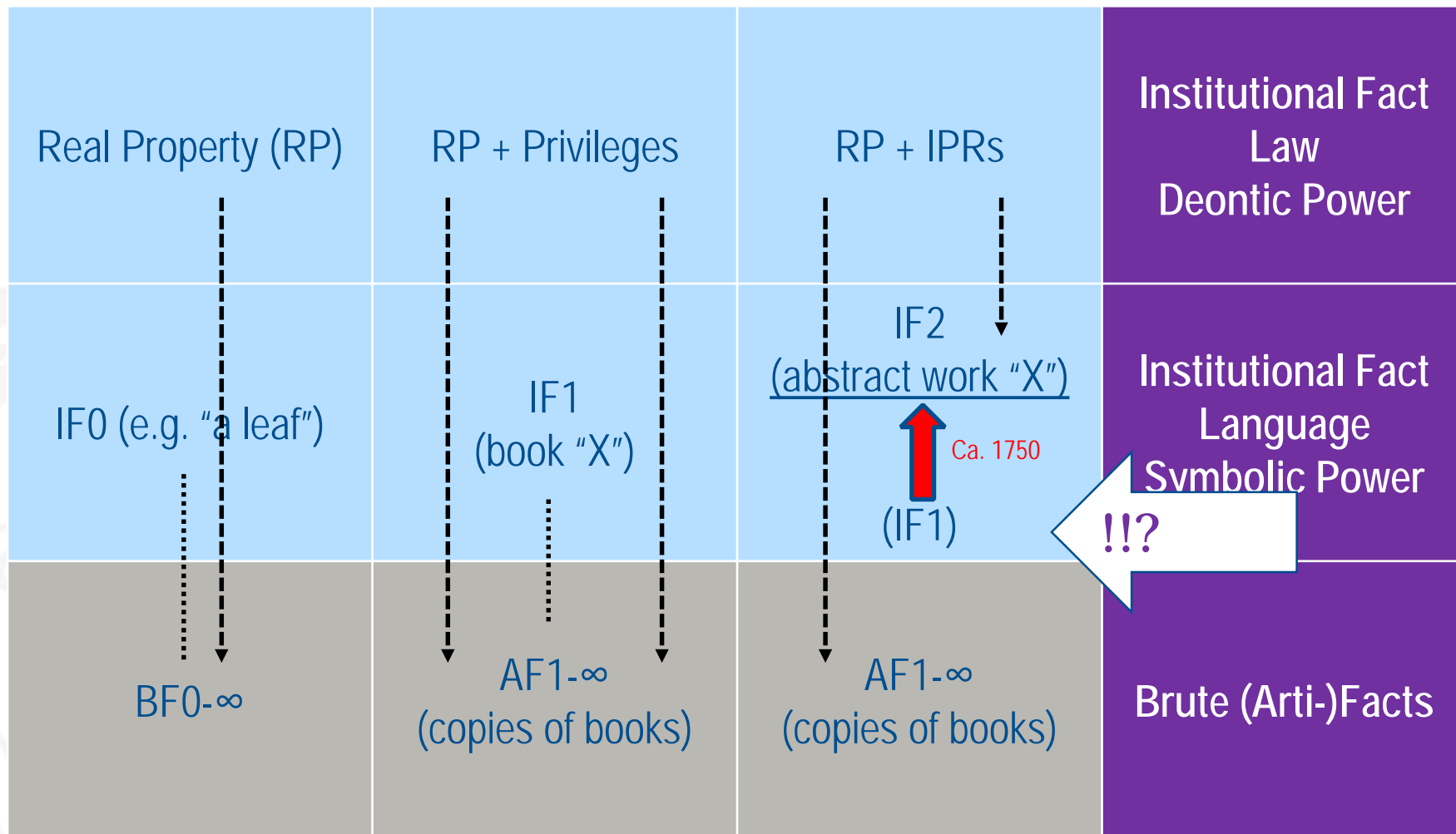












- Result

- The abstract IP object is not a given, observer-independent fact, but a historically contingent, purely language-based institution (social construct). It only exists because we think it exists.

- The legal realist point of view:
 - IPRs are exclusive rights
 - to prevent all third parties not having the right holder's consent
 - from the production and further use
 - of brute physical and mental artifacts
 - that count as infringing “Secondary Artifacts”
 - because they are considered sufficiently similar to a Master Artifact as claimed by the right holder

- Explanatory power of this understanding
 - The operation of IP law in practice
 - Philosophical justification of exclusive rights to act
 - Economic analysis of what?
 - The differences between IP and real property law

- Normative consequences
 - A shift of perspective
 - From objects to innovative and imitative activity regarding certain artifacts
 - Retain the idea of exclusive rights
 - From 18th century property to 21st century privileges