THE DYNAMIC LAW OF PROPERTY: THEORIZING THE ROLE OF LEGAL STANDARDS

Amnon Lehavi[*]

Abstract

Property law is engaged in a constant conflict between stability and dynamism. As a field of law, which delineates rights and duties to resources that apply in rem to large numbers of heterogonous parties, it is committed to ensuring stability and predictability. At the same time, even the most careful design of property norms cannot predict in advance all scenarios and legal contingencies, and must also address changes over time in values, socioeconomic environments, technological knowledge, etc. as affecting such norms.

One potential strategy to accommodate dynamism in law is by crafting norms as open-ended standards rather than as clear-cut rules. Contemporary scholarship has been dealing extensively with the rules/standards tradeoff by addressing both public promulgation of laws and various forms of private ordering, especially in contract law.

Property has, however, been generally left out of the rules versus standards literature, addressing only discrete issues such as the boundaries of a hard-edged right to exclude. This Article offers a first-of-its-kind systematic analysis of the ways in which legal standards operate in property. It identifies the unique manner in which the chief justifications for

---

* Professor, Radzyner School of Law, and academic director, Gazit-Globe Real Estate Institute, Interdisciplinary Center (IDC) Herzliya. LL.M., J.S.D. For helpful insights and comments, I thank Aharon Barak, Hanoch Dagan, Alon Harel, Assaf Jacob, Larissa Katz, Alon Klement, David Lametti, Daphna Lewinsohn-Zamir, Amir Licht, James Penner, Chris Serkin, Henry Smith, Laura Underkuffler, Katrina Wyman and the participants of the 2010 property theory workshop at the NYU School of Law and the 2010 meeting of the Israeli Society for Private Law.

standards—that is, inherent incompleteness of rights and enhancement of value-based jurisprudence—play out in constructing property law.

Cutting across conventional public/private distinctions by referring to various standards such as custom, reasonableness, abuse of rights, or public use, the Article argues that legal standards in property hinge prominently on the institutional mechanisms through which such norms are crafted and filled with content over time, and identifies the conditions under which property standards may outperform clear-cut rules.

TABLE OF CONTENTS

I. INTRODUCTION

The institution of property is forever challenged and contested. William Blackstone's famous statement that "[t]here is nothing which so generally

strikes the imagination, and engages the affections of mankind, as the right to property" has certainly found its followers in the ongoing jurisprudential debate over the fundamental features of property.

Contemporary scholarship in no way appears to be settling this dispute. Throughout much of the twentieth century, the *bundle of rights* approach has dominated property theory.[1] Many legal realists, and members of other academic schools, have subsequently advocated that *property* as such has no inherent meaning but that it is composed of numerous, diverging clusters of legal interests that could be designed at will through overt political and societal decision-making.[2] Recent years have seen, however, the emergence of sophisticated new formalism in property. Most notably, Thomas Merrill and Henry Smith have reformulated an essentialist approach to property, according to which the inherent substantive core of property lies in the right to exclude.[3]

Notwithstanding these normative controversies, property as a legal institution seems to possess certain *structural* attributes that attest to its fundamental features and respective challenges. Property law sets out the ways in which society allocates, governs, and enforces rights and duties in resources and human relationships around them. Property entitlements and obligations regarding both specific assets and more generally categories of resources (land, chattels, intellectual property, etc.) regularly implicate numerous parties not only abstractly, but also in social and economic practice.[4] Affected parties to property rights are by nature such that they may not have any sort of privity or voluntary relationships among them, and are often strangers that find themselves ex post facto entangled in a clash over competing claims regarding the same asset. This means that for property law to function properly in creating and implementing such in rem rights, it must facilitate broad-based social understanding about the legal regime and ensure a sufficient level of stability and security in the delineation of property rights.

---

1. *See generally* JE Penner, *The 'Bundle of Rights' Picture of Property*, 43 UCLA L. REV. 711 (1996).

2. *See, e.g.*, Thomas C. Grey, *The Disintegration of Property, in* NOMOS XII: PROPERTY 69 (J. Roland Pennock & John W. Chapman eds., 1980).

3. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 395–96 (2001) [hereinafter Merrill & Smith, *What Happened to Property*].

4. Amnon Lehavi, *The Property Puzzle*, 96 GEO. L.J. 1987, 2004–07 (2008) [hereinafter Lehavi, *Puzzle*].

At the same time, property law is never static.[5] Even the most careful design of property norms cannot anticipate and regulate in advance all potential frictions and disputes that may arise with respect to the delineation of property rights. In this sense, property rights are inherently *incomplete*. As I will argue, although the concept of incompleteness is deeply embedded in other legal fields, it is nearly neglected in property theory. However, the practical incompleteness of norms does affect property in that it introduces into property law not only some degree of uncertainty, but also dynamism.

Alongside incompleteness, dynamism may also be the result of a *substantive* approach to property—one which looks to connect the application of legal norms to the societal values and goals underlying the norms. The extent to which such an approach should be applied is obviously a matter of fierce debate, broadly implicating formalist versus substantive approaches to law.[6] But to the extent that a legal system does allow a certain degree of value-based jurisprudence, it poses yet another challenge to the focus on stability and predictability in the field of property.

Dynamism in property may also be the result of broad-based changes outside of the current framework of law. It may be due to a change of ideologies, tastes, or values in a certain society, or to exogenous shifts, such as technological, economic, or institutional innovations. Harold Demsetz's famous depiction of the evolution of private property in a Native American tribe following the fur trade with Europeans[7] has served as a linchpin for voluminous writing on the ways in which property regimes transform over time.[8]

How can property law deal with such dynamism? One strategy would be simply to replace current doctrine by writing a new law from scratch, or nearly so, when times so require. Another strategy, one which is the focus of this Article, is to initially design some legal norms as relatively open-ended *standards* rather than as clear-cut *rules*. Surprisingly enough, although legal standards do exist in actual property doctrine, their theoretical analysis and

---

5. For the idea that property, and private law in general, are dynamic, see Hanoch Dagan, *Legal Realism and the Taxonomy of Private Law, in* STRUCTURE AND JUSTIFICATION IN PRIVATE LAW: ESSAYS FOR PETER BIRKS 147, 152–53 (Charles Rickett & Ross Grantham eds., 2008) [hereinafter Dagan, *Taxonomy*].

6. *See* discussion *infra* Part II.

7. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 351–53 (1967).

8. *See, e.g.*, Terry L. Anderson & Peter J. Hill, *The Evolution of Property Rights*, *in* PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 118, 118–19 (Terry L. Anderson & Fred S. McChesney eds., 2003).

assessment have been only fragmented. This Article sets out to offer an innovative, comprehensive analysis of legal standards in property law.

In contrast to property, the rules versus standards debate has received much scholarly attention in other legal fields, implicating both public and private law. Generally speaking, *rule*s represent hard-edged norms (for example, a 55 m.p.h. speed limit), which set clear provisions in guiding conduct and in dictating its legal consequences. S*tandards* are viewed as open-ended, more vague norms (for example, the *reasonable care* norm in tort law).[9]

The nature of the current rules-versus-standards discourse goes well beyond the original "rebellion" of legal realism against the pretense of classical positivist jurisprudence to resolve all disputes by mere deduction of generally-applicable, closed-set legal provisions.[10] The economic analysis of law focuses on the tradeoff between the social costs of legislating fine-grained ex ante rules versus the back-end costs of judicial efforts to give content to vague, cheaper-to-promulgate legal standards.[11] Contract law theory has expanded the debate to embrace not only public decision-making, but also the optimal design of contracts by private parties.[12] Thus, the problem of incompleteness of rights, resulting from the high information costs that parties have to bear to figure out ex ante all the possible states-of-the-world that may occur during the phase of contract implementation, has been equated against the costs that parties would have to incur to resolve such potential contingencies ex post, by either renegotiation or adjudication.[13]

To correct for the current deficiency of property theory in the rules versus standards debate, this Article seeks to identify and analyze two chief justifications for employing standards: (a) the inherent *incompleteness* of rights, and (b) the enhancement of a *substantive* approach to the design of legal norms. It then studies the unique way in which standards play out in property law. In so doing, the Article rests on four fundamental assumptions

---

9. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–62 (1992).

10. As Justice Oliver Wendell Holmes, viewed by many as the predecessor of legal realism, stated, "[G]eneral propositions do not decide concrete cases." Lochner v. New York, 198 U.S. 48, 69 (1908) (Holmes, J., dissenting).

11. *See, e.g.*, Kaplow, *supra* note 9.

12. *See* Avery Wiener Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 506–12 (2004).

13. *See generally* Robert E. Scott & George G. Triantis, *Incomplete Contracts and the Theory of Contract Design*, 56 CASE W. RES. L. REV. 187 (2005) [hereinafter Scott & Triantis, *Incomplete Contracts*].

about the general nature of property law, and the potential role of standards within it.

First, as suggested above, property is a legal field typified by certain distinctive characteristics that influence the content and process of creating, updating, and enforcing legal standards. Such traits include property law's broad-based applicability to numerous and often indefinite parties; the implications of such in rem applicability for the difficulty of parties to consensually opt out of the property regime (unlike in contracts); and a higher level of epistemological, cultural, and social heterogeneity among parties. These characteristics create a special challenge for filling initially vague norms with content over time by what I term "bottom-up" or "top-down" institutions, in a manner that would preserve property as a dynamic institution but at the same time ensure sufficient security.

Second, the term *standard* in itself requires terminological precision. A major obstacle to the analysis of standards may stem from the fact that too often a certain normative agenda also tried to dictate a particular conceptual understanding of what is a *standard*, without being straightforward about this link.[14] My conceptualization of the term *standard* seeks to integrate the functional incompleteness of property norms with a limited degree of substance-oriented jurisprudence by focusing on the institutional structure of a legal standard. I define a *standard* as a legal provision that delegates the giving of fuller norm-content to bottom-up private actors or to top-down public bodies in a dynamic process, but that does not necessarily require that the legal norm remains vague all the way down to the judicial case-specific inquiry. To illustrate at the outset this definition, and especially its latter part, consider a *trade usage* provision in a commercial code, which refers to habits and practices of members of a certain trade. This *delegation* can lead, for example, to adopting hard-edged norms typical in the cotton or diamond industries.[15] The *trade usage* standard can thus fill up with clear-cut norms, albeit in a more dynamic process that typifies such bottom-up trade organizations.

Third, as hinted at above, the content of legal standards in property is inherently intertwined, probably more notably than in other fields, with *institutional mechanisms*. For reasons of either functional incompleteness or

---

14. *See infra* note 34 and accompanying text.

15. *See,* Lisa Bernstein, *Private Commercial Law in the Cotton: Industry: Creating Cooperation through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001) [hereinafter Bernstein, *Cotton*]; Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) [hereinafter Bernstein, *Diamond*].

normative preference for substantive jurisprudence, a public institution crafting a legal norm—be it the constitution-drafter, legislator, or administrative agency—may occasionally opt for initially designing the norm in a *softer* manner, delegating in effect the power of crystallization in due course.

This institutional delegation, however, is not free of constraints. It has to be made to bodies that are effectively capable of producing and disseminating collective norms. For example, the Fifth Amendment's *public use* norm on exercising the takings power can be viewed as a standard that delegates power to courts to fill it with content through interpretation, with courts expected in turn to design top-down guidelines that go beyond the specific dispute. Conversely, the ability to delegate such powers to *bottom-up* institutions, for example, non-government organizations such as prominent merchant organizations or common interest communities, by referring in the primary legal norm to standards such as *trade usage* or *custom*, depends on various institutional capabilities.[16] Thus, legal standards cannot exist over time in the absence of *institutions* that can take on the task of filling norms with content, without reducing property into ad hoc jurisprudence.

Fourth, the institutional aspects of legal standards are also strongly intertwined with the complicated relationship between public and private in property law. Demonstrating this intricate nature of property law, this Article argues that the analysis of the way in which legal standards are created and later delegated for further content-giving often cuts across conventional public/private distinctions, raising similar institutional and structural dilemmas in standards as diverse as abuse of rights, good faith, or public use.

Building on these key insights, the Article performs an innovative analysis of legal standards in property law, and sets the ground for a theoretical discourse about the terms under which legal standards may outdo *rules* in balancing between dynamism and stability. The analysis identifies five variables that prevail as dominant for this purpose: (1) incompleteness, (2) homogeneity, (3) scale of effect, (4) established institutional capability, and (5) external constraints—and the way in which these factors serve as foundational principles for constructing the rule/standard jurisprudence in property law.

The Article is structured as follows. Part II analyzes the evolution of the rules-versus-standards tradeoff within the new form/substance jurisprudence in different fields of law, focusing on contracts. It then highlights the unique

16. *See* discussion *infra* Part IV.B.1.

features of property law and the challenges it poses to the design of legal standards. Next, it demonstrates the lack of a comprehensive analysis of property standards, by reviewing a set of discrete issues related to form versus substance that are discussed in the property literature. Part III illuminates the two chief grounds for crafting standards: the inherently incomplete design of property norms and a normative propensity for some degree of substantive legal reasoning. Part IV focuses on the institutional mechanisms of property standards. It portrays *top-down* and *bottom-up* collective institutions that can effectively instill content over time in initially vague norms. It then moves to examining various types of standards from both the public and private spheres of property law. Finally, Part V identifies the abovementioned five variables that seem to dominate the analysis of standards, thus setting the stage for a theory of rules-versus-standards in property law.

II. FRAMING PROPERTY LAW IN THE FORM/SUBSTANCE SETTING

New empirical studies and fresh theoretical insights have reinvigorated one of the most classic themes in jurisprudence: form versus substance. Although the "revolt against formalism"[17] has been dominant throughout much of the twentieth century in tending American legal thought towards more *substance* and *context* in legal reasoning and interpretation, it seems that sweeping declarations, such as Grant Gilmore's *The Death of Contract*[18] or Thomas Grey's *The Disintegration of Property*,[19] have been facing an increasing backlash in recent years. In this sense, the reports of the death of formalism were an exaggeration.[20]

Traditionally, formalism has been supported either by positivist-authoritative approaches such as those of John Austin[21] and Hans Kelsen,[22]

17. *See* MORTON G. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 11–30 (1973); WILLIAM TWINNING, KARL LLEWELLYN AND THE REALIST MOVEMENT 9 (1973).

18. GRANT GILMORE, THE DEATH OF CONTRACT 65–71, 97–98 (1974).

19. Grey, *supra* note 2.

20. To paraphrase, of course, Mark Twain's ironic response to rumors about his death. Mark Twain, N.Y. J., June 2, 1897.

21. *See, e.g.*, JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 18 (1832) (Wilfrid E. Rumble ed., 1995) ("The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors.").

22. *See, e.g.*, Hans Kelsen, *The Function of a Constitution* (I. Steward, trans.), *in* ESSAYS ON KELSEN 113 (R. Tur & W. Twining eds., 1986) ("The validity of the lower,

or by various types of abstract "a priori reasoning" such as ones by Jeremy Bentham[23] or John Stuart Mill.[24] In contrast, legal realism's "rebellion" has focused on contextualism, pragmatism, and empiricism.[25] As Karl Llewellyn notes in describing the shifts between the "Formal Style" and the "Grand Style" in the history of the common law, the Grand Style can be typified by a judicial resort to a "situation sense" analysis.[26] Under the latter approach, in designing a judicial rule or principle for different situation-types, judges seek to engage in a "true understanding" and "right evaluation" of the actual facts before them.[27] In fact, the realist critique has been closely associated with binding together law and *real-life*—including in its discussion of politics and power—up to the point that its own adversaries viewed it as reducing law into mere nominalism and cynicism.[28]

Contemporary jurisprudence seems to reorient much of the form-substance discourse. In *Form and Substance in Anglo-American Law*, P.S. Atiyah and Robert Summers offer a comparative account of what they consider to be the largely *substantive* American legal system vis-à-vis the more *formal* English one.[29] They provide a comprehensive taxonomy of the

---

individual norm is grounded by the validity of the higher, general norm. And the judge, in fact, so grounds his judgment that it conforms to a valid general norm that authorizes him.").

23. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11–16 (J.H. Burns & H.L.A. Hart eds., 1970) (promoting utility as the guiding feature of desirable legal design).

24. For a depiction of Mill's formal logic and reliance on an abstract "economic man" as a form of *a priori* reasoning, see M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 985–86 (8th ed. 2008).

25. *Id.* at 802–13.

26. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 268–71 (1960).

27. *Id.*

28. In response, recent realist scholarship depicts itself as respecting legal rules and precedents, while at the same time viewing law as a dynamic institution that constantly deals with constitutive tensions. *See* Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L. J. 607, 610 (2007) (discussing realism's attempt to bridge the tensions between "power and reason, science and craft, and tradition and progress"); *see also* Frederick Schauer, *Introduction to* KARL LLEWELLLYN, THE THEORY OF RULES 1-27 (Frederick Schauer ed., 2011) (analyzing Llewellyn's discussion of the difference between "paper rules" and "real rules" actually applied by judges, and the types of regularities that can be found in applied rules so that they do not deviate from their original purpose; but admitting that Llewellyn can be considered "at best a faint-hearted enthusiast for rules" in the rules/standards sense).

29. P.S. ATIYAH & R.S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGISLATIVE INSTITUTIONS 1–41 (1987).

different facets of form and substance in legal reasoning, identify first-order and second-order justifications for each method, and ground these legal differences in institutional, cultural, and historical considerations.[30]

Notwithstanding potential controversies over such a depiction of these two legal systems, the Atiyah-Summers analysis can be seen as representing a shift from traditional scholarship in the discourse on form versus substance, in that it both illuminates the pragmatic and *real-life* facets of formalism, and reframes the debate within a broader-based institutional analysis, touching on both public and private decision-makers.[31]

Thus, in presenting pro-formalism second-order considerations, such as the need for finality in decision-making, systematic cost-effectiveness, minimizing the overall risk of error, making value judgments about the appropriate persons to make decisions, promoting security and peace, and enhancing certainty and predictability in the legal system,[32] the Atiyha-Summers analysis levels formalism to a realm that up until then has been occupied by the anti-formalist critique. It incorporates pragmatism and empiricism into the heart of the new formalist argument. This redirection of pro-formalist arguments also implicates the rules versus standards dilemma, as discussed in the next section.

A. The Current State of Rules Versus Standards in Legal Theory

A major focus of the new formalism literature lies in making the case for designing legal norms as *rules*. Rules are typically understood as legal provisions that are hard-edged and exhaustive, meaning not only that they are initially phrased in more concrete clear-cut terms, but also that the dispute-resolution would focus on a more limited set of authoritative or evidentiary materials, for example, through strict reliance on the statute or contract in question.[33] The analysis does not consecrate rules as inherently superior, but rather makes their potential advantages contingent on the empirical or systemic tradeoff of social costs and benefits for both decision-makers and the recipients of the norms.[34]

---

30. *Id.*
31. *Id.*
32. *Id.* at 23–28.
33. Katz, *supra* note 12, at 515–16.
34. This normative shift also sheds light on the inherent, though often implicit, link between the normative argument for or against legal standards, and the conceptualization of what is a *standard*. Thus, since the normative enterprise of at least some legal realists had been one of judicial case-sensitivity, vagueness was considered a good in itself, enabling courts to engage in highly detailed inquiry. *See* LLEWELLYN, *supra* note 26, at 268–71 (1960).

This functionalist viewpoint has led scholars to try and identify the different parameters that may tip the scales in favor of rules or standards in various settings. Some writers have focused on the calculus for public decision-makers by examining political economy considerations and the institutional capacities of legislatures versus courts,[35] and by evaluating factors such as information costs or the frequency and probability that a dispute will arise.[36] As Louis Kaplow argues, rules are more costly to enact than standards because rules involve extensive, up-front and elaborate determinations of the law's content, whereas vague standards create higher costs during the implementation and enforcement stages: parties and their legal advisers take pains to predict potential outcomes, and courts must engage in a more detailed ex post inquiry to decide the law in specific disputes.[37] This analysis of public decision-making has been supplemented by new takes on positivism and the *planning function* of legal systems.[38]

Other commentators, working mainly in contract theory, have looked to the rules-standards tradeoff that parties to transactions make as "private legal decision-makers."[39] Under this viewpoint, parties decide whether to take the costly action of writing an as-complete-as-possible contract, in the sense that they invest time and effort in trying to foresee the contingencies of different states-of-the-world that may occur during the contract implementation and in

---

For an analysis of Llewellyn's concept of "situation sense" adjudication, see Todd D. Rakoff, *Implied Terms: Of "Default Rules" and "Situation Sense," in* GOOD FAITH AND FAULT IN CONTRACT LAW 191, 201–08 (J. Beatson & D. Friedman eds., 1995). In contrast, modern economic analysis views the case for standards as deriving from an instrumental cost-benefit analysis, as is explained in this section. This means that if a feasible mechanism does enable the filling of the legal norm with content prior to the occurrence and resolution of the specific conflict, no normative or structural reason should prevent such upfront crystallization. *See, e.g.*, Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 584–90 (2003) [hereinafter Schwartz & Scott, *Contract Theory*].

35. *See, e.g.*, Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995) (arguing that the standard-oriented strategy of the U.C.C., and article 2 in particular, can be attributed to the influence of interest groups and individuals involved in the drafting). Previous work has linked the societal choice of interpretative strategy, liberal or strict, to the broader roles that legislatures versus courts play in designing legal and social policy. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

36. *See generally* Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150 (1995).

37. Kaplow, *supra* note 9, at 579–86.

38. *See* Curtis Bridgeman, *Why Contract Scholars Should Read Legal Philosophy: Positivism, Formalism, and the Specification of Rules in Contract Law*, 29 CARDOZO L. REV. 1443, 1456–62 (2008).

39. Katz, *supra* note 12, at 506.

determining specific obligations for each such state. Their choice hinges on balancing such *front-end*, or *transaction* costs, against the anticipated *back-end*, or *enforcement* costs, of resolving disputes over vague contract terms.[40] The latter costs include those of communicating and considering additional interpretative materials,[41] systemic uncertainty, the moral hazard that may undermine performance incentives,[42] and the risk of judicial error in considering various ex post factors.[43]

The studies of Lisa Bernstein vividly demonstrate why and how different private merchant industries opt for rule-type contracting and strict enforcement.[44] In the cotton industry, merchants and mills rely neither on the Uniform Commercial Code nor on court adjudication.[45] Members adhere rather to industry trade norms, a comprehensive set of bright-line contract rules that cover the different stages of the contract formation, implementation, and enforcement, and rely on certain industry-specific definitions of terms.[46] For the most part, these trade rules avoid standard-like terms such as *reasonable* and *seasonable*.[47] Similarly, notions of *good faith* or *fairness* do not seem to explicitly affect outcomes.[48] Arbitrators, industry experts who use a relatively formalistic approach that gives little weight to the specific context of the contract, resolve the quite rare open disputes.[49] Compensation is based only on market difference damages plus a trivial penalty, and excludes consequential damages or other remedies that would have required the aggrieved party to disclose firm-specific information.[50]

According to Bernstein, this approach reduces the cost of entering into agreements by providing a comprehensive set of well-tailored default rules; alleviates the likelihood that misunderstandings will arise while providing a streamlined process that resolves conflicts through relatively predictable outcomes; and facilitates the creation and publication of new contract governance provisions by the collective action of the trade organizations.[51]

---

40. Scott & Triantis, *Incomplete Contracts*, *supra* note 13, at 189–91.
41. Katz, *supra* note 12, at 525–26.
42. Schwartz & Scott, *Contract Theory*, *supra* note 34, at 601–05.
43. Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 831–34 (2006) [hereinafter Scott & Triantis, *Litigation*].
44. *See, e.g.*, sources cited *supra* note 15.
45. Bernstein, *Cotton*, *supra* note 15, at 1730–37.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*

Together with the complementary use of non-legal mechanisms such as reputation,[52] the trade rules' formalities provide a social and institutional framework that constrains opportunism and promotes long-term commercial cooperation in what is otherwise an industry typified by volatile prices, rapid transactional velocity, and slim profit margins.[53]

These findings thus allegedly undermine one of anti-formalism's main contentions, according to which strict rules violate the normative decree to turn to a *situation sense* analysis of legal transactions, by appealing, inter alia, to grassroots custom and practice.[54]

However, the case for rules on such grounds is not unequivocal. Avery Katz concludes, for example, that large and experienced traders prefer formalistic rules, given their ability to amortize the fixed cost of detailed negotiations, their better access to non-legal enforcement, and their greater wariness of biased tribunals and juries; but the same does not hold true for small and infrequent traders, who may favor legal standards.[55]

Robert Scott and George Triantis present yet other settings in which standards may prove effective for contracting parties.[56] First, they note that the rules/standards choice is almost never guided by a binary approach.[57] Most commercial contracts include a mix of vague and precise terms, aiming to arrive at an optimal tradeoff between front-end and back-end costs.[58] Second, given the adversarial process of dispute resolution, courts do not directly observe the materialization of contingencies or the performance of obligations. Courts rely instead on *proxies*—selected qualitative or quantitative measures that aid them in establishing the factual basis of the dispute (for example, using data on activities of comparable firms to determine whether a defendant franchisee used "best efforts to promote and maintain" a high sales volume).[59]

Scott and Triantis then explore how parties choose the rules/standards mix to optimize the selection of proxies over two dimensions: *when* is the proxy made and *who* makes the choice.[60] Parties can constrain the space

---

52. *See infra* note 205 and accompanying text.

53. Bernstein, *Cotton*, *supra* note 15*,* at 1739–45, 1762–64.

54. *See* David Charny, *The New Formalism*, 66 U. CHI. L. REV. 842, 843–44 (1999).

55. Katz, *supra* note 12, at 536–38.

56. Scott & Triantis, *Litigation*, *supra* note 43, at 817.

57. *Id.*

58. *Id.*

59. *Id.* at 835–39. Scott and Triantis point here to the "proxy" applied by the court in *Bloor v. Falstaff Brewing Corp. Id.* (citing Bloor v. Falstaff Brewing Corp*.,* 454 F. Supp. 258 (S.D.N.Y. 1978), *aff'd*, 601 F.2d 609 (2d Cir. 1979) (Friendly, J.)).

60. Scott & Triantis, *Litigation*, *supra* note 43, at 836–37, 850–51.

from which courts may draw proxies during litigation, by crafting the level of the term's precision: the vaguer the term, the broader the space.[61] Using a mixed strategy such as combining a *best efforts* or *good faith* standard with precise provisions serves the dual purpose of limiting the space of court proxy selection only to contingencies that are similar enough in kind, whereas the broad standard communicates the underlying goals and helps the court to interpret the precise terms in light of the general purpose.[62]

Summing up so far, the study of rules and standards is enjoying considerable academic attention as a prominent subset of the reinvigorated form-substance debate. The expansion of the traditionally abstract quandary to pragmatic, functional, and empirical realms has helped to identify the complexity of rules and standards as a *continuum* of design options rather than a binary a-priori determination. The contract-focused literature has also aided in illuminating the institutional facets of the rule/standard dilemma, such that the design and implementation of rules and standards involve not only legislatures, administrators and judges, but also private legal ordering. But this also reveals the limits of the current analysis: by focusing on the contractual paradigm, the rules/standards literature builds on certain substantive, procedural, and institutional assumptions that do not necessarily hold true for other fields of law. As I will now show, this is particularly the case in trying to configure the prospects and perils of legal standards in property law.

B. The Unique Traits of Property Law

Boundaries between property and contracts, or between property and torts, are not often neat. But distinctions do exist, and they are of importance to the rules/standards dilemma. Accordingly, I do not intend on engaging in a full-scale analysis of the distinctive and similar traits of property law vis-à-vis other fields. My main purpose is to demonstrate the ways in which the use of initially vague norms poses special challenges in property—a dynamic legal field that nevertheless relies on broad-based coordination—especially as compared to the above-surveyed literature on contractual parties acting as *private legal decision-makers* in setting-up their ideal mix of rules and standards. This should not lead to the conclusion that legal standards in property are impracticable or undesirable. At the same time, property standards should adhere to distinctive institutional mechanisms.

---

61. *Id.*
62. *Id.*

The question whether property law is inherently different from the law of personal obligations (that is, torts and contracts) is a source of vibrant debate. In his 1913 and 1917 seminal articles, Wesley Hohfeld questioned the traditional in rem/in personam dichotomy.[63] After defining and analyzing different attributes of in personam rights, Hohfeld argued that the same sets of "jural correlatives" and "jural opposites" typifying in personam legal relationships apply also to in rem rights—save only to the large and indefinite number of persons bound by the legal relationships in the latter case.[64]

The economic analysis of law has played a central role in conceptualizing property as a legal institution that looks very much like contracts or torts. The bellwether was probably Ronald Coase's defiance to view nuisances and other interferences with property rights as *a-priori wrongdoing* by one of the parties, but instead as an externality problem of a *reciprocal nature* that should be resolved to increase overall welfare.[65] In the absence of significant transaction costs, parties would privately opt for the most efficient arrangement regardless of the provisions of the public legal regime.[66] Yet the focus on bilateral relations in property conflicts remained intact as a methodological focal point even when the discussion shifted to the realistic world of positive transaction costs, which Coase saw as necessitating top-down ordering.[67]

Property conflicts were thus viewed as bilateral disputes over specific uses, and the legal design challenge was one of rearranging *entitlements*, to use Guido Calabresi and Douglas Melamed's terminology.[68] Ian Ayres's configuration of *put* and *call* options as a menu for resolving conflicts over

---

63. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913) [hereinafter Hohfeld, *1913*]; Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L. J. 710 (1917) [hereinafter Hohfeld, *1917*].

64. For example, in the case of "jural correlatives," Hohfeld refers to and describes the following sets: right/duty; privilege/no-right; power/liability; and immunity/disability. Hohfeld, *1913*, *supra* note 63, at 28–50.

65. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1–2 (1960).

66. *Id.* at 15–19.

67. For this depiction of Coase, see Merrill & Smith, *What Happened to Property, supra* note 3, at 371–75.

68. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089–93 (1972).

entitlements, including for nonconsensual transfers of title, may be viewed as the epitome of the in personam approach to property rights.[69]

This viewpoint has not remained, however, uncontested. Probably most prominent in aiming to *reintegrate* property is the work of Merrill and Smith.[70] They argue that in rem rights are not only quantitatively but also substantively different from in personam rights, even if the property/contract demarcation is not always easy.[71] The duty to respect the property of others is typified by "impersonality and generality that is qualitatively different from the duties that derive from specific promises or relationships."[72]

Although I question in Section II.C some of Merrill and Smith's normative arguments about the *content* of property rights and the implications that these arguments have for the rules/standards dilemma, I join their view that as a *structural* matter, property differs from other types of personal obligations. As the introduction suggests, property regularly implicates numerous and often indefinite parties in the public creation, allocation, and enforcement of rights and duties in resources, in a manner that is qualitatively distinctive.

Thus, parties to contracts may differ from one another in power, size, etc., but they are at least initially identifiable voluntary parties that do share some agreed-upon goals as provided for in the contract, even if occasional disputes may later arise.[73] In contrast, affected parties to property rights are by nature such that may not have any sort of privity or voluntary relationships among them, and are often complete strangers that find themselves ex post facto entangled in a clash of competing claims regarding the asset. Beyond the fact that such parties are usually not enumerated and identifiable to one another in advance, they often turn out to be much more heterogeneous in their epistemological, cultural, and social attributes, as compared to contractual counterparts.

In fact, property reveals its true complexity not only in the allegedly straightforward exclusion "good against the world" (viewed by Merrill and Smith as the essence of the in rem right), but rather in cases in which numerous actors affected by the property regime diverge from one another in the particular *bundle* they hold with respect to the resource. For example, in

---

69. IAN AYRES, OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS 13–38 (2005).

70. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001) [hereinafter Merrill & Smith, *Interface*].

71. *Id*.

72. *Id.* at 787.

73. *See* Schwartz & Scott, *Contract Theory*, *supra* note 34, at 544.

the context of security interests, one can think about the way in which a property regime entangles a mortgagee, first and second mortgagors, holders of mortgage-backed financial instruments, future lenders and assignees, and so forth.[74] Likewise, the nature of property rights is put to a particularly challenging test in scenarios of a good faith purchaser of voidable or void title; conflicting transactions; and other types of *legal triangles* in which parties that are not in contractual privity find themselves, due to the wrongdoing of an intermediary "villain," asserting simultaneous claims to the same asset, and property law is required to prioritize the claims.[75]

Yet another facet of property law that is unique, and that also has bearing on the rules/standards dilemma, concerns property's complex public/private interface. The challenge faced by legal systems in designing property regimes is one of *simultaneously* delineating the borders of permissible-versus-impermissible government intervention with property rights, while at the same time defining the scope and nature of property rights vis-à-vis the entire spectrum of third parties. Accordingly, legal rules controlling governmental interventions with private property are not, and cannot, be hermetically detached from the private law of property. Although the interface between the private and public realms in property is highly intricate and defies clear demarcation,[76] and although I definitely do not argue that the law of governmental intervention with property should necessarily aspire for harmony with the law governing property relations among private parties in every doctrinal issue,[77] it would be safe to say that the law of governmental takings does have bearing on the way in which different actors broadly understand property entitlements and obligations also in the private realm, and vice versa.[78]

For example, in interpreting the Takings Clause in *Loretto v. Teleprompter Manhattan CATV Corp.*,[79] the U.S. Supreme Court also based

74. *See* David A. Dana, *The Foreclosure Crisis and the Anti-Fragmentation Principle in State Property Law* 77 U. CHI. L. REV. 97 (2010) (pointing to the over-fragmentation of property interests in the mortgage market, which often prohibits necessary adjustments).

75. Menachem Mautner, *"The Eternal Triangles of the Law": Toward a Theory of Priorities in Conflicts Involving Remote Parties*, 90 MICH. L. REV. 95, 95–96 (1991) (aiming to formulate a consolidating theory for dealing with these different variations of conflicts, which the author dubs also as "legal accidents").

76. Lehavi, *Puzzle*, *supra* note 4, at 2000–12.

77. *Id.* at 2017–18.

78. For a more detailed analysis, see Amnon Lehavi & Amir N. Licht, *BITs and Pieces of Property*, 36 YALE J. INT'L L. 115, 132–36 (2011).

79. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). For a more in-depth discussion of this case, see *infra* Part III.A.4.

its decision on a public/private cross-analysis of property, reasoning that the power to exclude is "one of the most treasured strands in an owner's bundle of property"—thereby relying on the common law tradition of private property—and applying it to New York state law, by holding that the laying of cable infrastructure in private land affects a taking.[80] Beyond such substantive cross-field influences, the private-public interface implicates matters of norm-making authority. Probably more prominently than in other fields of law, the collective *institutions* engaged in the development of the private law of property are essentially the same ones entrusted with property's public aspects.[81]

This duality of property is highly relevant to the issue of legal standards. As Part III demonstrates, the way in which property standards are created and then delegated for further content-giving often cuts across public/private distinctions, raising similar institutional and structural dilemmas in norms as diverse as *abuse of rights* or *good faith* on one hand, and *public use* or *investment-based expectations* on the other.

C. Why Property Theory Remains (Relatively) Silent on Legal Standards

At this point, one may be left to wonder—If legal standards exist in property as a matter of actual doctrine, and if property's distinctive nature poses intriguing challenges for the design of standards across the public-private continuum, why has property theory been lagging behind contracts or legislative theory in articulating the role of legal standards?

There are no easy answers. In Part III, I examine the two chief goals for employing standards—*incompleteness* of rights and enhancement of *value-based* design and interpretation of norms. I will suggest that *incompleteness* has been somewhat of an alien concept in property theory, and that the school within property theory that supports the in rem distinctiveness tends to be quite suspicious toward value-based jurisprudence.

Before doing so, I articulate in this section yet another reason for the insufficiency of current property literature on legal standards, and I then briefly examine the instances in which current theory does touch on some discrete themes of form-versus-substance.

To date, the most influential work on hard-edged versus subtle norms in property law has been that of Henry Smith. In a series of articles, Smith develops a sophisticated theory of two strategies for delineating property

80. *Loretto*, 458 U.S. at 435.
81. Lehavi, *Puzzle*, *supra* note 4, at 2014–21.

rights: "exclusion" and "governance."[82] In the exclusion strategy, "decisions about resource use are delegated to an owner who, as gatekeeper, is responsible for deciding on and monitoring specific activities with respect to the resource."[83] Exclusion thus uses simple, clear-cut property norms by using rough on/off signals such as territorial boundaries.[84] Under the governance strategy, property norms pick out uses and users in more detail, that is, at a higher level of precision—such that "rights to resources are defined in terms of permitted and restricted uses."[85] The main advantage of the exclusion strategy lies in its lower information costs to the large and anonymous audience of the property norms. The greater precision of the governance strategy, which is beneficial when the gains from specialization through multiple uses become more important, may nevertheless be offset by higher information costs to third parties as well as by higher measurement costs in designing and enforcing the norm.[86] Thus, in deciding whether to move from the more clear-cut exclusion norms to the subtler governance norms, the legal system has to consider whether the stakes in particular use conflicts become high enough so as to justify the otherwise higher costs of precision.[87]

In their joint work, Merrill and Smith address the choice between rules and standards based on the in rem/in personam distinction.[88] Doctrine associated with in personam rights features "highly flexible rules designed to minimize the costs of specifying and enforcing rules for the use of resources as between identified parties," whereas "in rem rights will be governed by bright-line rules designed to identify the resources subject of these rights in a way that permits coordination among a large and indefinite number of persons."[89]

Taken together, these statements entail important insights for a rule/standard discourse in property law. Nevertheless, I argue that they do not offer a comprehensive theory, one that takes into account the various considerations that typify property law.

---

82. Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002) [hereinafter Smith, *Two Strategies*].

83. *Id.* at S454–55.

84. *Id.*; *see also* Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1754 (2004) [hereinafter Smith, *Property Rules*].

85. Merrill & Smith, *Interface*, *supra* note 70, at 791.

86. Smith, *Two Strategies*, *supra* note 82, at 467–68.

87. Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1039–40 (2004) [hereinafter Smith, *Exclusion and Nuisance*].

88. Merrill & Smith, *Interface*, *supra* note 70, at 778–79.

89. *Id.*

To start with, the "exclusion" strategy is based on a normative perspective, voiced by Smith and Merrill, by which the essential *substantive* core of property lies in the right of the owner to exclude others,[90] a right that is also embedded in a fundamental *moral* perspective adopted by the modern American legal system and the American populace.[91]

This is a normative stance, which is debatable[92] even among those who hold an otherwise *essentialist* view about property.[93] Regardless of where one stands on this debate, it is significant to acknowledge the effect to which Smith's exclusion-governance discussion, which translates roughly into a rules/standards division, relies on the owner's right of exclusion as the substantive core of property, and is constrained by it. The full-scale "delegation" to the owner under the exclusion strategy assumes that rule-type norms will be designed for the core of ownership, in which the owner prevails over others and takes decisions "without having to justify it to third parties, including court and other officials."[94] Standard-like norms, typical of the governance strategy, will be tailored to "peripheral" cases or to ones concerning high stakes for specific uses.[95]

But this division does not always conform to the actual rule/standard delineation in property law. For example, the law of adverse possession deals with the *core* of physical possession. Yet beyond the fact that in certain instances, it allows the non-owner to non-consensually take possession and title (thus undermining the alleged substantive *essence* of exclusion), the adverse possession's legal norms are comprised of a mix of rule-like and standard-like provisions. The law of adverse possession is a combination of statutory and case law. Whereas the statutory component is phrased in relatively clear-cut terms (for example, setting the required duration of

---

90. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV.1849, 1852–53 (2007) [hereinafter Merrill & Smith, *Morality*].

91. *Id.* at 1853.

92. For a critique of "exclusion-centrism," see Hanoch Dagan, *Exclusion and Inclusion in Property* (2009) [hereinafter Dagan, *Exclusion and Inclusion*], *available at* http://ssrn.com/abstract=1416580 (arguing that the values that underlie the right of exclusion, such as autonomy or utility, also justify the recognition of a right of inclusion as an *internal* trait of property).

93. *See, e.g.*, J.E. PENNER, THE IDEA OF PROPERTY IN LAW 23–27, 68–76 (1997) (grounding ownership in the right to use, not necessarily in the "negative" right to exclude). Larissa Katz identifies the core of ownership in the owner's exclusivity in "setting the agenda" for the resource, and not in exclusion. Larissa M. Katz, *Exclusion and Exclusivity in Property*, 58 U. TORONTO L. REV. 275, 289–93 (2008).

94. Smith, *Exclusion and Nuisance*, *supra* note 87, at 982.

95. Merrill & Smith, *Morality*, *supra* note 90, at 1890–94.

possession), courts have supplemented statutory requirements with judicial tests, some of which are well-crystallized, and others more complicated and subjected to judicial discretion.[96] Thus, next to relatively straightforward judicial requirements for an "actual entry giving exclusive possession," the possession being "open and notorious" and "continuous for the statutory period," an additional requirement by which the adverse possession would be "adverse and under a claim of title" has been more difficult to articulate and is a matter of diverging opinions among different courts.[97] In particular, the *claim of title* requirement has implicated different judicial views about the possessor's required subjective state of mind—a decisional element that extensively involves context-specific judicial inquiry.[98]

Moving to the rule/standard strategy in administrative and constitutional property law, one sees that *the* key provision in empowering a government to take private property (again, a *core* issue implicating the right of exclusion) is a legal standard: *public use*. The judicial interpretation of this legal standard has been of course a source of fierce debate, and Part III.A.4 will articulate on the *Kelo v. City of New London* case[99] and its aftermath. For now, suffice it to say that this public facet of property law further demonstrates that while the "exclusion-governance" framework is instrumental in understanding the way in which property rights are delineated, it is not sufficient to construct a comprehensive framework for rules-versus-standards in property.

Two other brief examples of current themes in property theory may further illustrate that although issues relating to form versus substance have received increasing attention, they do not suffice to construct a comprehensive theory of legal standards in property.

First, consider the renewed interest of American jurisprudence in the *numerus clausus* doctrine. According to this principle, only certain forms—a closed list—of property rights are recognized as such by the legal system, and thus preventing private parties from exercising their nearly unbound transactional freedom to shape their property legal relationships as they deem fit.[100] Merrill and Smith seek to justify such limits in property law as offering

---

96. JESSE DUKEMINIER ET AL., PROPERTY 116–17, 120 (7th ed. 2010).

97. *Id.* at 124.

98. For the different opinions among U.S. courts on the possessor's required mental state, see *id.* at 126–29.

99. 545 U.S. 469 (2005).

100. For a survey of current scholarship on the *numerus clausus* principle, see Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1599 n.3 (2008).

"optimal standardization," balancing economic and social demand for different types of property rights and interests against the need to economize on information costs imposed on third parties that have to accommodate such diversity, in view of the in rem nature of property rights.[101] The current discourse over the *numerus clausus* principle certainly offers important functional insights on form and substance in property. However, it does not in itself dictate whether legal norms pertaining to the allocation, management, or enforcement of property rights that are included in the list (ownership, mortgage, easements, etc.) should follow a rule-like or a standard-like approach—for example, whether the rights of an owner or a mortgagor should be subjected to open-ended provisions such as *abuse of right* or *good faith*.

A second prevalent discourse that has bearing on the form/substance character of property law concerns the quandary as to whether property rights should be protected by a property rule (for example, injunction) or by the somewhat weaker liability rule (such as, court-awarded compensation).[102] The liability rule/property rule debate is significant to the rule-standard analysis both in the sense that liability rule protection is often associated with a more substantive approach of weighing ex post the specific parties' balance of interests, and also since courts, rather than legislatures, are commonly perceived as playing the essential role in facilitating a liability rule regime. However, the liability rule/property rule taxonomy is in no way synonymous with the rule/standard tradeoff. Liability rule protection can be the result of a clear-cut, generally applicable rule. Thus, for example, the historical common-law categorical preference for monetary remedy in case of a breach of contract (rather than the later-developed, equitable specific performance),[103] can be viewed analytically as a rule—a clear norm. This is also the case with a constitutional provision categorically limiting the remedy in case of a taking to "just compensation," broadly construed as objective "fair market value."[104] Moreover, the focus of the property

101. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 24–42 (2000) [hereinafter Merrill & Smith, *Numerus Clausus*].

102. *See* Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. 1285, 1289–95 (2008) (providing a concise discussion of this vast literature); *see also* AYRES, *supra* note 69 (articulating a prominent current economic analysis of the property rule/liability rule tradeoff).

103. *See* THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 689 (1956).

104. *See* Katrina M. Wyman, *The Measure of Just Compensation,* 41 U.C. DAVIS L. REV. 239, 252–56 (2007).

rule/liability rule discourse on ex post judicial remedies disregards the role that form versus substance plays in the initial design of legal norms—typically by the legislature. Hence, while the two themes are definitely interconnected, the property rule/liability rule discourse provides only limited guidance to understanding the role of legal standards.

The analysis in this part has pointed to a systematic discrepancy between the significant presence of standards in property as a matter of positive law, and the piecemeal nature of the theoretical discourse of these themes in property theory. To correct for such incongruity, Part III offers a comprehensive analysis of the chief justifications for employing legal standards in property law. It is followed by Part IV, which illuminates the unique *institutional structure* within which such standards operate.

III. THE GOALS OF LEGAL STANDARDS IN PROPERTY

A. Filling in Incomplete Property Rights

Incompleteness is a central theme among lawyers and economists working in contract law.[105] In contrast, this term is nearly an alien concept in property jurisprudence.[106] This is of course not to say that public or private decision-makers do not realize the difficulty of devising a hermetically sealed legal regime of property rights and duties. These issues arise either ex ante, for example, when a legislator has to decide how to design a property regime in resources such as land, intellectual property, or the electromagnetic spectrum; or ex post, when parties find themselves asserting competing interests or claims regarding the same asset. But although doctrinal property law deals regularly with uncertainty and conflict,[107] it is not commonly conceived theoretically as a field *incomplete* by nature.

---

105. Legal works are cited in Part II.A. For examples of prominent economics scholarship on this matter, see also Oliver Hart, *Incomplete Contracts and Public Ownership: Remarks, and an Application to Public-Private Partnerships*, 113 ECON. J. 69, 70 (2003) and PATRICK BOLTON & MATHIAS DEWATRIPONT, CONTRACT THEORY 489–552 (2005).

106. The sole exception is probably the work of economist Antonio Nicita. *See generally* Antonio Nicita et al., *Towards a Theory of Incomplete Property Rights* (unpublished manuscript) (on file with author), http://ssrn.com/abstract=1067466 (follow hyperlink for "One-Click Download" to download cited article) (last visited October 3, 2011).

107. *See, e.g.*, Hanoch Dagan & Michael Heller, *Conflicts in Property*, 6 THEORETICAL INQUIRIES L. 37, 37–38 (2005).

This prevailing conception is due not only to the legacy of Blackstone's absolutistic concepts of property,[108] or to the traditional civil law metaphor of the unified "box of ownership."[109] Even though it was practically always clear that property rights are never absolute so that the interests of an owner should at times accommodate or even yield to the interests of others,[110] property was analyzed as offering a complete legal ordering.

The bundle of rights concept, although viewed as "disintegrative," is not necessarily antagonistic to this viewpoint. It is true that Llewellyn's "situation sense" analysis, discussed above,[111] views the judicial inquiry as instrumental to filling property norms with content ex post. But such an approach is not self-binding for the *bundle of rights* concept as a whole. When one focuses on the normative aspects of the bundle of rights theory, according to which *property* and *ownership* have no essential predetermined meaning, such that rights and duties can be allocated in various forms by public decision-makers, one may still aspire to design such legal regimes in a *complete* manner.

Consider, for example, a rent-control statute. Although such pieces of legislation have been a source of a fierce normative debate, they are nevertheless a persistent legal phenomenon in the Unites States and outside of it.[112] A rent-control statute, which restricts a landlord from evacuating a tenant unless a certain legislative specific scenario occurs, or that limits the landlord from raising the rent at more than a fixed percent per year, redistributes several sticks between the landlord and the tenant (for example, the right of decision-making and the right to income from the asset). But to the extent that such a division is articulated upfront in a statute, it may still keep intact a *complete* and clear delineation of the property rights and duties between the relevant parties. This means the case for *complete* ordering is not necessarily dictated by a particular normative agenda.

---

108. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (Univ. Chi. Press 1979) (1765) ("[Property is] that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.").

109. *See* John Henry Merriman, *Ownership and Estate (Variations on a Theme by Lawson)*, 48 TUL. L. REV. 916, 927 (1974).

110. *See* Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 603–06 (1998) (arguing that Blackstone's absolutistic concept was an abstract one, not a depiction of the complex legal reality of his time).

111. See *supra* text accompanying notes 26-27.

112. *See generally* ANTHONY DOWNS, RESIDENTIAL RENT CONTROLS: AN EVALUATION 8, 12 (1988).

But regardless of one's normative stance, as a functional matter, property cannot always conform to such tidiness or completeness. Even the most careful legal design would be unable to predict, allocate, and decide in advance all possible states-of-the-world regarding the bundle of property rights. Again, this problem is not dictated by a particular normative agenda. Assume, for example, that we are generally inclined to creating *absolute* ownership rights in land. Still, in a dense, industrialized, and dynamic world, we are likely to encounter numerous types of conflicts *between* landowners, not all of which can be predicted in advance or solved privately due to transaction costs.

Conversely, when we normatively aim at creating a more *balanced* set of property rights and duties to achieve complex or multiple goals, we are also often unable to crystallize in advance all the contingencies that may result. An example, which I discuss in Part III.A.1 below, concerns the granting of copyright to creators of literary works to encourage creativity, but at the same time allowing the public to utilize some degree of this knowledge by carving out certain limits to this right. It is in such cases that the use of a legal standard—here, a *fair use* provision—may prove generally useful to address such inherent incompleteness in addressing potential contingencies.

To better account for this *incompleteness*, while acknowledging the potential price tag that such a strategy entails—chiefly, decreased legal certainty—this section now sets out to offer a tentative, non-exhaustive taxonomy of incompleteness in property law.

1. Incomplete Delineation of Private, Overlapping Uses

As mentioned, the allocation of rights and duties pertaining to a certain resource cannot always be carved out in advance in a neat manner, and transaction costs may often hinder an ex post private consensual ordering when a specific dispute arises.

One facet of this type of incompleteness is illuminated in Yoram Barzel's work, which extends contractual incompleteness to the control and management of resources. According to Barzel, a resource consists of multiple attributes, not all of which are necessarily captured by contract, and are hence left in the *public domain*.[113] The party that is able to capture these attributes in view of such imperfect delineation may be viewed as the

113. YORAM BARZEL, ECONOMIC ANALYSIS OF PROPERTY RIGHTS 90–96 (2d ed. 1997).

"residual claimant," or as holding the "economic property rights" to these attributes.[114]

But property incompleteness deriving from private overlapping uses goes well beyond the contractual ordering of resources, and in fact shows its quintessential in rem nature when the parties in conflict have no prior consensual baseline whatsoever.

Probably the most typical setting is that governed by the law of nuisance. Though often slanted as "so amorphous and protean so as to make impossible a description of the area which it covers"[115] the vagueness of nuisance law is not simply a result of historical evolution,[116] or of contemporary legislative incompetence or neglect. In a world that has so many potential cross-border interactions and influences, it is practically impossible to meet the challenge of defining when does an "invasion of another's interest in the private use and enjoyment of land"[117] amount to an infringement of property rights by using only up-front clear-cut norms. The confusion and inconsistency typifying Anglo-American law need not of course be praised, but it does attest to the fact that private, overlapping uses cannot be governed only by *rules*. I discuss this dilemma further in Part IV.B.3.

Pragmatic infeasibility in regulating resources that are bound to collide in one way or another is, however, not the only cause for incompleteness in property. Often, the design of a property regime is driven by a normative viewpoint that explicitly does not want to entrust the owner with complete control over the various uses and attributes of a resource, but nevertheless struggles in ex ante dividing up the *bundle* to achieve such a balance.

U.S. copyright law, and its fair use doctrine, is a case in point. Protecting creative works by granting the creator monopolistic-like property rights over the use of the resource facilitates a mechanism for internalizing the benefits of innovation.[118] But this instrumental justification does not stand alone. Since the end of innovation is the promotion of knowledge in current and future society, copyright is intrinsically limited. Ownership is not perpetual

---

114. *Id.*

115. Warren A. Seavey, *Nuisance: Contributory Negligence and other Mysteries*, 65 HARV. L. REV. 984, 984 (1952).

116. *See* William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 999 (1966) (portraying the history of public nuisance as being a "catch-all low grade criminal offense").

117. RESTATEMENT (SECOND) OF TORTS § 822 (1979).

118. *See* Peter S. Menell & Suzanne Scotchmer, *Intellectual Property Law, in* 2 HANDBOOK OF LAW AND ECONOMICS 1473, 1476–77 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

but time-limited; law excludes certain types of information and knowledge from counting as protected works; and more to our point, it limits the exclusionary nature of the right during its term, chiefly by the doctrine of *fair use*.[119]

The legislative design of fair use in the Federal Copyright Act can be viewed as combining both rules and standards, but seems to be dominated by the latter.[120] The Act does enumerate a non-exhaustive list of types of uses (for example, use by reproduction) and of purposes of the non-owner use (for example, criticism, comment, news, teaching, or research) that may qualify as a fair use that is not an infringement of copyright.[121] But the determination of whether "the use made of a work in a particular case is a fair use" rests on the consideration of four factors:

> (1) the purpose and character of the use (e.g., commercial or non-profit educational); (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use on the potential market for the copyrighted work or on its value.[122]

Congress has not provided further guidelines for filling these factors with content, in the implicit expectation that a common-law like method would crystallize the fair use doctrine over time.[123] This has not happened to date. Several legislative attempts and scholarly calls to somewhat crystallize the fair use doctrine have not materialized.[124] But the disappointing result to date of content-giving to the doctrine does not indicate that the initial strategy of opting for standard-like norms was necessarily a mistake. Any attempt for a hermetically sealed set of rules to exhaustively tackle the multiple contingencies that typify the dynamic world of creative works would likely have become obsolete right from the outset. The relative failure so far to give fuller content to the fair use standards by top-down institutions or by bottom-

---

119. Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1494 (2007).

120. *See* 17 U.S.C.A. § 107 (West 2010).

121. *Id.*

122. *Id.*

123. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 596 (1994) (Kennedy, J., concurring).

124. For a survey of these attempts, and yet another call to crystallize the doctrine through the use of "fair use harbors," see Parchomovsky & Goldman, *supra* note 119, at 1502–24.

up industry organizations is in itself disappointing, but it also illustrates the severity of the incompleteness embedded in the Act's agenda.[125]

Indeed, an oft-made criticism of the Digital Millennium Copyright Act (DMCA),[126] concerns what seems to be a faulty rule/standard legal design. Aiming at prohibiting circumvention of technological protection measures, the Act does create certain up-front *safe harbors*, but those can hardly address the systemic problems of incompleteness in rights' delineation. For example, when an Internet search engine is barred from copying certain copyright-protected texts or images for the purpose of indexing, it is in effect prevented from engaging in *any* sort of copying on the Web, including of non-protected content, thus granting a certain plaintiff over-broad protection and power of veto that goes well beyond its own proprietary content.[127] The lack of a "fair access" legal standard, equivalent to the *fair use* standard in other settings of copyright, creates a suboptimal regime that inadequately addresses the issue of incompleteness.[128]

2. Incomplete Allocation of Future, Unforeseen Uses

The above discussion dealt with types of simultaneous uses that can be generally foreseen by a legislator or another public decision-maker in crafting the legal regime, even if some contingencies may challenge the doctrine and require dynamic adjustments (for example, do aesthetic nuisances fall within "classic" nuisance principles).[129] In contrast, the design of property faces an inherently different task in addressing categorically unforeseen types of uses, resulting from fundamental social, economic, or technological changes.

Antonio Nicita et al. define this problem as one of "yet un-attributed jural relations over newly discovered uses."[130] They argue that this issue

---

125. Some explanations for the *fair use* doctrine focus on the pragmatic transaction costs problem. *See* Wendy Gordon, *Fair Use as a Market Failure: A Structural and Economic Analysis of the* BetaMax *Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1653–54 (1982). But the normative "balanc[ing]" approach does seem to dominate this doctrine. *See* Menell & Scotchmer, *supra* note 118, at 1509.

126. Digital Millennium Copyright Act, Pub. L. No. 105–304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.)

127. Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information*, 85 TEX. L. REV. 783, 793–96, 800–03 (2007).

128. *See* Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 525–27 (2004).

129. *See, e.g.*, Robert D. Dodson, *Rethinking Private Nuisance Law: Recognizing Aesthetic Nuisances in the New Millenni*um, 10 S.C. ENVTL. L.J. 1, 1–3 (2002).

130. Nicita et al., *supra* note 106, at 11.

poses a true challenge when the new use creates externalities on others, and call to refrain from a sweeping attribution of the rights over such uses to the owner as holder of "residual control rights over the asset."[131] Although their general normative approach to allocation of future uses is sensible, their own definition of "newly discovered uses" is in effect overbroad (for example, applying it to the planting of a tree whose branches cross over into a neighbor's lot, thus creating an externality and a "new" dispute).[132] This conceptual confusion undermines an important distinction regarding incompleteness of property rights, one that also bears on the potential rules/standards strategy in allocating rights to yet unknown uses.

A contemporary type of such incompleteness concerns the challenges posed to intellectual property, and copyright in particular, in view of major technological changes over the past few decades. One example is private home-taping in the era of the digital music revolution.[133] Although piracy and copyright infringement are by no way a new theme, the issue of downloading, storing, and playing digital files containing copyright-protected contents could not simply build upon previous legislative provisions or otherwise be sorted out through broad-based grassroots, formal or informal norms among copyright holders, manufacturers of digital music devices, and consumers.

In the analogical-recording-era case of *Sony Corp. of America v. Universal City Studios*,[134] the Supreme Court rejected a contributory infringement suit against Sony as manufacturer of the Betamax videocassette recorder (VCR), reasoning that the VCR was capable of substantial non-infringing uses.[135] Following this, and especially in view of the digital technology revolution as of the late 1980s, Congress had set out to enact the 1992 Audio Home Recording Act (AHRA).[136] The Act aims at balancing the protection of interests of copyright holders with the prevention of an excessive chilling effect on the development of new technology. It does so by mandating technological safeguards against reproduction of first-generation copies of copyrighted material; compensating copyright holders for lost revenues due to home-taping through the payment of royalties collected in sales of digital audio recording devices and media; and granting

131. *Id.* at 22–25.

132. *Id.* at 13–14.

133. *See, e.g.*, Zachary Williams, *Hometaping in the Twenty-First Century: Updating the Audio Home Recording Act to Address Emerging Technologies*, 36 AIPLA Q.J. 77 (2008).

134. 464 U.S. 417 (1984).

135. *Id.* at 456.

136. Audio Home Recording Act of 1992, 17 U.S.C. §§ 1001–1010 (2000).

immunity to both manufacturers who follow AHRA and to consumers who engage in home-taping.[137]

But the rapid advance of technology and the incompleteness of rights allocation are continuing to challenge this field. In the 1999 case, *Recording Industry Association of America (RIAA) v. Diamond Multimedia Systems, Inc.*,[138] the Ninth Circuit rejected a copyright infringement claim against the manufacturer of Rio PMP 300, an early version MP3 digital music player, for failing to meet the requirements of AHRA. The court reasoned that the term "digital audio recording device" does not apply to the Rio, because it "can only make copies from a computer hard drive."[139] In view of legislative exemption in AHRA to a personal computer, whose "recording function is designed and marketed primarily for the recording of data and computer programs," the court held that the Rio cannot qualify as a "digital audio recording device."[140] However, since in effect the computer and the Internet play nowadays a major role in the recording and playback of music, the effectiveness of AHRA has been diminished, bringing about more uncertainty and renewed calls for a comprehensive reform.[141]

My point here is *not* that new uses will necessarily result in a weakening of previously broad protection of ownership. For example, whereas the adaptation of the *ad coelum* rule for subterranean oil and gas fields involved state-enforced "unitization" schemes to resolve problems of inefficient over-fragmentation, it maintained the rights of the group of surface owners to receive the income from these resources.[142] Rather, the main lesson is that the process of crystallizing incompleteness is often of a different nature when future, unforeseen uses materialize. This type of incompleteness may require a reconsideration of the fundamentals of property law, and hence may be generally *less* appropriate for a strategy that relies on a preexisting legal standard whose content is filled in by other institutions. It may rather require the legislature itself to promulgate entirely new rules, when formerly unforeseen yet now systematic contingencies arise.

---

137. *See* Williams, *supra* note 133, at 84–86.
138. 180 F. 3d 1072 (9th Cir. 1999).
139. *Id.* at 1081.
140. *Id.* at 1078.
141. Williams, *supra* note 133, at 92–98.
142. *See generally* Gary D. Libecap, *Unitization*, *in* 3 NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 864 (Peter K. Newman ed., 1998); Dana, *supra* note 74, at 111–14.

3. Incomplete Property Rights in the Public Regulation Context

Incompleteness in the delineation of property is not restricted to interpersonal relations. Some of its most challenging facets arise in the context of public law, with significant implications for the choice between standards and rules in the design of the legal regime.

Consider what is often ill reputed as the "muddiest" topic of all in property law: the regulatory takings doctrine.[143] Probably no other doctrine seems to embrace such a multiplicity of legal standards. According to the three-prong test developed in *Penn Central Transportation Co. v. City of New York*,[144] in deciding whether an adversely-affecting regulatory measure amounts to a taking, the court looks at: (1) "[t]he economic impact of the regulation on the claimant"; (2) the extent of interference with "distinct investment-backed expectations"; and (3) "the character of the governmental action."[145]

Although a rule-like exception has been carved in *Lucas v. South Carolina Southern Council*, by which a regulation amounts to a "taking per se" when it "denies all economically beneficial or productive use of the land," the extremely narrow applicability of the latter rule leaves the *Penn Central* standards to dominate this doctrine.[146]

The enormous volume of debate over this doctrine, and the consequent frustration from its ad-hoc nature and the inability of courts to introduce more certainty and predictability into it, have tended to focus on the paradigmatic considerations of physical takings law, that is, whether the regulation imposes an "unfair" burden of the owner; what effect does an uncompensated regulation have on economic investment incentives; and whether the regulation implicates a majoritarian bias against the owner.[147]

---

143. *See* Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697 (1988).

144. 438 U.S. 104 (1978).

145. *Id.* at 124–25.

146. 505 U.S. 1003, 1017 (1992).

147. For the fairness issue and the problem of political power in this context, compare WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS (1995) with Carol M. Rose, *Takings, Federalism*, Norms, 105 YALE L.J. 1121, 1131–39 (1996) (book review) (criticizing Fischel's view that local regulations should be more heavily scrutinized than state- or federal-level regulations, and arguing that exit and voice mechanisms are often more feasible locally). For the investment incentives issue, see R.S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law*, 9 N.Y.U. ENVTL. L.J. 449 (2001).

The problem of regulatory takings can, however, be conceptualized also as one of *incompleteness* of property rights, in a way that may also shed light on the type of norms (rule-like or standard-like) that may govern it, and on the ability of public decision-makers to provide thicker content and better future-looking guidance to parties.

To illustrate the difference that the incompleteness viewpoint makes for government regulation of property, consider that in the case of land, one can discern quite a consistent categorical difference in the judicial approach to *present* uses vis-à-vis *future* uses. With respect to the regulation of existing uses, the *vested rights* doctrine examines the extent to which the implementation of a project is sufficiently far along, and if that is the case, it shields the owner against a subsequently enacted regulation as if the existing use were already intact.[148] Under the closely-related doctrine of *amortization*, if the government wishes to eliminate a preexisting use that does not conform to a new zoning scheme, without having to pay compensation, it must allow the affected owner to continue her use for long enough to amortize her investment—a relatively clear-cut norm.[149] In contrast, when a regulation frustrates a *future* use, for example, when a rezoning scheme is denied due to considerations of growth control, environmental concerns, or historic preservation,[150] or when a moratorium prohibits new developments in an entire area for a certain period of time,[151] the court follows the much vaguer and ad-hoc *Penn Central* three-prong test.

This distinction has been criticized, and when issues of fairness, investment incentives, or politics are studied in isolation, it may indeed seem somewhat arbitrary.[152] But there is at least one sense that may explain why courts find it easier to govern existing uses by relatively clear-cut norms, whereas the legal regime regarding regulation of future uses seems so chaotic. This is so because existing uses are ones that have already been allocated, whereas future uses feature a genuine problem of incompleteness.

---

148. *See generally* VICKI L. BEEN & ROBERT C. ELLICKSON, LAND USE CONTROLS: CASES AND MATERIALS 202–09 (3d ed. 2005).

149. *Id.* at 197–202.

150. This was the specific controversy at stake in *Penn Central Transportation Co. v. City of New York*. 438 U.S. 104 (1978).

151. *See, e.g.*, Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

152. Chris Serkin argues that existing uses are not worthy of stronger protection, and calls to apply to existing uses the general tests of the Substantive Due Process Clause or the regulatory takings doctrine. *See* Christopher Serkin, *Existing Uses and the Limits of Land Use Regulation,* 84 N.Y.U. L. REV. 1222, 1258 (2009).

It is thus no wonder that courts are unable to clearly answer what seems to be a pretty straightforward question: what kind of legal right, if any, would a person have to develop her privately-owned land?[153] If we avoid extreme positions, according to which land development is either a purely governmentally granted prerogative or rather an inherent stick of ownership, then it is obvious that incompleteness plays a prominent role in the dilemma faced by public decision-makers. It dictates the limits on setting up a clear criterion for numerous contingencies that may arise for future resource uses, and sheds light on the tendency to defer to a later stage the crystallization of the governing norms.

It should be emphasized, however, that the use of standards *does not* translate automatically to weaker protection of private property rights, and vice versa. Thus, for example, the right of indemnification to landowners in German planning law is governed chiefly by a standard: *breach of faith*. Nevertheless, this regime grants landowners a broad right to compensation for adverse regulation, going way beyond U.S. doctrine.[154]

4. Incompleteness in Reallocating Property Rights by Eminent Domain

Incompleteness and the use of standards may also illuminate another high-profile theme in the public realm of property: the content of the Fifth Amendment's *public use* provision as a constitutional limit on the exercise of the power of eminent domain.[155]

The judicial interpretation of the public use requirement is a hotly contentious issue. The *public use* test serves not only as the chief substantive restraint on what is typically considered the most aggressive government intervention with private property. It also signifies more broadly the scope of individual liberty from collective coercion, especially in view of property's unique position in American popular discourse as the "guardian of every other right."[156] Thus, the public outrage and state-level legislative backlash

153. *See* Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of* Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 653, 675–76 (2005).

154. *See* Gerd Schmidt-Eichstaedt, *The Law on Liability for Reduced Property Values Caused by Planning Decisions in the Federal Republic of Germany*, 6 WASH. U. GLOBAL STUD. L. REV. 75, 85–86 (2007).

155. U.S. CONST. amend. V, § 4.

156. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 26 (2d ed. 1998). For a critical analysis of the prominence of property as a "key" right, see Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329 (1996).

following *Kelo v. City of New London*,[157] which validated the use of eminent domain for "economic development," seems to have reinvigorated the debate over other core themes in American society, including civil liberties, market economy and federalism.[158]

Beyond the debate over the current content of this norm, the jurisprudential and institutional nature of the *public use* legal standard clearly demonstrates the issue of incompleteness in the allocation and reallocation of property. The slanting of the *public use* norm as prone to inherent abuse or as one that is simply "useless,"[159] misses out a genuine legal design dilemma that a federal/state constitution drafter or legislator faces in delineating the future contours of property and potential government interference with it.

The fact that the Fifth Amendment does not specify in advance what types of uses would qualify as *public*, but rather delegates it to later stage administrative decisions supervised by judicial review and interpretation of the norm, is not necessarily oriented at a certain substantive result. A rule-like public use provision could have elaborated a non-exhaustive long list of uses, just as a judicial interpretation of a textually open-ended norm may not necessarily be committed to broad deference to government.

That said, what is exactly the type of incompleteness that the *public use* norm tries to deal with? How is the legal standard filled with content to identify those ends that qualify as public uses and that may require government coercion to implement them?

Consider, first, that even proponents of strong private property rights generally agree that the use of eminent domain, as a way to circumvent hold-outs or other types of monopolistic behavior, is less problematic when the good or service for which the power of eminent domain is employed possesses the economic traits of a public good, or otherwise requires strong

---

157. 545 U.S. 469 (2005). *See generally 50 State Report Card: Tracking Eminent Domain Reform Legislation Since Kelo*, CASTLECOALITION.ORG, http://www.castlecoalition.org/index.php?option=com_content&task=view&id=2412&Itemid=1 (last updated July 16, 2009) (listing a report of post-*Kelo* legislative reforms). *But see* Edward J. López et al., *Pass a Law, Any Law, Fast!: State Legislative Responses to the Kelo Backlash*, 5 REV. L. ECON. 101, 102–03 (2009) (noting that, in effect, many of these new laws do not substantively increase the protection of individual property against economic development takings).

158. Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. 1704, 1704–06 (2007).

159. *See* Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1412 (2006).

public intervention in the ongoing provision of the use.[160] Yet, even if one is driven by a strict *genuinely public* constraint, formerly-unknown types of uses may develop due to new technologies, public demand, or other exogenous changes.

In 1791, the drafters may have thought about taking private property for uses such as roads, navigable water routes, or military bases. But with the rapid development of technologies during the nineteenth and twentieth centuries came new public uses and consequently the occasional need to non-consensually reallocate property rights in lands: one may consider railroads, dams, infrastructures,[161] and other types of public utilities.[162]

The *Loretto v. Teleprompter Manhattan CATV Corp.* case exemplifies how technological developments thicken the content of the *public use* standard over time, but do not necessarily translate into unlimited deference to government.[163] In *Loretto*, the Supreme Court reviewed section 828 of the 1973 New York Executive Law enacted to facilitate tenant access to cable television.[164] Section 828 provides that a landlord may not "interfere with the installation of cable television facilities upon his property . . . ."[165] The Court accepted the New York Court of Appeals' determination that section 828 serves the legitimate purpose of "rapid development of and maximum penetration by a means of communication which has important educational and community aspects"—that is, a new type of *public use*.[166] At the same time, the Court held that this provision "so frustrates property rights that compensation must be paid" under the Takings Clause,[167] and concluded that state-authorized permanent invasions, including the installation of cable

160. *See* RICHARD A. ESTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 166–69 (1985) ("A large core of activities falls within this conception of public goods, so the economic conception, however interpreted, easily legitimates the state's exercise of its eminent domain power.").

161. *See* Thomas W. Merrill, *The Economics of Public Use,* 72 CORNELL L. REV. 61, 97–98 (1986) (noting the high proportion of land assembly cases, and especially of public utilities and other generally uncontested public uses, in the use of eminent domain powers).

162. *See* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. POL'Y REV. 1, 9–13 (2003).

163. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426–27 (1982).

164. N.Y. EXEC. LAW § 828 (McKinney Supp. 1981–1982). Prior to 1973, Teleprompter obtained installation permits from property owners along the cable route in return for a standard rate of 5% of the gross revenues that it realized from the particular property. *Loretto*, 458 U.S. at 422–24.

165. *Loretto*, 458 U.S. at 423–24 (citing N.Y. Exec. Law § 828(1) (McKinney Supp. 1981–1982)).

166. *Id*. at 425.

167. *Id*. at 425–26.

wires, constitute a taking per se.[168] Thus, the role that a legal standard such as *public use* may play in addressing incompleteness in the allocation or reallocation of property rights is manifested even in cases that generally seek to consecrate the right to exclude.[169]

It should be noted, however, that especially as far as states are concerned, the constitutional *public use* provision could be complemented by certain hard-edged norms, enacted through a constitutional amendment or a specific statute. This was the case, for example, with the post-*Kelo* backlash, which brought a number of states to amend their constitution or to enact statutes to specifically limit the use of eminent domain for private economic development.[170] This strategy still leaves, however, a central role to the *public use* standard as a property mechanism, which is filled over time with court-made content.

Incompleteness implicates, therefore, both the private and public aspects of property. The employment of legal standards, which are filled with content over time, may thus serve as a sensible strategy to address the dynamic aspects of delineating property rights and duties. At the same time, legal standards entrench legal uncertainty, and may thus undermine the systematic requirement for sufficient predictability in property. Following the discussion in the following section about another fundamental justification for using legal standards—promoting *value-based* jurisprudence—Part IV addresses such concerns by offering an *institutional* analysis of the way in which legal standards can maintain the proper balance between stability and dynamism by looking at the *bottom-up* and *top-down* institutions that engage in the task of filling standards with content over time.

B. Propping up Substantive Legal Reasoning

Part II.A briefly portrayed the discourse on form versus substance in Anglo-American jurisprudence.[171] To better understand the role that legal standards may play in promoting a more *substantive* approach to property design, one needs to identify, first, the general features of employing standards in this context, and second, the specific functional and institutional constraints that apply to such a design strategy in property law.

---

168. *See id.*
169. *See* DUKEMINIER ET AL., *supra* note 96, at 972–73.
170. *See supra* note 157.
171. *See supra* Part II.A.

Curtis Bridgeman draws a distinction between two types of objections to (over) formalist jurisprudence.[172] One is "norm-insensitivity," according to which the application of rules without regard to their normative justification may lead to wholesale arbitrary or unjust results.[173] The second is "context-insensitivity," meaning that applying rules regardless of the specific context may result in individual injustices.[174] Viewing the latter strategy as unacceptable since it undermines the planning function of law that is central to effective governance, Bridgeman argues that the common law has been able to develop the law of contracts over time; balancing values such as morality or justice with the maintenance of systematic and clearly-communicated guidance for future litigants.[175]

What might typify a norm-sensitive construction of property through legal standards? For example, in trying to make sense of the continuing vagueness of the regulatory takings doctrine, Mark Poirier identifies this constant challenge as driven by a "dialogic" conception of law.[176] Property is "a kind of social relation that is renegotiated over time as circumstances change," so that the regulatory takings debate can be rephrased in terms of "the renegotiation of the public regarding-limits on private property, or as a renegotiation of private property itself." Therefore, those who see an ongoing dialogue about property as desirable should favor standards because switching to clear rules "would make renegotiation considerably more difficult," and thus undermine the "sense of commitment to the community."[177]

Substantive value-based jurisprudence comes, however, with the price tag of decreasing stability and predictability. In this respect, property law may face potentially greater challenges in employing legal standards as compared to other fields of law. For example, legal actors who are displeased with a *substantive* jurisprudential approach taken by a court in interpreting contract law can more easily opt out of this regime, by resorting to private ordering mechanisms that will guarantee them better predictability.

This is not the case in the property context. To the extent that a court sets up certain requirements for a party to qualify as a *good faith purchaser* or to register a mortgage, affected parties are much more constrained in their

---

172. Bridgeman, *supra* note 38, at 1454–56, 1476–80.

173. *Id.*

174. *Id.*

175. *See id*. at 1456.

176. Mark R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 100–01 (2002).

177. *Id.* at 102–03.

ability to circumvent such norms. It may call for extra caution, or at least better awareness, in entrusting decision-making institutions with the power to fill property standards with in rem binding content.

Trying to bridge the tension between value-based jurisprudence and the fear of lack of systematicity in the design of property law, Hanoch Dagan offers a sophisticated approach, which he depicts as relying on the legal realism tradition.[178] Dagan argues that both existing and developing property institutions "are subject to an ongoing reconstructive inquiry, one in which lawyers identify and reevaluate their unifying normative ideals and the ways in which their particular configurations respond to these ideals."[179] Dagan is, however, cautious about the risk of turning property into a "formless bundle of rights" for the sake of promoting underlying societal values, just as he opposes a "uniform bulwark of exclusion/exclusivity."[180] What he suggests is to divide property into a "set of institutions—property institutions—bearing family resemblances."[181] Each such property institution would entail a specific composition of entitlements determined by the "unique balance of property values characterizing the institution at issue."[182] Thus, while arm-length transactions between strangers in the market focuses on values of autonomy or negative liberty, institutions such as martial property are—or should be—built around more communitarian values, so that their legal ordering would be crafted accordingly.[183]

How does one evade over-vagueness under this approach? Dagan argues that "law is justified in limiting the number of these property institutions exactly because of their role as default frameworks of interpersonal interaction that consolidate people's expectations and express law's normative ideals for core types of human relationships."[184] Moreover, addressing the level of rigidity of specific norms within each legal category, Dagan asserts that "legal realists acknowledge that law's use of categories, concepts and rules is unavoidable and even desirable, and that in most cases many legal reasoners should simply follow rules."[185] Rule-oriented realism is

178. Hanoch Dagan, *Property and the Public Domain*, 18 YALE J. L. & HUMAN. 84, 88 (2006) [hereinafter Dagan, *Public Domain*].

179. *Id*. at 88.

180. Dagan, *Exclusion and Inclusion*, *supra* note 92, at 10.

181. *Id*. at 10.

182. *Id*. at 10–11.

183. Dagan, *Public Domain*, *supra* note 178, at 88-89. . For the institution of marital property as featuring values of community, autonomy, and equality, see Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75 (2004).

184. Dagan, *Public Domain*, *supra* note 178, at 86.

185. Dagan, *Taxonomy*, *supra* note 5, at 156.

not a contradiction in terms, goes the argument, "so long as we remember that the (limited) stability of rules at any given moment relies on, and is thus contingent on, a convergence of lawyers' background understandings and not on the determinacy of the doctrine as such."[186]

Can such an approach indeed succeed in squaring the circle by maintaining both a sufficient level of security and predictability while at the same time adhering to a substantive approach that looks to underlying values in developing property doctrines? I will not engage here in a full-scale evaluation of this theory. A priori, I share the view that at least some level of a *substantive* approach could be adopted into property law without undermining the basic structure of a legal regime that is based on in rem rights and duties, and that is difficult to opt out from. Accordingly, legal standards may be adopted as a strategy for enabling such a jurisprudential task—and I would tend to think that although Dagan speaks of a "rule-oriented realism," it is clear enough that some measure of legal standards would have to be employed to allow for an effective dynamic interplay between legal norms and underlying values.

Moreover, as I have argued with respect to the incompleteness justification for legal standards, here too, I would assert that the use of standards to promote *substantive* jurisprudence is not committed to or dictated by a particular normative agenda. It is not necessarily a progressive plot in the guise of legal design. It is certainly true that in some cases, the embracement of standard-like provisions serves a certain distributive purpose. A leading example is the equitable right of mortgage redemption developed by the English courts of equity as of the early seventeenth century—a "muddy" standard-type intervention promoting a societal viewpoint of "flexibility, forgiveness, and willingness to make adjustments that long-term dealings normally offer."[187] But this does not mean that standards necessarily work to derogate from entrenched property rights, and vice versa. Thus, for example, Gideon Parchomovsky and Kevin Goldman argue that the vagueness of the *fair use* standard in copyright law leads to over-deterrence of non-owners from using copyrighted work, thus practically entrenching the owners' control.[188]

I view the chief challenge of promoting some level of *substantive* jurisprudence in property law through the employment of legal standards to

---

186. *Id.* at 156–57.

187. Carol M. Rose, *Crystals and Muds in Property Law*, in PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OR OWNERSHIP 199, 203–05, 221–25 (1994).

188. Parchomovsky & Goldman, *supra* note 119, at 1485–87.

be an *institutional* matter. By the term *institutions*, I do not refer to Dagan's division into legal categories, but rather to institutions in the simple sense: those *bottom-up* and *top-down* collective-making entities that take on the task of filling the initially vague norm with content over time, communicating this content, and gaining wide acceptance to it from their audiences.

Part IV therefore moves to study the work of such institutions in the property context, focusing on their capabilities and constraints from both an internal institutional viewpoint and an external one (that is, the relationships of these institutions with other entities who claim authority to create norms). It then builds on this institutional analysis to reevaluate several prominent examples of legal standards in existing property law doctrines.

IV. TOWARD AN INSTITUTIONAL ANALYSIS OF PROPERTY LEGAL STANDARDS

A. Identifying the Institutional Source of Content Giving to Property Standards

This section sets out to identify and analyze two broad types of institutions that regularly engage in norm-making, focusing on the role these institutions play in property ordering. The term *bottom-up institutions* refers to non-governmental entities such as merchant associations or residential community associations, which create norms that may become formally applicable either directly by industry- or community-wide internal mechanisms, or indirectly through the adoption of such norms through *custom* or *usage* provisions in general legislation. For this purpose, I discuss only norms that are formally binding, and not the numerous types of bottom-up entities that engage in setting-up *informal* rules of conduct that are enforced extra-legally.[189] By the term *top-down institutions*, I refer to state institutions that are entrusted with the governmental authority to create binding law, chiefly constitution-drafters, legislatures, administrative agencies, and courts.

189. For a discussion of such informal property rule-making, see Amnon Lehavi, *How Property Can Create, Maintain, or Destroy Community*, 10 THEORETICAL INQ. L. 43 (2009) (discussing informal property norms within *intentional communities*, *planned communities*, and *spontaneous communities*).

1. Bottom-up Private Ordering

Private ordering of property relationships may substantially diverge among different kinds of bottom-up groups and communities, regarding both their institutional aspects and the substantial and procedural norms they produce. Despite these differences, some generalizations may be made about the potential prospects and challenges of private property ordering in employing legal standards to address incompleteness and some level of substantive jurisprudence. I argue that the stronger the: (1) *established institutional authority* and (2) *ongoing group homogeneity*, the better the capability of the bottom-up group to effectively incorporate the use of property standards to allow for a successful compromise between dynamism and predictability in devising its property ordering.

Consider first the *lex mercatoria*, developed in Middle Ages Europe as a grassroots form of private ordering connecting merchants from different territories, and aimed at enabling these traders to follow common norms and resolve disputes speedily.[190]

Although there are disputes about the historical origins of the *lex mercatoria*, it would be safe to say that during that period, a set of customary norms applying to the class of merchants evolved and was practiced in various meeting places, typically trade fairs, across the continent.[191] These fairs also became places for conflict resolution, with merchants themselves setting up and administrating these tribunals.[192]

The importance of law merchant norms exceeded the contractual aspects of the transactions. In fact, the law merchant created the prominent legal and financial instruments of personal property that are known nowadays.[193] Although instruments such as letters of credit had existed in earlier periods, an innovation of the law merchant era was the introduction of the idea of a documentary transfer of an intangible—the right to a debt—and even more importantly, the evolvement of the practice by which a trader who purchased the negotiable instrument (for example, a bill of exchange) in good faith, did so free of any prior interests in it.[194]

---

190. *See, e.g.*, LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW 8 (1983).

191. *See* Richard A. Epstein, *Reflections on the Historical Origins and Economic Structure of the Law Merchant*, 5 CHI. J. INT'L L. 1, 1–4 (2004).

192. *See* JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 46 (2000).

193. *Id.* at 46–47.

194. *Id.* at 47–49.

Besides rule-like property norms that had been accepted throughout the trade community, and which later served as the basis for many civil codes and statutes in the nation-state era,[195] the merchants have also been aware of what we nowadays term *incomplete* contractual and proprietary aspects of commercial relationships. Thus, the core of trade practices was the principle of *good faith*.[196] The relative homogeneity of traders' commercial interests and social understandings across the continent allowed them to effectively handle such contingencies by consent or through the streamlined process of expert tribunals. Such cross-border efficacy of bottom-up standard-like norms gradually declined, however, with the taking over of commercial law by national courts.[197]

Nowadays, with the growing globalization of economies, questions of cross-border organizational structures and choice strategies for substantive and procedural property norms reemerge in full-force.[198] Interestingly, some research indicates that the ability of commercial parties to exploit the potential advantages of legal standards may be more effective in the cross-national realm than in some national legal systems. As Clayton Gillette argues, the UN Convention on Contracts for the International Sale of Goods has been able to effectively use a standard-like tactic, especially through Article 9(2), which relies heavily on identifying trade *usages* that are regularly accepted and respected by international traders.[199] Analyzing the circumstances under which international arbitrators and courts rely on such trade usages, Gillette argues that they are typified by the fact that they emerge either out of international mercantile associations—most notably the INCOTERMS of the International Commerce Commission (ICC)[200]—or from unwritten practices that condition on readily verifiable events.[201] Thus, the effectiveness of legal standards such as *trade usage*, *reasonableness*, or *good faith* hinge on both the level of epistemological and cultural homogeneity of the international traders' community, and the capacity of

195. *See, e.g.*, JAN DALHUISEN, DALHUISEN ON INTERNATIONAL, COMMERCIAL, FINANCIAL AND TRADE LAW 471-77, 671–73 (2d ed. 2004).

196. TRAKMAN, *supra* note 190, at 7.

197. BRAITHWAITE & DRAHOS, *supra* note 192, at 46–47.

198. *See, e.g.*, Amnon Lehavi, *The Global Law of the Land*, 81 U. COLO. L. REV. 425 (2010) [hereinafter Lehavi, *Global*]; DALHUISEN, *supra* note 195, at 642–67.

199. Convention on Contracts for the International Sales of Goods, art. 9(2), U.N. Doc. A/CONF.97/18, Annex I (1980), *reprinted in* 19 I.L.M. 671 [hereinafter CISG].

200. International Chamber of Commerce, *INCOTERMS 2000: ICC Official Rules for the Interpretation of Trade Terms* (2000).

201. Clayton P. Gillette, *The Law Merchant in the Modern Age: Institutional Design and International Trade Usages under the CISG*, 5 CHI. J. INT'L L. 157, 171–79 (2004).

bottom-up institutions such as ICC to fill initially vague norms with content, broadly disseminate information, and gain wide acceptance to such norms.[202]

It should be noted, however, that for such bottom-up strategy to work not only on the contractual level, but also on the proprietary one, certain features would have to be added to the overall legal regime applying to cross-border commerce. In this context, Jan Dalhuisen points to the existing gap between common law and civil law countries, by which the former have responded better to the dynamic process of international financial and commercial innovation, by recognizing flexible property mechanisms such as advance types of floating charges, repos and leases as conditional sales, trust structures and constructive trusts (all of which have been largely created by grassroots commercial dealings).[203] The task of leveling up such property mechanisms across borders cannot be shouldered of course only on bottom-up institutions, because such legal instruments would have to be validated, inter alia, in bankruptcy proceedings that would likely continue to be governed by *top-down* national courts.[204] But to the extent that different legal systems could become closer in their general attitude toward such innovative property structures, there is potential in employing cross-border legal standards also in property norms, while striking an appropriate balance between flexibility and certainty.

Consider next the way in which current merchant communities in the United States, such as the cotton industry, are able to combine hard-edged rules and procedures with effective mechanisms for handling uncertainties and unexpected contingencies. As Bernstein notes, the certainty and predictability of the crystallized rules enable parties to demonstrate flexibility, forgiveness, and willingness to renegotiate deal terms in truly exceptional events, without having to fear that such a *softer* approach would be abused by the other party—since the absolving party may always rely on the strict and swift enforcement of the clear industry-promulgated contract terms, whenever needed.[205]

---

202. *See* Avery Wiener Katz, *The Relative Costs of Incorporating Trade Usage into Domestic versus International Sales Contracts*, 5 CHI. J. INT'L. L. 181, 183–85 (2004).

203. DALHUISEN, *supra* note 195, at 20–25, 222–28. Dalhuisen recognizes, however, the potential danger in terms of certainty and finality stemming from such property flexibility, and thus calls to protect third parties by bona fide purchaser's rights or protection of the ordinary course of business. *Id.* at 549–52.

204. *Id.* at 699–701, 849–53.

205. In this sense, these norms can be seen as a set of informal norms complementing formal private ordering. Besides the fact that cotton traders are inclined to be flexible toward other parties and to adjust obligations in exceptional situations, there is yet another sense in which informal *softer* norms add up to strict formal arrangements. This is so in the sense that

In addition, private ordering institutions of such communities may have to address uncertainties and unexpected contingencies, ones that are not settled in advance by the firm industry rules and may thus justify employing *softer* type of bottom-up norms.

First, in many cases, parties act in subjective good faith but simply do not agree on a certain attribute of the resource and cannot rely on preexisting rules. This is so when parties genuinely disagree if the *quality* of a specific delivery conforms to the contract's specifications. To resolve this type of uncertainty, the cotton industry created a separate expert tribunal— the CSAB—that quickly and cheaply grades the good's quality.[206]

Second, the industry plays an ongoing active role in preserving not only the personal homogeneity of members, but also the professional epistemological homogeneity across the industry to decrease the likelihood of disagreement in scenarios that are not covered specifically by elaborate rules. It does so through channels of information dissemination, group discussion, and education.[207] Beyond instilling and constantly re-instilling the idea that commercial relationships in the industry are built on long-term cooperation and trust, the collective action organizations use these different conduits to create a "rough consensus as to the contours of acceptable behavior" not covered by current rules.[208]

The chief insight resulting from the analysis of bottom-up institutions is that even when the group engages relatively frequently in updating the industry's hard-edged property law rules to accommodate dynamism, it nevertheless acknowledges that it would have to face a considerable amount of contingencies and uncertainties that cannot be resolved in advance. In such cases, the use of standard-like norms and procedures may be advantageous. However, the success of such a strategy depends on certain features, such as established institutional authority and ongoing group homogeneity. This is especially because the property facets of the norms apply in rem, going beyond contractual parties.

---

members rely also on informal enforcement mechanisms such as reputation and gossip networks. Such effective forms of non-legal sanctions allow members to stick to the under-compensatory market-difference based damage provided for in the trade rules, without this leading to inefficiently high levels of contractual breach. Bernstein, *Cotton*, *supra* note 15, at 1745–59, 1776–78.

206. *See id.* at 1774–76.

207. *See id.* at 1771–74.

208. *Id.* at 1773.

2. Top-down Content-Filling

Courts and other state institutions involved in the ongoing content-giving to property norms substantially differ from the working of bottom-up institutions. Yet they too face particular challenges in administrating a workable system of legal standards in property.

On the one hand, courts seem to be *the* perfect forum for engaging in the ongoing process of filling initially vague norms with content, disseminating knowledge about it, and gaining wide acceptance and adherence through state enforcement mechanisms. Moreover, courts, as opposed to the legislature, let alone the constitution-drafter, have more frequent opportunities to engage in this dynamic process and thus to systematically address problems of incompleteness or "norm-sensitivity." In so doing, courts constantly engage both in the private aspects of property in dealing with interpersonal disputes, and in this field's public aspects especially with regards to takings cases. As the above discussion of the *Loretto* case in Part III.A.4 demonstrates, courts are often explicit about the cross-influences of these two facets of property law, and can accordingly fill legal standards with content, taking into consideration the broad spectrum of property.[209]

But these considerations also introduce certain institutional challenges that a court faces, if it wishes to successfully devise a strategy of employing property legal standards.

In a way, one can say that in looking at *established institutional authority* and *actor homogeneity* as essential ingredients for the feasibility of property legal standards, there is a certain tradeoff between top-down and bottom-up institutions. Whereas courts are exempted from constantly engaging in self-preserving their broad-based authoritative stance within the relevant group of affected parties—as a state institution, their decision-making is binding on the parties—courts do not enjoy the luxury of addressing only defined, smaller-scale communities that tend to be more homogenous to start with.

As a result, the judicial enterprise of filling standards with content faces an intricate challenge in compromising the court's institutional ability for dynamism and promoting substance-based jurisprudence with the need to preserve a sufficient amount of predictability, certainty, and future-looking guidance among the various norm recipients.

The content-filling of standards need not only clarify to litigating parties or to future parties to similar-in-kind disputes what is the law on this point,

209. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 431 (1982).

but it should also create the infrastructure for a broader-based understanding of the legal standard, in a way that would facilitate, to the best possible extent a common denominator among members of the general public about the basic traits of property law. One should not expect, therefore, homogeneity among the legal standard's audience. Nor should courts remain stubbornly loyal to a current content of the norm, when systematic changes occur and reintroduce the problem of incompleteness or of substantive-based jurisprudence. At the same time, the unique nature of property rights, as in rem ones involving distant parties requires the judiciary to maintain a delicate balance between dynamism and a society-wide baseline.

Beyond *internal* institutional constraints that state organs such as courts face in giving content to legal standards, one should also keep in mind potential *external* limits. The judicial enterprise of filling norms with content on a dynamic basis touches on broad questions of legitimacy, division of powers, and other considerations that act as external constraints on such institutions. For example, even if one assumes that a court shapes standards such as *good faith* or *public use* over time in a value-sensitive yet comprehensive manner so as to provide guidance to future actors, is it restricted in the kind of values it may rely on? Is it supposed to address only dynamic changes that the legislature could not have foreseen, or can it conduct a full-scale *paradigm shift* in identifying and explicating the kind of values to which the legal standard should generally adhere? Should legal standards in constitutions be more narrowly developed by courts vis-à-vis standards in statutes, in view of the legislature's more practical ability to overturn *inadequate* content-filling by the court?

A full-scale analysis of these external institutional constraints is outside the scope of this Article. Accordingly, I do not delve here into the broader dilemma of *originalism* in constitutional or legislative interpretation,[210] including the impact such an approach would have on the standard-type provisions in the Takings Clause.[211] However, I do assert that even an

---

210. *See, generally* PHILLIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11-22 (1991) (offering six "modalities" of constitutional arguments, including the "historical," originalist one); Sanford Levinson, *For whom is the* Heller *Decision Important and Why*, 13 LEWIS & CLARK L. REV. 315, 326–332 (2009); Symposium, *Original Ideas on Originalism*, 103 NW. U. L. REV. 491, 491–92 (2009).

211. *Compare* William M. Treanor*, The Original Understanding of the Takings Clause and the Political Process,* 95 COLUM. L. REV. 782, 791 (1995) (arguing that a plain language reading of state constitutions enacted just prior to the federal Bill of Rights indicates that they protected property only against physical confiscation and that early judicial decisions construed them in this way), with Andrew Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 AM. U. L. REV. 181, 240–41 (1999)

otherwise *originalist* interpreter would probably agree that a norm that is explicitly designed as a textually vague one (as opposed to a hard-edged provision) leaves at least some content-filling to other institutions at a later time. In fact, an originalist may embrace the choice between legal standards and rules as pointing to the intention of the constitution-drafter or legislator about the way in which the norm should develop over time and the role that other institutions should play in it—so that a rule would fixate the norm's content at the time of legislation, but the standard would not.

What it means, therefore, is that when one considers the issue of external institutional legitimacy of courts in interpreting statutes and constitutions, the case for a "dynamic interpretation" may actually be stronger when courts engage in filling standards with content, as compared to interpreting *rules* and deciding how to apply them.[212] This does not grant courts absolute power to engage in dynamic legal development. But standards, including property ones, seem to possess a trait, by which constitution-drafters and legislatures delegate at least some level of content-filling power to courts.

Based on the above analysis of bottom-up and top-down institutions, touching on both internal and external institutional considerations, Part IV.B now moves to reevaluate some prominent legal standards in current property doctrine. In so doing, this section focuses attention on the way in which these collective decision-making institutions are able to meet the challenge of dealing with incompleteness and some level of substantive-oriented approach—while keeping intact the basic features of in rem applicability and sufficient broad-based societal understanding—in filling property standards with content.

B. Reassessing Legal Standards in Property

1. "Custom," "Good Faith," and "Trade Usage" in Articles of Property

Legal norms such as custom, trade usage, or good faith exemplify the intricate relationship between top-down and bottom-up institutions in crafting property standards.

Part III.A.1 elaborated on the way in which bottom-up institutions may develop an industry-wide understanding of a term such as *usage*. But

(contending that the historical record on this alleged physical/regulatory distinction is ambiguous).

212. *Cf.* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 48–49 (1994) (supporting dynamic interpretation of statutes, but not addressing explicitly the rules/standards issue).

probably the true challenge of such norms lies in incorporating such standards by a top-down institution within its broader-based property jurisprudence. Can the court identify a bottom-up institution that engages in the ongoing collective action of filling the norm with content, disseminating it, and gaining wide acceptance to it among the relevant audience? In such a case, should the court adhere to it, or should it rather engage in its own interpretation of the term, or at the least scrutinize the bottom-up content to accommodate other goals or principles?

Consider, for example, the role of custom. In both the civil law and common law traditions, custom was traditionally considered an autonomous and independent source of law, which although based on immanent principles, was formally binding in the system. The power of custom substantially weakened in both legal families with the rise of national sovereignty, exclusivity of state institutions in lawmaking, and legal positivism.[213] Yet in today's world, which much defies national borders, the potential role of custom reemerges in the context of transnational private law. This is especially so when international instruments such as the UN Convention on the International Sale of Goods sanction not only usages and practices established by the parties, but also those usages, which in international trade are "widely known to, and regularly observed by, parties to similar contracts of the particular trade."[214] This latter provision is increasing in importance due to the activity of supranational professional institutions such as the ICC.

The potential reincorporation of custom as a binding source of law raises particular concerns in the context of property. For example, to the extent that professional norms on the various aspects of negotiable instruments or bona fide purchases gain the formal status of *custom*," their mandatory no-opt-out force, in view of their in rem effects, might be more pertinent as compared to other areas of customary norms. This would not only constrain individual parties, but also limit judicial discretion in applying the custom.[215]

Thus, on the one hand, bottom-up-created content of a *custom* may be favored due to it being closer to real-life dealings, and more dynamic in its ability for update or change. At the same time, legal policy must pay careful attention to the complex interplay between bottom-up and top-down institutions as to *who* gets to fill the standard with content.

---

213. *See* J.H. Dalhuisen, *Custom and its Revival in Transnational Private Law*, 18 DUKE J. COMP. & INT'L L. 339, 339–46 (2008).

214. CISG, *supra* note 199, art. 9(1)–(2).

215. Dalhuisen, *supra* note 213, at 348–52.

This complicated interplay may help to shed light on the intricacies of the judicial application of the U.C.C., and especially Article 2—which refers to "commercial standards" and "usages of trade" for interpretation and gap-filling of transactions.[216]

Criticizing the way in which courts carry on the task of making sense of these legal standards, Lisa Bernstein argues that this judicial enterprise is empirically detached from the actual rules and practices invoked among different industries.[217] Other commentators argue that the very aspiration to create a set of default standards is "wasted," since such standards address large heterogeneous communities. What follows, goes the argument, is that courts instill interventionist ad-hoc contents in Article 2, thus leading to problems of moral hazard and uncertainty among legal actors.[218]

These two types of criticism, assessed together, may nevertheless explain why American courts take a top-down interpretative approach to what should allegedly have been injected with bottom-up industry-based content. The U.C.C. covers much ground, in the sense that it applies to all types of commercial dealings across all industries. Moreover, opting out of Article 2 is practically impossible even in its pure contractual aspects,[219] let alone for proprietary aspects such as security transactions and good faith purchases. As a result, courts face an often frustrating task, but one that they cannot simply delegate *downwards*, of trying to create common ground for the vague terms included in Article 2 so as to preserve *some* level of collective guidance across society.

A similar dilemma is faced by courts in trying to instill content in the *good faith* requirement, which is spread across the U.C.C. through section 2-103(1)(b) and originally defines *good faith*, in the case of a merchant, as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." The latter part of this Article 2 definition, imposing a conduct of "reasonable commercial standards of fair dealing," thus requires a merchant to act in what may be defined as *objective* good faith. It goes beyond the *subjective* good faith facet in the former part of the definition.

In 2001, the general U.C.C. Article 1 definition of *good faith* was expanded beyond "honesty in fact" (that is, "subjective" good faith) to include also the *objective* good faith component of Article 2. This means that this broad definition of *good faith* now applies also to dealings involving

---

216. U.C.C. § 2-101.

217. *See* Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV.710, 715–17 (1999).

218. Schwartz & Scott, *Contract Theory*, *supra* note 34, at 608–09, 618–19.

219. Katz, *supra* note 202, at 186–87.

non-merchants.[220] The expansion of the *objective* facet of the good faith requirement to all types of parties led to a stormy response, with several states refusing to apply this standard to non-merchants.[221]

Moreover, *good faith* is one of the few requirements in the U.C.C. that cannot be disclaimed by agreement. Parties may determine the standards by which the performance of this obligation will be measured, but this private standard-setting will not apply if it is "manifestly unreasonable."[222] Needless to say, it will then also not apply to third parties.

It is clear that the incorporation of a general duty of *objective* good faith across the U.C.C. eliminates the possibility of *any* bottom-up collective meaning that could have been theoretically developed previously when this standard had been restricted to merchants.[223] As the experience of other legal systems that include a general objective duty of good faith shows, the content-filling of such norms is strictly a matter of top-down judicial enterprise, which aims at creating society-wide norms.[224] If this is the case, then it should be clear enough that the *good faith* standard would be top-down filled with content, especially in its proprietary aspects, since this objective standard affects not only heterogeneous contracting parties, but also entirely distant third parties. Thus, when the Restatement defines *bad faith* as violating "*community* standards of decency, fairness, or reasonableness," it can really only refer to *societal* standards as defined by courts.[225]

2. "Objectionable Conduct" and "Reasonableness" in Planned Communities

Residential Community Associations (RCAs) and other types of "planned communities" form a different type of bottom-up institutions that engage in private ordering of property. As this subsection illustrates,

---

220. U.C.C. § 1-201(20); *see* Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80 ST. JOHN'S L. REV. 559, 609–10 (2006).

221. Franklin G. Snyder, *Clouds of Mystery: Dispelling the Realist Rhetoric of the Uniform Commercial Code*, 68 OHIO ST. L.J. 11, 40–43 (2007).

222. U.C.C. § 1-302.

223. Although evidence shows that merchants themselves had strongly objected to this objective requirement in its original Article 2 format, so that one can have hardly identified such a bottom-up collectively-designed norm among merchants or within certain industries. Snyder, *supra* note 221, at 41–42.

224. Dalhuisen, *supra* note 213, at 359–60.

225. RESTATEMENT (SECOND) OF CONTRACTS § 205.

alongside the promulgation of *rules*, RCAs also resort to some degree of standard-type norms in regulating the community. RCAs, which are booming in numbers across the U.S. and outside of it, lead a complicated relationship with top-down institutions such as legislatures, executive bodies, and courts.[226] Thus, the employment of *private* legal standards by RCAs to regulate the property norms of the community raises intricate considerations of internal and external institutional authority.

To start with, the internal institutional structure of RCAs is designed to address collective action problems pertaining both to commonly-owned assets and amenities, and to the use of privately-owned housing units.[227] For that purpose, the RCA creates formal private ordering through the conditions, covenants, and restrictions (CC&Rs) included in the RCA's Declaration and in its other governing documents.[228]

Such documents typically contain numerous highly-detailed, rule-like norms. This involves an entire set of provisions regulating the establishment, maintenance, and rules of use regarding the commonly owned assets (such as streets, parks, or sport facilities).[229] In addition, the RCA's up-front norms may typically include interventionist, clear-cut provisions regarding the use of private housing units, such as a no-pets prohibition.[230] These rules are designed to prevent otherwise-legally-permitted, potential adverse spillover effects, which do not conform to the community members' tastes or preferences.

But not everything can be planned in advance. Even if the developer carefully designs the governing documents so that rule-like provisions not only define physical amenities and financial mechanisms, but also aim at specifying the attributes of the community's *character*, some yet unspecified contingencies are bound to emerge over time.

To resolve such potential problems of incompleteness in the delineation of property rights between the RCA as a corporate entity and its individual members, the community-based governance of collective and private properties has a built-in dynamic dimension. RCA institutions generally have

---

226. As of 2009, over 60 million Americans have lived in association-governed communities. *See* Community Associations Institute, *Industry Data*, CAIONLINE.ORG at http://www.caionline.org/info/research/Pages/default.aspx.

227. Amnon Lehavi, *Mixing Property*, 38 SETON HALL L. REV. 137, 160–62 (2008) [hereinafter Lehavi, *Mixing*].

228. *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 6.2 (2000).

229. Lehavi, *Mixing*, *supra* note 227, at 162–63.

230. *See, e.g.,* Villa De Las Palmas Homeowners Ass'n v. Terifaj, 90 P.3d 1223 (Cal. 2004).

powers that go beyond enforcing the terms of the original declaration to make ongoing managerial decisions, promulgate rules, and even amend the governing documents without a need for unanimous homeowners' consent.[231]

On the face of it, it seems that RCAs can address incompleteness and dynamism through a rule-like strategy. If a certain clear-cut norm no longer covers all types of behaviors that the community as a group views unfavorably, the RCA can simply amend current rules or promulgate new ones. But it seems that such a tactic may have its limits, even when the RCA's rulemaking institutions are alert to changing needs. Promulgating a new *rule* that restricts a certain specific behavior by a resident (for example, painting the exterior of the house in a color other than white) assumes that this type of behavior was previously permitted. In such cases, a majority-based decision can create overt conflicts, claims against retroactivity, and additional rulemaking organizational costs.

If this is the case, RCAs may consider employing standard-like norms to govern future contingencies that cannot always be defined in advance, but are nevertheless viewed as contradicting the *ambience* or *community values* of the neighborhood.

Consider, for example, the *40 West 67th Street v. Pullman* case.[232] In this case, a cooperative housing shareholders' meeting held that a tenant's behavior amounted to "objectionable conduct," which under the cooperative bylaws allows for unilateral termination of the lease agreement.[233] Upholding the cooperative's decision, the court followed corporate law's *business judgment rule* criterion, thus broadly delegating to the cooperative the power to fill the standard of *objectionable conduct* with content, as long as the corporation acts "in legitimate furtherance of corporate purposes."[234]

The *Pullman* case vividly demonstrates both the internal and external institutional aspects of governing community members through private legal standards such as *objectionable conduct*, having in rem applicability throughout the community for both current and future members.

---

231. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 6.4–6.14 (2000).

232. 790 N.E. 2d 1174 (2003).

233. *Id.* at 1177–78.

234. *Id.* at 1180–82. The *Pullman* decision follows up on an earlier case applying the *business judgment rule* to a cooperative corporation's decisions. *See* Levandusky v. One Fifth Avenue Apartment Corp., 553 N.E. 2d 1317 (N.Y. 1990). In *Levandusky*, the New York Court of Appeals held that cooperative and condominium boards should be afforded the "greatest possible degree of deference," and are subjected only to the *business judgment rule* rather than to a stricter *reasonableness* standard. *Id.* at 1322–24.

In many respects, questions about the legitimacy of the majority in RCAs, acting through its collective institutions, to impose certain types of behaviors on individual members through standard-like norms, arise also when the RCA introduces new *rule-like* norms that are not approved by unanimous consent. The affected member could argue against the retroactive application of a rule that was not included in the original governing documents. Courts generally defer, however, to such rule enactment, recognizing the dynamic nature of a "planned environment." In *Villa De Las Palmas Homeowners Ass'n v. Terifaj*, the California Supreme Court upheld a majority-approved "no-pets" amendment.[235] The court held that California's legislative provisions, by which norms set up in RCAs' governing documents are valid "unless unreasonable," apply also to subsequent registered amendments.[236] It reasoned that such powers are "crucial to the stable, planned environment of any shared ownership arrangement."[237]

Should a reviewing court treat differently the application of a *standard-like* provision that is filled with content over time by the RCA decision-making institutions? Is the generally lax judicial review in *Pullman,* by which the New York court applied the business judgment rule to the RCA's implementation of the *objectionable conduct* standard, an efficient and fair legal policy? Very briefly, it seems that on the one hand, whenever a legal standard is set forth in the governing documents, a community member is aware of the possibility that the RCA institutions would be authorized to instill at least some level of dynamic content in the initially vague norm. On the other hand, one cannot really anticipate in advance if she will find herself in a minority position in regard to a certain future contingency. This type of uncertainty and fear of majority abuse may be cause for genuine concern to members.

When one considers the top-down role of legislatures and courts in either scrutinizing or differing to the RCA's private ordering, it is worth noting that the parameters for judicial review, set forth in RCAs state enabling legislation, are regularly phrased themselves as legal standards. These judicial standards may diverge based on, for example, whether the equitable servitude in question is viewed as imposing a "direct restraint on alienation" (in such case, the RCA would usually have to meet a reasonableness test) or if it viewed as an *indirect restraint* (in which case the norm would be invalid

235. 90 P.3d 1223 (Cal. 2004).
236. *Id.* at 1224–25.
237. *Id.* at 1228 (quoting *Nahrstedt*, 878 P.2d at 1281).

only if it "lacks . . . rational justification").[238] Without going into a detailed analysis of the different kinds of legal standards that apply to such judicial review,[239] the employment of standards such as *unless unreasonable* allows the court itself to be dynamic over time in reviewing the RCA's property private ordering. Over time, the court may change its normative view about what should qualify as meeting such a standard. Therefore, the crafting of property norms through standards implicates both internal and external institutional considerations about the power of RCAs to instill content in legal standards.

3. "Normalcy" in Nuisance, and the "Abuse of Rights" Doctrine

The task of delineating and re-delineating property rights and duties among neighbors is naturally not less complicated outside the realm of planned communities. The potential for instances of incompleteness, and the institutional challenges in dynamically addressing such problems in the context of in rem property rights, is vividly demonstrated in nuisance law and related doctrines. It is also present in the *abuse of rights* principle, which may challenge what is otherwise conceived as a clearly allocated property right.

As noted in Part III.A.1 above, nuisance law is often notorious for its unpredictability and ad-hoc nature, although this legal instability is embedded in genuine problems of incompleteness.[240] Across different legal systems, nuisance is dominated by standard-like norms for both the basis of liability and the remedies awarded in case of violation. In U.S. law, private nuisance is said to apply only to invasions of another's interest in the private use of enjoyment of land that are either "(a) intentional and unreasonable, or (b) unintentional and otherwise actionable . . . for negligent or reckless conduct, or for abnormally dangerous conditions or activities."[241] Public nuisance is generally defined as "an unreasonable interference with a right common to the general public."[242] The choice of remedy is usually controlled by another vague test: the *balance of interests*.[243]

---

238. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 3.4, 3.5 (2000).

239. *See* DUKEMENIER ET AL., *supra* note 96, at 809–14; BEEN & ELLICKSON, *supra* note 148, at 553–62.

240. *See supra* text accompanying notes 115–117.

241. RESTATEMENT (SECOND) OF TORTS §822 (1979).

242. *Id.* at § 821B.

243. *Id.* at § 941.

This subsection does not offer a comprehensive analysis of the general wisdom of employing standards, or "fine-tun[ed]" norms in Smith's terminology,[244] in nuisance law. It focuses rather on one *institutional* issue: to the extent that legal standards are employed, should their content be filled by *bottom-up* institutions or by *top-down* ones?

Current nuisance law is typified by the fact that the question of whether a certain act constitutes a wrong is not decided on purely generalized, a-local principles. The U.S. Supreme Court's famous statement that "[a] nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard," vividly reflects this view.[245]

The sense in which the basis of liability in nuisance hinges often on contextual, local considerations, has led scholars to call to more systematically entrench the local basis of nuisance. Robert Ellickson suggests that a landowner be held liable only if his new use is "perceived as unneighborly according to contemporary community standards."[246]

Viewing "the unneighborliness test" as "a democratic and dynamic method," Ellickson suggests that community boundaries be delineated based on "metropolitan areas," and argues that switching to the "normalcy" framework would save on administrative costs and simplify the identification of nuisance cases.[247] Although Ellickson does not suggest a distinctive institution for decision-making, he does imply that identifying community standards of normalcy requires courts to "investigate perceptions . . . of neighbors."[248] In a somewhat different institutional analysis of nuisance as defined by "community standards," Plater et al. portray jury trials as ones in which "the actual decisionmakers on whether community standards have been met are local citizens themselves."[249]

And yet, there is only a certain sense in which nuisance legal standards can be filled with *local* content. This doubt goes beyond substantive issues of potential cross-local externalities, the rights of minority residents within localities, and potential inefficiencies in sticking to a land use status-quo.[250] Moreover, from an *institutional* perspective, it is not entirely clear to what

---

244. Smith, *Exclusion and Nuisance*, *supra* note 87, at 989–90, 1040–41.

245. Village of Euclid v. Ambler Realty Co.mpany, 272 U.S. 365, 388 (1926).

246. *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 731–32 (1973) [hereinafter Ellickson, *Alternatives*].

247. *Id.* at 732–33.

248. *Id.* at 733.

249. *See* ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 111 (3d ed. 2004).

250. *See* Rose, *supra* note 147, at 1047–49.

extent local entities—group of residents, neighborhoods, or even local governments—can engage over time in collectively defining community "normalcy" to address potential contingencies and incompleteness. Unlike planned communities, which rely on ongoing institutional mechanisms for dynamic decision-making as well as on a relatively small-scale and general homogeneity of users and uses—*regular* neighborhoods and cities rely heavily on the top-down work of courts to collectively design legal policy and *translate* distinctive local conditions into the norms of nuisance. Thus, though contextual, nuisance standards would rely mainly on top-down institutions.

The *abuse of rights* doctrine, which originated in the civil law tradition, but also took root in the common law legal systems, deals with somewhat different types of property relationships among neighbors.[251] In abuse of rights cases, a party holds what is otherwise a clearly delineated property right, but something about the particular circumstances in which she exercises the right may turn the legitimate *use* into a legally-prohibited *abuse*. Typical cases deal with the construction of "spite fences," malicious diversion of water streams, opening up of a business only to annoy neighbors or drive someone else out of business, and other cases in which one suspects a bad motive or that the use of the right is only a leverage for another aspect of the parties' relationships.[252]

Although one could argue that because of the highly contextual and localized nature of such disputes, the criteria for deciding an abuse of rights case should rest on some sort of *bottom-up* viewpoints; the way in which courts have filled this legal standard with content has been driven by a clearly top-down approach, characterized by moralistic, even paternalistic considerations. As Larissa Katz notes, two traditional lines in the abuse of rights jurisprudence have been a) a "perfectionist" approach of preventing people from acting with bad or malicious intentions, and b) a "communitarian" approach by which there are only certain legitimate social purposes that an owner may be allowed to further in using her private

---

251. *See, e.g.*, Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 PAC. L.J. 37, 40–47 (1995); Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL L.J. 389 (2002).

252. *See, e.g.*, Burke v. Smith, 37 N.W. 838, 838–39, 842 (Mich. 1888); Tuttle v. Buck, 119 N.W. 946, 946 (Minn. 1909); *see also* J.B. Ames, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor*, 18 HARV. L. REV. 411, 414–15 (1905) (surveying such early American cases).

property.[253] The *abuse of rights* doctrine is thus a legal standard clearly typified by a top-down institutional approach, which stems from broader-based societal values on the proper relationships among different individuals, and between the individual and society.

V. LESSONS FOR RECONFIGURING WORKABLE STANDARDS IN PROPERTY LAW

Property legal standards do not lend themselves to unequivocal design principles, especially since rule-like and standard-like norms often complement each other and are not exclusive substitutes. However, several variables have proven to be recurring and dominant throughout the analysis. By way of brief summation, I point to these features and to the main lessons that they entail for the rule/standard dilemma in property law.

1. Incompleteness. The inability of legislation and other up-front legal mechanisms to fully allocate property rights and duties serves as a chief justification for adopting legal standards, even by those otherwise committed to a formalist agenda. It therefore makes legal standards an essential instrument of legal design, independently from the normative debate over the other chief reason for standards—promoting *value-based* jurisprudence.

But even when only incompleteness is considered, two caveats are in order. *First*, not all types of incompleteness are equally adequate for using standards. Most notably, the prospect that a future exogenous change would significantly alter the basic traits of the resource or its main uses may often call for a fundamental revision of the legal regime. Such a change would often be better served by the promulgation of a new rule, rather than by the employment of a current, vaguely phrased norm. *Second*, the mechanism of delegating the task of filling vague norms with content over time to better address the problem of incompleteness must rely on the existence of viable bottom-up or top-down institutions. Such institutions must possess the capability for dynamic decision-making alongside the preservation of an adequate level of systematicity and predictability.

---

253. *See* Larissa Katz, *A Jurisdictional Principle of Abuse of Right* (February 8, 2010), *available at* http://ssrn.com/abstract=1417955 (surveying these theories, but offering an alternative principle, by which the owner's jurisdiction and reasons are limited to her "subjective determination of [a] worthwhile . . . agenda" for the "object"). In many legal systems, the requirement of actual bad motive has been waived, so that the court sets up objective tests to decide whether the property owner abused her rights. *See* K. ZWEIGERT & H. KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 620 (3d ed. 1998).

2. Homogeneity. As far as bottom-up institutions are concerned, the level of epistemological, social, and cultural homogeneity among the audience of property norms plays a significant role in the ability to infuse further, "thicker" content in the legal standard over time. The existence of a broad common denominator regarding basic values, general practices, and so forth, aids in decreasing the costs of instilling, implementing, and enforcing new contents when a certain contingency arises, as well as allows norm recipients to better know in advance how future dilemmas would be decided.

However, homogeneity does not always point to legal standards. As shown in some merchant industries, a strategy of formal rule-like norms combined with informal standard-like practices may at times justify the greater investment in upfront rulemaking.

For heterogeneous crowds, property standards can be filled with content only by top-down institutions such as courts. Such institutions not only carry the burden of deciding specific disputes; they must also create the infrastructure for a broad-based understanding of the legal standard—in a way that would facilitate a sufficient common denominator among members of the public about the basic traits of property norms.

3. Scale of effect. Property rights typically affect not only up-front identifiable contractual parties, but also strangers who may find themselves entangled in a legal dispute over a specific asset. But not all property regimes have the same scope of practical effects. Residential community associations, for example, provide property order that affects mainly current and future residents, and may thus employ standards that are filled with content by the community's institutions, alongside a set of clear-cut rules.

In this sense, bottom-up institutions serve as mini-legislatures, who produce norms that also have property aspects and that may be dynamically filled with content. For other settings such as merchant communities—domestic or international—the work of bottom-up institutions such as trade organizations would have to be more substantially intertwined with the work of top-down institutions such as legislatures and courts. This is in view of the broader effects that in rem rights and the application of legal standards such as *custom* or *trade usage* would have outside of the immediate commercial community.

4. Established institutional capability. For bottom-up institutions to continuously instill property order in initially vague norms, they must possess what I have termed *established institutional capability*. This means that the recipients of the property norms adhere to the ongoing authority of the institution not only to promulgate new rules—a process that is usually more burdensome and fragile for the institution—but also to tell the community what the already-existing legal standard *means* when a specific

contingency arises. A formal bottom-up institution would usually require some sort of consistent backing from top-down mechanisms such as enabling legislation or reviewing courts, especially when the bottom-up institutions cannot rely on entirely voluntary self-enforcement of the standard. In the case of residential community associations, in which the decisions of the RCA institutions are established in private formal arrangements but are increasingly contested by unpleased minorities, a judicial review criterion such as a *business judgment rule* applied to the RCA's interpretation of the term *objectionable conduct* provides the private ordering institution with significant *tailwind* to fill such norms with content. On the other hand, when top-down institutions such as courts are concerned, the potential limits on their authority to fill vague norms with content would usually be based on *external* institutional constraints, as the next point discusses.

5. External constraints. The mandate for bottom-up or top-down institutions to engage in ongoing content-giving to property legal standards does not hinge only on their internal institutional capabilities, but also on external considerations. For top-down institutions such as courts, otherwise familiar issues such as division of powers among different state organs play out in whether to entrust courts with instilling content in legal standards. In the private law realm of property, consideration should be given to the fact that parties cannot usually opt out of property norms, so that broad ex post powers to courts can result in excessive uncertainty among private actors. In the public law realm, sweeping interpretative powers to courts regarding standards such as *public use* or regulatory takings are especially challenging in the context of limits on constitutional interpretation.

For bottom-up institutions looking to instill property ordering within a certain group or community, issues of both extra-community externalities and intra-community minority abuse arise. These latter considerations are significant from a legal design policy viewpoint not only for the choice of whether to validate such sub-society configurations to start with, but also in deciding which type of institution would play the dominant role in filling property standards with content during the life of the community. As with other types of dilemmas addressed in this Article, such a choice is not necessarily binary: it may *divide* the role among bottom-up and top-down institutions; it may allow both types of institutions to employ standards alongside rules to deal with dynamism in property.

VI. CONCLUSION

This Article offers an innovative analysis of property legal standards, which are key design mechanisms that play a chief role in actual property

doctrines, but that up until now have not been articulated as a general phenomenon in the property theory literature.

To deal with this disparity, the Article engages in the groundwork for constructing a theory of legal standards in property. It does so by following three main methodological steps: *First*, identifying the chief goals that standards may serve as a legal mechanism. *Second*, articulating the unique traits of property law as compared to other fields of law and the consequent challenge that property law poses for the employment of standards: balancing between dynamism and the need for systematicity in formulating in rem rights. *Third* is basing the theory of property legal standards on *institutional* foundations, and not only on substantive normative principles. The Article thus identifies *top-down* and *bottom-up* institutions that engage in the task of filling initially vague norms with content. It assesses their institutional capabilities to do so over time, and illuminates the external constraints that bind such institutions in employing legal standards in property.

In investigating the theory of legal standards in property, many other issues come up, which have not been extensively analyzed in this Article. For example, since the Article focuses on the property/contract boundaries in the private law context, more work needs to be done on comparing legal standards in property to those in torts or the law of unjust enrichment. Similarly, in dealing with the public aspect of property such as the *public use* standard, consideration should be given to potential similarities and differences from other legal standards in constitutional and administrative law. More attention should also be paid to the role of informal arrangements in allocating rights and duties, and the ways in which such informal property norms too can be divided into *rules* and *standards*. I leave these and other currently vague questions for future scholarly crystallization.