The Property Puzzle

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This Article constructs a political and institutional model of property, offering an innovative approach for addressing some of property's most puzzling features, including the in rem/in personam quandary and the public/private interface in property. The central thesis of this Article is that regardless of our preferred substantive justifications for property, "dramatic" decisions about the definition, allocation, or enforcement of property, such as the full-scale nonconsensual transfer of title and possession in land from one person to another, should be chiefly made by explicit and publicly reasoned resolutions of governmental entities entrusted with the power and duty of collective decisionmaking—chiefly legislative and administrative bodies—supervised in turn by the institution of judicial review.

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INTRODUCTION

A puzzling dissonance seems to characterize the scope and nature of property rights. Consider on the one hand a Wisconsin Supreme Court case, *Jacque v. Steenberg Homes, Inc.*,[1] swiftly canonized in recent property textbooks as a vivid illustration of the powerful exclusionary right a landowner has against an intentional trespasser.[2] Lois and Harvey Jacque, an elderly couple, owned 170 acres near Wilke's Lake in the town of Schleswig. Streenberg Homes, Inc., which sells mobile homes, sought to deliver a home to a neighbor of the Jacques. Streenberg concluded that the easiest route for delivery was across the Jacques' land, as the only alternative was a private road covered in up to seven feet of snow and containing a sharp curve, making that option much riskier and more complicated. After the Jacques staunchly refused numerous offers by Streenberg for a paid permit, the company unilaterally decided to cut a path through the Jacques' field and hauled the home across it into the neighbor's lot.[3] While the jury awarded the Jacques $1 in nominal damages and $100,000 in punitive damages, the circuit court set aside the jury's award of $100,000, and the court of appeals affirmed.[4] The Wisconsin Supreme Court reversed and reinstated the punitive damages award, reasoning that "[p]rivate landowners should feel confident that wrongdoers who trespass upon their land will be appropriately punished."[5]

Contrast this ruling with the United States Supreme Court's *Kelo v. City of New London* decision.[6] In *Kelo*, the Court validated the use of eminent domain for purposes of economic development as meeting the Fifth Amendment's "public use" requirement.[7] It held this way even though the case seemed like a clear-cut instance of "condemn and transfer," namely, the use of the eminent domain power to make way for private, for-profit redevelopment. *Kelo* sparked fierce, wall-to-wall public and academic criticism[8] and resulted in legal back-

1. Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wis. 1997).

2. *See, e.g.*, JESSE DUKEMINIER ET AL., PROPERTY 87–88 (6th ed. 2006); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY PRINCIPLES AND POLICIES 1–9 (2007) (starting off the casebook).

3. *Jacque*, 563 N.W.2d at 156–57.

4. Jacque v. Steenberg Homes, Inc., 548 N.W.2d 80, 85 (Wis. Ct. App. 1996).

5. *Jacque*, 563 N.W.2d at 209.

6. Kelo v. City of New London, 545 U.S. 469 (2005).

7. *Id.* at 490; *see* U.S. CONST. amend. V, cl. 4 ("[N]or shall private property be taken for public use, without just compensation.").

8. For a survey of the academic criticism, see Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1423–26 (2006). For an example of a lobbying

lash in many states in the form of new legislation increasing restrictions on the use of eminent domain for private economic development[9] and in judicial rulings interpreting state legal limits on the use of eminent domain more stringently than *Kelo*'s reading of the federal Constitution.[10] Nevertheless, the state of eminent domain law is far from settled. The bottom line, in many jurisdictions, including the federal one, is that a landowner may be unwillingly stripped of title and possession of his land to facilitate such projects upon payment of "fair market value." Yet, such legal compensation fails to compensate owners for the subjective values they place on their properties or for any "dignitary harm" resulting from violating their sense of autonomy.[11] A critic of such apparent discord between *Jacque* and *Kelo* in the final balancing of the parties' respective interests may hardly be convinced by the formalistic stance that current doctrine does allow for such differentiation, or that one case belongs to private law whereas the other is located in public law (takings) jurisprudence. After all, if in essence, landowners such as the Jacques are compensated 100,000 times their practically non-existent nominal damages for a one-time intrusion of their property, how is it possible that other landowners would be fully and permanently dispossessed of their subjectively cherished properties for "objective" land value, mainly to benefit other private parties who had set eyes on their assets? If property law in its entirety is flawed or incoherent, shouldn't it be changed rather than simply adhered to?

Let us take our query one step further. A growing number of scholars, mostly associated with the economic analysis of law, have been advocating a systematic switch to a protection of property rights through liability rules—which may require a party to transfer an asset for an externally determined payment—instead of property rules, which require the consent of both parties.[12] In his book *Optional Law*, Ian Ayres thus spins a sophisticated legal web of liability

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group campaign against *Kelo*, see DANA BERLINER, OPENING THE FLOODGATES: EMINENT DOMAIN ABUSE IN THE POST-*KELO* WORLD (2006), *available at* http://www.castlecoalition.org/pdf/publications/floodgates-report.pdf (blaming the decision for spurring eminent-domain abuse in favor of politically powerful entrepreneurs at the expense of simple-rank landowners).

9. *See* Patricia Salkin, *Eminent Domain Legislation Post* Kelo*: A State of the States*, 36 ENVTL. L. REP. 10864 (2006); CASTLE COAL., 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE *KELO*, *available at* http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf.

10. *See, e.g.*, City of Norwood v. Horney, 853 N.E.2d 1115, 1123 (Ohio 2006); Bd. of County Comm'rs of Muskogee County v. Lowery, 136 P.3d 639, 647 (Okla. 2006).

11. *See* Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 962–67 (2004); Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 106–10 (2006). To give a fair account in the *Kelo* matter, Susette Kelo and a few other landowners (who were the last to holdout following the Supreme Court's judgment) settled for amounts greatly exceeding the properties' formal assessed values. *See* Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. 1704, 1708–09 (2007).

12. This basic taxonomy is derived from Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–11 (1972). For a list of works supporting the superiority of liability rules, see Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1721 n.5 (2004) (criticizing this broad tendency).

rules or "options" that could be universally employed and would avoid the charges of incoherence which, as demonstrated above, can be leveled at the current property regime.[13] Under this and similar schemes, a court, which has limited knowledge about the parties' private information but would be armed with sophisticated legal mechanisms to harness such information, could ensure that disputes over entitlements in assets are settled in a manner that is both efficient and just.[14] Although the focus of such writers on courts as problem-solvers and on private parties as the typical protagonists of such disputes could be attributed to an incidental evolutional growth of this literature from the particular examples (chiefly the polluter-polluttee standoff—set forth in the foundational writings of Ronald Coase[15] and of Guido Calabresi and Douglas Melamed[16]), I believe that this tendency reflects an implicit yet persistent normative viewpoint that decisions about the allocation of entitlements, including a drastic upset of preexisting property rights, should largely be the province of the judicial resolution of private wrestling.

This inclination toward the private realm may be supported by another prevalent academic school, that of public choice theory, which suspiciously views governmental decisionmaking as a twisted "market" in which the interests of the politically powerful parties prevail, often at the expense of overall social welfare.[17] Applying this notion to governmental intervention with private property, several authors have argued that since governments respond primarily to a political cost-benefit calculus rather than to a welfare or financial one, governmental decisions about property should often not be trusted, and current legal mechanisms, such as the "just compensation" requirement, are insufficient to discipline and constrain socially undesirable public actions.[18]

Since courts tend to fare better than legislatures and regulators under such theories,[19] our critic may eventually come to the conclusion that a differentiation within property law may be normatively desirable but should work in quite the opposite way from the current legal regime. In other words, those who believe in the need for flexibility in the allocation and reallocation of property based on criteria such as economic efficiency (for example, through the applica-

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13. IAN AYRES, OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS 1–38 (2005).

14. For the information-harnessing effect of liability rules, see Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 724–28 (1996); AYRES, *supra* note 13, at 103–04, 184–85.

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

16. Calabresi & Melamed, *supra* note 12, at 1115–24.

17. For an efficient overview of this theory, see Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 34–41 (1998).

18. *See, e.g.*, Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 289–90 (1992); Daryl J. Levinson, *Making Governments Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 348–51 (2000).

19. This view has led authors to advocate for increasing judicial intervention in political and administrative decisionmaking. For a critical review of this literature, see Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 44–48, 66–87 (1991) (arguing that adjudication is similarly prone to problems stated by public choice theory).

tion of sophisticated liability rules), yet also tend to suspect governments as being politically captured entities prone to corruption, may justify, for example, the nonconsensual transfer of private properties in run-down New London to allow for the upscale Fort Trumbull development project that was the subject of *Kelo*.[20] But they would rather have this outcome achieved by a reframing of the private law of property, one which is very different from its rigid manifestation in *Jacque*. Thus, the nonconsensual transfer of property among private parties in the case of a socially inefficient negotiation deadlock in the matter should be facilitated, in appropriate cases, by the more straightforward and trustworthy realm of private-law jurisprudence. If uniformity in property law cannot be maintained, let us at least have a differentiation that is benign.

Although such an approach may sound appealing, I will argue in this Article that it is unfounded and misconceived, as is the aspiration to have a universal law of property that equally applies to all realms of human activity, private and public alike. The current differentiation within property law is not a result of an intellectual or doctrinal disconnect. Rather, property law may be portrayed as a conscious jigsaw puzzle that includes an intricate division of labor between the public-decisionmaking realm—that is, legislative, regulatory, or other governmental decisions about property accompanied by judicial review—and the private-decisionmaking realm, namely the consensual or adjudicative resolution of private disputes over such resources.

This conception of property law can also be justified theoretically. My central argument in this Article is thus as follows: Generally speaking, "dramatic" decisions about the giving or taking of property, including, for that matter, full-scale nonconsensual transfer of title and possession of a certain asset from person A to person B, should chiefly be made by explicit and publicly reasoned resolutions of governmental entities entrusted with the power and duty of collective decisionmaking, mainly legislative and administrative bodies, supervised in turn by the institution of judicial review. Thus, while we should definitely weigh carefully whether the City of New London's decision to take the properties of Susette Kelo and her counterparts and transfer them to private developers was legally valid or should have been abolished through judicial review, it was at least initially taken in the appropriate forum—the public realm—notwithstanding all that forum's inherent flaws and deficiencies.

Let me make clear at the outset that I do not argue that the boundaries in property law between the public and private realms are clear-cut and hermetic. Nor is this Article simply a reiteration or reformulation of the familiar argument that private law in general is built around a consolidated idea of corrective justice, and that other principles, such as distributive justice or equity, should only be expressed in public law or in public programs of taxes and transfer

20. Kelo v. City of New London, 545 U.S. 469, 472–75 (2005).

payments.[21] Rather, my argument is restricted to property law, and in being so restricted, it seeks both to describe and defend an uneasy yet generally sustainable framework, embedded in moral, political, and institutional considerations. This construction supports the essentiality of recognizing the differences between the private and public realms and of realizing the ways in which these two spheres are sophisticatedly intertwined to create the jigsaw puzzle known as the institution of property.

In support of my thesis, I seek in this Article to question three prevailing—even if at times implicit—assumptions that seem to guide much of the literature on property law: *first*, that governmental interventions with property are categorically more legitimate when they seek to redistribute preexisting property entitlements "downwards," namely from the better-off to the less well-off; *second*, that judicial review of legislative, regulatory, or other governmental decisions about property entrusts the reviewing court with substantially weaker powers than the court would have in adjudication of private disputes; *third*, that the normative viability of the above-stated differential construction of property law necessarily hinges upon the feasibility of creating a comprehensive and unambiguous divide between private law and public law in general.

The Article proceeds as follows: Part I identifies property as a politically based institution, in which different normative considerations must coexist in the process of constructing property, occasionally pointing at similar directions and in other instances—probably not less often—working at cross-purposes. It thus shows the continuous challenge that property law faces in giving those different values and goals a proper place both in general rulemaking and in decisions about specific resources, without ending up in a state of doctrinal chaos or paradox.

Part II presents the intricate relationships between the public and private realms in property law. It shows that in certain close-knit or intimate social and economic settings, property law may be based on either one of the decisionmaking and reasoning systems typifying each realm. This may also be the case when the clash between the rival interests need not necessarily end in a "knock-out" in favor of one party, such as when a low- or medium-level environmental conflict may be similarly resolved by either governmental regulation or private nuisance adjudication. There are, however, certain drastic scenarios in which conflicting interests can simply not be compromised, so that one of the protagonists must completely yield its preexisting entitlements to facilitate the obtainment of another party's goals in a manner that may be considered to undermine the core structure of the property regime. It is in this kind of scenario that questions about the proper institutions to make such choices, and

21. For a general characterization of private law as founded on the idea of corrective justice, see ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 56–83, 204–31 (1995). For a discussion of the "separation" argument, see, for example, Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL. STUD. 667, 667–698 (1994).

the kind of reasoning on which they have to rely, arise in their most acute fashion.

Part III makes the case for the normative superiority of the public realm in dealing with such "dramatic" property conflicts through collective-decisionmaking institutions, mainly legislative and administrative bodies, supervised by judicial review. Relying on moral, political, and comparative institutional arguments, this Part emphasizes the unique traits of property law that allow for such an intelligible assembly of the pieces of the property puzzle, independently from the broader and often-futile debate about whether public law and private law form authentic, distinctive spheres or are practically meaningless labels. Part IV concludes briefly about property's place in the public-private discourse.

I. THE CONSTRUCTION OF PROPERTY

A. PROPERTY AS A POLITICAL INSTITUTION

I start my analysis by portraying property—that is, the formal regimes setting out the ways in which society allocates, governs, and protects entitlements and obligations in resources and human relationships around them—as a political institution. This definition is not merely a depiction of legal reality; more notably, it reflects a normative stance. By the term "political," I refer to three main characteristics of the institution of property.

First, property regimes, and property rights that emanate from them, are at their bases the result of conscious decisions by the State's authorized entities to designate resources as subjects of property and to create a certain set of entitlements and obligations in them.[22] This position therefore rejects moral or other philosophical views of natural rights,[23] which have become most associated in the property context with Lockean perceptions of the right to property as founded on pre-governmental justifications for individual appropriation of resources.[24] Importantly, whereas the idea that property is a pure creature of law has a long pedigree in Anglo-American thought,[25] this concept does not necessarily lend itself to any specific legal theory, including, for that matter, rigorous

22. *See* J.E. PENNER, THE IDEA OF PROPERTY IN LAW 202–203 (1997).

23. The term "natural law" is obviously an intricate one that has evolved in numerous forms but that, at its core, is based on the assertion that legal principles are founded on objective moral principles that are derived from the nature of the universe and can be discovered by reason. *See* M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 90–96 (7th ed. 2002).

24. For a leading analysis of John Locke's theory of property, see JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 137–252 (1988). I deliberately use the term "Lockean" rather than simply referring to Locke because of the unique way in which "Lockean" viewpoints of counter-government, strong rights to private property have developed and intensified in legal and popular thought in the Anglo-American world, often bearing only scant resemblance to Locke's own ideas. *See, e.g.*, Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. J.L. & PUB. POL'Y 891, 892–95 (2006) (alleging scholarly misinterpretation of Locke in the copyright arena).

25. Recall Bentham's statement that "property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases." JEREMY BENTHAM, THEORY OF LEGISLATION 113 (C.K. Ogden ed., Routledge & Kegan Paul Ltd. 1931) (1802).

formalism. The fact that society creates property does not in any way mean that property is void of ideas about ethics, justice, morality, or any other values and goals. It rather indicates that any deontological or consequentialist considerations that stand at the basis of the property regime pass through the prism of society's decisionmaking institutions and are not (and should not be) imposed on the legal regime as a given through "scientific" extra-societal reason.

Second, in creating the fundamental principles of property law—as in other legal fields—the State is not acting as simply a vessel that facilitates private coordination. The governmental action in establishing the institution of property is qualitatively and materially different from private voluntary cooperation. Beyond the resolution of straightforward collective-action problems and other types of market failures, which necessitate centralized decisionmaking, the authority of the State to enact rules and to exercise its monopolistic powers of enforcement and coercion substantially exceeds private agency. This applies not only to the direct State/citizen vertical relationship, but also to the basic tenets of property relationships among different individuals.[26]

This facet of the political nature of property therefore undermines strong contractual theories of state action and property law in particular. The virtue of property law does not hinge upon tracking down an explicit or implicit private consensus for establishing property rights, as a narrow reading of the various social contract theories might indicate.[27] This also points to the insufficiency of accounts such as Harold Demsetz's famous depiction of the evolution of private property among Native Americans[28]—that is, about the evolution of property as a rationally evident, largely grassroots process that follows from economic, technological, or institutional changes. Whereas property enforcement can be portrayed as "organized consent,"[29] the analysis of property law cannot stop there. Formal institutions play a significant independent role in establishing, protecting, and changing property regimes not only as a practical matter,[30] but

26. *See* Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 VA. L. REV. 1391, 1411–15 (2006).

27. Beyond classic "social contract" theories such as those of Thomas Hobbes, John Locke, and Jean-Jacques Rousseau, several contemporary theories of the State focus on its role as an efficient third party enforcer of private agreements. *See, e.g.*, YORAM BARZEL, A THEORY OF THE STATE: ECONOMIC RIGHTS, LEGAL RIGHTS, AND THE SCOPE OF THE STATE 13–58 (2002). For another contemporary contractual theory of property, albeit one embedded in political analysis, see GARY D. LIBECAP, CONTRACTING FOR PROPERTY RIGHTS 4 (1989).

28. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (PAPERS & PROC.) 347, 351–53 (1967). For later developments of Demsetz's principal insights, see, for example, 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).

29. *See* Benito Arruñada, *Property Enforcement as Organized Consent*, 19 J.L. ECON. & ORG. 401 (2003) (justifying governmental monopoly in land recording and registration activities as facilitating private contracts and protecting third parties).

30. *See* Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117, 127–52 (2005) (analyzing the intricate ways in which political institutions operate and make decisions about the establishment or hindrance of new property regimes); *see also* ITAI SENED, THE POLITICAL INSTITUTION OF PRIVATE PROPERTY 1 (1997).

also as part of an essential, normatively desirable function of the State.

Third, because the State is not just any other institution for private coordination but one that plays a constitutive role in establishing the basis of property regimes, it must rely on a different kind of reasoning in its decisionmaking. Thus, even legal norms that apply regularly to property relationships among individuals must rely at their core on "public" reasoning.

What does "public" reasoning mean in this context? The answer has been highly diverse in philosophical and legal discourse. Immanuel Kant, for example, focused on establishing a system of private rights consistent with a "united general will" and dedicated to ensuring basic equal independence of mutually free persons.[31] Thus, under a Kantian view, public reasoning and decisionmaking are necessary to guarantee that all persons in society will enjoy their essential freedoms together; this, in turn, serves as a basis for establishing a division of responsibility between society and the individual.[32] This is although such "publicness" focuses more on the *process* of a collective taking of responsibility rather than on any specific substantive outcome.

The idea of public reason is most commonly associated in contemporary thought with the writings of John Rawls. Rawls portrays public reason as the common reason of the collective body when exercising its political and coercive power in enacting or amending generally applicable laws.[33] Public reason is framed to apply solely to society's basic institutions and consists of premises and modes of deliberation that are widely accepted or are at least available to all citizens.[34] Focusing his attention on society's decisions about "constitutional essentials" (comprised of the general structure of government and the political process and of several basic individual rights and liberties),[35] Rawls thus depicts the process and the materially different reasoning mode of public forums, including courts, as opposed to personal and other nonpublic deliberations.[36]

In this context, it is significant to observe the shift in Rawls's theory of justice from the famous two substantive moral principles of justice in *A Theory of Justice*[37] to the political conception of justice in *Political Liberalism*.[38] Rawls's political conception accepts the fact of society's "reasonable pluralism" about

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31. Kant further argues that all citizens are entitled to demand that others treat them in accordance with the laws of natural freedom and equality, even if some are unable or ineligible to actively participate in public decisionmaking by voting, thus being "passive" members of society. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS 91–92 (Mary Gergor ed. & trans., Cambridge Univ. Press 1996) (1797).

32. *See* Ripstein, *supra* note 26, at 1394, 1406–15.

33. JOHN RAWLS, POLITICAL LIBERALISM 213–14 (rev. ed. 1996). For a concise analysis of Rawlsian public reason, see Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449, 1467–79 (2006).

34. POLITICAL LIBERALISM, *supra* note 33, at 223–27.

35. *Id.* at 227–30.

36. *Id.* at 215–16. Rawls even depicts the court as the "institutional exemplar" of public reason in a constitutional regime with judicial review. *Id.* at 231–40.

37. For these two principles, which would have been allegedly accepted by all society members in the "original position," see JOHN RAWLS, A THEORY OF JUSTICE 10–15 (rev. ed. 1999).

religious, moral, or philosophical doctrines.[39] It looks rather for the mechanism by which citizens are "able to explain to one another . . . how the principles and policies they advocate and vote for can be supported by the political values of public reason," so that all citizens may be expected to endorse such decisions as "reasonable and rational" even when some may disagree on specific substantive decisions.[40] Whereas Rawls insists that certain basic rights and liberties must be maintained even under a political conception of justice,[41] I think that the thrust of the shift in his theory—even if Rawls is somewhat implicit about it—lies in the assertion that foundational decisions by the State's institutions need not be based on specific consensus or "objective" viewpoints; rather, they must maintain a publicly reasoned nature, at least to some extent. And, as Arthur Ripstein argues more broadly, a public standpoint backed by public reason—as applied by legislatures, regulators, or courts—is a perspective that can generally claim normative superiority in society over private or nonpublic perspectives.[42]

Importantly, the political dimension of the institution of property does not necessarily presuppose a single model of society. Specifically, although one might think that a concept of publicly reasoned decisions about the establishment of property law makes normative sense only in a political community which demonstrates genuine "civic republicanism,"[43] or at the least maintains a rich "public sphere" which enables individuals to enjoy sufficient "public freedom" as envisioned by writers such as Hanna Arendt[44] or Jürgen Habermas,[45] I believe that arguments in favor of publicly reasoned decisions and their normative superiority can also be made for a society in which public decisions are made predominantly by state institutions, including legislators, administrators, and reviewing courts. But this is definitely not to say that *any* form of decisionmaking labeled "public" simply because it is undertaken by a public institution may qualify as employing "public reasoning" for that matter. Obviously, a legal system in which public decisionmaking entities are captured, corrupt, or otherwise constructed so that they do not meet the essential features of democratic, transparent, and genuine deliberative discourse is one in which "public reason" fails to possess a genuine meaning and cannot claim institutional or normative superiority in establishing the societal nature of property. As I will show in Part III, judicial review plays an essential role in ensuring that collective decisionmaking about property will indeed reflect a substantive "public" nature.

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38. RAWLS, *supra* note 33, at 11–15. For a general discussion of this shift, see FREEMAN, *supra* note 23, at 523–27.

39. RAWLS, *supra* note 33, at 36.

40. *Id.* at 217.

41. *Id.* at 223–24. *See also infra* text accompanying notes 55–59.

42. Ripstein, *supra* note 26, at 1428.

43. For a critical discussion of the interplay between property and "civic republicanism," see STEPHEN R. MUNZER, A THEORY OF PROPERTY 138–42 (1990).

44. HANNA ARENDT, ON REVOLUTION 30–32, 114–23 (1963).

45. JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger trans., MIT Press 1989) (1962).

B. THE VALUES OF PROPERTY

I argued above that a political model of property and the use of public legal reasoning in making foundational or primary decisions about property regimes do not endorse strict formalism or place severe limits on the types of values and goals that may be legitimately promoted through the institution of property.[46] The choice about what types of justification will be validated and how these would be implemented in the constitution of property regimes is for each society to make.

Decisionmakers and commentators have labored long and hard to craft founding principles for the establishment of property regimes, and I will not even attempt within the scope of this Article to offer an overview of such efforts.[47] The following remarks, however, are worthy of attention in the context of the present analysis.

Within the myriad property theories, one can discern an increasingly intriguing interplay between rationales for legitimate appropriation of resources and theories concerning broad social commitment.[48] One group of arguments includes theories that seek to justify—or disqualify—the granting of distinctive property rights in resources to persons based on the normative conviction that this will create proper incentives, reward certain activities, or otherwise facilitate the attainment of desirable outcomes for these and similarly situated persons and correspondingly to society in general. Such arguments relate most closely to economic efficiency considerations about incentives for resource productivity and internalization of costs and benefits,[49] the Lockean labor-desert theory,[50] and theories connecting legally mandated appropriation to attainment of individual liberty,[51] political freedom,[52] personhood-constitution,[53] and so forth.[54]

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46. I thus dispute Lawrence Solum's contention that public legal reason should be "shallow," that is, void of any deep premises about moral, religious, consequentalist, or deontological ideas. *See* Solum, *supra* note 33, at 1473–78. I subscribe to the more inclusionary view of public legal reason as expressed in George Rutherglen, *Private Law and Public Reason*, 92 VA. L. REV. 1503, 1513–15 (2006).

47. Some admirable scholarly endeavors include J.W. HARRIS, PROPERTY AND JUSTICE (1996); MUNZER, *supra* note 43; PENNER, *supra* note 22; LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER (2003); and WALDRON, *supra* note 24.

48. This suggested categorical division is my own. Other commentators have advocated for different groupings in mapping out property theories. *See, e.g.*, WALDRON, *supra* note 24, at 106–36 (differentiating between special- and general-rights-based arguments for private property, based on H.L.A. Hart's broad distinction between special rights and general rights in law).

49. The origins of this analysis go back to thinkers such as Adam Smith, William Blackstone, and Jeremy Bentham. *See* Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 360–64 (2001). For contemporary accounts, see STEVEN SHAVELL, THE FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 11–23 (2004); Demsetz, *supra* note 28, at 347–50.

50. WALDRON, *supra* note 24; *see also* MUNZER, *supra* note 43, at 255–56, 285–87.

51. *See, e.g.*, RICHARD PIPES, PROPERTY AND FREEDOM 279–81 (1999); UNDERKUFFLER, *supra* note 47, at 40; James M. Buchanan, *Property as a Guarantor of Liberty*, *in* PROPERTY RIGHTS AND THE LIMITS OF DEMOCRACY 1, 59 (Charles K. Rowley ed., 1993).

52. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 7–21 (1962).

53. *See* MARGARET JANE RADIN, REINTERPRETING PROPERTY 36–59 (1993).

The second group of theories may be said to consist of arguments that support the advancement of certain broad-based societal goals by shaping the rules on the basic allocation of goods and benefits in society. These theories are mostly associated with the promotion of an ideal of social justice and equality that acts as a fundamental constraint on societal-decisionmaking institutions. Kantian and Rawlsian political conceptions of society and property condition the State's legitimacy to exercise its powers and to enforce each person's private rights against others on a collective guarantee of providing adequate resources and opportunities for all,[55] so as to ensure "equal basic rights and liberties."[56] These conceptions thus mandate the existence of societal mechanisms for redistribution.[57] Similarly, Ronald Dworkin's theory of the right to equal "concern and respect"[58] rests upon a governmental assurance of a basic equality in the distribution of resources.[59]

Interestingly, whereas the latter category of theories has been traditionally conceived as suggesting *external* constraints or preconditions on the creation and enforcement of a private-property system, authors who support the promotion of values of social responsibility or distributive justice have increasingly challenged property from within. The institution of private property, goes the argument, is not only about exclusion and protection of the status quo in favor of the formal rights holder (whose ownership is generally justified by legitimate appropriation theories), but is also *inherently* laden with values of responsibility and obligation to others.[60] Furthermore, the constitutionalization of property in a certain legal system does not necessarily dictate outright, supralegislative hostility to the goals of social obligations or redistribution through property law.[61] These commentators have thus suggested reshaping property relations

54. For a critical analysis of such "resource-specific" arguments, see generally HARRIS, *supra* note 47, at 13–14.

55. Ripstein, *supra* note 26, at 1433–35.

56. RAWLS, *supra* note 33, at 227.

57. Both Kant and Rawls have been criticized, however, for allowing substantial economic disparities in society, thus undermining their own contentions about freedom and equality. *See* MUNZER, *supra* note 43, at 132; *see also* FREEMAN, *supra* note 23, at 527–28.

58. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 199 (1978).

59. Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 283–90 (1981) (holding a thought experiment of survivors on a desert island that uses auctions following an initial equal allocation of tokens to construct a system of mutually acceptable resource allocation).

60. *See* David Lametti, *The (Virtue) Ethics of Private Property: A Framework and Implications*, *in* NEW PERSPECTIVES ON PROPERTY LAW, OBLIGATIONS AND RESTITUTION 39, 39 (Alistair Hudson ed., 2004) [hereinafter NEW PERSPECTIVES]; JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 209–13 (2000).

61. *See* GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY 59 (2006) (arguing that the content of property is very much determined by judicial interpretation which "openly and systemically inquires what substantive value underlies the decision to make property a constitutionally protected right," and that the theory most compatible with liberalism is "pluralist, recognizing multiple purposes inhering in the constitutional protection of property").

between government and individuals (mainly the law of governmental takings[62] and benefits[63]), or among individuals,[64] in a manner that will incorporate such broad social commitment goals in appropriate settings.[65]

I am generally supportive of the contention that property should reflect various goals and values, which at times cohabit comfortably and in other instances make necessary a conscious compromise in the construction of specific property rules based on a normative process of value consideration and prioritization. In addition, as I have argued elsewhere, I reject the notion that an institutional choice to adopt a private-property regime in a certain setting necessarily dictates a clear-cut superiority of libertarian or welfarist values, just as embracing a public-property regime does not inevitably make egalitarianism the sole purpose to be pursued.[66] At the same time, the plurality of values and goals should not bring property into excessive ad hocery[67] and, more importantly, should not result in the conclusion that property is an empty concept that can be manipulated freely.[68]

The resolution of this tension may lie, in large part, in the institutional-political approach to property that is advanced in this Article. Society's decision-making institutions should engage in normatively conscious, publicly reasoned choices about the core nature of property institutions—that is, the resources that will be the subject of property rights, the construction of the types of property regimes (private, common, public, open access, or mixtures of these forms),[69] the basic allocation of entitlements and obligations with respect to such resources for the different types of stakeholders, and the development of prominent legal remedies to maintain the regime—considering and selecting the underlying values and goals to be attained.

This framework should apply not only to the establishment or reconfiguration

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62. *See* Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 767–91 (1999) (laying out a "progressive takings law").

63. This literature, which calls for placing positive duties on the government to endow its citizens with a certain level of governmental benefits, is most famously associated with Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

64. SINGER, *supra* note 60, at 95–139; Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326, 340–46, 379–90 (2006) (calling to implement redistributive goals, aimed at enabling weaker members of society to enjoy an objective threshold of well-being, in certain social scenarios such as landlord-tenant law and family property).

65. It is important to emphasize that not all these commentators agree on the same blueprint for the reconstruction of property law. For example, Lewinsohn-Zamir objects to the incorporation of explicit redistributive principles in takings law. Lewinsohn-Zamir, *supra* note 64, at 390–93 (arguing that compensation rules for regulatory takings are problematic because "they do not directly provide for objective goods or advance the worse-off's well-being").

66. Amnon Lehavi, *Mixing Property*, 38 SETON HALL L. REV. 137, 204–07 (2008).

67. *Cf.* Susan Rose-Ackerman, *Against Ad Hocery: A Reply to Michelman*, 88 COLUM. L. REV. 1697, 1700–02 (1988) (arguing against a strict case-by-case approach to judicial review of takings compensation).

68. *See infra* notes 75–77 and accompanying text.

69. *See generally* Lehavi, *supra* note 66 (identifying and analyzing different types of property regimes).

of a property regime as a whole (for example, the land tenure or the copyright system in a certain jurisdiction), but also for disputes about a specific resource whenever the legal action sought by one of the parties wishes to dramatically step out of the rough contours or core of the existing property regime. It is in such contexts that decisions made by collective institutions, acting through public reasoning, are better able to attain dispute-specific, normatively desirable outcomes without collapsing the foundations of the prevailing property structure and undermining its basic systemic integrity. I shall now develop this argument in more detail.

II. THE PUBLIC/PRIVATE INTERPLAY IN PROPERTY

A. THE UNIQUE COMPLEX OF PROPERTY

Any analysis of property law cannot avoid two foundational dilemmas that have constantly haunted scholars and have by no means seemed more crystallized in contemporary thought. The first is: what is property? The second: can a genuine public/private distinction be delineated in property law? I shall obviously abstain from making broad statements on these two issues and will rather make the following observations, which seem significant if one is to make any sense of the special texture of property within the context of this work.

Perhaps the greatest divide in the conceptualization of property follows from the long-standing in rem/in personam quandary—or, in more contemporary terms, the essentialist versus disintegrative approaches to property.[70] Very briefly, in Roman law and its successive civil law systems, the concept of property and of ownership in particular is fundamentally unified. This not only means that there is typically one party considered to hold the "box of ownership,"[71] but also that property rights are quintessentially in rem (against the asset) and are thus generally valid against the rest of the world.[72] Whereas the Anglo-American system of estates and tenure in land somewhat undermines the unitary concept of "ownership,"[73] property rights are nevertheless traditionally considered to possess the trait of an exclusionary right with universal validity, as most famously depicted by William Blackstone.[74]

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70. An efficient review of this debate is found in MERRILL & SMITH, *supra* note 2, at 15–22.

71. John Henry Merriman, *Ownership and Estate*, 48 TUL. L. REV. 916, 927 (1974) (explaining that under the Romanic theory of property, the "box of ownership" contains rights, "including that of use and occupancy, that to the fruits or income, and the power of alienation").

72. *See* BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 99–101 (1962); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 780 (2001).

73. Merriman, *supra* note 71, at 927–929.

74. *See* WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 2 (Univ. of Chicago Press 1979) (1765) (defining the right of property as "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"). *But 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 more wishful thinking than a depiction of the complex legal reality of his time).

A major paradigm shift in Anglo-American property thought was spurred by Wesley Hohfeld, who set out to challenge the traditional in rem/in personam dichotomy. Defining and analyzing the different attributes of in personam rights through the delineation of legal relationships among persons, Hohfeld argued that the same typology applies to in rem rights—save only to the large, indefinite number of persons who are bound by these in-personam-in-fact legal relationships.[75] Whereas Hohfeld's enterprise was largely analytical-conceptual, the subsequently developed metaphor of the "bundle of rights"[76] mostly served a normative purpose for the legal realists of the early twentieth century and for later academic schools that sought to decanonize property. According to these critics, property had no inherent meaning but, rather, was composed of numerous, diverging clusters of legal interests that could be distinctively determined in each instance through overt political and normative societal decisionmaking.[77]

This front has not remained quiet in recent discourse. Most notably, Thomas Merrill and Henry Smith have led a campaign in a series of articles to reinstate at least some of the integrity of property, arguing, inter alia, that: in rem rights are qualitatively different from in personam rights even if the property/contract boundaries are not always neat;[78] Anglo-American law continues to implicitly embrace a *numerus clausus* (closed number) principle of property forms;[79] property rights retain at least a basic layer of universal exclusion;[80] and that these distinctive traits of positive property law can be justified as socially efficient.[81]

In the other camp, one finds current disintegrative or context-specific concepts of property, aligning members of what are otherwise very different schools. This group includes numerous law-and-economics scholars, who embrace the idea of efficient entitlement-specific allocation of rights in resources based largely on a liability rule framework,[82] as well as critical theory and realist scholars.[83] One notable example is Hanoch Dagan, who seeks to con-

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75. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 718–19 (1917).

76. Some scholars have remained rather faithful to the analytical contours separating in personam from in rem rights, portraying what they deem as quintessential or typical incidents of property and ownership. *See, e.g.*, TONY HONORÉ, *Ownership*, *in* MAKING LAW BIND: ESSAYS LEGAL AND PHILOSOPHICAL 161, 161–84 (1987).

77. *See generally* Thomas C. Grey, *The Disintegration of Property*, *in* NOMOS XXII: PROPERTY 69 (J. Roland Pennock & John W. Chapman eds., 1980).

78. Merrill & Smith, *supra* note 72, at 787.

79. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 12–24 (2001).

80. Merrill & Smith, *supra* note 49, at 395–96.

81. *See, e.g.*, Merrill & Smith, *supra* note 72, at 789–809. Other prominent scholarship that advances an essentialist approach to property, especially in regard to the general right of exclusion, includes PENNER, *supra* note 22, at 23–27, 68–76, and HARRIS, *supra* note 47, at 85–86.

82. *See* text accompanying *supra* notes 12–16.

83. *See, e.g.*, SINGER, *supra* note 60, at 130–39 (locating property's center of gravity in social interdependence and arguing that rights, including property ones, should be perceived as "socially

struct a current realist concept of property while shying away from destabilizing nihilism. Dagan portrays property law as "divided into different property institutions that parse the social world into distinct types of human interaction with respect to given categories of resources."[84] Under these views, although in varying degrees, property has no predetermined or inherently unique substantive features that clearly distinguish it from other fields of law regulating legal relations among persons.

I believe that while all these viewpoints are highly valuable for better grasping and designing property, none of them fully and exclusively capture the essence of property and, in some respects, they tend to miss several important institutional ingredients of property.

To start with, I definitely agree that the set of proprietary entitlements and obligations may and should change for different resources, as is the case with the various circles of relationships that a resource owner has with other stakeholders (for example, family members, contractual parties, the government, members of the general public). Yet, the world of property cannot rely on the assumption that such contextual regimes will be neatly carved out in a manner that is both widely acceptable and readily comprehensible at any given point in time for the indefinite number of owners and other stakeholders of the different resources, especially given the dynamic and often unexpected evolution of societal relationships regarding a certain resource.[85] At least with respect to each one of the general categories of resources (that is, land, chattels, financial instruments, intellectual products, the environment, and so forth), there has to be a baseline that explicates the core nature or paradigm of property entitlements and obligations to facilitate a publicly announced, basic social understanding and, in turn, sufficient stability and security.[86]

This is definitely not to say that the default of property should always be possessive exclusion, as Merrill and Smith somewhat rush to conclude based on moral[87] and utilitarian perceptions.[88] Society's decisionmaking institutions may very well reach different conclusions in designing or amending the basic structure of property for different resources. The various considerations of

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situated, contingent on their effects on others, and therefore set within the context of relationships involving mutual obligations").

84. Hanoch Dagan, *Legal Realism and the Taxonomy of Private Law*, *in* STRUCTURE IN THE PRIVATE LAW: ESSAYS IN MEMORY OF PETER BIRKS 214, 224 (Charles Rickett & Ross Grantham eds., 2007).

85. The understanding that property rights are by nature incomplete, given also the inability to define and decide in advance the fate of all resource uses, "known and unknown, new and foreseeable," is not only recognized in the legal literature, but is also increasingly gaining currency in the economic literature.

86. *See, e.g.*, CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 11–20 (1994); Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 554–63 (2005).

87. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007) (arguing that the American property system is largely based on a moral convention of exclusion).

88. *See* Merrill & Smith, *supra* note 49, at 395–96.

utility, ethics, egalitarianism and so forth may point to different normative choices of legal rules in land vis-à-vis intellectual property, for example. Thus, the basic boundaries of "fair use" in copyrighted materials need not adhere to the laws governing encroachments on private land.[89] Furthermore, the carving out of exceptions to the property paradigm for a certain subclass of the resource, or for a very specific dispute, need not be considered normatively inferior to the property core or as a testament to the very weakness of a property paradigm.

In this sense, a common mistake that seems to typify much of the essentialist and disintegrative property scholarship alike is to identify the "uniqueness" of designated core property rights and interests in certain resources with the term "exclusion." This focuses the debate between the two camps on whether exclusion of others from a resource can be seen as the founding stone of property and whether property regimes across different resources share this trait broadly enough to be grouped under one discernible jurisprudential umbrella entitled "property."

Whereas the nature and extent of exclusion—that is, the general duty of non-owners to "stay out"—is definitely a major issue in determining socio-legal relationships with respect to resources, the very core elements of allocation, control, and protection of property interests in resources contain much more than exclusion. First, whereas external boundary-keeping may have some (contestable) intrinsic value of facilitating personal autonomy through the carving out of an isolated space,[90] exclusion is more comprehensively understood as mainly instrumental and "grounded by the interest we have in the use of things."[91] Second, and relatedly, the general negative duties of outsiders tell us relatively little about the affirmative and operative components of property rights.[92] The ability of a landowner to enjoy "positive" incidents of ownership, such as the right to use and manage the resource, the right to income and to the capital, or the right of alienability,[93] is far from being trivial or self-evident. Rather, the landowner's ability depends on state authorization of these kinds of private powers and rights in the construction of property as well as on the property owner's distinctive relationships with the holders of other rights and interests that stand out from the general public's duty to abstain from interfering with the control and use of the property.

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89. For a discussion of such tension, see Timothy J. Brennan, *Copyright, Property, and the Right to Deny*, 68 CHI.-KENT L. REV. 675 (1993). For an interesting recent exchange about similarities and differences in the protection of property in land vis-à-vis intellectual property, compare Peter S. Menell, *Intellectual Property and the Property Rights Movement*, REGULATION, Fall 2007, at 36, with Richard A. Epstein, *A Response to Peter Menell: The Property Rights Movement and Intellectual Property*, REGULATION, Winter 2008, at 58.

90. *See, e.g.*, WALDRON, *supra* note 24, at 295.

91. PENNER, *supra* note 22, at 71; *see also* Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1752 (2007).

92. Larissa M. Katz, *Exclusion and Exclusivity in Property* 16–23 (Legal Studies Research Paper Series No. 08-02, 2008), *available at* http://ssrn.com/abstract=1126674.

93. HONORÉ, *supra* note 76, at 168–79.

Moreover, another feature of the current property debate that tends to be misleading is the nearly automatic identification of the term "property" with "private property" when arguing whether property as an *institution* has any distinctive, inherent features. Again, the question of whether the concept of property can be seen as established on a fundamental basis of universal exclusion assumes almost instinctively a single picture of the world in which an individual is formally considered "owner." The debate is then about the existence of an inherent content for such private ownership. This conception, however, misses the crucial fact that the actual range of property regimes is much richer and includes not only "private property," in the sense of individual full-scale ownership, but also other property regimes in regard to both formal rights allocation and resource governance, including common property, public property, open-access, and different mixtures thereof.[94]

But the fact that property cannot always be reduced to a simplistic set of exclusion-type universal rules does not mean that it lacks—or should lack—defining characteristics that can be publicly communicated to enable the various stakeholders to understand the broad legal framework governing human relationships for certain resources. In other words, although property is not composed merely of in rem unity, it cannot and should not be shattered into an indefinite number of pieces.

Property should thus be understood as a jurisprudential framework the primary purpose of which is to delineate basic kinds of entitlements and obligations in regard to certain types of resources. This set of rules must be explicated through a societal process and made available to the various, often heterogeneous members of the public. The key to successfully reconciling the desirability of having a broad-based, relatively straightforward core of property with the inevitable need to recognize the complexity and dynamism of the resource and the variety of parties implicated by it lies not so much in a paternalistic, closed list of generic kinds of recognized property interests,[95] but rather in the nature of the institutional mechanism for decisionmaking and rule-announcement.

It is here that the public/private interface also comes into play. I now turn to land as an example that will lead me through the rest of this Article. First, in designing a property regime, the sets of entitlements and obligations pertaining to land cannot be spelled out easily in advance to encompass all the potential relationships that will arise in regard to the land. The nature and extent of the affinity of neighbors and other stakeholders to a certain tract may change

94. *See generally* Lehavi, *supra* note 66.

95. *See* Merrill & Smith, *supra* note 79, at 24–58 (arguing that the *numerus clausus* principle achieves optimal standardization that minimizes the sum of societal costs). Merrill and Smith's argument also has an institutional component, according to which new forms of property rights should be designed by the legislature and not by courts. *Id.* at 58–68. While I accept some of Merrill and Smith's general institutional arguments, I believe that their focus on generic kinds of property interests is too narrow and misses much of the real-life and theoretical complexity of property, in a manner that also distorts their otherwise insightful analysis.

invariably based on factors such as the current uses of the land (compare a polluting factory with a tranquil estate), the opportunity cost of the land given its unique location or other traits (think again about the settings of *Jacque* and *Kelo*), the identity of the tract's occupants vis-à-vis neighbors (consider the constantly debatable issue of neighborhood socio-economic composition),[96] and so forth.

The result of this dynamism and multidimensionality is that property becomes a complex web of general laws, area-specific public regulation, contract-based group governance, and other private arrangements, thus involving a variety of private, group, and public decisionmaking.[97] This means, for example, that on the one hand, government exercises considerable control over privately owned lands that is probably unmatched for other resources, whereas private individual and group actions increasingly shape the broader landscape of property ownership and control, especially when the actions receive a public blessing, as is generally the case with Common Interest Communities.[98] Hence, as I will show in the following section, in many contexts public and private decisionmaking are meshed together to create the institutional composition of property.

But there still remain fundamental issues that require overt, publicly reasoned, collective decisionmaking. The core of the property configuration designated for a certain type of resource, and major shifts from it[99] must be based on a resolution by society's collective-decisionmaking institutions. This task relies in turn on public reasoning. Such reasoning should explicate the societal values and goals at the basis of property's core and why the creation of a resource subcategory or major case-specific exception to the paradigm is justified.

This leads to another aspect of the complicated relationship between public and private in property law. One should not mistakenly attribute publicness only to property relations between an individual and the state or to property rules stemming from broad-based constitutional provisions. Core issues in property are also defined in a way that implicates both the institutional decisionmaking process and the substantive reasoning in matters of resource control that apply most commonly among non-state parties. Beyond the somewhat self-evident observation that any form of legal rule that is enforced by state institutions involves a significant public trait,[100] the very establishment of basic entitlements and obligations that are liable to implicate multiple, often indefinite parties with respect to a certain kind of resource normatively necessitates

96. For an analysis of neighborhood composition as a property issue, see Lee Anne Fennell, *Properties of Concentration*, 73 U. CHI. L. REV. 1227 (2006).

97. For a foundational analysis of the various forms of land-use controls and controllers, see Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).

98. *See* discussion *infra* section II.B.1.

99. *See infra* Part III.

100. *See generally* BARZEL, *supra* note 27.

collective decisionmaking. One may think, for example, about statutes authorizing certain corporations such as common carriers and public utilities to assemble lands or rights-of-way,[101] laws governing the nonconsensual private transfer of lands through adverse possession,[102] or laws limiting property owners from exercising an otherwise legally recognizable right of exclusion, such as statutes prohibiting several forms of discrimination against prospective tenants.[103]

Put differently, the legal institution of property is typified by the fact that entitlements and obligations regarding specific resources regularly implicate numerous parties not only as a matter of abstract analysis, but also in social and economic practice. Often, the unique positioning—physical or functional—of such resources (consider a strategically located plot of land or a medically essential, underutilized patent) requires specific deliberation over the fate of such resources not only ex ante, but also ex post, when the paradigmatic status quo proves to be unsatisfactory in either a specific instance or for the entire category of resources. However, excessive ad hocery, aimed at attaining resource-specific efficiency, justice, or some other goal, comes with its own high price tag: it undermines the broad and relatively straightforward signals that property should send about its core for similar resources and the large numbers of persons implicated by them.

I argue that the way to bridge such instances of difficult tension is mostly institutional, and that the institutions most appropriate for this task are those structured to possess, and regularly conceived as, entrusted with the power and duty to design broad public policy. Thus, regardless of what the actual core of property entitlements and obligations consists of with respect to a certain type of resource, and notwithstanding whether the dispute can be classified as falling under "public law" or "private law"—a distinction that is especially difficult to draw in the context of property—a more nuanced yet generally sustainable approach would be to examine if the potential broad-based undermining of the core concept of property for such a resource justifies the type of institutional intervention that consciously considers goals and values beyond the interests of the specific parties.

This argument should not be read as undermining the grand enterprise of the common law in developing the institution of property over centuries of case law. Nor does it imply that courts are unequipped or normatively constrained in explicitly discussing broad societal values and goals. Moreover, in many cases, the legislature may specifically opt to initially design the property institution regarding a certain resource in a very "flexible" or "soft" manner, consciously awarding courts substantial power in designing over time, through case law, the very core of the property regime. This is often the case when the legislature uses

101. Lehavi & Licht, *supra* note 11, at 1710–11.

102. *See infra* section III.C.

103. For a survey of such prohibitions, see DUKEMINIER ET AL., *supra* note 2, at 376–84.

broad legal standards such as "good faith" or "reasonable conduct" in establishing the fundamental features of the property regime, although such an initial collective policy choice has obvious implications for the stability and predictability of the property regime.

Furthermore, courts always participate in the process of designing and redesigning the very foundations of property as part of the *ensemble* of collective-decisionmaking institutions in their judicial review function. And somewhat counterintuitively, as I argue in section III.D, the court, in its judicial review capacity, may actually have no less power than it would have in private adjudication.

B. PUBLIC/PRIVATE OSMOSIS IN INTERMEDIATE PROPERTY CONFLICTS

1. Close-Knit Relations

One setting in which the core conception of property for a certain resource may be changed as a matter of both practice and theory, mostly or at the least conjointly with private decisionmaking entities, is that of closely-knit associations, which are explicitly and clearly distinctive of the general paradigm in their property relationships. The closely knit association typically refers to various dominant forms of group-based ownership or management of resources that rely on extensive internal norms.

Prominent examples are that of "Intentional Communities," that is, groups whose members share a substantial common denominator of ideology, values, or beliefs that is highly distinctive from those of general society, such that these communities functionally and physically insulate themselves from society and rely on an extensive set of internal norms and institutions to maintain their communality.[104] Different types of "Intentional Communities," such as members of monasteries, native tribes, ultra-orthodox Jews, Amish, Hutterites, Israeli kibbutzim, and so forth obviously diverge from one another in their distinctive property configurations. Yet, all property practices of Intentional Communities preserve a central role for the community in owning *or* governing assets or several attributes of those assets through either formal or informal internal norms.[105]

As I have shown elsewhere, the extent to which the community is able to exercise its distinctive property structure depends on whether society at-large, acting through its formal institutions, is generally willing to invalidate this independent development and control of property configuration or, as I have termed it, to provide the community with "Property Tailwind" that supports the way community institutions formally and informally conduct their affairs.[106]

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104. Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 271–76 (2006).

105. *See generally* Amnon Lehavi, *How Property Can Create, Maintain, or Destroy Community* (Theorectical Inquiries in Law, 2009), *available at* http://ssrn.com/abstract=1087026.

106. *Id.* at 19–23.

This basic societal choice naturally involves public-policy considerations and public-reason arguments about enclaves in a liberal democracy, addressing both the internal and external impacts of such sub-society "property sovereignty."

Naturally, I shall not expound upon the adequacy of all modes of sub-society property institutions,[107] and will draw attention here to one such dominant form, which is of growing importance and raises a special set of considerations.

Private developments governed by homeowners associations, typically referred to as Common Interest Communities (CICs), constitute a rapidly growing, established subclass of land control formations.[108] Their essence is embedded in the conditions, covenants, and restrictions (CC&Rs) that are part of the CIC's constitutive governing documents and that create a system of equitable servitudes to control and regulate commonly owned assets and amenities as well as the use of private housing units. The CIC's institutions generally have power not only to enforce the original terms, but also to make managerial decisions, promulgate rules, and even amend the governing documents without a need for unanimous homeowners' consent.[109]

The internal property structure of CICs is thus designed *ab initio* to solve a host of collective action problems that neighbors typically face in residential neighborhoods. These problems relate both to the establishment and management of joint resources and to the control of intraneighborhood externalities (perceived as such by the community members' idiosyncratic tastes) resulting from the use of the private housing units. To resolve these problems, individuals enter a consent-based legal regime characterized by extensive group governance that goes well beyond conventional public governance of properties in residential neighborhoods. The reciprocal nature of this regime purports in principle to make every community member better off than in a no-group-regulation scenario.[110]

CICs have generally received the blessing of American society's formal institutions, which not only facilitate the CICs' very existence but also provide

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107. One difficult problem in the context of my work concerns the proper institutional crafting of intrafamily property law. *See* Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75 (2004) (advocating for a property system based on a normative conception of marriage as an "egalitarian liberal community"); Lewinsohn-Zamir, *supra* note 64, at 385–89 (calling to incorporate egalitarian distributive concepts in this property system). I shall refrain from developing a full-scale argument about this setting and will only remark that the thrust of the dilemma lies in the fact that although a family is allegedly a quintessential close-knit community based on consent and fraternity, it is adversely affected by hierarchal social and cultural traditions that are increasingly conceived as requiring publicly reasoned, publicly made corrective measures.

108. The 286,000 CICs in the United States house about 57 million residents to date. *See* Community Associations Institution, Industry Data, http://www.caionline.org/about/facts.cfm (last visited Feb. 28, 2008).

109. I expounded upon the basic structure of CICs in Lehavi, *supra* note 66, at 160–62.

110. In a recent survey, 74% of CIC residents said that their CIC's rules "protect and enhance" property values. Only 3% said these rules "harm" property values. Zogby International, Homeowners and Community Associations, 2005 National Research Findings, http://www.caionline.org/about/survey.cfm (last visited Aug. 1, 2007).

significant tailwind in borderline cases.[111] One example is the California Supreme Court's decision in *Villa De Las Palmas Homeowners Ass'n v. Terifaj*,[112] which upheld a majority-approved amendment to a CIC's governing documents, imposing a no-pet restriction.[113] The court viewed use-restrictions as "crucial to the stable, planned environment of any shared ownership arrangement"[114] and held that "all homeowners are bound by amendments adopted and recorded subsequent to purchase."[115] The court thus awarded CICs substantial power not only to enforce contracts, but also to create and sustain what one would normally categorize as property entitlements and obligations within the compounds of the community.[116]

As already mentioned with respect to Intentional Communities, this is definitely not to say that the public policy toward CICs should be void of any public-reason considerations and even intervention in appropriate cases. The limits of majority-based coercion over a reluctant minority within the CIC must be delineated to avoid extreme cases of abuse, hardship, or exploitation.[117] Moreover, society's general institutions, including courts, cannot disregard CICs' powers and practices vis-à-vis outsiders, as CICs are often criticized as a "secession of the successful,"[118] "government for the nice,"[119] and so forth, referring to formal and informal exclusionary mechanisms employed by these communities.[120] The latter issue grows in importance with the proliferation of CICs, making the question of genuine individual choice and viable alternatives much more vivid. Indeed, several commentators have already called for viewing such planned communities as quasi-governments and for applying certain public legal norms to them in a way that would undermine their property-sovereignty

111. In some states, the creation of CICs is governed by specific legislation on the matter. *See* RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.3 (2000). Probably most familiar is California's Davis-Stirling Common Interest Development Act, codified at CAL. CIV. CODE § 350–78 (Deering 2005).

112. Villa De Las Palmas Homeowners Ass'n v. Terifaj, 90 P.3d 1223 (Cal. 2004).

113. *Id.* at 1235.

114. *Id.* at 1228.

115. *Id.* at 1229.

116. For a more detailed analysis, see Lehavi, *supra* note 66, at 160–66.

117. For differing views on the nature and scope of internal group power over members, compare Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1413–19 (1994) (generally advocating an approach to CIC powers based on a "relational contract" concept), with Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 55–58 (1989) (calling for the application of a more stringent standard of "reasonableness" for certain post-establishment nonconsensual decisions to avoid minority abuse).

118. *See generally* Sheryll D. Cashin, *Privatized Communities and the "Secession of the Successful": Democracy and Fairness Beyond the Gate*, 28 FORDHAM URB. L.J. 1675 (2001).

119. *See generally* Paula A. Franzese, *Privatization and Its Discontents: Common Interest Communities and the Rise of the Government for "The Nice,"* 37 URB. LAW. 335 (2005).

120. Overt mechanisms may include gates and fences physically isolating the community. Formal sorting of community members is achieved by associational provisions setting up, for example, age restrictions or bans on convicted sex offenders. This is in addition to informal sorting mechanisms such as premeditated choice of the type of common amenities offered by the CIC. For references on these issues, see Lehavi, *supra* note 66, at 161 n.100.

capacity.[121] Hence, we may very well witness a societal reconsideration as to whether CICs still form a genuine consent-based distinctive pattern of property relationships among neighbors in land in a way that justifies substantial leeway to such groups in designing and altering the very contours of their property configurations.

2. Low- and Medium-Level Disputes

Another instance in which the potential infringement of a person's preexisting property rights may not mandate that society's collective-decisionmaking institutions go back to the drawing board and reconsider the contours of property is that of "low- or medium-level disputes." This term refers to cases in which the core of the property regime is not undermined, either because the remedies sought are within the boundaries of the commonly understood perception of the property regime or because the potential sacrifice of legally recognizable rights is otherwise not "drastic" in the sense that it still falls within what the collective-decisionmaking entities define as the core concepts of the property regime.

To illustrate my argument, consider a low- or medium-level environmental dispute, such as one in which a person's use of his land interferes with another person's enjoyment and use of her land, but does not render the affected land substantially unusable or "unenjoyable."[122]

To begin with, it is a truism that nuisance law does not protect an affected landowner against *all* sorts of objective or subjective interferences, but is a priori limited by the longstanding legal and common perception of "live and let live."[123] Thus, to prevail in a private nuisance case, for example, the plaintiff usually has to show that the activity is sufficiently "subnormal" in nature and scope in relation to its vicinity.[124] Moreover, the basis of liability may sometimes hinge upon whether the defendant's conduct is considered otherwise tortious (for example, negligent).[125] Beyond that, the remedies for a nuisance

121. *See, e.g.*, David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 763, 778–79 (1995) (arguing that residential associations should be regarded as state actors and that their powers should not exceed those of government entities).

122. Whereas such disputes are usually resolved in private-law jurisprudence through the law of nuisance, nuisance law's traditional location in tort does not undermine its proprietary nature. *See* Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 990–96 (2004).

123. *See* Bamford v. Turnley, (1862) 122 Eng. Rep. 27, 32–33.

124. *See* ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 114 (3d ed. 2004); Ellickson, *supra* note 97, at 731–33. As the United States Supreme Court famously stated in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926), "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."

125. *See* CLERK & LINDSELL ON TORTS § 19-15 (Anthony M. Dugdale et al. eds., 18th ed. 2000) and RESTATEMENT (SECOND) OF TORTS § 822 (2007) for the English and American law, respectively, on that point.

that does not exceed the upper threshold of becoming a trespass in effect[126] are usually very context-specific, based on a "balance of interests" test, which at times is used quite confusedly to exempt the defendant of any liability[127] and in other instances vacillates in a very ad hocish manner between liability rule (monetary compensation) and property rule (injunctive relief) remedies.[128] Under either of these options, the resolution of the property conflict would not undermine the conventional paradigm or core of the property regime, although it would naturally bear the societal costs of constant fluctuations at the margins.[129]

Obviously, it may be difficult at times to draw the line between "low- or medium-level" and "drastic" disputes. One example is the increasingly complicated landlord-tenant law.[130] I do not share Merrill and Smith's view that since the disputes in this setting revolve around the terms of what are basically contractual relationships, they inherently do not touch upon the core meaning of property.[131] To me, this seems too simplistic an in personam/in rem line-drawing, which is somewhat anachronistic, as previously discussed. Without going into an elaborate analysis of the property/contract framework,[132] property issues may very well arise between parties who have a contract between them, such as when the contract is systematically incomplete so as to leave a sphere of "residual claim" to some of the resource's attributes,[133] or when certain normative or policy considerations are considered grave enough to justify external intervention—especially when the terms of the contract may substantially affect third parties.

Thus, issues such as the disallowance of self-help eviction by the landlord,[134] limits on contractual restraints on alienation by the tenant,[135] or the implied

126. *See* Smith, *supra* note 122, at 993–94.

127. Ellickson, *supra* note 97, at 720–21.

128. *See* RESTATEMENT (SECOND) OF TORTS § 941 (2007); *see also* John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 274–75 (2001). The property rules versus liability rules taxonomy is based, of course, on the work of Calabresi & Melamed, *supra* note 12.

129. Henry Smith argues that although the switch to such a "governance" regime is understandable from a case-specific efficiency viewpoint, too broad a reliance on such types of judicial resolutions may significantly increase the overall information costs, and this in turn justifies resolving such disputes through private parties or other institutions such as the legislature. Smith, *supra* note 122, at 1037–45. Whereas I definitely agree that for some types of disputes, other state institutions may be preferable to the judiciary, I think that Smith somewhat overstates the case against case-specificity. Obviously, environmental regulation is intended to resolve many potential land-use conflicts in advance, but arguing that every instance that is not covered by regulation requires site-specific legislation or administrative action may also prove prohibitively costly.

130. *See generally* DUKEMINIER ET AL., *supra* note 2, at 361–449.

131. *See* Merrill & Smith, *supra* note 87, at 1893–94.

132. *See infra* section III.E. *See generally* Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980); David Pearce, *Property and Contract: Where Are We?*, *in* NEW PERSPECTIVES, *supra* note 60, at 87; Merrill & Smith, *Interface*, *supra* note 72.

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

134. *See* Lewinsohn-Zamir, *supra* note 64, at 381–83.

135. *Id.* at 383–85.

warranty of habitability,[136] seem to also possess property traits. The more relevant question is whether the resolution of a private dispute may significantly chip away at the core understanding of property entitlements and obligations so as to justify a broader-based reconsideration and possible reformulation of the underlying societal values.

In other words, as already mentioned, property regimes will *always* be incomplete in the sense that any initial design of a property regime, careful and thoughtful as it may be, cannot predict all types of future uses, conflicts, externalities, or other "property frictions" that will arise with respect to certain types of resources in specific instances. Adjudication and other types of specific dispute resolution play a prominent role in giving ex post content where the initial property structure proves to be incomplete. Not every dispute resolution undermines the very core, broad-based understanding of the property structure in a manner that would dramatically affect multiple parties who are stakeholders in this and similar resources. The principal task, although far from easy in many cases, is thus to try to distinguish between the relatively non-core issues that I have typified as "low- and medium-level disputes" and those cases that have far-reaching consequences for the very foundations of the property institution. As we move up the scale of the potential "drasticness" of a conflict about property entitlements and obligations, the "publicness" of its resolution should be embedded not only in the resolution's content, but also in the institutional realm of decisionmaking. I shall now move to discuss these "drastic" instances more fully.

III. TAKING COLLECTIVE DECISIONS ON THE PRIMARY (RE)DESIGN OF PROPERTY

A. NOTE ON THE BROAD SPECTRUM OF LEGITIMATE PUBLIC ACTIONS

I now return to the *Kelo* case and to the normative quandary that I raised in the introduction, as to whether such a dispute should have been resolved by the institutional and doctrinal setting of governmental takings law or by litigation as a straightforward private case, given the identity of the "true" protagonists at the front and backstage of the drama.

Before delving into the role of collective-decisionmaking entities in designing and redesigning the core concepts of property, I find it important to put aside an implicit and considerably dominant perception among many about the spectrum of legitimate public actions regarding the state-facilitated allocation and reallocation of property entitlements and obligations.

Probably the core idea behind the various critiques of the rise and expansion of private property, especially during the age of laissez faire capitalism, is that reliance on the market economy in the production and consumption of goods and services reflects a conscious decision by government—by way of omis-

136. DUKEMINIER ET AL., *supra* note 2, at 431–39.

sion—to allow gross societal disparities in resource distribution[137] and to entrust private property owners with sovereign powers, in effect, over other persons.[138] Whereas relatively few in the West advocated a switch to comprehensive socialism or communism or to a market in which *all* surplus value (rents) will belong to society,[139] the State has nevertheless been conceived as the central tool for attaining an egalitarian-based, appropriate resource distribution in society either by regulation or other intervention in the market,[140] public ownership of core societal resources,[141] outright redistribution—mainly tax-and-transfer and other forms of government largess mechanisms[142]—or, more contestably, through a broader egalitarian-oriented crafting of legal rules in the various fields.[143]

What seems to grow out of this extensive intellectual endeavor is an implicit notion of a certain role allocation between the market (private decisionmaking) and the government (public decisionmaking), such that the former is generally responsible for maximization of aggregate resource productivity, whereas the latter is charged with tempering in appropriate cases the inevitable disparities in resource allocation (alongside other functions such as the resolution of straightforward market failures). This concept may and seems to have been taken a step further, in the sense that, when dealing overtly with the issue of resource distribution in society, public decisionmaking and public reasoning facilitated by active employment of the government's unique powers are fundamentally more legitimate for "downward" redistributive schemes (namely, from the better-off to the less well-off) than for "upward" redistributive ones. Accordingly, Justice O'Connor's famous assertion in her dissent in *Kelo* that "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory,"[144] was rhetorically aimed at exposing the allegedly clear illegitimacy of such government decisions.

I argue that this theoretical understanding is flawed. In the *Kelo* scenario, the City of New London would not have been outrightly illegitimate in publicly asserting as a reason for its decisionmaking that it saw much value in benefiting

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137. *See* MUNZER, *supra* note 43, at 98–110; BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 71–107 (1998).

138. *See generally* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

139. An interesting discussion of such theories is found in FRIED, *supra* note 137, at 108–59.

140. For a critical analysis of various measures used by governments to attain the goal of "providing an equitable distribution of resources" in areas such as food stamps, low income housing, health care, education, and labor market training, see RONALD J. DANIELS & MICHAEL J. TREBILCOCK, RETHINKING THE WELFARE STATE: THE PROSPECTS FOR GOVERNMENT BY VOUCHER (2005).

141. For a critical discussion of direct public provision, see *id. See also* Lehavi, *supra* note 66, at 143–150, 177–78 (surveying the current debate over privatization of traditional public services and arguing in favor of direct public provision in the context of public spaces).

142. This is probably most famously advocated in Reich, *supra* note 63. For a recent analysis of the British welfare state, see generally TONY BUTCHER, DELIVERING WELFARE (2d ed. 2002).

143. For an overview of this debate, see Lewinsohn-Zamir, *supra* note 64, at 327–28, 333–39.

144. Kelo v. City of New London, 545 U.S. 469, 503 (2005) (O'Connor, J., dissenting).

and promoting the interests of powerful and rich corporations at the expense of others because doing so would better serve the city's economy and enlarge its tax revenues, and that such a goal would justify the government's use of coercive powers to make way, literally, for the Fort Trumbull redevelopment. While the reader may move somewhat uncomfortably in her chair when the argument is put forward in such an explicit manner, it is not a reasoning that is inherently illegitimate for government to make or to act upon. Many of us would disagree with such a viewpoint, and public decisionmakers would naturally abstain from making such statements—although it is pretty much common knowledge that they sometimes act upon such perceptions. And, as I will argue in section D below, such a decision might not survive judicial scrutiny because it simply could not be settled with the prevailing legal regime or with the values and goals that are embedded in it. At the same time, however, regardless of our individual take on the matter, *Kelo* is the kind of "drastic" property conflict that must be resolved within the public realm of property, in the sense that it should be decided based on public reasoning by society's collective institutions, chiefly legislatures, administrators, and reviewing courts, and that such institutions have, as a normative matter, a broad range of options in considering and (re)designing the founding principles of property.

B. (RE)DESIGNING THE CORE OF PROPERTY THROUGH COLLECTIVE INSTITUTIONS

As argued, since property implicates a large—technically infinite—number of parties with certain entitlements or obligations for a specific resource (and resources in general), the legal regime has to rely on some core principles that are broadly understood and communicated, thus enabling a baseline of clarity, stability, and mutual respect.[145] In the context of land, I will assume that the various normative considerations, including prevailing moral perceptions, would justify the normal crafting of the property paradigm so that the owner would preserve certain key "negative" and "positive" components in regard to the use and management of the land. This is so at least in the sense that decisions on taking permanent possession or transferring title in the land should be largely left to the owner.[146]

Cases may arise, however, in which other considerations will come into play, calling into question the alleged prominence of this principle. At times, these rival principles may become widely accepted and generally uncontroversial with time, as was largely the case with the evolvement of rights-of-way for air

145. *See* Merrill & Smith, *supra* note 87, at 1853–57.

146. *Id.* at 1858–60, 1871–74 (describing the possessory rights afforded landowners under the first-in-time rule and the law of trespass). At the same time, private rights in land should be far from absolute. This should be so, for example, such that private rights would be subjected to principles such as "de minimis" or "abuse of rights." For the prevalence of the "abuse of rights" concept in legal systems, see generally Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 PAC. L.J. 37 (1995). Accordingly, I believe that the punitive damages award in the *Jacque* case was grossly exaggerated, even if it had set out to establish a property-rule protection and to deter future trespasses.

flights.[147] Other cases have been, and continue to be, more contestable. In this regard, I would like to discuss in this section two types of scenarios that involve a potentially drastic upset of the core elements of possession and control of transference: the first being governmental taking by the power of eminent domain, and the second being nonconsensual transfer of ownership by adverse possession.

Although the taking of land by eminent domain is a well-established power of government in the Anglo-American world,[148] its application in specific cases continues to be one of the stormiest and most unsettling areas of property law. This is so not only because the government as proprietor is granted an extreme power that is not possessed by other stakeholders and that stands in stark contrast to the otherwise prevailing perception of ownership, but also because either the use of this power is often made in controversial circumstances that blur the distinction between "public" and "private" so as to undermine the legitimacy of this allegedly unique and restricted power, or the issue of just compensation raises broader-based debates about the appropriateness of this very mechanism. This introduces into many specific takings cases broad implications that touch upon the core concepts of property in land so as to justify, in my view, the type of collective decisionmaking and public reasoning discussed in this Article.

Thus, for example, in *Loretto v. Teleprompter Manhattan CATV Corp.*,[149] the United States Supreme Court reviewed section 828 of the Executive Law enacted in 1973 by New York to facilitate tenant access to cable television.[150] Section 828 provided that a landlord may not "interfere with the installation of cable television facilities upon his property" and limited compensation to an amount later set by the Cable Television State Commission at $1.[151] 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," yet further inquired whether this otherwise valid use of the State's police power "so frustrates property rights that compensation must be paid" under the Fifth Amendment's Takings Clause.[152] Portraying the power to exclude as "one of the most treasured strands in an owner's bundle of property rights," the Court viewed permanent physical invasion to land as qualitatively

147. *See* MERRILL & SMITH, *supra* note 2, at 9–15 (describing how courts declined to allow trespass suits against owners of airplanes).

148. For the American historical context, see generally William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985).

149. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

150. 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.

151. *Loretto*, 458 U.S. at 423–24.

152. *Id*. at 425–26.

different from a temporary one or from regulatory intervention, noting that a special injury occurs when such an invasion and occupation is made by "a stranger,"[153] and concluded that State-authorized permanent invasions constitute a taking per se.[154]

The *Loretto* turn of events represents the redesigning of a property regime via collective-decisionmaking entities and through public reasoning. The New York legislature first led a generally applicable change to the allocation of the entitlements-and-responsibilities bundle in land, based on a normative viewpoint that tenant access to cable television and the broadening of cable companies' market penetration were significant enough societal goals to justify reformulating the foundational elements of possession. The State's administrative agency then sought to quantify, through setting up of a virtually valueless $1 payment, its normative evaluation of the transfer payment that needed to be made to complete the recrafting of property. The Supreme Court thought it normatively worthy to reallocate the property entitlements and obligations by switching from a property rule protection against permanent physical invasion to a liability one. At the same time, the Court refused to consider the New York statute's undermining of the core concept of possession as trivial, upholding what largely seemed to be deontological justifications for the property owner's stand against physical dispossession and remanding the matter for specific quantification.[155] The core values and resulting concepts of property in land were thus confronted in an explicit, society-wide, publicly reasoned manner.

We now move to what is undoubtedly the most "dramatic" of property conflicts in land, namely the nonconsensual taking of *all* property rights from an unwilling owner and the consequent transfer of such rights to other private hands. For that purpose, compare *Kelo* with another prominent Supreme Court case, which dealt with a world-apart normative standpoint about the reallocation of property in land. In *Hawaii Housing Authority v. Midkiff*,[156] the Court upheld Hawaii's Land Reform Act,[157] which followed from the legislature's finding that 47% of the entire land in Hawaii was owned by seventy-two private landowners.[158] Based on the legislature's conclusion that concentrated land ownership was responsible for skewing the state's residential fee-simple market, inflating land prices, and injuring the public tranquility and welfare,[159] the Act created a mechanism for condemning residential tracts against legal "just

153. *Id.* at 435–36.

154. *See id.*

155. On remand, the New York Court of Appeals upheld the State Commission's determination regarding the $1 compensation, relying on the following reasons, among others: the small amount receivable by any single property owner, the relatively insignificant damage to an owner's property by attachment of cable facilities, and that Teleprompter had offered to post a bond in light of the Supreme Court's ruling. Loretto v. Teleprompter Manhattan CATV Corp., 446 N.E.2d 428, 434–35 (N.Y. 1983).

156. Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

157. Land Reform Act of 1967, codified at HAW. REV. STAT. ANN. ch. 516 (LexisNexis 2007).

158. *Midkiff*, 467 U.S. at 232.

159. *Id.*

compensation" and for transferring ownership of the condemned fees simple to existing lessees, thus facilitating the redistribution of property rights in land throughout the state.[160]

In many respects, *Midkiff* is even more dramatic than *Kelo*. The property victims of the Act were not random. The case was not about Susette Kelo and her surrounding neighbors having the bad luck of owning properties that were interdependent with Pfizer's research facility abutting Fort Trumbull.[161] *Midkiff* was about a clear-cut state policy to carry out an egalitarian-driven reform in Hawaii's land regime. The public values and goals at the basis of the Act could not have been smoothed over comfortably with the principle that a private landowner has a right to make basic decisions about possession and title. No convenient "acoustic separation"[162] could have been maintained in *Midkiff* or in *Kelo*.

I thus dispute Merrill and Smith's argument against *Kelo* as representing the allegedly undisputed "basic immorality of coercing the innocent to give up their property"[163] not only as a matter of depiction of property doctrine evolvement, but more importantly, as an ethical analysis of the institution of property. Personally, I do not think that Hawaiian landowners in *Midkiff* were morally blameworthy, just as owners of blighted properties are not. But regardless of one's take on the matter, and although the right of landowners to make decisions about possession and title can be justified on moral grounds, it is not the *only* normative consideration that comes or should come into play. Most importantly, the integrity of property as a legal system designed to send broad signals for specific properties and resources is preserved when rival ethical and other considerations are battled out publicly through the prism of society's collective institutions.

Summing up so far, takings cases often do not involve what is simply a straightforward implementation of a general power awarded to government by a constitutional mandate or legislative provision. I definitely do not argue that the law for governmental nonconsensual transfers of property should always keep in mind the law governing such relations among private parties, as the unique power of eminent domain has solid reasons to justify it at its basis. It would, however, also be too simplistic to argue that eminent domain cases have no bearing whatsoever on the way people understand property entitlements and obligations in land in a broader sense, especially when the government's asserted "public purpose" or "public use"—the key precondition for employing

160. *Id.* at 233.

161. *See* Kelo v. City of New London, 545 U.S. 469, 473 (2005).

162. I borrow Meir Dan-Cohen's term, depicting the potential divergence between "conduct rules" (that is, conduct guidelines addressed to the general public) and "decision rules" (that is, decision guidelines addressed to judges in solving disputes)—the selection of which depends on the specific policy that rulemakers deem desirable in a given context. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 627, 629 (1984).

163. Merrill & Smith, *supra* note 87, at 1879–84.

this power—in the specific instance can reasonably be viewed by parties and observers as a borderline case, one which runs the risk of being conceived as inappropriately and artificially circumventing the core norms and social understandings about property in land. It is here that the consideration of whether to redesign the institution of property befits collective decisionmaking.

I now move to discuss briefly the contours of nonconsensual transfers of possession and title in land through the doctrine of adverse possession. I will focus my attention here on English law in the matter, especially in view of fascinating recent developments concerning both legislative reforms within England and the European Court of Human Rights' application of Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention")[164] to adverse possession in the *J.A. Pye (Oxford) Ltd. v. United Kingdom (J.A. Pye I)* case.[165] Yet, the theoretical and jurisprudential foundations of the analysis should apply, I believe, with equal force to the American and other relevant legal systems.

Briefly, the doctrine of adverse possession facilitates the nonconsensual transfer of land-ownership rights in certain circumstances in favor of a person—the adverse possessor—who has taken possession of land legally owned by another. The real thrust of the doctrine is that, upon the accumulation of the time period set forth in the statute of limitations, alongside the existence of other conditions, not only does any action by the original owner to repossess the land become barred, but the adverse possessor is entitled to become the new owner.[166]

Until 2003, when the new Land Registration Act 2002 came into force in England, adverse possession in land—registered or unregistered—was governed by the provisions of the Limitation Act 1980 and section 75 of the Land Registration Act 1925. Under that scheme, upon passage of the twelve-year limitation period, and subject to a number of other conditions pertaining to the element of adversity, continuance of possession, intent to possess, and so forth, as laid out in the Limitation Act itself and in relevant case law, the adverse possessor was entitled to apply to be registered as the new proprietor of the land.[167]

Whereas the doctrine of adverse possession has always been a source of controversy, recent developments both within England and outside it have resulted in the type of collective-decisionmaking deliberation and reconsidera-

164. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, March 20, 1952, 213 U.N.T.S. 262 [hereinafter European Convention].

165. J.A. Pye (Oxford) Ltd. v. United Kingdom (*J.A. Pye I*), App. No. 44302/02 (Eur. Ct. H.R. Nov. 15, 2005), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=J.A.%20%7C%20Pye%20%7C%20United%20%7C%20Kingdom&sessionid=5803891&skin=hudoc-en.

166. *See generally* MARK P. THOMPSON, MODERN LAND LAW 201-39 (3d ed. 2006). For a survey of American adverse possession law, see MERRILL & SMITH, *supra* note 2, at 194–220.

167. *See* THOMPSON, *supra* note 166, at 226–30.

tion, especially since the traditional rules of adverse possession no longer seemed to conform to revised conceptions of the core of property in land.

First, the constant expansion of registration of lands in contemporary England has called into question the applicability to such lands of the traditional justifications for adverse possession—that is, discouraging people from "sleep[ing] on their rights" and bringing stale claims to courts, and ensuring that the reality of unopposed occupation of land and its legal ownership coincide.[168] For registered lands, in which the owner was readily identifiable by inspecting the register of the relevant title, it was much less clear, to say the least, whether the "draconian" rule from the owner's perspective was appropriate. So when England enacted the new Land Registration Act 2002, which repealed the Land Registration Act 1925 in its entirety so as to comprehensively "reshape the terrain of modern Land Law"[169] and effectively redesign the core norms and conceptions about property rights in land, it was clear that the adverse possession doctrine had to be reconsidered as well.[170]

Interestingly, the Land Registration Act 2002 did not abolish the adverse-possession doctrine. It did introduce, however, certain significant changes that seem to have shored up adverse possession against the changing landscape of property in registered land. On the one hand, the limitation period has been reduced from twelve to ten years. But on the other hand, the transfer of rights is no longer automatic. When an adverse possessor applies for registration, the registrar is required to give formal notice to several stakeholders, including the proprietor of the estate to which the application relates, and the applicant is entitled to be registered as the new proprietor only if he meets one of three alternative conditions (dealing with estoppel, independent entitlement to registration, and boundary disputes).[171] The details of this new statutory scheme are not the main focus of this discussion. What is significant, rather, is the very fact that once the Act—aiming at enhancing the stability, reliability, and transparency of rights in land, among other things—redefined the core legal conceptions of property in registered land, the "drastic" scenario of nonconsensual transfer of registered rights also had to be reconsidered as part of the broad collective-decisionmaking process.

Another major, broad-based reconsideration of the law of adverse possession, resulting from both cross-jurisprudential influences and supranational authority, is found in the recent European Court of Human Rights' decision in the matter of *J.A. Pye (Oxford) Ltd. v. United Kingdom (J.A. Pye II)*.[172] Concisely, the case

168. *See J.A. Pye I*, App. No. 44302/02, paras. 63–65.

169. THOMPSON, *supra* note 166, at 94–95.

170. *See id.* at 230.

171. *Id.* at 230–36.

172. J.A. Pye (Oxford) Ltd. v. United Kingdom (*J.A. Pye II*), App. No. 44302/02 (Eur. Ct. H.R. Aug. 30, 2007) (Grand Chamber), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=J.A.%20%7C%20Pye%20%7C%20United%20%7C%20Kingdon&sessionid=6054179&skin=hudoc-en.

dealt with adverse possession of registered private land, which took place between 1984 and 1999, so that the applicable law was that preceding the 2002 Act.[173] The applicants, the former owners who had lost their case before the national courts including the House of Lords, argued that the then-in-force English adverse-possession law was in violation of Article 1 of the First Protocol to the European Convention.[174]

The first paragraph of Article 1 reads that, "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."[175] The second paragraph states that, "[T]he preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest . . . ."[176]

In November 2005, the Court's Section 4 Chamber ruled that the case did engage the first paragraph of Article 1 and that, although English adverse possession law may not be deemed as serving no genuine public interest, the interference with the registered owners' rights was disproportionate and thus in violation of Article 1.[177] In August 2007, in a dramatic 10-7 vote, the Court's Grand Chamber reversed, reiterating the principle that, especially in complex legal matters such as land law and housing, the Court would respect the national legislature's judgment "as to what was in the general interest unless that judgment was manifestly without reasonable foundation."[178] Viewing the adverse-possession legislation as falling under the "control of use" of land within the meaning of the second paragraph of Article 1, and not as "deprivation of possessions" under the first paragraph, the court concluded that the legislative provisions struck a "fair balance" between the means employed and the aim to be realized.[179] In so doing, the Court's Grand Chamber noted that many of the Convention's member states had "some form of mechanism for transferring title in accordance with principles similar to adverse possession in the common law systems"[180]—without payment of compensation to the owner for such transfer—and emphasized that "it is characteristic of property that different countries regulate its use and transfer in a variety of ways."[181]

I will not delve here into a debate over whether the *J.A. Pye II* decision was in itself correct. But I do want to point out three features of the decision that bear on the institutional-political model of property advanced in this Article.

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173. *Id.* paras. 9–12, 22–33.
174. *Id.* para. 3.
175. European Convention, *supra* note 164.
176. *Id.*
177. *J.A. Pye I*, App. No. 44302/02, paras. 49–76.
178. *J.A. Pye II*, App. No. 44302/02, para. 75.
179. *Id.*
180. *Id.* para. 72.
181. *Id.* para. 74.

First, both the Section 4 Chamber and the Grand Chamber viewed the doctrine of adverse possession as implicating the most fundamental principles of property law. In other words, the debate was particularly focused on the very core understanding of private ownership in land, especially because the case dealt with registered land, which was arguably materially different from the original paradigm of unregistered land against the backdrop of which the doctrine of adverse possession came to evolve—as is also learned in retrospect by the application of the new 2002 adverse possession provisions to registered land only.[182] It is in such cases that questions of broad social and economic policies come into play and are best resolved through a broader-scale consideration—and reconsideration—of the property basics, as was conducted by the English legislature and reviewed by both the domestic courts and by the European Court in light of the Convention.

Second, the application of Article 1 not only to governmental expropriation, but also to national laws governing deprivation of possession among private persons, demonstrates that questions of property core versus fringe, or of collective versus private decisionmaking, cannot be classified strictly along a public law/private law distinction. Rather, whenever "dramatic" disputes call into question the basic norms and understanding of property in a certain type of resource, regardless of the identity of the parties, the public entity entrusted with setting the new property norm must take into consideration the broad implications that such a decision would have on the institution of property in general. This is especially the case when the borders regarding state intervention are blurry such that there is significant conceptual spillover between the areas traditionally classified as "private law" and "public law" in property, even if we may normatively conclude that property entitlements and obligations for private parties should be materially different from those applying to government.

Third, although the European Court of Human Rights is a multinational judiciary that does not mesh into the conventional ensemble of state institutions, the *J.A. Pye II* case nevertheless serves as a good illustration of the role courts play in their judicial review capacity when considering collective decisions—in this instance, those of the legislature—in issues pertaining to the core concepts of property and the social and economic considerations that stand at their basis. I will take this point further in section D below.

C. COMPARING INSTITUTIONAL CAPACITIES

The central argument in this Article is institutional and political. It does not seek to advance certain substantive justifications for property rights, but rather to point to the appropriate processes and modes of reasoning by which the foundations of property regimes should be constructed and reconstructed. The

182. *See* THOMPSON, *supra* note 166, at 231.

rough contours of property regimes for different resources, goes the argument, are better delineated by society's collective-decisionmaking entities relying on broad, explicit considerations. This is so even when the use of property's public realm occasionally ends up in the resolution of what are essentially private disputes.

Beyond this general normative argument, legislatures or administrators supervised by judicial review are generally more competent *institutionally* to deal with conflicts that have implications substantially reaching beyond the parties to the dispute.[183] This may be the case either because the dispute itself is said to affect multiple non-litigating parties (consider the language in *Kelo* that the Fort Trumbull redevelopment was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city"[184]), or because the qualitative nature of the property dispute touches upon the core foundations of the broader legal regime in a way that implicates similarly situated resources and the stakeholders in them.

Thus, for example, the decision of the City of New London and the State of Connecticut—which largely underwrote the Fort Trumbull project[185]—to meddle with the homes of Susette Kelo and her counterparts and to reallocate the properties, may have been annoying to many. But, it nevertheless embodied a process and mode of reasoning in which the legislative and administrative agencies in these two levels of government served not only as interested parties in the act of nonconsensual acquisition, but also as social planners assigned with consciously explicating the broad public agenda behind this very specific dispute.

D. THE PROPERTIES OF JUDICIAL REVIEW

The institution of judicial review is highly complicated and contestable. Theories supporting judicial review may be divided roughly into majoritarian justifications and anti-majoritarian ones.[186] Under the first group of arguments, limiting the power of the legislature (and more clearly that of the executive branch) through judicial review does not circumvent democratic decisionmaking, but rather provides a mechanism for a faithful implementation of the will of the people.[187] Anti-majoritarian theories of judicial review do not consider majoritarian preferences as normatively omnipotent, but ones that should com-

183. *Cf.* Daniel H. Cole, *Taking Coase Seriously: Neil Komesar on Law's Limits*, 29 LAW & SOC. INQUIRY 261, 282 (2004) (book review) (arguing that, in practice, high numbers and complexity make decisions about the property system more suitable for political institutions than for legal ones).

184. Kelo v. City of New London, 545 U.S. 469, 472 (2005).

185. Up to the summer of 2006, most of the $73 million expended over the Fort Trumbull project's course, including monies expended on taking the properties of Susette Kelo and her neighbors, came from the State of Connecticut's Department of Economic and Community Development. Ted Mann, *Fort Trumbull Saga Ends on Costly Note*, THE DAY (New London, Conn.), Aug. 23, 2006, at A1.

186. *See* Alon Harel, *Right-Based Judicial Review: A Democratic Justification*, 22 LAW & PHIL. 247, 248–49 (2003).

187. *Id.* at 248–49.

promise with or even yield to other important goals. Most prominently, the moral rights justification asserts that certain basic rights and freedoms (recall the discussion of such deontological principles elaborated by Kant, Rawls, and Dworkin)[188] should be protected, even if being thus protected frustrates the will of the majority.[189]

I shall not delve into a general analysis of judicial review, but rather will seek to point out what seem to be unique features of judicial review in the context of property. These characteristics lead me to the conclusion that, as a matter of both practice and theory, courts in their judicial review capacity have no less power to intervene in shaping the contours and broad principles of property regimes than they would have if we were to adopt the viewpoint that the field of property law should largely be left to adjudication of private disputes.

Going back to the issue of governmental takings, *first*, as a matter of doctrine and practice, the Federal Constitution's Fifth Amendment Takings Clause,[190] as well as the procedural and substantive due process protection of "property" interests,[191] make reviewing courts—including the Supreme Court—a busy and vigorous arena for resolving property conflicts (especially as compared to contracts or torts cases). In addition, since forty-nine states have included their own versions of the Takings Clause in their constitutions,[192] judicial review of property issues is literally all over the place. This is especially so since governments are routinely exploiting their powers to intervene in private property, either when they do so overtly through eminent domain or other forms of explicitly announced reallocations of property, or when other types of government acts or omissions arguably achieve similar effects.[193]

Thus, questions such as whether a certain government-facilitated taking of property meets the "public use" requirement, or whether an otherwise-valid state-backed reallocation of entitlements and obligations in resources amount to a taking mandating the payment of "just compensation" are commonly (some would argue too commonly) discussed and analyzed by reviewing federal and state courts, granting those courts substantial influence in interpreting and designing the institution of property. This is the case not only because many courts have been willing to employ interventionist approaches, but also because the analysis of "constitutional" property has given courts the opportunity to articulate broader principles of property outside the immediate axis of the government/citizen takings dispute.

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188. *See supra* notes 56–59 and accompanying text.

189. For an analysis of this second group of arguments, see Harel, *supra* note 186, at 250–59.

190. U.S. CONST. amend. V, cl. 4.

191. *See* U.S. CONST. amend. V, cl. 4; *id.* amend. XIV, § 1, cl. 3. For an analysis of the procedural and substantive due-process rights to property, see, respectively, RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 598–615 (4th ed. 2002) and ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 94–112 (3d ed. 2005).

192. ELLICKSON & BEEN, *supra* note 191, at 836.

193. This latter type of acts or omissions is typically referred to as "inverse condemnations" or "regulatory takings." *See generally* DUKEMINIER ET AL., *supra* note 2, at 941–1065.

Consider again the Court's reasoning in *Loretto* that "the power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property."[194] Not only is this tradition derived largely from the foundations of "private" property law but, interestingly, in the footnote to this statement, the Court refers to *Pruneyard Shopping Center v. Robbins*,[195] in which the Court discussed, among other things, the nature of the private property rights of a shopping mall which sought to exclude the handing out of antiwar pamphlets.[196] This allegedly cross-field analysis of property has been carried out in many other instances, including in *Wilkie v. Robbins*[197] decided by the Court in June 2007. All of this goes to show that the constitutionally based judicial review of legislative and administrative acts situates courts in a unique, highly influential position to craft the broad principles of property regimes.

Second, the expansion of the government's use of its power to reallocate property in resources creates a largely ignored, counterintuitive *intensification* of the public nature of such acts. When the government tries, for example, to justify its use of eminent domain as falling within the "public use" requirement in order to pass constitutional muster, the condemning government must embed its decision to take the specific land in broader-based, "public" considerations because the Court has interpreted "public use" to mean "public purpose."[198] This state of affairs, involving "drastic" disputes, requires society's collective-decisionmaking institutions to employ public reasoning. It allows the reviewing court to hold the legislature or administrative agency accountable for their stated societal values and goals, at times monitoring that government's consistency in applying its self-declared principles to this and subsequent disputes, and at other times reconciling these declared public reasons with other societal values that constitute part of the institution of property and the entire legal system.

It was through this prism that the Court in *Kelo* examined the way in which the collective- decisionmaking institutions in the City of New London and the State of Connecticut decided a "drastic" property conflict and reformulated the core principles of the protection of private property in land based on a widely announced, publicly reasoned set of arguments.[199] The fact that, following *Kelo*, many state legislatures and courts revised and interpreted state law, respectively,

194. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).

195. *Id.* at 436 n.12 (citing Pruneyard Shopping Center v. Robbins, 447 U.S. 74 (1980)).

196. Pruneyard Shopping Center v. Robbins, 447 U.S. 74, 82–86 (1980). It should be noted that the shopping mall raised the property issue as a takings argument in view of the California Supreme Court's interpretation of the state constitution as entitling citizens to exercise free expression and petition rights on shopping center property. The case was not, however, about a conventional governmental taking of property, but rather about a state-mandated reallocation of entitlements and obligations in shopping malls among private parties.

197. Wilkie v. Robbins, 127 S. Ct. 2588, 2602 (2007) (discussing differences and similarities between the government and private citizens as landowners).

198. *See* Kelo v. City of New London, 545 U.S. 469, 480 (2003).

199. *See id.*

to increase the scope of protection for private property against certain types of nonconsensual reallocations, is not a problem, but rather a true blessing. It vividly demonstrates how, in following the overt talk of values and goals in *Kelo*, states' collective-decisionmaking institutions consciously and publicly reconsidered foundational tenets of state property law.[200]

E. NOTE ON PROPERTY AND OTHER FIELDS OF PRIVATE LAW

Whether or not one is convinced by the central thesis put forward in this Article about the need for collective decisionmaking and public reasoning in designing and redesigning core concepts of property for different types of resources, including in disputes directly involving private parties and thus conventionally classified as "private law" disputes, one may nevertheless be left to wonder what differentiates property in this respect from other fields of private law, namely contracts, torts, and the law of restitution.

As I have stated at the outset, since this Article focuses on property, I will not go into a detailed analysis of the potential applicability of my arguments to these other fields of law and will leave this issue for further research. However, I definitely do not rule out such applicability, especially since the borders between property and such other fields are far from clear. For example, property and contract form a continuum that has many points along it, which are characterized by both "contract-like" and "property-like" prominent features.[201]

At least two special features of property are worthy of attention for the purposes of such a potential cross-analysis. *First*, as discussed in section II.A, property is generally typified by the fact that entitlements and obligations regarding specific resources, and categories thereof, regularly implicate multiple, heterogeneous parties not only in the abstract but also in practice, so as to necessitate explaining the basic set of rules regarding entitlements and obligations through a broad-based public process. While it is true that the same can be said to some extent of other fields in law—for example, duties of care in negligence law and the tort of procuring breach of contract involve numerous, often indefinite parties—property-law rules more often involve broad-based considerations that go well beyond the parties to the conflict so as to implicate not only the institutional aspect of decisionmaking, but also the type of reasoning.

Second, the public and private aspects of property are meshed in together in a

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200. In this sense, the post-*Kelo* state reaction has resulted in "property federalism," that is, a distinctive design of the property regime in land based on each state's unique perceptions. *See* Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 76–78 (2005). *See generally* Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883 (2007) (calling to allow local governments to select the property protection they want to offer, so that consumers select the kind of property protection they want by choosing where to live and invest).

201. *Cf.* Merrill & Smith, *supra* note 72, at 809–49 (reviewing several legal institutions that exist along the property/contract interface, including bailments, landlord-tenant law, security interests, and trusts).

particularly intensive manner. As I have shown in section C above, in the context of "drastic" nonconsensual retransfers of property through either eminent domain or the doctrine of adverse possession, the role played by government and other public entities in what is essentially a dispute among private parties—whether they are regulators, enforcers, interested parties, proprietors, or simply outside observers—is very elusive, probably more so than in other fields of private law. As I have already stressed, this is definitely not to say that the law applying to governmental conduct should be in any way identical to that applying to private conduct, but, at the same time, the need for conscious collective decisionmaking and overt public reasoning for dealing with core property issues may be particularly pressing, as vividly demonstrated in the European Court of Human Rights' *J.A. Pye II* ruling, which applied Article 1 to various types of government involvement.

Linking this more broadly to one of the greatest debates in legal scholarship—that is, whether a viable distinction between private law and public law exists[202]—one can argue that property holds a special place within this debate that implicates both questions of institutions and of the content of legal reasoning.[203]

IV. CONCLUDING PROPERTY'S PLACE IN THE PUBLIC/PRIVATE DISCOURSE

As I argued elsewhere, the richness of property configurations in the world, and the difficulty in laying out a neat division between private, group, and public property, or between private law and public law in property jurisprudence, should not lead to a nihilistic perception of property as an empty concept that simply collapses into an ad hoc expression of societal values in each specific instance.[204] Nor should this discomfort lead, however, to the opposite conclusion, implied by Merrill and Smith[205] and by other scholars,[206] that the basic theoretical premises of property are unified in nature throughout the public/private front.

The purpose of this Article is neither to promote a single substantive theory of the right to property, nor to offer a comprehensive revision to the public/

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202. For an analysis of the debate over the integrity of such a distinction, see N.E. Simmonds, *Justice, Causation and Private Law*, *in* PUBLIC AND PRIVATE: LEGAL, POLITICAL AND PHILOSOPHICAL PERSPECTIVES 149 (Maurizio Passerin d'Entrèves & Ursula Vogel eds., 2000). Obviously, this quandary is also central to many other fields in the humanities and the social sciences. *See* Jeff Weintraub, *The Theory and Politics of the Public/Private Distinction*, *in* PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE 1, 2–4 (Jeff Weintraub & Krishan Kumar eds., 1997); Alan Wolfe, *Public and Private in Theory and Practice: Some Implications of an Uncertain Boundary*, *in* PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE, *supra*, 182, 196–201.

203. For the debate on the autonomy of private law with respect to the type of rules and values on which it should be based in resolving specific disputes, see generally Hanoch Dagan, *The Limited Autonomy of Private Law*, 56 AM. J. COMP. L. (forthcoming 2008).

204. Lehavi, *supra* note 66, at 209–11.

205. Merrill & Smith, *supra* note 87, at 1850 (viewing the right to exclude as the basic moral tenet of property, and applying it throughout the spectrum of private and public jurisprudence).

206. *See, e.g.*, Scott Hershovitz, *Two Models of Tort (and Takings)*, 92 VA. L. REV. 1146, 1149 (2006) (offering a consolidated theory for torts—especially "proprietary" nuisances—and takings).

private division of property law. Rather, this Article recognizes that, regardless of the identity of the parties to a specific property dispute (individuals, corporations, citizen groups, the government, and so forth), or of the feasibility of clearly locating a conflict within "private law" or "public law" jurisprudence, the foundational construction and reconstruction of property forms must follow a certain institutional process and should rely upon a particular mode of reasoning.

As discussed, this is so first and foremost for normative reasons, namely the recognition of the qualitative superiority of collective decisionmaking and public reasoning—although I do not follow the naiveté of Jean-Jacques Rousseau's belief that the publicly-oriented "general will" is incapable of severely harming individuals,[207] and I thus suggest a strong, interventionist if necessary, role for judicial review. Moreover, the institutional-political model of property is premised on property law's unique trait of implicating numerous parties with entitlements and obligations in regard to specific resources and to certain types of resources. This makes necessary, probably more so than in other legal fields, the construction of a clearly transmitted, publicly articulated set of basic principles and of an institutional mechanism for affecting changes in the core of property.

In summation, even if private adjudication of property conflicts may seem tempting at first sight, given the allegedly larger costs of collective decisionmaking and the always present fear of politically twisted outcomes, such an approach cannot serve as a panacea for the world of property. The *Kelo* saga may have upset many, but at least it followed the correct route for making such difficult, foundational choices about property.

207. *See* JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT, bk. IV, ch. 1 (G.D.H. Cole trans., Dover Publishing 2003) (1762).