

Why Philosophers, Social Scientists, and Lawyers Think Differently about Property Rights

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Abstract

Property is a powerful concept. It features prominently in academic and public discourse. But it is also a source of ongoing confusion. While some of this disarray may be attributed to the success of “disintegrative” normative agendas, much of it is the result of a methodological and conceptual disconnect both within and among different fields of study. Aimed at narrowing this gap, this Article analyzes the transformation of property from a moral and social concept into a legal construct. It seeks not to develop a historical or intellectual account of such an evolution, but to analyze the institutional and structural features of property once it is incorporated into the legal realm.

The Article identifies the unique jurisprudential ingredients of a system of rules by which society allocates, governs, and enforces rights and duties among persons in relation to resources. It examines the work of decisionmaking institutions entrusted with the task of designing property norms over time. Clarifying the institutional and structural attributes of property does not require, however, adhering to a uniform body of substantive norms or to a single set of underlying values. Illuminating the construction of property allows rather for a better informed debate about the socially-desirable content of property rights.

Table of Contents

I. INTRODUCTION: PROPERTY AT THE INTERSECTION OF DISCIPLINES	2
II. THE PHILOSOPHY OF PROPERTY: MORALITY OF THE CIVIL CONDITION.....	6
III. SOCIAL SCIENCES AND PROPERTY: MARKET, POWER, AND STATE	12
A. <i>Property and Society</i>	13
B. <i>Property and Economics</i>	17
IV. THE INTERNAL FEATURES OF LAW	21
A. <i>Right versus Value</i>	22
B. <i>The Right-Remedy Dialectic</i>	27
V. THE STRUCTURE OF “LEGAL PROPERTY”	31
A. <i>Third Party Applicability</i>	31
B. <i>Constraints on Opting Out</i>	33
C. <i>The Public/Private Interface</i>	34

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VI. COLLECTIVE INSTITUTIONS OF PROPERTY DESIGN	37
VII. WHY PROPERTY STRUCTURE DOES NOT IMPOSE CONTENT.....	43
CONCLUSION.....	51

I. INTRODUCTION: PROPERTY AT THE INTERSECTION OF DISCIPLINES

Very few legal concepts steer strong emotions among the general public. The same probably holds true for their impact on non-legal academic discourse. Lawyers would likely continue to passionately quarrel about concepts such as “consideration,” “liability,” “substantive due process,” and “Chevron’s two-step inquiry” in thousands of court cases and academic papers. Philosophers, psychologists, sociologists, and even political scientists and economists would be bored, however, by these concepts and their details, unless they could somehow be convinced why it matters to their fields of study.

Property is different. Contrary to the British tendency for understatement, William Blackstone famously declared in his *Commentaries on the Laws of England* that “There is nothing that so generally strikes the imagination, and engages the affections of mankind, as the right of property.”¹ He did so in 1766, well before the 1789 French Revolution and its Declaration of the Rights of Man and the Citizen, the American Revolution and the U.S. Federal Constitution’s Fifth Amendment that enshrined the protection of property, socialism and its negation of private property (“property is theft” in the words of Pierre-Joseph Proudhon),² modern capitalism, the Depression, the end of colonialism, globalization, and the recent world economic crisis. Property is indeed a powerful concept, employed both in public discourse and in multidisciplinary academic research.

Philosophers have always talked about property. From Aristotle and Plato to Hobbes, Locke, Bentham, Hegel, Kant, and Mill, and up to Berlin and Rawls, philosophical discourse has offered a detailed account of potential moral justifications for property and of property’s pivotal role in the shift from a state of nature to a legitimate civil condition. Social theorists, from Smith and Weber to Marx and Engels, also recognized from early on the essential role that the modes of control over scarce resources play in the structuring of society, power relations, markets, and production, even if their points of

¹ WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 2 (1979 [1766]).

² PIERRE JOSEPH-PROUDHON, WHAT IS PROPERTY? 12-13 (B. R. Tucker trans., 1966 [1840]).

departure and respective conclusions share probably nothing else. Modern sociology has also engaged extensively in the property discourse, studying the tension between property and social equality or mobility, and the way in which social and cultural orientations are intertwined with the ordering of property relations.³

Political science, the origins of which are intermingled with philosophical and social thought on this topic, has more recently taken a somewhat different path, by analyzing, as a self-standing point of inquiry, the practical dynamics among governmental entities and related stakeholders. This line of research resorts to methodologies such as game theory or empirical evidence to explain the real-life political process of evolution and change in the design of property regimes.⁴

Psychology has offered its own account of the nature and meaning of property, relying on biological perspectives connecting property to the individual's innate genetic structure, as well as on social and cultural explanations. Based on these methodologies, psychological discourse has defined the concept of "psychological ownership," which is often depicted as explicitly different from "legal ownership."⁵

Economics has contributed its fair share to property literature. Tracing back to the works of Adam Smith and Jeremy Bentham, which grounded the need to secure private property rights in the creation of incentives for productive activity, twentieth century economic theory has looked at how property could foster markets, control externalities, and more generally bring about the optimal use of the world's scarce resources.⁶

Contemporary economists have looked not only to craft general design principles, but also to resolve particular conflicts over property rights, often detaching themselves from

³ See, e.g., Bruce G. Carruthers & Laura Ariovich, *The Sociology of Property Rights*, 30 ANN. REV. SOCIOL. 23 (2005).

⁴ See, e.g., GARY LIBECAP, *CONTRACTING FOR PROPERTY RIGHTS* (1989); ITAI SENED, *THE POLITICAL INSTITUTION OF PRIVATE PROPERTY* (1997). Although Gary Libecap is an economist, his scholarship has taken a somewhat different path from conventional economic analysis by focusing, inter alia, on political economy considerations in the evolution of property regimes. Political economy has also been a focal point for some legal scholars offering a critical view of the conventional economic model of property regimes. See, e.g., Stuart Banner, *Transitions between Property Regimes*, 31 J. LEGAL STUD. 359, 365–370 (2002); Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117, 224–26 (2005). For the sake of simplicity, I label this line of scholarship as one embedded in political science.

⁵ Jon L. Pierce et al., *The State of Ownership: Integrating and Extending a Century of Research*, 7 REV. GEN. PSYCH. 84, 86–91 (2003).

⁶ Two seminal works along these lines are Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) and Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

current legal doctrine.⁷ Some have focused on how economic relationships, even if grounded in formal contracts, can result in quarrels over the “residual claim” to resources. They have thus identified “economic property rights”--often distinctive from “legal property rights”--as an essential feature of resource allocation and of the ability of stakeholders to extract value from different attributes of assets.⁸

More recently, New Institutional Economics (NIE) has looked at the way in which institutions may facilitate or rather hinder an efficient use of resources. No longer simply assuming competitive markets and perfect enforcement of property rights, NIE has played a dominant role in both economic theory and actual reform projects undertaken mostly in transitional and developing economies. An enthusiastic supporter of formalizing property rights in such economies so that assets could serve as a stable source of capital and credit,⁹ NIE has nevertheless emphasized the ways in which societal institutions should be transformed to properly absorb and enforce property rights. This should be done, for example, by securing judicial independence, fighting corruption, and correcting for other political failures.¹⁰

Contemporary legal theory has been more than receptive to cross-influences with these and other fields of study. It would be simplistic to describe law as ever purporting to truly isolate itself from other fields of knowledge. Even in the high days of positivism, jurists such as John Austin and Hans Kelsen have relied heavily on the foundations of western philosophy. But there can be little doubt that ever since “the revolt against formalism,” advocated as of the early twentieth century by the legal realists and their followers,¹¹ legal theory has reached out more extensively to other fields of study, both methodologically and ideologically. Morris Cohen’s depiction of private property as the exercising of sovereignty over other persons with the endorsement of the state can be seen as one such milestone, aimed at breaking the conventional modes of property

⁷ Coase, *supra* note 6, at 2. For a detailed discussion of Coase’s approach, see *infra* Part IIIB.

⁸ See, e.g., YORAM BARZEL, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS* 90–96 (2d ed. 1997); Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 48 J. POL. ECON. 1119 (1990).

⁹ See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITAL TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 32-35 (2000) (pointing to the inefficiency of “dead capital” in developing countries).

¹⁰ See DOUGLAS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990); OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* (1998).

¹¹ See MORTON G. WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1957).

jurisprudence, undermining the traditional private/public distinction, and exposing the underlying social and political features of this purportedly-neutral legal institution.¹²

From critical legal theory to hardcore law and economics, numerous legal issues have been since then rethought and relocated at the crossroads of disciplines. While the various “law and...” schools have become prominent across the board, property seems to have been an ideal candidate for such interdisciplinary pursuits. For example, the two works considered by many as laying the foundations for law and economics, i.e. those of Ronald Coase¹³ and Guido Calabresi & Douglas Melamed,¹⁴ focused on the optimal allocation of property rights and duties to resolve disputes over externalities and other conflicting uses.

The interdisciplinary study of property theory has expanded elsewhere. Mentioning just two examples, Margaret Radin’s influential work, which relies on Hegel’s moral philosophy to construct a “property and personhood” theory,¹⁵ has been further developed in substantial work on the law and psychology of property.¹⁶ The increasingly prominent theory of the social-obligation norm in property has drawn extensively on a range of economic, sociological, and psychological insights that explain how the individual is embedded in various human interrelationships and commitments.¹⁷

So far, everything seems perfect. Since everybody is interested in property, and because interdisciplinary research is in vogue, various academic disciplines have joined forces to create a richer methodological and theoretical framework for discussing the institution of property. Even if thinkers have different ideological and normative inclinations, they have nevertheless been able to establish a unified conceptual basis.

Matters are not that simple, however. The fact that property is--but not only--a legal concept is also a source of growing confusion and, at times, of a conceptual and methodological disconnect both among and within disciplines. This is especially the case *within* property jurisprudence. While there is much merit in interdisciplinary research, it

¹² See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

¹³ Coase, *supra* note 6.

¹⁴ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

¹⁵ See MARGARET JANE RADIN, *Property and Personhood*, in REINTERPRETING PROPERTY 36-59 (1993).

¹⁶ See, e.g., Frederick Schauer & Barbara A. Spellman, *Artists’ Moral Rights and the Psychology of Ownership*, 83 TUL. L. REV. 661 (2009).

¹⁷ Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009). The Cornell Law Review has dedicated an entire issue (Volume 94, Issue 4, 2009) to a scholarly debate about Alexander’s theory of the social-obligation norm.

seems that the “law and” study of property has not brought different disciplines closer together, but has probably worked the other way around. Different legal theory schools have grown apart not only from one another, but also from actual legal doctrine. Property law seems to persistently follow a certain course, often to the growing dismay of these different schools. While current doctrine should definitely not be sanctified as such, it does help to illuminate the core structural and institutional features of the legal concept of property.

This Article sets out to identify the lingering differences across disciplines about the concept of property. Obviously, within the scope of a single research, one cannot do justice to these disciplines and offer an in-depth analysis of the different schools and streams within each one of them. The Article thus resorts to broad generalizations, which seek to identify mainstream approaches within philosophy, social sciences, and legal theory. The Article focuses on the transition of property from a moral and social concept into a legal one. It describes the internal constraints of law in implementing moral convictions and social goals, resorting as it does to the structural features of property rights and duties, the public/private interface in property, the construction of remedies, and the course that collective decisionmaking institutions, such as legislatures, administrative agencies, and courts, follow in developing property norms over time.

A key conclusion reached in the Article is that the structural and institutional features of property do not impose a uniform body of substantive norms or a single set of underlying values. It is up to society’s institutions to decide whether they seek to promote values and goals such as just distribution, equality, efficiency, or autonomy through the institution of property. But there are certain patterns and procedures that are essential to transform these ideals from moral and social concepts into legal ones.

II. THE PHILOSOPHY OF PROPERTY: MORALITY OF THE CIVIL CONDITION

It is impossible to encompass the vast philosophical discourse on property within the scope of a few paragraphs. Nor is it feasible to neatly delineate the different schools of philosophical thought into distinctive rubrics of property theory. At the same time, it would be fair to state that the prominent works of western philosophy, which articulate

the moral basis of the allocation and validation of claims to the use and enjoyment of scarce resources, tend to focus on certain aspects--ones that often diverge from those prevailing in legal discourse. This is not to say that one discipline is more sophisticated or subtle than the other, but only that the locus of inquiry is often different. Realizing these differences is essential to avoid making simplistic suggestions that the moral philosophy of property is designed to be a-legal, and vice versa, thereby further disconnecting these realms of analysis. It rather identifies how these spheres may complement one another.

A focal point of the philosophical discourse deals with the morality of the civil condition (*status civilis*),¹⁸ by inquiring how morally justifiable claims to possess and use resources maintain their legitimacy, or *become* fully legitimate, in a world where the state takes over the role of public ordering and employs its coercive power for this purpose.

To a large extent, the content of the underlying moral principles advocated by a certain theory dictates the way in which the transition of the property claim is made from the state of nature to the social contract or the civil condition.

Roughly speaking, moral theories that identify an individual's right to exclusively possess and use a certain resource in a preexisting state of events--such as John Locke's labor theory¹⁹ or Robert Nozick's theory of historical acquisition²⁰--would usually require the state to enshrine and enforce such a prefixed moral basis for acquiring property rights.

Following up on H.L.A. Hart's distinction between "specific rights" and "general rights,"²¹ Waldron depicts these kinds of theories as promoting a "special right" claim: a person is viewed as possessing a certain moral justification for appropriating resources by virtue of a certain act or concrete expression of volition she has undertaken.²² While such

¹⁸ While the term "social contract" is more often used in the literature following JEAN-JACQUES ROSSEAU, *THE SOCIAL CONTRACT* (1762), Immanuel Kant referred to this concept as one of a "civil condition." IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary Gregor ed. and trans., 1996 [1797]).

¹⁹ JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT*, Ch. V, (C.B. Macpherson ed., 1980 [1690]).

²⁰ ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 151-68 (1974).

²¹ H.L.A. Hart, *Are There any Natural Rights?* 64 *THE PHILOSOPHICAL REV.* 175, 183-88 (1955).

According to Hart, a special right exists when the "claimant has some special justification for interference with another's freedom which other persons do not have" or when the "claimant is concerned to resist or object to some interference by another person as having no justification." General rights differ from special rights in the following fashion: (1) they "do not arise out of any special relationships or transaction between men"; (2) they are not "peculiar to those who have them but are rights which all men capable of having a choice have in the absence of special conditions which give rise to special rights"; (3) they have as correlatives "obligations not to interfere to which everyone else is subject and not merely the parties to some special relationship..." *Id.*

²² JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 106-115 (1989).

rights may practically become more limited in the civil condition, their underlying moral character is independent of the collective act of decisionmaking by the state's institutions. One could say that the public realm follows the private one. The unifying moral principle stems from a claim that a certain person can make toward other persons. The practical need to place the power of reciprocal coercion in the hands of the state in order to avoid chaos does not undermine the otherwise valid moral basis of the right to private property.

Other kinds of moral theories, which advocate principles by which persons have a "general right" to enjoy some share of the world's scarce resources to allow for their subsistence, development of personality, preservation of human dignity, and so forth, typically identify the civil condition as the normative setting in which the moral justification of property is created. The affirmative right to have access to some assets in the civil condition thus depends on the existence of the state, which embodies the only authentic "united general will" legitimizing decisionmaking on the allocation of property.

Under these kinds of theories, the state of nature is not only a practical havoc, but also a moral one. Rawls's two substantive moral principles of justice in the allocation of scarce resources, to which all persons would have conceded in the original state behind the "veil of ignorance,"²³ is an example of such a view, which conditions the morality of property on the existence of a notional consensus and a civil state. Otherwise, unilateral authority or the promotion of deontological values such as equality,²⁴ self-development of the person,²⁵ or consequentialist ideals,²⁶ would have no genuine moral basis. The state thus plays a *constitutive* role in deciding how to allocate and enforce rights and duties in resources in order to obtain such collective goals or values. Under these theories, therefore, the private realm follows the public one. Even the private aspects of property ordering would be viewed as some form of "public law in disguise."²⁷

²³ The two principles, as set out in JOHN RAWLS, *A THEORY OF JUSTICE* 10-15 (rev'd ed. 1999) (hereinafter: RAWLS, *JUSTICE*) are first, "equality in the assignment of basic rights and duties" and second, "social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society."

²⁴ See Rawls's abovementioned theory of "justice as fairness." RAWLS, *supra* note 23.

²⁵ RADIN, *supra* note 15, at 35-71.

²⁶ Here, I generally refer to Jeremy Bentham's principle of maximization of societal welfare, which has since been the core of mainstream economic thought about property. Bentham's utilitarian account is most prominently articulated in JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION*, Ch. 4 (J.H. Burns & H.L.A. Hart eds., 1970).

²⁷ ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 86-87 (2009) (criticizing, based on Kant's theory of rights, this approach to property rights within political philosophy).

The unification of the public and the private in identifying the underlying moral basis of property within each of these groups of theories should not be too surprising. Many philosophical theories aim at universal moral validity, and at the same time are generally not interested in the details of different doctrines applying this overarching moral basis.

Such moral theories could live comfortably with the fact that the particular rules regulating the law of governmental eminent domain would not be identical with the set of rules governing interpersonal cases of adverse possession. They certainly do not call to abolish all types of line-drawing between public and private. As liberal theories, they are rather committed to preventing a state of affairs in which the individual loses her identity and her ability to engage in private conduct, one that is not governed by the principles of public reason. But the underlying basis of collective decisionmaking regarding the allocation of property rights and duties should be morally coherent. In this sense, these theories, each one according to its own credo, share also a *deterministic* viewpoint about the content of property norms that will be set out and enforced in the civil condition. The general principles of rulemaking are inherently dictated by the underlying moral basis.

But not all philosophical theories are oblivious to the actual dynamics and processes within the state institutions that engage in the design of property legal norms, or to the structural features that typify the *legal* institution of property. I touch here briefly on two such theories: Rawls's *Political Liberalism*²⁸ and Kant's discourse of the "private right" and "public right" in *The Metaphysics of Morals*.²⁹ Both philosophical accounts entail features that seem more closely aligned with property jurisprudence.

As for Rawls, it is significant to observe the shift in his theory of justice from the two substantive moral principles of justice in *A Theory of Justice*³⁰ to the political conception of justice in *Political Liberalism*.³¹ Two related political-procedural terms used by Rawls, "public reason" and "reasonable pluralism," help to explain how Rawls's *Political Liberalism* offers an account of property that addresses issues that are also of particular concern in jurisprudence, and specifically in legal property theory.

²⁸ JOHN RAWLS, *POLITICAL LIBERALISM* (rev'd ed. 1996) (hereinafter: RAWLS, LIBERALISM).

²⁹ KANT, *supra* note 18.

³⁰ RAWLS, *JUSTICE*, *supra* note 23.

³¹ RAWLS, LIBERALISM, *supra* note 28.

Rawls portrays public reason as the common reason of the collective body when it exercises its political and rulemaking powers. 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. Rawls focuses on society's decisions about "constitutional essentials." These are comprised of the general structure of political process and government, and of basic individual rights and liberties, including "the right to hold and to have the exclusive use of personal property."³² Public reason is thus the distinctive process and reasoning mode of public forums with regard to these constitutional essentials, as opposed to personal and other nonpublic deliberations.³³

Rawls also accepts the fact of society's "reasonable pluralism" about religious, moral, or philosophical doctrines. This viewpoint thus looks 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.³⁴ Whereas Rawls insists that certain basic rights and liberties must be maintained even under a political conception of justice, it seems 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 a specific consensus or on "objective" viewpoints.

The institution of property is thus the product of an ongoing process of decisionmaking by society's formal institutions. At the same time, the fact that these institutions *create* property does not mean that property is void of ideas about ethics, justice, morality, or other goals and values. 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 employing "public reason," so that these considerations are not imposed on the legal order by preemptive moral dictates.³⁵

³² *Id.* at 298.

³³ Rawls identifies courts as the "institutional exemplar" of public reason in a constitutional regime with judicial review. *Id.* at 231-40.

³⁴ *Id.* at 223-27.

³⁵ For a more elaborate discussion of Rawls's political model and its implications for property, see Amnon Lehavi, *The Property Puzzle*, 96 GEO. L. J. 1987, 1993-97 (2008) (hereinafter: Lehavi, *Puzzle*).

Kant's theory of property relies on a strong deontological basis, stemming from his concept of the categorical imperative, by which a person as agent must always be an end in itself, one that is endowed with the inalienable capability to set purposes as the basis for his actions. Because material resources are essential means to attain the goals of the purposive agent, property rights must be structured in such manner as to allow persons the equal freedom to set purposes and to use external objects to pursue their goals.³⁶

Kant makes a central distinction between a "private right" and a "public right."³⁷ The moral basis of the right to carve out certain resources for exclusive possession and use in order to achieve one's purposes, provided this is consistent with the freedom of others, exists already in the state of nature. From a *structural* perspective, such a "private right" focuses not on the relation to the object but on one's entitlement to constrain others with respect to this resource. This right vis-à-vis others is established by taking physical possession to the object and by publicly signifying to others that the asset would serve as a means to achieve one's purposes. While this right is not formally enforceable in the state of nature, its moral basis does not depend on positive law or on subjecting oneself to the purposes of others, be they individuals or a collective.

The private right would become, however, formally enforceable and thus a "public right" only in the *rightful condition*, in which the state and its institutions take over in order to make rules and exercise coercion and enforcement powers.³⁸ The existence of the state's institutions is not merely instrumental--it plays a normative and constitutive role in ensuring that a true and legitimate "united general will," an omnilateral authorization by citizens, would serve as the basis for creating laws and enforcing property rights.

Kant's theory teaches us three main lessons, which seem distinctive from other philosophical theories of property and appear to consider more closely the types of concerns and considerations that regularly engage the challenges of property lawmaking.

First, as a *structural* matter, property rights are typified by the ordering of relations among persons with respect to resources. The basic structure or concept of property does not change in the transfer from a "private right" to a "public right" in the civil condition.

³⁶ See RIPSTEIN, *supra* note 27, at 90-92.

³⁷ KANT, *supra* note 18, at 89-120.

³⁸ *Id.* at 84-86.

Second, as an *institutional* matter the role that state institutions play in the allocation and enforcement of property rights is not merely instrumental. Public legal ordering, promulgated and organized by society's collective entities, is a necessary condition to grant a legitimate basis to the use of power and coercion, and the only way in which true omnilateral consent to the creation and enforcement of property rights could be given.

Third, as a *normative* matter, the content of property rulemaking by the state's institutions is not predetermined by fixed deontological principles. While the state must ensure the preservation of general equal freedom to all, chiefly by its duty to support the poor,³⁹ the details of substantive and procedural property norms can take on several forms. It is up to the public institutions to resolve the different issues pertaining both to private disputes and to the public law of property. The normative content of property would thus be designed through the process of public legal reasoning.

In conclusion, the focus of philosophical discourse on the morality of the civil condition plays a central role in exposing the normative foundations of the legal institution of property. But at the same time, it tends to pay less attention to many considerations that typify the structural and institutional features of property lawmaking. Kant and Rawls, by focusing also on the institutional process of decisionmaking and on the complicated private-public structure of property rights, seem to be most attentive to these jurisprudential aspects, ones which will be explored in detail in Parts IV-VII.

III. SOCIAL SCIENCES AND PROPERTY: MARKET, POWER, AND STATE

Similar to the caveat issued in the previous part, the discussion of the social sciences' concept of property does not aim to be exhaustive, or even to represent all the academic disciplines within the social sciences that have dealt directly with this theme.

I focus attention in this part on two types of literature. *First*, socio-political theories that seek to link property to issues of politics, social structure, and power. Such theories question the extent to which the legal system and the decisionmakers acting within it are qualitatively distinctive from other types of social institutions involved with controlling access to resources and use thereof. *Second*, mainstream economic theories, mostly

³⁹ For a discussion of this duty, see Ernest Weinrib, *Poverty and Property in Kant's System of Rights*, 78 NOTRE DAME L. REV. 795 (2003); RIPSTEIN, *supra* note 27, at 267-84.

liberal and New Institutional Economics ones, which set out to define and evaluate property rights by focusing on the stream of benefits or economic rents that can be extracted from the resource by stakeholders, especially by the person defined as “owner.”

These two types of social science theories have become extremely popular also among many legal theorists: the “law and society” and “law and economics” schools, respectively. Accordingly, I discuss here various theories that rely heavily on social science literature or methodologies, notwithstanding the writer’s disciplinary affiliation. Indeed, it seems that alongside the obvious benefits of interdisciplinarity, these “law and” theories are so deeply invested in the social sciences, up to the point that they have become almost alienated from legal doctrine, as well as from one another.

A. *Property and Society*

One cannot truly discuss the nexus of society and property without first juxtaposing the views of Marx and Weber, often considered the founders of modern social thought. In *The German Ideology*, a critique of the Hegelian tradition, Karl Marx and Frederick Engels engaged in their first comprehensive study of historical materialism.⁴⁰ Defining the relation of state and law to property, they argue that “through the emancipation of private property from the community, the State has become a separate entity, beside and outside civil society; but it is nothing more than the form of organization which the bourgeois necessarily adopt both for internal and external purposes, for the mutual guarantee of their property and interest.”⁴¹ Property is thus an invention, a tool for social hierarchy in the guise of Hegelian individual development.

In contrast, Max Weber refused to explain law, including the institution of property, as simply determined by economic forces.⁴² This is not to say that Weber was oblivious to the fact that historical or economic considerations are inherently related to property--quite the contrary. But he viewed the influence as two-directional, and moreover, assessed the development of law as a *rational* process, one that leads to the development

⁴⁰ KARL MARX & FREDERICK ENGELS, *THE GERMAN IDEOLOGY* (R. Pascal ed., 1960 [1846]).

⁴¹ *Id.* at 59.

⁴² For a discussion of Weber’s rational-scientific approach to jurisprudence, see M.D.A. FREEMAN, *LLOYD’S INTRODUCTION TO JURISPRUDENCE* 839-42 (8th ed. 2008).

of legal institutions endowed with a rational quality and maintaining a relatively autonomous position in the development of law.⁴³

According to Weber, this rationalism in law, which is typical of western culture, was due in large part to the growth of bureaucracy and of the legal profession. These agents have managed to create a systematic conception of rational law, the functioning of which could be rationally predicted. Predictability and security in the transformation of abstract legal concepts to specific rules by professional institutions played a key role in the development of the capitalist society. Property law is thus not only influenced by socio-economic factors, but also capable of impacting economic processes and allowing for progress in society. The binding together of “the appropriation of all physical means of production... as disposable property of autonomous private industrial enterprises,” the “freedom of the market,” “rational technology” and “calculable law” is what makes capitalism possible.⁴⁴ Weber’s concept of law and of the institution of property in particular thus contrasts the type of social-legal nexus suggested by Marx. Property is not only an effect but also a cause. Moreover, it is the product of a rational process developed by professionals trained “in a learned and formally logical manner.”⁴⁵

This struggle between power and reason has continued to affect modern social thought about the law, and the institution of property in particular. A central role has been played in this context by the legal realists. Morris Cohen likened private property to a state-endorsed form of private sovereignty over others.⁴⁶ Viewed this way, capitalism, with its rhetoric of free markets and free choice, is not entirely detached from feudalism, in which “ownership of the land and local political sovereignty were inseparable.”⁴⁷

But unlike Marxism, Cohen believed that the “recognition of private property as a form of sovereignty is not itself an argument against it.” Nevertheless, it does require giving good justifications for property rights, ones that would often justify placing limits on the right of property. In so doing, Cohen and other legal realists analyzed the way in which property law is also, but not only, about power or politics, while insisting that it is

⁴³ MAX WEBER, GENERAL ECONOMIC HISTORY 313 (Frank H. Knight trans., 2003 [1927]).

⁴⁴ *Id.* at 275-78.

⁴⁵ FREEMAN, *supra* note 42, at 839.

⁴⁶ Cohen, *supra* note 12.

⁴⁷ *Id.* at 9.

also a forum of reason. Such reason poses “constraints on the choices of legal decisionmakers, and thus on the concomitant exercise of state power.”⁴⁸

This careful approach may therefore counterbalance the viewpoint, which has become prevalent in much of the law and society scholarship, by which property is an inherently-empty concept. Because this “disintegrative” approach has linked itself to the legal realist tradition and in particular to the work of Wesley Newcomb Hohfeld,⁴⁹ I briefly present it in this context, but as I later argue, such a “naked politics” approach to property law is by no means a necessary conclusion of Hohfeld’s analysis.

To concisely explain the background, in Roman law and successive civil law systems, the concept of property and ownership in particular is fundamentally unified. This means not only that there is typically one party considered to be holding the “box of ownership,”⁵⁰ but also that property rights are quintessentially *in rem* (against the asset) and are thus generally valid against the rest of the world, as opposed to contractual and obligatory rights which are *in personam* in nature. Whereas the Anglo-American system of estates in land had somewhat undermined the unitary concept of “ownership,” property rights were nevertheless traditionally considered to possess the trait of an exclusionary right with universal validity, as famously depicted by Blackstone.⁵¹

Hohfeld had set out to challenge the traditional *in rem/in personam* dichotomy. Defining and analyzing the different attributes of *in personam* rights through delineation of “jural opposites” and “jural correlatives” that govern 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-effect legal relationships.⁵² But whereas Hohfeld’s enterprise was largely analytical-conceptual, one addressing the legal structure of property rights, the subsequently developed metaphor of

⁴⁸ Hanoch Dagan, *Legal Realism and the Taxonomy of Private Law*, in *STRUCTURE AND JUSTIFICATION IN PRIVATE LAW: ESSAYS FOR PETER BIRKS* 147, 150 (Charles Rickett & Ross Grantham eds., 2008).

⁴⁹ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L. J.* 16 (1913) (hereinafter: Hohfeld, 1913); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L. J.* 710 (1917) (hereinafter: Hohfeld, 1917).

⁵⁰ John Henry Merriman, *Ownership and Estate*, 48 *TUL. L. REV.* 916, 927 (1974).

⁵¹ BLACKSTONE, *supra* note 1, at 2.

⁵² Hohfeld 1917, *supra* note 49, at 718-19.

the “bundle of rights” served mostly a *normative* purpose, especially by critical legal theory, which sought to de-canonize the institution of property on an ideological basis.⁵³

According to these critics, “property” has no inherent meaning. It is comprised rather of numerous, diverging clusters of legal interests, which could be determined in each instance through overt political decisionmaking.⁵⁴ Politics and power can thus freely design property law with practically no restrictions. Beyond criticizing the entrenchment of a political status-quo that favors existing owners in the guise of allegedly-inherent legal constraints, these writers suggest that politics could just the same redesign property to promote competing agendas, i.e. progressive or redistributive ones.⁵⁵

This is a superfluous, not to say superficial view of property. As I argue in the following parts, property law does entail certain structural and institutional features that should be adhered to in transforming moral or social ideals to sets of legal rights. While these features do not impose the underlying normative values or primary content of property regimes and doctrines, the other extreme of a politics-only view of property simply misconceives the legal system in general, and property law in particular. Law is not simply an empty vessel for reflecting such extra-legal considerations. In particular, disregarding the structural and institutional traits of the system of property rules fails to grasp the way in which social values or policy choices translate into legal norms.

To be fair, this depiction of property has not been driven only by radical or critical agendas. As Greg Alexander aptly shows, throughout American history, alongside the dominant depiction of “property as commodity,” by which property is intended to satisfy individual preferences mostly through market exchange while also fostering social mobility, there existed also a competing view of this legal institution, one of “property as propriety.”⁵⁶ According to this approach, as it was understood during the generation of the Founders, proper social order, one promoting the public good, was by and large a static one. Property was central to this plan of social stability, as it anchored the citizen to his rightful place in the proper social hierarchy, so that “property, of which the only

⁵³ See Lehari, *Puzzle*, *supra* note 35, at 2000-01.

⁵⁴ Thomas C. Grey, *The Disintegration of Property*, in *NOMOS XXII: PROPERTY 69* (J. Roland Pennock & John W. Chapman eds., 1980).

⁵⁵ For this literature, see BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE* (1998).

⁵⁶ GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY, COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970* (1997).

important form was the freehold estate in land, was more than wealth; it was authority, or at least the source of authority.”⁵⁷ Such a naked political view of property has thus typified not only radical agendas, but also reactionary or highly conservative ones.

Moreover, the “disintegration” of property has also been the result of social science or “law and” academic work that is otherwise premised on mainstream societal views. Section B below will analyze how the economic analysis has contributed to this result, but here I refer to recent work in political science, which aims at exposing the *real politic* of developing property regimes, by focusing on political power-plays and methodologies such as game theory. Itai Sened argues that the origin of private property is not to be found “in any set of moral principles or of ‘nature.’”⁵⁸ Property rights rather emerge as outcomes of interactions “between government officials who control social institutions by their monopoly over the use of force and their unique role in the legislative process, and free agents who challenge these institutional structures to fit them to their own needs.”⁵⁹

This approach seems to support the depiction of property as pure politics in the guise of rational jurisprudence. But in so doing, it too misses the mark of offering a full-scale analysis of the *legal* institution of property. In many respects, the fundamental deficiency of such theories is a mirror-image of the incompleteness of moral philosophy approaches.

B. Property and Economics

Moving to the massive investment of economic thought in property, one may be confronted at the outset with a puzzle. Though not oblivious to distributive concerns, the holy grail of mainstream economics is regularly one of identifying the optimal allocation of resources and use thereof to increase overall welfare--broadly defined to include not only standard economic gains but also other types of benefits, goals, and preferences. “Property rights” should facilitate the ability of stakeholders to exploit scarce resources in a way that would be most beneficial both individually and in the aggregate. But while it is natural that different minds would not think alike on how to achieve this goal and would

⁵⁷ *Id.* at 4.

⁵⁸ SENED, *supra* note 4, at 1.

⁵⁹ *Id.*

thus suggest different recipes for optimal resource allocation, at first glance one may even identify a kind of self-contradiction in the work of prominent economists on this issue.

Consider the work of Ronald Coase, probably the most prominent contemporary economist dealing with the concept of property. On the one hand, in *The Problem of Social Cost*,⁶⁰ when discussing the standard example of a factory, the smoke from which “has harmful effects on those occupying neighboring properties,” Coase staunchly refuses to adopt conventional legal analysis as articulated in the doctrine of nuisance. Rejecting common legal principles of harm, causality, and liability, Coase argues that “we are dealing with a problem of a reciprocal nature. To avoid the harm to *B* would be to inflict harm to *A*. The real question that has to be decided is, Should *A* be allowed to harm *B* or should *B* be allowed to harm *A*? The problem is to avoid a more serious harm.”⁶¹

This is indeed a “disintegrative” normative agenda, though one stemming not from radical or reactionary politics, but rather from the pursuit of aggregate efficiency. It disintegrates the institution of property into a cluster of different attributes that should be allocated or reallocated, including through the coercion of court orders, so as to ensure that a certain use of the resource is granted to the party that can better benefit from it.

This queue has been picked up by law and economics scholars, many of which have advocated 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 by “property rules,” which require the consent of the right holder. Ian Ayres spins a sophisticated legal web of liability rules or “options” that could be universally employed for property disputes.⁶² Under such 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.⁶³

⁶⁰ Coase, *supra* note 6.

⁶¹ *Id.* at 2.

⁶² IAN AYRES, OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS 1–38 (2005).

⁶³ See Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 724–28 (1996). However, not all law and economics scholars share this view. Thomas Merrill and Henry Smith argue that Coase’s seminal analysis of externalities, transaction costs, and market exchange of property rights is at odds with his own picture of property as merely a cluster of ad hoc use rights. They view Coasean analysis as better conforming to the traditional concept of property, one typified by exclusion and broad powers to the owner. Thomas W. Merrill & Henry E. Smith, *Making Coasean*

Needless to say, this facet of the economic analysis of property destabilizes conventional property jurisprudence. Legal rights may be up for grabs, regardless of their initial allocation or questions of fault and causation, and external arbiters would be at general liberty to reallocate entitlements to ensure asset- or use-specific efficiency.

But on the other hand, Coase is also considered to be one of the founders of New Institutional Economics (NIE), together with fellow economists Douglas North and Oliver Williamson.⁶⁴ In the context of property, NIE has stressed the need for institutional structuring that will strongly protect property rights against expropriation or other types of infringements. Building on the classical arguments by Bentham and Smith, by which secured property rights are essential to create incentives for investment and productivity, NIE has seen weak property rights as a major obstacle for economic growth. Only if property rights are clearly defined and protected, can efficiency be attained by creating incentives for productive activities and by facilitating mutually-beneficial trade.

In 2007, under the guidance of economist Hernando De Soto, the Property Rights Alliance has started publishing the *International Property Rights Index*, which ranks countries based on a list of variables under the headings of “legal and political environment,” “physical property rights,” and “intellectual property rights.”⁶⁵ In his foreword to the 2011 edition, De Soto contends that “with each new year, the link between economic prosperity and property rights protection becomes increasingly clearer.”⁶⁶ Accordingly, the index is created in such a manner so that the more “Blackstonian” a certain property regime is, the higher the country ranks in the index.

So how can one settle Coase’s disintegrative agenda of unbundling and reallocating existing property rights even against the will of the formal right-owner with Coase’s parallel “Blackstonian” agenda of securing and protecting private property rights?

Benito Arruñada suggests that the economic analysis of property tends to focus on its public aspects, so that its chief concerns deal with the preclusion of violence and confiscation. Identifying government and politics as setting out the initial allocation of

Property More Coasean, J. L. & ECON. (forthcoming), available at <http://ssrn.com/abstract=1758846> (hereinafter: Merrill and Smith, Making).

⁶⁴ NORTH, *supra* note 10; WILLIAMSON, *supra* note 10.

⁶⁵ See Property Rights Alliance, *International Property Rights Index 2011 Report*, available at: <http://www.internationalpropertyrightsindex.org/>

⁶⁶ *Id.* at 3.

rights, which then enables free market transaction and thus a more efficient reallocation, economic analysis is bothered mostly by political failures in this initial stage of creating the infrastructure for property and markets. Under this thesis, economists are less concerned with the ongoing private aspects of property ordering and may even be supportive of upsetting existing entitlements for the sake of efficiency.⁶⁷ In a way, this could be explained in terms of Coase's discussion of transaction costs.⁶⁸ In a world with no or little transaction costs, what matters is that property rights are initially well defined and secured. Subsequent market transactions will ensure that an asset will end up in the hands of the person who values it the most. But in a world of substantial transaction costs, strict enforcement of rights may be counterproductive. Extensive judicial intervention in preexisting rights may ensure efficiency, such goal being obtained allegedly without undermining the overall "public" structure of property.

Taking this analysis further, one could therefore depict the fundamental difference between mainstream economic and legal concepts of property in that economic theory focuses on *value*, not on *rights*. Viewed in pure economic terms, property rights are merely an instrument for maximizing value and should not be sanctified as such when their rigid protection would lead to inefficiency. What matters for economists is how access to resources and use thereof are organized so as to increase overall productivity.

As the following parts show, conventional legal thinking on property is quite different. In the public law context, I suggest that legal systems regularly do not protect the asset's value *in itself* against government-inflicted losses. They rather shield legally-recognized *rights* in regard to such assets, with the question of restoring lost value coming into play mostly during the second stage of remedying the infringement.⁶⁹ The same holds true for private disputes about property. The way that private law property jurisprudence regularly works is by identifying, first, whether a legally-enshrined *right*, as opposed to a mere *economic interest*, has been violated by the defendant, and if so, how should it be protected through the legal mechanism of remedies.

⁶⁷ BENITO ARRUÑADA, INSTITUTIONAL FOUNDATIONS OF IMPERSONAL EXCHANGE: THEORY AND POLICY OF CONTRACUTAL REGISTRIES 21-24 (2012).

⁶⁸ Coase, *supra* note 6.

⁶⁹ See Amnon Lehavi, *The Taking/Taxing Taxonomy*, 88 TEX. L. REV. 1235, 1257-62 (2010) (hereinafter: Lehavi, *Taxonomy*).

Indeed, as I now move to show, the conceptual and institutional distinction between *right* and *value* (in the two senses of the word) is one of the key features of a legal system. While this is relevant for all fields of law, recognizing this feature is especially acute for property law. Because of the enormous interest of various social science disciplines in the concept of property, it is essential to understand why a disparity continues to exist between philosophers, social scientists, and lawyers in their understanding of this concept. Again, the purpose here is not to rank different disciplines by evaluating which one offers a more sophisticated analysis of property, but rather to unfold the process of transforming moral values and social goals into legal rights.

IV. THE INTERNAL FEATURES OF LAW

There is probably no clearer manifestation of classical legal positivism than 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."⁷⁰ While positivists generally view law as the source of all binding norms and enforceable rights and duties, property seems to have been central enough to deserve such special attention.

The following parts do not set out to engage in the general debate about the autonomy of law as a self-standing system for setting up state-enforced rules of conduct in society--that is, whether law could be detached from moral values, social and economic structures, and other facts, interests, and reasons for action that operate in the human environment.

What the analysis sets out to do is to illustrate the way in which law, or at least the Anglo-American tradition, is embedded in certain structures and institutions regardless of substantive values, goals, and norms that operate in specific fields of law. In so doing, this part touches on two fundamental features that seem to typify conventional western legal systems and their law of property in particular: *first*, the distinction between right and value; and *second*, the design of remedies as a distinctive feature of the legal realm.

While other distinctive features of legal systems could be analyzed in this context, such as law's special emphasis on the creation of categories as the basis of legal

⁷⁰ JEREMY BENTHAM, THE THEORY OF LEGISLATION 113 (C.K. Ogden ed., 1931 [1802]).

analysis,⁷¹ or the centrality of determining “legal causality” for imposing liability in private law,⁷² these two features could offer a concise introduction to the distinctiveness of the legal realm, an analysis which is complemented in Part V by discussing some particular features of “legal property”: (1) *in rem* applicability of property rights; (2) constraints on property actors from effectively opting out of the public legal order; and (3) property law’s unique public/private interface.

Part VI then examines the challenges that collective decisionmaking institutions face in designing legal property norms. The overarching goal of the analysis is to demonstrate how property jurisprudence distinguishes itself, even if not hermetically, from other disciplines that have long been invested in the inquiry of property. This does not mean that the law of property is bound to dispute the underlying values and goals, factual observations, or methodological tools of these other disciplines, but rather that “legal property” introduces distinctive structural and institutional considerations.

A. Right versus Value

The term “value” can generally refer to *economic* value, i.e., a certain quantifiably-measurable stream of benefits deriving from a certain asset, or to a *moral, cultural, or social* value, i.e., a qualitative matter of importance to a certain person, group, or society.

As the previous parts have shown, the economic analysis of property tends to focus on the overall maximization of economic value as the underlying goal of property systems, while philosophical inquiries seek to identify a certain qualitative ideal as the providing a *sine qua non* moral justification for the institution of property.

The system of law functions somewhat differently. While it should be attentive to such extra-legal considerations, a certain process of transformation is required, both conceptually and normatively, to turn such justifications and interests into legally-enforceable ones. It is through the mechanism of entitlements and obligations, those sets of jural relationships that Hohfeld has identified, that “value” becomes consolidated into

⁷¹ Lehavi, Taxonomy, *supra* note 69, at 1276-81.

⁷² See Donald H. Gjerdingen, *The Coase Theorem and the Psychology of Common Law Thought*, 56 S. CAL. L. REV. 712, 734-40 (1982-83); N.E. Simmonds, *Justice, Causation and Private Law*, in PUBLIC & PRIVATE: LEGAL, POLITICAL AND PHILOSOPHICAL PERSPECTIVES 149, 164-72 (Maurizio Passerin d’Entrèves & Ursula Vogel eds., 2000).

a legal construct. I focus attention here on the concept of “right” as the product of legal design, though as Hohfeld shows, the landscape of legal interests is more diverse.⁷³

In many respects, the right/value dialectic in jurisprudence manifests itself in the broad debate about positivism and formalism in law. Although this discourse is vast and obviously cannot be resolved or even properly presented here, it would be fair to say that mainstream jurisprudence recognizes that for a system of law to function properly, it should entail some degree of *formalism*, i.e., that legal interests are defined and enforced in a systematic and coherent manner, and *positivism*, i.e., that legal norms are crafted and designed by certain institutions that follow certain procedures so that legal rules are not simply interchangeable with currently-prevailing social norms or moral credos.

Within this general framework, the mechanism of *rights* serves as the structural and institutional buffer between social or moral values and legally-binding norms. The particular operation of this mechanism and the ensuing degree of formalism and positivism is a matter of much debate, but the focus of legal systems on the definition of rights as central to the process of transformation of values into legal rules remains intact.

Consider, for example, the famous debate between H.L.A. Hart and Ronald Dworkin about the nature of jurisprudence. In the *Concept of Law*, Hart depicts law as comprised of a coherent set of primary duty-imposing and rights-granting norms that exist alongside secondary norms--“rules of adjudication,” “rules of change,” and “rule of recognition”--that confer powers on officials to enforce, change, or validate the primary norms.⁷⁴

Much criticism has been voiced about this conceptualization of legal systems. In particular, the allegedly-technical nature of Hart’s rule of recognition, which presumably looks only to the rule’s pedigree or to a determinate list of sources of law regardless of the underlying substantive justifications for legal norms, has been much debated, most notably by Dworkin.⁷⁵ Dworkin asserts that Hart ignores the essential role of principles,

⁷³ Hohfeld extends the landscape of legal interests beyond a “right” and its correlative “duty” to the following correlatives: privilege and duty, power and liability, and immunity and disability. See Hohfeld, 1913, *supra* note 49, at 30; Hohfeld, 1917, *supra* note 49, at 710.

⁷⁴ “Rules of adjudication” confer power on officials, chiefly courts, to decide matters of alleged infringements of primary duties or rights and to enforce the law through sanctions or remedies. “Rules of change” confer the power on certain institutions to change or amend current first-order norms. The “rule of recognition” determines the criteria that identify the validity of all other rules of the system. The last type of rule is further explicated in the following paragraphs in the text. H.L.A. HART, *THE CONCEPT OF LAW* 79-99 (rev’d ed 1994).

⁷⁵ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

policies, and other standards. Policy refers to a “kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community,” while a principle is a more fundamental standard that has to be observed because it is a requirement of “justice or fairness or some other dimension of morality.”⁷⁶ Such standards diverge from “all-or-nothing” rules not only in the sense that they are based on relative weight, but moreover, in that they connect the legal norms to underlying policies and principles that form the moral basis of a certain society.

In his 1994 Postscript to *The Concept of Law*, Hart responds by asserting that the rule of recognition need not be purely technical, such that in “some systems of law, such as in the United States, the ultimate criteria of legal validity might explicitly incorporate besides pedigree, principles of justice or substantive moral values, and these may form the content of legal constitutional restraints.”⁷⁷ But not all differences can be bridged over. Most notably, Dworkin’s approach is such that that society’s underlying principles leave the law gapless so that judges must strive to construct law in “the best possible moral light” by applying and properly weighing existing standards. Hart, in contrast, believes that even if a system of rules is understood to include “open texture” provisions, some issues may remain unresolved under the current system of rules so that judges are permitted to exercise strong discretion and make new law to fill these gaps.⁷⁸

But even if one adheres to Dworkin’s idea about underlying moral principles that always govern the entire legal field, this does not mean that legal rules become simply synonymous with moral or social values. Quite contrarily, it is Dworkin who has developed the idea of legal *rights* as “trumps” over goals and values that the community as a whole may wish to advance. As he suggests in *Taking Rights Seriously*, transforming a certain moral or social concept into a legal right means that the right now becomes the point of reference for evaluating human conduct, and that accordingly, it must be “a right

⁷⁶ *Id.* at 22.

⁷⁷ HART, *supra* note 74, at 247. Hart is not the first prominent positivist to recognize the underlying extra-legal basis of legal rules. Kelsen’s development of the “science of law,” and the structuring of all legal norms as deriving from more fundamental norms all the way to the Basic Norm (*Grundnorm*), views the Basic Norm itself as governed by the principle of efficacy—meaning that most people regularly conduct themselves in conformity with this norm. Moreover, Kelsen has recognized the close connections of other disciplines with law, while portraying the pure theory of law as aimed at preventing the essence of the science of law from being obscured by the “uncritical mixture of methodologically different disciplines.” HANS KELSEN, *PURE THEORY OF LAW 1* (Max Knight trans., 1989 [1934]).

⁷⁸ For an analysis of this debate, see FREEMAN, *supra* note 42, at 386-91.

to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done.”⁷⁹ The idea is not only one of counter-majoritarianism that protects the individual from the whims of the majority, but also one of legal structure. A legal system cannot function by constantly weighing values and goals *ab initio*; it must be embedded in the construction and enforcement of legal molds consisting of rights, duties, and other legal entitlements.

Joseph Raz views the assertions of rights as “intermediate conclusions in arguments from ultimate values to duties.”⁸⁰ Under his interest theory of rights, a person can assert a right when an aspect of his “well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.”⁸¹ A political society, acting through its decisionmaking institutions, makes morally-founded choices about which interests or aspects of well-being are generally worth validating. The law would then apply to the “standards which reached a certain stage of maturation and endorsement in the process.”⁸² According to Raz, “the importance of intermediate steps like rights, duties, rules and the like to a common culture explains and justifies the practice of referring to them as reasons in their own right, albeit not ultimate reasons.”⁸³

Advocating an institutional approach to law, Raz views society’s political institutions as proceeding from the “deliberative stage,” in which the question what is to be done “is open to argument based on all sorts of considerations,” into the “executive stage,” whose conclusions--i.e., the determination of rights, duties, rules, etc.--become “authoritative positivist considerations.”⁸⁴ Thus, while the basis of a legal system is embedded in moral considerations, their consolidation into legal rights and duties is a constitutive process, one which does not simply fall back on underlying moral values.

This insight about the intrinsic importance of rights as the subject of legal order bears major implications for understanding the working of law, and property in particular.

Starting with constitutional or public aspects, I argue that property law, including the U.S. Fifth Amendment’s Takings Clause, does not protect the asset’s economic *value* in

⁷⁹ DWORKIN, *supra* note 75, at 194.

⁸⁰ JOSEPH RAZ, THE MORALITY OF FREEDOM 181 (1986) (hereinafter: RAZ, FREEDOM).

⁸¹ *Id.* at 166.

⁸² JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN iv (1994) (hereinafter: RAZ, ETHICS).

⁸³ RAZ, FREEDOM, *supra* note 80, at 181.

⁸⁴ RAZ, ETHICS, *supra* note 82, at 206-07.

itself against government-inflicted losses. It rather shields those legally recognized *rights* in regard to the asset, with the question of restoring value coming into play mostly during the second stage, after it has been established that a certain right had been infringed.

Consider the U.S. Supreme Court's decisions in *Phillips v. Washington Legal Foundation*⁸⁵ and later in *Brown v. Legal Foundation of Washington*.⁸⁶ The two cases dealt with the Interest on Lawyers' Trust Accounts (IOLTA) programs adopted in the different states. Under these programs, certain client funds held by an attorney in connection with his practice of law are deposited in a bank account, with the interest income generated by the funds being paid to foundations that finance legal services for low-income individuals. The Court in *Phillips* recognized the respondents' argument that each one of the separate client funds was too small to generate interest income in itself, such that there was no direct economic loss, but at the same time held that:

We have never held that a physical item is not "property" simply because it lacks a positive economic or market value. For example... we held that a property right was taken even when infringement of that right arguably *increased* the market value of the property at issue. Our conclusion in this regard was premised on our longstanding recognition that property is more than economic value; it also consists of "the group of rights which the so-called owner exercises in his dominion of the physical thing," such "as the right to possess, use and dispose of it." While the interest income at issue here may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property."⁸⁷

In *Brown*, the Court again held that the IOLTA programs constituted a taking, since the interest of the bank accounts' beneficial owners was "taken for a public use when it was ultimately turned over to the Foundation." But it then decided that no compensation was due for the taking because "compensation is measured by the owner's pecuniary loss-- which is zero" so that "there has been no violation of the Just Compensation Clause of the Fifth Amendment in this case."⁸⁸

⁸⁵ 524 U.S. 156 (1998).

⁸⁶ 538 U.S. 216 (2003).

⁸⁷ *Phillips*, 524 U.S. at 169-70.

⁸⁸ *Brown*, 538 U.S. at 240.

One may be left to wonder--as the dissenting opinion in *Brown* did⁸⁹--what point is there in recognizing an infringement of property rights as a taking but at the same time holding that no compensation is due. But puzzling and controversial as this ruling may be, it seems to reflect a persisting leitmotif in property law, one by which *rights*, and not *value*, are the subject of legal protection, whereas lost private value serves as a benchmark--though not the only possible measure--in designing the remedy.

The private law of property seems to share this basic idea. In setting up a system of formal, enforceable rights that apply among members of society, the law determines what interests are enshrined as rights and under what circumstances these rights would be enforced in case of breach. But no such guarantee exists in regard to the actual value that the owner would enjoy. For example, while a homeowner could generally prevent certain types of disturbances that fall under legal "nuisances," she has no such control over other types of external effects that may have similar or bigger effect on her private value, such as larger housing market trends.⁹⁰ The latter too are caused by the actions of different market actors and they definitely implicate value, but not legal rights. Such legal line-drawing may stem not only from practical constraints on identifying the entire range of parties that affect or are being affected by such changes, but also from a normative limitation on the types of actions that should be subjected to legal liability.

What one thus legally owns is the set of rights allocated to her, not the asset's value. Whether one looks at property from a philosopher's or an economist's *value* perspective, she may well have a different idea than the lawyer's concept of the *right* to property.

B. The Right-Remedy Dialectic

The analysis of right-versus-value may also shed light on another prominent distinction in law, that between right and remedy, and its specific application in property.

The non-lawyer may initially be puzzled by such a division between a *right*, i.e., the form and manner in which a recognized legal interest is defined by the legal system and a *remedy*, i.e., the way in which enforcement institutions, chiefly courts, would respond to

⁸⁹ See *id.* at 252 (Scalia, J., dissenting).

⁹⁰ See Lee Anne Fennell, *Homeownership 2.0*, 102 Nw. U. L. REV. 1047, 1049 (2008).

the right's violation. This tension is nonetheless a prominent feature of legal systems, implicating not only structural and institutional issues, but also normative considerations.

Ernest Weinrib examines two competing conceptions of the relationship between the plaintiff's right (or the defendant's correlative duty) and the remedy awarded.⁹¹

Under the "corrective justice" conception, which Weinrib dubs as Aristotelian, "what the defendant has done to the plaintiff determines what the judge requires the defendant to do for the plaintiff." The direct relationship of the parties characterizes both the "causative event" and the remedy, and is thus immanent in the parties' private law relationship. The remedy has the same correlative structure as the relationship itself because a "relational injustice cannot be corrected non-relationally."⁹² The restoration of the plaintiff's right typically takes one of two forms: *qualitative*, which restores to the plaintiffs the very thing that is the subject matter of the right (by an injunction, specific performance, etc.) or *quantitative*, which restores to the plaintiff the monetary equivalent of the injury. While not necessarily identical in form or content, the choice of remedy seeks to best serve the underlying correlation under the circumstances. Moving back across disciplines, one could say that roughly speaking, such an approach would usually conform to moral philosophy's account of rights and of property rights in particular.

Under the "condition" conception of remedies, which Weinrib attributes to Kelsen's general approach to law, the relationship between the causative event and the remedy is solely one of condition and consequence. Kelsen, says Weinrib, is concerned not with justice, since a norm can be legally valid even if it is thought to be unjust, but with the posited nature of law as the exercise of organized coercion. The legal order stipulates the condition under which "certain coercive acts function as sanctions that react against illegal acts of omissions," but what counts as a wrong or delict to start with "is an act or omission that the legal order makes the condition of the coercive act."⁹³ Once such a distinction is drawn between the parties' relationships and the remedy as the employment of organized coercion, courts and other state institutions can pursue other goals through remedies. Punitive damages are an example of a remedy that comfortably fits the "condition" conception but not the "corrective justice" one. By promoting deterrence and

⁹¹ Ernest Weinrib, Remedies (unpublished manuscript, 2011) (on file with author).

⁹² *Id.* at 2, 7-10.

⁹³ *Id.* at 2.

distribution, punitive damages focus on one-sided considerations pertaining to the defendant as doer, rather than on the underlying relations between the parties.⁹⁴

As Weinrib suggests, the condition conception is particularly dominant in the economic analysis of law. This is the case with Calabresi and Melamed's work,⁹⁵ which offers a broad spectrum of potential remedies, while detaching itself from the original wrongdoing so that efficiency considerations could justify granting a remedy in favor of a party who has not been wronged from a normative viewpoint. The economic analysis of property/tort "entitlements" and their protection by state institutions thus becomes a discourse of purely instrumentalist justifications for granting entitlements to certain parties, alongside parallel "options" to purchase such entitlements. Under this conception, argues Weinrib, remedies lose any causation to moral fault by the parties.⁹⁶

Interestingly, one could trace the origin of the "option" viewpoint of remedies to Oliver Wendell Holmes's famous statement in *The Path of The Law* that "the duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it -- and nothing else."⁹⁷ Holmes's point was to expose the "confusion between legal and moral ideas," such that people obey the law to avoid "disagreeable consequences," regardless of whether such people are otherwise morally good or bad.⁹⁸

But, as Holmes observes, he does not promote cynicism or agnosticism toward the moral virtues of law.⁹⁹ As an analytical and positive exercise, Holmes seeks to offer a more realistic and complex view of the way in which moral ideas are transformed into legal rules and then enforced through the award of remedies. Similarly, I do not think that the economic analysis is necessarily oblivious to the normative basis of the entitlements. Calabresi and Melamed do argue, for example, that the choice among otherwise parallel remedies of monetary compensation--e.g., should the polluting factory pay the neighbor or the other way around--could hinge on normative questions of justice.¹⁰⁰

Which concept of remedies is more befitting a legal system, is an issue that cannot be resolved here. On the one hand, the historical evolution of the common law points to a

⁹⁴ *Id.* at 16-17.

⁹⁵ Calabresi & Melamed, *supra* note 6.

⁹⁶ Weinrib, *supra* note 91, at 22-26.

⁹⁷ Oliver Wendell Holmes, *The Path of The Law*, 10 HARV. L. REV. 457, 462 (1897).

⁹⁸ *Id.* at 461.

⁹⁹ *Id.* at 459-60.

¹⁰⁰ Calabresi & Melamed, *supra* note 6, at 1112.

shift from a more formalistic “discourse of remedies” to a substantively-based “discourse of rights” as the basis for protecting legal interests,¹⁰¹ a trend that seems to reconnect remedies to the moral basis of the underlying legal rights and duties.

But as Stephen Smith argues, the award of remedies is never merely a “rubber-stamp” process.¹⁰² As both a positive and normative matter, courts consider if and how to intervene by additionally weighing, *first*, the issue of systemic administrative and other costs involved in delivering justice; *second*, whether the plaintiff should be entitled under the specific circumstances to invoke the state’s coercive powers; and *third*, the way in which remedies as personalized directives “that command a specific individual to do a specific thing” are limited in their ability to attain certain goals. The traditional reluctance of courts to grant injunctive or operative orders in many scenarios, the operation of limitation periods, “symbolic orders” such as punitive damages, and other remedial mechanisms point to the independent inquiry that courts hold during this process.¹⁰³

These complexities are well known to legal scholars, but could remain puzzling to other academic disciplines, with property being a particular source of friction. The moral philosopher might wonder what point there is in reaching a normative conclusion that a person’s claim to an asset is superior to all others if it is not being practically enforced. The economist might ask what goal is served in defining abstract rights when it is clear that only actual allocations promote welfare to start with. But this is at times the path of the law: recall the *Phillips* and *Brown* ruling,¹⁰⁴ by which the state action has been found to constitute a taking of the plaintiffs’ property right, but no remedy has been granted. While not common, such a ruling reveals the complexity of the right-remedy interface.

¹⁰¹ KARL N. LLEWELLYN, *A Realistic Jurisprudence: The Next Step*, in JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 8-23 (1962).

¹⁰² Stephen A. Smith, *Rights and Remedies: A Complex Relationship*, in TAKING REMEDIES SERIOUSLY 31, 43-45 (Robert J. Sharpe & Kent Roach eds., 2009).

¹⁰³ *Id.* at 45-60. Hanoch Dagan offers mediating the tension between rights and remedies by adopting a “pluralist” approach, by which remedies participate “in the constitution of rights they help to enforce” so that “the multiplicity of potential remedies is but the outer manifestation of the heterogeneity of rights we can have.” Hanoch Dagan, *Remedies, Rights, and Properties*, 4 J. TORT LAW 1, 1-2 (2001). Similarly, Weinrib argues that a “dualist” approach, by which the court chooses from the entire menu of potential remedies the most appropriate one in the case’s context, is nevertheless committed to the “unbreakable relationship” between obligation and remedy--so that “the nature of the obligation breached is the starting point and generally the most important factor” in determining the remedy. Weinrib, *supra* note 92, at 27.

¹⁰⁴ See text accompanying *supra* notes 85-89.

V. THE STRUCTURE OF “LEGAL PROPERTY”

Having introduced some of the features that typify the general transformation of moral views or social goals into legal rights and duties, this part explicates on the unique traits of property within the legal realm. The purpose of the analysis is not to engage only in an intra-legal taxonomic enterprise, but also to crystallize the distinctions between “legal property” and the concept of property as commonly viewed by other disciplines.

This part identifies the *structural* features that are essential to the legal institution of property. A different approach is taken in Part VII with regard to prominent *substantive* features of property. While there exist certain substantive traits that typically constitute the incidents of private property, such as the right to exclude, the right to sell or bequeath (i.e., alienability), or the right to income from the resource,¹⁰⁵ these are not equally essential. First, these incidents regularly refer to *private ownership*, meaning that not all of them would equally apply to other property regimes (e.g., common or public)¹⁰⁶ or to other types of property rights, such as leases, mortgages, or servitudes. Second, even for private ownership, as Part VII illustrates, some of these incidents may at times be significantly constrained without necessarily undermining the concept of legal property.

A. *Third Party Applicability*

The standard list of rights that are typically enumerated in legal systems as property rights, i.e., ownership, lease, mortgage, easements, etc., possess at least some measure of *in rem* quality, i.e., one that has general applicability toward an undefined class of persons or third parties in setting priorities for claims or rights in regard to assets. These rights do not simply break down to bilateral legal relations among specifically-defined parties (i.e., *in personam* rights). True, boundaries between property and contracts, or between property and torts, are often not neat, and property relations may be combined with contracts or torts, such as when a landowner sues another in nuisance or when

¹⁰⁵ For these and other typical incidents of private ownership, see TONY HONORÉ, *Ownership, in* MAKING LAW BIND: ESSAYS LEGAL AND PHILOSOPHICAL 161, 161–84 (1987).

¹⁰⁶ For a discussion of the different types of property regimes, i.e. private, common, public, open-access, and different property hybrids, see Amnon Lehavi, *Mixing Property*, 38 SETON HALL L. REV. 137 (2008).

neighboring landowners sign a contract to create an easement such as a right-of-way. But qualitative distinctions do exist, and attempts by schools such as the economic analysis of law to fully merge property with contracts or torts fail to represent the way in which rights that are defined as “property rights” regularly function in various legal systems.

In a series of influential articles, Thomas Merrill and Henry Smith argue that *in rem* rights are qualitatively different from *in personam* rights even if the property/contract boundaries are not always neat; that different legal systems continue to embrace, implicitly or explicitly, a *numerus clausus* (closed number) principle of property forms; that property rights retain at least a basic layer of a universal right of exclusion in favor of the owner; and that these distinctive traits of positive property law can be justified as socially efficient given systemic information and enforcement costs.¹⁰⁷

Although, as Part VII explains, I somewhat doubt Merrill and Smith’s normative arguments about the essential *content* of property rights, and especially their contention that the right to exclude is the inherent core of property ownership, I join their view that as a *structural* matter, property differs from other types of personal obligations in the law.

Thus, property rights and duties regarding both specific assets and more generally categories of resources (land, chattels, intangibles, intellectual property, etc.) regularly implicate numerous parties not only abstractly, but also in social and economic practice.

Unlike the case of contract law, affected parties to property rights do not necessarily have privity or voluntary relationships among them and may often be strangers that find themselves *ex post facto* entangled in a clash of competing claims regarding the same asset. Beyond the fact that such parties are usually not enumerated and identifiable to one another in advance, they often turn out to be more heterogeneous in their epistemological, cultural, and social attributes, as compared to typical contractual counterparts.¹⁰⁸ All of this means that for property law to function properly in creating, allocating, and enforcing such *in rem* rights, it must facilitate broad-based social understanding about the legal regime and the way in which property rights and duties are structured and defined.

¹⁰⁷ See Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001) (hereinafter: Merrill & Smith, *Interface*); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2001) (hereinafter: Merrill & Smith, *Numerus Clausus*); Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007) (hereinafter: Merrill & Smith, *Morality*); Merrill and Smith, *Making*, *supra* note 63.

¹⁰⁸ Amnon Lehavi & Amir N. Licht, *BITs and Pieces of Property*, 36 YALE J. INT’L L. 115, 132-36 (2011).

Moreover, property rights reveal their true complexity not only in the allegedly straightforward owner's right of exclusion "good against the world" (to the extent that the legal regime indeed validates such a right), but rather in cases in which numerous actors affected by the property regime diverge from one another in the particular bundle of rights they hold with respect to the resource. For example, in the context of security interests, one can think about the way in which a property regime entangles numerous actors: a mortgagee, mortgagors (first and subsequent), holders of mortgage-backed financial instruments, future lenders and assignees, and so forth.

Likewise, property reveals its complex nature in scenarios of a good faith purchaser of voidable or void title; conflicting transactions; and other types of "legal triangles" where, due to the wrongdoing of an intermediary "villain," parties that are not in contractual privity find themselves asserting simultaneous claims to the same asset, and property law is required to *prioritize* the claims.¹⁰⁹ Property thus deals not only with the relatively binary legal relationship between owner and non-owners, but also with the complicated task of sorting out and prioritizing competing claims of different magnitude and content that are made by otherwise distant parties.

Bankruptcy is yet another priority-setting scenario that exemplifies the distinctiveness of property rights. Roughly speaking, in bankruptcy and similar legal proceedings, rights recognized as "property" or as "secured" ones have a categorical preference over mere contractual or obligatory rights, with a further internal ranking occurring within each one of the different categories. The legal institution of property is thus typified by ranking different rights and interests to the asset, and determining the ways in which superior rights will be validated *in rem vis-à-vis* inferior rights or claims.

B. Constraints on Opting Out

A second qualitative difference between property and other legal fields that regulate relationships among persons concerns the parties' ability to opt out for private ordering.

¹⁰⁹ Menachem Mautner, "The Eternal Triangles of the Law": Toward a Theory of Priorities in Conflicts Involving Remote Parties, 90 MICH. L. REV. 95 (1991) (formulating a theory for dealing with this different variations of property conflicts, which he dubs also as "legal accidents" based on Guido Calabresi's work).

In contracts, for example, parties who are displeased with the general laws of contracts can relatively easily opt out of this regime by resorting to private ordering mechanisms. These may deviate from law's default rules regarding the content of the parties' contractual obligations, procedure, evidence, or forum for dispute resolution. Contract law traditionally includes few restrictions on the power of the parties to do so.

Property is different. To the extent that the law sets up certain requirements for a party to qualify as a "good faith purchaser" or to register a mortgage so that it would have a binding effect on third parties, legal actors are much more constrained in their ability to privately circumvent such norms. This is in fact one of the underlying reasons for the *numerus clausus* principle, according to which only limited types of property rights are recognized as such by the legal system.¹¹⁰ This structural principle thus prevents parties from exercising their nearly unbound transactional freedom to shape their legal relationships, if they wish their rights to have a binding effect on third parties as well.

In addition, while it is theoretically possible for parties to entirely opt out of the legal regime by regulating their relationships solely by informal norms--as Robert Ellickson has famously shown in his study of "order without law" in Shasta County, California¹¹¹--such informal property ordering would be essentially restricted to small-scale, close-knit groups and would definitely not fit property relations involving remote parties. In this respect as well, the Coasean view, which narrows down property to bilateral bargaining relations, simply comes short in depicting the full scope of legal property ordering.

C. The Public/Private Interface

Yet another distinctive facet of legal property concerns the complex public/private interface. The challenge faced by legal systems in designing property regimes is one of simultaneously delineating the permissible borders of government intervention with property rights, while at the same time defining the scope and nature of property rights vis-à-vis the entire spectrum of third parties. The interface between the private and public

¹¹⁰ See Merrill & Smith, *Numerus Clausus*, *supra* note 107, for a discussion of the Anglo-American legal system. For this principle's more stringent version in the European civil law system, see BRAM AKKERMANS, *THE PRINCIPLE OF NUMERUS CLAUSUS IN EUROPEAN PROPERTY LAW* (2008).

¹¹¹ ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1990).

realms is extremely intricate and defiant of clear demarcation, and there is no a-priori justification to argue that the law of governmental intervention should always aspire for harmony with the law governing property relations among private parties. But nevertheless, it would be safe to conclude that the law of eminent domain and regulatory interventions does bear upon the way in which different actors broadly understand property entitlements and obligations in the private realm, and vice versa.

The dilemmas about the public/private interface in property, and especially whether constitutional property rights also apply, directly or indirectly, to relationships among private parties, is a source of major controversy in many legal systems.¹¹²

While the task of drawing the lines between public-constitutional legal norms and those controlling private conduct is well familiar in many other fields of law,¹¹³ property does seem to introduce a special challenge. The very use of the same term, “property,” in the private law field that orders legal relations among persons in regard to assets, and in the public-constitutional realm, is not merely a matter of historical accident or conceptual confusion. While the general, mostly liberal arguments in favor of differentiating between government conduct and private conduct may apply for property, any attempt to hermetically separate the two realms of property law would be both impractical and normatively awkward. The result is one of constant tension between public and private.

¹¹² See GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY* 188-91 (2006) (studying the horizontal effect of constitutional rights on private law in the South African and German systems, and calling to embrace similar ideas in American property law); *FUNDAMENTAL RIGHTS AND PRIVATE LAW IN THE EUROPEAN UNION*, Vol. 2, 279-321 (Aurelia Colombi Ciacchi et al. eds., 2010).

¹¹³ The demarcation of the public/private interface is far from being clear or consistent, at least in American jurisprudence. In the seminal *Shelley v. Kraemer*, 334 U.S. 1 (1948), the U.S. Supreme Court invalidated a restrictive covenant that had been signed and recorded by thirty property owners in a neighborhood in St. Louis, and which provided that the properties would be leased or sold to whites only. The Missouri state courts, based on state common law property principles, upheld the restrictive covenant. The constitutional anchor, through which the Court invalidated this measure as an infringement of the Fourteenth Amendment’s Equal Protection clause, was to view the state judicial decrees upholding the restrictive covenants as constituting “state action,” since the trial court was exercising the “full coercive power of government” to deny black petitioners “the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.” *Id.* at 844-46. Allegedly, by viewing judicial rulings in private law settings as “state action” that consequently implicates the Bill of Rights, the *Shelley v. Kraemer* case could have led to fuller-scale osmosis of public and private in property. But this has not happened to date, for the practical and normative reason that the Supreme Court wishes to maintain a sphere of private activity that is not subjected to constitutional scrutiny, even if the borders between “private” and “public” are often blurry and ambiguous. See Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CAL. L. REV. 451, 458-70 (2007).

Thus, for example, the public and legal outrage over the U.S. Supreme Court's *Kelo v. City of New London* decision,¹¹⁴ regarding the constitutionality of exercising the power of eminent domain to facilitate "economic development" in lands that ended up in the hands of private entrepreneurs, was vividly expressed in Justice O'Connor's assertion in her dissent 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."¹¹⁵

Justice O'Connor seems to have expressed a deeper concern by which the overbroad construction of "public use" to facilitate a condemn-and-transfer practice for economic development was not only a matter of governmental abuse, but one that may also undermine the fundamental understanding of what it means to be a property owner, including vis-à-vis other persons.¹¹⁶ If the government can take land only to pass it on another private party who is said to make better use of the land, does this not necessarily reflect on the level of protection regularly awarded to owners against invasion by others? And if we do not favor such assimilation, how do we design property law to decrease the friction between public and private, when such borderline cases are bound to emerge?

Indeed, in a number of cases, the U.S. Supreme Court actually made cross-references between the public law and private law of property without necessarily being committed to an overall public-private "integrative" agenda. This was done, for example, in takings cases, in which the Court considered the power to exclude as "one of the most treasured strands in an owner's bundle of property rights"¹¹⁷--referring as it did to the private common law jurisprudence, thus allegedly equating a taking to a private encroachment.

Thus, although in developing its takings jurisprudence, the U.S. Court has refrained from subjecting the entire spectrum of property, including common law elements, to the public realm, it has not opted for outright alienation between the two realms of analysis.

This legal intricacy is yet another feature that may be viewed differently by other academic disciplines that look into the concept of property. As Parts II-III have shown,

¹¹⁴ 545 U.S. 469 (2005).

¹¹⁵ *Id.* at 503 (O'Connor, J., dissenting).

¹¹⁶ *See id.* at 505 (arguing that property rights are fundamentally insecure once a legislative body may take one party's private property for the benefit of another private party); Merrill & Smith, *Morality*, *supra* note 107, at 1879-84 (portraying a *Kelo*-type condemn-and-transfer use of the eminent domain power as contradicting popular conceptions about the overall morality of property rights).

¹¹⁷ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 n.12 (1982) (referring to *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), which discussed the private property rights of a shopping mall that banned the handing out of antiwar pamphlets).

philosophical or social science schools are often committed to a certain normative agenda that seeks either to isolate a certain realm of property relations (as is the case with the economic analysis of bilateral entitlements as a self-standing concept of property), or rather to offer an overarching normative framework for property that disregards traditional legal line-drawing (as is the case with some moral theories, or alternatively, with critical social theories that seek to undermine the public-private distinction).

While “legal property” is necessarily sensitive to such theoretical exercises, it does not have the luxury of conveniently isolating property issues into different rubrics or of obeying a single normative agenda across the board. It must engage in the practical reasoning of crafting property doctrines in view of real-life disputes being brought before the courts, and to create sustainable legal categories while being aware of the potential cross-field influences of specific doctrines. How closely aligned should trespass and eminent domain be in a certain legal system? When would property rights be protected even if no objective loss of value has occurred in either a private or a public setting? And what type of remedies is appropriate for each one of these realms, given the fact that property rights are defined as *in rem*, ones with allegedly universal force? These puzzles do and will continue to pose major challenges for structuring property as a legal concept.

VI. COLLECTIVE INSTITUTIONS OF PROPERTY DESIGN

These structural features of property carry substantial implications for the collective decisionmaking *institutions* entrusted with the role of designing property’s legal regime.

This part focuses on “top-down” institutions.¹¹⁸ It does so by examining the relationship among constitutions, legislatures, and courts in the design of property norms.

¹¹⁸ Accordingly, this part does not elaborate on the ability of “bottom-up” institutions, such as residential community associations or merchant communities, to design such norms through formal arrangements, informal norms, or the long-term endorsement of customs that could be validated in legal systems that recognize custom as a binding source of law. Briefly, while such bottom-up institutions can quite easily opt for private ordering in the realm of contracts, the same does not hold true for property rights. For example, while a merchant association could adopt a private blueprint for contracts for the sale of goods, addressing contractual issues such as the date of delivery, quality of goods, etc., then to the extent that such an association wishes to set rules for affecting securities or liens on the goods, these norms would be of little value if they did not bind distant third parties who have no privity of contract with the merchants and who do not otherwise abide by the association’s norm-making. This makes it difficult for bottom-up institutions to come up with comprehensive legal regimes that entail the full effect of property rights. For a more detailed discussion of property ordering by bottom-up institutions, see Amnon Lehavi, *The Dynamic Law of*

It starts by examining the particular institutional challenges deriving from the *in rem* and no opt-out traits of property, and it then moves to discuss the manner in which the unique public/private interface affects the way in which institutions design property over time.

At the outset, consider the tension between stability and dynamism in property, and the role that lawmaking institutions must play in accommodating the two in property law.

On the one hand, the *in rem* and no opt-out traits of property mean that for property law to function properly, it must facilitate broad-based understanding about the legal regime and ensure a sufficient level of stability and security in the delineation of property rights. Merrill and Smith link these requirements to the *numerus clausus* principle as a key ingredient for establishing a standard list of rights, one that can be disseminated and understood by the general public with clarity and relatively low information costs.¹¹⁹

They argue that the legislature is typically in a superior position to do so, and tie this to what they deem to be the general advantages of legislation over case law in securing *clarity, universality, comprehensiveness, stability, prospectivity, and implicit compensation*.¹²⁰ Property is thus a field of law that should be developed chiefly by legislatures, so that future rule changes would not undermine its essential traits.

While I generally share Merrill and Smith's view that legislation plays a key role in designing property law and especially in making "dramatic" changes to it,¹²¹ I argue that the role of courts in lawmaking is far from negligible and that the inevitable need for dynamism in designing property over time may often properly be met by courts.

To understand why this is the case, consider the various reasons for the dynamic or inherently "incomplete" nature of property rights. *First*, "incompleteness" may result from the fact that even the most careful design of property norms cannot anticipate and regulate in advance all potential frictions that may arise with respect to the delineation of property rights, i.e., overlapping private uses affecting a certain resource.¹²² Consider conflicting uses in neighboring lands and whether such externalities would be permitted or amount to a wrongful nuisance; or a certain use of a copyrighted work made by a non-

Property: Theorizing the Role of Legal Standards, 42 RUTGERS L. J. 81, 121-24 (2010) (hereinafter: Lehavi, Dynamic).

¹¹⁹ Merrill & Smith, *Numerus Clausus*, *supra* note 107.

¹²⁰ *Id.* at 60-66. Under this theory, implicit compensation for those who stand to lose from the new norm can be better secured by the legislature, which can consider interests broader than those of litigating parties.

¹²¹ See Lehavi, *Puzzle*, *supra* note 35, at 2014-22.

¹²² For a detailed analysis, see Lehavi, *Dynamic*, *supra* note 118, at 105-08.

owner and whether this would amount to a “fair use” or to an infringement. It is practically impossible for legislation to neatly delineate all possible scenarios in advance.

Second, dynamism in property may also be the result of broad-based changes outside the current framework of law. This may be due to a change of societal ideologies, tastes, and values, or to technological, economic, and institutional innovations. Harold Demsetz has famously depicted and theorized the emergence of private property among a Native American tribe following the fur trade with the Europeans.¹²³ This study has served as a linchpin for voluminous writing on the ways in which property regimes transform in the face of incomplete allocation of originally-unforeseen uses.¹²⁴ These dilemmas are ever-present: in the current age of digital media, satellite technology, or new energy resources, existing property regimes must always be reconsidered and reevaluated.

Third, besides incompleteness, dynamism in property may also be the result of a “substantive” approach to law, one that looks always to connect the application of legal norms to the values and goals underlying the norms.¹²⁵ Whether such a non-formalistic approach should be adopted is a matter of much debate, but to the extent that a legal system does allow for *some* degree of value-based jurisprudence, it poses yet another challenge for the focus on stability and predictability in property law.

How can property law deal with such dynamism or incompleteness? One strategy would be to replace current doctrine by writing a new law from scratch, or nearly so, when times so require. If this is the strategy chosen, then Merrill and Smith’s argument about the superiority of legislation as the conduit for change in property stands firm.¹²⁶

But there is yet another strategy that has proven to be very dominant, one that also carries substantial institutional implications for the design of property law over time. This is one of initially designing some legal norms as relatively open-ended “standards” rather than as clear-cut “rules” (compare a “reasonable care” duty on motor vehicle drivers with a 55 mph speed limit as two different strategies for mitigating the risk of accidents).¹²⁷

¹²³ Demsetz, *supra* note 6.

¹²⁴ See, e.g., Terry L. Anderson & Peter J. Hill, *The Evolution of Property Rights*, in PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 118 (T.L. Anderson & F.S. McChesney eds., 2003); Douglas W. Allen, *The Rhino’s Horn: Incomplete Property Rights and the Optimal Value of an Asset*, 31 J. LEGAL STUD. 339 (2002).

¹²⁵ See Lehavi, *Dynamic*, *supra* note 118, at 116-20.

¹²⁶ Merrill & Smith, *Numerus Clausus*, *supra* note 107, at 60-66.

¹²⁷ See Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L. J. 557, 559-62 (1993).

Legal standards are prevalent throughout the law, including in property doctrine, although they are somewhat under-theorized among property scholars. “Reasonableness” and “abnormality” are prevalent in nuisance doctrine;¹²⁸ the “abuse of rights” standard limits the exercise of otherwise-valid property rights;¹²⁹ the “fair use” list of legislative standards distinguishes permissible uses from infringement of copyrighted materials.¹³⁰

I suggest that a legal standard should be analyzed chiefly as an *institutional* mechanism. A standard promulgated in a constitution or a statute is a provision that *delegates* the giving of fuller norm-content over time to other decisionmakers, chiefly courts. At the same time, this institutional delegation does not mandate that the legal norm remains vague all the way down to the case-specific inquiry. The judicial enterprise of filling standards with content is one of balancing the court’s institutional ability for dynamism and promotion of substance-based jurisprudence with the need to preserve a sufficient amount of predictability, certainty, and future-looking guidance among the indefinite and heterogeneous members of the general public. If successful in doing so, courts can engage in judicial lawmaking without undermining property’s basic structure.

In this context, it should be noted that standards are employed not only in the private law of property. They also feature prominently in the public aspects of property law.

The “public use” provision in the U.S. Fifth Amendment’s Takings Clause is a quintessential example of such a legal standard that has been filled with content by the U.S. Supreme Court in a long line of cases. One such aspect of content-filling implicates the inherent *incompleteness* of property in the face of technological or macroeconomic changes. Thus, in 1791, the drafters may have thought about taking private property for uses such as roads, navigable water routes, or military bases. But with the nineteenth and twentieth centuries came new public uses and consequently the occasional need to nonconsensually reallocate property rights in lands: one may consider railroads, dams,

¹²⁸ See Restatement (Second) of Torts §822 (1979); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 731-32 (1973).

¹²⁹ See, e.g., Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 PAC. L.J. 37, 40-47 (1995); Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL L.J. 389 (2002).

¹³⁰ Under U.S. law, the determination of whether “the use made of a work in a particular case is a fair use” rests on the consideration of four factors: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use on the potential market for the copyrighted work or on its value. 17 U.S.C.A. § 107.

infrastructures,¹³¹ and other types of public utilities.¹³² But the Court has also delved into *substantive* policy decisions in filling “public use” with content over time. As suggested in Part V3, the public outrage and state-level legislative backlash following *Kelo v. City of New London*,¹³³ which validated the use of eminent domain for “economic development,” seems to have reinvigorated the debate over core themes and values in American society, including civil liberties, market economy, and federalism.¹³⁴

At the same time, these questions bear more broadly on the institutional legitimacy of courts vis-à-vis the legislature and constitution-drafter in giving content to property norms, considering issues such as separation of powers, political accountability, etc. Even if one assumes that a court shapes standards such as “abuse of rights” or “public use” over time in a value-sensitive yet comprehensive manner so as to provide guidance to future actors, is it restricted in the kind of values it may rely on? Is it supposed to address only dynamic changes that the legislature could not have foreseen, or can it conduct a full-scale paradigm shift in identifying and explicating the kind of values to which the legal standard should generally adhere? Should property legal standards in constitutions be more narrowly developed by courts vis-à-vis standards in statutes, in view of the legislature’s more practical ability to overturn “inadequate” content-filling by the court?

These grave institutional questions remain outside the scope of this Article. In the context of this Article, I suggest only that in the era of the modern administrative state, when legislation or administrative regulation is made in a certain field of common law, including property, a choice to enact certain legal standards, or to leave uncovered a

¹³¹ See Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 97-98 (1986) (noting the high proportion of land assembly cases, and especially of public utilities and other generally uncontested public uses, in the use of eminent domain powers).

¹³² See Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 9-13 (2003).

¹³³ 545 U.S. 469 (2005).

¹³⁴ Similarly, the Court has played a chief role in giving content to other property standards over time. Consider what is often ill-reputed as the “muddiest” topic of all in property law: the regulatory takings doctrine. See Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Susan Rose-Ackerman, *Against Ad-Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697 (1988). Probably, no other doctrine embraces such a multiplicity of legal standards. According to the three-prong test developed in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124-25 (1978), in deciding whether an adversely-affecting regulatory measure amounts to a taking, the court looks at: (1) “the economic impact of the regulation on the claimant”; (2) the extent of interference with “distinct investment-backed expectations”; and (3) “the character of the governmental action.” Whether this strategy overburdens the legal system with too much uncertainty and ad-hoc jurisprudence, or rather serves as the only feasible mechanism for addressing inherent incompleteness so as to effectively discipline government property regulation, is an issue that cannot be fully analyzed here.

significant amount of relevant issues within this field, entails a delegation of authority to courts to engage in a dynamic process of giving or adding content to these provisions. Because filling standards with content need not only clarify to parties what the law is on this point, but should also create a broader understanding of the legal landscape, judicial lawmaking in property is often an inevitable result of such an institutional delegation.

Finally, the institutional analysis of collective decisionmaking in property law is also implicated by the unique public-private interface in property. To illustrate this intricacy, consider the recent U.S. Supreme Court's decision in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*.¹³⁵

Without going into the details of the case, the matter of principle before the Court was whether a judicial decision that has the effect of systematically upsetting existing property rights under state law (regularly, its common law) could be viewed as a "judicial taking" and thus implicate the provisions of the Fifth Amendment's Taking Clause.¹³⁶

All eight Justices held that no such constitutional violation had occurred in this case, concluding that the judicial decision at stake, concerning littoral property rights, was consistent with the background principles of state property law (here, the common law of Florida). But the Justices significantly departed on the possibility of a "judicial taking."

Based on the Fifth Amendment's language and on "common sense," Justice Scalia reasoned that the Takings Clause "is not addressed to the action of a specific branch or branches." It would be absurd "to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat."¹³⁷ The test for a judicial taking is thus formulated by Scalia as follows: "If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."¹³⁸

In a brief separate opinion, Justice Breyer deems it best to leave "for another day" the broader constitutional issues raised by the plurality opinion.¹³⁹ Justice Kennedy, in his separate opinion, does not affirmatively hold that a "judicial taking" could or could not

¹³⁵ 130 S.Ct. 2592 (2010).

¹³⁶ For a detailed analysis of this case, see Amnon Lehavi, *Judicial Review of Judicial Lawmaking*, 96 MINN. L. REV. 520, 552-52 (2011) (hereinafter: Lehavi, Lawmaking).

¹³⁷ 130 S.Ct. at 2601 (Scalia, J.).

¹³⁸ *Id.* at 2602.

¹³⁹ *Id.* at 2618-19 (Breyer, J.).

ever occur. But he does voice strong concerns about simply extending the Takings Clause to judicial decisions. Kennedy doubts the legitimacy of courts to engage in the taking of property, viewing this power as belonging to the political branches. Judicial elimination of an established property right, including by a shift in a common law doctrine that is not merely an “incremental change,” could thus amount to a violation of Due Process.¹⁴⁰

Although, as I have elsewhere argued,¹⁴¹ the potential implications of the *Stop the Beach* case could go well beyond the interface of state common law property jurisprudence and the Federal Constitution’s Takings Clause or Due Process Clauses, it is probably no surprise that the controversy did erupt in the context of property law.

It is here that the public/private interface, i.e., the complex relationship between the common law of property and its public-constitutional aspect, in view of the fact that property is at the same time a private law concept and public law one, becomes entangled in complicated institutional questions. The evaluation of the institutional role of courts within the system of government in the crafting of property thus implicates not only the relationships between courts and legislatures or administrative agencies, but also those among different types of courts: those acting in the capacity of judicial lawmakers of property common law doctrines, and other courts serving as judicial reviewers to ensure that such lawmaking conforms to property’s public-constitutional constraints.

This is yet another complexity that may not be of much interest to philosophers, economists, and members of other disciplines in the social sciences. But once property becomes a legal construct, the institutional dilemmas as to proper mode of collective decisionmaking become part and parcel of making sense of the institution of property.

VII. WHY PROPERTY STRUCTURE DOES NOT IMPOSE CONTENT

Do the institutional and structural features of property dictate a specific content for property norms? Must property rights entail a pre-fixed list of attributes or a “bundle of rights” to qualify as property rights? In other words, is there an essentialist nature for property, one without which property would truly become an empty legal concept?

¹⁴⁰ *Id.* at 2613-16 (Kennedy, J.).

¹⁴¹ Lehavi, Lawmaking, *supra* note 136.

Thomas Merrill and Henry Smith argue for such an inherent link between structure and content. As a structural matter, Smith identifies two chief strategies for delineating property rights: “exclusion” and “governance.”¹⁴² In the exclusion strategy, “decisions about resource use are delegated to an owner who, as gatekeeper, is responsible for deciding on and monitoring specific activities with respect to the resource.” Exclusion thus uses simple, clear-cut property norms by using rough on/off signals such as territorial boundaries.¹⁴³ Under the governance strategy, property norms pick out uses and users in more detail, that is, at a higher level of precision--such that “rights to resources are defined in terms of permitted and restricted uses.”¹⁴⁴

The main advantage of the exclusion strategy lies in its lower information costs to the large and anonymous audience of the property norms. The greater precision of the governance strategy, which is beneficial when the gains from specialization through multiple uses become more important, may be offset by higher information costs to third parties as well as by higher measurement costs in designing and enforcing the norm.¹⁴⁵

For Merrill and Smith, this prominence of the “exclusion” strategy necessarily means that the essential *substantive* core of property lies in the right of the owner to exclude others. They argue that this right is also embedded in a fundamental *moral* perspective which is typical at least of the American populace and its legal system.¹⁴⁶

But this Gordian knot is doubtable even among those who hold an otherwise essentialist view about property. James Penner grounds ownership in the right to use but not in the negative right to exclude,¹⁴⁷ while Larissa Katz identifies the core of ownership in the owner’s exclusivity in “setting the agenda” for the resource and not in exclusion.¹⁴⁸

Others negate such an essentialist approach altogether, arguing that the institution of property may allow for a plurality of values without ending up in arbitrary jurisprudence. Dagan argues that a “value-pluralist jurisprudence recognizes a broad menu of incommensurable human alternatives, but acknowledges a minimal core of moral truths.”

¹⁴² Henry E. Smith, *Exclusion versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002).

¹⁴³ *Id.* at S454-55.

¹⁴⁴ Merrill & Smith, *Interface*, *supra* note 107, at 791.

¹⁴⁵ *Id.* at 792-99.

¹⁴⁶ Merrill & Smith, *Morality*, *supra* note 107, at 1853-58.

¹⁴⁷ J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 91 (1997).

¹⁴⁸ Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L. J. 275, 289-93 (2008).

In the case of property these are “the moral significance of autonomy, personhood, utility, labor, community, and distributive justice.”¹⁴⁹ He thus suggests to divide property into a “set of institutions--property institutions--bearing family resemblances,” with each such institution entailing a specific composition of entitlements determined by the “unique balance of property values characterizing the institution at issue.”¹⁵⁰ Thus, whereas arm-length transactions in the market may focus on individual autonomy, institutions such as marital property would be built around more communitarian or egalitarian values.

While this controversy cannot be fully elaborated here, I do wish to point out why the structure of property does not dictate content in the clear-cut manner that Merrill and Smith suggest, while plurality of values is also limited due to the structure of property.

First, Merrill and Smith’s exclusion strategy assumes that hard-edged, rule-type norms will be designed for the core of ownership, in which the owner prevails over others and takes decisions “without having to justify it to third parties, including courts and other officials.” Standard-like norms, typical of the governance strategy, will be tailored to “peripheral” cases or to ones concerning high stakes for specific uses.¹⁵¹

But consider, for example, a rent-control statute. Although such pieces of legislation have been a source of a fierce normative debate, they are nevertheless a persistent legal phenomenon throughout legal systems.¹⁵² A rent-control statute, which restricts a landlord from evacuating a tenant unless a certain legislative specific scenario occurs, or that limits the landlord from raising the rent at more than a fixed percent per year, redistributes several sticks between the landlord and the tenant (e.g., the right of decisionmaking and the right to income from the asset). But to the extent that such a division is articulated upfront in a statute, it may still keep intact a rule-like delineation of the property rights and duties among the relevant parties. This means that the case for a legislative complete ordering is not necessarily dictated by a particular normative agenda.

Second, the same non-essentialist conclusion could be reached also in the opposite case of “incomplete” or initially vague property norms. As demonstrated in the discussion of property legal standards in Part VI, even the most careful design of property would be

¹⁴⁹ HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS xxiv-xxv (2011).

¹⁵⁰ *Id.* at 42.

¹⁵¹ Merrill & Smith, Morality, *supra* note 107, at 1890-94.

¹⁵² See, e.g., RENT CONTROL: REGULATION AND THE RENTAL HOUSING MARKET (W. Dennis Keating et al. eds., 1998).

practically unable to predict all possible states-of-the-world and allocate in advance the bundle of rights. But this is not driven by, or leading to, a particular normative agenda.

Thus, as a matter of legal engineering, we see standards playing a prominent role in different legal systems that regulate the issue of nuisance.¹⁵³ But the way in which courts would fill these initially-vague provisions with content may greatly differ among legal systems. An underlying “live and let live”¹⁵⁴ approach to the law of nuisance may yield very different results from a jurisprudential approach that promotes ideals such as social responsibility.¹⁵⁵ The structure of such a property norm could implement either ideology.

Third, even a decision to promote “substantive” jurisprudence by placing more emphasis on context in property is not necessary a progressive plot in the guise of legal design. It is certainly true that in some cases, the embracement of standard-like provisions serves a certain distributive purpose. A good example is the equitable right of mortgage redemption developed by the English courts of equity as of the early seventeenth century—a “muddy” standard-type intervention promoting a societal viewpoint of “flexibility, forgiveness, and willingness to make adjustments that long-term dealings normally offer.”¹⁵⁶ But this does not mean that substance-based standards necessarily work to undermine protection of ownership. Thus, an oft-made argument is that the vagueness of the “fair use” statutory list of standard-like provisions in the area of copyright law leads to over-deterrence of non-owners, thus practically entrenching the owners’ control.¹⁵⁷

Fourth, while this part focuses on the substantive incident of the right to exclude, one could also consider the ways in which other key substantive incidents such as the right of alienability could be constrained for normative reasons without entirely undermining the concept of property. Such constraints could be imposed not only for idiosyncratic

¹⁵³ Nuisance is often slanted as “so amorphous and protean so as to make impossible a description of the area which it covers.” Warren A. Seavey, *Nuisance: Contributory Negligence and other Mysteries*, 64 HARV. L. REV. 984 (1952). But the vagueness of nuisance law is not simply a result of historical evolution or of contemporary legislative incompetence or neglect. In a world that has so many potential cross-border interactions, it is practically impossible to define in advance when does an “invasion of another’s interest in the private use and enjoyment of land” (in the language of the Restatement (Second) of Torts § 822 (1979)) amount to an infringement of property rights by using only up-front clear-cut norms.

¹⁵⁴ For the classic manifestation of the “live and let live” approach to nuisance, see the English case *Bamford v. Turnlet*, 122 Eng. Rep. 27, 32-33 (Ex. 1862).

¹⁵⁵ Alexander, *supra* note 17, at 779-82.

¹⁵⁶ Carol M. Rose, *Crystals and Muds in Property Law*, in PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RETHORIC OF OWNERSHIP 199, 203-05, 221-25 (1994).

¹⁵⁷ See Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1494-94 (2007) (calling to introduce certain “fair use harbors” to increase certainty, especially in favor of users).

resources such as human body parts, prizes in recognition of personal achievements, or certain kinds of licenses or franchises, but also for more conventional resources such as land, whenever unconstrained alienability could prove to be counterproductive from a broad social perspective.¹⁵⁸ This does not mean, however, that once such a substantive incident is limited or even removed, the essence of property as a legal concept is lost.

Fifth, while a pluralist approach to the content of property norms is generally feasible, the structural and institutional aspects of property do put some practical limits on constructing the spectrum of cases within which pluralism could be accommodated. Thus, bearing in mind the *in rem* trait of property law, which requires a sufficient amount of stability, predictability, and guidance to large heterogeneous crowds, a legal system should carefully consider which types of typology in property could allow for pluralism.

One such type of division, which allows for normative plurality without undermining the structure of property, concerns the *types of resources* that are the objects of property rights, such as land, chattels, financial instruments, intellectual products, the environment, or the human body. All of these resources are part of the legal and non-legal property discourse, but it is safe to say that few would argue that the property ordering of these different resources should follow the exact same normative blueprint. Indeed, such differentiation among various resources persists as a matter of doctrine in legal systems.

I do not refer here only to obvious borderline cases such as property in one's body or body parts,¹⁵⁹ or to innovative property schemes involving tradable emission permits.¹⁶⁰ It is clear enough that the legal ordering of property rights in such resources follows distinctive normative concerns, ones which cannot be cut and pasted from, say, land law. But a resource-based differentiation exists also among "classical" property resources.

For example, although there is controversy about the land/intellectual property interface,¹⁶¹ I suggest that the basic boundaries of "fair use" in copyrighted materials

¹⁵⁸ See Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403 (2009).

¹⁵⁹ For prominent accounts, see Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113 (2003); Margaret J. Radin, *Market Inalienability*, 100 HARV. L. REV. 1849 (1987).

¹⁶⁰ See Carol M. Rose, *Common Property, Regulatory Property, and Environmental Protection: Comparing Community-Based Management to Tradable Environmental Allowances*, in THE DRAMA OF THE COMMONS 233 (Elinor Ostrom et al. eds., 2002) (analyzing the pros and cons of common resource management vis-à-vis property-like tradable environmental allowances in controlling externalities).

¹⁶¹ 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 opposing views about the distinctiveness of intellectual property

need not adhere to the laws governing encroachments to land. I, for one, believe that this is the case as a *normative* matter, because considerations of autonomy, personhood, utility, and the balance between private interests and the public good play differently in these two types of resources. But even if someone were to disagree with me normatively, such a differentiation is sustainable as a *structural* and *institutional* matter. The average norm-recipient could well live with the fact that the rules governing copyright are not identical to those of land. There is little risk that incorporating a “fair use” provision in copyright law would utterly confuse people about the parallel bundle of rights in land.

But other types of differentiations aimed at allowing a plurality of values may sit less comfortably with the structural and institutional aspects of property. I touch here briefly on one prominent stream of scholarship, which seeks to construct a spectrum of different property norms based on the kind of interpersonal relations involving the parties.

This “property as interpersonal relations” literature has a few versions. Margaret Radin, for example, promoting her “property and personhood” theory, makes the case that a tenant who had lived long enough and in good behavior in a house so that her personhood has become embedded in the home should be granted special rights, such as a permanent tenure, vis-à-vis the landowner.¹⁶² Joseph Singer constructs a more general theory of property and social relations, by which “the social context in which the conflict arose is crucial to understanding both what occurred and what the appropriate response of the legal systems should be”¹⁶³ so that social situations involving trust or long-term dependency such as between employer-employee, landlord-tenant, friends, or neighbors should yield different property norms than those governing socially distant parties.

Dagan offers a more nuanced approach, one of constructing a relatively limited number of “property institutions” that seek to generalize typical kinds of personal relations, starting with family and continuing all the way to distant parties in the market.¹⁶⁴ Marital property, for example, should reflect values of equality and community alongside autonomy. This means that the property interests of a married person should

from “conventional” property law typifying land, 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.

¹⁶² RADIN, *supra* note 15, at 57-59.

¹⁶³ JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 134-39 (2000).

¹⁶⁴ DAGAN, *supra* note 149, at 69-74.

impact not only the property division with her spouse, who may formally own various assets from land to increased earning capacity, but also legal relations with relevant third parties such as creditors or debtors of the spouse.

But while marital property is indeed the subject of property doctrines, which differ from general property law and may also implicate third parties,¹⁶⁵ it is questionable to what extent property rights could be constructed more generally and comprehensively along such a spectrum of interpersonal relations.

At the outset, the determination as to whether some sort of special relationships have emerged between the parties so as to justify a distinctive property norm may be difficult to make even on the bilateral level. It will typically require courts to make ad-hoc contextual findings that may often involve subjective viewpoints and a complicated set of facts. But even if the bilateral aspect could be reasonably resolved by the legal system, as is somewhat the case with “relational contracts,”¹⁶⁶ the potential impact on third parties may be much more burdensome as a matter of legal design.

Consider the following scenario. Jane owns Blackacre. To purchase it, she had resorted to a loan from a commercial bank, one secured by a mortgage. Jane then leases the house to Richard, who lives there in good behavior for many years. At some stage, Jane wishes to terminate the lease and sell the house in the market. This is because she has a hard time financing the mortgage payments and the bank is about to start foreclosure procedures. Richard refuses to leave, arguing that his personality has become invested in the house and that he is dependent on his relations with Jane. If Richard cannot be evacuated and Jane becomes insolvent, the house would be put in the market for a foreclosure sale, but being evaluated as occupied for the life of Richard, the sale price would fall short of the amount of the debt secured by the mortgage.

Even if we are normatively favorable to Richard’s position vis-à-vis Jane and believe that it should be formally validated through landlord-tenant law, as Radin and Singer believe, how should property law be comprehensively redesigned to consider third parties, here the bank? Could it be done in a manner that is value-sensitive but at the same time allows for a sufficient level of predictability, stability, and guidance to distant

¹⁶⁵ See Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75 (2004).

¹⁶⁶ For the complicated approach of American jurisprudence to the peculiarity of “relational contracts,” see Melvin A. Eisenberg, *Why There is no Law of Relational Contracts*, 94 NW. U. L. REV. 805 (2000).

third parties? Assuming no privity of contract or special interpersonal relations between a party such as Richard and one like the bank, how effectively can such a property spectrum be constructed?

I emphasize that the argument here is not normative, but structural. As a matter of legal design, a property system could be made to conform to what Alexander has dubbed the “social-obligation norm in property.”¹⁶⁷ If we are favorable to such a normative viewpoint, by which property owners have an obligation to others in the community so as to allow all persons to enjoy certain capabilities required for human flourishing, I trust that property law could be redesigned in a comprehensive manner so that doctrines in both the public and private law of property would work to attain such underlying values. It is so because Alexander’s theory of interpersonal relations is structured in broad and general terms, ones implicating a person’s *in rem* duties toward other members of the community.¹⁶⁸ This is exactly what allows the lawmaker to redesign and reallocate the property bundle in various resources to promote the underlying goal of social responsibility, implicating also distant parties that are not necessarily tied by contract. Even if not happy about it, property owners and other stakeholders could quite clearly understand the systematic implications of such a comprehensive normative viewpoint. In contrast, a contextual “property as interpersonal relations” spectrum might be haphazard.

In these and other respects, structure does not impose content. The core normative choices are for each legal system to make, while not losing sight of the institutional and structural features of property and the constraints they place on the task of legal design.

Consider a final example: the Property Rights Law of the People’s Republic of China enacted in 2007 after years of stormy debates.¹⁶⁹ The statute was explicitly influenced in its crafting by civil law codes, mostly those of Germany and Japan.¹⁷⁰ But this is far from indicating that China simply turned its back on its ideological, cultural, and legal past.

¹⁶⁷ Alexander, *supra* note 17.

¹⁶⁸ *Id.* at 771 (arguing that “Citizenship in its broadest sense is one of the most important forms of social-network membership” characterized by the process of interaction for the sake of the common good, one which involves “dependence on others to become autonomous individuals”). Obviously, once the society at large is viewed as the most prominent type of “community” in which persons have obligations to others to allow all to flourish, the scope of the social-obligation norm in property law becomes all-encompassing.

¹⁶⁹ Property Rights Law (promulgated by the Nat’l People’s Cong., March 16, 2007, effective Oct. 1, 2007). An unofficial English version is available at <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/property-rights-law-of-the-peoples-republic-of-china.html>.

¹⁷⁰ See Mo Zhang, *From Public to Private: The Newly Enacted Chinese Property Law and the Protection of Property Rights in China*, 5 BERKELEY BUS. L.J. 317, 321 (2008).

The adoption of “western” structural and institutional concepts, such as the *numerus clausus* principle or the creation of a conclusive land registry system, has not dictated a particular substantive outcome.

Thus, for example, alongside the protection of individual property rights in Article 4, by which such rights “shall not be infringed by any institute or individuals,” the statute simultaneously protects state and collective property rights.¹⁷¹ It maintains a division of labor between these categories of ownership so as to implement “the socialist market economy, ensuring equal legal status and right for development of all market players.” Accordingly, Articles 47 and 58 reiterate the principle already embedded in China’s constitution by which all lands in China “are owned by the State, that is, by the whole people,” with some lands owned by collectives, so that any individual rights in land are basically only usufructuary ones.¹⁷² The underlying assumption is that “equal protection” does not mean an equal role for private and state ownership, thereby maintaining the longstanding dominant role of public property in Chinese society.¹⁷³

Thus, the new Chinese property law seems to conform well to the *structural* goals of a property regime as Merrill and Smith depict them--i.e., clarity, universality, comprehensiveness, stability, and prospectivity.¹⁷⁴ But few would argue that the *substantive* provisions and the underlying normative viewpoints of the Chinese property system closely resemble the American, British, German, or Russian ones for that matter.

CONCLUSION

In articulating the structural and institutional features of property law, the Article has set out to provide some keys for identifying the lingering differences among and within disciplines about the concept of property. The conclusion, however, is a happy one.

It makes perfect sense for each academic discipline or methodology to take direct interest in property and to offer its own building blocks for the institution of property. As a matter of both content and methodology, the institution of property does not inherently

¹⁷¹ Property Rights Law, *supra* note 169, Article 4.

¹⁷² *Id.* at Articles 47, 58.

¹⁷³ For a more elaborate analysis, see Amnon Lehari, *The Global Law of the Land*, 81 U. COLO. L. REV. 426, 437 (2010).

¹⁷⁴ Merrill & Smith, *Numerus Clausus*, *supra* note 107, at 60-66.

favor moral philosophy over economic utilitarianism or a property-and-power approach, and vice versa. The ideological and policy-oriented features of a property system are up for grabs, and each society may choose its distinctive blueprint for regulating the formal relations among persons in regard to access and use of society's resources. Each such set of moral or social ideals could in principle be translated to a set of legal rights and duties.

But unlike the normative point of genesis, the *process* of transformation into legal property is not void of constraints. It is probably here that the current conceptual and methodological disconnect plays out most dominantly. For a system of legal property to function properly, certain *structural* and *institutional* patterns must be followed to avoid disintegration and confusion. Recognizing these features is essential for understanding why it is beneficial and actually essential for different disciplines to converse with one another about the substantive tenets of property. At the same time, it would mitigate much frustration over the prospect for change. Property is not a predetermined institution, but philosophers, social scientists, and lawyers must better understand how to construct it.