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Judges and Property

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Abstract

This Essay considers the question of whether judges should refrain from engaging in the development of property law and leave the field to the legislatures. Like previous studies, I address both the expected performance of the judiciary in property matters and its democratic legitimacy, considering the features characteristic of property. But while others have advocated judicial passivity in the creation and modification of property rights, I argue that, subject to a few exceptions dealing with general limitations of judge-made law, judges should not be excluded from the drama of property law. Indeed, the unique features of adjudication, at least in the “Grand Style” of the common law tradition, make it an important source for the ongoing critical and constructive process of reshaping property institutions by challenging the desirability of their normative underpinnings, their responsiveness to the social context in which they are situated, and their effectiveness in promoting their contextually examined normative goals.

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This Essay considers the question of whether judges should refrain from engaging in the development of property law and leave the field to the legislatures. Like previous studies, I address both the expected performance of the judiciary in property matters and its democratic legitimacy, considering the features characteristic of property. But while others have advocated judicial passivity in the creation and modification of property rights, I argue that, subject to a few exceptions dealing with general limitations of judge-made law, judges should not be excluded from the drama of property law. Indeed, the unique features of adjudication, at least in the “Grand Style” of the common law tradition, make it an important source for the ongoing critical and constructive process of reshaping property institutions by challenging the desirability of their normative underpinnings, their responsiveness to the social context in which they are situated, and their effectiveness in promoting their contextually examined normative goals.

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JUDGES AND PROPERTY

INTRODUCTION

Much of private law in the common law tradition is judge-made law. Both the significant impact that judges have had in the past on the laws of contracts, torts, and restitution, as well as the continuous active role of adjudication in their normative development—at times, as interpreters of legislated statutes—are taken as obvious features of these fields.¹ Property may seem different. Many years ago, the English legal historian W. S. Holdsworth noted that “the Legislature has had a larger share in shaping the land law than it has had in shaping any other branch of private law.”² Recently, the dominance of legislation seems as apparent regarding property’s frontiers: the law of intellectual property.³ As Shyamkrishna Balganesh—a friend of common law—observes, “the frequency with which Congress amends the patent and copyright statutes seems to leave little doubt that it alone determines intellectual property’s precise content and coverage.”⁴

These descriptive propositions should be treated cautiously,⁵ but may nonetheless seem conceptually tempting. They may invite a claim regarding the deep foundations of property law, which makes it conceptually distinct from other areas of private law. Property, in this view, is by essence less amenable to judge-made law than the rest of private law. An even stronger lesson that might be learned is that judges should altogether

¹ See, e.g., Melvin A. Eisenberg, *Principles of Legal Reasoning in the Common Law*, in COMMON LAW THEORY 81, 82 (Douglas E. Adlin ed. 2007).

² W.S. HOLDSWORTH, AN HISTORICAL INTRODUCTION TO THE LAND LAW 325 (1927).

³ Some scholars resist this classification of copyright. I defend it elsewhere, showing that the critics’ position implicitly and paradoxically relies on, and may bolster, the Blackstonian conception of property. See HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS ch. 4 (2011).

⁴ Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543, 1544 (2010).

⁵ Reliance on Holdsworth’s statement must be of limited value in this context given that his book was published shortly after the massive statutory revision of land law in England. Nor is it at all clear that legislation dominated American property law (particularly in comparison to contract law, given the predominant status of the Uniform Commercial Code). See, e.g., GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970, at ch.4 (1997) (discussing the limited success of the New-York legislature’s attempt to launch a comprehensive revision of land law). Another important example comes from the significant contribution of the judiciary to the transformation of water law. See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 at 34-42 (1977); CAROL M. ROSE, *Energy and Efficiency in the Realignment of Common Law Water Rights*, in PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 163 (1994). On courts’ continued activity in developing intellectual property law notwithstanding the significant expansion of statutory law, see Balganesh, *supra* note 4; Mark McKenna, *Trademark Law’s Faux Federalism* Section A2 (in this volume); Peter Menell, *Deciphering (and Justifying) the Mixed Heritage of Modern Intellectual Property* Pt. II (in this volume).

avoid the business of affecting—creating, modifying, or abolishing—property rights, leaving this task entirely to legislatures. This temptation of property exceptionalism seems to be validated by the *numerus clausus* principle, which prescribes that, at any given time, property law offers only a limited number of standardized forms of property. As a principle of “judicial conservatism regarding innovation in the system of property rights,” which is a typical feature of many (and maybe most) modern legal systems,⁶ *numerus clausus* may be interpreted as the doctrinal manifestation of such property exceptionalism.

I begin this Essay with the claim that the temptation of property exceptionalism should be resisted. I recognize that, in certain property law contexts, the appropriate judicial strategy is indeed passivity and deference. This is the case, for example, when the property right in question has been crafted by the legislature only recently, or where a property innovation can best be implemented via a regulatory structure, such as a formal registration of rights. These examples are quite obvious since they represent particular cases with close analogies outside property law, which specifically tilt considerations of democratic legitimacy and expected performance in favor of judicial conservatism. Because the sense in which these important considerations call for judicial conservatism in these cases applies also to parallel cases in other areas of private law (and of law at large), they cannot support the position of property exceptionalism.

Although I dispute the exceptionalists’ presentation of property’s uniqueness and therefore reject their blueprint for a priori judicial conservatism, I do not deny that property has typical characteristics. The character of property, its role in creating and sustaining important default frameworks of interpersonal interaction with respect to resources that consolidate people’s expectations and express the law’s normative ideals for such core types of human relationships, both explains and justifies *numerus clausus* as a principle of *legal* conservatism. But this understanding of property, which I call “property as institutions,” does not make the required conservatism of the judiciary conceptually or qualitatively different from that of the legislature. Indeed, given the virtues of what Karl Llewellyn described as the “Grand Style” of the common law tradition,⁷ the conception of property as institutions may occasionally even support some degree of judicial activism and innovation.

⁶ Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 Yale L.J. 1, 59 (2000). Merrill and Smith overstate this point by presenting the *numerus clausus* principle as universal but, in fact, some modern legal systems “have opted for an ‘open-list’ principle of property rights.” Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U.L. REV. 1669, 1733 (2003).

⁷ KARL L. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 37-38 (1960). My reliance on this account in order to present an attractive ideal of adjudication does not imply involvement in the historical debate about the original nature of common law adjudication. For

The key to understand, evaluate, and guide the proper judicial strategy regarding property law does not lie in the grand categorical proposition of property exceptionalism. Rather, given the character of property as institutions, it requires a careful comparative analysis of the relevant features of the judiciary vis-à-vis those of the legislature in terms of democratic legitimacy and expected performance. This Essay seeks to provide a preliminary outline for such an analysis.

I. REJECTING PROPERTY EXCEPTIONALISM

Property exceptionalism crystallized in property discourse as part of the attempt to account for the *numerus clausus* principle. The most prominent of these accounts is the one by Thomas Merrill and Henry Smith,⁸ which turns them into the most influential supporters of property exceptionalism. Merrill and Smith argue that the regulation of property as a fixed menu of options reduces the communication costs of third parties who need to determine the attributes of these rights, both to avoid violating them and to acquire them from present owners. Law, they claim, should be reluctant to recognize new types of property rights because parties who create such rights are unlikely to take into account the full magnitude of costs incurred by such strangers in determining the attributes of these rights. This account finds the distinctive features of property in its effects on “classes of individuals who fall outside the zone of privity.”

Conceptualizing the focus on the communication costs of third parties as the core concern of property justifies, according to Merrill and Smith, rendering the judiciary an “inhospitable forum” for creating or modifying property rights. The comparative advantage of legislation over adjudication in communicating information to third parties justifies channeling parties interested in such changes to the legislature for two reasons.⁹

competing views on this matter, see DAVID LOBBAN, *THE COMMON LAW AND ENGLISH JURISPRUDENCE 1760-1850* at 12-16 (1991); William Cornish, *Sources of Law*, in 11 *THE OXFORD HISTORY OF THE LAWS OF ENGLAND* 41, 45 (2010); Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 *OXFORD U. COMMONWEALTH L.J.* 155 (2002) & Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 *OXFORD U. COMMONWEALTH L.J.* 1 (2003); A.W.B. Simpson, *The Common Law and Legal Theory*, in 1 *FOLK LAW: ESSAYS IN THE THEORY AND PRACTICE OF LEX NON SCRIPTA* 119 (Alison Rentein & Alan Dundes eds., 1994).

⁸ See Merrill & Smith, *supra* note 6, at 26-34, 56-68. See also Carol M. Rose, *What Government Can Do for Property (and Vice Versa)*, in *THE FUNDAMENTAL INTERRELATIONSHIPS BETWEEN GOVERNMENT AND PROPERTY* 209, 213-15 (Nicholas Mercuro & Warren J. Samuels eds., 1999); Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 *STAN. L. REV.* 1105 (2003).

⁹ Merrill and Smith mention six reasons, but I note two because: (1) The ambiguity resulting from the limited binding effect of decisional rules of intermediate courts of appeal and the lack of a federal common law jurisdiction are of limited significance, since they do not argue against decisional rules prescribed by a State Supreme Court. (2) Their discussion of the stability of legislation adds little to that of comprehensiveness and, therefore, I combined both into one

First, whereas common law rules need to be extracted from a complex body of case law, legislated rules “are set forth in a canonical text which is easy to identify and usually terse,” rendering them clearer and thus cheaper to be identified and grasped. Second, whereas decisional rules evolve incrementally, resolving questions regarding issues such as their scope and precise effects as they arise in the adjudicated cases, legislation tends to deal comprehensively and with lesser frequency with the multiple questions evoked by any innovation, again economizing in the gathering of needed information. These comparative advantages of legislation over adjudication, conclude Merrill and Smith, are significant enough to override the public choice problems of “the legislative process emphasized by supporters of common-law courts,” which they find to be less significant “in the context of reforming property regimes [than] elsewhere.”

Contrary to Merrill and Smith’s functional account of property exceptionalism, Avihay Dorfman’s rests on ideas of political legitimation.¹⁰ Dorfman’s starting point is that the *numerus clausus* is “a purely formalistic device,” because parties can achieve new goals by tinkering with property’s existing forms.¹¹ Dorfman then argues—in line with what I have claimed elsewhere¹² and elaborate below—that the various forms of property (what I call property institutions) “represent society’s *shared acknowledgement* of the basic terms of interactions for private individuals seeking to trade property rights.” In sharp contrast with my position, however, Dorfman then claims that this understanding of the forms of property suggests that *only* the legislature should be authorized to create or modify new forms.

Investing this authority in the democratic process, Dorfman argues, expresses the fundamental democratic tenet that political authority must be grounded in the citizens’ co-authorship of the laws governing their interactions. Property forms, he claims, should “embody the shared understandings and commitment characteristic of the collective undertaking facilitated (only) through democracy,” which explains “why the legislature is the only possible entity (in a representative democracy)” to legitimately create or modify property forms. Courts, he insists, are not qualified for this purpose, because decisional law “is neither co-authored” (as it involves only the particular parties to the dispute,

category. (3) The features of prospectivity and implicit compensation are, as Merrill and Smith admit, far less relevant to information costs. More significantly, the possible disruption of the common law traditional retroactive application, and the ability of legislatures to provide implicit compensation as part of a comprehensive statute are by no means, even on their face, peculiar to property. I thus discuss these features in Section IV.A below.

¹⁰ See Avihay Dorfman, *Property and Collective Undertaking: The Principle of Numerus Clausus* * U. TORONTO L.J. *, *-* (2011). [last para of I; III.D]

¹¹ *Contra* Lewinsohn-Zamir, *supra* note 6, at 1733 (insisting that the justification of the *numerus clausus* principle is to assure “some predefined ‘core’ of minimal content” for each property right).

¹² See Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1558-70 (2003).

excluding all the other citizens from the process) “nor self-given (as the final decision is made by an unelected judge).” Except for cases where the legislative process not only underperforms due to interest groups and the like but is actually “incapable of performing at all,” the mere fact that “the ordinary democratic process falls short of an ideal one” does not justify bypassing it.

* * *

Both these statements of property exceptionalism fail although, as shown below, their inadequacy will help to develop a more nuanced analysis of the proper role of judicial activity in property.¹³

Merrill and Smith’s account of property exceptionalism does not hold because the *numerus clausus* principle is not fully explained by the concern of communication costs. In their critique of Merrill and Smith’s theory, Henry Hansmann and Reinier Kraakman argue that limiting the forms of property does not economize on communication costs, given the parties’ ability to tinker with the specific content of each property form. On these grounds, Hansmann and Kraakman maintain that the standardization of property is unjustified and that the only concern of third parties that property law should facilitate is the verification of ownership of rights. Accordingly, the distinguishing feature of property law for Hansmann and Kraakman must be the regulation of notice: providing mechanisms for giving effective notice about the partitioning of property rights in a given asset among several people.¹⁴

In response, Merrill and Smith correctly indicate that the dismissal of standardization as a means for economizing on communication costs is overstated, because the way information is structured affects the costs of processing it.¹⁵ And yet, the gist of Hansmann and Kraakman’s critique is still correct: the relevant concern of third parties is verification, and it is indeed hard to see how this concern can justify the onerous *numerus clausus* principle. Accordingly, insofar as this principle captures something unique about

¹³ To be sure, the comparison to other branches of private law is only suggestive since: (1) Judicial activism in these fields may be premised on justifications that are inapplicable to property or (2) Activist practice in these branches may be misguided. Because such comparisons cannot do the real work of assessing judicial activism in property, I turn in Part IV to an examination of it in terms of legitimacy and expected performance.

¹⁴ Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373, 374-75, 380-84, 416-17, 419 (2002). See also, e.g., Glenn O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449, 1484-88 (2004).

¹⁵ Merrill & Smith, *supra* note 6, at 33, 43-45.

property, as Merrill and Smith argue, communication costs cannot justify a sharp preference for legislative rule-making as opposed to other branches of private law.¹⁶

Dorfman's account is no more successful: why should legislatures enjoy a strict monopoly regarding the creation and modification of property forms? Why exclude judges from engaging in these matters while allowing them to actively develop the common law of contracts, torts, and unjust enrichment, as well as to interpret and develop existing property forms, either legislated or judge-made? Dorfman may respond to the challenge of property exceptionalism by emphasizing that only property rights affect the obligations of third parties.¹⁷ But this response, as noted, only means that property law should ensure that no such external effects are validated without proper notice.¹⁸ Dorfman would be right to insist that, given the role that property law plays in structuring people's interpersonal relationships, notice can help only if we want to *publicly* acknowledge the relevant form of property.¹⁹ Because property law is not the only private law field that structures our daily interactions, however, this response does not explain why only the legislature can legitimately provide such a public acknowledgement, assuming that the judiciary is in principle a proper agent of private law rulemaking.

The challenge of the courts' significant role in interpreting existing property forms is not easily answered either. The story about the evolution of common law is largely that of a series of cautious, incremental changes resulting from the interpretation of the existing legal landscape, which eventually generate new and at times innovative doctrines.²⁰ Such interpretive leeway is indeed always available. Despite the wide acceptance of H. L. A. Hart's claim that the indeterminacy of any given legal norm is limited to "hard cases,"²¹ legal realists have convincingly demonstrated that the indeterminacy of doctrine as a whole is primarily premised on the availability of multiple potentially applicable sources. Because legal rules never exist in solitude and are always part of the legal system in

¹⁶ It is thus not surprising that Merrill's general position regarding statutory interpretation recommends minimizing normative reasoning. See Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. * (2011).

¹⁷ He may also add that, insofar as tort law is indeed analogous, it too is—or should be—subject to *numerus clausus*. See Dorfman, *supra* note 10, at * [FN100]. My reply in the text addresses this response as well.

¹⁸ This is taken care of by the law of legal accidents, which deals with conflicts between original owners and third parties and takes into account issues of verification and of notice, as well as other normative concerns pertinent to such conflicts. See *generally* Dagan, *supra* note 12, at 1544-47.

¹⁹ See Dorfman, *supra* note 10, at * [22].

²⁰ Cf. DON HERZOG, POISONING THE MINDS OF THE LOWER ORDERS 18 (1998).

²¹ H.L.A. HART, THE CONCEPT OF LAW 123, 141-42, 144 (1961).

which they are embedded,²² doctrine as such, including a doctrine enshrined in a statute, always “speaks with a forked tongue” so that, at least potentially, the judicial task is never one of sheer application.²³

Furthermore, even on its own terms, Dorfman’s binary split between legislation as a process of collective co-authorship vs. adjudication as lacking that democratic virtue is hard to accept. Unless this dichotomy is simply stipulated (thus begging the needed justification), the issue of collective co-authorship must be carefully and contextually examined. One need not reject the significance of public deliberation in the pursuit of the common good highlighted by the supporters of deliberative democracy²⁴ in order to appreciate that such deliberation is both impossible and undesirable across the (broad) board of public decisions,²⁵ and that, even if we are content with the deliberations of elected representatives, their intensity and quality is not uniform across the board. Similarly, if the *numerus clausus* is supposed to assure the participation of that subset of citizens likely to be affected by a given property form in its creation and modification, examining the property exceptionalist thesis requires a comparison between the characteristic forms of participation in these issues in legislation and in adjudication. Given the public choice difficulties mentioned above on the one hand, and the possibility, however limited, that courts function in property matters as public fora of grassroots democracy on the other, an a priori preference for legislation seems questionable.

* * *

Although unsuccessful in their attempt to defend property exceptionalism, these accounts yield important lessons. First, they represent an increasing sense amongst property theorists that the *numerus clausus* principle is a doctrinal manifestation of an important characteristic of property. Second, they point to the two main—and interrelated—considerations that should guide the division of labor between legislatures and courts once the character of property is properly identified: democratic legitimacy and expected performance. These two lessons will guide the discussion that follows. Part II offers a conception of property as institutions that takes its cue from the *numerus clausus* principle; Part III presents a charitable account of adjudication as a forum for rulemaking; and Part IV uses the lessons of the previous two parts in order to sketch a comparative

²² See HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* 3, 110-23 (Anders Wedberg Trans. 1946).

²³ KARL L. LLEWELLYN, *Some Realism about Realism*, in *JURISPRUDENCE: REALISM IN THEORY AND IN PRACTICE* 42, 70 (1962). See generally Hanoch Dagan, *The Realist Conception of Law*, 57 *U. TORONTO L.J.* 607, 613-17 (2007).

²⁴ See, e.g., AMY GUTTMAN & DENNIS F. THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996); HENRY S. RICHARDSON, *DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY* (2002).

²⁵ See, e.g., RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 108-09, 132-43 (2003).

analysis of the democratic legitimacy and expected performance of courts and legislatures in property matters.

II. THE CHARACTER OF PROPERTY

The *numerus clausus* principle, which limits property to some set of identifiable and standardized forms, goes well beyond what can be justified by reference to third parties' interests. This seems to be a devastating conclusion to scholars who hold that the core idea of property lies in the relationships of owners and non-owners. In line with the Blackstonian conception of property as "sole and despotic dominion,"²⁶ these scholars understand this "external dimension" of property (as I will call it) in radically one-sided terms as exhausted by the obligations property imposes on non-owners. Thus, for example, if "the differentiating feature of a system of property [is] the right of the owner to act as the exclusive gatekeeper of the owned thing,"²⁷ then, as Hansmann and Kraakman maintain, notice is crucial but standardization, as they indeed insist, is unjustified.

But before we dismiss the *numerus clausus* principle, some caution seems warranted given that it is such a pervasive characteristic of property law in post-feudal property systems. The *numerus clausus* can be read more charitably and the character of property better understood if we question the underlying assumptions of both sides to this debate. And indeed, notwithstanding the recent impressive resurrection of the Blackstonian understanding of property,²⁸ it is profoundly mistaken. Property requires attention not only to the external dimension addressing third parties' interests but also to the internal dimension, which focuses on property governance, namely, on the relationship among stakeholders. Furthermore, even regarding third parties, property is not just about exclusion. In fact, limitations on the right of owners to exclude are quite prevalent and non-owners are at times even entitled to be included—to buy, rent, use, or physically enter. A better understanding of property that accommodates these two corrections to the Blackstonian model can justify the *numerus clausus* principle. It can also helpfully guide our inquiry as to the proper role of judicial rulemaking in property.

* * *

²⁶ 2 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *2 (Univ. of Chi. ed. 1979) (1765-69).

²⁷ Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (2007).

²⁸ In addition to Merrill and Smith's work, see also, e.g., J.E. PENNER, THE IDEA OF PROPERTY IN LAW (1997); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L. J. 275 (2008).

The conception of property as an exclusive right erroneously looks only at property's external dimension, ignoring the significant role that the governance of property's internal life plays in our understanding of property. I do not question that in some property institutions the name of the game is indeed external, and that part of the drama of property law is about the productive struggle between autonomous excluders, with each individual cloaked in the Blackstonian armor of sole and despotic dominion. But the property institutions constituted in this way—atomistic, competitive, and vindicating negative liberty²⁹—by no means exhaust property law. Property institutions provide structures for various types of interpersonal relationships: from strangers and market transactors, through landlords and tenants, members of a local community, neighbors, co-owners, and partners, up to intimate relationships among family members. Accordingly, people experience property both as a locus of competition and as an arena for cooperation. In other words, governance—the ongoing management of cooperative relationships—typifies property as much as exclusion.

Property law supports a wide range of institutions that facilitate the economic and social gains made possible by cooperation. Some of these institutions, such as a publicly held corporation, are mainly about the economic gains of securing the efficiencies of economies of scale and risk-spreading, with social benefits merely an occasionally pleasant side-effect. Other institutions, such as marriage, are more about the intrinsic good of being part of a plural subject, where the *raison d'être* of the property institution refers more to one's identity and relationships, while the attendant economic benefits are usually perceived as helpful by-products rather than the primary motive for cooperation. In between, there are many other property institutions such as close corporations, partnerships, common interest communities, and co-ownerships, where both the economic and the social aspects are significant. The underlying character of these divergent relationships is legally significant because it proves to be the key for explaining the particular property configuration that serves as the default for the property institution at hand.³⁰ Indeed, alongside its support of more market-oriented types of interaction, property law appropriately provides governance mechanisms that facilitate other, equally valuable spheres of human interaction and human flourishing, in which cooperation looms large.

Like its marginalization of property's internal dimension, the Blackstonian definition of property's external dimension as strictly limited to outsiders' obligations is also mistaken and misleading. As Felix Cohen demonstrated long ago, every property right certainly involves *some* power to exclude others from doing something. But as Cohen further emphasized, this is a rather modest truism, which hardly yields any practical

²⁹ For a provocative account of these institutions as intrinsically social, see Avihay Dorfman, *Property, Trespass, and the Form/Function Gap* (unpublished manuscript).

³⁰ See DAGAN, *supra* note 3, at ch. 10.

implications. Owners' right to exclude is often subject to limitations and obligations, and "the real problems we have to deal with are problems of degree, problems too infinitely intricate for simple panacea solutions."³¹ Limits on the right of individual or group property owners to exclude, whether by refusing to sell or lease or by insisting that non-owners refrain from physically entering their land, are indeed quite prevalent in property law.³² Furthermore, in certain circumstances, such as the law of public accommodations, the copyright doctrine of fair use, and the law of fair housing, notably in the contexts of common-interest communities' law and landlord-tenant law, the right of non-owners to be included is also quite typical of property. And, as I show elsewhere, although they are less typical of property, these rights to entry or access and the limitations of exclusion on which they rely are just as intrinsic to it. Like owners' rights to exclude, they too are grounded in the very reasons, the very same property values, that justify the law's support for the pertinent property institution in the first place.³³

* * *

Implicit in these comments is a different conception of property, one that is both loyal to the practice of property and more normatively attractive than its Blackstonian counterpart. In this conception, which I defend in my book *Property: Values and Institutions*, property is understood as an umbrella for a set of institutions bearing family resemblances. Each such property institution entails a specific composition of entitlements that constitute the contents of an owner's rights vis-à-vis others (co-owners or other stakeholders as well as various types of non-owners), with respect to a given resource. The particular configuration of these entitlements is, or at least should be, determined by its character, namely, by the particular balance of property values characterizing the institution at issue. At least ideally, these values both construct and reflect the ideal ways in which people interact with one another in a given category of social contexts—such as market, community, family—and with respect to a given category of resources—such as land, chattels, copyright, patents. The ongoing process of reshaping property as institutions and thus facilitating various forms of human interaction and human flourishing is rule-based, and is usually addressed with an appropriate degree of caution. But the possibility of repackaging makes it (at least potentially) an exercise in legal optimism, in which lawmakers explicate and develop existing property institutions

³¹ Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 362, 370-74, 379 (1954).

³² See Kevin Gray & Susan Francis Gray, *Civil Rights, Civil Wrongs and Quasi-Public Space*, 1 EUR. HUM. RIGHTS L. REV. 46 (1999); Joseph W. Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U.L. REV. 1283, 1303, 1466 (1996). See also, e.g., JAMES GORDLEY, *FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT* 130-39 (2006), discussing the doctrine of necessity.

³³ See DAGAN, *supra* note 3, at ch. 2.

by accentuating their normative desirability while remaining attuned to their social context. In appropriate cases, they may also divide up a property institution, minimize its scope of application or outright eliminate it, or create new property institutions for new types of resources or emerging categories of interpersonal interaction.³⁴

In this framework of property as institutions, limiting property to some set of identifiable and standardized forms as the *numerus clausus* principle prescribes is understood as a means of facilitating stable (and thus necessarily a limited number of) categories of human interaction. More precisely, the institutions of property consolidate people's expectations so that they know what they are getting into when entering, for example, a joint tenancy, a common interest community, or, for that matter, a marriage. Thus, a set of fairly precise rules must govern each property institution to enable people to predict the consequences of various future contingencies and to plan and structure their lives accordingly.³⁵ Furthermore, the institutions of property may also affect people's ideals and therefore their preferences with respect to these categories of relationships. In this latter role, property institutions perform a significant expressive and cultural function. Both roles—consolidating expectations and expressing ideal forms of relationships—require some measure of stability. To form effective frameworks of social interaction and cooperation, property law can recognize a necessarily limited number of categories of relationships and resources. This prescription of standardization is particularly acute with regard to the expressive role, which mandates limiting the number of property institutions because law can effectively express only so many ideal categories of interpersonal relationships.

Indeed, the best justification for the standardization of property lies exactly in the aspects of property that the Blackstonian conception obscures. Limiting the number of property forms and standardizing their content facilitates the role of property in consolidating expectations and expressing ideal forms of interpersonal interaction, both within the privity zone and as per the various types of external relationships that property constitutes. Both the understanding of property as a “laundry list” of limitless permutations (“bundle of rights”) and its conception as a monistic bulwark of exclusion, even if combined with broad contractual freedom re property's internal affairs, fail to sustain the normative integrity of the institutions of property. Thus, they undermine the

³⁴ DAGAN, *supra* note 3, at chs. 1-4.

³⁵ As the text implies, nothing in the conception of property as institutions suggests that property law should adopt the form of vague standards as opposed to bright-line rules. Quite the contrary. The ways in which the various property values are embedded in these institutions are, or at least can and should be, rule-based (rather than affected by the equities of each particular case), so that only some legal actors, notably judges of appellate courts, occasionally use new cases as triggers for an ongoing refinement of existing rules *qua* rules. These rules can and should be founded on a contextual application of normative judgment rather than on decision-makers' subjective preferences. This allows property as institutions to respect property's stability and predictability.

role of property law in consolidating expectations, and its function in expressing such normative ideals for core types of human relationships.

Admittedly, my reconstruction of the *numerus clausus* principle, just like other interpretations of it that also do not purport to expose the original intent of its promulgation, does not perfectly fit its operation in practice. Thinking about *numerus clausus* through the prism offered here may imply, for instance, that some forms are overly broad because they cut through types of resources or categories of relationships that are too heterogeneous. Rather than as a pitfall, however, I see these gaps between the justification of the *numerus clausus* principle and its actual manifestation as a helpful product of my proposed reconstruction because they help to push the evolution of property institutions in felicitous directions.

One important implication of this account of the *numerus clausus* principle is that, in contrast with Merrill and Smith's theory, *numerus clausus* can peacefully coexist with a liberal take on the possibility of contracting around property rules. If *numerus clausus* focuses on policing the externalization of verification costs to third parties, contractual freedom in property is justifiably curtailed as long as the contracting parties' frustration costs are lower than the third parties' verification costs.³⁶ By contrast, understanding the institutions of property as unifying normative ideals for core categories of interpersonal relationships coexists comfortably with a much broader realm of freedom of contract. In most cases, allowing people to opt out and tailor their property arrangements in accordance with the way they prefer to shape their interpersonal relationships does not undermine law's functions of consolidating expectations and expressing ideals for core types of human interaction. People may legitimately want to accommodate their property arrangements to their particular needs and circumstances. Furthermore, in a liberal society, citizens should be free to reject many of law's messages and repudiate at least some of the values recommended by the state. Thus, the conception of property as institutions welcomes the trend in property law most significantly manifest in the traditionally immutable areas of marital property and of servitudes.³⁷ Except for cases of illegitimate external effects,³⁸ proscribing contractual opting out in property is justifiable only in extreme cases, when the social or cultural role of a property institution is both overwhelming and likely to be particularly facilitated by immutability.³⁹ In all other

³⁶ Cf. Merrill & Smith, *supra* note 6, at 38.

³⁷ See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch. 7 (2002); RESTATEMENT (THIRD) OF SERVIDUES §§2.1, 2.4, 2.6, 3.2 (2000).

³⁸ *Shelley v. Kraemer*, 334 U.S. 1 (1948) is a case in point.

³⁹ Defaults, and not only immutable rules, may also have some expressive effect that may entail other significant real-life consequences. In particular, prescribing the baseline from which deviations require active contracting imposes burdens of disclosure on parties who want to deviate from these normative baselines.

cases, as long as opting out does not generate such externalities, the particular configurations of the various property institutions should be understood as defaults.

The second significant implication of my account re the character of property deals directly with the key question of this Essay:⁴⁰ the scope of legitimate judicial rulemaking in property law. I elaborate on this issue in Part IV below, after providing a rough account of judicial rulemaking at its best. One preliminary comment in this respect is nonetheless already in order. As indicated at the outset, intellectual property is an important context for the question of judicial involvement in property rulemaking. One tempting strategy for common law supporters in this context is to justify the robust activism of state courts in developing common law intellectual property by emphasizing the limited exclusion these types of rights typically entail.⁴¹ They thereby imply that their legitimacy is unthreatened by the implicitly justified strong association between “full-blown” property rights, for which exclusion is the name of the game, and the legislative monopoly of rulemaking. Should the above analysis of the character of property prove persuasive, this strategy is doomed to fail because exclusion is not the core of property and because the various types of intellectual property, be they legislated or judge-made, are no less members of the family of property institutions than is the fee simple absolute. Fortunately, as shown below, this failure is inconsequential because the legitimate scope of judicial activity *throughout property law* covering the various property institutions assembled under the umbrella of property is in fact rather broad.

III. GRAND STYLE ADJUDICATION

An analysis of the division of labor concerning rulemaking between the legislature and the judiciary, in property or indeed in any other legal field, requires a careful comparison of their respective expected performances in developing the doctrines under consideration and of the democratic legitimacy of their doing so. Because this exploratory Essay examines the position stating that judges should not participate in the creation and modification of property rights, my focus here is on the judiciary. Relying on what I take to be the core contribution of legal realism to this topic,⁴² the following discussion outlines some of the virtues of adjudication that, together with the understanding of the character of property outlined above, can help articulate a proper domain for judicial property activism.

⁴⁰ As the text hints, the issue of contractual freedom in property is also relevant to the scope of legitimate judicial rulemaking in property. *See infra* text accompanying note 88.

⁴¹ *See* Balganesh, *supra* note 4, at 1553-54, 1570.

⁴² This Part draws on Dagan, *supra* note 23.

Legal realists are always wary of romanticizing law and its carriers. They take to heart Oliver Wendell Holmes' statement that "in societies like ours the command of the public force is entrusted by judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees."⁴³ They further realize that certain built-in features of law—notably, the institutional division of labor between "interpretation specialists" and the actual executors of their judgments, and our tendency as lawyers, and even as citizens, to "thingify" legal constructs and accord them an aura of obviousness and acceptability—render the danger of obscuring law's coerciveness particularly troubling.⁴⁴

Alongside their wariness of romanticism, realists are also careful not to fall into the trap of cynicism. They reject as equally reductive the mirror image of adjudication, which portrays it as sheer power (or interest, or politics). Realists insist that legal discourse is also a forum of reason and that reason poses real, albeit elusive, constraints on the choices of law's carriers. Furthermore, because so much is at stake in reasoning about law, legal reasoning becomes particularly urgent and rich, attentive, careful, and serious. Legal actors understand that reasons can justify law's coercion only if they are properly, even if implicitly, grounded in human values.⁴⁵ Realists reject cynicism about law because the need to justify is a fruitful source of social and moral progress that forces, at the minimum, a respectable façade, an idealized picture of law that can often challenge conventional opinions and practices.⁴⁶

The task of articulating an account of legitimate adjudication is formidable for legal realists because, as noted,⁴⁷ they reject the formalist reliance on doctrine *per se* as the sole constraining feature of judicial discretion. Because law is always dynamic, at least potentially, realists consider hopeless the legal positivist attempt to understand law

⁴³ OLIVER W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 167 (1920).

⁴⁴ See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 811-12, 820-21, 827-29 (1935); John Dewey, *Logical Method and Law*, in AMERICAN LEGAL REALISM 185, 191, 193 (William W. Fisher III et al. eds. 1993); OLIVER W. HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS, *supra* note 43, at 210, 230, 232, 238-39. See also ROBERT COVER, *Violence and the Word*, in NARRATIVE, VIOLENCE, AND THE LAW 203 (Martha Minow et al. eds., 1992).

⁴⁵ See K. N. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 YALE L.J. 1355, 1362-65, 1367-68, 1370, 1381-83, 1387 (1940). See also, e.g., Thomas W. Bechtler, *American Legal Realism Reevaluated*, in LAW IN SOCIAL CONTEXT: LIBER AMICORUM HONOURING PROFESSOR LON L. FULLER 3, 20-21 (Thomas W. Bechtler ed., 1978); Harry W. Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799, 801, 809 (1961); Hessel E. Yntema, *The Rational Basis of Legal Science*, 31 COLUM. L. REV. 295, 255 (1931).

⁴⁶ See Hanoch Dagan, *Remedies, Rights, and Properties*, * J. TORT L. *, * (2011).

⁴⁷ See *supra* text accompanying note 23.

statically by sheer reference to verifiable facts such as the authoritative commands of a political superior or the rules identified by a rule of recognition.⁴⁸ Nevertheless, legal realists insist that judge-made law is quite predictable and largely legitimate, even salutary. They celebrate common law's Grand Style, described by Llewellyn as "a functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need," mediating between "the seeming commands of the authorities and the felt demands of justice."⁴⁹

Llewellyn thus argued that, although adjudication is necessarily creative, it is invariably constrained by legal tradition. More specifically, he observed that cases are decided with "a desire to move in accordance with the material as well as within it . . . to reveal the latent rather than to impose new form, much less to obtrude an outside will." The case law *system* imposes "a demand for moderate consistency, for reasonable regularity, for on-going conscientious effort at integration." The instant outcome and rule must "fit the flavor of the whole"; it must "think with the feel of the body of our law" and "go with the grain rather than across or against it." Legal realists begin with the existing doctrinal landscape because it may and often does incorporate valuable normative choices, even if implicit and sometimes imperfectly executed. They nonetheless recognize that the existing legal environment always leaves considerable interpretive leeway and, furthermore, believe that law's potential dynamism is laudable as it represents law's perennial quest for justice. Adjudication is thus "the constant questing for better and best law"; a relentless "re-examination and reworking of the heritage." And judges have the "duty to justice and adjustment," which means an "on-going production and improvement of rules."⁵⁰

This forward-looking aspect of legal reasoning in its realist rendition relies on both science and craft. Realists recognize the profound differences between, on the one hand, lawyers as social engineers who dispassionately combine empirical knowledge with normative insights, and, on the other hand, lawyers as practical reasoners who employ contextual judgment as part of a process of dialogic adjudication. They nonetheless insist that, at least at its best, common law adjudication accommodates science and craft.

Realists place a high premium on studying two types of social facts pertinent to the development of legal doctrine. They follow Roscoe Pound's prescription for looking at

⁴⁸ See John Dewey, *My Philosophy of Law*, in MY PHILOSOPHY OF LAW 73, 77 (1941); Karl L. Llewellyn, *My Philosophy of Law*, *id.*, 183, 183-84; Max Radin, *My Philosophy of Law*, *id.*, at 285, 295.

⁴⁹ LLEWELLYN, THE COMMON LAW TRADITION, *supra* note 7, at 37-38. See also RONALD DWORKIN, LAW'S EMPIRE (1986). I discuss the relationship between the realist conception of law and Dworkin's conception of law as integrity in Dagan, *supra* note 23, at 658-59.

⁵⁰ LLEWELLYN, THE COMMON LAW TRADITION, *supra* note 7, at 36, 38, 190-91, 217, 222-23; Llewellyn, *The Normative*, *supra* note 45, at 1385.

“the actual social effects of legal institutions and legal doctrines,” both in law reform and in the application and interpretation of existing law.⁵¹ Moreover, they believe with Benjamin Cardozo that judges must also rely on “the life of the community” and that, in order to further stabilize the objectivity and legitimacy of law, judges should generally respond “to the accepted standards of the community, the *mores* of the time,” namely, the actual normative preferences of law’s constituents.⁵² But legal realism, at least at its best, rejects any pretense that knowledge of all these important social facts can be a substitute for political morality. Realists realize that value judgments are indispensable not only when evaluating empirical research but also when simply choosing the facts to be investigated. Moreover, they are careful not to accept existing normative preferences uncritically. They thus insist that neither science nor an ethics that ignores the data of science offers a valid test of law’s merits. Legal analysis needs both empirical data and normative judgments.⁵³

Because law affects people’s life dramatically, these social facts and human values must always inform the direction of legal evolution. Legal reasoning necessarily shares this feature with other forms of practical reasoning, but realists also emphasize that legal reasoning is, to some extent, a distinct mode of argumentation and analysis. Hence, they pay attention to the distinctive institutional characteristics of adjudication and study their potential virtues, while still aware of their possible abuse. The procedural characteristics of the adversary process, as well as the professional norms that bind judicial opinions, notably the requirement of a universalizable justification, provide a unique social setting for adjudication. These procedural characteristics encourage judges to develop what Cohen terms “a many-perspectived view of the world” that “can relieve us of the endless anarchy of one-eyed vision,” a “synoptic vision” that is “a distinguishing mark of liberal civilization.”⁵⁴ Moreover, because the judicial drama is always situated in a specific human context, lawyers have constant and unmediated access to human situations and to actual problems of contemporary life. This contextuality of legal judgments ensures

⁵¹ Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489, 513 (1912).

⁵² BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 105-06, 108 (1921).

⁵³ See Felix S. Cohen, *Modern Ethics and the Law*, 4 BROOK. L. REV. 33, 45 (1934); Cohen, *supra* note 44, at 848-49; William Twining, *The Idea of Juristic Method: A Tribute to Karl Llewellyn*, 48 U. MIAMI L. REV. 119, 151-52 (1993).

⁵⁴ FELIX S. COHEN, *Field Theory and Judicial Logic*, in *THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN* 121, 125-26 (Lucy Kramer Cohen ed., 1960). See also, e.g., LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 7, at 46-47, 132; LLEWELLYN, *American Common Law Tradition and American Democracy*, in *JURISPRUDENCE*, *supra* note 23, at 282, 308-10.

lawyers a unique skill in capturing the subtleties of various types of cases and in adjusting legal treatment to the distinct characteristics of each category.⁵⁵

IV. LEGISLATURES AND COURTS

Having (briefly) introduced both the character of property and the idealized view of common law adjudication, we are finally in a position to consider the comparative democratic legitimacy and expected performance of legislatures and courts in property matters. Two remarks are still in order before taking on this task (in reverse order, for the convenience of exposition):

(1) On its face, by revealing the breadth of potential judicial choice, the radical doctrinal indeterminacy noted by realists⁵⁶ makes our inquiry redundant. But the fact that judges can use such potential does not mean that they always do or that they should, insofar as property is concerned. Doctrinal indeterminacy does not rule out the position that judges should abstain from property rulemaking and limit their role to applying the existing understandings of property law (within the relevant legal community) to the cases before them. While doctrinal indeterminacy implies that new cases *can* serve as opportunities to rethink, it does not exclude the possibility that these opportunities are (and should be) used only infrequently and only by *certain* legal actors—notably, judges of appellate courts—who are responsible for the ongoing refinement of the existing private law rules *qua* rules.⁵⁷

(2) The realist celebration of common law does not purport to provide a real-life description of adjudication. Rather, parallel to the understanding of legislation as an exercise of co-authorship that Dorfman endorses, or to the more conventional reason for the authority of legislation based on legislators' political accountability (to which I also refer below), it provides an account of the ideal of adjudication that should serve as a benchmark for evaluating its daily operation. A comparison between legislatures and courts regarding property lawmaking should consider both these idealized pictures of rulemaking and the likely failures of their actual manifestations.⁵⁸

⁵⁵ Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 73-74, 159 (1928). *See also, e.g.*, LLEWELLYN, *A Realistic Jurisprudence: The Next Step*, in JURISPRUDENCE, *supra* note 23, at 3, 27-28, 32; Walter Wheeler Cook, *Scientific Method and the Law*, in AMERICAN LEGAL REALISM, *supra* note 44, at 242, 246.

⁵⁶ *See supra* text accompanying note 23.

⁵⁷ *See* Hanoch Dagan, *Restitution's Realism*, in PHILOSOPHICAL FOUNDATIONS OF UNJUST ENRICHMENT 54, 75-76 (Robert Chambers et al. eds., 2009).

⁵⁸ *But see* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006), who argues that an institutional inquiry must be thoroughly empirical, studying “the actual capacities and interactions of judges, legislatures, and agencies.”

A. Performance

The core claim of Merrill and Smith's functionalist case against judicial activism in property law, as noted, is that the comparative legislative advantages in terms of clarity and comprehensiveness are particularly significant in property because of its strong connection to the economization of communication costs. Although I reject this characterization of property, in this section I follow their insight that the character of property revealed by looking at the underlying rationale of the *numerus clausus* principle is the key to a functionalist analysis of judicial rulemaking in property. Given the above discussion of the character of property as institutions, the task is therefore to evaluate the relative performance of the legislature and the judiciary in shaping the core default legal regimes governing interpersonal relationships dealing with resources so as to stabilize people's expectations and express our normative ideals.

The character of property explains and justifies the relative stability and conservatism of property vis-à-vis other segments of our private law. While property lawyers should be cautious not to engage in a "blind imitation of the past" by upholding doctrines whose "grounds have vanished,"⁵⁹ they should appreciate the added value of adherence to tradition in property matters, besides the more general value of following legal tradition. The restraint imposed by the virtues of stable expectations and effective transmission of normative ideals, however, is by no means unique to judges. Rather, to the extent that the character of property justifies an attitude of forbearance and temperateness, this approach should guide judges and legislators alike.⁶⁰

But restraint is not synonymous with stagnation. Expectations can be stable even if rules are not frozen in time, as long as they are not revisited too frequently. The proper frequency must surely also be affected by the pace of other developments, for instance in technology, pertinent to the property institution. Equally, and to avoid the risk of romanticizing the law, we must not be overly deferential to its existing doctrine. Both law's normative ideals and its means for promoting them should therefore be challenged and properly re-examined. Property law has indeed evolved throughout its history: new types of property institutions have emerged (consider equitable servitudes, common

Id., at 10. Empirical inquiries re judicial capacity are surely important. But they cannot be plausibly answered without reference to the ideals of adjudication, which enter judges' utility function both directly and *via* the impact of the social and professional groups that judges seek to please. See Hanoch Dagan, *Between Rationality and Benevolence: The Happy Ambivalence of Law and Legal Theory* (The 2010 Meador Lectures on Rationality), 62 ALA. L. REV. 191, 198 (2011). See also *infra* text accompanying notes 85-86.

⁵⁹ HOLMES, *supra* note 43, at 187.

⁶⁰ In fact, this attitude seems particularly amenable to common law judges given their incrementalist disposition. See Balganes, *supra* note 4.

interest communities, and various types of intellectual property); old types have been marginalized and at time vanished (such as the fee tail⁶¹); and many others have been modified. In some cases, the reform of a given property institution has been relatively radical (as was the case with leaseholds⁶² and marital property⁶³). Sometimes, more moderate options seemed in order, such as restating the doctrine pertaining to a property institution in a way that brings its rules closer to its underlying commitments, in the process removing indefensible rules (one example here is the Restatement of Servitudes⁶⁴), or adjusting a given property institution—think here of the fee simple absolute—to the various social contexts in which it may be situated.⁶⁵

As these examples demonstrate, both legislatures and courts were involved in these developments. If property is about consolidating expectations and expressive normative ideals with respect to core types of human relationships regarding resources, it is indeed hard to justify excluding judges from lawmaking. The reason is that, in this conception of property, the creation and modification of property institutions is, or at least should be, triggered by challenges bearing on the desirability of the normative underpinnings of property institutions, their responsiveness to their social context, or their effectiveness in promoting their contextually examined normative goals. Challenging property law to live up to the ideals embedded in its institutions, or to shape these or new institutions in a way that promotes other worthy ideals, can definitely come from the legislature. But why discount the possibility or the desirability that such challenges might come about via the adjudicatory process? At least in its Grand Style discussed above, adjudication is a perfectly appropriate forum for developing property law along these lines.

The last feature of adjudication mentioned in Part III merits emphasis partly because it is the flip-side of the legislative comprehensiveness celebrated by Merrill and Smith. A judicial drama is not a dialogue about principles of abstract justice but is situated in a given human context, which is significant because, as Herman Oliphant observed, it holds

⁶¹ See, e.g., JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 215-19 (5th ed. 2002).

⁶² For significant developments in landlord-tenant law, see, for example, the Fair Housing Act, 42 U.S.C. 3601-3619, 3631 (2002) (limiting landlords' discretion in selecting tenants); *Myers v. E. Ohio Gas Co.*, 464 N.E.2d 1369, 1373 (Ohio 1977) (loosening the rigid forms of leasehold estates); *Hilder v. St. Peter*, 478 A.2d 202 (Vt. 1984) (implying an unwaivable warranty of habitability). See generally Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984).

⁶³ The most important developments here are the rise of no-fault divorce, the entrenchment of the norm of equal division, and the expansion of the scope of the marital property estate. See generally DAGAN, *supra* note 3, at ch.9.

⁶⁴ See RESTATEMENT (THIRD) OF SERVITUDES (2000).

⁶⁵ See, e.g., *State v. Shack*, 277 A.2d 369 (N.J. 1971) (holding that farmer-owner had no right to deny reasonable access to governmental or charitable agencies or organizations seeking to assist migrant workers).

judges close to “the actual transactions before them.” This daily and unmediated access to actual human situations and problems in contemporary life serves as an “alert sense of actuality” that “checks our reveries in theory.” It provides judges with “the illumination which only immediacy affords and the judiciousness which reality alone can induce,” and it encourages them to shape law “close and contemporary” to the human problems with which they deal.⁶⁶ To clarify: as Llewellyn explained, the claim is *not* that “the equities or sense of the particular case or the particular parties” is determinative.⁶⁷ Rather, the idea is that judges develop the law while “testing it against life-wisdom,” benefitting from “the sense and reason of some significantly seen *type* of life-situation.”⁶⁸ Therefore, if the development of property law indeed is (as I claim it should be) an ongoing dialogue regarding our property institutions, aimed at their reconstruction along the lines mentioned above, this unique feature of adjudication must count as a significant comparative advantage.⁶⁹

None of this implies that there are no functional difficulties with judicial property lawmaking or that there are no limitations to its proper domain. But these problems are not unique to property or particularly acute in property matters, nor do they apply across the board of property law. Without attempting to be exhaustive, it seems safe to mention three significant types of cases limited to particular subsets of property doctrines in which judicial caution is in place. They are premised on three familiar and general limitations of judicial competence:

(1) At least in its conventional rendition, adjudication does not involve the creation of complex and elaborate regulatory schemes as may at times be required in order to

⁶⁶ Oliphant, *supra* note 55.

⁶⁷ Cf. Frederick Schauer, *Do Cases Make Bad Law?* 73 U. CHI. L. REV. 883 (2006) (arguing that concrete cases are more often distorting than illuminating).

⁶⁸ LLEWELLYN, *The Current Recapture of the Grand Tradition*, in JURISPRUDENCE, *supra* note 23, at 215, 217, 219-220. See also Postema, Part I, *supra* note 7, at 167, 175, 177-80. Joseph Raz’s analysis of the phenomenon of distinguishing cases brings home a similar point. See JOSEPH RAZ, *THE AUTHORITY OF LAW* 183-97 (1979). For a careful account of the process by which a given case is taken as an example, see Gerald J. Postema, *A Similibus ad Similia Analogical Thinking in Law*, in COMMON LAW THEORY, *supra* note 1, at 122-24.

⁶⁹ Thus, Balganesch welcomes the development of common law intellectual property as centered on such ideas as “proceeding with caution, balancing multiple values or interests, looking to the context and necessities of an area to tailor a rule, and paying close attention to the actual practical consequences that flow from a rule so as to reformulate it, when needed.” Balganesch, *supra* note 4, at 1549. He mentions in this context the option of relying on customary practices for guidance, but prudently mentions that they may distort the law when they “systematically undervalue the interests of less powerful participants.” *Id.*, at 1584. Another and even more obvious potential difficulty with heavy reliance on custom is the temptation of participants to externalize costs on outsiders (e.g., customers). See, e.g., Jennifer Rothman, *Custom, the Common Law, and Intellectual Property* (in this volume).

create or modify a property institution (as, for example, in the formal registration of property rights).⁷⁰

(2) Contexts requiring specialized knowledge and expertise, such as innovative technologies or complex market ramifications, may justify judicial deference to governmental agencies equipped with such technical expertise.⁷¹ The Israeli doctrine that in principle allows unjust enrichment claims for imitations of non-patentable designs if an additional unspecified element is present seems to violate this prescription.⁷²

(3) Finally, some modifications, such as the annulment of an existing property institution, generate widespread excessive⁷³ redistribution so that their retroactive application, as the common law usually applies, is inappropriate.⁷⁴ Certain cases are obviously exceptions, as when people's reliance on the pre-existing distribution was illegitimate (think of slave-owners) and thus unworthy of legal protection.⁷⁵ In others, however, the fact that legislatures can and typically do apply their norms prospectively, and can moreover provide explicit or implicit compensation or set up other ameliorating means for the transition period, such as grandfather clauses, may count as significant reasons for judicial caution.

B. Legitimacy

When judged from the viewpoint of comparative performance, then, property—understood as an umbrella for a set of institutions governing core types of interpersonal

⁷⁰ See, e.g., Merrill, *supra* note 16, at * [113]; but see OWEN FISS, *The Forms of Justice, in THE LAW AS IT COULD BE 1* (2003).

⁷¹ See, e.g., NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 139-40 (1991); Margaret H. Lemos, *Interpretive Methodology and Delegation to Courts: Are "Common Law Statues" Different?* * (in this volume).

⁷² See HANOCH DAGAN, *PROPERTY AT A CROSSROADS* 90-96 (2005) [HEB.]. For similar reasons, I find it hard to celebrate *Int'l News Services v. Associated Press*, 248 U.S. 215 (1918) and I tend to prefer Judge Learned Hand's more cautious attitude in *Cheney Bros. v. Doris Silk Corp.*, 279, 280 (2nd Cir. 1929). See HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 137-38 (2004). For a careful, narrow reading of *INS*, which may well be acceptable, see Shyamkrishna Balganes, *"Hot News": The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419 (2011).

⁷³ The question of when such changes are excessive is indeed one of the most serious and complicated issues in property law and theory. For my answer, see DAGAN, *supra* note 3, at Pt. II.

⁷⁴ Recall that Merrill and Smith mention this feature when making their case for property exceptionalism. See *supra* note 9. As the text implies, however, not only is this feature not unique to property, but it does not even apply across the board of property law. Cf. *Stop the Beach Renourishment v. Fla. Dep't of Env'tl. Prot.*, 130 S.Ct. 2592 (2010).

⁷⁵ See Hanoch Dagan, *Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions*, 84 B.U.L. REV. 1139 (2004).

relations regarding resources—seems quite amenable to judicial development, subject to its general conservative tilt and to the three local qualifications just mentioned. But this answer is not enough to justify judicial engagement in the shaping of our property institutions. Although Dorfman’s attempt to provide a strong a priori case against judicial activism in property fails, he must be correct in insisting that the topic of judges and property should be approached as one of legitimacy and not as one—or, rather, not only as one⁷⁶—of expected performance. The following discussion addresses this aspect. As in the previous section, I understand the development of property law as directed to refine our repertoire of default frameworks for interpersonal relations so that they live up better to their ideals, or shape them or new ones in a way that promotes other worthy ideals.

I obviously do not challenge the legitimacy of legislatures taking part in such an exercise. As elected institutions, they are or, in a democracy, at least presumed to be “well suited to represent the multiple interests involved in [] property law, and to reach compromises when necessary.”⁷⁷ This simple proposition requires, for example, significant judicial deference in contexts of newly enacted legislation,⁷⁸ and renders legislative responses to judicial activism in other contexts obviously legitimate.

As with expected performance, however, the legitimacy of judicial activism in property must be addressed in comparative terms and without assuming that the legislature’s authority necessarily implies the exclusion of the judiciary. Rather, to figure out the proper domain of judicial creation and modification of property institutions, if any, we need to examine potential bases of democratic legitimacy of judicial rulemaking

⁷⁶ Following Darwall’s critique of Raz’s service conception of authority, one may wonder (as Dorfman does), whether expected performance should have *any* significance, since grounding a right to rule or an obligation to obey in superior knowledge is difficult in a democracy. See Stephen Darwall, *Authority and Reasons: Exclusionary and Second-Personal*, 120 *ETHICS* 257 (2010). But as Scott Hershovits correctly claims, it is nonetheless important to notice that there are practices in which “the role of authority is, as Raz says, to help subjects conform to reason, and one may not have authority in that kind of practice unless one can play that role.” Scott Hershovitz, *The Role of Authority*, * PHILOSOPHERS’ IMPRINT *, * (2011). As Hershovitz further claims, this means that: (1) Like coaches or physicians, who participate in practices aimed at helping subjects to better conform to reason, judges too need to ground their authority in tools like “expertise, freedom from bias, [or] an ability to solve coordination problems.” (2) As in other such practices, judge-made law—the practice in which judges’ role of normative authority plays a part—needs to be justified in a way that will not collapse to the service conception of authority. Thus, whereas Raz’s service conception of authority implies legitimacy’s collapse to expected performance, and whereas Darwall’s critique dismisses expected performance as a basis for authority, I believe (with Hershovits) that both expected performance and legitimacy are significant.

⁷⁷ See Balganesch, *supra* note 4, at 1592.

⁷⁸ See ANDREI MARMOR, *Legislative Intent and the Authority of Law*, in *INTERPRETATION AND LEGAL THEORY* 155 (1992). See also WILLIAM N. ESKRIDGE JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

in property matters given the character of property. Though I could not possibly hope to provide here an adequate account of democratic legitimacy, the following remarks should suffice to support the claim that the legitimate scope for judicial rulemaking in property is in fact rather broad.⁷⁹

Consider the view endorsed by Dorfman that democratic legitimacy turns on co-authorship. To be meaningful, as noted, the ideal of co-authoring the shared commitments manifest in property law must not be axiomatically attached only to the legislative process. Rather, a commitment to co-authorship requires a more careful comparative account of meaningful participation and deliberation in legislation and in adjudication. This account can either look at the participation of the citizens directly or via elected representatives, or focus on the participation of the subset of citizens who are likely to be affected by the property law development at hand.

In general, participation and deliberation will more likely be found in legislation than in adjudication because lawmaking is legislation's only task, whereas in adjudication it emerges as part of the resolution of discrete disputes.⁸⁰ But the broad or representative participation that might significantly foster collective co-authorship does not seem typical in legislation on property matters. Quite the contrary. Some property doctrines, such as the law of co-ownership or of common interest communities, may seem too mundane as a subject for real democratic deliberation.⁸¹ By contrast, where the creation or modification of property institutions provides significant opportunities for rent seeking, as in the repeated extensions of the term and scope of copyright, the legislative process is dominated by interest groups promoting narrow distributive goals⁸² and thus cannot meaningfully count as collective co-authorship.

The ideal of participation by parties affected by the proposed development of property law is a more realistic expectation. But insofar as this participatory ideal is concerned, adjudication fares quite well and in some contexts probably better than legislation. The adjudicatory adversarial process fares well because, as hinted in Part III, it invites disagreements on questions of facts, opinion, and law, thus creating a forum

⁷⁹ Note that I do not claim for judicial supremacy, as in judicial review. My sole focus is on the legitimacy of judicial rule-making where legislatures are silent.

⁸⁰ Another reason relates to comparative costs: voters "often face a far less expensive road [than litigants] to registering their needs... in the political process." See KOMESAR, *supra* note 71, at 127.

⁸¹ Cf. Merrill & Smith, *supra* note 6, at 67. To preempt a possible objection, I may add that the notion that judicial passivity can upset the marginality of these topics within our public discourse does not seem particularly plausible.

⁸² See generally JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001). *But cf.* Jonathan M. Barnett, *What's So Bad About Stealing?*, * J. TORT L. *, * (2011) (emphasizing the *de facto* reduction in copyright protection given the widespread disobedience to copyright law).

where judges' normative and empirical horizons are constantly challenged by conflicting perspectives.⁸³ As Neil Komesar shows regarding tort law, at times adjudication seems to provide a qualitatively better forum for the participation of affected parties. One instance are cases where there is a sharp "distinction between ex ante and ex post stakes," so that the low ex ante probability of harm may obscure an important perspective rendered vivid in the ex post litigation triggered by the unfortunate realization of such harm.⁸⁴ Certain important developments of property institutions such as marital property, cohabitation, and leaseholds by the judiciary may also fit well into this category.

But maybe democratic legitimacy should require only accountability of decision-makers rather than participation of citizens. Accountability is a more modest standard: it does not require active participation or deliberation but merely insists that decision-makers be responsive to citizens' values and preferences. As with participation, the accountability requirement may in the abstract appear as a trump in favor of elected legislators vis-à-vis unelected judges, given that re-election is a rather potent guarantee of responsiveness. But my previous observations regarding skewed participation in property matters immediately and detrimentally affect legislators' responsiveness as well. If most or many property matters are either politically marginal or dominated by interest groups, the legislators' expected responsiveness is likely to be rather limited. Likewise, an outright dismissal of judges' responsiveness seems exaggerated. As Llewellyn insisted, in their opinions judges need to "account to the public, to the general law-consumer" on a regular basis and in detail; they must persuade not only their brethren but also the legal community, including losing counsel, "that outcome, underpinning, and workmanship are worthy" and that their judgment was formed "in terms of the Whole, *seen whole*."⁸⁵ While real-life adjudication surely falls short of these ideals, having these standards in place is nonetheless significant because it affects judges' utility function and thus informs judicial behavior, as even the tough-minded portrayals of judges as maximizers of their utility function admit.⁸⁶

Finally, consider again my critique of the conception of property as an exclusive right for its excessive focus on property's external dimension as well as its exaggerated

⁸³ Cf. Alon Harel & Tzvi Kahana, *The Easy Core Case for Judicial Review*, 2 J. LEGAL ANALYSIS 1 (2010). Unlike Harel & Kahana, I do not claim that this feature of adjudication can justify judicial review.

⁸⁴ See KOMESAR, *supra* note 71, at 135-36.

⁸⁵ LLEWELLYN, THE COMMON LAW TRADITION, *supra* note 7, at 48, 132; LLEWELLYN, *American Common Law Tradition*, *supra* note 54, at 309-10.

⁸⁶ See RICHARD A. POSNER, HOW JUDGES THINK 11-12, 60-61, 371 (2008). See also LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 16-21, 90, 106 (2006); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 615-17, 619-21 (2000).

emphasis on outsiders' obligations. Consider also my endorsement of a competing conception that perceives property as an umbrella for a set of property institutions, offered as default frameworks of interpersonal interactions embodying diverse ideals of human flourishing. The former conception, which imagines the development of property law as involving mandatory rules generating additional obligations on people, raises a significant requirement of legitimacy throughout the entire domain of property law possibly analogous to that of tort law. As noted, I obviously do not claim that property is not about others' obligations as well, and the above discussion is aimed to address the legitimacy challenge posed by property law developments that carry such an effect.⁸⁷ Yet, both the fact that the new or modified property institutions are often more about governance than about exclusion or that they weaken third party obligations vis-à-vis the *status quo*, and the role that freedom of contract plays in property matters, as it indeed should, render judicial activism in property quite innocuous. The development of property law often generates additional frameworks of interpersonal interaction that enrich the repertoire of available options open to tailor-made adjustments. Insofar as this is the case or, in other words, insofar as at stake are the more contract-like than tort-like aspects of property law, it is particularly difficult to justify the insistence on the exclusivity of legislatures in the creation and modification of property institutions.⁸⁸

CONCLUDING REMARKS

Property is a complex and heterogeneous area of law, best thought of as a loose coalition of property institutions. The creation of new property institutions and the modification of existing ones are major events in the development of our social frameworks of interpersonal interaction. They shape and reshape our social order, adjusting it to new circumstances, challenges and opportunities (think about the environment, the information revolution, or gender equality). In a democracy, legislatures have an important role to play in such developments. In certain contexts—as where a property innovation requires a regulatory structure, depends on specialized knowledge available elsewhere, or involves excessive widespread redistribution—judges should generally avoid taking part in this drama. They should likewise be significantly deferential regarding newly-enacted property legislation. But these qualifications of judicial authority are not unique to property, and other than them (or parallel ones I may have failed to mention), there seem to be no good reasons, either from expected performance

⁸⁷ Consider, for example, cases in which the plaintiff argues for some degree of protection against appropriation of a resource she holds, where the preexisting law perceives this type of resource as part of the public domain.

⁸⁸ A subset of these types of property development may, however, involve significant redistributive effects, which then may serve as an independent justification for judicial passivity. See *supra* text accompanying notes 73-75.

or from legitimacy, for a particularly heightened degree of judicial passivity in property matters. Judges must respect property's stability and the conservatism entrenched in the *numerus clausus* principle, but so must legislators. Still, when appropriate, both legislators and judges should utilize their distinct comparative advantages in order to create new property institutions and modify existing ones so as to enrich and refine our repertoire of default frameworks of interpersonal relations.

