PRIVATE LAW PLURALISM AND THE RULE OF LAW

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Abstract

This Essay considers whether a pluralist account of private law can, notwithstanding its multiplicity, its dynamism, and its disavowal of neutrality, comply with the rule of law. My focus will thus be on two aspects of the rule of law: as a requirement that law be capable of guiding its subjects’ behavior, and as a prescription that law not confer on officials the right to exercise unconstrained power. At first glance, a pluralist and perfectionist understanding of private law is vulnerable on both the guidance and the constraint fronts, but this impression is fortunately incorrect. Private law pluralism neither requires nor should it imply adopting the dubious nominalistic approach of case by case adjudication, which indeed undermines guidance. Rather, properly understood, private law pluralism supports, even requires, relatively stable and internally coherent—albeit properly narrow—doctrinal categories. Each such private law institution is governed by fairly precise rules alongside informative standards founded on the regulative principles of these institutions, enabling people to predict the consequences of future contingencies and to plan and structure their lives accordingly. These private law institutions are shaped and developed through both legislation and adjudication. Courts are appropriately involved in many of these processes because at least insofar as private law is concerned they typically enjoy no less legitimacy, from either a participation or an accountability perspective, than legislatures. Likewise, while the plurality of values involved in the molding of our private law institutions’ regulative principles makes this a challenging endeavor, we have no grounds for assuming that the requirement of normative contextual inquiry typifying common law adjudication does not reliably constrain this judicial power.
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INTRODUCTION

In my previous work, I have characterized private law as structurally pluralist and moderately perfectionist. Its pluralism implies that property, contracts, torts, and unjust enrichment are merely broad umbrellas for narrower private law institutions sharing some thin common denominators. Property law, for example, my central example in this Essay, is composed of a set of diverse doctrines that cannot be reasonably described as being governed by one coherent regulative principle, at least if that principle is to be robust enough to play a meaningful role in the development of this heterogeneous body of law. But while the search for property’s core is thus futile, a careful study of various property institutions such as fee simple absolute, co-ownership, common interest communities, marital property, copyrights, patents, and the like, is valuable and important because the regulative principles of these institutions—and here comes the perfectionist nature of private law—express our societies’ ideals for core categories of interpersonal relationships regarding various resources.

I hold that this structural pluralist account of private law (and of property law more particularly) fits our private law better than its monist counterparts and is also normatively superior to these alternative understandings, such as the exclusion conception of property. By facilitating and possibly enabling a diverse set of interpersonal relationships, a pluralist private law participates in the state’s obligation to empower people to make real choices among viable alternatives, and thus be the authors of their own lives. One implication of the perfectionist nature of private law is that its institutions are subject to ongoing normative and contextual reevaluation and possible reconfiguration, even if properly cautious. They are thereby forced to live up to their promise as valuable options of human flourishing making a significant contribution to worthwhile life plans.

I assume in this Essay that this understanding of private law, which is summarized in Part I, is appealing both in terms of its fit to our legal practice and in terms of its normative desirability. My current mission is to examine whether this understanding, despite its multiplicity, dynamism, and disavowal of neutrality, complies with the rule of law. In pursuing this task, I focus on two faces of the rule of law: as a requirement that the law be capable of guiding its subjects’ behavior, and as a prescription that law may not confer on officials the right to exercise unconstrained power.¹ On its face, a pluralist and perfectionist understanding of private law is vulnerable on both the guidance and

¹ By identifying guidance and constraint as the two faces of the rule of law, I join Martin Krygier’s meta-claim whereby, in order to understand the rule of law, we must begin with its telos. See Martin Krygier, Four Puzzles about the Rule of Law: Why, What, Where? and Who Cares?, in NOMOS L: GETTING TO THE RULE OF LAW 64, 67-73 (2011).
constraint fronts. If this first impression is correct, defending this conception of private law would require a choice between downplaying the significance of the rule of law for private law, or showing that the rule of law deficit generated by a pluralist and perfectionist private law is dwarfed by its normative virtues.

Fortunately, as I hope to show, there is no real friction between private law and neither the guidance nor the constraint strands of the rule of law. Private law pluralism neither requires nor should it imply adopting the dubious nominalistic approach of case by case adjudication, which indeed undermines guidance. Rather, properly understood, private law pluralism supports, even requires, relatively stable and internally coherent—albeit properly narrow—doctrinal categories. Each such private law institution is governed by fairly precise rules alongside informative standards founded on the regulative principles of these institutions, enabling people to predict the consequences of future contingencies and to plan and structure their lives accordingly. These private law institutions are shaped and developed through both legislation and adjudication. Courts are appropriately involved in many of these processes because at least insofar as private law is concerned they typically enjoy no less legitimacy, from either a participation or an accountability perspective, than legislatures. Likewise, while the plurality of values involved in the molding of our private law institutions’ regulative principles makes this a challenging endeavor, we have no grounds for assuming that the requirement of normative contextual inquiry typifying common law adjudication does not reliably constrain this judicial power.

Consequently, no comparison is now required between the virtues of the rule of law and those of my account of private law. To be sure, it is not my claim that no private law system would have scored better than private law pluralism in terms of guidance or constraint. But if the claims just mentioned (which are elaborated in Parts II and III) are correct, private law pluralism seems to score quite high on both fronts. Thus, if one supports a threshold conception of the rule of law, private law pluralism would probably pass it. Even barring such a threshold, meaning a situation wherein the rule of law and substantive virtues must always be balanced, my conclusions imply (assuming that private law pluralism is indeed worth endorsing substantively) that adding the concerns of the rule of law to the picture is unlikely to lead to its abandonment, at least when compared, as on this view it must be, with alternative approaches to private law.²

² While conformity with the rule of law is an inherent value of law, my understanding of the rule of law implies that Joseph Raz is correct when insisting that (1) it is a matter of degree, and (2) it may conflict with other values, so that less conformity may at times be preferable because it helps to realize these values. See Joseph Raz, The Rule of Law and Its Virtues, in The Authority of Law: Essays on Law and Morality 210, 222, 225, 228-29 (1979). Contra Ernest J. Weinrib, The Intelligibility of The Rule of Law, in The Rule of Law: Ideal or Ideology 59 (Allan Hutchinson & Patrick Monahan eds., 1987).
Reconciling private law pluralism and the rule of law does not vindicate the conventional perception that the rule of law is only marginally interesting to private lawyers. Quite the contrary. Much of the resistance of private law theorists to embracing pluralism and perfectionism, despite their saliency in the practice of our private law, rests implicitly on rule of law concerns. Explicitly articulating these worries in the language of the rule of law and demonstrating why a pluralist and perfectionist private law neither fails to guide people’s behavior properly nor sanctions unconstrained judicial power may thus allow private law theorists to celebrate these core features of private law instead of marginalizing or suppressing them. Moreover, this exercise is useful not only to private law theory but also to our understanding of the rule of law. Tracing how a pluralist and perfectionist private law complies with the rule of law may enrich our perspective on both the guidance and the constraint aspects of the rule of law.

I. STRUCTURAL PLURALISM IN PRIVATE LAW

Private law is canonically divided into property, contracts, torts, and unjust enrichment, and nothing in what follows will necessarily challenge this division. Yet, legal actors—judges, practicing lawyers, academics, and lobbyists—sometimes assume that this division carries some important justificatory burden. To take one example, consider the analysis that many lawyers apply to the question of whether copyright is property. Notwithstanding the vigorous debate between advocates of the information industry and champions of the public domain, many players on both sides seem to assume that classifying copyright as a species of property is bound to bolster the claims of the former at the expense of the latter. The (usually implicit) presuppositions of both sides to this debate are that property is a more or less monist concept, that at its core is the owner’s right to exclude, and that this exclusion principle is significant to the point of affecting real life consequences concerning the scope of authors’ rights. Rather than the innocuous cohabitation of various property doctrines under the broad category of property, it is these presuppositions that are the target of my critique, because I consider them both wrong and misleading. Just like its sister categories of contracts, torts, and unjust enrichment, property is far too heterogeneous a field to be guided by one regulative principle (such as exclusion), at least when defined as one that generates significant doctrinal prescriptions. Therefore, classifying copyright as property does not necessarily imply an expansion of the scope of authors’ rights.

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3 For similar expressions of these presuppositions in the context of the so-called new property and in regard to body parts, which are thus subject to the very same line of criticism, see, respectively, J. W. HARRIS, PROPERTY & JUSTICE 151, 304 (1996); ALAN HYDE, BODIES OF LAW 73 (1997).

Structural pluralism in private law begins with a position that is part of the (lost) legacy of American legal realism. According to this stance, broad legal categories like property, contracts, torts, or unjust enrichment are merely convenient “umbrellas” for a more diversified landscape. Along these lines, Herman Oliphant celebrated the traditional common law strategy of employing narrow legal categories, each covering only relatively few human situations. This strategy “divided and minutely subdivided the transactions of life for legal treatment,” with the desirable result of a significant “particularity and minuteness in the [legal] classification of human transactions.” Such narrow categories help to produce “the discrimination necessary for intimacy of treatment,” holding lawyers and judges close to “the actual transactions before them” and thus encouraging them to shape law “close and contemporary” to the human problems they deal with. The traditional common law strategy thereby facilitates one comparative advantage of lawyers (notably judges) in producing legal norms: their daily access to actual human situations and problems in contemporary life. Similar convictions led Karl Llewellyn to insist that wholesale legal categories, such as property, contracts, or torts are “too big to handle” because they encompass too “many heterogeneous items” and, accordingly, to recommend “[t]he making of smaller categories, which allow lawyers to develop the law while “testing it against life-wisdom.” To preempt certain responses, let me clarify that the claim (at least Llewellyn’s claim—and mine) is not that “the equities or sense of the particular case or the particular parties” should be determinative. Rather, it is that decision making should benefit from “the sense and reason of some significantly seen type of life-situation.”

Property law follows the prescriptions of structural pluralism by setting up a number of distinct property institutions. Each governs a specific social context or a given resource and is typified by a particular configuration of property owners’ entitlement corresponding to a particular property value or balance of such values serving as its regulative principle. Thus, some property institutions, such as the fee simple absolute, are

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6 Herman Oliphant, A Return to Stare Decisis, 14 A. B. A. J. 71, 73-74, 159 (1928).

structured along the lines of the Blackstonian view of property as sole and despotic dominion. These institutions are atomistic, competitive, and vindicate people’s negative liberty. Liberal societies justifiably facilitate such property institutions, which serve both as a source of personal well-being and as a domain of individual freedom and independence. In other property institutions, such as marital property, a more communitarian view of property may dominate, with property as a locus of sharing. In yet many others along the strangers-spouses spectrum, shades and hues will be found. In these various categories of cooperative property institutions, both liberty and community are of the essence, and the applicable property configuration includes rights as well as responsibilities. This variety is rich both between and within contexts: it provides more than one option for people who want, for example, to become homeowners, engage in business, or enter into intimate relationships.8

Thus, alongside more atomistic property institutions, 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 close corporation, are mostly about economic gains, including securing efficiencies of economies of scale and risk-spreading, with social benefits merely a (sometimes 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 identity and interpersonal relationships, while the attendant economic benefits are perceived as helpful by-products rather than the primary motive for cooperation. The underlying character of the divergent relationships proves to be the key to explaining the particular property configuration that serves as the default for the property institution at hand.9

Property institutions vary not only according to the social context but also according to the nature of the resource at stake. The resource is significant because its physical characteristics crucially affect its productive use. Thus, for example, the fact that information consumption is generally non-rivalrous implies that, when the resource at hand is information, use may not always necessitate exclusion.10 The nature of the resource is also significant in that society approaches different resources as variously constitutive of their possessors’ identity.11 Accordingly, resources are subject to different property configurations: whereas the law vigorously vindicates people’s control of their

8 See generally Dagan, supra note 4, at chs. 1, 3-4, 8, 10. For a structural pluralist account of contract law, see Hanoch Dagan, Autonomy, Pluralism, and Contract Law Theory, 76 Law & Contemp. Probs. 9 (2013).
9 See Dagan, supra note 4, at ch. 10.
constitutive resources, the more fungible an interest, the less emphasis property law will need to place on its owner’s control.  

To be sure, the similarities among the various property institutions (or the various types of torts, contracts, or unjust enrichments) justify studying them together and treating them as the subject-matter of unified scholarly analysis. Often, however, these similarities merely mean that studying the various institutions of property law requires us to ask similar questions, such as: What is the appropriate scope of an owner’s exclusion? Or what is the optimal governance regime for this property institution? At times, these similarities imply some overlap in the pertinent values that affect the regulative principles of these diverse institutions such as, for example, personhood concerns inform a certain subset of property institutions, while utility is significant in another subset. These similarities ensure that reflecting on the variety of property institutions or the diverse families of contracts, torts, or unjust enrichments is likely to yield some useful cross-fertilization. They do not imply, however, the type of normative coherence needed to justify making membership in one of these wide areas of law a reason for any concrete prescriptive consequence.

Accordingly, the pluralist conception of property as institutions takes the heterogeneity of our existing property doctrines seriously. It understands property as an umbrella for a limited and standardized set of property institutions, which serve as important default frameworks of interpersonal interaction. All these institutions mediate the relationship between owners and non-owners regarding a resource, and in all property institutions owners have some rights to exclude others. This common denominator derives from the role of property in vindicating people’s independence. Alongside this important property value, however, other values also play crucial roles in shaping property institutions. As briefly indicated above, property also can and does serve our commitments to personhood, desert, aggregate welfare, social responsibility, and distributive justice. Different property institutions offer differing configurations of the entitlements constituting the contents of an owner’s rights vis-à-vis others, or a certain type of others, with respect to a given resource. At least at its best, this plurality allows property law to vindicate differing balances among these property values according to their characteristic settings, namely, the type of social relationship in which they are situated and the nature of the resource at stake. Although the cohabitation of different property values and divergent property institutions within property is always contentious, property law—again, at its best—offers principled ways of accommodating this happy plurality.

Thus, what from a monist viewpoint seeking to pigeonhole property law in its entirety under the rule of one regulative principle such as exclusion looks like a random mess, turns out to be a rich mosaic once a perspective of structural pluralism is applied. This mosaic is valuable, indeed indispensable, for people’s autonomy. The fee simple absolute, the property institution that seems to be core for exclusion theorists, facilitates people’s independence and is thus indispensable for liberal societies. But law’s support for other property institutions is just as crucial for autonomy, which is precisely why the conception of property as institutions resists the way exclusion theory privileges this one property institution—the fee simple absolute—and suppresses the others as variations on a common theme, or marginalizes them as peripheral exceptions to a robust core. As Joseph Raz explains, autonomy understood as the ideal that people should, to some degree, be the authors of their own lives, requires not only appropriate mental abilities and independence but also “an adequate range of options.” For autonomy to be meaningful, there must be (other things being equal) “more valuable options than can be chosen, and they must be significantly different,” so that choices involve “tradeoffs, which require relinquishing one good for the sake of another.” Thus, autonomy admits and indeed emphasizes “the value of a large number of greatly differing pursuits among which individuals are free to choose,” and valuing autonomy inevitably “leads to the endorsement of moral pluralism.”

Given the diversity of acceptable human goods from which autonomous people should be able to choose as well as their distinct constitutive values, the state must recognize a sufficiently diverse set of robust frameworks for people to organize their life. And because many of these plural values cannot be realistically actualized without the active support of viable legal institutions, law should, within limits, facilitate the coexistence of various social spheres embodying different modes of valuation. Hence, although the global coherence in monistic conceptions of broad private law fields such as property is appealing, it is reasonable and even desirable for law to adopt more than one set of principles and, consequently, more than one set of coherent doctrines. Accordingly, a structurally pluralist property law includes sufficiently diverse types of institutions, each incorporating a different value or different balance of values. Boundaries between these institutions are open, enabling people to freely choose their...
goals, principles, forms of life, and associations by navigating their way among them. Only in this way can law recognize and promote the individuality-enhancing role of multiplicity.\textsuperscript{18}

Implicit in this account is the twofold role of property institutions and their other private law counterparts. These institutions consolidate people’s expectations when, for example, entering a joint tenancy or a common interest community, or, for that matter, using another person’s copyrighted work. They may also perform an expressive and cultural function, affecting people’s ideals and consequently their preferences regarding these categories of relationships. Both roles 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, enshrined in property law as the \textit{numerus clausus} principle, is particularly acute with regard to the expressive role. This role mandates limiting the number of property institutions because law can effectively express only so many ideal categories of interpersonal relationships.\textsuperscript{19}

Sheer multiplicity is obviously not sufficient. The legal conventions encapsulated in private law (our private law institutions) do not supply merely an assortment of disconnected choices. Rather, they offer a repertoire that responds to various forms of valuable human interaction. Admittedly, regarding many private law institutions, law often falls short of the human ideals they represent. But these gaps only mean that, rather than searching for unifying normative accounts of property, contracts, torts, or unjust enrichment in their entirety, the main task of private law and theory is to distill the distinct human ideals of the various private law institutions, to elucidate the ways each of them contributes to human flourishing, and to offer reform, if needed, that would force these private law institutions to live up to their own implicit promises.\textsuperscript{20}

The pluralist understanding of private law is thus inherently dynamic. While existing private law institutions are and should be the starting point of any analysis of private law questions, they are never frozen. Rather, as institutions structuring and channeling people’s relationships, they are subject to ongoing—albeit properly cautious—normative and contextual re-evaluation and possible reconfiguration. The conservative baseline of this approach derives not only from the pragmatic reality that existing rules cannot be abandoned completely, but also from the recognition that existing law represents a cumulative judicial and legislative experience that deserves respect. In turn, the forward-

\textsuperscript{18} \textit{Cf.} RAZ, \textit{supra} note 15, at 417-18, 425.

\textsuperscript{19} \textit{See} DAGAN, \textit{supra} note 4, at 31-35.

\textsuperscript{20} To be sure, if these promises themselves turn out to be disappointing or, worse, unjust, or if the repertoire of private law institutions is not sufficiently diverse, private law theory should call (respectively) for amending these promises or adding institutions which can enrich its inventory.
looking perspective of this endeavor is premised on an understanding of law as a dynamic enterprise. Its content unfolds through challenges to the desirability of normative underpinnings in private law institutions, their responsiveness to their social context, and their effectiveness in promoting their contextually examined normative goals. In this way, this understanding of private law follows the common law method 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.”

At times, this process helps to fill gaps in the law by prescribing new rules that further bolster and vindicate these goals. At other times, it points out “blemishes” in the existing doctrine, rules that undermine the most illuminating and defensible account of such a private law institution, which should be reformed so that an institution lives up to its own ideals. This reformist potential may and actually has yielded different types of legal reforms throughout the history of property. In some cases, the reform is relatively radical—the abolition of a property form (as was the case, for all practical purposes, with the fee tail form) or an overall reconstruction of its content (as with leaseholds). Sometimes more moderate options are in order, such as restating the doctrine pertaining to a property form in a way that brings its rules closer to its underlying commitments and, in the process, removing indefensible rules. The best recent example for such moderate reform is probably the transformation of the property form of servitudes, discussed in some detail below.

II. THE RULE OF LAW AS GUIDANCE

Henry Smith has recently argued that this pluralist conception of property can hardly be distinguished from the bundle understanding of property. Accordingly, he has claimed, this conception irreparably undermines stability. Referring to my book Property: Values and Institutions, where I developed this conception of property, Smith argues that stability is not “yet another detachable feature or lever to be dialed up or down” or “a factor to be balanced whenever we are deciding on the supposedly separable sticks in the bundle,” but is rather “a feature that can only be evaluated as an aspect of the system.” And while it may be important for the system to serve “values like community,

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22 See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 118-23 (1977).
23 See DUKEMINIER ET AL., PROPERTY 200-01 (7th ed., 2010).
25 See infra text accompanying notes 36-61 and 102-109.
autonomy, efficiency, personhood, labor, and distributive justice,” we must reject “[t]he idea that doctrines are part of an issue-by-issue balancing of [these values].” Smith’s claims rely on the view that the only alternative to the exclusion school of property is “to invoke a plethora of general principles to be balanced as specific situations present themselves.” And given that “ad hocery itself is not a feature that can easily be dialed down,” Smith concludes that nothing separates my account of property from the understanding of property as “an ad hoc, unstructured bundle.”26

To understand Smith’s critique of ad hocery, consider his defense of concepts in property. Concepts “pick out categories” and thus serve as “mental shortcuts,” which are essential given “people’s cognitive limitations” “for prediction, communication, and abstract thought.” Conceptualism, which he claims is rightly associated with formalism, is thus helpful precisely because of its “relative indifference to context”: “To be useful, the concept has to pick out enough facts to serve the purpose in question but not so many that it entails too much complexity.” Smith argues that the objection of legal realists (like me) to defining exclusion “as any baseline or starting point,” which is reminiscent (in his view) of the realists’ “nominalistic impulse,” is misguided because it downplays and may undermine this important function of concepts “in reducing information costs and building the overall architecture of property.” Thus, rejecting the exclusionary conception of property might substitute rigidity with “near-chaos.” Exclusion is “the baseline for delineation purposes,” not because it is “the moral ‘core’ of property” but rather because “it is the general case, and governance is special.” Only the presumption of exclusion, Smith insists, can assure that we keep the bundles “lumpy” and “opaque,” allow property to function as “something more that high transaction costs prevent us from fully achieving by contract,” and avoid “hard-to-predict ripple effects through the entire system.”27

This critique of property pluralism, hence of private law pluralism more generally, must be taken seriously. The conception of property as a formless bundle of sticks open to ad hoc judicial adjustments bears no resemblance to the law of property as lawyers know it or as citizens experience it in everyday life. More generally, and more significantly for my purposes, if—as Smith contends—property (or private law) pluralism necessarily collapses into such unstable nominalism it necessarily undermines the rule of law.

In order to fully appreciate its power, Smith’s critique can be recast in terms of one of the most prominent understandings of the rule of law. In this view, associated mostly with Frederick Hayek and Joseph Raz, the rule of law is organized around the idea that

26 Henry E. Smith, Property is Not Just a Bundle of Rights, 8 ECON. J. WATCH 279, 287 (2011); Id., Property as The Law of Things, 125 HARV. L. REV. 1691, 1705-06 (2012).

“the law should be such that people will be able to be guided by it”; that law should “provide effective guidance.” While seemingly thin, the guidance conception of the rule of law, which is often broken up into lists of formal requirements, is intimately connected with people’s autonomy understood as self-authorship. By requiring that “government in all its actions [be] bound by rules fixed and announced beforehand,” the rule of law enables people “to foresee with fair certainty how the authority will use its coercive power in given circumstances, and to plan [their] affairs on the basis of this knowledge.” Only a relatively stable and predictable law can serve as a “safe basis for individual planning,” which is a prerequisite to people’s ability to “form definite expectations” and plan for the future. Law’s participation in creating and securing stable “frameworks for one’s life and action” increases “[p]redictability in one’s environment,” and therefore “one’s power of action,” thus facilitating people’s “ability to choose styles and forms of life, to fix long-term goals and effectively direct one’s life towards them.”

The guidance conception of the rule of law is often associated with the idea coined by Justice Antonin Scalia that the rule of law is the law of rules. According to this view, in order to “provide maximally effective guides to behavior,” the preferred form of the law must be that of “a ‘rule,’ conceived as a clear prescription that exists prior to its application and that determines appropriate conduct or legal outcomes.” Open-ended standards that allow, let alone require, judges to consult law’s underlying commitments in each case they must settle jeopardize, so the argument goes, this virtue of “the rule of rules”: rules “are designed to translate the implications of normative values into concrete prescriptions,” and must therefore be “sufficiently determinate” so as to be followed by their appliers “without first resolving the very normative questions [they] are designed to settle” or “considering whether the local outcome of the rule conforms to the values [they are] supposed to advance.”

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28 RAZ, supra note 2, at 213, 218.
30 F. A. HAYEK, THE ROAD TO SERFDOM 54 (1944). Relying on Hayek for the conception that founds the rule of law on our commitment to self-authorship is somewhat ironic. Hayek gives no significance to non-government factors, which can deprive people of control over their life in ways as debilitating as those implemented by governments. Furthermore, his views are alien to the Razian notion that government is responsible for actively ensuring a range of choices.
31 RAZ, supra note 2, at 220, 222.
On its face, the “normative dynamism” of the pluralist conception of private law poses a serious threat to the rule of law as guidance. In line with the common law tradition, private law pluralism conceptualizes adjudication as “a process that allows judges to remake the existing doctrinal propositions in the process of applying them.” But if rules “are defeasible when direct application of their background rationales would generate a different result” then “the constraint of the rule *qua* rule seems to disappear.” If normative commitments can always upset existing doctrinal propositions and require that they be discarded or modified, then these propositions seem to be no more than rules of thumb. As Frederick Schauer argues in criticizing the common law tradition, “[r]ules of this sort, capable of modification at the time of application and thus incapable of constraining that application, differ so much from our ordinary conception of rules as guides and constraints that it hardly pays to speak of them as rules at all.”

*I claim that, properly interpreted, private law pluralism conforms to the prescriptions of the guidance conception of the rule of law and also fits this conception’s emphasis on rule-based decision-making insofar as this emphasis is indeed justified (which, as will be shown, it not always is). An example demonstrating many of the characteristics I find in private law pluralism will be helpful.

*Neponsit Prop. Owners’ Ass’n v. Emigrant Indus. Sav. Bank* is the first major decision on the enforceability of the assessment covenant, whose validity at that time (1938) was very much in doubt. This makes *Neponsit* a significant milestone in one of the most important developments of American land law in the last century: the emergence of common interest communities, a property institution that by now is a major form of land ownership. My choice of this property institution and of this particular case are not fortuitous: no one can hope to provide a reasonable account of common interest communities without considering governance, which is obscured in the exclusionary conception of property with its excessive focus on property’s foreign affairs. Moreover, as shown below, *Neponsit* is the landmark decision that enlisted servitudes law into facilitating the governance of this property institution.

35 Frederick Schauer, *Is the Common Law Law?*, 77 CALIF. L. REV. 455, 455-56, 464, 467 (1989). *See also, e.g.*, Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT’L & COMP. L.Q. 52, 68-70 (1996). To be sure, Schauer admits that “rules of thumb are useful guides for prediction and useful to consult when time is short,” but he insists that because rules of thumb can only indicate “the result likely to be reached by the rationales or justifications lying behind the rule . . . they are intrinsically unweighty.” *Id.*, at 467.

36 15 N.E.2d 793 (N.Y. 1938).

37 *See DUKEMINIER ET AL.* supra note 23, at 872.

38 *See Dagan, supra note 16, at *.”
As Justice Lehman noted when delivering the decision of the New York Court of Appeals, Neponsit had unquestionably intended that the covenant should run with the land. The difficulties posed by this case were elsewhere, in the “age-old essentials of a real covenant” set by “ancient rules and precedents,” according to which “a covenant will run with the land and will be enforceable against a subsequent purchaser” only if it “is one ‘touching’ or ‘concerning’ the land with which it runs,” and if “there is ‘privity of estate’ between the promisee or party claiming the benefit of the covenant and the right to enforce it, and the promisor or party who rests under the burden of the covenant.”

Does “an affirmative covenant to pay money for use in connection with, but not upon, the land which it is said is subject to the burden of the covenant” indeed “touches” or “concerns” the land? The “touch and concern” test developed by old English cases is, says the court, “too vague to be of much assistance” and, as such, leaves the enforceability question “‘for the court to determine in the exercise of its best judgment upon the facts of each case.’” The Court mentioned that some prior cases may imply that only negative covenants “which compel the covenanter to submit to some restriction on the use of his property, touch or concern the land” and, therefore, affirmative covenants do not run with the land. It also noted, however, the cases that, notwithstanding this seemingly bright line distinction, enforce “promises to pay money . . . as covenants running with the land, against subsequent holders of the land who took with notice of the covenant.” Acknowledging the difficulty of classifying these exceptions or formulating “a rigid test or definition which will be entirely satisfactory or which can be applied mechanically in all cases,” the Court moves on to state “a reasonable method of approach” to such cases, namely: “that a covenant which runs with the land must affect the legal relations—the advantages and the burdens—of the parties to the covenant as owners of particular parcels of land and not merely as members of the community in general, such as taxpayers or owners of other land.” While the results of this test may still be “a matter of degree,” it is—the Court insists—superior to the negative/affirmative distinction because it does not “exalt technical form over substance,” and because it also accounts well for quite a few prior cases.

Applying this test to the question at hand allows the court to conclude with a rather bright line rule regarding the specific issue of assessment covenants. While the payments at hand serve “public purposes” upon land other than the land conveyed to a grantee’s predecessors in title, through that conveyance grantees obtain “not only title to particular lots, but an easement or right of common enjoyment with other property owners in roads, beaches, public parks or spaces and improvements in the same tract.” In order for the “property owners of these easements or rights” to fully enjoy them in common, these public improvements “must be maintained.” This happy outcome can be achieved only if

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39 Neponsit, 15 N.E.2d at 795.
40 Id. at 795-97.
the burden of paying this cost is “inseparably attached to the land which enjoys the benefit.”

The Court had to pass yet another hurdle. Although “[v]arious definitions have been formulated of ‘privity of estate’ in connection with covenants that run with the land . . . none of such definitions seems to cover the relationship” between a property owners’ association, which “has been organized to receive the sums payable by the property owners and to expend them for the benefit of such owners,” and a subsequent purchaser. The *Neponsit* Court alluded to the rather tortuous privity doctrine, but refused to have its analysis obscured by its technical details. “Only blind adherence to an ancient formula devised to meet entirely different conditions could constrain the court to hold that a corporation formed as a medium for the enjoyment of common rights of property owners owns no property which would benefit by enforcement of common rights and has no cause of action in equity to enforce the covenant upon which such common rights depend.” Thus, the Court held that a corporate plaintiff like *Neponsit*, which “has been formed as a convenient instrument by which the property owners may advance their common interests,” should be able to enforce the covenants at hand.

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*Neponsit*’s set bright line rules on the standing of property owners’ associations and the validity of the assessment covenant. It also prescribed the standard articulating the regulative principle underlying the property form of covenants, thereby serving as the springboard for the development of common interest communities, which are the fastest growing property institution in America. On both fronts, *Neponsit* demonstrates the happy cohabitation of private law pluralism and the guidance conception of the rule of law.

The first and most obvious aspect of *Neponsit* worth mentioning is its bright line rules establishing the validity of the numerous assessment covenants and the standing of homeowners associations, which were (almost literally) necessary preconditions for the subsequent flowering of common interest communities. This simple observation attests that, *pace* Smith’s assertion to the contrary, a pluralist conception of property or of private law can, and indeed should, distance itself from the dubious nominalist approach of case by case adjudication. Private law pluralism neither requires nor should it indeed imply focusing on the equities of the particular case or the particular parties. By the same token, private law pluralism should not imply rule-sensitive particularism allowing judges

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41 *Id.* at 797.

42 *Id.* at 797-98.

43 Later cases indeed show that *Neponsit* is standing for such rules. *See, e.g.*, Lincolnshire Civic Ass’n v. Beach, 64 N.Y.S.2d 248 (N.Y. App. Div. 3d Dep’t 1975); Riverton Community Ass’n v. Myers, 142 A.D.2d 984, 985 (N.Y. App. Div. 4th Dep’t 1992).

http://law.bepress.com/taulwps/art149
to depart from rules whenever the outcome of a particular case so requires, while taking into account both substantive values and the value of preserving the rule’s integrity. Private law pluralism does not suggest substituting clear rules with open-ended discretionary decision-making. Instead, it stands for the proposition that reasoning about private law rules should involve reasoning about the normatively appropriate character of the private law institution at hand—for example, about the relevant property institution’s (common interest communities in my case) social context, or about the nature of the resource at hand—and not about property (or contracts, torts, or unjust enrichment) writ large. Given that the number of property institutions is limited and the role of the property values in their regard is confined to a few deliberative moments, we need not assume that private law pluralism cannot, to a significant extent, be rule-based. And given the function of stability and predictability in the way the institutions of property and of private law more generally consolidate expectations and express ideals of interpersonal relationships, private law pluralism is not only capable of setting bright-line rules, but is in fact, if properly executed, inclined to do so.

Indeed, the identification of legal realism with nominalism, although prevalent, is mistaken. While a small minority among realists does endorse the dubious ad hoc approach of case-by-case adjudication, most realists take a very different position. They realize that law’s use of categories, concepts, and rules is unavoidable, even

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44 See Sherwin, supra note 34, at 1591-94.

45 Cf. Michael Lobban, Legal Theory and Judge Made Law in England, 1850-1920, 40 QUADERNI FIORENTINI 553 (2011); Jeremy Waldron, Stare Decisis and the Rule of Law: A Layered Approach, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1942557. Loban’s survey of the codification debate concludes that common law rules were shown to be different from legislated ones—“[t]hey were more flexible and had to be interpreted not according to a verbal formula, but according to the broader case law context from which they had emerged.” But Loban also demonstrates that advocates of codification had successfully demonstrated that “the common law was not a mass of undigested chaos but that it contained rules which could be identified and articulated.” Id., at 580. Waldron shows how this approach to precedent, as opposed to one that conceptualizes precedent as an exercise of analogical or case-by-case reasoning, follows (among others) our commitment to the rule of law. See also Larry Alexander & Emily Sherwin, Judges as Rule Makers, in COMMON LAW THEORY 27 (Douglas E. Adlin ed. 2007).

46 See supra text accompanying note 19.


48 See, e.g., FRED RODELL, WOE UNTO YOU, LAWYERS! 169-174, 201-202 (1940).

desirable, and that many legal reasoners should in most cases simply follow rules, which is why realists indeed take pains to improve legal rules. Thus, for example, the property values of autonomy, personhood, utility, labor, community, and distributive justice neither are nor should be invoked as reasons for particular outcomes of specific property cases, but rather as reasons for property rules or standards, as shown below. Recognizing these values as the normative infrastructure of property law should advise some legal actors—notably, judges of appellate courts—to occasionally use new cases as triggers for an ongoing refinement of the doctrine and as opportunities for both revisiting the normative viability of existing rules qua rules and re-examining the adequacy of the legal categorization that organizes these rules. In fact, much of Property: Values and Institutions is similarly devoted to the identification of property rules that best promote the property values underlying the property institutions to which they belong.

Besides prescribing rules regarding the validity of assessment covenants and the standing of homeowners associations, Neponsit significantly transformed the doctrinal analysis of covenants more generally. Although not explicitly overruling the complex requirements of touch and concern and of privity, Neponsit explicitly criticized the technical niceties of these doctrines. It pointed out that, even where they took the form of a rule (as in the affirmative/negative covenants distinction) courts have tended to use such a rule merely as a rule of thumb, arguably because of its undue detachment from any reasonable understanding of the regulative principle that should guide this area of the law. Thereby, Neponsit also paved the way for the substitution of the old (vague) tests of touch and concern and of privity with more substantive elements focusing on the role of covenants in the landowners’ endeavor to pre-regulate their relationships, qua landowners, so as to facilitate their common enjoyment of certain public improvements and advance their common interests. This process culminated in the Restatement of Servitudes, which replaces the touch and concern requirement with a list of “public policy” issues that justify invalidating servitudes, and substitutes the privity test with rules that properly accommodate the verification interest of third parties. Both the critical and the reconstructive sides of this part of Neponsit are relevant for my purposes.

In criticizing the preexisting doctrinal rules, the Court reminds us that, at times, a complex set of rules may fail to adequately serve as a guide for action. Regulating a wide range of conduct is complex, and technical non-intuitive complexity may undermine the

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50 See, e.g., LLEWELLYN, A Realistic Jurisprudence, supra note 7, at 27. See also, e.g., Walter Wheeler Cook, Scientific Method and the Law, in AMERICAN LEGAL REALISM 242, 246 (William W. Fisher III et al. eds. 1993).

51 Karl Llewellyn, the most important legal realist, was of course the principal draftsman of article 2 of the Uniform Commercial Code.

guidance value of rules.\footnote{See Richard A. Posner, The Problems of Jurisprudence 48 (1990); Timothy Endicott, The Value of Vagueness, in Philosophical Foundations of Language in the Law 14, 23, 28, 30 (Andrei Marmor & Scott Soames eds., 2011).} In such circumstances (and Neponsit’s reconstructive side comes into play here), less precise norms—vague standards—may be needed, such as Neponsit’s focus on the role of covenants in facilitating landowners’ ability to enjoy the potential benefits of common interest communities. Even though such standards do not provide bright-line instructions, they may still guide people’s actions. As Jeremy Waldron claims, although complying with such a vague standard “may be more onerous than” complying with a bright-line rule, a standard can still be action-guiding, channeling and directing people’s behavior. People aware of this kind of vague standard (or their lawyers who are actually the active players at the relevant moments of common interest community formation) can “[t]ake it on board,” make for themselves “the evaluative judgment that the norm requires,” and thus monitor and modify their behavior accordingly.\footnote{See Jeremy Waldron, Vagueness and the Guidance of Action, in Language in the Law, id., at 58, 65-66, 69.}

This conceptualization of vague standards as appeals to people’s practical reasoning also sheds light on the types of issues wherein standards can be particularly guidance-friendly, as well as on the kind of legal reasoning that can accentuate the guidance potential of standards. It explains the truism that, given normative consensus on the pertinent issue, one may expect broad agreement regarding the application of a standard, and thus expect it to be particularly helpful as a guide.\footnote{See Fuller, supra note 29, at 50, 92; Fallon, supra note 33, at 49-50; John Gardner, Rationality and the Rule of Law in Offences against the Person, 53, Cambridge L.J. 502, 513, 515-17 (1994).} Furthermore, in cases lacking such social agreement, the guidance capacity of standards as appeals to people’s practical reasoning can rely on the significance of judicial reasoning in the common law tradition. Because “the justification of a common law rule is as important as the norm itself,”\footnote{Douglas E. Adlin, Introduction, in Common Law Theory 1, 3 (Douglas E. Adlin ed. 2007).} refining the justification of a norm (or, for my purposes, explaining the role of a regulative principle in promoting the social ideal underlying its private law institution) helps its addressees figure out its intended content and realm of application. Finally, in addition to the benefits these vague standards can provide “as is,” this type of “mud” can, and usually does, create further “crystals” over time, namely, more bright-line rules to implement its prescriptions.\footnote{See Carol M. Rose, Crystals and Mud in Property Law, 40 Stan. L. Rev. 577 (1988).}

Both of these aspects seem to be at work regarding property institutions generally and the Neponsit doctrine more particularly. To see why, recall that by structuring
property as a limited number of identifiable and standardized forms and dividing the other fields of private law along similar lines, unlike the broad and heterogeneous private law fields to which they belong, each of these private law institutions is internally coherent, meaning it is more or less guided by one regulative principle, one value or balance of values. Thus, given social consensus as to this regulative principle, or even without it but with the law clarifying (in constitutive cases such as Neponsit) what this regulative principle is and making it sufficiently stable (meaning it is not revisited so frequently as to make law incapable of guiding behavior), legal subjects or their lawyers are likely to be aware of the “character” of an institution and form their expectations accordingly. (Recall that “the rule of law does not require that law’s guidance never change. It requires that the prospect of change should not make it impossible to use the existing law as a guide.”)

Therefore, insofar as property law or private law more generally cannot use only bright-line rules but must also rely on vague standards, using the various property (or private law) institutions as its building blocks seems optimal from a guidance perspective, at least by comparison to the alternative of using the broad private law fields of property, contracts, torts, and unjust enrichment.

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My claims regarding the guidance potential of private law pluralism that, as I mentioned in Part I, are inspired by legal realism, are ostensibly threatened by the legal realist critique of doctrinal determinacy. Legal realists argued that the irreducible choice among the many potentially applicable doctrinal sources competing to control any given case, all of which can be expanded, contracted, or variously interpreted or elaborated, means that legal doctrine is always open to multiple readings.

Unlike their image in some caricatures of legal realism, however, most realists did not challenge the predictability of

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59 See supra text accompanying note 19.


61 Smith acknowledges that “[o]ptimal concepts [...] have a medium level of generality”—Smith, supra note 27, at *, 2105—but nothing in his critique supports the assertion that the correct level of abstraction in private law is that of such broad and heterogeneous legal fields.

62 See Hanoch Dagan, *The Realist Conception of Law*. 57 U. TORONTO L.J. 607, 614-17 (2007). This radical claim has often been domesticated. Thus, even Frederick Schauer, who recently elaborated on the consequences of taking seriously the realist distinction between real rules and paper rules—but does not consider the effects of multiplicity—ends up with the conclusion that the significance of the realist critique of doctrinal determinacy can only be evaluated empirically. See Frederick Schauer, *Legal Realism Untamed* 20, 28, 32-34, available at http://ssrn.com/abstract=2064837.
legal doctrine. While persuasively insisting that legal doctrine *qua* doctrine can never constrain decision makers, they recognized that the convergence of lawyers’ background understandings at a given time and place generates a significant measure of stability.63 Thus, rather than threatening the compatibility of private law pluralism with the guidance conception of the rule of law, legal realism merely insists that such guidance does not inhere in the doctrine as such and rests instead on the broader social practice of law.64 In the present case, guidance rests on the prevalent understanding of the private law institution’s character, which reflects the regulative principle governing its constitutive rules.

Llewellyn thus argued that, although adjudication is necessarily creative, it is invariably constrained by legal tradition. 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, as we have seen in *Neponsit*, “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 interpretive leeway. Furthermore, they believe that law’s potential dynamism, as long as properly cautious and not too frequent, is laudable because it represents our perennial quest “for better and best law” and, therefore, our judges’ “duty to justice and adjustment,” thus implying an “on-going production and improvement of rules.”65

III. THE RULE OF LAW AS CONSTRAINT

However fortunate this conclusion may appear to be in terms of guidance, it seems to be alarming in terms of another understanding of the rule of law. The conception of the rule of law discussed so far has focused on the subjects of law and their guidance, whereas henceforth it will focus on the government.66

63 Dagan, *supra* note 62, at 647. *See also*, e.g., ALEXANDER & SHERWIN, *supra* note 34, at 32-34.


66 This focus on the government, to be sure, is important because it affects people.
Consider the notion that the rule of law is the flip side of the rule of man. While its literal interpretation, as Albert Ven Dicey put it, is “absurd” because “[p]olitical institutions . . . are made what they are by human voluntary agency,” a more substantive understanding of this contrast implies that the rule of law stands for “the absence of arbitrary power on part of the government.” This characterization explains E.P. Thompson’s spirited claim that the rule of law is “an unqualified human good” since it stands for “the imposing of effective inhibitions upon power and the defense of the citizen from power’s all-intrusive claims.” Unrestrained power is frightening because of its potential devastating impositions; even more fundamentally, unrestrained power renders us mere objects, dominated by the power-wielder. The conception of the rule of law as constraint seeks to address these grave concerns.

Waldron traced the main contours of the idea that the rule of law stands for the absence of unconstrained power. The rule of law in this conception, he explains, corresponds to an “aspirational idea,” wherein law must purport to be guided by “justice and the common good that transcend the self-interest of the powerful.” Its main mission, therefore, is “to correct abuses of power,” to “take the edge off human political power, making it less objectionable, less dangerous, more benign and more respectful.” Accordingly, the core requirement of the rule of law as constraint is to insist on “a particular mode of the exercise of political power: governance through law.” It thus maintains that “people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong.”


68 E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 266 (1975). See also DAVID DUDLEY FIELD, MAGNITUDE AND IMPORTANCE OF LEGAL SCIENCE (address at the opening of the Law School of the University of Chicago, Sept. 21, 1859) REPRINTED IN 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD, at 530 (A. Sprague ed. 1884). But cf. RAZ, supra note 2, at 219 (“Many forms of arbitrary power are compatible with the rule of law”).

69 See Krygier, supra note 1, at 79-80. Parenthetically, note that the conception of the rule of law as constraint is thicker than that of the rule of law as guidance, but serves a thinner understanding of individual autonomy.


72 Waldron, supra note 70, at 6, 31. See also, e.g., Krygier, supra note 1, at 75-76, 78, 82, 88. Cf. David Dyzenhaus, Recrafting the Rule of Law, in RECREATING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER 1, 7, 9 (David Dyzenhaus ed. 1999).

http://law.bepress.com/taulwps/art149
In a sense, insofar as private law pluralism follows the guidance conception of the rule of law it also addresses the concerns of unconstrained judicial power, because the requirement to identify and articulate a general norm imparts some element of impersonality.\(^73\)

But is this an adequate answer to the challenge at hand? Consider the possibility of allowing property doctrines (or their contracts, torts, and unjust enrichment counterparts) to rest on the pertinent property values (liberty, personhood, labor, well-being, community, and distributive justice) without a predetermined formula for measuring and balancing these values. Would not such an option entail unbridled judicial discretion, inviting these unaccountable officials to apply their subjective (or self-serving) normative preferences?\(^74\)

To appreciate this challenge, consider Duncan Kennedy’s account of “the experience of legal reasoning as an activity pursued in a medium that is at once plastic and resistant.” Somewhat along the lines of my claim regarding the conventional rather than purely doctrinal underpinnings of the guidance function of private law pluralism,\(^75\) Kennedy claims that an interpreter of legal materials “works to create or to undo determinacy, rather than simply registering or experiencing it as a given.” Rather than being “‘qualities’ or ‘attributes’ inherent in the norm,” this argument continues, determinacy or indeterminacy are effects “produced contingently by the interaction of the interpreter’s time, energy, and skill with an . . . ‘essential’ nature of the rule [at hand].” And therefore, Kennedy concludes, “we predict a result because we anticipate that no work will be done to destabilize the initial apprehension.”\(^76\)

Some may find this account an alarming affront to the rule of law, posing “the specter of the usurpation of power by an unaccountable elite,” misrepresenting political decisions “as if they were matters of law,” and thus making “the rule of law ideal . . . a fraud.”\(^77\) Kennedy’s response to this worry is that “juristic work intended to inflect the law in the judge’s (or jurist’s) preferred ideological direction” is legitimate.\(^78\) But this

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\(^75\) See supra text accompanying notes 62-64.

\(^76\) DUNCAN KENNEDY, LEGAL REASONING: COLLECTED ESSAYS 3, 159-61, 167 (2007).


\(^78\) KENNEDY, supra note 76, at 163.
defense seems far from comforting. We need not object to such “judicial activism,” Kennedy argues, because we should not expect that the notion of obedience or fidelity to law might help jurists to decide whether to employ “ideologically oriented work strategies” to transform, or at least destabilize, “initial apprehensions of what the materials require.” To think otherwise is to adhere to a “fetishized or reified belief in the rule of law,” rather than to maturely realize that the jurist’s “role constraint is no more than ‘do your best under all the circumstances to do something politically good.’”

* * *

The anxieties that friends of the rule of law as constraint experience in light of statements that collapse law into politics inform many critiques of judge-made law in general and of the common law more particularly. These concerns cannot be easily dismissed even by those (like myself) who agree with Kennedy that law, like politics, cannot avoid addressing normative commitments and furthermore do not deny that politics, like law, must rely on the aspiration to constrain decisionmakers’ power. The reason for this is that the appropriate modes of constraining power in these two realms are different: “participatory politics is . . . situated between the realm of the market (that focuses on preferences) and that of the law (that must always strive for public-regarding justification),” so that in politics—even in its ideal form—“neither convictions nor preferences should be excluded.”

Taking the CLS critique of the rule of law as constraint experience in light of statements that collapse law into politics inform many critiques of judge-made law in general and of the common law more particularly. These concerns cannot be easily dismissed even by those (like myself) who agree with Kennedy that law, like politics, cannot avoid addressing normative commitments and furthermore do not deny that politics, like law, must rely on the aspiration to constrain decisionmakers’ power. The reason for this is that the appropriate modes of constraining power in these two realms are different: “participatory politics is . . . situated between the realm of the market (that focuses on preferences) and that of the law (that must always strive for public-regarding justification),” so that in politics—even in its ideal form—“neither convictions nor preferences should be excluded.”

79 Id., at 6-8, 165, 168.


83 Weinrib, supra note 2, at 60, 63, 70-71, 78, 80-81, 83.
“constitutes, as it were, its own ideal, intelligible from within and capable of serving as constraint upon the radical idealisms which postulate its depreciation.”

Private law, Weinrib claims, especially in the common law tradition, “makes a show of [such] a self-contained rationality.” This is the case because the “adjudicator in a private law dispute [must] follow through and give specificity to the order implicit in the nature of the transactions, and his reasons for judgment are the public announcement of the intimations of this order in the context of a particular occurrence.” This is the case because, by being “presented with two parties only, a plaintiff and a defendant,” the court is “structurally cut off from consideration of overall welfare” and is strictly confined to “the litigants’ assertions of right arising out of particular courses of dealings.” In this way, “[t]he structural features of the form of corrective justice place it conceptually beyond the reach of political determination,” thereby rendering “law intelligible as its own end,” and justifying “the common law’s self-understanding of the adjudicative process which regards the judge’s decision not as the exercise of political choice but as an act of cognition.”

Weinrib’s claim that the rule of law requires private law to adhere to corrective justice and exclude any collective or public values from our understanding of property (or of its sister private law doctrines) is, if successful, devastating to private law pluralism. Fortunately, it is not. The main reason for its lack of success, which I have discussed at some length elsewhere and can only address briefly here, is anticipated by Weinrib himself when he notes that the integrity of this position “depends upon whether [corrective justice is indeed] immune to the projection on to [it] of extrinsic purposes.”

Weinrib significantly illuminates the unique justificatory burden generated by the bipolar structure of private law litigation: private law is structured as a drama between plaintiff and defendant and must therefore require correlativity between the defendant’s liability and the plaintiff’s entitlement. But Weinrib’s more ambitious claim (and the one that is relevant here) concerning private law’s airtight insulation from collective values does not stand. Although private law is not just one of many strategies of regulation, it

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84 Weinrib’s thesis threatens, of course, not only private law pluralism, but also most (if not all) of the competing monistic conceptions of private law.

85 Another significant shortfall of Weinrib’s conception of the rule of law is that it does not properly address the significance of the prospective effects of every significant legal pronouncement, which must imply that judges should be able to justify their decisions to those who will be subject to them even if they are not participating in the judicial drama at hand. See Hanoch Dagan, Law as an Academic Discipline (unpublished manuscript).


87 Weinrib, supra note 2, at 75.
neither is nor can be dissociated from our social values. Quite the contrary: in order for the correlativity inquiry to even begin, and indeed be intelligible, we need to determine what exactly is the content of the parties’ rights, a determination that necessarily invokes our public values. To be sure, not every value can qualify for the task. By and large, only values that participate in the regulative principle that underlies the private law institution at issue, meaning only values that inform our ideal vision of the interpersonal relationship at hand, can legitimately be taken into account. The implication is that the values underlying private law are not identical to those guiding public law, that not only one set of values underlies private law (or any one of its broad fields) in its entirety, and that these values are not to be directly engaged by judges deciding specific cases. At the same time, the implication is also that private law is deeply affected by our public values, so that corrective justice cannot render private law intelligible from within, sealed off from our social ideals.

Indeed, the pivotal role of private law in defining our mutual legitimate claims and expectations in our daily interactions undermines the legitimacy of a private law regime that ignores these values. The parties’ \textit{ex ante} entitlements, from which correlativity must be measured, are best analyzed by reference to our social values. Rather than being divorced or abstracted from our social values, private law both reflects these values and at times even participates in their formation.

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The fact that Weinrib’s strategy is not a panacea able to set aside the concerns of the rule of law as constraint is insufficient to redeem private law pluralism, as it merely reinstates the challenge of constraint. There seem to be two aspects to this challenge: one from legitimacy and the other from determinacy.

The sheer fact that judges, unlike legislators, are often unelected ostensibly suffices to condemn their significant impact on our private law as illegitimate application of power. But the question of legitimacy should be examined in much more nuanced and comparative terms.\footnote{My discussion of legitimacy draws on Hanoch Dagan, \textit{Judges and Property}, in \textit{INTELLECTUAL PROPERTY AND THE COMMON LAW *} (Shyam Balganesh ed. 2012). \textit{Cf.} Scott J. Shapiro, \textit{Legality} 331, 358 (2011).} To figure out the proper domain of judicial creation and modification of private law institutions, if any, we need to examine potential bases for the legitimacy of judicial rulemaking in private law matters. Though I could not possibly hope to provide here an adequate account of legitimacy in a liberal democracy, the following remarks should suffice to support the claim that the legitimate scope of judicial rulemaking in private law is in fact rather broad.\footnote{Note that I do not make a claim for judicial supremacy, as in judicial review. My sole focus is on the legitimacy of judicial rule-making where legislatures are silent.}

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Consider first the notion that state power can be legitimate only if it is a product of its citizens’ co-authorship. To be meaningful, the ideal of co-authoring the normative commitments that (necessarily) serve as the foundation of our private law entitlements must not be axiomatically attached solely to the legislative process.\(^90\) 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 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 private 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.\(^91\) But the broad or representative participation that might significantly foster collective co-authorship does not seem typical of legislation on many private law matters. Take (again) property: some property doctrines, such as the law of common interest communities that serves as my main example in this Essay, may seem too mundane as a subject for robust public deliberation.\(^92\) By contrast, when 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 tends to be dominated by interest groups promoting narrow distributive goals,\(^93\) 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 it invites disagreements on questions of facts, opinion, and law. It thereby creates a forum where the judges’ normative and empirical horizons are constantly challenged by the conflicting perspectives of the participating parties, which present a microcosm of the social

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\(^90\) Even if one insists that such an axiom is justified in the discussion of democracy-based legitimacy, it is out of place in the discussion of legitimacy in a democracy. As the text implies, the latter, broader type of legitimacy that concerns me here accommodates differing types of citizens’ participation and of decision-makers’ accountability.

\(^91\) Another reason relates to comparative costs: voters “often face a far less expensive road [than litigants] to registering their needs… in the political process.” NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 127 (1991).

\(^92\) To pre-empt 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.

\(^93\) See generally JESSICA LITMAN, DIGITAL COPYRIGHT (2001).
dilemma at hand. Moreover, as Neil Komesar shows regarding tort law, adjudication sometimes seems to provide a qualitatively better forum for the participation of affected parties. One instance are cases showing 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. Certain important developments of property institutions, such as marital property, cohabitation, and leaseholds, by the judiciary, may also fit well into this category.

But legitimacy should perhaps require only decision-makers’ accountability rather than citizens’ participation. 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 private law matters immediately and detrimentally affect legislators’ responsiveness as well. If most or many private law 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.” 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.

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Even if judges can legitimately affect our private law, is granting judges the power to apply a rather diverse set of collective values not tantamount to inviting them to apply

95 See KOMESAR, supra note 91, at 135-36.
subjective and thus illegitimate application of power? I do not think so. Different types of human interactions and, consequently, different categories of private law doctrines, call for different balances of the (indeed limited number of) values relevant to any given private law institution. Here, as elsewhere, the requirement to explicitly apply judgment, which needs to be normatively and contextually justified, is a real constraint. In some categories of cases, this contextual normative inquiry might indeed lead to a standoff, with reason unable to adjudicate between two or more competing accounts. The relevant question, however, is not whether such cases are possible. The sheer existence of hard cases scarcely undermines the determinacy or the integrity of our private law, especially given that purely doctrinal reasoning, the main alternative to openly normative legal reasoning, is hopelessly malleable and thus indeterminate. Rather, the question is whether cases of contextual-normative-deadlock are prevalent enough so that they threaten a conception of private law premised on these guidelines, that is, whether we are indeed unable to use reason as the arbiter for identifying the most normatively desirable regulative principle of the private law institution at hand. As I attempted to demonstrate in my books on property and on restitution, a sufficiently robust contextual normative account can often have quite sharp doctrinal teeth. Although some of my analyses may be controversial, they can hardly be challenged by the sheer difficulty of measuring or balancing the private law values I employ or by the possibility that there are other pertinent values. To challenge my approach, a detailed demonstration of the superiority of a competing account is needed, and a blanket claim that a better account will always be available will not suffice.

Let me again take an example, then, from the law of common interest communities. My example this time deals with another constitutive characteristic of this important property institution, which is improperly marginalized in the exclusionary conception of property: inclusion. Since the landmark case of Shelley v. Kraemer held that judicial enforcement of racially restrictive covenants is an exercise of state action that violates the Fourteenth Amendment, some rights to entry in defiance of the property owners’ will have become inherent in a significant segment of housing law in America. With the enactment of the Fair Housing Act, discrimination in the sale or rental of residential


99 See supra text accompanying note 62.

100 See Dagan, supra note 4 and Dagan, supra note 34.


103 Fair Housing Act, 42 U.S.C. 3601. See also Civil Rights Act of 1866, 42 USC §1982, which prescribes that “all citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey
dwellings on the basis of race, color, religion, sex, familial status, national origin, or handicap is indeed currently prohibited.

Given its constitutional origin, the right to fair housing is usually analyzed as an external qualification of the owner’s exclusionary prerogative, but rather than as an internal entailment of the meaning of the right to property in common interest communities (or of landlords’ property right). But this seems to be wrong or at least incomplete because, as Carol Rose insisted, Shelley poses “a state action enigma”: both prior and later decisions show that the bare potential for judicial enforcement of private arrangements and preferences does not transform them into state action. While Rose’s specific solution to this puzzle seems to me unsatisfactory, her more general claim that Shelley presents “some of the best instincts of property law” is precise. The non-owners’ right of entry to common interest communities is indeed intrinsic to this property institution and should not be perceived as an external limitation or imposition.

To see why, and to appreciate the constraining power of contextual normative reasoning regarding private law institutions, consider the way the right to entry to common interest communities is grounded in the very reasons—the very same property values—that justify the support of our legal system for this property institution. Consider, in other words, why Shelley is correct notwithstanding the state action enigma, and why the basic entry rule set by the Fair Housing Act should likewise be treated as a real and personal property.” Jones v. Alfred Mayer Co., 392 U.S. 409 (1968) held that this prescription applies not only to public discrimination, but also to private discrimination.


105 Rose suggested that this puzzle can be solved by reference to the welfarist commitment of property law to minimize negative externalities on third parties who may not share the preferences of the existing transactors. But, as Rose herself admits, making the protection of third parties from the idiosyncratic preferences of current transactors the core of property raises difficult questions for cases such as Shelley, where third parties are likely to share these current preferences.

106 Carol Rose, Shelley v. Kraemer, in PROPERTY STORIES 169 (Gerald Korngold & Andrew P. Morriss eds., 2004).

107 Cf. Noble v. Alley [1951] S.C.R. 64, invalidating racially based restrictive covenants because they referred to the identity of users/owners rather than to any actual use of the pertinent land. Not only is this reasoning from within property, but it also (implicitly) relies on the raison d’être of the property institution of covenants as a means to facilitate landowners’ ability to commonly enjoy the benefits of private land use controls along the lines discussed (supra text accompanying notes 53-54). Understanding covenants in these terms does, on its face, make references to the identity of users and owners suspicious.

108 The following paragraphs draw on DAGAN, supra note 4, at ch.2. See also Sophia Moreau, What is Discrimination, 38 PHIL. & PUB. AFF. 143 (2010).
statutory specification of the regulative principle of common interest communities (refined in *Neponsit*) rather than as a public law intervention.

Consider first the justification common to all property institutions as means for securing people’s ability to be the authors of their lives. Limiting the opportunities of certain people to buy or lease houses or apartments in a certain geographical area undermines this role of property in facilitating people’s self-determination. For this reason, exclusionary practices that unreasonably limit the mobility of the excluded persons (a mobility crucial to them in forming, revising, and pursuing their own ends) must be invalidated. In some settings, the concern for the autonomy of entrants is defeated by the autonomy and personhood concerns of property owners: the Fair Housing Act vigorously protects the right to exclude in intimate settings, where the personhood value of the owner (potential landlord) trumps any possible interest of potential tenants. The Act, however, reverses this rule and recognizes a rather capacious right to entry where the lessor is a commercial entity. Because negative liberty is not an ultimate value but rather a means for self-determination, a claim by one who wishes to establish her life in a certain locus must override that of someone who perceives that property as a fungible asset.

Thinking about common-interests communities as a property institution aimed at fostering the community value of property, thus conceptualizing covenants along the lines of the regulative principle identified in *Neponsit*, leads to similar conclusions. This perspective sanctions exclusionary practices of residential communities only in limited circumstances. In particular, it implies that law should not authorize such practices insofar as they are used against, rather than by, cultural minority groups. It also requires that the law should make sure that the limits on entry applied by “thin” common interest communities are indeed necessary in order to ensure that “bad cooperators” likely to jeopardize the success of the commons property are excluded. This means that courts need to supervise both the admissions criteria of such communities and the way they are practiced on the ground. One implication of this prescription is that rejections of applicants for admissions must be reasoned, and that the reasons must be sufficiently detailed so that both their evaluative and factual components can be properly scrutinized.

**CONCLUDING REMARKS**

The most charitable reading of private law theorists’ resistance to embrace the structural pluralism typical of private law is the concern that, by endorsing this feature of our law, they could end up exacerbating its deficiencies concerning both the conception of the rule

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109 See the Act’s exceptions for intimate associations: single families (§3603(b)(1)) and small owner-occupied multiple unit dwellings (§3603(b)(2)).
of law as guidance and its understanding as constraint. As I tried to show in the preceding pages, however, these concerns are exaggerated if not simply wrong.

Properly interpreted, private law pluralism does not endorse ad hoc decision making, which is indeed detrimental to guidance, and is often supportive of rule-based decision making. As any (sensible) understanding of the rule of law as guidance acknowledges, however, private law pluralism does need to resort to standards in certain cases. Rather than undermining guidance, however, its standards are frequently conducive to guidance because they build on the character of the private law institution at hand, which is typically the basis of most people’s expectations.

Private law pluralism need not raise serious concerns of unconstrained judicial power either. To be sure, legislatures in a democracy can legitimately play a role in the development of private law, which shapes and reshapes our social order, adjusting it to new circumstances, challenges, and opportunities. In some contexts, judges should possibly refrain from taking part in this drama,110 but in many others, courts enjoy no less legitimacy—from a participation or from an accountability perspective—in the shaping of our private law institutions. Likewise, while the plurality of values involved in the molding of these institutions’ regulative principles makes the enterprise challenging, we have no grounds for assuming that a normative contextual inquiry cannot lead to just and principled results.

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110 Typical types of cases calling for significant deference are those of newly-enacted private law legislation, as well as of private law innovations that require a regulatory structure, depend on specialized knowledge available elsewhere, or involve excessive widespread redistribution. See Dagan, supra note 88, at *-*.