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The Rule of Reason in Property Law

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The inquiry would be adequately made if it should attain the clarity that accords with the subject matter. . . The noble things and the just things, which the political art examines, admit of much dispute and variability. . . ¶ It would certainly be desirable enough, then, if one who speaks about and on the basis of such things demonstrate the truth roughly and in outline, and if, in speaking about and on the basis of things that are for the most part so, one draw conclusions of that sort as well.¹

Aristotle

[S]teadfast adherence to principle, with rigorous disregard of the conflicting exception, is a sure mode of attaining the maximum of attainable truth, in any long sequence of time. The practice, *in mass*, is therefore philosophical; but it is not the less certain that it engenders vast individual error.²

Edgar Allan Poe

Scholars often remark that property rights cannot work if they are not clear.³ After all, we cannot use or transfer property if we do not know who owns it. If title to real estate is not clear, disputes over control rights will arise, impeding both development and marketability. If this intuition is correct, we might expect a mature property system to be based on clear rules defining who owns property and what they can do with it. Vague standards would pass away over time and be replaced by predictable, rigid rules of law. Such rules would not only better protect the rights and liberties of owners but would promote desirable investment in the real estate market.⁴

¹ ARISTOTLE'S NICOMACHEAN ETHICS 3 (Robert C. Bartlett & Susan D. Collins trans., Univ. of Chi. Press 2011).

² Edgar Allan Poe, *Mystery of Marie Roget*, in TALES 151, 174-75 (1845), available at <http://www.eapoe.org/works/tales/rogetb.htm>.

³ See, e.g., Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015, 1022 (2008) ("There cannot be ownership in land without some clear idea of who owns the land, what land is owned, and what rights accrue to the owner as a result of her status."); Steven J. Eagle, *Private Property, Development and Freedom: On Taking Our Own Advice*, 59 SMU L. REV. 345, 352 (2006) ("Individuals working to grow their assets must be supported by clear laws defining their property rights"); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1797 (2004) [hereinafter *Property and Property Rules*] ("Property rules have informational advantages").

⁴ On the crucial importance of the institution of property in lowering information costs in knowing who has presumptive control over predictable packages of resources

Recent developments show that these expectations may be misplaced. First, contrary to the intuitive view, the subprime crisis reveals that clear rules may neither promote predictability nor clarify property rights. The securitization of subprime mortgages occurred against a background of relatively clear rules; for example, put your property transactions in writing and record them in the registry of deeds. These rules were intended to clarify title to real property and to publicize the relevant information in an accessible government office. But the banks did not consistently follow these clear rules. Many not only bypassed public recording offices — thus privatizing information about mortgage ownership — but they carelessly failed to formalize all the mortgage transactions involved in the securitization process. We are left today with clouded titles, rampant litigation, and insecure property rights. Clear rules did not lead either to clear titles or predictable results.

Second, and also contrary to the intuitive view, property law has always contained flexible standards as well as clear rules. Nor has it relegated those standards to peripheral or unimportant areas of the law.⁵ More surprising still, property law seems to be moving away

in the world, see the work of Henry Smith and Thomas Merrill. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1856-57 (2007) [hereinafter *Morality of Property*] (arguing that property rules must be simple to cohere with ordinary morality and to promote widely accepted norms in order to lower the costs of recognizing and complying with property rights); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 24-42 (2000) [hereinafter *Optimal Standardization*] (limiting the packages of property rights that can be created minimizes information costs by enabling clear communication of what rights are associated with ownership); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 359, 385-88 (2000) [hereinafter *What Happened*] (arguing that because property rights must be communicated to everyone, they must come in standardized packages to minimize the costs of communicating what rights are associated with ownership); Henry E. Smith, *Exclusion v. Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 5453, 5469-5471, 5486-5487 (2002) [hereinafter *Exclusion v. Governance*] (noting that broad exclusion strategies lower the cost of delineating property rights and communicating them to the world); Smith, *Property and Property Rules*, *supra* note 3, at 1753-74 (explaining the information cost advantages of property rules).

⁵ On the crucial role of standards in property law, see Amnon Lehari, *The Dynamic Law of Property: Theorizing the Role of Legal Standards*, 42 RUTGERS L.J. 81 (2010); John Lovett, *Love, Loyalty and the Louisiana Civil Code: Rules, Standards and Hybrid Discretion in a Mixed Jurisdiction*, 72 LA. L. REV. 923, 930-40 (2012); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577-78 (1988); Henry E. Smith, *Community and Custom in Property*, in 10 THEORETICAL INQUIRIES IN LAW 5, 15-16 (2008) [hereinafter *Community and Custom*]; Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. 1285 (2008).

from clear rules and toward flexible standards. Over the last fifty years or so, both courts and legislatures have discarded many technical rules of traditional property law and replaced them, not with modernized rules, but with standards of one form or another. Reasonableness tests now abound in property law. If predictability is crucial to property law — and if the way to achieve predictability is to adopt clear rules — then property law is in a sorry state and getting worse. If so, we should reverse course at once. Yet the intuitive view may well be wrong. Rules may be less important and standards more important in property law than we might have thought.

Empirical analysis of the way property rules operate in real cases demonstrates that standards perform core functions in the property law system. Contrary to the intuitive view, rules do not always promote predictability. Because justified expectations are based on both informal and formal sources, predictability will sometimes be improved by framing property doctrines in the form of a standard. For example, when expectations are founded on informal arrangements such as longstanding borders, strict application of the statute of frauds may destabilize property rights rather than protect them. While rules seem to make it easier for lawyers to advise clients about property rights, rules may undermine the predictability of property rights if actors in the real world base their expectations on factors other than those legal rules. They may do so because of mistake, ignorance of the law, the high cost of complying with the law, or greed. In such cases, reduction of uncertainty in one area or for one party might increase uncertainty in another area or for another party. Uniform application of rigid rules does not lead to a uniform increase in predictability across the board. Because of the importance of informal expectations for property rights, the conventional wisdom is upside down; *when informal expectations diverge from formal rules, standards promote certainty while rules undermine it.*

On rules and standards generally, see generally Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 16 (1967); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L. J. 557 (1992) [hereinafter *Rules Versus Standards*]; Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J. L. & PUB. POL'Y 645 (1991); Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010); Smith, *Property and Property Rules*, *supra* note 3; Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953 (1995); Jeremy Waldron, *Vagueness and the Guidance of Action* (New York Univ. Sch. of Law, Pub. Law Research Paper No. 10-81), available at <http://ssrn.com/abstract=1699963>. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1994) (on the divergence between law on the books and law on the ground).

Empirical analysis also shows that rules cannot function without standards to supplement them. Because the interpretation and application of legal rules requires moral and pragmatic judgment, property law cannot operate in *any* sphere without standards. Nor are standards as formless or vague as many imagine; they achieve a high degree of predictability through the use of precedent, exemplars, and presumptions. Examination of real cases thus shows that rules are less predictable and standards more predictable than we might have thought. In addition, property law benefits from ambiguity as well as clarity. Standards promote useful moral reflection and deter socially destructive behavior. Fuzziness at the edges of rules often prompts better decision making, both by market actors and by judges. Standards allow property rights to be adjusted when they conflict with the property or personal rights of others or when the exercise of property rights cause externalities or systemic disturbances that undermine the infrastructure of the property system. Finally, predictability is only one of various functions of property law; it is not the only thing that matters to us. We care about getting things right and that often requires us to reformulate rules when they lead to untoward results.

“Rules” and “reasonableness” are not opposites. Antitrust law has long operated under a regime that identifies some practices as *per se* illegal while others are subject to a “rule of reason” that balances procompetitive and anticompetitive effects of agreements that restrain trade.⁶ Real property law works the same way. Some issues are governed by presumptively rigid rules, but it is always open to question whether the rule should apply in a particular context. And when things are too complicated to canvass in a mechanical approach, we turn to rules of reason. It turns out that the difference between rigid rules and flexible standards is far less clear than theorists imagine. While it is sometimes useful to consider rules and standards as ideal types, it is counterproductive and unrealistic to assume that rules operate in the real world in a mechanical fashion or to assume that standards provide no guidance or constraint.

Whether we use rules or standards, many cases are easy; we know that they are covered by the rule of law at issue. However, when we have reason to question whether a rule should apply to a case, standards *inevitably* come into play. Hard cases may or may not make bad law, but they cannot be adjudicated without appealing to standards. And there is no rule for determining which cases are hard

⁶ JOSEPH WILLIAM SINGER, PROPERTY § 6.7.3, at 283-84 (3d ed. 2010) [hereinafter PROPERTY].

and which are easy. Moreover, for certain classes of property law issues, flexible standards work far better than rigid rules. “Rules of reason” are an essential component of a mature property law system and I want to explain why.

Part I explains and criticizes the conventional analysis of the relative virtues and vices of rules and standards. Because rules do not determine their own scope and are limited by competing norms, they are less predictable than we may imagine. Because standards are elaborated through precedent, exemplars, and presumptions, they are more predictable than we may imagine. Part II documents the central role standards play in property law. Standards form an increasingly important part of property law in every area. Standards define the scope of all important property rights, including the right to exclude, immunity from loss, freedom to use property, and the power to transfer property rights. Part III summarizes some of the core functions that standards serve in the property law system. Standards perform *systemic functions* that shape the infrastructure and the outer contours of the property system by: (1) setting *minimum standards* compatible with the norms of a free and democratic society; (2) *protecting the justified expectations of consumers*; and (3) responding to *externalities* and *systemic effects* of the exercise of property rights. Standards also determine the *scope* of property rights by: (4) *distinguishing cases*; (5) resolving *conflicting norms*; (6) *excusing mistakes*; (7) escaping the “*dead hand*” of the past; and (8) deterring the “*bad man*” from abusing property rights. Part IV concludes with thoughts on what rules of reason teach us about the rule of law.

I. RULES AND STANDARDS

A. *Conventional Analysis*

Duncan Kennedy coined the terminology we use today to distinguish rules and standards.⁷ He identified and systematized their basic virtues and vices, focusing on the trade-off between predictability and flexibility. John Lovett provides a concise summary of the most important arguments.⁸ Rules require “the decision maker to focus her attention on a narrowly circumscribed set of applicable facts and then to take those facts and mechanistically feed them into a precisely engineered calculus,” generating a clear answer and leaving

⁷ Kennedy, *supra* note 5, at 1687-1701.

⁸ A great summary of this analysis can be found in Lovett, *supra* note 5, at 930-40.

no room for discretion, judgment, or choice.⁹ In contrast, standards require judgment to be exercised to apply “a general background principle or policy goal to a particular factual situation taking into account *all* of the relevant facts and circumstances.”¹⁰

Conventional wisdom teaches that rules are predictable but over- and under-inclusive, while standards are flexible but less predictable. The predictability provided by rules allows actors to invest in reliance on clear rules of the game, avoids unfair surprise, controls the arbitrary discretion of judges, and promotes equality before the law by treating like cases alike.¹¹ Because rules generalize, there will be some cases that reach “wrong” results under any rule system. This is partly because we are not smart enough to get the rules exactly right and partly because both our moral intuitions and policy goals are too complex to be reduced to easily administrable rules. The generalizations provided by rules come at the cost of accuracy; we use them because the benefits of predictability often outweigh the costs of imprecision. Yet rules may cause both injustice and inefficiency if inappropriately shaped. Even the best crafted rules may require results that diverge from justified expectations. Rigid rules fail to protect those who were ignorant of the law or failed to conform their conduct to its dictates even if their ignorance was understandable and justifiable. Because their application may be experienced as essentially arbitrary, rules may therefore lessen confidence in the legal system and even reduce incentives to voluntarily comply with law.

Standards, on the other hand, allow us to consider all relevant factors and come to what we consider the right result in particular cases. By exercising judgment under a covering standard, judges can avoid the unfair results mandated by rigid rules, as well as the inefficiencies that result from applying a rule even when its benefits are outweighed by its costs.¹² This potential increase in fairness and efficiency comes at the cost of predictability; rather than mechanical application of a clear rule, individuals must “guess” what judges will do when confronted with a case. By requiring judgment, standards therefore make it harder for individuals to plan, for lawyers to advise clients about their rights, and for judges to decide cases. Standards increase the possibility that like cases will not be treated alike and that judges may exercise inappropriate favoritism. Standards may not only

⁹ *Id.* at 930.

¹⁰ *Id.* at 933 (emphasis added).

¹¹ *Id.* at 936-40.

¹² *Id.* at 936.

mire private actors in uncertainty but lower confidence in the court system and the rule of law.

Duncan Kennedy noted that rules facilitate planning but they also can promote both unfairness and inefficiency because they allow “the bad man to walk the line.”¹³ If one is acting within the scope of a rule and knows that it will be applied mechanically, then one can be certain there will be no legal sanction for one’s conduct. Rules grant the luxury of indifference.¹⁴ They invite self-interested persons to act like Holmes’s ‘bad man’ and go forward with harmful but lawful conduct.¹⁵ In contrast, standards promote attentiveness to the effects of one’s actions on others and may thereby promote an other-regarding altruist ethical stance.¹⁶ Their vagueness gives actors incentives to imagine how their conduct will be judged by others, thus inducing them to avoid actions judges or juries will view with disfavor.¹⁷ For this reason, Seanna Shiffrin and Jeremy Waldron argue that standards promote moral introspection and justification.¹⁸ Both rules and standards require individuals to think before they act but they do so in different ways. Rules require actors to be attentive to what is prohibited, but standards require actors to engage in moral

¹³ Kennedy, *supra* note 5, at 1695-96.

¹⁴ See Joseph William Singer, *Corporate Responsibility in a Free and Democratic Society*, 58 CASE W. RES. L. REV. 1031, 1036-39 (2008) [hereinafter *Corporate Responsibility*] (explaining the effects of standards in the law of contracts, torts, and property that promote attentiveness to the effects of one’s actions on others). *But see* Claire A. Hill, *Justification Norms Under Uncertainty: A Preliminary Inquiry*, 17 CONN. INS. L.J. 27, 28 (2010) (noting that the obligation to justify one’s actions may not lead to better decisions if one follows group norms that maximize groups interests but impose negative externalities on society).

¹⁵ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

¹⁶ See Singer, *Corporate Responsibility*, *supra* note 14 (explaining the effects of standards in the law of contracts, torts, and property that promote attentiveness to the effects of one’s actions on others). *But see* Hill, *supra* note 14 (noting that the obligation to justify one’s actions may not lead to better decisions if one follows group norms that maximize group interests but impose negative externalities on society).

¹⁷ Louis Kaplow applied this argument to the regulatory takings context, arguing that too rigid a protection against changes in property law allows owners to engage in socially destructive activities, while a standard-based regulatory takings doctrine gives owners incentives to refrain from engaging in development they can anticipate would be judged harshly by independent observers and thus better promote efficient developments and discourage inefficient ones. Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 520-52 (1986).

¹⁸ See Shiffrin, *supra* note 5, at 1216 (arguing that standards induce moral reflection); *see also* Lehari, *supra* note 5, at 116-20 (explaining the advantages of “value-based jurisprudence” in the property law area). *See generally* Waldron, *supra* note 5 (explaining how law guides action even when it is vague).

reflection to determine whether they could justify their actions to those affected by them or to those empowered to judge them.¹⁹

Louis Kaplow has argued that rules require greater effort to construct while standards allow postponing lawmaking until the application stage.²⁰ Rules are therefore more costly than standards to make *ex ante* but they lower planning costs for individuals because of their specificity. Standards are easier for lawmakers to create because they delay real choices until later at the *ex post* stage after disaster has struck or a dispute has emerged; however, because standards are more uncertain than rules, they increase planning costs for individuals at the *ex ante* stage. The choice between rules and standards therefore represents a tradeoff between *ex ante* and *ex post* planning costs and between costs for lawmakers versus costs for market actors.²¹

Property law scholars generally presume that rules are crucial to property because they are more predictable than standards. At the same time, the scholars recognize that property law cannot function without standards. Henry Smith and Thomas Merrill have emphasized the structural function that clear rules of ownership play while acknowledging the place of standards. They argue that both information and transaction costs can be minimized by allocating broad decisionmaking authority over property to owners with clear rights to exclude.²² “Exclusion” strategies depend on clear rules to work and they form the basic infrastructure of the property system. While they may be clunky and require reallocation to achieve efficient

¹⁹ For a discussion on the way the obligation to give reasons shapes conduct, see Frederick E. Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 642-45, 648-49 (1995).

²⁰ Kaplow, *Rules Versus Standards*, *supra* note 5, at 579-86.

²¹ Kaplow distinguished between the clarity of legal rules and their complexity. While rules are clearer than standards, they are not always simpler or easier to administer. Rules, after all, can pile on each other in a messy heap — consider the Internal Revenue Code. Viewed in this light, rules may sometimes be more complex (and harder to administer) than a simple standard. Conversely, standards can be simple (“act reasonably”) or they can be structured to include multiple factors and tests (think of the *Penn Central* test for regulatory takings) and both less clear and more complex than simple rules. See Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150, 150-51 (1995) [hereinafter *Optimal Complexity*]; Kaplow, *Rules Versus Standards*, *supra* note 5, at 586-96.

²² See Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) (arguing that the right to exclude is the defining characteristic of property); Smith, *Exclusion v. Governance*, *supra* note 4 (arguing that governance strategies replace exclusionary strategies only when the benefits of refined rule application outweigh the low information costs associated with broad exclusionary rights); Smith, *Property and Property Rules*, *supra* note 3, at 1753-74; Merrill & Smith, *Optimal Standardization*, *supra* note 4, at 24-42; Merrill & Smith, *What Happened*, *supra* note 4, at 385-88.

results, they save the costs of case-by-case judicial determinations of the best use of property. Because owners can reallocate rights through contract, we do not need judicially-enforced standards to achieve flexibility.

Merrill and Smith argue that standards are reserved for unusual contexts where transaction costs are high, the benefits of getting it right outweigh the costs of reduced predictability, and courts are capable of making reasonable contextual decisions.²³ So-called “governance strategies” are the exception that proves the rule. We use standards only when rules cannot function or where there are things we care about that are more important than predictability. Nuisance law, for example, sacrifices predictability so that neighbors can live together in peace. It is simply not possible to make a list of all the ways people can unreasonably interfere with the use and enjoyment of neighboring property and the interest in the quiet enjoyment of land is important enough to protect despite the ambiguity and unpredictability it engenders.

Carol Rose noticed an historical swing back and forth between rules and standards in property law and concluded that this swing was inevitable.²⁴ She argued that we start with rules, adopting them when we are in our planning mode, hoping to clarify things and promote certainty and security. However, we move to standards when we are in our adjudication mode dealing with a conflict after “things have gone awry.”²⁵ When rules allow “scoundrels” to cheat “fools,” judges jettison rigid rules to avoid “forfeiture.”²⁶ They do so by adopting

²³ Merrill & Smith, *Optimal Standardization*, *supra* note 4, at 24-42; Smith, *Exclusion v. Governance*, *supra* note 4, at 474-78.

²⁴ Rose, *supra* note 5, at 580-604.

²⁵ *Id.* at 603.

²⁶ In describing the cases of “forfeiture” where a sharp character tricks a gullible one out of resources, Rose suggests that we are likely to find “[f]ools on the one side and sharp dealers on the other.” *Id.* at 600. Rose acknowledges but deemphasizes the fact that the pattern of rules turning into standards and back again “recurs so often in so many areas, it is difficult to believe that it is due to abnormal foolishness or turpitude.” *Id.* at 593. While admitting this, her explanation of the movement from rules to standards focuses on cases involving “fools” and “ninnies” on the one hand and “scoundrels” on the other. *Id.* at 587, 601 (discussing the “fool/scoundrel relationship”). Sometimes she is right that the cases that move judges do involve Holmes’s proverbial “bad man,” but sometimes the result seems unjust even in the absence of a bad actor. Conversely, it is important to see that we are usually dealing, not with “fools,” but with ordinary people who trusted those with whom they dealt — and felt entitled to do so. The courts protect them, not because they were stupid or foolish or incompetent, but because they had a right to trust those with whom they were dealing. If the prevailing rule of law was not on their side, it was the fault of the law, not any incompetence or immaturity on their part.

muddy standards like “reasonableness” and “good faith.” The benefits of predictability look good at the planning stage but the costs in injustice loom large at the adjudication stage. Because standards make rights unpredictable, market actors try to recreate the predictability by contracts that waive such muddy entitlements. The courts respond by invalidating such waivers as a violation of public policy, again sacrificing certainty for justice, and so the historical oscillation continues.

The conventional analysis assumes that rules and standards are very different from each other. Rules are rigid and standards are flexible. Rules appear to be at the core of property law because of its need to determine who owns resources before they can be used or exchanged, but we adopt standards to deal with problems that rules cannot solve.²⁷ Although none of the scholars puts it this way exactly, I believe they teach us that standards displace rules when rules *deprive* people of property rights rather than protecting them. We adopt standards to protect us from being defrauded or cheated out of our property or to promote quiet enjoyment. But in protecting these interests through standards, the scholars all argue that we inevitably sacrifice some measure of predictability. For some scholars, this means that standards inevitably represent a second-best strategy. However, other scholars emphasize the benefits of ambiguity in promoting attentiveness to the rights of others as well as moral reflection — goals we sacrifice if we limit ourselves to rigid rules.

B. *Legal Realism About Rules and Standards in Property Law*

1. Why Rules Are Less Predictable than We Think

a. *Informal Sources of Justified Expectations*

“Rules” and “standards” are ideal types that clarify some issues while obscuring others. Unfortunately, they obscure issues that are particularly important for property law. The conventional assumption that rules are clear and standards are vague suggests that property law inevitably becomes less predictable if it is framed in the form of standards. This assumption ignores the fact that property expectations are based as much on *informal* arrangements as they are on formal documents. Consider the maxim that “possession is nine-tenths of the

²⁷ See Kaplow, *Rules Versus Standards*, *supra* note 5, at 600-01 (explaining that some kinds of issues cannot be regulated by rules because the types of considerations relevant to the legal determination cannot be reduced to mechanical formulae).

law.” It turns out to be true, not only as a description of how we form expectations about property rights but as a statement of the law. In adverse possession cases, the parties have usually lived informally for many years with a border they both recognize as the line between their properties. At some point, one of them does a survey and realizes that the record border in the formal documents diverges from the facts on the ground. Rigid adherence to the border established in the deeds would *destabilize* existing expectations rather than protect them. Adverse possession law recognizes those expectations as justified. Many similar property law doctrines are based on protecting the *actual* expectations of the parties (based on informal arrangements) despite their divergence from formal rights.

Stewart Sterk has explained that it is often costly to determine how rules apply to one’s case.²⁸ One may need to do a title search or hire a surveyor to determine what formal interests encumber the land and where the formal boundaries are. When owners refuse to incur these costs, courts sometimes hold them to the formal rules. However, courts often understand why the owner took the risk of not incurring those costs. Instead of rigidly applying the rules, judges often define property rights based on the informal expectations of the parties that arose from customary use of the land.²⁹ Courts jettison clear property rules either by adopting an equitable exception to the rule or by denying injunctive relief and instead adopting damages remedies coupled with reallocation of property entitlements. These “liability rule” remedies muddy property rights by making their enforcement dependent on contextual judgments. Sterk argues that courts do this when the transaction costs and externalities of strict enforcement of formal property arrangements outweigh the benefits of rigidity. I have

²⁸ Sterk, *supra* note 5, at 1286.

²⁹ My explanation for this result differs somewhat from that offered by Sterk, who focuses on determining the efficient level of search costs when actors are trying to figure out what their property rights are. Even though ignorance of the law is generally not an excuse, judges often protect those who invest in reliance on what they think to be the existing property entitlements even though more careful (and expensive) inquiry would have revealed the opposite. *Id.* at 1335. My view is similar to that of Mark Edwards, who argues that formal assignments of property rights often diverge from informal customs and that changes in normative sensibilities that lead to deviation from formal property arrangements may lead to subsequent changes in formal doctrine that reflect emerging informal norms. Mark A. Edwards, *Acceptable Deviance and Property Rights*, 43 CONN. L. REV. 457, 468-69 (2010); *see also* Nestor M. Davidson, *Property’s Morale*, 110 MICH. L. REV. 437 (2011) (arguing that property owners depend not only on stable property law doctrines, but also judicial flexibility in the face of unforeseen circumstances and systemic risk).

argued that it also happens when strict rule application would be experienced as a deprivation of property rather than protection of it.³⁰

Predictability in property law comes as much from deferring to possession, reliance, custom, and moral norms as it does from formal documents of title.³¹ Henry Smith explains that community customs that are widely known and shared form the basis for legal conclusions when it is not costly for individuals to figure out what the custom is.³² Property systems cannot function without widespread confidence in their legitimacy, including a sense that it is immoral to infringe on property rights.³³ Moral norms and customs define circumstances when informal arrangements are more accepted than formal ones to define the allocation and scope of property rights. Paradoxically, property law rejects rigid rules and recognizes those informal norms and customs *in order to make property rights predictable*. Although a rule defining borders based on the metes and bounds stated in the deeds may make it easier *for a lawyer* to advise a client or *for a judge* to decide a case, it would not make property law more predictable *for property owners*.

We often say that ignorance of the law is not an excuse, but property law often makes it so. The importance of stable property rights leads us to value possession as much as formal documents as a source of title. In theory, property would be more predictable if everyone invested in doing periodic surveys, hired the best and most expensive contractors as well as checking up on their work, paid for a rigorous title search and title insurance, and educated themselves on the intricacies of the local zoning code. In the real world, owners are fine with a “good enough” job and judges understand and empathize with them. Judges recognize that buyers make offers on houses based not only on what the deeds say but on what a visual inspection of the property shows. Telling a buyer she didn’t get what she thought she was getting because experts (like the lawyer and the builder) put the fence in the wrong place would undermine her expectations rather than promote them. Moreover, standards like adverse possession law can be fairly predictable in practice by defining the circumstances in which they apply. Because judges face pressures to adopt exceptions to rigid rules when circumstances warrant, flexible standards like adverse possession may wind up, on balance, to be more predictable for

³⁰ See *supra* text accompanying note 26.

³¹ See, e.g., Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988) [hereinafter *Reliance Interest*].

³² Smith, *Community and Custom*, *supra* note 5, at 15-24.

³³ See Merrill & Smith, *Morality of Property*, *supra* note 4, at 1866-84.

everyone than an injunction to apply the formal rules without exception.

b. Rules Do Not Determine Their Own Scope

The conventional approach to rules and standards assumes that rules can be and are applied rigidly and without exception. But this assumption is as unrealistic as that of the economist who says “assume a can opener” to solve the problem of opening a can on a deserted island. Stewart Sterk correctly explains that the “scope of many property rights is not self-evident.”³⁴ When a rule requires an unfortunate result, judges face pressure to ignore the rule. They can do so by creating an exception or by distinguishing the case and narrowing the scope of the rule. Rules give out when judges cannot live with the results rules imposed on them and on the litigants.³⁵ Nor is there anything untoward about this. As Amnon Lehavi explains, “not everything can be planned in advance.”³⁶ When confronted with a question about the legitimate *scope* of a rule, judges exercise judgment; they *interpret* precedents to define the scope of the rule. Interpretation requires judgment and that means we are no longer applying the rule mechanically. This means that *when cases are hard, rules are not rules*.

In the real world, as opposed to the ideal world of scholarly theory, rules are not applied mechanically when their scope is called into question. When a judge confronts both a clear rule and a hard case, the question is *whether the rule applies to the case*. Whenever that is at issue, the rule can no longer be applied without providing *reasons* for doing so.³⁷ And how do we determine when a case is hard? We turn to standards. How do we figure out whether to distinguish earlier cases? We apply standards. In hard cases, rules cannot function without standards to supplement them. Rules are less certain than we may think because *rules do not determine their own scope*. Standards intervene to determine the scope of rules.³⁸ Once a case is recognized

³⁴ Sterk, *supra* note 5, at 1286.

³⁵ Rose, *supra* note 5, at 590-93. The examples she gives are the move from caveat emptor to implied warranties and disclosure duties, from strict foreclosure of mortgages to the equity of redemption and foreclosure, from race statutes in the recording system to race/notice statutes.

³⁶ Lehavi, *supra* note 5, at 131; *accord* Sunstein, *supra* note 5, at 984 (“Encounters with particular cases will confound the view that things really have been fully settled in advance.”).

³⁷ On the need for judgment to apply rules, see Dworkin, *supra* note 5, at 32-40.

³⁸ See Lehavi, *supra* note 5, at 86-87 (explaining this problem through the concept

as hard, we are no longer in the land of rule application but rule interpretation. When that happens, the rule is not a rule.

It does no good to excoriate judges for using judgment in hard cases. It does not matter how loudly one insists on mechanical rule following or how one justifies doing so through fancy jurisprudential arguments. Rules are there not only to give us predictable results, but to promote fairness and welfare; when those rules start backfiring, judges stop the car and drive off in another direction. Even judges like Justices Scalia and Thomas who have signed on as dues-paying members of the “rules club” wind up defecting from time to time — and more often than they would like to admit.³⁹

Scholars who wax eloquent about the predictability of rules take their cues from focusing on easy cases. They then extrapolate from the easy case the premise that it is easy to tell when a case is easy; beyond that, they imagine that easy cases are the norm and hard cases the exception. But this series of inferences is faulty. The history of property law doctrine teaches us that easy cases turn into hard cases when one of the parties has reason to argue that a rule should not apply to her; if her argument is at all plausible, then the celebrated predictability of rules flies out the window.⁴⁰ In deciding such cases, judges judge; they do not approach their task as if they were machines

of the incompleteness of property law rules and norms); Frederick E. Schauer, *Precedent*, 39 STAN. L. REV. 571, 577 (1987) (“[T]he relevance of an earlier precedent depends upon how we characterize the facts arising in the earlier case. It is a commonplace that these characterizations are inevitably theory-laden.”); Sunstein, *supra* note 5, at 985 (“The very fact that a rule has at least one exception (as nearly all rules do), and the very fact that the finding of this exception is part of ordinary interpretation, means that in nearly every case a judge is presented with the question of whether the rule is reasonably interpreted to cover the circumstances at issue.”).

³⁹ See, e.g., *Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 202, 204, 213, 216-17 (2005), in which Justice Scalia (a rules advocate) joined the majority opinion when the Supreme Court applied the equitable doctrine of laches to deny the Oneida Indian Nation the right to assert its property rights, despite the fact that it had title to the land, its title was protected against loss by an unambiguous statute passed in 1790, and a prior Supreme Court case had affirmed that there was no federal or state statute of limitations that would bar the claim. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 505-23 (2005) (Thomas, J., dissenting) where Justice Thomas waxes eloquent about the literal meaning of the words “public use” in the takings clause, forgetting that there is no takings clause in the Fourteenth Amendment and that the entire doctrine is based on a substantive interpretation of the due process clause. See also Scalia, *supra* note 5, at 1186-87 (acknowledging that some legal doctrines cannot be reduced to general rules).

⁴⁰ On the inherent difficulty of distinguishing easy cases from hard cases, partly because of the divergence between “paper rules” and “real rules,” see Frederick Schauer, *Legal Realism Untamed* 15-24 (Va. Pub. Law & Legal Theory, Research Paper No. 2012-38), available at <http://ssrn.com/abstract=2064837>.

executing a computer program. Judges do apply rules, but when the scope of the rule is in question, rule application requires judgment. Because rules do not determine their own scope, every act of law application in a hard case is also an act of legal interpretation. Karl Llewellyn recognized this truth long ago.⁴¹

This point may seem obvious. After all, it is the traditional focus of many Socratic classes in the first year of law school. Professors ask students to talk about a particular case to figure out its holding; the professor then changes one fact at a time to see if the rule still applies. At some point, the student is backed into a corner and wants to say, “Well maybe that’s a different case.” This is not a failure on the student’s part but an exercise in judgment required of every judge and every lawyer. Every lawyer knows how to do this; every lawyer knows it is necessary. An injunction to apply rules mechanically would mean one could not distinguish cases. Such a system would be the very opposite of the rule of law as it is understood and practiced in the United States.

Why then do rules advocates forget this basic truth when they pontificate about the needs of the property system for clear rules? They do so because the property system does indeed require predictability; they are quite right about that. It seems that anxiety about this problem causes temporary blindness to the fact that rules cannot be applied without exercising judgment. Predictability is necessary, yes; but it does not come from mechanical application of rules. Something else provides the predictability we seek.

c. Competing Norms Limit the Scope of Legal Rules

Amnon Lehavi emphasizes “the inherent *incompleteness* of rights” that need to be further specified in the course of application through “value-based jurisprudence.”⁴² Standards promote the ability to render rights more specific over time and to do so in light of substantive goals and values. Lawmakers limit rules when they run up against competing norms. A grandson murders his grandfather. Does he inherit his grandfather’s property? The famous case of *Riggs v. Palmer*⁴³ says no. A joint tenant murders his co-owner; does he get title to her interest in the property because of his right of survivorship? Again, the

⁴¹ See KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 71 (Oxford Univ. Press 2008) (1930).

⁴² Lehavi, *supra* note 5, at 81-82 (emphasis added).

⁴³ *Riggs v. Palmer*, 22 N.E. 188, 189 (N.Y. 1889).

answer is no, according to the Massachusetts case of *Lee v. Snell*.⁴⁴ Why not? The New York Court of Appeals explained in *Riggs* that “it never could have been [the] intention [of the lawmakers] that a donee who murdered the testator to make the will operative should have any benefit under it.”⁴⁵ The legislature never meant the rule to apply in that instance. “If such a case had been present to their minds, and it had been supposed necessary to make some provision of law to meet it, it cannot be doubted that they would have provided for it.”⁴⁶ In effect, *Riggs* distinguished the statute, determining that it did not apply in the factual circumstances presented by the case at hand. The court created an equitable exception to the statute by finding that the statute never extended to this fact situation at all. Similarly, the Massachusetts Probate Court applied the equitable doctrine that prohibits anyone from benefiting from his own wrong to impose a constructive trust on the property, obligating the murderer to turn title to his wife’s property over to their children.⁴⁷ In both cases, the court determined that the reasons underlying the rule did not apply to the case at hand and that competing, overriding values, were at stake.

A company withdraws water from underneath its land as it is entitled to do under the state’s rules applicable to ownership of groundwater. But the company withdraws so much water from beneath neighboring property that an entire city is sinking into Galveston Bay. Does the company’s right to withdraw water encompass the right to destroy everyone else’s property? Amazingly, the Texas Supreme Court came close to saying yes to this question; a blistering dissenting opinion would have distinguished the case.⁴⁸ Precedents allowing withdrawal of water in ways that dried up the wells on neighboring property did not necessarily mean that water could be withdrawn in a manner that would destroy the surface of neighboring land, along with the structures built on it. The applicability of the rule depended on the effects of exercising legal rights on others. “What we do,” Justice Pope opined, “cannot be understood except in relation to those we touch.”⁴⁹

⁴⁴ *Lee v. Snell*, 25 MASS. LAWYERS WKLY. 1210 (Mass. Prob. Ct., Feb. 10, 1997) (No. 95E-0019-GC1).

⁴⁵ *Riggs*, 22 N.E. at 189.

⁴⁶ *Id.*

⁴⁷ *Snell*, 25 MASS. LAWYERS WKLY.

⁴⁸ *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21, 28-30 (Tex. 1978) (adopting a negligence standard for water withdrawal that may or may not prevent further subsidence in the future); *cf. id.* at 32-35 (Pope, J., dissenting) (arguing for a nuisance standard to prevent future harms).

⁴⁹ *Id.* at 33 (Pope, J., dissenting).

A retail store is entitled to exclude a disruptive customer but can it exclude a customer because of her race?⁵⁰ Traditionally, only innkeepers and common carriers had duties to serve the public, and although there is a federal law that prohibits race discrimination in public accommodations, it does not apply to retail stores. Yet it is hard to imagine a court, in this day and age, holding that stores have a common law right to exclude customers based on their race or to treat them differently on that basis.⁵¹

Whether a rule applies to a case depends on a decision about what the rule is. Is the rule “the testator’s written will must be obeyed, no matter what” or is it “give the property to the person mentioned in the will unless that person murdered the testator”? Is the rule “joint tenants have a right of survivorship” or is this rule qualified by the language “unless they murder their co-owner”? Is the rule “you can withdraw as much water as you like (as long as you do not waste it) even if this takes water from beneath neighboring land” or is it “you may take as much water as you like unless you undermine the surface of the neighbor’s land”? Is the rule “retail stores are not public accommodations and can exclude anyone for any reason” or is it “retail stores may exclude anyone for any reason except for an invidiously discriminatory one”?

In each case, we are interested in the reasons we adopted the rule in the first place; we are also interested in determining the appropriate scope of the rule when it clashes with important competing values. At some point, the rule gives out and judges can and will refuse to apply it in a situation outside its legitimate scope. Determining where that line is drawn is not something that can be accomplished without engaging in reasoned analysis and considered judgment. Rules may seem to be more predictable than standards, but rules cannot function in hard cases unless they are supplemented by standards. Whenever application of a rule comes into serious question, rules are inherently limited by a supplemental “rule of reason.”

2. Why Standards Are More Predictable than We Think

Rules are less predictable than we may have thought because their application in hard cases requires interpretation to determine their scope. The converse is also true. Standards are often more predictable

⁵⁰ See *Uston v. Resorts Int’l. Hotel, Inc.*, 445 A.2d 370, 375 (N.J. 1982) (holding that businesses open to the public cannot exclude customers without good reason).

⁵¹ See Joseph William Singer, *The Anti-Apartheid Principle in American Property Law*, 1 ALA. C.R. & C.L. L. REV. 91 (2011) [hereinafter *Anti-Apartheid Principle*].

than we may think because they are elaborated through the case law system in a way that produces generalizations that approach the form of rules. Both rules and standards operate through explicit or tacit *exemplars*; storytelling defines the contexts in which both rules and standards apply. Exemplars give standards a fair degree of predictability. Standards also often contain implicit *presumptions*. Such default outcomes function as “soft rules” that often approach or exceed the predictability we typically associate with rigid rules. For these reasons, standards are often far more constraining and decision-guiding than the scholars may assume.⁵²

a. *Exemplars and Precedent Make Standards Concrete*

Nuisance law prohibits substantial, unreasonable interferences with the use and enjoyment of land.⁵³ This legal doctrine is as far as one can get from the rigid, predictable rules thought to be needed for a property system to function. Yet this rule of law is as old as the hills and does not seem to have done the property system in. Nor has the doctrine made it impossible for lawyers to advise their clients about land use conflicts. While it requires judges and juries to think in order to apply the standard, it does not seem to inhibit real estate development; indeed, it arguably promotes it. Why is that?

The answer is that standards comprised of reasonableness tests and multiple factors achieve shape and substance through the use of explicit or tacit *exemplars*. In the nuisance context, the core case is pollution. The quintessential nuisance case involves a factory spewing smoke onto neighboring property, creating conditions that are uncomfortable and unhealthful. While the remedy raises complex questions,⁵⁴ the core case is vivid. Conversely, it is not a nuisance to put up a sign on your front lawn supporting Barack Obama for President, no matter how much the neighbors may disagree with the sentiment. Nor is it a nuisance to paint one’s house bright orange.

Nuisance law achieves predictability by reference to core cases like these. The case of pollution tells a story about a particular kind of conduct with a particular kind of impact. It vividly embodies the qualitative kind of harm that nuisance law protects against and

⁵² See Kaplow, *Rules Versus Standards*, *supra* note 5, at 564, 611-16 (acknowledging that standards can turn into rules through the operation of precedent).

⁵³ SINGER, PROPERTY, *supra* note 6, § 3.2.1, at 104.

⁵⁴ See, e.g., *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (N.Y. 1970) (denying injunctive relief and allowing damages only for nuisance caused by a cement factory).

engages our “situation sense.”⁵⁵ Standards operate by identifying core cases covered by the standard and core cases outside it. A large amount of predictability comes from stories that form exemplars that tell us what is inside and what is outside the standard. Cultural knowledge (including the specialized know-how of lawyers) is needed to understand what it is about the core cases that matters. Hard cases require judgment about where they fit on the spectrum.

Similarly, adverse possession law is relatively predictable because of requirements that occupation be obvious and exemplars of actions sufficient to constitute “possession” such as fences or structures or vegetation. While it is true that there is a great deal of litigation about adverse possession, it is not clear we would increase predictability by abolishing the doctrine. That is because longstanding possessors who mistakenly occupied neighboring land would have incentives to litigate to create exceptions to existing rules. They might argue for continued rights based on a number of other legal doctrines such as acquiescence, oral agreement, or estoppel. Because adverse possession law depends on open and notorious acts of occupation, it may well lead to more predictable outcomes than abolition of the rule. Because judges distinguish cases, reliance on formal title may give way when title diverges from longstanding, customary land use patterns. Fortright application of a standard based on long occupation may create greater stability for property rights than futile attempts to mandate rigid adherence to the borders defined in recorded deeds.

While standards engage our judgment, that does not mean that there are no easy cases under them. Recall that in non-property cases, we live by a general negligence standard that requires us to avoid conduct that creates an unreasonable risk of harm to others. That is about as vague a standard as one can get, yet it does not paralyze us in daily life. We reason from tacit or explicit exemplars about what constitutes negligent conduct; we know that driving 100 MPH on the highway qualifies while listening to music while driving (generally) does not. Property law is no different in this regard. There are easy cases under both nuisance and adverse possession law and practicing lawyers are perfectly capable of giving advice to clients about whether they are likely to win or lose such claims.

⁵⁵ See Todd Rakoff, *The Implied Terms of Contracts: Of ‘Default Rules’ and ‘Situation-Sense,’* in GOOD FAITH AND FAULT IN CONTRACT LAW 191, 201-16 (Jack Beatson & Daniel Friedmann eds., 1995); Sunstein, *supra* note 5, at 989 (“[C]ategories receive their human meaning by reference to typical instances.”)

b. Presumptions Make Standards Predictable

Standards achieve predictability not only through storytelling and core exemplars but through tacit or explicit presumptions. Negligence law, for example, does not start from the proposition that you have a duty to justify anything you do to others that affects them. The law puts the burden of proof on the plaintiff; it is the complaining party that must convince the decision maker that the defendant acted unreasonably. Similarly, in the nuisance system, we operate from the presumption that owners are entitled to use their own property. Our system gives a large amount of freedom of action to possessors of real estate. The burden is on the victim to show that those bounds have been exceeded. Meeting this burden requires convincing the decision maker that the case fits within the area covered by core exemplars.⁵⁶ Covenants used to be considered encumbrances on land and were interpreted narrowly; the modern approach sees them as valuable property rights presumes that they are valid unless they violate important public policies. Either presumption allocated burdens of persuasion in a manner that promoted predictability.

II. PROPERTY STANDARDS

In the second half of the twentieth century, state courts and legislatures engaged in a modernization project for property law that not only got rid of outdated doctrines but shifted from rigid rules to standards in many areas of property law. This change supplemented traditional equitable doctrines that always existed in the property law system, as well as core doctrines like nuisance that had always taken the form of standards. Standards are central to property law and even more so now than in the past. These recent developments have been, on the whole, salutary. They have not made property law unpredictable; indeed in many cases, standards are both more predictable and more efficient than rigid rules. There are, of course, notable exceptions to this happy picture; in certain areas, the move to standards has indeed increased uncertainty. In the following sections, I will document the many changes that have occurred in the rights, privileges, powers, and immunities of property owners.⁵⁷ I will focus

⁵⁶ It is true that these burdens shift over time. It is likely that in 1789, the burden was on the owner committing the harm to show why she should not be held liable, while in 2012, the burden is on the victim to show that a nuisance was inflicted on her.

⁵⁷ See generally Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (articulating and explaining these different types of legal rights).

on the right to exclude, immunity from loss, the freedom to use property, and the power to contract about property. In each of these doctrinal areas, we can see substantial change from rules to standards in the recent past.

A. *Right To Exclude*

The Supreme Court has asserted that the right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property”⁵⁸ Legal scholars have also affirmed the central importance of the right to exclude.⁵⁹ Recent changes in legal doctrine have in some cases defined the scope of the right to exclude through standards rather than rules.⁶⁰ Some of these changes have limited the right to exclude while others have increased enforcement of the right to exclude through new standards-based damages remedies.

1. Public Accommodations Law

The federal public accommodations law of 1964 not only ended segregation in inns, common carriers, places of entertainment, and gas stations, but required those businesses to serve customers without regard to race.⁶¹ It was followed in 1968 by a new judicial interpretation of the Civil Rights Act of 1866 that effectively imposed a right of access without regard to race in all businesses open to the public.⁶² The 1964 statute also prohibited racial discrimination in employment and the Fair Housing Act of 1968 prohibited invidious discrimination in housing.⁶³ Most states also had or adopted their own

⁵⁸ *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *see also* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-38 (1982) (determining it was a categorical violation of the takings clause to force a residential landlord to suffer the invasion of her property in an apartment building by the cables and box owned by the cable television company).

⁵⁹ Merrill, *Property and the Right to Exclude*, *supra* note 22, at 740 (1998); Smith, *Exclusion v. Governance*, *supra* note 4, at 453; Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 964 (2009).

⁶⁰ On the importance of the scope issue, *see* Lehari, *supra* note 5, at 96-98.

⁶¹ 42 U.S.C. § 2000a (2012).

⁶² *See id.* §§ 1981, 1982; *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438-39 (1968) (interpreting § 1982 to apply to private conduct); Singer, *Anti-Apartheid Principle*, *supra* note 51, at 85-91, (explaining the historical significance of the principle established in this case).

⁶³ Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2; Fair Housing Act, 42 U.S.C. §§ 3601-3631 (Fair Housing Act).

antidiscrimination statutes that deny owners the right to refuse to serve customers, rent to tenants, sell homes to buyers, or grant mortgages to borrowers, in a racially discriminatory manner. These laws limit the right to exclude by granting a right to enter property to participate in the marketplace without regard to one's race or the color of one's skin.

Without public accommodation laws, a retail store owner could exclude a patron without a reason.⁶⁴ Today when an owner excludes a customer, she faces the possibility that the customer might claim that the exclusion was discriminatorily motivated and thus illegal. Moreover, an excluded patron can prove intentional discrimination by using testers to show patterns of unconscious racial exclusion. For that reason, store owners must monitor their policies to ensure that they can articulate a legitimate, non-racial reason for excluding particular patrons. In addition, most states prohibit discrimination based on categories other than race, such as sex, religion, and age, in all businesses open to the public.⁶⁵ One state has even gone so far as to require all businesses open to the public to allow access to their property unless they can articulate a legitimate reason for exclusion.⁶⁶

In 1990, Congress prohibited disability discrimination in public accommodations.⁶⁷ The Americans with Disabilities Act (ADA) requires businesses to make "reasonable modifications" of existing premises and to make "reasonable accommodations" of existing policies to ensure access to persons with disabilities.⁶⁸ These reasonableness qualifications exist because no rigid rule could define precisely when the benefits of increased access outweigh the burdens to the business. Achieving the goal of promoting equal access to public accommodations without regard to disability could not be achieved without adopting a legal rule that requires some amount of judgment in individual cases.

⁶⁴ These laws were, for the most part, a post-Civil War development. Before then, the law in the United States generally gave a right of access to all businesses open to the public. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1303-48 (1996) [hereinafter *No Right to Exclude*]. And in the South, regulatory laws *required* racial exclusion and segregation and that placed an obligation on many public accommodations to determine the race of their customers — something that turned out to be a difficult judgment in close cases and which led to litigation to determine who was and who was not in the excluded class.

⁶⁵ *Id.* at 1478-91.

⁶⁶ See *Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370, 375 (N.J. 1982).

⁶⁷ 42 U.S.C. §§ 12101-12213 (2012).

⁶⁸ See *id.* § 12182(b)(2)(A)(ii), (iv).

Public accommodation, employment discrimination, and fair housing laws have rendered the contours of property more uncertain than it would be if owners had an absolute right to exclude. Access to property without invidious discrimination is a mark of a free and democratic society that treats each person with equal concern and respect.⁶⁹ That goal could not be achieved if owners had an absolute right to exclude. Predictability may be key to property law but it is not the only value we have. Not only do the benefits of public accommodation laws outweigh their costs, but the ambiguities associated with determining when a owner had acted inappropriately serve the useful function of deterring wrongful conduct and inducing market actors to consider whether they can articulate nondiscriminatory reasons to exclude individuals from property open to the public.

2. Trespass Damages

Until recently, trespass damages only compensated for actual harm to the property. If a trespasser knocked down a tree, for example, one could recover either the reduction in fair market value of the land or the market value of the timber the tree could have provided.⁷⁰ If there was no physical damage, the owner was limited to nominal damages of one dollar to mark that a legal wrong had been inflicted on the owner. These measures of damages are relatively easy to determine, as well as being quite low. And therein lies the problem. In recent years, courts have become more receptive to the idea that the traditional measure of damages for trespass fails adequately to protect the rights of owners to exclude nonowners from their land. Judges have been receptive to changes in damages law to deter trespass. Some courts allow trespass victims to recover not only actual damages but the cost of restoration of the property — a figure that is likely to be much higher. Some courts have also become more receptive to the idea of imposing

⁶⁹ Singer, *Anti-Apartheid Principle*, *supra* note 51, at 94-101.

⁷⁰ Some states have long permitted supercompensatory damages for certain types of trespasses, such as cutting trees. *See, e.g.*, MASS. GEN. LAWS ch. 242, § 7 (2012) (treble damages for timber value of trees cut on another's land without permission); *Glavin v. Eckman*, 881 N.E.2d 820 (Mass. App. Ct. 2008) (applying this statute); *accord*, *Wright v. Brown*, 5 Kan. 600, 601-02 (1870); *Emerson v. Beavaus*, 12 Mo. 511, 512 (1849). Some states also may have long allowed the cost of restoration of the property and/or granted juries the power to assess punitive damages in cases of "malicious" trespass. *See, e.g.*, *Day v. Woodworth*, 54 U.S. 363, 371 (1852). In those states, the law has been consistent with the cases discussed in this section. I would like to thank Prof. Michael Kenneally for the information in this footnote about the nineteenth century cases.

punitive damages to deter trespass in cases where no physical harm was done to the property.

In *Glavin v. Eckman*,⁷¹ property owners hired a contractor to cut down trees that blocked their view of the ocean. Although their neighbor had refused their request to cut down trees on the neighbor's property, the owners went ahead and did this anyway. Because both the reduction in fair market value of the neighbor's property and the timber value of the trees was low, the trial judge believed that damages measured by those standards would not deter others from doing this in the future; nor would this be fair to the victim. The court therefore allowed the jury to award the cost of restoring the trees. But because the trees were very large, replacement was either astronomically expensive or impossible, so the court allowed the jury to determine a reasonable amount designed to deter such conduct in the future and mark the wrongfulness of the conduct. This made the law less clear than it would have been under traditional rules while *increasing* legal protection for the right to exclude. It made trespassers vulnerable to moral judgments about the wrongfulness of their conduct and forced them to consider what a jury of their peers would view as an appropriate response to nonconsensual destruction of property.

In *Jacque v. Steenberg Homes, Inc.*,⁷² the court awarded \$100,000 in punitive damages to owners who refused to allow a mobile home to be dragged across their property only to have their wishes ignored. There was no physical damage to the Jacques' property — a circumstance that traditionally would have entitled them only to nominal damages. The criminal trespass statute would have allowed a fine of up to \$1,000, but the prosecutor sought a fine of only \$30. The legislature could have raised the amount of the penalty if it thought this was needed to deter willful trespasses. The court ignored these traditional, relatively predictable rules, instead authorizing the jury to pick some very large amount designed both to punish and deter if the jury found morally reprehensible behavior on the defendant's part. Recent years have seen much lobbying by businesses to pass tort reform acts that limit punitive damages because of their unpredictability and lack of relation to the amount of actual damages. The Supreme Court has listened and has held that punitive damages may violate the Due Process clause if they are too high relative to actual damages.⁷³ But what to do when the damages are only nominal and the conduct outrageous?

⁷¹ *Glavin*, 881 N.E.2d at 821-22.

⁷² *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 156 (Wis. 1997).

⁷³ *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 574-75 (1996).

The Wisconsin Supreme Court adopted a rule allowing punitive damages in such cases to vindicate strongly-held norms of ownership. In one sense, the ruling makes property rights more certain because of the added deterrence. But note that this added certainty comes from adopting an unpredictable rule of law that allows a jury of random citizens to determine whether the defendant's conduct was morally outrageous and to exercise discretion in choosing whatever amount they find appropriate, subject only to equally unpredictable review by the judge who can reduce the damages to an appropriate level. Even if these developments are justified, they reduce the ability of lawyers to tell clients precisely what rights they have under existing law, placing their fate into the hands of a jury entitled to make moral judgments not only about their conduct but the size of the penalty. Property rights may have added protection because of the possibility of punitive damages for trespass but the greater certainty comes, not from a clear rule, but a vague standard that achieves its deterrent purpose precisely because of its unpredictability.⁷⁴

B. Immunity from Loss

A corollary of the right to exclude is the right to keep your property. Others cannot take your property away from you without your consent no matter how much they want it. Of course there have always been exceptions to this principle. Owners have long lost their property by adverse possession and eminent domain and equitable doctrines have conferred informally-created rights to property through doctrines like easement by estoppel, necessity, and implication, and exceptions to the statute of frauds such as the part performance doctrine. The law of mortgages emerged when the equity courts granted borrowers relief from the strict rules of the law courts, denying lenders their contractually-established rights to possession. These traditional limitations on the right to keep what one owns rest on standards rather than strict rules. Recent innovations in this area include the relative hardship doctrine, the use of good faith and laches in some adverse possession cases, equitable distribution of marital property on divorce, and recent developments in the public use test and regulatory takings doctrine.

⁷⁴ See Kaplow, *Optimal Complexity*, *supra* note 21, at 151 (arguing that the uncertainty associated with making actors guess when the law will change has the salutary effect of inducing them to reflect on the relative costs and benefits of their conduct and to refrain from engaging in currently allowable but socially harmful actions).

1. Relative Hardship

An owner builds a structure on what appears to be the owner's property but because of an error by the surveyor or the building contractor encroaches on a neighbor's land. Traditional rules counted this as a simple trespass and the land owner had the remedy of ejectment; you build on other people's land at your peril and your only remedy is to bargain with your neighbor to attempt to buy the land on which the building sits. If your neighbor did not agree to the land sale, the trespass victim had the right to force the encroaching builder to remove the structure, no matter how valuable it was, no matter how much it cost to build, no matter how minimal the intrusion on the neighbor's land, and no matter how excusable or understandable the mistake was. Although some courts still apply this rule in some cases, most have discarded it in favor the *relative hardship* doctrine.⁷⁵ If one builds in good faith belief that one is building on one's own land, the encroachment is small and the expense of removing the building large, most courts will force the parties to engage in a forced sale of the land on which the building sits to the improving trespasser, denying this remedy only if the encroachment was in bad faith by a builder who knew he was building on neighboring land. The doctrine may even apply if an entire structure is built on someone else's land.⁷⁶

The relative hardship doctrine is based on the equitable idea that an owner is not entitled to sit by while someone else builds on her land. If a land owner knows about the encroachment on her land during construction and does not intervene, then she failed to prevent the harm when she could have done so. She has a moral duty to act to prevent the harm before it arises in such cases. If she did not know about the construction at the time or did not know that it encroached on what was formally her property, then she did not care enough about her property to stop someone from intruding on it in such a conspicuous and permanent manner. Owners have rights to exclude and immunities from forced taking of their land, but they have obligations to take reasonable care to police their own land. The courts protect the security of good faith investment in real estate by refusing to order the destruction of valuable real estate improvements that encroach on land an owner did not even realize was her own or that she did not care to protect from the intrusion.⁷⁷

⁷⁵ *Somerville v. Jacobs*, 170 S.E.2d 805, 812 (W.Va. 1969).

⁷⁶ *Id.*

⁷⁷ Some states have adopted laws called "betterment statutes" that effectively

Experience shows that good faith border errors are common. Because courts view the old rule as both unfair and inefficient, they have relaxed the clear immunity rights of the land owner in cases of mutual mistake, instead relying on informal arrangements or the facts on the ground. They have done so in a way that subjects property rights to a reasonableness standard that requires judgment about the excusability of the builder's conduct rather than rigid application of formal boundary designations. In one sense, this makes property rights less certain because we have moved from a rule to a standard, but in a different sense, the new rule increases the certainty and stability of property rights because large investments in real estate improvement performed in good faith are likely to be protected even if the owner encroaches on neighboring land. This arguably makes the expectations of owners more certain rather than less while giving them full powers to protect themselves against intrusion if they make efforts to find out where their borders are and pay attention to what is happening around them.

2. Adverse Possession

Like the relative hardship doctrine, adverse possession usually applies in cases of mutual mistake. Most adverse possession cases involve technical defects such as lack of a signature on a deed or border cases involving encroachments where neither party knew where the record border was but acted as if the border were someplace else. Because it is so common for borders on the ground to diverge from the plans recorded in the registry of deeds, adverse possession arguably provides more stability for property rights than would a rule focusing solely on record title to set borders. Recently some states have made adverse possession law less predictable by requiring proof of "good faith" by the adverse possessor. Some of these laws responded to the hubris of a state judge and former mayor of Boulder, Colorado who encroached on his neighbors' land, took advantage of the relatively short statutes of limitation in the western states, and intentionally obtained title to a strip of his neighbor's land in a rural area by adverse possession.⁷⁸ The land pirate then apparently had the chutzpah to brag about what he had done. The reaction was so strong

codify the relative hardship doctrine. See, e.g., ARK. CODE ANN. §18-60-213 (2012); N.C. GEN. STAT. §§1-340 to 1-351 (2012).

⁷⁸ See Heath Urie, *Couple will appeal "adverse possession" ruling*, DAILY CAMERA ONLINE Nov. 15, 2007, <http://www.dailycamera.com/news/2007/nov/15/couple-will-appeal-ruling-kirlins-locked-in-ex/>.

that Colorado amended its statutes to prohibit adverse possession unless good faith could be demonstrated by clear and convincing evidence.⁷⁹

The Colorado anti-piracy statute is intended to prevent wrongful appropriation of neighboring land but it arguably does so at the cost of making all land titles in the state less predictable. Adverse possession law generally rests on observable, objective facts about land use, not on what people knew and when they knew it. Adding states of mind to laws allocating property rights muddies the waters. Rather than focusing on objective evidence of longstanding land occupation, fact finders must now determine whether the adverse possessor acted in good faith. This requires testimony to establish lack of knowledge of the record border and lawyers must assess whether the jury will find witnesses credible. The good faith requirement may even lead judges to question whether an owner who acts without conducting a survey has acted reasonably; even if such an owner did not know of the record border, perhaps she “should have known.” The legislature adopted the good faith test to make property rights more secure, but it did so by replacing a relatively objective standard with a more subjective one. It promoted stability of property rights by means of a less predictable rule of law.

In contrast, the state of New York effectively abolished adverse possession in border cases by enacting a conclusive presumption that all occupations of another’s land are “permissive” unless they involve substantial structures.⁸⁰ This avoids the predictability issues that good faith requirements entail but it also destabilizes expectations that arise from longstanding possession. Nor is it clear that the new standard makes it easier for lawyers to advise clients about their borders. The statute does not clearly abolish the equitable doctrine of *acquiescence* that shifts borders to a line that is mutually recognized by the neighbors.⁸¹ Similarly, the doctrines of *estoppel* and *oral agreement* also shift the border if the neighbors had any oral conversations in which they agreed on the location of the border.⁸² As exceptions to the statute of frauds, these doctrines acknowledge that expectations of

⁷⁹ COLO. REV. STAT. §§ 38-41-101(3)(a), (b)(II) (2012). Alaska similarly amended its laws in 2003 to adopt a good faith requirement for border cases. ALASKA STAT. § 09.45.052 (2012) (permitting adverse possessors to prevail in border disputes only if they have “a good faith but mistaken belief” that the property lay within the borders of their own land).

⁸⁰ N.Y. REAL PROP. ACTS. LAW § 543 (McKinney 2008).

⁸¹ JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, & PRACTICES 328-29 (5th ed. 2010) [hereinafter PROPERTY LAW].

⁸² *Id.*

ownership rest as much on informal arrangements between neighbors as they do on the formal writings recorded in the registry of deeds.

Lest one think that we could get rid of all these equitable doctrines without destabilizing property rights, consider the problem of Indian title. The state of New York took land owned by the Oneida Indian Nation in the early nineteenth century in violation of an unambiguous federal statute first passed in 1790 that provided that no transfer of tribal property without the consent of the United States would have “any validity in law or equity.”⁸³ A 1985 Supreme Court ruling held that no statute of limitations barred the tribe from suing to assert rights in its land under the statute.⁸⁴ But a recent Supreme Court case has been interpreted by lower courts to mean that the Oneida Indian Nation can neither recover its land nor sue for damages for the wrongful taking. The courts have found that too much time has passed, making the equitable doctrine of *laches* applicable.⁸⁵

These cases made titles to property less clear in one sense; the Oneidas have unextinguished title to their land but no rights in it at all. This means that formal title-holders cannot count on having the right to control their own land if circumstances are such that others have justified expectations of access to it.⁸⁶ However, these cases made property titles clear in a different sense; longstanding arrangements may be respected regardless of the legality or morality of their origins. New York’s bad faith in taking tribal land in violation of a clear federal statute did not prevent it from effecting a change in property rights.⁸⁷ Possession, it turns out, really is nine-tenths of the law. Of course, this basis of expectation is less certain than a rigid rule based on formal

⁸³ 25 U.S.C. § 177 (West 2012).

⁸⁴ *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 244 (1985).

⁸⁵ *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 217-18 (2005); *Oneida Indian Nation of New York v. Cnty. of Oneida*, 617 F.3d 114, 126-31 (2d Cir. 2010) (Oneida Indian Nation’s claims for possession and damages were barred by *laches*); see *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 279 (2d Cir. 2005) (similar holding). Traditionally, *laches* applies only when there is no good reason for the delay in asserting rights. The Court suggested that there was no reason the tribe could not have brought the claim in 1795. “The Oneidas did not seek to regain possession of their aboriginal lands by court decree until the 1970’s.” *City of Sherrill*, 544 U.S. at 216. The Court was unfortunately unaware that there were practical and legal barriers to the tribe’s bringing suit until the 1970s. See Joseph William Singer, *Nine-Tenths of the Law: Title, Possession, and Sacred Obligations*, 38 CONN. L. REV. 605 (2006) (criticizing the *Sherrill* decision).

⁸⁶ See, e.g., Singer, *Reliance Interest*, *supra* note 31.

⁸⁷ See Daniel J. Sharfstein, *Atrocity, Entitlement, and Personhood in Property*, 98 VA. L. REV. 635, 669-70 (2012) (arguing that injustice in the origins of property rights may strengthen attachment to them).

title. But when titles are clouded either because of mutual mistake or land piracy by private citizens or by state governments, lawmakers feel obligated to make judgments and to fashion legal rules that may diverge from simple allocation of property rights to the formal title holder. When possession is acquired in bad faith, some lawmakers will deny remedies to the wrongdoer (as in the new “good faith” statute in Colorado) while others will protect the rights of wrongdoers in order to vindicate longstanding possessory expectations of nonowners (as in the *Oneida Indian Nation* case). Whether protecting wrongdoers or their victims, lawmakers have used standards and fairness considerations to allocate property rights rather than mechanically favoring the title holder.

3. Equitable Distribution of Property

Before the 1960s, fewer than a dozen states in the West had the community property system while most states had the separate property system for marital property.⁸⁸ On the surface, each system was clear. Community property states provided for even sharing of property accumulated during marriage while separate property states held that property acquired by each marital partner remained his or her own property. Of course, in practice, things were far from simple. Community property states developed complicated legal standards to distinguish separate property acquired before marriage or from inheritance or gift from community property acquired during the marriage. And separate property states used the practice of alimony as a way to share property — or at least income — on divorce. Starting in the 1960s, however, the separate property states adopted *equitable distribution* statutes that divided property accumulated during marriage “equitably” between the spouses on divorce, while deemphasizing alimony and making it both temporary and exceptional. Equitable distribution is based on a long list of factors and the statutes do not define how priorities are to be made among them; in fact, the statutes give judges a huge amount of discretion to allocate property rights “equitably.” This new system was obviously based on the idea that women contribute equally to the marital partnership by unpaid labor in the home and that they deserve an equal share of the economic fruits of the marriage. It also rests on the idea of marriage as an equal partnership; when two people decide to share their fate, unequal incomes should not mean unequal resources.

⁸⁸ For a summary of marital property law, see SINGER, PROPERTY, *supra* note 6, at § 9.3, 393-405.

While equitable distribution statutes make the assignment of marital property on divorce much more uncertain than before, they reflect fundamental judgments about appropriate minimum standards for a free and democratic society that treats women as equals of men.

4. Public Use

Until the case of *Kelo v. City of New London*,⁸⁹ it was understood that property could be taken by governments for urban renewal projects. The Supreme Court had affirmed as much in 1945 in *Berman v. Parker*.⁹⁰ And the Supreme Court had unanimously decided in 1984 that the state of Hawai'i could engage in a land reform project to redistribute land ownership from landlords to tenants in order to increase the number of fee simple owners of land and introduce more competition to the real estate market.⁹¹ That meant that the state could take property from one owner and transfer it to another if the state had a legitimate governmental purpose for the exchange. Moreover, courts were enjoined by these precedents to defer to the legislature on what constitutes a public purpose. However, when the Supreme Court affirmed these traditional principles in *Kelo*, it unleashed a firestorm of criticism that resulted in more than forty states adopting state constitutional or statutory provisions to limit the ability of the states to take property for economic development purposes from one owner for transfer to another.⁹²

These new state laws make eminent domain law (and thus title to land) much less certain than it was beforehand. Most of the laws that overturned *Kelo* allow takings of “blighted” property.⁹³ Before *Kelo*, the legislature determined when it was appropriate to take property; now the courts must distinguish when property is, and is not, “blighted.” Other states prohibit “economic development” takings, leaving room for interpretation over what that means; does it prohibit, for example, a taking of land for an airport designed to increase economic investment in nearby counties if the government authority that owns the airport leases it to private airline companies?⁹⁴

Many people found a fundamental injustice in the proposed taking of Suzette Kelo's house. The response was to adopt laws that require

⁸⁹ *Kelo v. City of New London*, 545 U.S. 469 (2005).

⁹⁰ *Berman v. Parker*, 348 U.S. 26, 31-34 (1954).

⁹¹ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 239-42 (1984).

⁹² SINGER, PROPERTY, *supra* note 6, at § 14.8.2, 744-46.

⁹³ *Id.*

⁹⁴ *Id.*

the exercise of judgment in assessing when takings of property are, and are not, lawful. These laws were not only intended to limit the taking of property from one owner to transfer it to another but were intended to give the courts the discretion to oversee legislative and municipal decisions by application of standards designed to avoid what are thought to be fundamental injustices. In one sense, these laws make property rights more certain by making it harder for states to take them. But the laws achieve this goal by adopting standards that require the exercise of judgment and they make it more difficult, not less difficult, to advise a client about her legal rights.

5. Regulatory Takings

Because the fifth amendment's takings clause applies only to the federal government, there was no federal constitutional right to compensation for taking of property by the states for most of the nineteenth century. This made federal law clear but property vulnerable; as we have seen before, predictability of rights and clarity of rules do not necessarily go hand in hand. Things changed in 1897 when the Supreme Court applied the takings clause to the states by interpreting the due process clause of the fourteenth amendment to incorporate the fifth amendment's takings clause.⁹⁵ This increased legal protection for property rights, but it also made their contours less clear, as evident in 1922 when the Supreme Court ruled that a regulation of property use might constitute a taking of property if it "goes too far."⁹⁶

The test for identifying a regulatory taking crystallized in the 1978 case of *Penn Central Transportation Co. v. City of New York*,⁹⁷ and the test is as far from a clear rule as one can get. The Supreme Court explained that it "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."⁹⁸ Rather, the Court generally looks at the "particular circumstances" of each case, "engaging in . . . essentially ad hoc, factual inquiries," focusing on three major factors: (1) the "character of the government action"; (2) the protection of "reasonable, investment-backed expectations"; and (3) the "economic impact" of the regulation on the

⁹⁵ *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897).

⁹⁶ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

⁹⁷ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-24 (1978).

⁹⁸ *Id.* at 124.

particular owner.⁹⁹ This “question necessarily requires a weighing of private and public interests.”¹⁰⁰ In evaluating these three factors, the Court’s goal is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁰¹ This *ad hoc* test places the concepts of fairness and justice at the heart of both the takings clause and property law itself. While this might have resulted in increased security for property owners by limiting the ability of states to regulate property in a confiscatory manner, it did so at the cost of clarity. The Supreme Court made takings law less, not more, predictable in the twentieth century.

Around 1980, the Supreme Court flirted with the attempt to develop *per se* tests to identify types of regulations that constitute categorical takings for which compensation is required regardless of how important the public interest is in the regulation. The 1982 *Loretto* case and the 1992 *Lucas* case seemed to herald a new era of clear rules to govern regulatory takings doctrine.¹⁰² However, the Court retreated from this effort in important cases decided in 2001 and 2002 when it emphasized the wisdom of avoiding categorical rules, instead requiring lower courts to undertake a “careful examination and weighing of all the relevant circumstances.”¹⁰³ The Supreme Court recently clarified that there are only “two categories of regulatory action that generally will be deemed categorical takings.”¹⁰⁴ Those include: (1) government-mandated “permanent physical invasions of property,”¹⁰⁵ (*Loretto*); and (2) regulations that “completely deprive an owner of all economically viable use of her property [unless]

⁹⁹ *Id.*

¹⁰⁰ *Agins v. Tiburon*, 447 U.S. 255, 261 (1980); *accord* *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 326 (2002) (“We have ‘generally eschewed’ any set formula for determining” when a regulation goes “too far” and becomes a taking).

¹⁰¹ *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (quoted in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005)).

¹⁰² *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (deprivation of all economically viable use is a categorical taking unless the right was never legally recognized to begin with); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421, 434-37 (1982) (permanent physical invasion is a categorical taking).

¹⁰³ *Tahoe-Sierra*, 535 U.S. at 327 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O’Connor, J., concurring)).

¹⁰⁴ *Lingle*, 544 U.S. at 538.

¹⁰⁵ *Id.*; *see Loretto*, 458 U.S. at 421, 434-37. It is important to note that these cases will only “generally” be deemed *per se* takings. They apply in “relatively narrow” circumstances, *Lingle*, 544 U.S. at 538. Thus, even these two classes of cases are not always deemed takings of property.

background principles of nuisance and property law independently restrict the owner's intended use of the property" (*Lucas*).¹⁰⁶

The Court has eschewed clarity in favor of ambiguity. Most regulatory takings cases will be analyzed under the *ad hoc Penn Central* reasonableness test. Many scholars decry this test as unworkable, unpredictable, incoherent, and incomprehensible.¹⁰⁷ The general view seems to be that the test is so formless that one cannot actually say what it means or use it to predict outcomes. I believe this wall of criticism is unwarranted for two reasons.

First, the Court repudiated categorical tests for a reason. Property law is simply too complicated and too contextually nuanced to be rigidly defined by categorical rules. The plurality opinion in the 2010 case of *Stop the Beach Renourishment* tried to re-establish rigid rules by arguing that the takings clause is violated any time a court ruling changes state property law in a manner that deprives someone of an "established right of private property."¹⁰⁸ This rule appears to be a rule only until we try to apply it. Interpreted broadly, it would disable courts and legislatures from modernizing property law or even distinguishing cases. Yet many changes in property law have occurred that have not been ruled unconstitutional takings requiring compensation. Examples include abolition of male privileges to control tenancy by the entirety property and equitable distribution statutes that redistributed property rights from husbands to wives.¹⁰⁹ Nor was the Fair Housing Act of 1968 held to be a taking of property even though it requires landlords to rent to persons without regard to race or religion.¹¹⁰ Nor were housing codes held to be takings of

¹⁰⁶ *Lingle*, 544 U.S. at 538 (emphasis in original); see *Lucas*, 505 U.S. at 1019.

¹⁰⁷ See, e.g., John D. Echeverria, *Is the Penn Central Three-Factor Test Ready for History's Dustbin?*, 52 LAND USE L. & ZONING DIG. 3, 4 (2000) (stating that the *Penn Central* balancing test "is so vague and indeterminate that it invites unprincipled, subjective decision making by the courts"); Anthony B. Sanders, *Of All Things Made in America Why are We Exporting the Penn Central Test?*, 30 NW. J. INT'L. L. & BUS. 339, 343 (2010) ("The line between a regulatory taking and a permissible regulatory action must be as clear as possible. As this article will argue, an unclear, wavering, multi-faceted test — exactly what the *Penn Central* test is — leaves too much uncertainty in what is already a very uncertain decision: an investor sinking capital into a country whose regulatory environment and investment protections may be unfamiliar and unfriendly.").

¹⁰⁸ *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2602 (2010).

¹⁰⁹ See, e.g., *Robinson v. Trousdale County*, 516 S.W.2d 626 (Tenn. 1974) (holding that the state Married Women's Property Act of 1913 retroactively abolished male privileges over tenancy by the entirety property).

¹¹⁰ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-59 (1964).

property even though they substantially increased the costs of housing. Nor were height and setback limits or zoning laws that reduced property values by as much as seventy-five percent found to be takings of property.¹¹¹ As with all rules, judgment is needed to identify “established property rights” that are or should be immune from change without compensation.

Second, while the *ad hoc* test looks vague on paper, it is highly predictable in practice. The courts entertain a strong presumption that regulations of property are legitimate if passed by legislatures to promote public ends. Regulations will almost always be upheld under this test as legitimate exercises of the police power despite their impact on property use or value. Moreover, exemplars and case law define the paradigm situations that are likely to be held to be takings. Standards in this area have not made it impossible for lawyers to advise clients or judges to decide cases. On the contrary, the *Penn Central* test is more predictable than a seemingly rigid rule that would prevent changes in “established property rights” given the need to interpret what those rights are before they can be defined as immune from change without compensation.

C. Freedom To Use Property

1. Flooding Doctrines

A developer builds a subdivision by draining the area and directing surface water from rain to underground pipes that expel the water from the land downhill to neighboring land. Unfortunately, the pipes increase the force and flow of the water, turning the neighbor’s lazy creek into a torrent of fast-moving water that eats away at the bank until the foundation of the neighbor’s house is threatened. In 1956, when the case of *Armstrong v. Francis Corp.*¹¹² was decided, about half the states had the common enemy doctrine that allowed real estate owners to expel surface water without liability while the other half

¹¹¹ *Gorieb v. Fox*, 274 U.S. 603, 608 (1927) (requirement that portions of parcels be left unbuilt not a taking); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384-90 (1926) (prohibition of industrial use resulting in 75% reduction in fair market value of the land); *Welch v. Swasey*, 214 U.S. 91, 106-108 (1909) (height restriction not a taking).

¹¹² *Armstrong v. Francis Corp.*, 120 A.2d 4, 10 (N.J. 1956). A similar change has happened with the law of trees, which are increasingly being recognized as nuisances in a variety of situations. *See, e.g., Fancher v. Fagella*, 650 S.E.2d 519 (Va. 2007) (holding that encroaching trees that cause harm or threaten imminent harm are nuisances).

had the natural flow rule that imposed strict liability on owners who harmed their neighbors' property by altering the force or flow of surface water as it drained or was expelled onto neighboring land. Only two states regulated such cases by the reasonable use test adopted by the Supreme Court of New Jersey in *Armstrong*. Today almost all states have adopted the reasonable use test.¹¹³ The reasonable use test is arguably less predictable than either a no-duty rule or a strict liability rule. Why have almost all courts adopted it?

Justice William Brennan explained that the common enemy rule had often been interpreted not to apply when a developer introduced artificial means to increase the force or flow of surface water. Conversely, states that adopted the natural flow rule refused to impose liability for what were seen as minor changes that were the necessary corollary of any land development. The seemingly absolute rules were in fact far from absolute. Courts balanced competing interests in free use of land and security by limiting the scope and context within which the rules applied. They did so based on judgments about the legitimacy of land development and the relative interests of neighboring land owners.

Did the change to a reasonable use test make the law in this area wholly unpredictable? The answer is no and one need only remember that the basic common law rule governing land use conflicts is the law of nuisance. Like negligence law, the nuisance doctrine requires explicit judgments about the reasonableness of behavior and does so through a combination of attention to considerations of fairness and social welfare, as well as exemplars of conduct within and outside the rule.¹¹⁴ Nor would it help to go back to strict rules; those required judgment to apply just as the reasonable use test does. It is no more difficult for lawyers to counsel clients about the likely results of a nuisance claim or a reasonable use claim than it was to determine the results of a lawsuit involving the common enemy doctrine. In both cases, the factual and social context matter, as well as the character and magnitude of the harm, and the social utility of the conduct. A presumption of free use of land allocates the burden of proof and tacit or explicit exemplars operate in both cases. As Justice Brennan explained, the adoption of the reasonable use test was merely an

¹¹³ SINGER, PROPERTY, *supra* note 6, § 3.4.1, 127-31; *see, e.g.*, *Keys v. Romley*, 412 P.2d 529 (Cal. 1966) (holding that a property owner must take reasonable measures to prevent injury when dealing with surface waters).

¹¹⁴ SINGER, PROPERTY, *supra* note 6, § 3.2, at 104-18; SINGER, PROPERTY LAW, *supra* note 81, at 376-83.

acknowledgment of what was going on anyway but had been hidden behind the patina of rigid rules.¹¹⁵

2. Land Use Regulation

At one time, zoning law was structured in a relatively rigid fashion. Called “Euclidian zoning” after the Supreme Court case that legitimized it in 1922, zoning laws classified property as industrial, commercial, or residential, identified separate geographic zones, and allowed owners to determine what they could do on their land.¹¹⁶ Minor variation was allowed through the use of variances but governing law made such exceptions truly exceptional. When I published the first edition of my property law casebook in 1993, so-called “planned unit developments” were still controversial. They involved zoning laws that allowed certain owners of large parcels to negotiate a package of zoning regulations that would allow different uses on the same property (mixed commercial/residential developments, for example) with relaxed or complicated density and set-back requirements. “Contract zoning” was banned because it involved agreements between developers and lawmakers that seemed to bypass democratic lawmaking procedures and appeared to contract away legislative power.¹¹⁷ Contract zoning also seemed to allow special benefits to individual owners in ways that were inconsistent with the general zoning plan and arguably constituted unlawful spot zoning. Fast-forward to today and the situation is astonishingly different.

Negotiated zoning is now the norm. Most large real estate projects involve negotiations between the owner and the zoning board, as well as the city council. They also require meetings with community members and neighbors to get them to agree to go along with the project, or at least not to pressure their political leaders to deny needed building permits. And regardless of what the zoning laws say, variances are often routinely granted even though owners cannot show undue hardship. Many states have formally relaxed the requirements to get a variance by allowing them to be granted in the case of “practical difficulties” — a standard that allows a huge amount of judgment and variation.¹¹⁸ Zoning has become political, not just in the

¹¹⁵ *Armstrong*, 120 A.2d at 330 (“We therefore think it appropriate that this court declare . . . our adherence . . . to the reasonable use rule and thus accord our expressions in cases of this character to the actual practice of our courts.”).

¹¹⁶ See *Vill. of Euclid*, 272 U.S. at 379-90 (zoning law not an unconstitutional taking of property).

¹¹⁷ See SINGER, PROPERTY, *supra* note 6, § 13.3.4, at 641-44.

¹¹⁸ See *id.* at 648-50.

sense that the lawmaking body must pass a zoning law but because individual zoning decisions about parcels of property are made in a political fashion through the exercise of judgment and bargaining among public officials and private citizens. In one recent case, a developer induced a town to change its zoning law to allow it to build a power plant by offering to pay \$8 million so it could afford to build a new high school.¹¹⁹

Recall that real estate developers are not only regulated by local zoning laws but by federal and state regulations designed to protect the environment (especially wetlands and toxic waste sites) and to ensure access without regard to disability. Builders are required to obtain building permits, not only to ensure that the builder is qualified to build the structure, but to ensure compliance with complicated regulatory laws that promote the safety and accessibility of the building. All these laws make real estate development less predictable because they require compliance with regulations that are often phrased in the form of standards, such as the requirement that alterations to buildings be accomplished in a manner that “to the maximum extent feasible [make] the altered portions of the facility . . . readily accessible to and usable by individuals with disabilities.”¹²⁰

On the surface, negotiated zoning is less predictable than Euclidean zoning. One either was or was not entitled to build a certain type of structure under the old rules. But of course the predictability of traditional zoning rules was always a bit of an illusion. One could always seek a rezoning of the property by the city council, for example, or sue to obtain a variance. Since zoning boards are political creatures, they tend to grant variances if no one objects. In such cases, no one brings a lawsuit to challenge what the board did even if it was violating the law that limits variances to cases where the owner would otherwise have no economically viable use of the property. If the city council rezoned the property, an owner might well face a lawsuit arguing that the rezoning was incompatible with the general plan or that it constituted spot zoning — and the outcome of such lawsuits was never certain.

In some ways the modern system is more predictable. All one has to do is to obtain agreement among relevant actors within a regulatory framework. Determining whether one can or cannot successfully complete a planned development requires a prediction about whether one can convince relevant audiences that it is a good idea.

¹¹⁹ *Durand v. IDC Bellingham, LLC*, 793 N.E.2d 359, 361-63 (Mass. 2003).

¹²⁰ 42 U.S.C. § 12183 (2006).

Experienced developers are likely to be more accurate in guessing whether this is the case than in predicting the outcome of a lawsuit determining whether a rezoning is or is not “inconsistent with the general plan.” Even if the new approach is less predictable than the old, it ensures that the environment within which people own and enjoy their property is a comfortable and useful one while preventing undue rigidities that force results no one wants. Such regulations are both predictable enough and may even be as predictable as what preceded them.

In one sense we could substantially improve predictability by getting rid of all land use regulations. Abolishing environmental regulation would simplify land development enormously. Allowing owners to do what they like on their land makes their rights more predictable by giving them freedom of action. But of course then they could engage in acts that harm neighboring property, making the rights of the neighbors less predictable. Since each owner can affect others, they have interests both in freedom and security. Hobbes and Locke argued that the reason we created property rights in the first place was to make investments more predictable. If you plant a field, work it for the season, you will be able to harvest your crop without fear that a plundering thief will intervene to take it from you.¹²¹ Your security in your property comes from regulating others. Abolition of environmental or zoning law would not increase predictability for owners. It would simply substitute one form of unpredictability for another. And the complete absence of regulation might have the effect of leaving toxic property unsuited to development or use of any kind, thereby undermining the scarce resource that land is, harming property rights rather than promoting them.

¹²¹ THOMAS HOBBS, *LEVIATHAN* 277 (C.B. MacPherson ed., Penguin Classics 1968) (1651) (noting that government is instituted “to defend them from . . . the injuries of one another, and thereby to secure them in such sort, as that by their owne industrie, and by the fruites of the Earth, they may nourish themselves and live contentedly”); *id.* at 188 (“The Passions that encline men to Peace, are Feare of Death; Desire of such things as are necessary to commodious living; and a Hope by their Industry to obtain them.”); JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* ¶ 57, at 306 (Peter Laslett ed. 1988, Cambridge Univ. Press, 2009) (1690).

D. Power To Transfer

1. Restraints on Alienation

Restraints on alienation of fee simple interests were traditionally void because they are “repugnant to the fee.”¹²² Conversely, restraints on alienation of many other interests, including life estates and leaseholds, were usually presumptively valid. Modern law has altered this set of rigid rules by adopting a general reasonableness test to determine when restraints on alienation are enforceable. Both the *Restatement (Third) of Property (Servitudes)* and most recent cases have held that “the validity of a restraint against alienation depends upon its reasonableness in regard to the justifiable interests of the parties.”¹²³

The pretense that the old rule was predictable because it could be mechanically applied was an illusion. Exceptions were made for property held for charitable purposes, for partial restraints, and lesser interests in land such as leaseholds. Today, restraints on partition of tenancy in common property may be enforced if they are between spouses or other family members with legitimate interests in keeping property temporarily in the family.¹²⁴ Conversely, under the rule of reasonable restraints, it is still the case that restraints on alienation of fee interests are presumptively void while those associated with leaseholds and life estates are presumptively valid. The old rules have simply been replaced by softer rules rather than wholly displaced by unmoored standards. In this sense, it is not obvious that there has been either a loss or gain in terms of predictability. Why then the change?

The modern reasonableness test rests on a recognition of the contextual nature of property rights. Different rules apply to commercial tenancies than to residential tenancies, for example, despite an overarching doctrinal structure that does not depend on

¹²² *Nw. Real Estate Co. v. Serio*, 144 A. 245, 246 (Md. 1929) (“The restriction imposed by the deed . . . was clearly repugnant to the fee-simple title which the deed conveyed.”); *De Peyster v. Michael*, 6 N.Y. 467, 468 (1852) (“[W]e cannot entertain a doubt that the condition to pay sale money on leases in fee, is repugnant to the estate granted, and therefore void in law.”); *Riste v. E. Wash. Bible Camp, Inc.*, 605 P.2d 1294, 1295 (Wash. Ct. App. 1980) (holding grantor consent to sell clause “void as repugnant to the nature of an estate in fee”).

¹²³ *Horse Pond Fish & Game Club, Inc. v. Cormier*, 581 A.2d 478, 480 (N.H. 1990); accord *RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES)* § 3.4 (2000).

¹²⁴ See, e.g., *Kopp v. Kopp*, 488 A.2d 636 (Pa. Super. Ct. 1985) (upholding a restraint on partition in a separation agreement between husband and wife).

this distinction. Similarly, family and charitable property are different from other forms of property precisely because the policies promoting alienation of property are inapposite in these contexts; unlike the business realm, stability and inalienability are in fact desired in the case of certain kinds of family or charitable property. Nor do these categories exhaust the contexts where inalienability may be appropriate. Consider the case of low-income housing. Even if the property is not held by a charitable trust, the courts have enforced restrictive covenants intended to keep the property affordable by, and occupied by, low-income families.¹²⁵ Recall that many condominium associations have rights of first refusal that give them first choice to purchase condo units when they come up for sale. Such preemptive rights may inhibit alienability because some buyers will be discouraged from bidding if they know the association can snatch the unit away from them by matching their price. Yet courts have authorized these restraints on alienation on the ground that the effect on alienability is minor and because the condominium association has legitimate interests in regulating who moves into the complex given the intertwined economic interests of condominium owners.¹²⁶

The modern reasonableness test achieves predictability in the same way the old repugnancy rule did — by identifying core cases where restraints either are or are not enforceable. Judgments were always made in this regard and it is not clear that there is a strong difference between the old rule and the modern one other than greater transparency about the fact that restraints on alienation sometimes are enforced and sometimes are held to be void. The modern standard authorizes judges to determine the contexts within which restraints will be struck down without forcing them to adopt “exceptions” to a seemingly rigid rule.

2. Future Interests

In recent years, a fair minority of states has abolished the rule against perpetuities, mostly to take advantage of tax laws that allow for perpetual trusts.¹²⁷ A majority of states have exempted commercial transactions from the rule.¹²⁸ You might think this would increase

¹²⁵ *City of Oceanside v. McKenna*, 264 Cal. Rptr. 275, 280 (Ct. App. 1990).

¹²⁶ *See, e.g., Old Port Cove Condo. Ass’n One, Inc. v. Old Port Cove Holdings, Inc.*, 954 So. 2d 742 (Fla. Dist. Ct. App. 2007) (holding that a right to first refusal does not impose any hindrance on sales).

¹²⁷ *See, e.g., N.J. STAT. ANN. § 46:2F-9; R.I. GEN. LAWS § 34-11-38.*

¹²⁸ SINGER, PROPERTY, *supra* note 6, § 7.7.4, at 336-38.

predictability by deregulating property transactions, but the effects of these legal changes are not clear. For one thing, the courts did not apply the traditional rule mechanically in any event. They refused to apply the rule against perpetuities to options contained in commercial leases.¹²⁹ Nor did they apply the rule to preemptive rights held by condominium associations.¹³⁰ Because judges limited the scope of the rule to appropriate contexts, the traditional rule was never as rigid as we might have assumed. Moreover, future interests remain regulated by the rule against unreasonable restraints on alienation; that standard is much less predictable than the old rule against perpetuities. The traditional rule against perpetuities clearly invalidated options held by corporations that were not certain to vest within twenty-one years, while the rule against unreasonable restraints on alienation makes the legal validity of options uncertain. Some courts invalidate options if they have no time limit; others limit them to the life of the grantee or require their exercise in a reasonable time.¹³¹ This is one change from a rule to a standard that has indeed increased uncertainty.¹³²

Courts have also begun to exercise more nuanced judgments in interpreting ambiguous estates. Traditionally, if one did not use magic words to create a particular estate, the courts would enforce the “presumption against forfeitures,” ruling against creation of a future interest or making the future interest discretionary rather than automatic.¹³³ Similarly, a conveyance that appeared to mix estates in an unconventional way would be interpreted to consolidate interests in the current owner as a fee simple absolute to promote the alienability of land. In recent years, these regulatory rules have been replaced by the idea that our goal is to implement the intent of the grantor as long as there is no public policy reason not to do so.¹³⁴ This means that

¹²⁹ See, e.g., *Texaco Ref. & Mktg., Inc. v. Samowitz*, 570 A.2d 170 (Conn. 1990) (concluding that a commercial lease option to purchase is not prohibited by the rule against perpetuities if the option must be invoked within the leasehold term).

¹³⁰ *Cambridge Co. v. E. Slope Inv. Corp.*, 700 P.2d 537, 541-43 (Colo. 1985).

¹³¹ See, e.g., *Broach v. City of Hampton*, 677 S.W.2d 851 (Ark. 1984) (interpreting an option not to extend beyond the life of the grantee); *Mr. Sign Sign Studios, Inc. v. Miguel*, 877 So. 2d 47 (Fla. Dist. Ct. App. 2004) (holding option good if exercised within a reasonable time); *Reynolds v. Gagen*, 739 N.Y.S.2d 704 (App. Div. 2002) (interpreting an option to last for the lives of the parties); *Peterson v. Tremain*, 621 N.E.2d 385 (Mass. App. Ct. 1993) (interpreting an option to require its exercise within reasonable time).

¹³² Things would be improved, for example, if legislatures passed statutes that invalidated options if they were not exercised within thirty years or so, perhaps allowing the option to be renewed if both parties agree.

¹³³ SINGER, PROPERTY, *supra* note 6, § 7.6.1, at 313-15.

¹³⁴ See, e.g., *Cain v. Finnie*, 785 N.E.2d 1039 (Ill. App. Ct. 2003) (finding a life

future interests will be recognized even if the grantor used nontraditional language to do so and that mixed estates will be recognized if one could have created them without violating any regulatory rules, such as the rule against unreasonable restraints on alienation. This modern approach is designed to recognize that we give owners a great deal of freedom to disaggregate property rights and that they should be free to do so unless we have good reason to stop them.

Interpreting an ambiguous conveyance to achieve the intent of the grantor is far less predictable than an approach requiring magic words and adopting a presumption against forfeitures in the case of ambiguity. This new approach sacrifices predictability to better achieve the results favored by the parties, thereby promoting their contractual and testamentary freedom and protecting their justified expectations where there is no reason to prevent them from creating the interests they tried to create. The modern approach recognizes that many people create property interests without consulting an attorney and that even when attorneys write conveyances, they make mistakes in applying technical rules of law. The modern inclination to achieve the grantor's intent recognizes the inevitability of mistake and excuses ignorance of the law in order to promote the will of the parties. Judges today refuse to assign property rights in a way that no one intended just because the parties failed to use magic words to achieve their ends.

3. Servitudes

Traditional servitudes law was relatively rule-bound — and therein lay the problem. Consider a subdivision with one hundred houses subject to covenants limiting the property to single-family structures. Over time, ninety-nine of the owners come to resent the covenants because they want to allow owners to convert garages to separate apartments so their parents can move in with them when they become elderly. One owner refuses to go along with the change. Covenants can be released by consent of the owners, but does each owner have veto power over any change? Under the old law, the answer was yes; the changed conditions doctrine does not apply to this situation.¹³⁵

estate despite lack of language limiting rights to life); *Cathedral of the Incarnation in the Diocese of Long Island, Inc. v. Garden City Co.*, 697 N.Y.S.2d 56 (App. Div. 1999) (finding a right of entry despite the lack of traditional language creating it); *Edwards v. Bradley*, 315 S.E.2d 196 (Va. 1984) (finding a life estate despite lack of language limiting rights to life).

¹³⁵ The covenant remains of substantial value to the owner who wishes to retain its benefit and that benefit is still capable of being fulfilled by enforcement of the covenant. See SINGER, *PROPERTY*, *supra* note 6, § 6.8.1, at 288-91.

Modern lawmakers have come to doubt the wisdom of this approach. They think of the one stalwart as a “holdout” who is bucking desirable change rather than as an owner exercising his legitimate property rights.¹³⁶

One way to achieve flexibility is expanded use of the *changed conditions* doctrine. For example, the Supreme Judicial Court of Massachusetts applied a state statute to allow an owner to build a bridge between its property and the neighboring hotel despite a longstanding covenant requiring the alleyway to be kept open. The state statute in question identified a dozen different reasons for defeating a covenant or enforcing it solely by damages rather than injunctive relief — effectively letting the servient estate buy its way out of the restriction against the will of the servitude owners and privileging change and economic development over stability of property rights.¹³⁷

A more important technique for avoiding a minority veto is the use of *homeowners associations* with the power to alter covenants by a majority vote. All states now encourage or require developers of subdivisions with land use covenants to create homeowners associations with the power to manage commonly owned areas and to alter covenants. Homeowners associations are also empowered to adopt and enforce highly intrusive rules governing the use of the properties; they can also change those rules retroactively over time. The astronomical growth of homeowners associations in the United States means that more and more owners are subject to regulation by their neighbors through such rules. Not only does this mean that covenants can be repealed against the will of individual owners but that new covenants and rules can be imposed retroactively on existing owners.

The ability of a homeowners association retroactively to amend existing covenants or to create new covenants and new rules governing property use has generated a legal backlash limiting new restrictions if they are “unreasonable.” For example, many declarations establish architectural committees that have the power to determine how and when properties can be physically changed; such committees often have the power to determine all questions about the external appearance of units, including the color of the house, the surrounding vegetation, and even the type and color of curtains inside

¹³⁶ See, e.g., *Horse Pond Fish & Game Club, Inc. v. Cormier*, 581 A.2d 478 (N.H. 1990) (considering whether to enforce a restraint on alienation that required a 100% vote of club members to transfer the land).

¹³⁷ MASS. GEN. LAWS ch. 184, § 30; *Blakeley v. Gorin*, 313 N.E.2d 903, 909-10 (Mass. 1974).

the home. Although some courts have adopted a “business judgment rule” that grants almost complete deference to such decisions, most courts subject the decisions of an architectural committee to a reasonableness standard.¹³⁸

In general, the courts require the exercise of good faith when one party to a contract has a discretionary power and the courts have recently applied this doctrine in the context of servitudes. For example, in the case of *Appel v. Presley Cos.*¹³⁹ a developer restricted lots to single-family homes while creating an architectural control committee with the power to “make amendments and/or exceptions” to the restrictions. Oral assurances were made to the buyers that the neighborhood would have uniform restrictions. The developer appointed the members of the committee and maintained control even after most of the units had been sold. When the committee voted to delete the last nine lots from the restrictions and sought to build smaller homes and townhouses, the neighbors sued and won. Rather than reading the covenants literally to give the committee full power to amend the covenants, the New Mexico Supreme Court remanded for factual findings to determine “whether the exceptions were reasonably exercised or whether they essentially destroyed the covenants.”¹⁴⁰

Modern servitudes law tends to subject covenants to general judgments of *reasonableness*. California, for example, has a statute that invalidates unreasonable covenants.¹⁴¹ The *Restatement (Third) of Property (Servitudes)* provides that covenants are void if they violate public policy and the commentary lists a wide variety of norms that might be relevant to that determination, including those that restrain alienation, promote racial discrimination, or interfere with core interests in privacy, freedom of speech, or freedom of religion.¹⁴² It

¹³⁸ See, e.g., *Westfield Homes, Inc. v. Herrick*, 593 N.E.2d 97, 101-02 (Ill. App. Ct. 1992) (architectural review committee acted unreasonably by refusing to allow an owner to install a swimming pool); *Appel v. Presley Cos.*, 806 P.2d 1054, 1055-57 (N.M. 1991) (unreasonable for architectural control committee to exempt last unsold lots from uniform restrictive covenants). *But see* *Levandusky v. One Fifth Ave. Apartment Corp.*, 553 N.E.2d 1317, 1320 (N.Y. 1990) (applying business judgment rule).

¹³⁹ *Appel*, 806 P.2d at 1055-57.

¹⁴⁰ *Id.* at 1056.

¹⁴¹ CAL. CIV. CODE § 1354 (West 2012).

¹⁴² RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.2(2) (2000) (“Unless the purpose for which the servitude is created violates public policy, and unless contrary to the intent of the parties, a servitude should be interpreted to avoid violating public policy.”); *see id.* § 3.1 cmt. h.

also counsels a wholesale abolition of a number of technical doctrines that courts found both confusing to apply and unrelated to public policy goals. In place of “privity of estate” and the “touch and concern” tests, we will now allow covenants to run with the land when it is appropriate to do so, policing those covenants to see if they violate “public policy” — defined to include a wide range of important social and individual interests.¹⁴³ In addition, the *Restatement* abolishes the touch and concern requirement only to reintroduce it through the backdoor. It provides, for example, that only “appurtenant” benefits and burdens should run with the land and defines those as “tied to ownership or occupancy of land [because they] obligate[] the owner or occupier of a particular unit or parcel in that person’s capacity as owner or occupier.”¹⁴⁴ This circular argument effectively provides that covenants should run with the land if it makes sense for them to do so. While this may be a more honest doctrinal framework than the traditional touch and concern test, it does put front and center the need for judgment in determining which covenants will be allowed to run with the land.

The modern approach recognizes that servitudes are not merely encumbrances on property that should be narrowly construed but that they are valuable property rights in themselves, precisely because of the stability they provide to the owners of dominant estates. That is

h. Resolving public policy claims requires balancing interests. Resolving claims that a servitude violates public policy requires assessing the impact of the servitude, identifying the public interests that would be adversely affected by leaving the servitude in force, and weighing the predictable harm against the interests in enforcing the servitude. Only if the risks of social harm outweigh the benefits of enforcing the servitude is the servitude likely to be held invalid. The policies favoring freedom of contract, freedom to dispose of one’s property, and protection of legitimate expectation interests nearly always weigh in favor of the validity of voluntarily created servitudes. A host of other policies, too numerous to catalog, may be adversely impacted by servitudes. Policies favoring privacy and liberty in choice of lifestyle, freedom of religion, freedom of speech and expression, access to the legal system, discouraging bad faith and unfair dealing, encouraging free competition, and socially productive uses of land have been implicated by servitudes. Other policies that become involved may include those protecting family relationships from coercive attempts to disrupt them, and protecting weaker groups in society from servitudes that exclude them from opportunities enjoyed by more fortunate groups to acquire desirable property for housing or access to necessary services.

¹⁴³ *Id.* § 3.1 (allowing covenants to run with the land unless they are unconscionable, without rational justification, or violate public policy).

¹⁴⁴ *Id.* §§ 5.2, 1.5.(1) (2000).

why most courts have repudiated the traditional notion that ambiguous covenants should be interpreted narrowly in favor of free use of land, adopting instead the modern idea that they should be interpreted to achieve the intent of the grantor.¹⁴⁵ As with future interests, this change promotes contractual freedom at the expense of clarity. Presumptions lead to clear results if conventional forms are not followed; in contrast, promoting the parties' intent requires more nuanced, contextual, and fact-sensitive judgments.

Recent legal changes have made each owner's land use rights contingent on retroactive covenants and rules imposed by a majority of neighbors in the association, and it limits the powers of homeowners associations by requiring them to exercise their powers reasonably. They have done so to achieve the substantive goals of mutual governance, security, and flexibility. In one sense, these legal changes have made property rights much less stable and clear than they used to be. On the other hand, the ability to make and enforce covenants exists precisely because owners find security in being able to adopt rules that are mutually beneficial. Nor were the traditional rules mechanically applied in any event. Courts always limited the scope of traditional rules when they saw fit to do so. Or they used judicial discretion to deny injunctive relief, relegating the covenant beneficiary to damages. Allowing the courts to consider directly the interests and policies implicated in servitudes enforcement arguably increases predictability by inducing candor about the factors involved in denying or allowing enforcement. Moreover, adopting a presumption in favor of covenant enforceability also promotes predictability by putting the burden of persuasion on the party seeking to defeat a covenant. While the modern approach expressly requires the use of judgment to determine whether covenants run with the land and whether they are enforceable, it is a mistake to believe that such

¹⁴⁵ Compare *Forster v. Hall*, 576 S.E.2d 746, 750 (Va. 2003) ("Restrictions of the free use of land . . . are disfavored by public policy and must be strictly construed."), and *Yogman v. Parrott*, 937 P.2d 1019, 1023 (Or. 1997) (ambiguous covenants should be interpreted in the manner that would be the "least burdensome to the free use of land"), and *Country Club District Homes Ass'n v. Country Club Christian Church*, 118 S.W.3d 185, 189 (Mo. Ct. App. 2003) ("restrictive covenants are regarded unfavorably and are strictly construed because the law favors the free and untrammled use of real property.") (alterations in original) (internal quotation marks omitted), with *Riss v. Angel*, 934 P.2d 669, 675 (Wash. 1997) (stating that covenants should be interpreted to achieve the intent of the grantor), and RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) §4.1(1) (2000) ("A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.").

discretion was never utilized under the traditional rules. Judgment was and will be present, no matter what form the rules take. The modern approach also increases security for property owners by giving homeowners associations the power to regulate property uses for common benefit while protecting minorities from oppression through public policy doctrines. And it achieves these goals through an institutional framework that makes property rights far less rigid than in the past.

4. Leaseholds

The law of residential tenancies changed dramatically in the 1960s. The courts finally implied a warranty of habitability in residential leases and made the landlord's right to receive rent contingent on complying with that obligation. For the first time, not only were the tenant's possessory rights contingent on the payment of rent but the landlord's reversionary rights were contingent on complying with maintenance obligations. Courts and legislatures also prohibited retaliation against tenants who exercised their rights to habitable housing by calling up the housing inspector to enforce the state housing code. And almost all states now imply a duty to mitigate damages on landlords from which they had previously been exempt.¹⁴⁶ While these rule changes better protect tenants' rights to habitable housing, they make the law less predictable in the sense that they require judgment to implement the new standards.

At the same time, the traditional rules left tenants vulnerable to landlord choices about maintenance. A tenant whose landlord did not repair the premises not only had no contractual remedy but no right to get out of the lease. In the absence of adequate enforcement of housing codes, the tenant was therefore at the mercy of the landlord. This deprived the tenant of the certainty of knowing that the apartment would be kept livable. The new rules arguably reverse this vulnerability, creating more certainty for tenants while subjecting landlords to somewhat more unpredictability. On the other hand, most states interpret the warranty of habitability to require compliance with the housing code which tends to define requirements in a relatively predictable manner.

The changes in the law in this area extend consumer protection principles to tenants. Tenants have the right to get what they paid for. Landlords would love to have the right to receive rent regardless of

¹⁴⁶ SINGER, PROPERTY, *supra* note 6, § 10.4.4.4, at 461-65. See, e.g., *Sommer v. Kridel*, 378 A.2d 767 (N.J. 1977).

their compliance with the housing code but that is like paying for a car that is never delivered or that does not run. Landlords may own the reversion but tenants own the leasehold. The warranty of habitability allocates property rights between the parties in a way that reflects justified expectations of the packages of rights in each bundle. Tenant protection laws establish minimum standards for the rental housing market and ensure that consumers do not have to bargain about things that they would like to take for granted.¹⁴⁷ And any increased uncertainty for landlords is balanced by greater tenant security that the housing they bargained for will be fit for its intended purpose.

5. Real Estate Transactions

Over the last fifty years, courts have become more open to inventing exceptions to the statute of frauds, thereby recognizing interests in land despite the failure of the parties to reduce their deals to writings that satisfy the statute. In one sense, there is nothing new about this. The history of property law is the history of equitable doctrines being invented by the chancery courts to limit the enforceability of rigid common law rules. The back and forth between legal rules and equitable doctrines is a defining feature of property law since medieval times. Yet it is notable that the courts have begun to treat the statute of frauds as if it were a common law rule rather than a statute.¹⁴⁸

The statute of frauds is not the only area where real estate transactions have become subject to legal regulation that takes the form of standards. New regulations of property transactions since 1960 include the Fair Housing Act, the Clean Water Act, the Clean Air Act, the Americans with Disabilities Act, the National Historic Landmarks Act, the Religious Land Use-Institutionalized Persons Act, the Truth in Lending Act and other mortgage regulations, state consumer protection statutes, warranties of habitability for new housing, state statutes mandating disclosure of latent defects in property known to the seller but not obvious to the buyer, and beefed-

¹⁴⁷ See Joseph William Singer, *Subprime: Why a Free and Democratic Society Needs Law*, 47 HARV. C.R.-C.L. L. REV. 141, 155-60, 166-67 (2012) [hereinafter *Subprime*]; Joseph William Singer, *Things That We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society*, 2 HARV. L. & POL'Y REV. 139, 146-52 (2008) [hereinafter *Take for Granted*].

¹⁴⁸ Compare, for example, the strict reading of the statute of frauds by Judge Cardozo in *Burns v. McCormick*, 135 N.E. 273 (N.Y. 1922), with the looser application in cases like *Gardner v. Gardner*, 454 N.W.2d 361 (Iowa 1990); *Hickey v. Green*, 442 N.E.2d 37 (Mass. App. Ct. 1982); and *Roussalis v. Wyoming Medical Center*, 4 P.3d 209 (Wyo. 2000).

up state building codes. Environmental statutes alone have increased the uncertainty of real estate transactions, as most contracts for the sale of property contain contingencies for adverse environmental discoveries — a far more serious problem today than traditional defects in title. And both federal and state laws may require buyers of contaminated property to pay to clean it up — a requirement that substantially increases the cost of real estate transactions as well introducing uncertainty into them.

These new regulations may effectively prevent owners from selling property “as is.” In so doing they increase the costs and uncertainty of real estate transactions. Or do they? Laws that increase costs on sellers may lower costs for buyers by protecting them from unforeseen defects in property. Environmental regulations do increase the costs of managing property but they do so to prevent harm to other owners and to the public at large. By preserving the environment within which property is situated, they may even increase the value of property over the long run. Regulatory laws have costs but they are in place because they have benefits as well, and the legislators who pass them and the public who support them find the benefits outweigh the costs. Similarly, uncertainty associated with regulatory requirements promotes certainty for buyers who want to take certain things for granted — i.e., that the property is safe, suitable for its intended purpose, not polluted, accessible, and in conformity with existing zoning and other land use laws.

III. RULES OF REASON

Categorical rules are not as different from flexible standards as we might think. Rules cannot be applied without determining their scope and there is no rule for determining whether a case is easy or hard. When a rule leads to a problematic result, judges and lawyers use standards to determine whether a rule applies. Precedents that establish rules can be distinguished, exceptions can be crafted, or independent standards can be applied that require contextualized judgment. Sometimes standards are simple (“justice and fairness” or “reasonableness”) and sometimes they involve multi-factor balancing tests (as with nuisance and regulatory takings law). All these techniques constitute the “rules of reason” of property law.

“Rules of reason” respond to a number of basic problems in the legal infrastructure of property. Solving these problems requires contextual judgments about the institutional framework for property and the reasonableness of applying rules to particular cases. The historical evidence shows that rules of reason perform *systemic functions* by: (1)

defining the *minimum standards* for property relationships compatible with the norms of a free and democratic society; (2) *protecting the legitimate expectations of consumers*; and (3) managing the *externalities* and *systemic effects* of the exercise of individual property rights. Rules of reason also determine the *legitimate scope* of property law rules by: (4) *distinguishing cases*; (5) resolving *conflicting norms* and values; (6) responding wisely to *excusable mistakes*; (7) allowing owners to escape the clutches of the “*dead hand*” of the past; and (8) *detering the “bad man”* who deliberately uses clear rules to wrongfully deny others property entitlements.

These eight functions capture some of the key reasons courts and legislatures have moved from rules to standards in different areas of property law. Each of these basic problems requires both contextual analysis and practical reason to choose and apply appropriate rules of law. Nor could it be otherwise. These problems are intrinsic to the structure of any private property system; we cannot escape the need to use judgment to respond to them. This means that reasonableness standards of one type or another will be employed to grapple with these problems whether we structure property doctrines as rigid rules or flexible standards. It would be impossible to run a private property system without “rules of reason” even if we wanted to do so.

A. *Systemic Functions of Rules of Reason*

1. Setting Minimum Standards Compatible with Democratic Norms

Rules of reason determine the minimum standards for the legal framework of a property law system compatible with the values and norms of a free and democratic society.¹⁴⁹ Property rights cannot be absolute, not only because the rights of some may be exercised in ways that conflict with the rights of others, but because there are many property rights that a democracy cannot recognize. We have abolished feudalism, titles of nobility, primogeniture, debtor’s prison, and the fee tail. We have outlawed slavery, racial segregation, and discrimination in access to housing, employment, and public accommodations. We

¹⁴⁹ Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1051-53 (2009); Joseph William Singer, *Property Law as the Infrastructure of Democracy* [The Fourth in the Wolf Family Lecture Series on the American Law of Real Property], in 11-1 POWELL ON REAL PROPERTY (2011); Singer, *Subprime*, *supra* note 147, at 155-60, 166-67; Singer, *Take for Granted*, *supra* note 147, at 146-52.

have outlawed established religion that assigns benefits and privileges based on adherence to an official creed. We have prohibited husbands from controlling the property owned by their wives; we have ensured that husbands and wives benefit equally from the property accumulated during marriage through community property and equitable distribution and statutory share laws. We have abolished male privileges that used to characterize tenancy by the entirety. We promote access to public accommodations, employment and housing for persons with disabilities by requiring reasonable modifications of premises and reasonable accommodation of policies and practices. And we prohibit regulations that impose uncompensated burdens on property owners that, in all fairness and justice, should be shared by the public as a whole.

Judgments of political and moral principle were and are needed to identify the property relationships that are beyond the bounds of those compatible with the fundamental norms governing a free and democratic society. This is not merely a matter of adding up costs and benefits; it requires *interpreting* the meaning of our most basic values. Nor is this something we did back in 1789 and need not think about again. We sometimes act as if all such judgments have already been made and we can now devote ourselves to developing property law rules that diminish transaction costs or that minimize the information costs needed for mutually-beneficial market transactions. Nothing could be further from the truth. We are never going to be done arguing about the legitimate contours of allowable property rights. That is so because defining the meaning of concepts like liberty, equality, and democracy is not something that can be put to rest, as if all we needed were rules of logic or mathematics. The content of justice is not something that just exists and we can discover it; it is something we come to understand as we grapple with practical problems in the world and it is something whose content changes as our understanding of what is right and good and just changes.

For example, one might think that it was illegal for retail stores to engage in racially discriminatory surveillance of customers or to subject customers to racial epithets while shopping. Yet many courts find no violation of federal civil rights acts when retail stores engage in these despicable behaviors.¹⁵⁰ They do so because they rigidly apply the common law rule that places a duty to serve the public on common carriers and innkeepers but not on retail stores rather than the pre-Civil War norm that gave the public a right to be served in all

¹⁵⁰ See Singer, *Anti-Apartheid Principle*, *supra* note 51, at 93-100.

businesses open to the public.¹⁵¹ Courts also narrowly interpret the meaning of the “right to contract” and the “right to purchase personal property” in the Civil Rights Act of 1866.¹⁵² These are not merely technical issues; they require judges to interpret what it means to have an equal right to contract and to purchase property. This requires sensitivity to changing understandings of what property rights are compatible with a democratic society that treats each person with equal concern and respect.

We will be making judgments about fairness and justice and equality and liberty regardless of the form a legal rule takes. Whether we say that the right to exclude must be reasonably exercised or we say that the right to exclude is subject to exceptions, we will be making judgments of reasonableness to determine the legitimate scope of the right to exclude in different social contexts and the situations in which it must yield to rights of access. The same is true, for example, of regulatory takings law. When we assess whether a regulation imposes unjust and unfair obligations on property owners or singles them out for unfair treatment, we do not come to conclusions through mechanical protection of “established property rights.” We use rules of reason.

2. Consumer Protection: Things that We Would Like To Take for Granted

In addition to basic democratic norms, both statutes and common law evolved in the twentieth century to adopt a core principle of consumer protection. You should get what you pay for. When you buy a car, you expect it to work and to be safe. When you rent an apartment in Boston, you expect it to have a working heating system. When you sign a lease, you expect to be able to leave before the end of the lease term if the landlord can find a suitable replacement tenant, rather than being tied to the land like a feudal peasant. When you buy a house, you expect the seller to be telling the truth when she says that there are no termites; you expect the builder to have been competent and the foundation and electrical systems to be secure rather than dangerous. When a developer promises that all parcels in the neighborhood will be restricted by similar covenants, you expect the developer’s word to be good. Both federal and state laws prohibit fraud and many state laws regulate the provision of housing and goods and

¹⁵¹ See Singer, *No Right to Exclude*, *supra* note 64, at 1303-412.

¹⁵² See Singer, *Anti-Apartheid Principle*, *supra* note 51, at 94; Singer, *No Right to Exclude*, *supra* note 64, at 1425-35.

services to ensure that we get our money's worth — to get what we think we are paying for. Consumer protection statutes both create and protect legitimate expectations in market transactions. They allow us to take many things for granted when we enter the world of commerce, and they protect us from having to bargain about these things over and over again, leaving us free to bargain about other things.¹⁵³ Like democratic norms, consumer protection laws define minimum standards for market relationships and thus ensure that bargaining takes place within an institutional framework that accords with our justified expectations.¹⁵⁴

Consumer protection laws do more than lower transaction costs or prevent fraud. They ensure that we are treated with dignity when we engage in property transactions by preventing sellers from picking our pockets or fooling us into buying things we don't want. Determining the content of such laws requires us to imagine ourselves in the position of the seller and the buyer in order to determine not only what we would expect but what we have a right to expect from the transaction. The Golden Rule — or Rawls's veil of ignorance — seems to apply here. What contract terms would you think were fair if you did not know on which side of the transaction you would be situated? Or perhaps we should think of the Rule of the Loved One: if your daughter were renting the house, how would you want the landlord to treat her? Would you want her to be evicted if her rent check were late by a single day? Would you want the landlord to be able to put her belongings on the street? Would you be happy if the electrical wiring in the house she bought were installed by an unqualified and incompetent person? Would you sell your own daughter one of those subprime mortgages? Consumer protection laws define things that we would like to take for granted. They establish minimum standards for market transactions. Both the decision to enact such laws and their interpretation require the use of judgments of reasonableness; they need rules of reason.

3. Managing Externalities and Systemic Effects of Property Rights

Judgment is required to respond both to externalities and to the systemic effects of the recognition and exercise of individual property rights. Individual entitlements that appear innocent in themselves may both cause harm to others and result in systemic consequences that we cannot live with and which cause us to narrow the scope of those

¹⁵³ Singer, *Subprime*, *supra* note 147, at 155-58.

¹⁵⁴ *Id.*

entitlements. It may not limit one's opportunities if one store refuses to serve you because of your religion because you can always shop elsewhere. But what if religious prejudice is widespread and you happen to belong to a minority religion that is the object of scorn and derision? The multiple effects of the exercise of the right to exclude by many individual owners could severely narrow your ability to engage in market transactions. Similarly, it might not matter if one person built a house on the coast but if the entire coast is built up, the cumulative effect of each small construction project may be massive, destroying the land on which the houses are built and undermining property further inland. Both nuisance and environmental law take into account the systemic effects of individual property use decisions, as antidiscrimination law takes into account the cumulative impact of individual acts of discrimination.

Rules of reason provide an escape valve when the individual exercise of property rights has the cumulative effect of negatively affecting the system of property rights for everyone. If the importance of systemic norms seems hard to grasp, remember the subprime crisis. The idea of "systemic risk" is now a mainstay of political and economic rhetoric. While a few subprime mortgages may not have large effects on other property owners or the economy as a whole, an entire industry premised on them wrecked the world economy. Property law regulates the packages of rights we are allowed to create partly because those packages can have large externalities, both negative and positive, and because some packages have such noxious systemic effects that we want to avoid them altogether or ensure that their exercise does not undermine the infrastructure of the property system.¹⁵⁵

B. Determining the Scope of Property Law Rules

1. Distinguishing Cases

Scholars who debate the relative virtues of rules and standards assume that they can be clearly distinguished.¹⁵⁶ In particular, they

¹⁵⁵ See Gretchen Morgenson, *How to Avert a Financial Overdose*, N.Y. TIMES, Apr. 1, 2012, at BU1 (discussing proposal by Eric Posner and Glen Weyl for regulations preventing the sale of financial products that serve no useful purpose and pose undue risks to the smooth functioning of the economy).

¹⁵⁶ See, e.g., Kaplow, *Rules Versus Standards*, *supra* note 5; Kennedy, *supra* note 5; Rose, *supra* note 5. The exception is Amnon Lehavi, who rightly focuses on the inherent incompleteness of rights. See Lehavi, *supra* note 5, at 84 (discussing the "practical incompleteness of norms.")

imagine that judges apply rules mechanically.¹⁵⁷ In the real world, however, a rule is not a rule. To apply a rule requires determining the fact situations to which the rule applies. Because rules do not determine their own scope, they cannot be applied without judgment. This does not mean that every rule application is a difficult case. It means that, *when a case is hard*, mechanical rule application is not available. And how do we determine when a case is hard? We use rules of reason. *There is no rule that can tell us whether a case is hard or easy.*

Sometimes it is easy to distinguish a case and find a rule not to apply. The law allows owners to determine who inherits their property when they die. But can you inherit your grandfather's property if you murder him? Of course not.¹⁵⁸ But it is often not so easy to determine the scope of a property rule. Do you have the right to withdraw water if this will sink an entire town?¹⁵⁹ Was the water company justified in relying on a rule of law that immunized it from liability for harm to the water underlying neighboring land, or should it have understood that the right dry up your neighbor's well is not the same thing as the right to undermine the surface of your neighbor's land? Most courts uphold restraints on alienation of leaseholds, but when a lease requires the landlord's consent to a sublease, must the landlord have a good reason to deny the sublease?¹⁶⁰ Condo associations are entitled to alter covenants and to apply such changes retroactively but can they impose restraints on alienation such as leasing restrictions?¹⁶¹ Condo associations have the power to enact rules governing the appearance of the premises but can they prohibit owners from affixing religious symbols to their property or posting signs related to political campaigns?¹⁶²

¹⁵⁷ Rules require "the decision maker to focus her attention on a narrowly circumscribed set of applicable facts and then to take those facts and mechanistically feed them into a precisely engineered calculus," Lovett, *supra* note 5, at 931.

¹⁵⁸ Riggs v. Palmer, 115 N.Y. 506, 509-10 (1889).

¹⁵⁹ Friendswood Dev. Co. v. Smith-Sw. Indus., Inc., 576 S.W.2d 21 (Tex. 1978) (addressing this issue).

¹⁶⁰ Courts are split on this question. SINGER, PROPERTY, *supra* note 6, § 10.7.2, at 489-90.

¹⁶¹ Compare Woodside Vill. Condo. Ass'n v. Jahren, 806 So. 2d 452 (Fla. 2002) (allowing retroactive leasing restriction but overturned by statute, FLA. STAT. § 718.110(13)), with Breene v. Plaza Tower Ass'n, 310 N.W.2d 730 (N.D. 1981) (prohibiting retroactive application of a newly adopted leasing restriction).

¹⁶² Bloch v. Frischholz, 587 F.3d 771 (7th Cir. 2009) (addressing the question of whether fair housing laws prohibited restrictions on mezuzahs); Mazdabrook Commons Homeowners' Ass'n v. Khan, 46 A.3d 507, 513-21 (N.J. 2012) (discussing right to post political sign on one's property).

Scholars sometimes forget the most basic lessons we teach first year law students. Rules work as we expect in the core cases they cover. When we confront a fact situation to which the rule may or may not apply, our understanding of both the rule of law and the appropriate judicial role requires the judge to determine whether this case is like the precedent or relevantly different. The injunction to treat like cases alike depends on a determination of what makes the cases alike. That, in turn, requires attention to reasons we adopted the rule in the first place, the norms it is supposed to protect, the consequences we hope it promotes, and the context in which it is supposed to operate. How do we make these determinations? We use rules of reason.

2. Resolving Conflicting Norms

Because we need to know who owns property and we all want to know that our homes will be waiting for us at the end of the day, we sometimes forget that property is no different from other areas of law in its need to contend with conflicting norms and values. We often distinguish cases because of important competing principles. Rules of reason provide crucial relief and guidance when mechanical rule application would lead to unwelcome results that sacrifice important competing values, interests, and rights.

Rights to exclude are limited when they deny access to public accommodations because of race or religion or disability. Rights to inherit property are limited when they conflict with the duty not to commit murder.¹⁶³ Freedom to develop property is limited if it causes flooding or destruction of neighboring land. Rights to restrict land use by private covenants are limited when they interfere with the alienability of property or they violate fundamental rights to free speech, religion, or privacy. Rights to rely on written documents are limited when they would result in unjust enrichment or enable fraud. Rights to keep what one has earned are limited on divorce to ensure that married women are equal partners with their husbands. The rights of landlords to collect rent are limited by a duty to mitigate damages to promote the freedom of tenants to move without undue financial constraints. Immunity from forced sale is limited when private property is needed to create a public highway or when a neighbor encroached on your property in good faith and you only found out about the record boundary line after the building was completed. Servitudes are enforced unless the homeowners association

¹⁶³ *Riggs*, 115 N.Y. at 509.

votes to amend the covenants or changed conditions render enforcement unreasonable.

In all these cases, conflicting values, norms, interests, or rights lead us to narrow the scope of a presumptively-applicable rule of law. This would be the case whether the rule was enacted in the form of a rigid rule or a flexible standard. Reasons must be given to determine the scope of legitimate interests and the appropriate context within which they can be recognized when they clash with the legitimate interests of others. In adjudicating conflicts among competing values, context is often crucial. Property open to the public (like a shopping center) is subject to different rules of access than property that is partially open (like a workplace) and different still from property in a private club or in one's home. Residential leases are subject to different rules than commercial leases; we expect commercial tenants to have more ability and interest in choosing the terms of the business arrangement while tenants are dependent on landlords to provide basic services. An activity that would not be a nuisance in the country may be one in the city. Determining the place to draw a line between competing norms is not one that can be accomplished by a rigid formula; nor is the appropriate context for the application of a rule or standard something that can be determined mechanically. Rules of reason establish the contours and scope of conflicting rights and values.

Here again, our property laws reflect criteria other than cost-benefit comparisons. They entail judgments about the relative interests of the parties that cannot be reduced to dollar amounts. Consider the condominiums in Boston that have recently outlawed smoking not only in common areas but inside units as well.¹⁶⁴ They have done so to protect all residents from second-hand smoke. Some have grandfathered in existing units, allowing current owners to smoke inside their homes while others have applied the new rules retroactively to existing owners. In older buildings, smoke may waft from one unit to another, harming those who are sensitive to smoke and who would not be safe or comfortable in their own homes without a full ban. Of course, smokers bought their units in reliance on rules that allowed them to smoke. The new rules require these owners either to stop smoking or to sell their units. How do we balance the rights of smokers against the rights of non-smokers? Most courts subject condominium rules to a reasonableness test to determine when to defer to judgments of the majority and when to limit their powers to protect the legitimate expectations of the minority. Rules of reason

¹⁶⁴ Kay Lazar, *Boston's largest condo goes smoke-free: residents vote on third attempt to ban practice*, BOSTON GLOBE, Mar. 21, 2012, at 3.

allow judgments of what is fair and just, allowing changing social values to affect the definition of what property rights one acquires when one buys property.

3. Excusing Mistakes

Many innovations in property law in the twentieth century concern changing attitudes to the problem of mistake. Rather than rigid application of technical rules of law, courts and legislatures have increasingly excused people who, for understandable reasons, do not know the law or cannot or will not follow it to the letter. Sometimes this is because the lawmakers wrote the rule with a certain set of tacit exemplars in mind and did not anticipate how the rule would apply in a different context. Sometimes it is because we were unduly confident that people would learn what the rules are and follow them. Sometimes, even when rules are known, people simply make mistakes, and we can sympathize with them and want to excuse them. Sometimes the cost of complying with the rules is higher than we thought and it seems reasonable for owners to act without regard for them if the chances of a problem seem small. Rules of reason allow us to avoid the untoward results of rigid application of rules in cases of excusable mistake.¹⁶⁵

Many property law rules reflect the doctrine of excusable error. Adverse possession law excuses mutual mistake in border cases or in cases of good faith but defective title. Relative hardship doctrine extends that practice to the improving trespasser even before the statute of limitations has run. The *laches* doctrine protects the non-Indian possessors of land in New York who wrongly, but understandably, thought that the Oneida title had long been extinguished. Property law includes equitable doctrines of acquiescence, oral agreement, estoppel to set borders at informally-established places rather than through the measurements contained in recorded deeds. Owners are granted easements by necessity when they purchase a landlocked parcel and fail to create a formal access easement in the relevant documents. Courts recognize equitable exceptions to the statute of frauds in cases of promissory estoppel or part performance. Courts ignore “as is” clauses in real estate contracts when sellers lie to buyers to induce them to buy. Courts ignore the statute of frauds when developers make oral promises to homebuyers that are not reflected in the deed covenants. Courts recognize the

¹⁶⁵ Rose, *supra* note 5, at 597-601.

property entitlements the parties intended to create even though they failed to use traditional magic words to create them.

In all these cases, courts and legislatures recognize that actual expectations of property buyers may diverge from what is contained in formal documents. Stability of property expectations in the real world comes as much from established land use patterns as it does from the formalities on pieces of paper. Although lawmakers often romantically hope that market actors will abide by formality rules, they recognize that life is complicated, grown-ups make mistakes, and it is the province of the law to determine when those mistakes are both understandable and excusable. Rules of reason require us to recognize when adherence to formal rules will violently clash with justified expectations rather than promote them.

4. Escaping the “Dead Hand” of the Past

Standards free us from ossification resulting from past property developments, land use patterns, and property restrictions. We allow owners to impose restrictions on property but we also want some limits on how long they can last. Courts eventually free owners from the “dead hand” of the past when current owners yearn for freedom to do as they please. “The Earth,” as Jefferson said, “belongs to the living.”¹⁶⁶ Property development and patterns of land use lock us into certain patterns, and rules of reason free us to rearrange things to suit contemporary values and needs.

A city built before there were cars may have streets that are dangerously narrow. Eminent domain may be needed to make cities livable and vibrant. Houses built before there were housing codes may be considered dangerous by contemporary standards if they do not have fire warning or prevention equipment or if they are imbued with lead paint. Covenants entered into when racial segregation was legal violate contemporary equality norms. Land use restrictions that were useful and popular in 1950 may prevent modern housing preferences if individual covenant beneficiaries are entitled to veto any changes. An expanded changed conditions doctrine enables freedom from obsolete covenants. Enforceable restrictions on the use of property devoted to charitable uses may be relaxed or removed by use of the *cy pres* doctrine when the property no longer suits its intended purpose. Easements may be relocated if they do not harm the interests of the

¹⁶⁶ Thomas Jefferson, *Letter to James Madison* (Sept. 6, 1789), <http://lachlan.bluehaze.com.au/lit/jeff03.htm>.

easement owner.¹⁶⁷ Homeowners associations give a majority of owners the freedom to adopt and to rescind covenants rather than giving each individual a veto right on change. Landlords are required to mitigate damages so tenants are free to move to another city.

Rules of reason allow us to determine the appropriate balance between stability and change, between enforcing expectations based on formal documents or past practices and promoting current freedoms for individual owners. Sometimes we protect the reliance interests of those who still claim benefit from old restrictions or patterns and sometimes we decide that it is more important to free owners to follow their own path. Thus Congress made a fundamental value choice when it freed condominium owners from covenants that prevented them from flying the American flag.¹⁶⁸ The federal courts freed condo owners to place a mezuzah on the doorpost of their units despite condo rules to the contrary.¹⁶⁹ State courts have construed charitable trusts that provide scholarships for public school students so as to excise outdated discriminatory limits on eligibility that violate contemporary norms.¹⁷⁰ Although some Supreme Court Justices pine for strict protection of “established property rights,” it is a staple of property law theory that strictly adhering to the wishes of our ancestors may not only tie up property and reduce welfare for everyone but deprive both owners and non-owners of justifiable freedoms.

¹⁶⁷ RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.8(c) (2000). *But see* *Herren v. Pettengill*, 538 S.E.2d 735, 736 (Ga. 2000); *Koeppen v. Bolich*, 79 P.3d 1100, 1109-10 (Mont. 2003); *MacMeekin v. Low Income Housing Institute, Inc.* 45 P.3d 570, 575-79 (Wash. Ct. App. 2002) (all rejecting the *Restatement* rule).

¹⁶⁸ Freedom to Display the American Flag, Pub. L. No. 109-243, 120 Stat. 572 (2006) (codified as amended at 4 U.S.C. § 5 (2006)).

¹⁶⁹ *Bloch v. Frischholz*, 587 F.3d 771, 783-87 (7th Cir. 2009); 765 ILL. COMP. STAT. 605/18.4(h); MUNICIPAL CODE OF CHICAGO § 5-8-030.

¹⁷⁰ *In re Certain Scholarship Funds*, 575 A.2d 1325, 1328-30 (N.H. 1990); *see also In re Crichfield Trust*, 426 A.2d 88, 90 (N.J. Super. Ct. Ch. Div. 1980) (applying the cy pres doctrine to reform a trust that established a college scholarship for male graduates of a public high school to permit award of scholarships to females as well); *Coffee v. William Marsh Rice University*, 408 S.W.2d 269, 271 (Tex. Ct. App. 1966) (using cy pres to excise racial restriction in endowment fund); *cf. United States v. Hughes Memorial Home*, 396 F.Supp. 544 (D.W.Va. 1975) (cy pres doctrine applied to excise racial restriction on trust benefiting orphanage because racial exclusion from the orphanage would violate the federal Fair Housing Act).

5. Deterring the “Bad Man”

We have found that we need to supplement rules with standards to ensure that people do not “get away with murder” by exploiting the letter of the law in a manner that destroys its spirit. The problem of Holmes’s “bad man” who wants to know what he can away with turns out to be an especially tricky dilemma for property law.¹⁷¹ Sometimes we deal with this problem by simultaneously increasing the amount of potential penalties while decreasing the certainty about whether one will be subject to them. This occurred when a court awarded punitive damages for trespass in the absence of tangible harm to the land. Sometimes we sacrifice predictability to achieve justice, as Colorado did when it required proof of good faith to acquire land by adverse possession. Sometimes we limit the scope of a rule to prevent abuse of rights, as when we prevent murderers from benefiting from their wrongs and when we prevent developers from revoking covenants in a manner that upsets justified expectations.¹⁷² Every state has a consumer protection act that protects consumer from “unfair or deceptive” practices; such statutes may apply to subprime lenders who induced buyers to take loans they could not pay back even though the banks argued that “everyone was doing it.”¹⁷³ We supplement rules with standards to induce moral deliberation, as Seana Shiffrin and Jeremy Waldron have taught us.¹⁷⁴ We want people to think before they act rather than assuming they can walk right up to the line of the law. Ambiguity is useful to property law. Before a property owner acts, we want her to think: how would you explain this to a judge? To a jury of your peers? To the press? To your family? When push comes to shove, do you really think you can defend your actions without shame?

IV. PRACTICAL REASON AND THE RULE OF LAW

It has occasionally been remarked upon that it is as easy to overlook something large and obvious as it is to overlook

¹⁷¹ Holmes, *supra* note 15, at 459; *accord*, Sunstein, *supra* note 5, at 995 (“Because rules have clear edges, they allow people to ‘evade’ them by engaging in conduct that is technically exempted but that creates the same or analogous harms.”).

¹⁷² *Appel v. Presley Cos.*, 806 P.2d 1054, 1057 (N.M. 1991); *Riggs v. Palmer*, 115 N.Y. 506, 509-10 (1889).

¹⁷³ *Commonwealth v. Fremont Inv. & Loan*, 897 N.E.2d 548, 555-59 (Mass. 2008).

¹⁷⁴ Shiffrin, *supra* note 5; Waldron, *supra* note 5; *see also* Shawn J. Bayern, *Against Certainty*, 41 HOFSTRA L. REV. 53, 87-89 (2012) (explaining the benefits of uncertainty in the law).

something small and niggling, and that the large things one overlooks can often cause problems.¹⁷⁵

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The intuitive view that property rights cannot work if they are not clear makes sense only if you don't think about it too much. It is a poor prescription for a mature property law system. Experience teaches that clarity is not best attained through rigid rules. Rather, a combination of rules and standards is essential if we want to define and protect justified expectations about property. Nor is predictability the only goal of property law. We care not only about clarity but about getting it right. Context matters in property law as it does in elsewhere in the law. This does not mean that we should not generalize or that rules do not come in handy. It does mean that we care about *tailoring* rules to circumstances and that our ability to do a good job of this *ex ante* is inherently limited.¹⁷⁶ If we examine rules as they operate in the real world, rather than focusing on ideal types, we find that rules were never as predictable as we might have thought. Because their scope was always in question, it has never been possible to interpret or apply them without exercising judgment to determine when to distinguish prior cases. Nor are standards formless or vapid. They operate through a common law process that creates presumptive results in particular contexts.

These empirical observations yield descriptive, institutional, analytical, sociological, and normative insights. The assumption that property law works best if framed in the form of rigid rules does a poor job of describing the property law system of the United States. Indeed, it is increasingly inaccurate and misleading. Nor does the intuitive view cohere with the institutional role of judges or the norms underlying the rule of law. Judges are empowered to use common sense to shape the scope of legal rules. They do so by analytical methods that use analogy, core exemplars, policy, and normative and practical reasoning to determine the scope of application of rules and standards alike.¹⁷⁷ The intuitive view ignores both the useful functions

¹⁷⁵ NEIL GAIMAN, *STARDUST* 133 (1999).

¹⁷⁶ See Sunstein, *supra* note 5, at 1022 (arguing that there “is some important truth in [the] claim [that] . . . full *ex ante* specification of outcomes is a chimera. The need for interpretation during encounters with concrete cases means that *ex post* assessments of some sort are an inescapable part of law”); Bayern, *Against Certainty*, *supra* note 174, at 55-58 (explaining how legal rules cannot be applied without interpretive judgments about the appropriate contexts in which they should apply).

¹⁷⁷ On the various techniques of normative reasoning, see Joseph William Singer, *Normative Methods for Lawyers*, 56 *UCLA L. REV.* 899 (2009).

standards play in shaping behavior and the sociological truth that expectations about property rights are based as much on informal practices as on formal arrangements. If we try to promote clarity by adhering to rigid rules, and people fail to follow those rules because of social custom, excusable mistake, or unacceptable cost, we will wind up undermining the stability of property rights by upsetting legitimate expectations. And when rules allow the bad man to walk the line, they undermine property rights rather than promote them. While ambiguity has drawbacks in the property area, it is also useful. Ambiguity promotes moral reflection, allows us to shape property rights to promote our deepest values, deters fraud and abuse of rights, and allows individual property rights to be made consistent with each other through regulating the systemic effects of the exercise of individual rights.

Property is different from other areas of law because it involves the assignment of entitlements that establish the foundations from which people act in the world. They *precede* both actions and transactions. We cannot act unless we know we have a right to act somewhere. We cannot contract with others unless we have entitlements with which to bargain. Because property serves this foundational role in promoting both freedom and welfare, we need rules that establish a basis from which people can act in the world. The intuitive view is quite right about all these things. Yet it is a mistake to conclude from these truisms that the best way to achieve these ends is to reduce property law to mechanical rules that can be applied without the need to think or exercise judgment. Property law is a practical art that requires practical reason to work. Property rules never operated without such judgment; nor could they. The rule of law is not a Procrustean bed. Rules of reason shape the infrastructure of property law and we are lucky that they do.