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## Private Law Pluralism and the Rule of Law

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### 1. Introduction

My previous work characterizes private law as structurally pluralist and moderately perfectionist. Its pluralism implies that property, contracts, torts, and unjust enrichment are merely broad umbrellas for narrower private law institutions sharing some thin common denominators. Property law, for example—my central example in this chapter—is composed of a set of diverse doctrines that cannot be reasonably described as being governed by one coherent regulative principle, at least if that principle is to be robust enough to play a meaningful role in the development of this heterogeneous body of law. Thus the search for property's core is futile. But a careful study of various property institutions (such as fee simple absolute, co-ownership, common-interest communities, marital property, copyrights, patents, and the like) is valuable because the regulative principles of *these* institutions express our society's ideals for core categories of interpersonal relationships regarding various resources and consolidate people's expectations in their regards.

I hold that this structural pluralist account fits private law better than its monist counterparts and is also normatively superior to these alternative understandings, such as the exclusion conception of property. By facilitating a diverse set of interpersonal relationships, a pluralist conception of private law participates in

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the state's obligation to empower people to make choices among viable alternatives, and thus be the authors of their own lives. One implication of the perfectionist nature of private law is that its institutions are subject to ongoing normative re-evaluation and possible, even if properly cautious, reconfiguration. They are thereby forced to live up to their promise as valuable options of human flourishing, thus making a significant contribution to worthwhile life plans.

I assume in this chapter that this understanding of private law, which is summarized in Section 1, fits our legal practice and is normatively appealing. My current mission is to examine whether this understanding, despite its multiplicity, dynamism, and disavowal of neutrality, complies with the rule of law. There are, or at least so I argue, two key aspects to the rule of law—the requirement that the law be capable of guiding its subjects' behaviour and the prescription that law may not confer on officials the right to exercise unconstrained power<sup>1</sup>—and they are both connected to people's autonomy. On its face, my account of private law is vulnerable on both fronts. If this first impression is correct, defending this conception of private law would require a choice between downplaying the significance of the rule of law for private law, and showing that the rule-of-law deficit generated by a pluralist and perfectionist private law is dwarfed by its normative virtues.

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

Consequently, no comparison is now required between the virtues of the rule of law and those of my account of private law. To be sure, it is not my claim that no private law system would have scored better than private law pluralism in terms of

<sup>1</sup> In this respect I join Martin Krygier's meta-claim whereby, in order to understand the rule of law, we must begin with its telos. See Martin Krygier, 'Four Puzzles about the Rule of Law: Why, What, Where? and Who Cares?' in James E Fleming (ed), *Getting to the Rule of Law* (NYU Press 2011) 64, 67–73.

guidance or constraint. But if the claims just mentioned (which are elaborated in Sections 2 and 3) are correct, private law pluralism seems to score quite high on both fronts. Thus, if one supports a threshold conception of the rule of law, private law pluralism would probably pass it. Even barring such a threshold—meaning a situation wherein the rule of law and substantive virtues must always be balanced—my conclusions imply (assuming that private law pluralism is indeed worth endorsing substantively) that adding the concerns of the rule of law to the picture is unlikely to lead to its abandonment, at least when compared with alternative (that is: monist) approaches to private law.<sup>2</sup>

Reconciling private law pluralism and the rule of law does not vindicate the conventional perception that the rule of law is only marginally interesting to private lawyers, quite the contrary. Much of the resistance of private law theorists to embracing pluralism and perfectionism, despite their saliency in the practice of our private law, rests implicitly on rule-of-law concerns. Explicitly articulating these worries in the language of the rule of law and demonstrating why a pluralist and perfectionist private law neither fails to guide people's behaviour properly nor sanctions unconstrained judicial power may thus allow private law theorists to celebrate these core features of private law instead of marginalizing or suppressing them. Moreover, this exercise is also useful to our understanding of the rule of law. Tracing how a pluralist and perfectionist private law complies with the rule of law may enrich our perspective on both the guidance and the constraint aspects of the rule of law.

## 2. Structural Pluralism in Private Law

Private law is canonically divided into property, contracts, torts, and unjust enrichment, and nothing in what follows will necessarily challenge this division. Yet, legal actors—judges, practising lawyers, academics, lobbyists, and the like—sometimes assume that this division carries some important justificatory burden. To take one example, consider the analysis that many lawyers apply to the question of whether copyright is property. Notwithstanding the vigorous debate between advocates of the information industry and champions of the public domain, many players on both sides seem to assume that classifying copyright as a species of property is bound to bolster the claims of the former at the expense of the latter. The (usually implicit) presupposition of both sides to this debate is that property is a more or less monist concept that, at its core, is the owner's right to exclude. Thus

<sup>2</sup> While conformity with the rule of law is an inherent value of law, my understanding of the rule of law implies that Joseph Raz is correct when insisting that (1) it is a matter of degree and (2) it may conflict with other values, so that less conformity may at times be preferable because it helps to realize these values. See Joseph Raz, 'The Rule of Law and its Virtues' in *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009) 210, 222, 225, 228–9. See also eg John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press 2012) 33, 192, 195–6. But see Ernest J Weinrib, 'The Intelligibility of The Rule of Law' in Allan Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell 1987) 59.

they imply that this exclusion principle is significant to the point of affecting real life consequences concerning the scope of authors' rights. Rather than the innocuous cohabitation of various property doctrines under the broad category of property, it is these presuppositions that are the target of my critique because I consider them both wrong and misleading.<sup>3</sup> Just like its sister categories of contracts, torts, and unjust enrichment, property is far too heterogeneous a field to be guided by one regulative principle (such as exclusion), at least when defined as one that generates significant doctrinal prescriptions. Therefore, classifying copyright as property does not necessarily imply an expansion of the scope of authors' rights.<sup>4</sup>

The starting point of structural pluralism in private law, which is part of the legacy of American legal realism, is that broad legal categories like property, contracts, torts, or unjust enrichment are merely convenient 'umbrellas' for a more diversified landscape.<sup>5</sup> Along these lines, Herman Oliphant celebrated the traditional common law strategy of employing narrow legal categories, which 'divided and minutely subdivided the transactions of life for legal treatment', with the desirable result of a significant 'particularity and minuteness in the [legal] classification of human transactions'. Such narrow categories help to produce 'the discrimination necessary for intimacy of treatment', thus encouraging lawyers to shape law 'close and contemporary' to the human problems they deal with. The traditional common law strategy thereby facilitates one comparative advantage of lawyers (notably judges) in producing legal norms: their daily access to actual human situations and problems in contemporary life.<sup>6</sup> Similar convictions led Karl Llewellyn to insist that wholesale legal categories, such as property, contracts, or torts, are 'too big to handle' because they encompass too 'many heterogeneous items' and, accordingly, to recommend '[t]he making of smaller categories', which allow lawyers to develop the law while 'testing it against life-wisdom'. To pre-empt certain responses, let me clarify that the claim (at least Llewellyn's claim—and mine) is *not* that 'the equities or sense of the particular case or the particular parties' should be determinative. Rather, it is that decision-making should benefit from 'the sense and reason of some significantly seen *type* of life-situation'.<sup>7</sup>

<sup>3</sup> For similar expressions of these presuppositions in the context of the so-called new property and in regard to body parts, which are thus subject to the very same line of criticism, see, respectively, JW Harris, *Property & Justice* (Oxford University Press 1996) 151, 304, Alan Hyde, *Bodies of Law* (Princeton University Press 1997) 73.

<sup>4</sup> See Hanoch Dagan, *Property: Values and Institutions* (Oxford University Press 2011) ch 4.

<sup>5</sup> See generally Hanoch Dagan, *Reconstructing American Legal Realism & Rethinking Private Law Theory* (Oxford University Press 2013) chs 6, 8.

<sup>6</sup> Herman Oliphant, 'A Return to Stare Decisis' (1928) 14 *American Bar Association Journal* 71, 73–4, 159.

<sup>7</sup> Karl N Llewellyn, 'A Realistic Jurisprudence: The Next Step' in *Jurisprudence: Realism in Theory and in Practice* (University of Chicago Press 1962) 3, 27–8, 32; Llewellyn, 'Some Realism about Realism' in *Jurisprudence* 42, 59–60; Llewellyn, 'The Current Recapture of the Grand Tradition' in *Jurisprudence*, 215, 217, 219–20. Frederick Schauer has argued that the concrete examples faced by judges distort their judgment rather than illuminate it because they systematically trigger certain cognitive biases. See Frederick Schauer, 'Do Cases Make Bad Law?' (2006) 73 *University of Chicago Law Review* 883. But as Jeff Rachlinski shows, alongside the cognitive weaknesses of adjudication, courts also have several cognitive advantages over legislatures, which might facilitate superior

Property law follows the prescriptions of structural pluralism by setting up a number of distinct property institutions. Each governs a specific social context or a given resource and is typified by a particular configuration of property owners' entitlement corresponding to a particular property value or balance of such values serving as its regulative principle. Thus, some property institutions, such as the fee simple absolute, are structured along the lines of the Blackstonian view of property as sole and despotic dominion. These institutions are atomistic, competitive, and vindicate people's negative liberty. Liberal societies justifiably facilitate such property institutions, which serve both as a source of personal well-being and as a domain of individual freedom and independence. In other property institutions, such as marital property, a more communitarian view of property may dominate, with property as a locus of sharing. There are many others along the strangers–spouses spectrum, thus shades and hues of these property institutions will be found. In these various categories of cooperative property institutions, both liberty and community are of the essence, and the applicable property configuration includes rights as well as responsibilities. This variety is rich both between and within contexts: it provides more than one option for people who want, for example, to become homeowners, engage in business, or enter into intimate relationships.<sup>8</sup>

Thus, alongside more atomistic property institutions, property law supports a wide range of institutions that facilitate the economic and social gains made possible by cooperation. Some of these institutions, such as a close corporation, are mostly about economic gains, including securing efficiencies of economies of scale and risk-spreading, with social benefits merely a (sometimes pleasant) side-effect. Other institutions, such as marriage, are more about the intrinsic good of being part of a plural subject, where the *raison d'être* of the property institution refers more to identity and interpersonal relationships, while the attendant economic benefits are perceived as helpful by-products rather than the primary good of cooperation. The underlying character of the divergent relationships proves to be the key to explaining the particular property configuration that serves as the default for the property institution at hand.<sup>9</sup>

Property institutions vary not only according to the social context but also according to the nature of the resource at stake. The resource is significant because its physical characteristics crucially affect its productive use. Thus, for example, the fact that information consumption is generally non-rivalrous implies that, when the resource at hand is information, use may not always necessitate exclusion.<sup>10</sup> The nature of the resource is also significant in that society approaches different

law-making. See Jeffrey J Rachlinski, 'Bottom-Up Versus Top-Down Lawmaking' (2006) 73 *University of Chicago Law Review* 933, 950–61.

<sup>8</sup> See generally Dagan, *Property* (n 4) chs 1, 3–4, 8, 10. For a structural pluralist account of contract law, see Hanoch Dagan, 'Autonomy, Pluralism, and Contract Law Theory' (2013) 76 *Law & Contemporary Problems* 19.

<sup>9</sup> See Dagan, *Property* (n 4) ch 10.

<sup>10</sup> See Mark A Lemley, 'Ex Ante versus Ex Post Justifications for Intellectual Property' (2004) 71 *University of Chicago Law Review* 129, 143.

resources as variously constitutive of their possessors' identity.<sup>11</sup> Accordingly, resources are subject to different property configurations: whereas the law vigorously vindicates people's control of their constitutive resources, the more fungible an interest, the less emphasis property law will need to place on its owner's control.<sup>12</sup>

To be sure, the similarities among the various property institutions (or the various types of torts, contracts, or unjust enrichments) justify studying them together and treating them as the subject matter of unified scholarly analysis. Often, however, these similarities merely mean that studying the various institutions of property law requires us to ask similar questions, such as: What is the appropriate scope of an owner's exclusion? Or what is the optimal governance regime for this property institution? At times, these similarities imply some overlap in the pertinent values that affect the regulative principles of these diverse institutions. For example, personhood concerns inform a certain subset of property institutions, while utility is significant in another subset. These similarities ensure that reflecting on the variety of property institutions (or the diverse families of contracts, torts, or unjust enrichments) is likely to yield some useful cross-fertilization. They do not imply, however, the type of normative coherence needed to justify making membership in one of these wide areas of law a reason for any concrete prescriptive consequence.<sup>13</sup>

Accordingly, the pluralist conception of property as institutions takes the heterogeneity of our existing property doctrines seriously. It understands property as an umbrella for a limited and standardized set of property institutions, which serve as important default frameworks of interpersonal interaction. All these institutions mediate the relationship between owners and non-owners regarding a resource, and in all property institutions owners have some rights to exclude others. This common denominator derives from the role of property in vindicating people's independence. Alongside this important property value, however, other values also play crucial roles in shaping property institutions. As briefly indicated above, property can and does serve our commitments to personhood, desert, aggregate welfare, social responsibility, and distributive justice.<sup>14</sup> Different property institutions offer differing configurations of the entitlements constituting the contents of an owner's rights vis-à-vis others, or a certain type of others, with respect to a given resource. At least at its best, this plurality allows property law to vindicate differing balances among these property values according to their characteristic settings, namely, the type of social relationship in which they are situated and the nature of the resource at stake. While the cohabitation of different property values and divergent property institutions within property is contentious, property law—again, at its best—offers principled ways of accommodating this happy plurality.

<sup>11</sup> See Margaret J Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957, 992, 1013.

<sup>12</sup> See Hanoch Dagan, *Unjust Enrichment: A Study of Private Law and Public Values* (Cambridge University Press 1997) 40–9, 63–108.

<sup>13</sup> See n 4 and accompanying text.

<sup>14</sup> See Gregory S Alexander and Hanoch Dagan, *Properties of Property* (Aspen Publishers 2012) pt I.

Although from a monist viewpoint the heterogeneous landscape of property law looks like a random mess, it turns out to be a rich mosaic once a perspective of structural pluralism is applied. This mosaic is valuable, indeed indispensable, for people's autonomy.<sup>15</sup> The fee simple absolute, the property institution that is at the core for exclusion theorists, facilitates people's independence and is indeed crucial for liberal societies. But law's support for other property institutions is just as crucial for autonomy, which is precisely why the conception of property as institutions resists the way exclusion theory privileges this one property institution—the fee simple absolute—and suppresses the others as variations on a common theme, or marginalizes them as peripheral exceptions to a robust core. As Joseph Raz explains, autonomy understood as the ideal that people should, to some degree, be the authors of their own lives, requires not only appropriate mental capabilities and independence but also 'an adequate range of options'. For autonomy to be meaningful, there must be (other things being equal) 'more valuable options than can be chosen, and they must be significantly different', so that choices involve 'tradeoffs, which require relinquishing one good for the sake of another'. Thus, autonomy admits and indeed emphasizes 'the value of a large number of greatly differing pursuits among which individuals are free to choose'.<sup>16</sup>

Given the diversity of acceptable human goods from which autonomous people should be able to choose as well as their distinct constitutive values, the state must recognize a sufficiently diverse set of robust frameworks for people to organize their life. And because many of these plural values cannot be realistically actualized without the active support of viable legal institutions,<sup>17</sup> law should actively facilitate them. Hence, although the global coherence in monistic conceptions of broad private law fields such as property is appealing, law should adopt more than one set of coherent doctrines.<sup>18</sup> Accordingly, a structurally pluralist property law includes diverse types of institutions, each incorporating a different value or different balance of values. Boundaries between these institutions are open, enabling people to freely choose their goals, principles, forms of life, and associations by navigating their way among them. Only in this way can law recognize and promote the individuality-enhancing role of multiplicity.<sup>19</sup>

Implicit in this account is the twofold role of property institutions (and of the institutions of the other branches of their private law). These institutions consolidate people's expectations when, for example, entering a joint tenancy or a common-interest community, or, for that matter, using another person's copyrighted work. They may also perform an expressive and cultural function, affecting

<sup>15</sup> See Dagan, *Reconstructing American Legal Realism* (n 5) ch 8.

<sup>16</sup> See Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986) 372, 381, 395, 395, 398–9; cf Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) 309–12. The ideal of personal autonomy should be strictly distinguished from Kant's conception of personal independence. See Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009) 14, 34, 45.

<sup>17</sup> See Hanoch Dagan, 'Inside Property' (2013) 63 *University of Toronto Law Journal* 1, 8–10.

<sup>18</sup> See Joseph Raz, 'The Relevance of Coherence' in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press 1994) 261, 281–2, 291–304.

<sup>19</sup> See Raz, *Morality* (n 16) 417–18, 425.

people's ideals and consequently their preferences regarding these categories of relationships. Both roles require some measure of stability. To form effective frameworks of social interaction and cooperation, property law can recognize a necessarily limited number of categories of relationships and resources. This prescription of standardization, enshrined in property law as the *numerus clausus* principle, is particularly acute with regard to the expressive role. This role mandates limiting the number of property institutions because law can effectively express only so many ideal categories of interpersonal relationships.<sup>20</sup>

Moreover, our private law institutions do not supply merely an assortment of disconnected choices. Rather, they offer a repertoire that responds to various forms of valuable human interaction. Admittedly, regarding many private law institutions, law often falls short of the human ideals they represent. But these gaps only mean that, rather than searching for unifying normative accounts of property, contracts, torts, or unjust enrichment in their entirety, the main task of private law theory is twofold: first, to distil the distinct human ideals of the various private law institutions in order to elucidate the ways each of them contributes to human flourishing. And second, to offer reform, if needed, that would force these private law institutions to live up to their own implicit promises; and if these promises themselves turn out to be disappointing or, worse, unjust, or if the repertoire of private law institutions is not sufficiently diverse, to call, respectively, for amending these promises or adding institutions that can enrich its inventory.

The pluralist understanding of private law is thus inherently dynamic. While existing private law institutions are and should be the starting point of any analysis of private law questions, they are never frozen. Rather, as institutions structuring people's relationships, they are subject to ongoing—albeit properly cautious—re-evaluation and possible reconfiguration. The conservative baseline of this approach derives not only from the pragmatic reality that existing rules cannot be abandoned completely, but also from the recognition that existing law represents a cumulative judicial and legislative experience that deserves respect. In turn, the forward-looking perspective of this endeavour is premised on an understanding of law as a dynamic enterprise. Its content unfolds through challenges to the desirability of normative underpinnings in private law institutions; their responsiveness to their social context; their effectiveness in promoting their contextually examined, normative goals; and the sufficiency of the repertoire private law offers for any given type of activity. In this way, this understanding of private law follows the common law method described by Llewellyn as 'a functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need', mediating between 'the seeming commands of the authorities and the felt demands of justice'.<sup>21</sup>

At times, this process helps to fill gaps in the law by prescribing new rules that further bolster and vindicate these goals. At other times, it points out 'blemishes' in the existing doctrine, rules that undermine the most illuminating and defensible

<sup>20</sup> See Dagan, *Property* (n 4) 31–5.

<sup>21</sup> Karl N Llewellyn, *The Common Law Tradition* (Little Brown 1960) 37–8.

account of such a private law institution, which should be reformed so that an institution lives up to its own ideals.<sup>22</sup> This reformist potential has actually yielded different types of legal reforms throughout the history of property. In some cases, the reform is relatively radical—the abolition of a property form (as was the case with the fee tail form<sup>23</sup>) or an overall reconstruction of its content (as with leaseholds<sup>24</sup>). Sometimes more moderate options are in order, such as restating the doctrine pertaining to a property form in a way that brings its rules closer to its underlying commitments and, in the process, removing indefensible rules. The best recent example for such moderate reform is probably the transformation of the property form of servitudes, discussed in some detail below.

### 3. The Rule of Law as Guidance

Henry Smith has recently argued that this pluralist conception of property can hardly be distinguished from the bundle understanding of property. Accordingly, he has claimed, this conception irreparably undermines stability. Referring to my book *Property: Values and Institutions*, where I developed this conception of property, Smith argues that stability is not ‘yet another detachable feature or lever to be dialled up or down’ or ‘a factor to be balanced whenever we are deciding on the supposedly separable sticks in the bundle’, but is rather ‘a feature that can only be evaluated as an aspect of the system’. And while it may be important for the system to serve ‘values like community, autonomy, efficiency, personhood, labor, and distributive justice’, we must reject ‘[t]he idea that doctrines are part of an issue-by-issue balancing of [these values]’. Smith’s claims rely on the view that the only alternative to the exclusion school of property is ‘to invoke a plethora of general principles to be balanced as specific situations present themselves’. And given that ‘ad hocery itself is not a feature that can easily be dialed down’, Smith concludes that nothing separates my account of property from the understanding of property as ‘an ad hoc, unstructured bundle’.<sup>25</sup>

To understand Smith’s critique of ad hocery, consider his defence of concepts in property. Concepts ‘pick out categories’ and thus serve as ‘mental shortcuts’, which are essential given ‘people’s cognitive limitations’ ‘for prediction, communication, and abstract thought’. Conceptualism, which he claims is rightly associated with formalism, is thus helpful precisely because of its ‘relative indifference to context’: ‘To be useful, the concept has to pick out enough facts to serve the purpose in question but not so many that it entails too much complexity.’ Smith argues that the objection of legal realists (like me) to defining exclusion ‘as any baseline or starting point’, which is reminiscent (in his view) of the realists’ ‘nominalistic

<sup>22</sup> See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 118–23.

<sup>23</sup> See Dukeminier et al, *Property* (7th edn, Aspen Publishers 2010) 200–1.

<sup>24</sup> See generally Edward H Rabin, ‘The Revolution in Residential Landlord–Tenant Law: Causes and Consequences’ (1984) 69 *Cornell Law Review* 517.

<sup>25</sup> Henry E Smith, ‘Property Is Not Just a Bundle of Rights’ (2011) 8 *Econ Journal Watch* 279, 287; Henry E Smith, ‘Property as the Law of Things’ (2012) 125 *Harvard Law Review* 1691, 1705–6.

impulse', is misguided because it downplays and may undermine the important function of concepts 'in reducing information costs and building the overall architecture of property'. Thus, rejecting the exclusionary conception of property might replace rigidity with 'near-chaos'. Exclusion is 'the baseline for delineation purposes', not because it is 'the moral "core" of property' but rather because 'it is the general case, and governance is special'. Only the presumption of exclusion, Smith insists, can assure that we keep the bundles 'lumpy' and 'opaque', allow property to function as 'something more that high transaction costs prevent us from fully achieving by contract', and avoid 'hard-to-predict ripple effects through the entire system'.<sup>26</sup>

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

Indeed, Smith's critique can be recast in terms of one of the most prominent understandings of the rule of law. In this view, associated mostly with Raz, the rule of law is organized around the idea that 'the law should be such that people will be able to be guided by it'; that law should 'provide effective guidance'.<sup>27</sup> While seemingly thin, the guidance conception of the rule of law, which is often broken up into lists of formal requirements,<sup>28</sup> is intimately connected with people's autonomy understood as self-authorship. By requiring that 'government in all its actions [be] bound by rules fixed and announced beforehand', the rule of law enables people 'to foresee with fair certainty how the authority will use its coercive power in given circumstances, and to plan [their] affairs on the basis of this knowledge'.<sup>29</sup> Only a relatively stable and predictable law can serve as a 'safe basis for individual planning', which is a prerequisite to people's ability to 'form definite expectations' and plan for the future. Law's participation in securing stable 'frameworks for one's life and action' increases '[p]redictability in one's environment', and therefore 'one's power of action', thus facilitating people's 'ability to

<sup>26</sup> Henry E Smith, 'On the Economy of Concepts in Property' (2012) 160 *University of Pennsylvania Law Review* 2097, 2100–2, 2105–6, 2113, 2116–17, 2123, 2128.

<sup>27</sup> Raz, 'Rule of Law and its Virtues' (n 2) 213, 218. Whereas the requirement of law's guidance is important because of law's coercive power, the emphasis here is not on limiting this power and thus its potential abuse, but rather on circumscribing its detrimental effects on people's self-authorship. This is also why the desirability of predictability to autonomy may be disputed in more benevolent authority settings, such as parenthood.

<sup>28</sup> See eg Lon L Fuller, *The Morality of Law* (rev edn, Yale University Press 1969) 39.

<sup>29</sup> FA Hayek, *The Road to Serfdom* (University of Chicago Press 1944) 54. To be sure, in general, Hayek's account of the rule of law is more amenable to the constraint conception. See Trevor Allan, 'The Rule of Law as Private Law' in this volume. Furthermore, relying on Hayek for the conception that founds the rule of law on our commitment to self-authorship is somewhat ironic. Hayek gives no significance to non-government factors, which can deprive people of control over their life in ways as debilitating as those implemented by governments; his views are also alien to the Razian notion that government is responsible for actively ensuring a range of choices.

choose styles and forms of life, to fix long-term goals and effectively direct one's life towards them'.<sup>30</sup>

The guidance conception of the rule of law is often associated with the idea that the rule of law is the law of rules.<sup>31</sup> According to this view, in order to 'provide maximally effective guides to behavior', the preferred form of the law must be that of 'a "rule," conceived as a clear prescription that exists prior to its application and that determines appropriate conduct or legal outcomes'.<sup>32</sup> Open-ended standards that allow judges to consult law's underlying commitments in each case jeopardize, so the argument goes, this virtue of 'the rule of rules': rules 'are designed to translate the implications of normative values into concrete prescriptions' and must therefore be 'sufficiently determinate' so as to be followed by their appliers 'without first resolving the very normative questions [they] are designed to settle' or 'considering whether the local outcome of the rule conforms to the values [they are] supposed to advance'.<sup>33</sup>

On its face, the 'normative dynamism' of the pluralist conception of private law threatens the rule of law as guidance. In line with the common law tradition, private law pluralism conceptualizes adjudication as 'a process that allows judges to remake the existing doctrinal propositions in the process of applying them'. But if rules 'are defeasible when direct application of their background rationales would generate a different result' then 'the constraint of the rule *qua* rule seems to disappear'. If normative commitments can always upset existing doctrinal propositions and require that they be discarded or modified, then these propositions seem to be no more than rules of thumb. As Frederick Schauer argues in criticizing the common law tradition, '[r]ules of this sort, capable of modification at the time of application and thus incapable of constraining that application, differ so much from our ordinary conception of rules as guides and constraints that it hardly pays to speak of them as rules at all'.<sup>34</sup>

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

<sup>30</sup> Raz, *Authority* (n 2) 220, 222; see David Dyzenhaus, 'Liberty and Legal Form' in this volume.

<sup>31</sup> See Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 *University of Chicago Law Review* 1175.

<sup>32</sup> Richard H Fallon Jr, 'The Rule of Law' as a Concept in Constitutional Discourse' (1997) 97 *Columbia Law Review* 1 14–15.

<sup>33</sup> Emily Sherwin, 'Rule-Oriented Realism' (2005) 103 *Michigan Law Review* 1578, 1589, 1590, 1591. See generally Larry Alexander and Emily Sherwin, *The Rule of Rules* (Duke University Press 2001).

<sup>34</sup> Frederick Schauer, 'Is the Common Law Law?' (1989) 77 *California Law Review* 455, 455–6, 464, 467. To be sure, Schauer admits that 'rules of thumb are useful guides for prediction and useful to consult when time is short', but he insists that because rules of thumb can only indicate 'the result likely to be reached by the rationales or justifications lying behind the rule... they are intrinsically unweighty' (467).

*Neponsit Property Owners' Ass'n v Emigrant Industrial Savings Bank*<sup>35</sup> is the first major decision on the enforceability of the assessment covenant, whose validity at that time (1938) was in doubt.<sup>36</sup> This makes *Neponsit* a significant milestone in one of the most important developments of American land law in the last century: the emergence of common-interest communities, a property institution that by now is a major form of land ownership. My choice of this property institution and of this particular case are not fortuitous: no one can hope to provide a reasonable account of common-interest communities without considering governance, which is obscured in the exclusionary conception of property with its excessive focus on property's foreign affairs.<sup>37</sup> *Neponsit* is the landmark decision that enlisted servitudes law into facilitating the governance of this property institution.<sup>38</sup>

As Justice Lehman noted when delivering the decision of the New York Court of Appeals, *Neponsit* had unquestionably intended that the covenant should run with the land. The difficulties posed by this case were elsewhere, in the 'age-old essentials of a real covenant' set by 'ancient rules and precedents', according to which 'a covenant will run with the land and will be enforceable against a subsequent purchaser' only if it 'is one "touching" or "concerning" the land with which it runs', and if 'there is "privity of estate" between the promisee or party claiming the benefit of the covenant and the right to enforce it, and the promisor or party who rests under the burden of the covenant'.<sup>39</sup>

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

<sup>35</sup> 15 NE 2d 793 (NY 1938).

<sup>36</sup> See Dukeminier et al, *Property* (n 23) 872.

<sup>37</sup> To be sure, *Neponsit* (n 35) relied on the prior relaxation of the requirements for the enforcement of covenants in equity in cases such as *Tulk v Moxhay* (1848) 41 ER 1143.

<sup>38</sup> See generally Dagan, 'Inside Property' (n 17) 6–7.

<sup>39</sup> *Neponsit* (n 35) 795.

distinction because it does not ‘exalt technical form over substance’, and because it also accounts well for quite a few prior cases.<sup>40</sup>

Applying this test to the question at hand allows the court to conclude with a rather bright line rule regarding the specific issue of assessment covenants. While the payments at hand serve ‘public purposes’ upon land other than the land conveyed to a grantee’s predecessors in title, through that conveyance grantees obtain ‘not only title to particular lots, but an easement or right of common enjoyment with other property owners in roads, beaches, public parks or spaces and improvements in the same tract’. In order for the ‘property owners of these easements or rights’ to fully enjoy them in common, these public improvements ‘must be maintained’. This happy outcome can be achieved only if the burden of paying this cost is ‘inseparably attached to the land which enjoys the benefit’.<sup>41</sup>

The court had to pass yet another hurdle. Although ‘[v]arious definitions have been formulated of “privity of estate” in connection with covenants that run with the land . . . none of such definitions seems to cover the relationship’ between a property owners’ association, which ‘has been organized to receive the sums payable by the property owners and to expend them for the benefit of such owners’, and a subsequent purchaser. The *Neponsit* court alluded to the rather tortuous privity doctrine, but refused to have its analysis obscured by its technical details:

Only blind adherence to an ancient formula devised to meet entirely different conditions could constrain the court to hold that a corporation formed as a medium for the enjoyment of common rights of property owners owns no property which would benefit by enforcement of common rights and has no cause of action in equity to enforce the covenant upon which such common rights depend.

Thus, the court held that a corporate plaintiff like *Neponsit*, which ‘has been formed as a convenient instrument by which the property owners may advance their common interests’, should be able to enforce the covenants at hand.<sup>42</sup>

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

Consider first *Neponsit*’s bright line rules establishing the validity of assessment covenants and the standing of homeowners’ associations,<sup>43</sup> which were (almost literally) necessary preconditions for the subsequent flowering of common-interest communities. This simple observation attests that, notwithstanding Smith’s assertion to the contrary, a pluralist conception of property or of private law can, and

<sup>40</sup> *Neponsit* (n 35) 795–7.      <sup>41</sup> *Neponsit* (n 35) 797.      <sup>42</sup> *Neponsit* (n 35) 797–8.

<sup>43</sup> Later cases indeed show that *Neponsit* is standing for such rules. See eg *Riverton Cmty Ass’n v Myers*, 142 AD 2d 984, 985 (NY App Div 1992); *Lincolnshire Civic Ass’n v Beach*, 64 NYS 2d 248 (NY App Div 1975).

indeed should, distance itself from the dubious nominalist approach of case-by-case adjudication. Private law pluralism neither requires nor should it imply focusing on the equities of the particular case or the particular parties. By the same token, private law pluralism should not imply rule-sensitive particularism allowing judges to depart from rules whenever the outcome of a particular case so requires, while taking into account both substantive values and the value of preserving the rule's integrity.<sup>44</sup> Private law pluralism does not suggest replacing clear rules with open-ended discretionary decision-making. Instead, it stands for the proposition that reasoning about property rules should involve reasoning about the normatively appropriate character of the property institution at hand—given the social context of the relevant property institutions and the nature of the resource at hand—and not about property (or contracts, torts, or unjust enrichment) writ large. Given that the number of property institutions is limited and the role of the property values in their regard is confined to a few deliberative moments, we need not assume that private law pluralism cannot, to a significant extent, be rule based.<sup>45</sup> More importantly, given the significance of stability and predictability in the institutions of private law to function in consolidating expectations and expressing ideals of interpersonal relationships,<sup>46</sup> private law pluralism is not only capable of setting bright line rules, but is in fact, if properly executed, inclined to do so.

Indeed, the identification of legal realism with nominalism, although prevalent,<sup>47</sup> is mistaken. While a small minority among realists does endorse the dubious ad hoc approach of case-by-case adjudication,<sup>48</sup> most realists take a very different position.<sup>49</sup> They realize that law's use of categories, concepts, and rules is unavoidable, even desirable,<sup>50</sup> and that many legal reasoners should in most cases simply follow rules, which is why realists indeed take pains to improve legal rules.<sup>51</sup> Thus, for example, the property values of autonomy, personhood, utility, labour, community, and distributive justice neither are nor should be invoked as reasons for particular outcomes of specific property cases, but rather as reasons for property rules or standards. Recognizing these values as the normative infrastructure of property law should advise *some* legal actors—notably, judges of

<sup>44</sup> See Sherwin, 'Rule-Oriented Realism' (n 33) 1591–4. Interestingly, Smith's conception of equity, discussed in his contribution to this volume, seems to follow this strategy which, as the text implies, tends to undermine the stability and predictability of any system of rules.

<sup>45</sup> Cf Michael Lobban, 'Legal Theory and Judge Made Law in England, 1850–1920' (2011) 40 *Quaderni Fiorentini* 553, 580; Jeremy Waldron, 'Stare Decisis and the Rule of Law: A Layered Approach' (2012) 111 *Michigan Law Review* 1. See also Larry Alexander and Emily Sherwin, 'Judges as Rule Makers' in Douglas E Edlin (ed), *Common Law Theory* (Cambridge University Press 2007) 27.

<sup>46</sup> See text accompanying n 20.

<sup>47</sup> See eg Dworkin, *Taking Rights Seriously* (n 22) 15–16; Morton Horwitz, *The Transformation of American Law, 1870–1960* (Harvard University Press 1992) 202.

<sup>48</sup> See eg Fred Rodell, *Woe Unto You, Lawyers!* (Reynal and Hitchcock 1939) 169–74, 201–2.

<sup>49</sup> See eg Andrew Altman, 'The Legacy of Legal Realism' (1986) 10 *Legal Studies Forum* 167, 171–2.

<sup>50</sup> See eg Llewellyn, 'A Realistic Jurisprudence' (n 7) 27; Walter Wheeler Cook, 'Scientific Method and the Law' in William W Fisher III et al (eds), *American Legal Realism* (Oxford University Press 1995) 242, 246.

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

appellate courts—to *occasionally* use new cases as triggers for an ongoing refinement of the doctrine and as opportunities for both revisiting the normative viability of existing rules qua rules and re-examining the adequacy of the legal categorization that organizes these rules. In fact, much of *Property: Values and Institutions* is similarly devoted to the identification of property rules that best promote the property values underlying the property institutions to which they belong.

Besides prescribing rules regarding the validity of assessment covenants and the standing of homeowners' associations, *Neponsit* significantly transformed the doctrinal analysis of covenants more generally. Although not formally overruling the complex requirements of touch and concern and of privity, *Neponsit* criticized the technical niceties of these doctrines. It pointed out that, even where they took the form of a rule (as in the affirmative/negative covenants distinction) courts have tended to use such a rule merely as a rule of thumb, arguably because of its undue detachment from any reasonable understanding of the regulative principle that should guide this area of the law. Thereby, *Neponsit* paved the way for the substitution of the old (vague) tests of touch and concern and of privity with more substantive elements focusing on the role of covenants in the landowners' endeavour to pre-regulate their relationships qua landowners—or, more precisely, in their capacity<sup>52</sup> as participants in the property institution of common-interest communities—so as to facilitate their common enjoyment of certain public improvements and advance their common interests. Both the critical and the reconstructive sides of this part of *Neponsit* are relevant for my purposes.

In criticizing the pre-existing doctrinal rules, the court reminds us that, at times, a complex set of rules may fail to adequately serve as a guide for action. Regulating a wide range of conduct is complex, and technical non-intuitive complexity may undermine the guidance value of rules.<sup>53</sup> In such circumstances (and *Neponsit's* reconstructive side comes into play here), vague standards may be needed, such as *Neponsit's* focus on the role of covenants in facilitating landowners' ability to enjoy the potential benefits of common-interest communities. Even though such standards do not provide bright line instructions, they may still guide people's actions. As Jeremy Waldron claims, although complying with such a vague standard 'may be more onerous than' complying with a bright line rule, a standard can still be action-guiding, channelling and directing people's behaviour. People aware of this kind of standard (or their lawyers who are actually the active players at the relevant moments of common-interest community formation) can '[t]ake it on board', make for themselves 'the evaluative judgment that the norm requires', and thus monitor and modify their behaviour accordingly.<sup>54</sup>

<sup>52</sup> See Christopher Essert, 'The Office of Ownership' (2013) 63 *University of Toronto Law Journal* 1.

<sup>53</sup> See Richard A Posner, *The Problems of Jurisprudence* (Harvard University Press, 1990) 48; Timothy Endicott, 'The Value of Vagueness' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (Oxford University Press 2011) 14, 23, 28, 30.

<sup>54</sup> See Jeremy Waldron, 'Vagueness and the Guidance of Action' in *Language in the Law* (n 53) 58, 65–6, 69.

This conceptualization of standards as appeals to people's practical reasoning also sheds light on the types of issues wherein standards can be particularly guidance-friendly, as well as on the kind of legal reasoning that can accentuate the guidance potential of standards. It explains the truism that, given normative consensus on the pertinent issue, one may expect broad agreement regarding the application of a standard, and thus expect it to be particularly helpful as a guide.<sup>55</sup> Furthermore, in cases lacking such social agreement, the guidance capacity of standards as appeals to people's practical reasoning can rely on the significance of judicial reasoning in the common law tradition. Because 'the justification of a common law rule is as important as the norm itself',<sup>56</sup> refining the justification of a norm (or, for my purposes, explaining the role of a regulative principle in promoting the social ideal underlying its private law institution) helps its addressees figure out its intended content and realm of application. Finally, in addition to the benefits these vague standards can provide 'as is', they can, and usually do, create over time more bright line rules to implement their prescriptions.<sup>57</sup>

Both of these aspects are at work regarding property institutions generally and the *Neponsit* doctrine more particularly. To see why, recall that by structuring property as a limited number of identifiable and standardized forms and dividing the other fields of private law along similar lines,<sup>58</sup> private law facilitates stable categories of human interaction.<sup>59</sup> Unlike the broad and heterogeneous private law fields to which they belong, each of these private law institutions is internally coherent, meaning it is more or less guided by one regulative principle, one value or balance of values. Thus, given social consensus as to this regulative principle, or even without it but with the law clarifying (in constitutive cases such as *Neponsit*) what this regulative principle is and making it sufficiently stable (meaning it is not revisited so frequently as to make law incapable of guiding behaviour), legal subjects or their lawyers are likely to be aware of the 'character' of an institution and form their expectations accordingly.<sup>60</sup> (Recall that 'the rule of law does not require that law's guidance never change. It requires that the prospect of change should not make it impossible to use the existing law as a guide.'<sup>61</sup>)

Therefore, insofar as private law cannot use only bright line rules but must also rely on vague standards, using the various private law institutions as its building blocks seems optimal from a guidance perspective. This comforting conclusion is

<sup>55</sup> See Fuller, *Morality* (n 28) at 50, 92; Fallon, 'The Rule of Law' as a Concept' (n 32) 49–50; John Gardner, 'Rationality and the Rule of Law in Offences against the Person' (1994) 53 *Cambridge Law Journal* 502, 513, 515–17.

<sup>56</sup> Douglas E Edlin, 'Introduction' in Douglas E Edlin (ed), *Common Law Theory* (Cambridge University Press 2007) 1, 3.

<sup>57</sup> See Carol M Rose, 'Crystals and Mud in Property Law' (1988) 40 *Stanford Law Review* 577.

<sup>58</sup> See eg Roy Kreitner, 'Multiplicity in Contract Remedies' in Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies For Breach of Contracts* (Hart Publishing 2005) 19, 19–20, 38.

<sup>59</sup> See text accompanying n 20.

<sup>60</sup> This does not mean, of course, that such guidance is always effective. Thus, even the New York Court of Appeals failed at times to rely on and properly apply *Neponsit*'s reformulation of the regulative principle of covenant law. See eg *Eagle Enters v Gross*, 349 NE 2d 816 (NY 1976).

<sup>61</sup> Timothy AO Endicott, 'The Impossibility of the Rule of Law' in *Vagueness in Law* (Oxford University Press 2000) 185, 193; see also eg Gardner, *Law as a Leap of Faith* (n 2) 41.

particularly valid by comparison to the alternative that private law monism presents of resorting to the principles underlying property, contracts, torts, or unjust enrichment, which—given the heterogeneity of these fields<sup>62</sup>—are inevitably thin, and thus hardly informative.<sup>63</sup>

My claims regarding the guidance potential of private law pluralism that, as I mentioned in Section 1, are inspired by legal realism, are ostensibly threatened by the legal realist critique of doctrinal determinacy.<sup>64</sup> Legal realists argued that the irreducible choice among the many potentially applicable doctrinal sources competing to control any given case, all of which can be expanded, contracted, or variously interpreted or elaborated, means that legal doctrine is always open to multiple readings.<sup>65</sup> Unlike their image in some caricatures of legal realism, however, most realists did not challenge the predictability of legal doctrine. While insisting that legal doctrine qua doctrine cannot constrain decision-makers, they recognized that the convergence of lawyers' background understandings at a given time and place generates a significant measure of stability.<sup>66</sup> Thus, rather than threatening the compatibility of private law pluralism with the guidance conception of the rule of law, legal realism merely insists that such guidance does not inhere in the doctrine as such and rests instead on the broader social practice of law.<sup>67</sup> In the present case, guidance rests on the prevalent understanding of the private law institution's character, which reflects the regulative principle governing its constitutive rules.

Llewellyn thus argued that, although adjudication is necessarily creative, it is invariably constrained by legal tradition. Cases are decided with 'a desire to move in accordance with the material as well as within it . . . to reveal the latent rather than to impose new form, much less to obtrude an outside will'. The case law *system* imposes 'a demand for moderate consistency, for reasonable regularity, for on-going conscientious effort at integration'. The instant outcome and rule must 'fit the flavor of the whole'; it must, as we have seen in *Neponsit*, 'think with the feel of the body of our law' and 'go with the grain rather than across or against it'. Legal realists

<sup>62</sup> Smith acknowledges that '[o]ptimal concepts [] have a medium level of generality' (Smith, 'Concepts in Property' (n 26) 2105), but nothing in his critique supports the assertion that the correct level of abstraction in private law is that of such broad and heterogeneous legal fields.

<sup>63</sup> Thus, as Felix Cohen argued, whereas every property right involves *some* power to exclude others from doing something, this is a rather modest truism, which hardly yields any practical implications. Private property is also always subject to limitations and obligations, and 'the real problems we have to deal with are problems of degree, problems too infinitely intricate for simple panacea solutions.' Felix S Cohen, 'Dialogue on Private Property' (1954) 9 *Rutgers Law Review* 357, 362, 370–4, 379.

<sup>64</sup> See Lisa M Austin, 'Pluralism, Context and the Internal Life of Property: A Response to Hanoch Dagan' (2013) 63 *University of Toronto Law Journal* 22.

<sup>65</sup> See Dagan, *Reconstructing American Legal Realism* (n 5) 18–22.

<sup>66</sup> Dagan, *Reconstructing American Legal Realism* (n 5) 26; see also eg Alexander and Sherwin, *The Rule of Rules* (n 33) 32–4.

<sup>67</sup> See Frederick Schauer, 'Editor's Introduction' in Karl N Llewellyn, *The Theory of Rules*, ed Frederick Schauer (University of Chicago Press 2011) 1, 5, 7–8, 18, 20–4, Fallon, 'The Rule of Law' as a Concept' (n 32) 16–17; Margaret Jane Radin, 'Reconsidering the Rule of Law' (1989) 69 *Boston University Law Review* 781, 803.

begin with the existing doctrinal landscape because it may and often does incorporate valuable normative choices, even if implicit and sometimes imperfectly executed. They nonetheless recognize that the existing legal environment always leaves interpretive leeway. Furthermore, they believe that law's potential dynamism, as long as properly cautious and not too frequent, is laudable because it represents our perennial quest 'for better and best law' and, therefore, our judges' 'duty to justice and adjustment', thus implying an 'on-going production and improvement of rules'.<sup>68</sup>

#### 4. The Rule of Law as Constraint

However fortunate this conclusion may appear to be in terms of guidance, it seems to be alarming in terms of another understanding of the rule of law. The conception of the rule of law discussed so far has focused on the subjects of law and their guidance, whereas henceforth it will focus on the government.<sup>69</sup>

Consider the notion that the rule of law is the flip side of the rule of man. While its literal interpretation, as Albert Ven Dicey put it, is 'absurd' because '[p]olitical institutions... are made what they are by human voluntary agency', a more substantive understanding of this contrast implies that the rule of law stands for 'the absence of arbitrary power on part of the government'.<sup>70</sup> This characterization explains EP Thompson's spirited claim that the rule of law is 'an unqualified human good' since it represents 'the imposing of effective inhibitions upon power and the defense of the citizen from power's all-intrusive claims'.<sup>71</sup> Unrestrained power is frightening because of its potential devastating impositions; even more fundamentally, unrestrained power renders us mere objects, dominated by the power-wielder.<sup>72</sup> The conception of the rule of law as constraint seeks to address these grave concerns.

As Waldron explains, the rule of law in this conception stands for an 'aspirational idea', wherein law must purport to be guided by 'justice and the common good that transcend the self-interest of the powerful'. Its main mission, therefore, is 'to correct abuses of power',<sup>73</sup> and to 'take the edge off human political power, making it less objectionable, less dangerous, more benign and more respectful'.<sup>74</sup> Accordingly,

<sup>68</sup> Llewellyn, *The Common Law Tradition* (n 21) 36, 38, 190–1, 217, 222–3; Karl N Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method' (1940) 49 *Yale Law Journal* 1355, 1385.

<sup>69</sup> This focus on the government, to be sure, is important because it affects people.

<sup>70</sup> V Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan and Company 1959) 188, 196.

<sup>71</sup> EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (Pantheon Books 1975) 266; Gardner, *Law as a Leap of Faith* (n 2) 213. But cf Raz, 'The Rule of Law and its Virtues' (n 2) 219 ('Many forms of arbitrary power are compatible with the rule of law').

<sup>72</sup> See Krygier, 'Four Puzzles' (n 1) 79–80. Parenthetically, note that the conception of the rule of law as constraint is thicker than that of the rule of law as guidance, but serves a thinner understanding of individual autonomy.

<sup>73</sup> RR 1, 11, 32.

<sup>74</sup> Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137, 159.

the rule of law as constraint requires ‘a particular mode of the exercise of political power: governance through law’. It thus maintains that ‘people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong’.<sup>75</sup>

In a sense, insofar as private law pluralism follows the guidance conception of the rule of law it also addresses the concerns of unconstrained judicial power, because the requirement to identify and articulate a general norm imparts *some* element of impersonality.<sup>76</sup> But is this an adequate answer to the challenge at hand? Consider the possibility of allowing property doctrines to rest on the pertinent property values (liberty, personhood, labour, well-being, community, and distributive justice) without a predetermined formula for measuring and balancing these values.<sup>77</sup> Would not such an option entail unbridled judicial discretion, inviting these unaccountable officials to apply their subjective (or self-serving) normative preferences?<sup>78</sup>

To appreciate this challenge, consider Duncan Kennedy’s account of ‘the experience of legal reasoning as an activity pursued in a medium that is at once plastic and resistant’. Somewhat along the lines of my claim regarding the conventional rather than doctrinal underpinnings of the guidance function of private law pluralism,<sup>79</sup> Kennedy argues that an interpreter of legal materials ‘works to create or to undo determinacy, rather than simply registering or experiencing it as a given’. Rather than being “qualities” or “attributes” inherent in the norm’, this argument continues, determinacy or indeterminacy are effects ‘produced contingently by the interaction of the interpreter’s time, energy, and skill with an . . . “essential” nature of the rule [at hand]’. And therefore, Kennedy concludes, ‘we predict a result *because we anticipate that no work will be done to destabilize the initial apprehension*’.<sup>80</sup>

Some may find this account an affront to the rule of law, posing ‘the specter of the usurpation of power by an unaccountable elite’, misrepresenting political decisions ‘as if they were matters of law’, and thus making ‘the rule of law ideal . . . a fraud’.<sup>81</sup> Kennedy’s response to this worry is that ‘juristic work intended to inflect

<sup>75</sup> Waldron, ‘Is the Rule of Law an Essentially Contested Concept’ (n 74) 6, 31; see also eg Krygier, ‘Four Puzzles’ (n 1) 75–6, 78, 82, 88.

<sup>76</sup> See Waldron, ‘Stare Decisis’ (n 45) section 3; cf William Lucy, ‘Abstraction and the Rule of Law’ (2009) 29 *Oxford Journal of Legal Studies* 481.

<sup>77</sup> Notice that in these (not too many) deliberative moments in which judges rethink the regulative principles of a private law institution, they do not (and should not) solely rely on conventional morality, and thus cannot (solely) rely on prevalent social conventions.

<sup>78</sup> See Austin, ‘Pluralism, Context and the Internal Life’ (n 64).

<sup>79</sup> See text accompanying nn 65–7.

<sup>80</sup> Duncan Kennedy, *Legal Reasoning: Collected Essays* (The Davies Group Publishers 2007) 3, 159–61, 167.

<sup>81</sup> Brian Z Tamahana, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) 125; Brian Z Tamahana, ‘How an Instrumental View of Law Corrodes the Rule of Law’ (2006) 56 *DePaul Law Review* 469, 493; see also eg Robert H Bork, *The Tempting of America* (Free Press 1990) 4–5; Martti Koskeniemi, ‘Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization’ (2007) 8 *Theoretical Inquiries in Law* 9, 25.

the law in the judge's (or jurist's) preferred ideological direction' is legitimate.<sup>82</sup> But this defence seems far from comforting. We need not object to such 'judicial activism', Kennedy argues, because we should not expect that the notion of obedience or fidelity to law might help jurists to decide whether to employ 'ideologically oriented work strategies' to transform, or at least destabilize, 'initial apprehensions of what the materials require'. To think otherwise is to adhere to a 'fetishized or reified belief in the rule of law', rather than to maturely realize that the jurist's 'role constraint is no more than "do your best under all the circumstances to do something politically good"'.<sup>83</sup>

The anxieties that friends of the rule of law as constraint experience in light of statements that collapse law into politics inform many critiques of judge-made law and thus of the common law tradition.<sup>84</sup> These concerns cannot be easily dismissed even by those (like myself) who agree with Kennedy that law, like politics, cannot avoid addressing normative commitments and furthermore do not deny that politics, like law, must rely on the aspiration to constrain decision-makers' power. The reason for this is that the appropriate modes of constraining power in these two realms are different: 'participatory politics is... situated between the realm of the market (that focuses on preferences) and that of the law (that must always strive for public-regarding justification)', so that in politics—even in its ideal form—'neither convictions nor preferences should be excluded'.<sup>85</sup>

Taking the critical legal studies' critique of the rule of law seriously,<sup>86</sup> Ernest Weinrib, who is a friend of common law, proposes a radical but seemingly attractive understanding of private law purporting to be an adequate response to the challenge of preserving the distinction between law and politics.<sup>87</sup> Weinrib's account builds on a particularly demanding reading of the rule of law as constraint: Aristotle's claim that the rule of law is 'differentiated from the rule of men' by being 'the embodiment of intelligence without appetite'. In order to 'sustain the possibility' of this injunction, Weinrib argues, law must not be 'subservient to external ideals'; it must be 'conceptually sealed off from the interplay of extrinsic purposes'. Rather than promoting purposes such as the plural values that inform private law pluralism, the rule of law rests on the view that law 'constitutes, as it were, its own ideal, intelligible from within and capable of serving as [a] constraint upon the radical idealisms which postulate its depreciation'.

Private law, Weinrib claims, especially in the common law tradition, 'makes a show of [such] a self-contained rationality'. This is the case because the 'adjudicator

<sup>82</sup> Kennedy, *Legal Reasoning* (n 80) 163.

<sup>83</sup> Kennedy, *Legal Reasoning* (n 80) 6–8, 165, 168.

<sup>84</sup> See respectively Waldron, 'Rule of Law as Essentially Contested Concept' (n 74) 142–3, Frederick Schauer, 'The Failure of the Common Law' (2004) 36 *Arizona State Law Journal* 765, 781–2.

<sup>85</sup> Hanoch Dagan, 'Political Money' (2009) 8 *Election Law Journal* 349, 356.

<sup>86</sup> Ernest J Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 *Yale Law Journal* 949, 1015–16.

<sup>87</sup> Weinrib, 'Intelligibility of the Rule of Law' (n 2) 60, 63, 70–1, 78, 80–1, 83.

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

Weinrib's claim that the rule of law requires private law to adhere to corrective justice and exclude any collective or public values from our understanding of property (or of its sister private law doctrines) is, if successful, devastating to private law pluralism.<sup>88</sup> Fortunately, it is not. The main reason for its lack of success,<sup>89</sup> which I have discussed at some length elsewhere<sup>90</sup> and can only address briefly here, is anticipated by Weinrib himself when he notes that the integrity of this position 'depends upon whether [corrective justice is indeed] immune to the projection on to [it] of extrinsic purposes'.<sup>91</sup>

Weinrib illuminates the unique justificatory burden generated by the bipolar structure of private law litigation: private law is structured as a drama between plaintiff and defendant and must therefore require correlativity between the defendant's liability and the plaintiff's entitlement. But Weinrib's more ambitious claim (and the one that is relevant here) concerning private law's airtight insulation from collective values does not stand. Although private law is not just one of many strategies of regulation, it neither is nor can be dissociated from our social values. Quite the contrary, in order for the correlativity enquiry to even begin, and indeed be intelligible, we need to determine the content of the parties' rights, a determination that necessarily invokes our public values.<sup>92</sup> To be sure, not every value can

<sup>88</sup> Weinrib's thesis threatens, of course, not only private law pluralism, but also most (if not all) of the competing monistic conceptions of private law.

<sup>89</sup> Another significant shortfall of Weinrib's conception of the rule of law is that it does not properly address the significance of the prospective effects of every significant legal pronouncement, which must imply that judges should be able to justify their decisions to those who will be subject to them even if they are not participating in the judicial drama at hand. See Hanoch Dagan, 'Law as an Academic Discipline' in Shauna Van Praagh and Helge Dedek (eds), *Stateless Law* (Ashgate Publishing 2014).

<sup>90</sup> Hanoch Dagan, 'The Distributive Foundation of Corrective Justice' (1999) 98 *Michigan Law Review* 138; See Dagan, *Reconstructing American Legal Realism* (n 5) ch 5; Dagan, *Property* (n 4) 58–60, 63–6. The next two paragraphs draw on these sources.

<sup>91</sup> Weinrib, 'Intelligibility of the Rule of Law' (n 2) 75.

<sup>92</sup> Weinrib denies, of course, any reliance on such public values and derives his thesis of private law autonomy from the correlativity requirement by relying on the idea of property. Property, in his view, serves as a benchmark requiring no reference to collective values: while voluntary changes in the distribution of property cannot generate any legitimate grievance, involuntary changes both justify owners' complaints and specify the appropriate remedial response. See eg Ernest J Weinrib, 'Restitutionary Damages as Corrective Justice' (1999) 1 *Theoretical Inquiries in Law* 1, 6–7, 12, 24. But for property to serve as such a safe haven for private law autonomy, Weinrib must defend a conception of property that is securely detached from social values. Weinrib faces this challenge by advancing a regime in which the state functions both as a guarantor of people's robust property rights against one

qualify for the task. By and large, only values that participate in the regulative principle that underlies the private law institution at issue, meaning only values that inform our ideal vision of the interpersonal relationship at hand, can legitimately be taken into account. The implication is that the values underlying private law are not identical to those guiding public law, that not only one set of values underlies private law (or any one of its broad fields) in its entirety, and that in most cases these values are not to be directly engaged by judges deciding specific cases. At the same time, the implication is also that private law is deeply affected by our public values, so that corrective justice cannot render private law intelligible from within, sealed off from our social ideals.

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

The fact that Weinrib's strategy is not a panacea able to set aside the concerns of the rule of law as constraint is insufficient to redeem private law pluralism, as it merely reinstates the challenge of constraint. There seem to be two aspects to this challenge: one from legitimacy and the other from determinacy.<sup>93</sup>

The sheer fact that judges, unlike legislators, are often unselected ostensibly suffices to condemn their significant impact on private law as illegitimate application of power. But the question of legitimacy should be examined in more nuanced and comparative terms.<sup>94</sup> To determine the proper domain of judicial creation and

another, and as the authority responsible for levying taxes in order to fulfil a public duty to support the poor so as to secure everyone's independence. Strong property rights and a viable welfare state, so the argument goes, cluster as a matter of conceptual necessity. See Ernest J Weinrib, 'Poverty and Property in Kant's System of Rights' in *Corrective Justice* (Oxford University Press 2012) 263. But such a strict division of labour between a libertarian private law and a robust welfare state wherein the threat of dependence is universally alleviated is quite implausible. As I show elsewhere (Dagan, *Property* (n 4) 63–6), the public law of tax and redistribution is unlikely to supplement private law with rules adequately remedying the injustices of a libertarian private law, if not in terms of distribution at least in terms of interpersonal dependence. The reason for this is threefold. *First*, the realities of interest group politics in the promulgation of tax legislation render egalitarian tax regimes, such as one based on Rawls's difference principle, a matter of political theory rather than of empirical reality. This difficulty is intrinsic to the concept of democracy, which respects people's preferences and not only their principles. *Furthermore*, because our understandings of the responsibilities of owners and the limits of what we perceive to be their legitimate interests are influenced by our legal conception of ownership, an extreme libertarian private law regime might undermine social solidarity and dilute people's responsiveness to claims from distributive justice. *Finally*, treating the propertyless as passive recipients of welfare and mere beneficiaries of the public duty to support the poor entrenches their dependent, subservient status rather than their dignity and independence. Shifting dependence from the context of private law to that of the individual's relationship with the state via the welfare bureaucracy does not solve the problem and, indeed, might actually exacerbate it.

<sup>93</sup> Both aspects are raised by Austin, 'Pluralism, Context and the Internal Life' (n 64).

<sup>94</sup> My discussion of legitimacy draws on Hanoch Dagan, 'Judges and Property' in Shyamkrishna Balganesch (ed), *Intellectual Property and the Common Law* (Cambridge University Press 2013) 17; see Gardner, *Law as a Leap of Faith* (n 2) 200–1; Scott J Shapiro, *Legality* (Belknap Press of Harvard University Press 2011) 331, 358.

modification of private law institutions, if any, we need to examine potential bases for the legitimacy of judicial rulemaking in private law matters. Though I could not possibly hope to provide an adequate account of legitimacy in a liberal democracy here, the following remarks should suffice to support the claim that the legitimate scope of judicial rulemaking in private law is in fact rather broad.<sup>95</sup>

Consider first the notion that state power can be legitimate only if it is a product of its citizens' co-authorship. To be meaningful, the ideal of co-authoring the normative commitments that serve as the foundation of our private law entitlements must not be axiomatically attached solely to the legislative process.<sup>96</sup> Rather, a commitment to co-authorship requires a comparative account of real participation and deliberation in legislation and in adjudication. This account can look at the participation of the citizens (directly or via elected representatives) or focus on the participation of the subset of citizens who are likely to be affected by the private law development at hand.

In general, participation and deliberation will more likely be found in legislation than in adjudication because law-making is legislation's only task, whereas in adjudication it emerges as part of the resolution of discrete disputes.<sup>97</sup> But the broad or representative participation that might significantly foster collective co-authorship does not seem typical of legislation on many private law matters. Take (again) property: some property doctrines, such as the law of common-interest communities, may seem too mundane as a subject for robust public deliberation.<sup>98</sup> By contrast, when the creation or modification of property institutions provides significant opportunities for rent seeking, as in the repeated extensions of the term and scope of copyright, the legislative process tends to be dominated by interest groups promoting narrow distributive goals,<sup>99</sup> and thus cannot meaningfully count as collective co-authorship.

The ideal of participation by parties affected by the proposed development of private law is a more realistic expectation. But insofar as this participatory ideal is concerned, adjudication fares quite well and, in some contexts, probably better than legislation. The adjudicatory adversarial process fares well because it invites disagreements on questions of facts, opinion, and law. It thereby creates a forum where the judges' normative and empirical horizons are constantly challenged by the conflicting perspectives of the participating parties, which present a microcosm

<sup>95</sup> Note that I do not make a claim for judicial supremacy, as in judicial review. My sole focus is on the legitimacy of judicial rulemaking where legislatures are silent.

<sup>96</sup> Even if one insists that such an axiom is justified in the discussion of democracy-based legitimacy, it is out of place in the discussion of legitimacy in a democracy. The latter, broader type of legitimacy that concerns me here accommodates differing types of citizens' participation and of decision-makers' accountability.

<sup>97</sup> Another reason relates to comparative costs: voters 'often face a far less expensive road [than litigants] to registering their needs . . . in the political process' (Neil K Komisar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press 1991) 127).

<sup>98</sup> To pre-empt a possible objection, I may add that the notion that judicial passivity can upset the marginality of these topics within our public discourse does not seem particularly plausible.

<sup>99</sup> See generally Jessica Litman, *Digital Copyright* (Prometheus Books 2001).

of the social dilemma at hand.<sup>100</sup> Moreover, as Neil Komesar shows regarding tort law, adjudication sometimes provides a qualitatively better forum for the participation of affected parties. One instance is cases showing sharp ‘distinction between *ex ante* and *ex post* stakes’, so that the low *ex ante* probability of harm may obscure an important perspective rendered vivid in the *ex post* litigation triggered by the unfortunate realization of such harm.<sup>101</sup> Certain developments of property institutions, such as marital property, cohabitation, and leaseholds, by the judiciary may also fit well into this category.

But legitimacy should perhaps require only decision-makers’ accountability rather than citizens’ participation. Accountability is a more modest standard: it does not require active participation or deliberation but merely insists that decision-makers be responsive to citizens’ values and preferences. As with participation, the accountability requirement may in the abstract appear as a trump in favour of elected legislators vis-à-vis unelected judges, given that re-election is a rather potent guarantee of responsiveness. But my previous observations regarding skewed participation in private law matters detrimentally affect legislators’ responsiveness as well. If many private law matters are either politically marginal or dominated by interest groups, the legislators’ expected responsiveness is likely to be rather limited. Likewise, an outright dismissal of judges’ responsiveness seems exaggerated. As Llewellyn insisted, in their opinions judges need to ‘account to the public, to the general law-consumer’ on a regular basis and in detail. They must persuade not only their brethren but also the legal community ‘that outcome, underpinning, and workmanship are worthy’ and that their judgment was formed ‘in terms of the Whole, *seen whole*’.<sup>102</sup> While real life adjudication falls short of these ideals, having these standards in place is nonetheless significant because it affects judges’ utility function and thus informs judicial behaviour, as even the tough-minded portrayals of judges as maximizers of their utility function admit.<sup>103</sup>

Even if judges can legitimately affect our private law, is granting judges the power to apply a rather diverse set of collective values not tantamount to inviting them to apply subjective and thus illegitimate unbounded discretion? I do not think so. Different types of human interactions and, consequently, different categories of private law doctrines, call for different balances of the (indeed limited number of) values relevant to any given private law institution. Here, as elsewhere, the requirement to explicitly apply judgment, which needs to be normatively and contextually justified, is a real constraint.<sup>104</sup> In some categories of cases, this enquiry might

<sup>100</sup> See Dagan, *Reconstructing American Legal Realism* (n 5) 51–3; Matthew Steilen, ‘The Democratic Common Law’ (2011) *The Journal Jurisprudence* 437.

<sup>101</sup> See Komesar, *Imperfect Alternatives* (n 97) 135–6.

<sup>102</sup> Llewellyn, ‘The Common Law Tradition’ (n 21) 48, 132; Llewellyn, ‘American Common Law Tradition and American Democracy’ in *Jurisprudence* (n 7) 282, 309–10.

<sup>103</sup> See Richard A Posner, *How Judges Think* (Harvard University Press 2008) 11–12, 60–1, 371; Lawrence Baum, *Judges and their Audiences: A Perspective on Judicial Behavior* (Princeton University Press 2006) 16–21, 90, 106; Frederick Schauer, ‘Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior’ (2000) 68 *University of Cincinnati Law Review* 615, 615–17, 619–21.

<sup>104</sup> See eg Michael Martin, *Legal Realism: American and Scandinavian* (P Lang 1997) 39–40, 76; Joseph William Singer, ‘Normative Methods for Lawyers’ (2009) 56 *UCLA Law Review* 899.

indeed lead to a standoff. The relevant question, however, is not whether such cases are possible. The sheer existence of hard cases scarcely undermines the determinacy or the integrity of our private law, especially given that purely doctrinal reasoning, the main alternative to openly normative legal reasoning, is hopelessly malleable and thus indeterminate.<sup>105</sup> Rather, the question is whether cases of contextual-normative deadlock are prevalent enough so that they threaten a conception of private law premised on these guidelines, that is, whether we are indeed unable to use reason as the arbiter for identifying the most normatively desirable regulative principle of the private law institution at hand. As I attempted to demonstrate in my books on property and on restitution,<sup>106</sup> a sufficiently robust contextual normative account can often have quite sharp doctrinal teeth. Although some of my analyses may be controversial, they can hardly be challenged by the sheer difficulty of measuring or balancing the private law values I employ or by the possibility that there are other pertinent values. To challenge my approach, a detailed demonstration of the superiority of a competing account is needed.<sup>107</sup> Furthermore, recall that private law pluralism is committed to provide a rich variety of institutions both between and within social contexts, so that people who want, for example, to become homeowners, engage in business, or enter into intimate relationships have more than one option. Thus, private law pluralism ‘allows individuals to navigate their course so that they bypass certain legal prescriptions’,<sup>108</sup> which means that judicial errors are less worrisome than they are in a monist private law regime.

Let me again take an example, then, from the law of common-interest communities. My example this time deals with another constitutive characteristic of this property institution, which is improperly marginalized in the exclusionary conception of property: inclusion. Since the landmark case of *Shelley v Kraemer* held that judicial enforcement of racially restrictive covenants is an exercise of state action that violates the Fourteenth Amendment,<sup>109</sup> some rights to entry in defiance of the property owners’ will have become inherent in a significant segment of housing law in America. With the enactment of the Fair Housing Act,<sup>110</sup> discrimination in the sale or rental of residential dwellings on the basis of race, colour, religion, sex, familial status, national origin, or handicap is indeed currently prohibited.

Given its constitutional origin, the right to fair housing is usually analysed as an external qualification of the owner’s exclusionary prerogative,<sup>111</sup> rather than as an internal entailment of the meaning of the right to property in common-interest

<sup>105</sup> See text accompanying n 65.

<sup>106</sup> See Dagan, *Property* (n 4), Hanoch Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004).

<sup>107</sup> Cf Ronald Dworkin, *Law’s Empire* (Belknap Press 1986) 76–86.

<sup>108</sup> See Dagan, *Reconstructing American Legal Realism* (n 5)176.

<sup>109</sup> *Shelley v Kraemer*, 344 US 1 (1948).

<sup>110</sup> Fair Housing Act, 42 USC § 3601; see also Civil Rights Act of 1866, 42 USC §1982 and *Jones v Alfred Mayer Co*, 392 US 409 (1968).

<sup>111</sup> See Richard A Epstein, ‘Covenants and Constitutions’ (1988) 73 *Cornell Law Review* 906, 918–19; Stewart E Sterk, ‘Minority Protection in Residential Private Governments’ (1997) 77 *Boston University Law Review* 273, 281.

communities (or of landlords' property rights). But this seems to be wrong or at least incomplete because, as Carol Rose insisted, *Shelley* poses 'a state action enigma': both prior and later decisions show that the bare potential for judicial enforcement of private arrangements does not transform them into state action. While Rose's specific solution to this puzzle seems to me unsatisfactory,<sup>112</sup> her more general claim that *Shelley* presents 'some of the best instincts of property law' is precise.<sup>113</sup> The non-owners' right of entry to common-interest communities is indeed intrinsic to this property institution and should not be perceived as an external limitation or imposition.<sup>114</sup>

To see why, and to appreciate the constraining power of contextual normative reasoning regarding private law institutions, consider the way the right to entry to common-interest communities is grounded in the very reasons—the very same property values—that justify the support of our legal system for this property institution.<sup>115</sup> Consider, in other words, why *Shelley* is correct notwithstanding the state action enigma, and why the basic entry rule set by the Fair Housing Act should likewise be treated as a statutory specification of the regulative principle of common-interest communities (refined in *Neponsit*) rather than as a public law intervention.

Consider first the justification common to all property institutions as means for securing people's ability to be the authors of their lives. Limiting the opportunities of certain people to buy or lease houses or apartments in a certain geographical area undermines this role of property in facilitating people's self-determination. For this reason, exclusionary practices that unreasonably limit the mobility of the excluded persons (a mobility crucial to them in forming, revising, and pursuing their own ends) must be invalidated. In some settings, the concern for the autonomy of entrants is defeated by the autonomy and personhood concerns of property owners: the Fair Housing Act vigorously protects the right to exclude in intimate settings, where the personhood value of the owner (potential landlord) trumps any possible interest of potential tenants.<sup>116</sup> The Act, however, reverses this rule and recognizes a rather capacious right to entry where the lessor is a commercial entity. Because

<sup>112</sup> Rose suggested that this puzzle can be solved by reference to the welfarist commitment of property law to minimize negative externalities on third parties who may not share the preferences of the existing transactors. But, as Rose herself admits, making the protection of third parties from the idiosyncratic preferences of current transactors the core of property raises difficult questions for cases such as *Shelley*, where third parties are likely to share these current preferences. Carol Rose, 'Shelley v. Kraemer' in Gerald Korngold and Andrew P. Morriss (eds), *Property Stories* (Foundation Press 2004) 169.

<sup>113</sup> Rose, 'Shelley v. Kraemer' (n 112) 169.

<sup>114</sup> See *Noble v. Alley* [1951] SCR 64 (SCC), invalidating racially based restrictive covenants because they referred to the identity of users/owners rather than to any actual use of the pertinent land. Not only is this reasoning from within property, but it also (implicitly) relies on the *raison d'être* of the property institution of covenants as a means to facilitate landowners' ability to commonly enjoy the benefits of private land use controls along the lines discussed earlier (text accompanying nn 53–4). Understanding covenants in these terms does, on its face, make references to the identity of users and owners suspicious.

<sup>115</sup> The following paragraphs draw on Dagan, *Property* (n 4) ch 2; see also Sophia Moreau, 'What is Discrimination' (2010) 38 *Philosophy & Public Affairs* 143.

<sup>116</sup> See the Act's exceptions for intimate associations: single families (§3603(b)(1)) and small owner-occupied multiple unit dwellings (§3603(b)(2)).

negative liberty is not an ultimate value but rather a means for self-determination, a claim by one who wishes to establish her life in a certain locus must override that of someone who perceives that property as a fungible asset.

Thinking about common-interest communities as a property institution aimed at fostering the community value of property, thus conceptualizing covenants along the lines of the regulative principle identified in *Neponsit*, leads to similar conclusions. This perspective sanctions exclusionary practices of residential communities only in limited circumstances. In particular, it implies that law should not authorize such practices insofar as they are used against, rather than by, cultural minority groups.<sup>117</sup> It also requires that the law should make sure that the limits on entry applied by ‘thin’ common-interest communities are indeed necessary in order to ensure that ‘bad co-operators’ likely to jeopardize the success of the commons property are excluded. This means that courts need to supervise both the admissions criteria of such communities and the way they are practised on the ground. One implication of this prescription is that rejections of applicants for admissions must be reasoned, and that the reasons must be sufficiently detailed so that both their evaluative and factual components can be properly scrutinized.<sup>118</sup>

## 5. Conclusion

The most charitable explanation of private law theorists’ resistance to embrace the structural pluralism typical of private law focuses on the worry that, by endorsing this feature, they could end up exacerbating private law’s deficiencies concerning both the conception of the rule of law as guidance and its understanding as constraint. As I tried to show in the preceding pages, however, these concerns are exaggerated if not simply wrong.

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

<sup>117</sup> Or, for that matter, by other types of groups, such as where a common-interest community is organized around a commitment to, say, vegetarianism. But see Austin, ‘Pluralism, Context and the Internal Life’ (n 64) 27–9.

<sup>118</sup> And there is no way to avoid the hard questions of distinguishing appropriate goals of common-interest communities from illegitimate ones. But see Austin, ‘Pluralism, Context and the Internal Life’ (n 64) 27–9, who implies that common-interest communities can never relate to the identity of their members. Identifying the specific content of the minimal core to which private law pluralism must adhere is a significant task that cannot be undertaken here. For our purposes, it is enough to indicate that this core must be located around the maxim of treating every person as a human being whose dignity—or normative agency—fundamentally matters. See Dagan, *Reconstructing American Legal Realism* (n 5) 180.

Private law pluralism need not raise serious concerns of unconstrained judicial power either. To be sure, legislatures in a democracy can legitimately play a role in the development of private law, which shapes and reshapes our social order, adjusting it to new circumstances, challenges, and opportunities. In some contexts, judges should possibly refrain from taking part in this drama,<sup>119</sup> but in many others, courts enjoy no less legitimacy—from a participation or accountability perspective—in the shaping of our private law institutions.<sup>120</sup> Likewise, while the plurality of values involved in the moulding of these institutions' regulative principles makes the enterprise challenging, we have no grounds for assuming that a normative contextual enquiry cannot lead to just and principled results.

The compatibility of private law pluralism with the rule of law is not coincidental; rather, it is ingrained in its foundational features: its commitment to stability and predictability given its dual mission of stabilizing expectations and expressing ideals; and its even more fundamental commitment to employ multiple and relatively small categories, which are sufficiently distinct from one another and internally coherent, so as to facilitate autonomy as self-authorship. The former feature is crucial from a rule-of-law perspective because it requires private law to employ bright line rules whenever possible, and to otherwise resort to informative standards. The latter feature is even more critical both because only small categories can plausibly rely on regulatory principles that are sufficiently determinate so as to function as informative standards, and because the multiplicity of private law categories dilutes the power yielded by the carriers of private law, be they judges or legislatures. Indeed, the contrast to the large heterogeneous categories advocated by private law monists invites the question of whether monism, rather than pluralism, can plausibly comply with either the guidance or the constraint injunctions of the rule of law.

<sup>119</sup> Typical types of cases calling for significant deference are those of newly enacted private law legislation, as well as of private law innovations that require a regulatory structure, depend on specialized knowledge available elsewhere, or involve excessive widespread redistribution. See Dagan 'Judges and Property' (n 94) 36–7.

<sup>120</sup> There may also be cases in between these categories in which judges may legitimately begin a process of law reform, which would benefit from a further legislative intervention which can solidify that reform in a comprehensive scheme of rules. This may well be the full story of common-interest communities.

