The Craft of Property

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TABLE OF CONTENTS

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Notwithstanding the modern description of property as a bundle of sticks, the conception of property as forms still exerts significant influence in legal analysis. This Article claims that both understandings of property are necessary and can indeed be incorporated into a realist approach to property. A realist perspective understands the forms of property as institutions: important default frameworks of interpersonal interaction that consolidate people's expectations and express law's normative ideals for core types of human relationships. For this reason, the existing forms of property are helpful as starting points of legal analysis. But as social institutions, the existing property forms are not accorded overwhelming normative authority. Rather, using the bundle metaphor, these property forms are subject to an ongoing normative (and properly contextual) reevaluation and possible reconfiguration.

This Article presents the realist approach to property through analysis of United States v. Craft, *a 2002 Supreme Court decision involving the vulnerability of marital property to the claims of one spouse's creditors. The conceptions of property presented in* Craft *as either forms or bundles are both riddled with flaws. This Article develops the competing approach of property as institutions and demonstrates how it can inform the resolution of conflicts between various types of creditors of one spouse and the nondebtor spouse. Property as institutions usefully focuses the legal analysis of these issues on the guiding principles of property governance in marriage and of legal accidents law, which regulates contradictory claims raised by parties with no contractual privity.*

Understanding property as institutions helps account for the numerus clausus *principle, which prescribes that the forms of property are limited in number and standardized. It also refines the implications of this pervasive characteristic of property. This Article claims that, properly understood, the* numerus clausus *principle requires a purposive, rather than formalistic, legal discourse. It also shows that within the framework of property as institutions the* numerus clausus *principle leaves rather broad room for freedom of contract, allowing parties to opt out of most incidents of existing property forms.*

INTRODUCTION

Property is torn between form and substance. Every student of property remembers—some with joy, others with horror—the system of estates, with its fine distinctions among various forms of present and future interests. Fee simple absolute, fee tail, and life estate are only the beginning of a long repertoire of forms. An intricate taxonomy of various types of defeasible estates, future interests, and concurrent ownerships follows them.[1] This labyrinth of property serves as a nice introduction to the importance and the complexity of form in the life of the law and to the rich catalog of forms for human interaction and organization constituted by law.

But property is also quite obviously about substance. Property is frequently described as a bundle of sticks: that is, a collection of substantive rights, such as the right to exclude, to use, to alienate, and so on.[2] Furthermore, property is—how can it not be?—about values and normative choices.[3] Property is frequently analyzed as a bulwark of individual freedom and independence; some holdings are even regarded as constitutive components of personal identity.[4] Property also concerns the efficient (or inefficient) allocation of resources, and is thus a matter of aggregate social welfare (or utility). Finally, because property allocates claims to various scarce resources in society, property must be about distribution, as well as about our conceptions of community and social responsibility.

Is property then a matter of form or of substance? The short answer is that it is both, if we properly understand these classifications. Property is about form because there are a limited number of ways in which the various sticks (rights) are, and should be, bundled together. Each human institution that property law facilitates requires a form: a particular configuration of the bundle of sticks. But prescribing this configuration cannot itself be a matter of form; the forms of property are not free-floating logical entities, each with its own inevitable set of incidents. Rather, property constitutes human institutions, serving human goals and thus involving human values. Their rationale, the raison d'être of the various configurations of sticks of property as institutions, derives (or at least should derive) from the human values underlying each such property institution.[5] The forms of property are important only if, and insofar as, they help

1. *See, e.g.*, JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 195-441 (5th ed. 2002).

2. *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 742-43, 746-47 (1917).

3. *See, e.g.*, ROBERT C. ELLICKSON ET AL., PERSPECTIVES ON PROPERTY LAW, 45-169 (3d ed. 2002) (exposing the normative concerns underlying private property).

4. *Id.*

5. My use of the term "institutions" is somewhat narrower than Douglass North's all-encompassing understanding of institutions as "the humanly devised constraints that shape human interaction." DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 3 (1990). *See infra* Part IV.

consolidate people's expectations and express law's normative ideals for core types of human interaction.

Property law thus should shape and reshape forms—or, better, institutions—that will optimally promote these human values. This enterprise of institution building requires the application of some contextual judgment, informed by both experience and normative persuasion, as to both the role of legal rules in promoting these values and the values that should be promoted in the context at hand.[6] This ongoing (probably endless) process of reshaping property as institutions does not undermine the importance of the forms of property. To perform suecessfully their role in consolidating people's expectations and expressing law's ideals for various types of interpersonal interactions, the institutions of property should be limited in number and their reconstitution should be addressed with an appropriate degree of caution. Yet understanding property as institutions does undermine, as it should, any attempt to discuss property as a sheer matter of formal deduction or of counting incidents.

The mission of this Article is to develop, demonstrate, and defend the conception of property as institutions—namely, as important default frameworks of various categories of interpersonal interaction. In line with the legal realist commitments underlying this conception of property, mueh of my discussion is situated in the context of one particular, and particularly important, property institution: marital property. The trigger for my discussion and the test case for my claims is *United States v. Craft*.[7] In *Craft*, the Supreme Court discussed the vulnerability of one form of marital property—the tenancy by the entirety—to a federal tax lien resulting from the tax liability of one spouse only.[8] As we will see, this seemingly technical question provides an exciting opportunity to explore the realist conception of property because its resolution raises fundamental issues: What is property, and what makes a person the owner of property or of a right to property? What is the importance of the various forms of property within our system of estates? What are the proper rules of property governance in marriage? And what are the rights of the creditors of one spouse vis-à-vis the other, nondebtor spouse?[9]

Craft is important for my purposes because the Supreme Court rarely addresses these questions head on. To be sure, property and marriage frequently appear in Supreme Court cases. But usually the Court addresses these issues from the perspective of individual rights and the limits of

6. *Cf.* DON HERZOG, WITHOUT FOUNDATIONS: JUSTIFICATION IN POLITICAL THEORY 24-25, 224-25, 236-40 (1985).

7. 535 U.S. 274 (2002).

8. *Id.* at 276.

9. The decision in *Craft* also raises a host of implementation questions, which are beyond the scope of this Article. *See* Steve R. Johnson, *After* Craft*: Implementation Issues*, 96 TAX NOTES 553 (2002).

governmental interference. Property and marriage thus often arise in the context of issues such as regulatory takings or access to children.[10] The mundane but ultimately fundamental issues that constitute the daily lives of property and of marriage—issues such as the system of estates in land and the meaning and content of ownership, as well as questions regarding the governance of concurrent ownership and marital property—are not frequent visitors in the highest court of the land.[11]

The *Craft* case, summarized in Part I, offered the Supreme Court a unique opportunity to address some of these questions. Even though the Justices' answers are unsatisfactory, as I claim in Part II, they are helpful in refining the two prevailing conceptions of property—as bundles and as forms—and in pointing ultimately to the realist alternative that this Article celebrates. Before I introduce this alternative, however, I discuss in Part III the substantive issue in *Craft* and like cases: the vulnerability of marital property to claims of one spouse's creditors. In delving into the guiding principles of property governance in the context of marriage and of legal accidents law, which regulates conflicts between owners and third parties, this discussion implicitly demonstrates the main features of the realist conception of property as institutions. It thus facilitates the more abstract discussion of Part IV, which explicitly defends the conception of property as institutions. As Part IV shows, understanding property along these lines helps account for the standardization of property—the *numerus clausus* principle. In property as institutions the *numerus clausus* principle neither requires a formalistic legal discourse, nor does it invite a particularly cautious approach to freedom of contract. On the contrary, properly understood, the *numerus clausus* principle requires a purposive legal discourse and perfectly coheres with a broad room for freedom of contract. A brief conclusion follows.

I
THE *CRAFT* CASE

Don Craft failed to file his federal income tax returns for the years 1979 through 1986. In 1988, the Internal Revenue Service (IRS) assessed $482,446 in unpaid income tax liabilities against him.[12] According to the federal lien statute, such failure triggered the attachment of a lien to "all

10. *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002); Troxel v. Granville, 530 U.S. 57 (2000).

11. For a notable exception, see *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (finding unconstitutional a Louisiana law allowing a husband to mortgage joint property without his wife's consent). For the claim that property is not only "a fundamental and essential element of private law, but also [receives] its purest and original expression in private law," see Peter Benson, *Philosophy of Property Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 752, 753 (Jules Coleman & Scott Shapiro eds., 2002).

12. *Craft*, 535 U.S. at 276.

property and rights to property, whether real or personal, belonging to" him.[13] Because recovery of this tax liability, which was undisputedly Don's alone, did not seem promising, the IRS went after Don's interest in property he owned with his wife Sandra—the only respondent in the case[14]—as tenants by the entirety.[15] Using nonexempt funds of a separate estate to purchase marital property in order to protect the assets from creditors undisputedly constitutes a fraudulent act that would entitle the IRS to collect that amount from the marital estate.[16] But does a federal tax lien attach to an entireties property that was not financed in such a fraudulent fashion?

In *Craft*, the Supreme Court addressed this question with respect to a piece of land in Grand Rapids, Michigan, which Don and Sandra owned as tenants by the entirety.[17] After they received notice of the lien, the couple transferred the land to Sandra for a consideration of one dollar.[18] If, on the one hand, the tax lien can attach to a spouse's interest in an entireties estate, this transfer was surely fraudulent and thus invalid. But, on the other hand, the Justices assumed (as have other courts) that if a lien on Don's property could not attach to property held by Don and Sandra as tenants by the entirety, the transfer would not constitute fraud on Don's creditors.[19] The validity of the transfer, and the outcome of the case, thus depended on whether a tenant by the entirety "possesses individual rights in the estate sufficient to constitute 'property' or 'rights to property' for the purposes of the lien."[20]

Writing for the Court, Justice O'Connor relied on the *Drye* doctrine[21]—which, for the purposes of this Article, I accept as a

13. *Id.* (quoting 26 U.S.C. § 6321 (West 2002)).

14. The IRS claim actually related to the proceeds from Sandra's 1992 sale of the property—which at that time she owned in fee simple—to a third party. Don thus was not entitled to receive these proceeds. *See id.* at 290 n.1 (Thomas, J., dissenting). Don Craft died in 1998. *Id.* at 298 (Thomas, J., dissenting).

15. I introduce the features of a tenancy by the entirety in this Section. *See infra* text accompanying notes 35-37. I discuss this form of property in more detail in Parts II.A and III.A.3.

16. *See Craft*, 535 U.S. at 277 (describing district court's findings that Don's "use of nonexempt funds to pay the mortgage on the entireties property, which placed them beyond the reach of creditors, constituted a fraudulent act" and that accordingly the IRS was correctly awarded "a share of the proceeds of the sale of the property equal to that amount") (citing Craft v. United States, 65 F. Supp. 2d 651, 659 (W.D. Mich. 1999), *aff'd*, Craft v. United States, 233 F.3d 358 (6th Cir. 2000), *rev'd*, United States v. Craft, 535 U.S. 274 (2002)).

17. *Craft*, 535 U.S. at 276.

18. *Id.* at 276-77.

19. There was no dispute that "the Government's lien under § 6321 'cannot extend beyond the property interests held by the delinquent taxpayer,'" and that "'the tax collector not only steps into the taxpayer's shoes but must go barefoot if the shoes wear out.'" *Id.* at 291, 299 (Thomas, J., dissenting) (citing, respectively, United States v. Rodgers, 461 U.S. 677, 690-91 (1983), and BORIS I. BITTKER & MARTIN J. MCMAHON, FEDERAL INCOME TAXATION OF INDIVIDUALS § 44.5(4)(a) (2d ed. 1995 & 2000 Cum. Supp.)).

20. *Craft*, 535 U.S. at 276.

21. *See* Drye v. United States, 528 U.S. 49, 58 (1999).

given[22]—that while state law determines "what rights the taxpayer has in the property the Government seeks to reach," federal law must determine "whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation."[23] As it turned out, the traditional canons of statutory interpretation were of very little help in resolving this question,[24] and the Court was thus left to its own devices. How should the Court have addressed this question? What concept or theory of property could have guided its classificatory task?

Justice O'Connor began her opinion by rejecting the approach of the Court of Appeals of the Sixth Circuit, which, in deciding for the respondent (Sandra), relied on the notion that "a tenant by the entirety has no separate interest in entireties property."[25] Federal tax law, the Court held, should not give too much weight to this common law notion of marital unity, "the common law *fiction* that the husband and wife [are] one person at law."[26] Rather, it should pierce the artificial "*labels* the State gives" and consider "the *substance* of the rights state law provides."[27]

To shift from labels to substance, Justice O'Connor invoked the Hohfeldian conception of property as "a 'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property."[28] In the Court's view, the substantive inquiry required a careful examination of the composition of the bundle of rights Don held as a tenant by the entirety. Did "those sticks qualify as 'property' for purposes of the federal tax lien statute?"[29] Sure they did, said the Court, given the lengthy list of sticks a tenant by the entirety holds under Michigan law with respect to the entireties estate.[30]

Of particular importance, explained the Court, were the rights to use, to receive income, and to exclude, which together gave a spouse "a

22. For strong and convincing support of the *Drye* doctrine, see Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000). For a defense of *Craft* from the federalism perspective, see Steve R. Johnson, *Why* Craft *Isn't Scary*, 37 REAL PROP. PROB. & TR. J. 439, 452-60 (2002).

23. *Craft*, 535 U.S. at 278 (quoting *Drye*, 528 U.S. at 58).

24. *Id.* at 287 (discussing the ambiguity of the legislative history).

25. *Id.* at 276.

26. *Id.* at 281 (emphasis added).

27. *Id.* at 279 (emphasis added).

28. *Id.* at 278.

29. *Id.* at 279.

30. The Court mentioned the following rights with respect to the entireties property:

> the right to use the property, the right to exclude third parties from it, the right to a share of income produced from it, the right of survivorship, the right to become a tenant in common with equal shares upon divorce, the right to sell the property with the respondent's consent and to receive half the proceeds from such a sale, the right to place an encumbrance on the property with the respondent's consent, and the right to block respondent from selling or encumbering the property unilaterally.

Id. at 282.

substantial degree of control over the entireties property."[31] The Court acknowledged that a single spouse lacks "the right to unilaterally alienate the property, a right that is often in the bundle of property rights."[32] But the majority held that "[t]here is no reason to believe . . . that this one stick—the right of unilateral alienation—is essential to the category of 'property.'"[33] Therefore, the Court concluded that Don's interest in the entireties property was subject to the federal tax lien.

The Court noted the wide implications of this case.[34] *Craft* dealt specifically with tenancy by the entirety, a form of concurrent ownership that can exist only between spouses and that confers on each spouse undivided ownership interests and a right of survivorship.[35] Only twenty-one states recognize tenancy by the entirety,[36] a form of property created only by a direct conveyance to both spouses simultaneously or by conveyance from one spouse to the two together.[37] However, the Court's ruling also must apply to some community property. Because, functionally, individual spouses have similar sticks in community property,[38] there is no principled reason to distinguish between these forms of marital property.[39] The Court

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31. *Id.* at 283.

32. *Id.* at 284. More precisely, "unilateral alienation of a spouse's interest in entireties property is typieally not possible without severance." *Id.* at 281. In addition,

> [T]enancies by the entirety cannot easily be severed unilaterally. Typically, severance requires the consent of both spouses or the ending of the marriage in divorce. . . . Neither spouse may unilaterally alienate or encumber the property although this may be accomplished with mutual consent. Divorce ends the tenancy by the entirety, generally giving each spouse an equal interest in the property as a tenant in common, unless the divoree decree specifies otherwise.

Id. at 281-82 (internal citations omitted).

33. *Id.* at 284.

34. *Id.*

35. *See, e.g.*, DUKEMINIER & KRIER, *supra* note 1, at 341 (indicating that tenancy by the entirety requires, in addition to the four unities that characterize joint tenancy, also the unity of marriage).

36. Tenancy by the entireties is reeognized in Alaska, Arkansas, Delaware, Florida, Hawaii, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wyoming, and in Washington, D.C. For recent case law examples evidencing this reeognition, see *infra* notes 73, 74, 76, and 78, and cases cited therein.

37. *See* 7 RICHARD R. POWELL, POWELL ON REAL PROPERTY 52-4 to 52-11 (Michael Allen Wolf ed., 2002).

38. *See Craft*, 535 U.S. at 284 ("Community property states often provide that real community property eannot be alienated without the consent of both spouses."). *But see id.* at 297 (Thomas, J., dissenting) (insisting that tenancy by the entirety is "significantly different from community property") (citing 4 GEORGE W. THOMPSON, THOMPSON ON REAL PROPERTY § 37.14(a) (David A. Thomas ed., 1994)). On community property see *infra* Part III.A.2.

39. *See* Johnson, *supra* note 22, at 467-68. Johnson somewhat overstates this point by adding other forms of concurrent estates that arc not unique to thc marital context. Johnson also implies that because the pre-*Craft* doctrine did not immunize homcstead interests and community property from the federal tax lien, the pre-*Craft* doctrine regarding the entireties estate was mistaken. This inference implicitly assumes that the rules regarding homestead interests and community property are correct and thus that the pre-*Craft* rule regarding tenancy by the entirety is an outlier. But this assumption surely

implied that this observation regarding the wide scopc of its decision fortified its conclusion because it emphasized the breadth of property that would be exempt from the federal tax lien if the IRS did not prevail in *Craft*: "Excluding property from a federal tax lien simply because the taxpayer does not have the power to unilaterally alienate it would . . . exempt a rather large amount of what is commonly thought of as property."[40] Such an exemption would have been undesirable because it would have facilitated tax abuse by allowing spouses to shield property from the reach of the federal tax authorities by classifying it as entireties property.[41] The majority also claimed that such an exemption was "absurd" because it implied that "the entireties property would belong to no one for the purposes of [the federal lien statute]."[42]

Justice Scalia, joined by Justice Thomas, and Justice Thomas, joined by Justices Stevens and Scalia, wrote the two dissenting opinions in *Craft*. The dissenters objected to both the conceptual and the substantive analyses of the Court and presented their alternative approaches on both fronts.[43] The dissenters' conceptual objection was twofold. First, they criticized the Court's methodology, according to which "so long as sufficicnt 'sticks' in the bundle of 'rights to property' 'belong to' a delinquent taxpayer, the lien can attach as if the property itself belonged to the taxpayer."[44] The "laundry list" thc Court composed, said Justice Thomas, cannot determine whether the delinquent taxpayer has "property" or "rights to property."[45] Second, the dissenters critiqued the Court's dismissal of the common law form of tenancy by the entirety. Although they conceded that ownership by the marriage is a fiction of sorts, they identified a similar fiction in relation to partnerships and corporations, whose property similarly cannot be encumbered by the debts of their individual members.[46] In neither case, the dissenters argued, was there reason to ignore this fiction, particularly because the entireties property remained subject to a lien for the joint tax liability of the spouses.[47]

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begs the question at stake. The *Craft* Court correctly avoided this trap and thus presented the full implications of the decision.

40. *Craft*, 535 U.S. at 284.

41. *Id.* at 285.

42. *Id.*

43. Justice Thomas's dissent also criticized the Court for ignoring "the primacy of state law in defining property interests," as well as "the longstanding consensus in the lower courts that tenancy by the entirety property is *not* subject to lien for the tax liability of one spouse." *Id.* at 291, 301 (Thomas, J., dissenting). These issues are beyond the scope of this Article.

44. *Id.* at 291 (Thomas, J., dissenting).

45. *Id.* at 295 (Thomas, J., dissenting).

46. *Id.* at 289 (Scalia, J., dissenting).

47. *Id.* at 301 (Thomas, J., dissenting). While correct, Justice O'Connor's response to this point—that the tax lien can attach "to the fair market value of his or her share in the partnership assets," *id.* at 286—did not address the dissents' concerns, at least as they are interpretcd in Parts II.B and III.B.2.c below.

The dissenters' conceptual alternative followed at some length the deductive method of the Court of Appeals of the Sixth Circuit. In this approach, the identity of the owners of the entireties estate should follow, as a matter of logic, from the entireties form. Accordingly, Justice Thomas cited the canonical definition of an entireties estate as "indivisible 'sole tenancy'"[48] and deduced that "property held as a tenancy by the entirety does not belong to either spouse, but to a single entity composed of the married persons."[49] For this reason, the dissents concluded that the Grand Rapids property did not belong to either spouse individually and therefore "was not property to which the federal tax lien could attach for Mr. Craft's tax liability."[50]

Finally, the dissenters challenged the Court's policy argument and offered a competing one. The Court's policy rationale was nothing but an unsound "straw man," suggested Justice Thomas, given "the Government's failure to adduce any evidence that this has led to wholesale tax fraud by married individuals."[51] Furthermore, the Court's decision was objectionable, added Justice Scalia, because it

> nullifies (insofar as federal taxes are concerned, at least) a form of property ownership that was of particular benefit to the stay-at-home spouse or mother. She is overwhelmingly likely to be the survivor that obtains title to the unencumbered property; and she (as opposed to her business-world husband) is overwhelmingly unlikely to be the source of the individual indebtedness against which a tenancy by the entirety protects.[52]

II

NEITHER (JUST) FORMS, NOR (MERELY) BUNDLES

The conceptual debate in *Craft* is timely. Property is a core concept in both constitutional and private law adjudication, yet it is neither defined in the Constitution nor discussed frequently or in any detail by the Court's Justices.[53] The *Craft* conceptual debate, which comes at a time when

48. *Id.* at 292 (Thomas, J., dissenting) (citing Budwit v. Herr, 63 N.W.2d 841, 844 (Mich. 1954)).

49. *Id.*

50. *Id.* As one state supreme court dealing with the tenancy by the entirety held, "indivisibility of the estate, except by joint action of the spouses, is an indispensable feature of the tenancy by the entirety." Sawada v. Endo, 561 P.2d 1291, 1296 (Haw. 1977).

51. *Craft*, 535 U.S. at 301 (Thomas, J., dissenting).

52. *Id.* at 289-90 (Scalia, J., dissenting).

53. For an attempt to make sense of existing judicial doctrine on the question of which resources can be subject to property rights—as opposed to the question of who is a property owner, which is the focus of this Article—see Merrill, *supra* note 22, at 893 (proposing a "patterning definition" method for the identification of constitutional property and arguing for different definitions for procedural due process ("property-as-entitlement"), the Takings Clause ("property-as-ownership"), and substantive due process ("property-as-wealth")).

property scholars are devoting increasing attention to conceptual analysis,[54] is thus of particular importance. This debate helps refine two approaches to the concept of property that I will denote "property as forms" and "property as bundles." Unfortunately, both approaches are riddled with flaws.

A. Property as Forms

In the dissent's conceptual alternative, property is a form or, more precisely, a list of forms. Each form has its own recognizable structure and internal logic. Logical deductions from the definition of the property form provide answers to doctrinal questions, and these answers are therefore internally valid. The tasks of courts and lawyers are thus classification, induction, and deduction, which, as such, do not involve any normative judgments.[55] As long as these doctrinal means generate one right answer, lawyers need not address social goals and human values.[56] In our context, the correct form dictates the correct answer to the doctrinal question of *Craft*[57]: the indivisibility of the entireties estate means that the creditors of an individual spouse cannot reach the property.

This approach is a nice illustration of classical formalism.[58] As such, it is subject to the legal realist critique, echoed in the majority's complaint, of form obscuring substance. More specifically, legal realists maintain that the idea that legal concepts (in our context, the forms of property)

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54. *See, e.g.*, ALAN BRUDNER, THE UNITY OF THE COMMON LAW 21-86 (1995); J.E. PENNER, THE IDEA OF PROPERTY IN LAW (1997); Benson, *supra* note 11; Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001).

55. *See* Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 608-09 (1999) (characterizing classical formalism as "the view of law as an internally valid, autonomous, and self-justifying science" in which right answers are "derived from the autonomous, logical working out of the system"); Thomas C. Grey, The New Formalism 5 (Stanford Law Sch., Stanford Pub. Law & Legal Theory Working Paper Series, Working Paper No. 4, 1999), *available at* http://papers.ssrn.com/paper.taf?abstract<uscore>id=200732 (characterizing classical formalism by the assumptions that law must be determinate, systematic, and autonomous). *Cf.* Menachem Mautner, *Beyond Toleration and Pluralism: The Law School as a Multicultural Institution*, 9 INT'L J. LEGAL PROF. 55, 56 (2002) (arguing that at the crux of formalism lies a sharp "dichotomy between politics and law, which parallels and overlaps a dichotomy between the legislature and the judiciary").

56. *Cf.* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 47-52, 158-62 (1991) (describing rules as entrenched generalizations that exclude certain reasons from the jurisdiction of decision makers).

57. *See* Grey, *supra* note 55, at 11 (discussing the classical formalists' "Platonic or Aristotelian theory of concepts," according to which "a concept delineated the essence of a species or natural kind").

58. *See, e.g.*, NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 10 (1995) (describing formalism as "the endeavour to treat particular fields of knowledge as if governed by interrelated, fundamental, and logically demonstrable principles of science"); Anthony Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335, 335 (1988) (describing the Langdellian project as one of "working out in detail in each branch of law a comprehensive and rigorously structured doctrinal science").

inevitably entail some doctrinal conclusions is false.[59] Instead, they assert that a broad menu exists of possible alternative ways for interpreting or elaborating on a legal concept. This multiplicity is the main reason for Justice Holmes's dictum that "[y]ou can give any conclusion a logical form."[60] It is thus futile to attempt, as the *Craft* dissenters attempted, to derive doctrinal conclusions by such internal deductive reasoning.

Furthermore, legal realists argue that this type of reasoning, which is an integral part of the conception of property as forms, is objectionable because it falsely presents important value judgments made by judges as inevitable, obscuring their choices and shielding them from empirical and normative critique.[61] As Felix Cohen maintained, although using legal concepts is unavoidable, this innocuous practice is risky because lawyers tend to "thingify" legal concepts.[62] Lawyers' "language of transcendental nonsense" treats such concepts not as legal artifacts but rather as an unmodifiable part of our natural or ethical environment, and thus misleadingly presents existing legal concepts as explanations and justifications for subsequent legal results.[63] But "the magic 'solving words' of traditional jurisprudence," Cohen claimed, neither explain nor justify court decisions.[64] Worse still, when "the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions," then "the author, as well as the reader, of the opinion or argument[] is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged."[65] Deductive formalism, which uses legal concepts as reasons

59. *See, e.g.*, OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 180 (1920) (referring to "the fallacy" of the logical form). *See also* JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 7 (2000) ("Property does not come in a preset package. There is no simple definition of property that can be posited without making controversial value judgments about how to choose between conflicting interests.").

60. HOLMES, *supra* note 59, at 181. Indeed, here and elsewhere, the most significant source of doctrinal indeterminacy is not the indeterminacy of discrete legal sources, whether enshrined in statutory norms or in judicial opinions, but rather the multiplicity of doctrinal sources. *See* FELIX S. COHEN, *The Problems of a Functional Jurisprudence*, *in* THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 77, 83 (Lucy Kramer Cohen ed., 1960); JEROME FRANK, LAW AND THE MODERN MIND 138 (1930); KARL LLEWELLYN, *Some Realism About Realism*, *in* JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 42, 58 (1962) [hereinafter LLEWELLYN, *Some Realism*]; KARL LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 45, 51 (Paul Gewirtz ed. & Michael Ansaldi trans., 1989); FRED RODELL, WOE UNTO YOU, LAWYERS! 154, 160 (1957); *see also* EDWARD A. PURCELL JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE 90 (1973); Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205 (1986).

61. *See, e.g.*, OLIVER WENDELL HOLMES, *Law in Science and Science in Law*, *in* COLLECTED LEGAL PAPERS, *supra* note 59, at 205, 230, 232, 238-39.

62. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 811 (1935).

63. *Id.* at 812.

64. *Id.* at 820, 812.

65. *Id.* at 812.

rather than as conclusions, bars the way to open inquiry of the normative desirability of alternative judicial decisions.[66]

The entireties estate at issue in *Craft* is a vivid illustration of an open-ended concept that begs a realist critique, because the nature of the estate varies across time and place. The historical development of the tenancy by the entirety demonstrates the legal realist claims that legal concepts are malleable and that their evolution is explained at least partly by their normative implications. The heterogeneity of contemporary manifestations of the tenancy by the entirety, discussed below, further illustrates the impossibility of deductive formalism.

Originally, the entireties estate was a patriarchal institution like other forms of marital property.[67] At common law, although the wife's interest was indefeasible without her consent, it was deemed "a mere expectancy of speculative value."[68] The husband controlled the estate: he could use it as collateral, and, as such, his creditors were entitled to collect from his interest in the entireties estate.[69] But with the passage of the Married Women's Property Acts in the late nineteenth century, states that had not abolished the tenancy by the entirety altered it significantly.[70] Today, both husband and wife have equal rights to their entireties property and to any of its constitutive incidents.[71]

Contemporary law is divided on the question of whether one spouse can transfer his or her interest in the entireties property during marriage, as

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66. *See* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 290-95 (1987); Robert W. Gordon, *Critical Legal Studies*, *in* READINGS IN THE PHILOSOPHY OF LAW 176, 178-82 (John Arthur & William H. Shaw eds., 2d ed. 1993); Robert W. Gordon, *New Developments in Legal Theory*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 413, 418-21, 424 (David Kairys ed., 2d ed. 1990); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 211-21 (1979); Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1157-59 (1985).

The astute reader will notice my deliberately limited use of Cohen's argument. I do not dispute Jeremy Waldron's claim that legal concepts help "represent[] a nexus of connections" that "may be something of substantial importance for anyone proposing to change or repeal any one or more items in the array, or even for anyone proposing simply to apply one of the rules in the array to a particular set of events in a particular case." Jeremy Waldron, *"Transcendental Nonsense" and System in the Law*, 100 COLUM. L. REV. 16, 25 (2000). Nothing in the critique that follows is aimed at undermining, or in fact undermines, the role of the coneeptual terminology of law in "keep[ing] track of the significance of legal changes in a complex patchwork of doctrine," thus facilitating "law's ability to flourish in an environment of complexity, diversity, and disagreement." *Id.* at 52-53. Indeed, while insisting that not "every non-empirical connection is discreditable and unimportant," Waldron himself is careful enough to add that "Cohen might be right in his distaste for conceptual arguments that trapeze around in cycles and epicycles without ever coming to rest on the floor of verifiable fact." *Id.* at 51.

67. *See, e.g.*, Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

68. Richard G. Huber, *Creditors' Rights in Tenancies by the Entireties*, 1 B.C. INDUS. & COM. L. REV. 197, 200 (1960).

69. *Id.*

70. United States v. Craft, 535 U.S. 274, 283 (2002).

71. CORNELIUS J. MOYNIHAN & SHELDON F. KURTZ, INTRODUCTION TO THE LAW OF REAL PROPERTY 277 (3d ed. 2002).

well as on the corresponding power of that spouse's creditors to subject the debtor-spouse's interest in the entireties estate to creditors' claims.[72] The twenty-one states that recognize the entireties estate are divided into two main groups.[73] In most jurisdictions, including Michigan,[74] a valid alienation requires a joint act by both spouses so that only the marital unit, as opposed to any individual spouse, has the right of control.[75] Neither spouse can alienate the property without the consent of the other, and creditors cannot obtain satisfaction from the entireties estate for the separate debts of an individual spouse.[76] In five jurisdictions the opposite rule applies: each spouse has "full powers of management, control, and alienation as to his or her undivided one-half portion of possession and income."[77] Correspondingly, creditors may levy the interest of one spouse for his or her separate debts, subject to the possessory right of the other spouse and his or her right of survivorship.[78]

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72. *See id.* at 277-78 (suggesting a different taxonomy than the one discussed *infra*); WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 196 (3d ed. 2000) (same).

73. Two states, Kentucky and Tennessee, have a hybrid regime in which neither spouse individually can alienate his or her possessory rights, but the right of survivorship of each spouse is separately alienable. Correspondingly, creditors cannot interfere with the spouses' use and enjoyment, but take all if the nondebtor spouse dies first. *See* Raybro Elec. Supplies, Inc. v. D.J. Barclay, 813 F. Supp. 1267, 1269-70 (W.D. Ky. 1992); Third Nat'l Bank in Nashville v. Knobler, 789 S.W.2d 254, 255 (Tenn. 1990). Rhode Island also seems to have joined this group and defected from states that hold all interests in a tenancy by the entirety inalienable. *See* In re Furkes, 65 B.R. 232, 235 (D.R.I. 1986) (citing Cull v. Vadnais, 406 A.2d 1241, 1245 (R.I. 1979)). Note that Mississippi remains undecided on this issue. *See* Henderson v. West Cash & Carry Bldg. Materials of Memphis, Inc., 112 B.R. 231, 234 (Bankr. W.D. Tenn. 1990).

74. *Craft*, 535 U.S. at 288 (citing Sanford v. Bertrau, 169 N.W. 880, 881 (Mich. 1918)).

75. *See, e.g.*, Huber, *supra* note 68, at 203.

76. According to recent case law, this majority group is comprised of, in addition to Michigan, Delaware (Johnson v. Smith, No. 13585, 1994 WL 643131, at *5-10 (Del. Ch. Oct. 31, 1994) (unpublished decision)), Florida (Neu v. Andrews, 528 So. 2d 1278, 1279 (Fla. Dist. Ct. App. 1988)), Hawaii (Traders Travel Int'l, Inc. v. Howser, 753 P.2d 244, 246 (Haw. 1988)), Maryland (In re Giles, 222 B.R. 766, 769-70 (Bankr. D. Md. 1998)), Missouri (In re Eads, 271 B.R. 371, 376 (Bankr. W.D. Mo. 2002)), Pennsylvania (Koffman v. Smith, 682 A.2d 1282, 1288 (Pa. Super. Ct. 1996)), Vermont (Med. Ctr. Hosp. of Vt. v. Lorrain, 675 A.2d 1326, 1330 (Vt. 1996)), Virginia (Jones v. Conwell, 314 S.E.2d 61, 64 (Va. 1984)), Washington, D.C. (Morrison v. Potter, 764 A.2d 234, 236-37 (D.C. 2000)), and Wyoming (Talbot v. United States, 850 F. Supp. 969, 975 (D. Wyo. 1994)). Although a recent case indicates that Indiana also remains part of this group, a recodification of Indiana law effective July 1, 2002, may change Indiana's stance on this matter. *See* In re Cross, 255 B.R. 25, 32 (Bankr. N.D. Ind. 2000); IND. CODE § 32-17-3-1 (2002).

77. Oval A. Phipps, *Tenancy by Entireties*, 25 TEMP. L.Q. 24, 40 (1951).

78. The most recent available case law indicates that this minority group is comprised of Alaska (Pilip v. United States, 186 F. Supp. 397, 401-02 (D. Alaska 1960) (with exception of homestead tenancies)), Arkansas (Morris v. Solesbee, 892 S.W.2d 281, 282 (Ark. Ct. App. 1995)), New Jersey (Freda v. Commercial Trust Co. of N.J., 570 A.2d 409, 414 (N.J. 2000)), New York (In re LaBorde, 231 B.R. 162, 166 (Bankr. W.D.N.Y. 1999)), and Oregon (Or. Account Sys., Inc. v. Greer, 996 P.2d 1025, 1030 (Or. Ct. App. 2000)).

This heterogeneity of tenancies by the entirety[79]—pertaining to the very question contemplated in *Craft*—demonstrates the impossibility of deductive formalism. The form (the entireties estate) has evolved and changed its content with the changing attitudes regarding marriage and the status of married women.[80] Furthermore, within our own legal system, different jurisdictions have adopted by statute or judicial decision different models of governance (at least regarding alienation) and, correspondingly, divergent approaches to the rights of third parties. Unless one is willing to claim that some jurisdictions are conceptually misguided—a difficult position to maintain—such heterogeneity must undermine the viability of deductive formalism.

Perhaps, however, the dissent derived its conclusion not from the general form of tenancy by the entirety but rather from the specific type adopted in Michigan and the majority of states. On this reading, the multiple manifestations of the entireties form are merely artifacts of the multiplicity that characterizes federal systems. The IRS's power to collect, in this view, simply follows from that of some other creditors of an individual spouse. This claim is reasonable, and a modified version of it may be acceptable in the end if it can be supported by convincing normative reasons. But this claim is certainly not an inevitable one,[81] even if we were to set aside the *Drye* doctrine, according to which state law does not control the classificatory question for the purposes of the federal tax lien statute.

In fact, this seemingly more charitable reading of the dissent—that, as a matter of conceptual analysis, the rights of different types of creditors must be uniform—misses the point of the realist claim of the malleability of legal concepts in general and of property forms in particular. Although in some cases the rights of different types of creditors may be uniform, such uniformity is not always present, and it is certainly not conceptually necessary. As Wesley Hohfeld claimed, property rights do not imply "one *joint* duty of the *same* content resting on all."[82] Rather, one property right in a given resource may mean different duties for different duty holders.[83] The *Restatement of Property* adopted this important lesson of Hohfeld's seminal contribution, explaining that property constitutes a set of "legal

79. *See* EDWARD E. CHASE, PROPERTY LAW: CASES, MATERIALS, AND QUESTIONS 323 (2002) ("[T]here is not one tenancy by the entirety, but rather three, each version reflecting a somewhat different collection of sticks in the bundle."); *see also* Phipps, *supra* note 77, at 39.

80. *See* John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 BYU L. REV. 35, 48 (1997).

81. Indeed, as petitioner's brief asserts, federal law has no presumptive reason to treat federal tax authorities in the same manner as state law treats other creditors. *See* Brief for the United States at 9-10, United States v. Craft, 535 U.S. 274 (2002) (No. 00-1831) (citing United States v. Nat'l Bank of Commerce, 472 U.S. 713, 722, 727 (1985)).

82. *See* Hohfeld, *supra* note 2, at 743.

83. *Id.* at 742-43; *see also* Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 655 (1988).

relations between persons with respect to a thing."[84] There is no conceptual necessity that the content of various categories of relations be uniform. On the contrary, the meaning of property varies among its divergent categories of social settings and resources that are subject to property rights.[85] Private property is a "complex bundle of relations," which are "in principle separable" and which "differ considerably in their character and effect."[86]

B. *Property as Bundles*

Hohfeld is also closely associated with the conception of property as a bundle of sticks, the same conception the *Craft* majority employed. Property, according to Hohfeld, is "a complex aggregate" of rights (or claims), privileges, powers, and immunities. A landowner, for example, is vested by law with various such sticks vis-à-vis other people with respect to his or her land. These "different classes of jural relations," suggested Hohfeld, should be distinguished because the possession of any one stick by a person (for instance, the owner) is "strikingly independent" of the other sticks.[87]

Property theorists usually invoke the bundle of sticks understanding in an effort to examine critically the existing content of property rights and thus liberate property law from the confines of sheer form. The bundle metaphor captures the truism that property is an artifact, a human creation that can be, and has been, modified in accordance with human needs and values.[88] There is neither an a priori list of entitlements that the owner of a given resouree inevitably enjoys[89] nor an exhaustive list of resources that enjoy the status of property.[90] Property can take different configurations, which are not necessarily all manifested in the existing doctrine. Therefore, we eannot resolve legal debates by sheer reference to property's existing

84. RESTATEMENT (FIRST) OF PROPERTY ch. 1, Introductory Note (1936). *See also* STEPHEN R. MUNZER, A THEORY OF PROPERTY 23 (1990).

85. *See infra* Part IV.A.

86. JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 28 (1988).

87. Hohfeld, *supra* note 2, at 747. Hohfeld was not the first, however, and actually did not mention the term "bundle of rights." *See* Thomas C. Grey, *The Disintegration of Property*, *in* PROPERTY 69, 85 n.40 (J. Roland Pennock & John W. Chapman eds., 1980). Hohfeld is responsible for another property truism, beyond the scope of this Article: the dephysicalization of property rights. *See* Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 333-40, 359-62 (1980).

88. *See* JEREMY BENTHAM, THE THEORY OF LEGISLATION 111-13 (C.K. Ogden ed., 1987); Fredrick G. Whelan, *Property as Artifice: Hume and Blackstone*, *in* PROPERTY, *supra* note 87, at 101; *see also* Elizabeth V. Mensch, *The Colonial Origins of Liberal Property Rights*, 31 BUFF. L. REV. 635 (1982) (describing the republican conception of property stressing cooperation and equality that was prevalent in the New England colonies moving toward American independence, thus showing the contingency of our current understanding of property).

89. *See* Hohfeld, *supra* note 2, at 746-47; *see also* Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 29 ARIZ. ST. L.J. 1075, 1076 (1997).

90. *See* Hohfeld, *supra* note 2, at 720, 733-34; *see also* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); Singer, *supra* note 83.

forms.[91] As legal realists argue, legal decision makers have no choice but to shape the particular configuration of property for the issue at hand, thus making inevitable the application of normative judgment.[92] Rather than resorting to internal deductive reasoning, decision makers must ask whether it is justified that a certain category of people (i.e., owners) will enjoy a particular right, privilege, power, or immunity over a category of resources (land, chattels, copyrights, patents, and so on) as against another category of people (spouses, neighbors, strangers, community members, and so on).

The *Craft* majority uses the bundle of sticks metaphor in a conspicuously different manner. The majority barely discusses the question of whether a governmental tax authority should be able to recover the liability of one spouse from the marital estate held by both spouses as tenants by the entirety. Instead, the weight of its conclusion lies in its enumeration of the sticks—admittedly numerous—included in each spouse's bundle. As I have just noted, however, one of the most significant lessons of the bundle understanding of property runs entirely counter to such an exercise. If property is a bundle, it means that it has no canonical composition,[93] that a reference to the concept of property is an invitation to a normative inquiry rather than to a menu of inevitable packages of incidents. Notwithstanding the antiformalistic tenor of the majority's opinion, it ends up with another type of formalistic exercise (counting incidents), thus potentially sacrificing substance for labels.[94]

Because of its peculiar use of the bundle metaphor, this failure of the majority's conceptual approach should not be interpreted as evidence of the fallacy of the bundle conception of property. Rather, it can help refine its limitations. First, understanding property as bundles can and should

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91. *See* Vandevelde, *supra* note 87, at 362-66; Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 491 (1988) (review essay); *see also* Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 578 (1983) (noting that property is open to competing interpretations and permutations).

92. *See* HOLMES, *supra* note 59, at 184, 238-39 (referring to the inevitability of the judiciary's application of judgment relating to "soeial ends" and "considerations of social advantage"). For some powerful statements on the inevitability of applying moral judgments as part of legal discourse (even in its most descriptive aspects), see, for example, Felix S. Cohen, *Modern Ethics and the Law*, 4 BROOK. L. REV. 33, 44-45 (1934); Cohen, *supra* note 62, at 848-49; Roscoe Pound, *A Comparison of Ideals of Law*, 47 HARV. L. REV. 1, 2-3 (1933). Referring to Justice Holmes and his *Path of the Law*, the text implicitly adopts an interpretation to Holmes's (and the legal realists') endorsement of the separation of law and morality being a strategic device, aimed at preserving our capacity for morally responsible and morally informed legal criticism, rather than a manifestation of moral skepticism or of a libertarian persuasion. *See* Robin West, *Three Positivisms*, 78 B.U. L. REV. 791 (1998).

93. In this respect I endorse the first prong of the dissent's conceptual objection.

94. To be sure, the set of sticks the majority found with the husband indeed approximates the liberal conception of ownership. *See* TONY HONORÉ, *Ownership*, *in* MAKING LAW BIND: ESSAYS LEGAL AND PHILOSOPHICAL 161 (1987). However, as Hohfeld insisted, and Honoré admitted, this descriptive observation cannot entail any conclusion about the existence of the stick in question or the lack thereof.

liberate us from the imaginary methodology of deduction from frozen forms. But it cannot substitute for normative analysis. The whole point of the bundle metaphor, after all, is to trigger such an analysis. Second, and more subtle, at any given time property law justifiably offers only a limited number of bundles of property, and each of these bundles must be normatively coherent. Although I believe this limitation is at least implicit in Hohfeld,[95] it is not part of the way the bundle metaphor is used in contemporary property discourse.[96] The dissenters' claim that entireties property is no more artificial than partnership and corporate forms hints at this limitation.[97] Because all legal concepts and rules, including the concept of property itself, are artifacts, the artificiality of the unity of ownership in the entireties form (of the type observed in the majority of states) proves nothing and cannot be a fatal blow to Sandra Craft's claim. That we describe this form of estate linguistically in fictitious terms is not, in and of itself, a condemning argument,[98] as long as it does not obfuscate the operation of the doctrine or inhibit its normative scrutiny.[99]

In other words, the bundle metaphor should not mislead us into thinking that property can be conceived of as a "laundry list" of substantive rights with limitless permutations.[100] Although we should not treat the common law forms of property as abstract entities with internally untouchable structure and content, we also should not unreflectively dismiss these property forms because they represent our existing default frameworks of interpersonal interaction.[101] To know if and how the existing configuration of a property form should affect the legal outcome, however, we must analyze the forms of property from a normative and contextual (i.e., legal

95. Hohfeld was careful enough to note that looking at the aggregation of the various elements of property rights is important in analyzing property adequately. *See* Hohfeld, *supra* note 2, at 747. As the text notes, both contemporary users and critics of the bundle metaphor usually ignore this cautionary prescription.

96. *See, e.g.*, BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 9-15, 26-29, 97-100 (1977) (suggesting deconstruction of property into a bundle of rights and then deciding—concerning each right separately—who should be its rightful owner according to one "comprehensive view").

97. *See supra* text accompanying note 46.

98. *See* LON L. FULLER, LEGAL FICTIONS 38-40 (1967).

99. *See* FRANK, *supra* note 60, at 41-44; CRAIG ROTHERHAM, PROPRIETARY REMEDIES IN CONTEXT: A STUDY IN THE JUDICIAL REDISTRIBUTION OF PROPERTY RIGHTS 43-44, 47 (2002). Indeed, the marital unity fiction should be abandoned wherever it can be shown to be normatively harmful. *See, e.g.*, Lily Kahng, *Fiction in Tax*, *in* TAXING AMERICA 25 (Karen B. Brown & Mary Louise Fellows eds., 1996) (discussing how the application of the marital unity fiction to tax exacerbates the marginalization of married women in the workplace).

100. For a stronger claim, according to which the right to use, the right to possess, and the right to alienate are necessary and sufficient incidents of the right of property, see Benson, *supra* note 11, at 759-77.

101. By the same token, we should not, as some have advocated, reduce the concept of property itself to a mere indication of the existence of a certain bundle of legal relations. *See* Grey, *supra* note 55. For a convincing critique, see MUNZER, *supra* note 84, at 31-36.

realist) perspective.[102] The forms of property should affect outcomes to the extent that they help constitute property institutions that serve important human values.

III
THIRD-PARTY INTERESTS IN MARITAL PROPERTY

Instead of turning at this stage to this Article's main project of articulating this competing conception of property as institutions, I will suspend the theoretical inquiry and immediately put this alternative approach to work, showing how it can illuminate *Craft*'s substantive issue of resolving competitions between one spouse and the creditors of the other spouse. As the very brief substantive discussion in *Craft* implies, this question requires a twofold inquiry into the decision's internal and external consequences—namely, its effects on married individuals and on third parties, respectively. Part III.A discusses the internal implications for married individuals and for the institution of marriage of permitting creditors of one spouse to reach property held as a tenancy by the entirety. Part III.B completes the analysis by addressing external effects of the decision for the interests of third parties such as the IRS.

Together, the internal and external perspectives should help address the specific issue of the applicability of the federal tax lien to one spouse's interests in an entireties property. The analysis of this question—and of related questions regarding the appropriate governance rules of marital property and the rights of other types of third parties (contract creditors and tort victims) to claims against interests in the marital estate—also demonstrates the viability of the realist conception of property, discussed in Part IV of this Article.

A. Governance of Marital Property

Although the effects of the decision in *Craft* on married individuals and on the institution of marriage must be at least one of its most fundamental dimensions, only Justice Scalia (briefly) addressed this issue.[103] He was concerned that the Court's decision abandons important assurances of available resources for support of stay-at-home spouses.[104] This may be an important concern if we can set aside Justice Scalia's association of stay-at-home spouses with mothers and his reference to "business-world

102. *Cf.* SINGER, *supra* note 59, at 11.

103. The fact that Justice Scalia raised this issue is particularly interesting because he is the Court's most outspoken formalist. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 25 (1997) ("Long live formalism. It is what makes a government a government of laws and not of men."). *Cf.* Grey, *supra* note 55, at 4-5 (characterizing Justice Scalia's formalist rhetoric as "notoriously fierce" but insisting that "it is a strikingly moderate one, congruent with the teachings of orthodox modern American functionalist legal theories").

104. *See supra* text accompanying note 52.

husband[s]."[105] However, it is at least debatable whether the dissent's preferred rule can effectivcly alleviate this concern.[106] Tenancy by the entirety is not well tailored to this protective rationale, because, on the one hand, it can apply to any amount of real property that is put into this form,[107] and yet, on the other hand, it leaves the nondebtor spouse with no protection upon divorce. Other legal devices that address this policy head on, such as homestead and personal property exemption statutes,[108] are better suited for the job.[109] Yet, although Justice Scalia's protective rationale may be misplaced, his focus on the social context of marriage points to an important dimension of the *Craft* discussion: the internal perspective on the implications of the decision for married couples.

As discussed below, the pertinent question in this respect is which governance regime—in particular, which rules of alienability—are best suited for the context of marriage. Framing the question in this way should not be surprising. The entireties estate always "depended in its characteristies upon the marital-unity concept."[110] The common law conception of marital unity disguised sheer male dominance, of course, and thus can hardly trigger a defensible account.[111] But, as we have seen, eliminating the most flagrant elements of its original patriarchal character has reformed tenaney by the entirety significantly. As the *Craft* majority correctly observed, in eontemporary law the entireties estate serves as a substitute—albeit, as I maintain below, a rather imperfect one—for community property.[112] This admittedly new normative premise for a veteran doctrine should now guide its adaptation as it "enters on a new career."[113]

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105. Justice Scalia's "cult-of-domcsticity" attitude contrasts with my commitment to gender equality in marriage, as articulated in the text below. The cautious language of the text correspondingly derives from the concern that adopting his protective rationale may do more harm than good in the long run.

106. Because this Article does not premise its critique of *Craft* on the rationale of protection of nondebtor spouses, Steve Johnson's careful analysis of the consequences of lien attachment and enforcement collection after *Craft*—concluding that *Craft* does not excessively compromise "the legitimate interests of entireties spouses who do not owe tax"—does not challenge my account. *See* Johnson, *supra* notc 22, at 468-77.

107. *See* Huber, *supra* note 68, at 205-06; Johnson, *supra* note 9, at 560.

108. *See* JON W. BRUCE & JAMES W. ELY, JR., CASES AND MATERIALS ON MODERN PROPERTY LAW 325-26 (4th ed. 1999); JOHN E. CRIBBET & CROWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 92-93 (3d ed. 1989). *But see* Orth, *supra* note 80, at 48 ("In practice, . . . the real estate that is protected is usually the marital residence, often compensating for a miserly homestead exemption.").

109. *See* Huber, *supra* note 68, at 206-07.

110. Phipps, *supra* note 77, at 25.

111. *See* Paul Ritter, *A Criticism of the Estate by the Entirety*, 5 U. FLA. L. REV. 153, 155-57 (1952).

112. *See also* MOYNIHAN & KURTZ, *supra* note 71, at 279.

113. OLIVER WENDELL HOLMES, THE COMMON LAW 5 (1881).

1. Marriage as an Egalitarian Liberal Community

A discussion of the proper governance (and alienation) regime of both community property and tenancy by the entirety must begin with an articulation of the normative underpinnings of marital property law. In other words, it should rely on the new, nonpatriarchal understanding of the marital unity concept. In *Properties of Marriage*, Carolyn Frantz and I advocate such a new understanding.[114] The ideal of marriage as an egalitarian liberal community, discussed below, is the regulative principle of modern marital property law. To be sure, this vision of marriage is not a description of any particular marriage, let alone the average one. Furthermore, the ideal of marriage as an egalitarian liberal community does not explain every extant feature of marital property law; as with other accounts of the human values underlying property institutions, a commitment to this ideal requires important reforms.[115]

The ideal of marriage as an egalitarian liberal community perceives marriage as reflecting a plural subject[116] that generates the potential for intimacy, caring and commitment, and meaningful self-identification.[117] The projects of marriage—in the property context, the common management of resources—facilitate these virtues by providing opportunities for an intensive, long-term fusion of the couple.[118] This (partial) fusion, which is so crucial for the success of marriage, forms the basis for the sharing principle. Sharing both the advantages and difficulties of a joint life—infusing costs and benefits with an intersubjective character and rejecting any strict accounting based on individual merit—is the linchpin of the marital community.[119]

But although the marital ideal is inherently communal, it is also bounded by a commitment to autonomy as free exit and to equality as nonsubordination. No-fault divorce, the legal manifestation of spouses' right to exit, is an important feature of the ideal of marriage because it clearly distinguishes marital communities as good for spouses from marital

114. This Section draws substantially from Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. (forthcoming Jan. 2004).

115. The most significant reform needed relates to the scope of the marital estate, in particular the inclusion of any changes effected during the tenure of marriage in the earning capacity of the spouses. *See* Frantz & Dagan, *supra* note 114 (manuscript at pt. II.B.1, on file with author).

116. Margaret Gilbert coined this term to describe the self-perception of participants in a group with a joint commitment. *See* MARGARET GILBERT, LIVING TOGETHER: RATIONALITY, SOCIALITY, AND OBLIGATION 2, 8 (1996). If the notion of plural identity is indeed the crux of the value of marriage, as I think it is, then the *Craft* majority's dismissal of the idea of marital unity as a fiction is particularly disturbing.

117. *See, e.g.*, Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 632, 635 (1980); Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225, 228-29 (1997) (review essay).

118. *See* GILBERT, *supra* note 116, at 222-23.

119. *See, e.g.*, MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 138, 147 (1993); Simon Gardner, *Rethinking Family Property*, 109 LAW Q. REV. 263, 283, 290-91 (1993).

communities as exercises of self-denial.[120] The legal right to free exit is a prerequisite to a self-directed life, a precondition to the ability to form, revise, and pursue our own ends.[121] This right is particularly important in marriage because, in the liberal conception, the communal goods of marriage are all part of the good life for individuals, not a legal duty they must bear regardless of its continuing appeal.[122] Furthermore, the legal right to free exit is an important means for continuing reaffirmation of spouses' plural identity.[123]

Like autonomy, equality is also both a constraint and a core feature of the ideal of marriage. It is a constraint because a disparity in the control and possession of the goods of marriage, the most pervasive human engagement, leads to subordination, which systematically and pervasively denies the importance of one spouse and threatens his or her basic personhood.[124] It is a core feature of the ideal of marriage because subordination is a threat to the communal nature of marriage itself; hierarchy, exploitation, and oppression subvert intimacy, caring and commitment, and meaningful self-identification.[125]

2. *Governance of Community Property*

The ideal of marriage as an egalitarian liberal community provides an appropriate normative premise for a system of community property. The basic principle of the community property form—which applies, in one version or another, in nine states[126]—is that spouses are equal owners of all

120. *Cf.* Jean Hampton, *Selflessness and the Loss of Self*, *in* ALTRUISM 135, 136, 138, 164 (Ellen Frankel Paul et al. eds., 1993).

121. *See* Leslie Green, *Rights of Exit*, 4 LEGAL THEORY 165, 176 (1998).

122. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 235, 238 (1983).

123. *See* Karst, *supra* note 117, at 637-38.

124. *See* SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 136, 150-59 (1989).

125. *See* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 151, 153 (1993). Unfortunately, a social environment of pervasive gender discrimination presents a real threat to this nice fit of the three marital virtues. With pervasive gender discrimination, the ordinary mechanisms of entry and exit that are otherwise adequate to protect parties from subordination are not sufficiently effective. Exit from a subordinating relationship is not always a tenable alternative, and the asymmetry of the threat of exit affects power and influence in the relationship and generates asymmetric vulnerability. By jeopardizing women's ability to exit from marriage and their voice within marriage, subordination threatens their autonomy. Subordination may also undermine the communal goods of marriage because a community that persists out of economic dependence and fear is the antithesis to the notion of genuine community. An important challenge to marital property law, addressed at some length in Frantz & Dagan, *supra* note 114, is to provide institutional guarantees of gender equality to support the community of marriage.

126. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington carry on the Continental tradition of community property. *See* DAVID WESTFALL, FAMILY LAW 231 (1994). A somewhat similar system was promulgated in 1983 in the Uniform Marital Property Act (UMPA). *See* UNIF. MARITAL PROP. ACT, Prefatory Note, 9A U.L.A. 19 (Supp. 1984). Wisconsin later adopted a version of this statute. *See* WIS. STAT. §§ 766.001-766.97 (2002). In 1998, Alaska, a common law

property acquired during marriage resulting out of either one's effort, regardless of how the property is nominally titled.[127] By granting each spouse an immediate half interest in the entire marital property estate, the community property form recognizes the special relationship between the spouses and reinforces each spouse's sense of equal participation in the marriage.[128] Within an intact marriage, each spouse is an owner by right, and that right derives from the parties' marital status.[129] Thus, in a community property regime, equal sharing, an important implication of the marital ideal of an egalitarian liberal community, becomes a verified reality rather than a transient hope.[130]

The tripartite governance regime applicable to the community property form, which includes spheres of joint, sole, and equal management, broadly reflects this normative premise. The first sphere of joint management places decision-making power with the marital unit (as opposed to individual spouses) with respect to transactions that involve substantial amounts of money (such as community real estate or a business) or resources that reflect the group identity of the marital community and the personhood of its members (such as the marital residence and its contents).[131] A joint decision by both spouses is important in these contexts because such joinder helps ensure that decisions reflect communal rather than individual goals. Joint management may also indirectly help achieve some of the more distinctive goods of marriage. Deliberation over management decisions requires spouses to synthesize their divergent experiences and preferences to reach a collective decision. In this way, joint management helps inculcate the spouses' collective commitments and becomes a part of the process in which the spouses develop their distinctive character as a couple.[132]

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jurisdiction, enacted a statute that enables spouses to elect proactively to hold their property as community property. *See* ALASKA STAT. § 34.77.030 (Michie 2002).

127. *See, e.g.*, J. Thomas Oldham, *Management of the Community Estate During an Intact Marriage*, 56 L. & CONTEMP. PROBS. 99, 100 (1993). For a statutory pronouncement of this principle, see, for example, CAL. FAM. CODE § 751 (West 2003) ("The respective interests of the husband and wife . . . during continuance of the marriage relation are present, existing and equal interests.").

128. *See* Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 25, 27 (1994).

129. *Id.*

130. *See* UNIF. MARITAL PROP. ACT, Prefatory Note, 9A U.L.A. 19 (Supp. 1984). To be sure, like the entireties estate of the common law, the history of community property is patriarchal. *See, e.g.*, IRA MARK ELLMAN ET AL., FAMILY LAW 142 (3d ed. 1998). But in 1981, coalescing with, and bringing to a closure the 1970s process of state reform, the Supreme Court held that the flagrantly unjust regime of husband management was unconstitutional. *See* Kirchberg v. Feenstra, 450 U.S. 455 (1981).

131. The rule mentioned in the text is somewhat expansive vis-à-vis the pertinent rules of most community property states. *See* Frantz & Dagan, *supra* note 114 (manuscript at pt. II.D, on file with author).

132. *See* Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 591 (2001); Elizabeth De Armond, *It Takes Two: Remodeling the Management and Control Provisions of Community Property Law*, 30 GONZAGA L. REV. 235, 249-51, 259-60, 287 (1995). To be sure, at times

With respect to other decisions, the vast majority of daily transactions regarding the marital estate, joinder does not apply. Some of these transactions are subject to sole management, a sphere of exclusive management authority of one spouse only. Sole management may be particularly important for family businesses where a spouse's specialization and the ability of outside actors to deal with a single decision maker are likely to be important.[133] This management structure does not offend the marital ideal of egalitarian liberal community if, but only if, the identity of the manager and the scope of his or her authority are based on this economic rationale. To the extent that community property law is allowed to deviate from this rationale, however, it risks reintroducing gender biases that may undermine the marital community and threaten women's place within it.[134] One important device that can help ameliorate these unfortunate outcomes is the "add-a-name" remedy, which allows a passive spouse to have a court shift a marital resource to the joint management sphere in appropriate circumstances.[135]

Finally, community property law leaves residual room for equal management: decisions regarding marital property that either spouse can make with the imputed consent of the other spouse.[136] This sphere of individual management and consumption is both practically and normatively desirable. Burdening each and every decision with the procedures of joint management may overwhelm the ability of the spouses to govern their joint affairs efficiently.[137] Furthermore, a sphere of equal management preserves the ability of each spouse to act in the world as an individual; it may also reinforce the parties' mutual trust and caring by providing them with opportunities to demonstrate to one another their concern about each other's well-being. Of course, equal management also poses the lingering difficulty of policing overuse of the marital estate. Therefore, the community property form provides some safety nets that protect each spouse from extreme cases of opportunistic, overly self-interested, or otherwise irresponsible behavior by the other, reassuring both spouses that cooperation will

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joinder may engender conflict rather than harmony. But the alternative—the façade of harmony generated by decision making by one spouse to the exclusion of the other—is an enemy of the communal ideal of marriage rather than its instantiation.

133. *See* ELLMAN ET AL., *supra* note 130, at 146; Carol S. Bruch, *Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform*, 34 HASTINGS L.J. 227, 273-74 (1982); Oldham, *supra* note 127, at 112-13, 124.

134. *See* Frantz & Dagan, *supra* note 114 (manuscript at pt. II.D, on file with author).

135. *See* CAL. FAM. CODE § 1101(c) (West 2003); WIS. STAT. ANN. § 766.70 (West 2002); *see also* Oldham, *supra* note 127, at 124-25 (criticizing some of the unjustified restrictions current law applies to this remedy).

136. *See* ARIZ. REV. STAT. § 25-214(b) (1999); CAL. FAM. CODE § 751 (West 2003); IDAHO CODE § 32-912 (Michie 2002); LA. CIV. CODE ANN. art. 2346 (West 2003); NEV. REV. STAT. 123.230 (2002); N.M. STAT. ANN. § 40-3-14(a) (Michie 2002); TEX. FAM. CODE ANN. § 3.102(c) (Vernon 2002); WASH. REV. CODE § 26.16.030 (2003); WIS. STAT. § 766.51 (2002).

137. *See* Oldham, *supra* note 127, at 106-07, 109.

not lead to abuse or excessive vulnerability.[138] This safety net includes extreme measures—ordering sole management or dissolving the marital estate—where one spouse's continuous financial irresponsibility threatens the well-being of the other,[139] as well as more moderate forms of judicial intervention in cases of management decisions that intentionally deplete the marital estate.[140]

3. *Governance of Entireties Property*

The governance of marital property in non-community property states is very different. In these forty-one common law jurisdictions (including Michigan, the state at issue in *Craft*), equitable principles govern the allocation of entitlements upon divorce. Therefore, insofar as the scope and the division of the marital estate upon divorce are concerned, there is hardly a difference between the community property and the common law systems.[141] But in common law states, title determines ownership (and therefore governance) during an intact marriage and marital status is simply irrelevant. Thus, many resources that would be part of the marital estate for the purposes of divorce are governed during marriage by the general property rules of joint tenancy, tenancy in common, or fee simple (if only one spouse is the title owner). The formal, recorded owner has the sole authority to sell the property (or even give it away) without the consent of his or her spouse.[142] Thus, outside the form of tenancy by the entirety, common law property institutions treat spouses as proprietors in their relationships with one another and place the spouse without property in a dependent, subordinate position.[143]

Yet in twenty-one of these states, couples who want to form the property aspects of their interpersonal relationship differently—that is, in a more communal and egalitarian fashion—can do so by opting for the entireties form. To be sure, tenancy by the entirety is not an optimal form of marital property because it lacks many of the essential features that facilitate the ideal of marriage as an egalitarian liberal community. Notably, unlike community property, tenancy by the entirety is not the default rule

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138. *See* Frantz & Dagan, *supra* note 114 (manuscript at pt. II.D, on file with author).

139. *See* LA. CIV. CODE ANN. art. 2374 (West 2003); NEV. REV. STAT. 123.259 (2002); N.M. STAT. ANN. § 40-3-16 (Michie 2002); TEX. FAM. CODE ANN. § 3.301 (Vernon 2002); WIS. STAT. § 766.70(4) (2002).

140. *See* Oldham, *supra* note 127, at 155, 157. For a somewhat similar rule in the context of the common law tradition of equitable division, see AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 750-51 (2002).

141. *See, e.g.*, Oldham, *supra* note 127, at 99.

142. *Id.* at 100. *See also* BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY §§ 2.07-2.08 (2d ed. 1994) (noting that marital property rights never vest in equitable distribution regimes, except when spouses divorce). The Uniform Marriage and Divorce Act § 307, Alternative A, also takes this approach. *See* UNIF. MARRIAGE & DIVORCE ACT, 9A U.L.A. 550 (1987).

143. *See* Waggoner, *supra* note 128, at 25.

in these states. Spouses must proactively place their property in this form, so that this form of marital property requires some awareness of its legal significance.[144] Furthermore, as we have seen, for any given jurisdiction, tenancy by the entirety provides a one-size-fits-all rule that falls short of the sensitive fine-tuning of the tripartite governance regime of the community property form. Finally, whereas community property regimes allow at least some safety outlets in cases of abuse, tenancy by the entirety is not attentive enough to the commitment to individual autonomy. A tenancy by the entirety cannot terminate except at the death or finding of incompetence of a spouse or at the dissolution of the marriage, and neither spouse can unilaterally seek to partition the tenancy otherwise.[145] For all of these reasons, tenancy by the entirety does not provide nearly the same material and expressive support of the marital ideal of the egalitarian liberal community as community property does.

Nevertheless, imperfect as it is, the tenancy by the entirety form is closer to the ideal of marriage as an egalitarian liberal community than the alternatives in these common law jurisdictions. After all, a tenancy by the entirety confers concurrent and undivided ownership interests and a right of survivorship on each spouse. Thus, while the historical concept of marital unity simply disguised male dominance, in contemporary law, the entireties estate can and thus should be guided by the marital ideal of an egalitarian liberal community.[146] With no legislative reform adopting community property principles in these states on the horizon, courts should reconceptualize the entireties form as the second best alternative and should gradually develop it, as much as possible, along the lines of the optimal governance regime for marital property outlined above.

Even without consideration of third-party interests, to which I will turn shortly, this prescription of trying to tailor the entireties form to the marital ideal of egalitarian liberal community may be difficult to implement in many cases because of the relative inflexibility inherent in the entireties form. But focused solely on the internal perspective, *Craft* poses a relatively easy case for one who is committed to the ideal of marriage as an

144. *See supra* text accompanying note 37. The practical impact of a requirement of affirmative action and intent to create a concurrent and undivided interest in husband and wife is necessarily that much less of the marital property will become communally owned property than under the community property system, which imposes no such requirement. *Cf.* Huber, *supra* note 68, at 206 ("[M]uch depends upon whether the spouses were sufficiently foresighted to take property in this form.").

145. *See* POWELL, *supra* note 37, at 52-28 to 52-33. *Cf.* MOYNIHAN & KURTZ, *supra* note 71, at 278 ("In situations where the marriage relationship is unstable, the tenancy can operate to the disadvantage of one or both of the spouses" by creating "a deadlock with respect to the property.").

146. *Cf.* Orth, *supra* note 80, at 42 (suggesting that part of the explanation for the resiliency of the tenancy by the entirety is an attempt "to build . . . out of the scraps of common law an analog to the civil-law system of community property"); Phipps, *supra* note 77, at 45 ("[S]pouses may desire to hold property by the entireties . . . to promote subjective impressions of unification, of companionship, and of economic interdependency.").

egalitarian liberal community. At stake in *Craft* is the control—the operative test according to both majority and dissent—over an asset of some economic significance: real property. The regime most conducive to the ideal of marriage as an egalitarian liberal community in this context is joint management, which places control with the marital unit rather than with either spouse. The majority's dismissal of the common law notion of marital unity as a fiction undermines this joinder regime and thus the marital ideal. Therefore, insofar as the internal perspective is concerned, I end up endorsing, although for different reasons, Justice Scalia's conclusion that "[i]t is regrettable that the Court has eliminated a large part of this traditional [form of property]."[147]

B. Third-Party Interests in the Governance of Marital Property

Many cases involving marital property can begin and end with such an analysis of the implications of property laws for the married couple. As long as a case does not implicate the interests of third parties, the proper focus of the law should be and usually is on the bilateral relationship between the spouses.[148] Furthermore, even when third parties are involved, their interests may not affect the outcome where these interests can be fully vindicated by recovering from the separate estate of the debtor-spouse.[149]

However, as demonstrated by the *Craft* majority's concern about tax abuse, in other cases such a happy outcome is more difficult, if not impossible.[150] In these harder cases, third parties, such as contract creditors, tort victims, or the government,[151] have valid claims against only one spouse and seek recovery from an asset that is part of the marital estate. The question then is whether they should be able to collect from the

147. United States v. Craft, 535 U.S. 274, 290 (2002) (Scalia, J., dissenting). My position and that of Justice Scalia's dissent differ not only with respect to the substantive reasons. Rather, following my critique of the dissent's approach to the forms of property, and anticipating my alternative account in Part IV.A, my position is different from the dissent's on the methodological plane as well. Justice Scalia's language, which this Article cites, suggests that when two options for interpreting a rule are available, we should choose the option that strengthens the institution of tenancy by the entirety. But, because the forms of property are somewhat malleable, this comment by itself does not tell us much, unless we are willing to assume—as I am not—a strong privilege to the current content of the form. By contrast, my approach does not rely on the notion of strengthening the form, but rather on the idea of negotiating the content of the institution in an attempt to shift it closer both to the ideal of egalitarian liberal community and to the ideal solutions for legal accident cases. This approach acknowledges the malleability of the form, thus repudiating any claim for an essence that needs to be strengthened, but it does insist that there are better and worse ways to develop any given institution.

148. For a critique of rules regarding marital property that deviate from this prescription, see Frantz & Dagan, *supra* note 114 (manuscript at pt. II.D, on file with author).

149. *See* Oldham, *supra* note 127, at 128-33.

150. *See supra* text accompanying note 41.

151. It should be noted at the outset that, for me, this classification is not just a consequence of the accepted legal categories of contract, tort, and public law. As the analysis of Part III.B.2 below shows, this classification is purposive because each of these categories raises distinct and coherent concerns for the legal accidents analysis.

debtor-spouse's individual interest in this estate or, alternatively, are limited only to his or her separate interests. Even if it is desirable from the internal perspective to assign control over the marital estate or a significant part of it to the marital unit, rather than to either of its components, the interests of such third parties may require some adjustment to the model of control most favorable to the married couple.

To understand how the concern for third-party claims should be integrated into the analysis of marital property governance, particularly in the *Craft* scenario, it is best to begin with a brief account of the normative underpinnings of the law governing cases that deal with conflicts involving third parties.

1. The Law of Legal Accidents

In *The Eternal Triangles of the Law*, Menachem Mautner conceptualizes a category of cases that involve contradictory claims raised by parties with no contractual privity as "legal accidents."[152] The main examples Mautner discusses are conflicts between two parties holding contradictory contractual commitments from the same intermediary, conflicts between sellers and transferees of buyers, and triangular conflicts emerging from entrustment or theft.[153] The parties to these legal dramas, typically an original owner and a third party, each interacted with an intermediary for the same right. In the typical case, the intermediary turns out to be judgment-proof, so that achieving priority with respect to this right is the conflicting parties' only or most significant possible remedy. Resolving the competition between these parties—prescribing priority rules—can be compared to resolving accident cases. Both types of cases require the allocation of harm resulting from the parties' attempt to use the same resource simultaneously. In a "factual" accident, they both attempt to have recourse to the same physical resource. In the conflicts Mautner discusses, they both attempt to have recourse to the same "legal resource": the right in dispute.

Following the accident analogy, Mautner correctly suggests that some of the same normative concerns that guide tort law in dealing with factual accidents guide decisions about priority rules in dealing with legal accidents.[154] Applying the economic analysis of tort accidents, which, in his view, also represents concerns of justice, Mautner sets out three guiding considerations for priority rules.[155] First, ex ante efficiency concerns (which can also be recast in terms of retributive justice) recommend

152. See Menachem Mautner, *"The Eternal Triangles of the Law": Toward a Theory of Priorities in Conflicts Involving Remote Parties*, 90 MICH. L. REV. 95, 95, 102 (1991).

153. *Id.*

154. *Id.* at 96.

155. *Id.* at 100-26. For a similar analysis, see, for example, ROTHERHAM, *supra* note 99, at 70-73.

imposing liability on the least cost avoider of the legal accident to encourage people in this situation to invest sufficient resources to prevent the very occurrence of conflict.[156] Second, ex post allocative efficiency (minimizing the losses suffered by the litigating parties) and the need criterion of distributive justice entail a preference for the party "likely to suffer the greater loss if the other party prevails."[157] These two considerations, translated into legal doctrine, typically require the third party who seeks priority to be a good faith purchaser for value. Bad faith clearly indicates opportunism and easy (cheap) avoidance, as well as culpability; and without significant investment ("value") in reliance on the interaction with the intermediary, the third party's potential loss if the right is allotted to the original owner is likely to be relatively small.[158] Third, priority rules minimize litigation and uncertainty costs, which may overwhelm a system in which both the least cost avoider and the least vulnerable party are determined on a case-by-case basis.[159] This third consideration, along with other virtues of the rule of law, explains and justifies the law of legal accidents' articulation of precise rules for typical cases, rather than vague standards requiring the evaluation of every case on its own terms.

A difficult question concerns the weight to be assigned to each of these three considerations. One aspect of this problem, beyond the scope of this Article, concerns the balance between the two substantive considerations on the one hand and the third consideration (litigation costs) on the other hand.[160] For our purposes it is sufficient to consider another aspect of this problem—namely, the relationship between ex ante efficiency, or the identification of the least cost avoider, and ex post efficiency, or the identification of the least vulnerable party. Mautner appears to suggest that the ex ante considerations are of primary importance, while ex post considerations enter the picture only when the parties' relative preventive ability is in doubt.[161] This approach focuses on maximizing incentives for least cost avoiders. On its face, such a rule of lexical ordering seems justified also because the ex post efficient allocation is likely to emerge regardless of the way law allocates rights between the parties, assuming that the transaction

156. Mautner, *supra* note 152, at 101, 103-04.

157. *Id.* at 101-02, 105-06. For an opposing view, arguing that need-based concerns have no place in private law, see Benson, *supra* note 11, at 754-55, 801-14, and Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283 (1989). For a discussion of the intrinsic role of need-based concerns in the justification of property, see Jeremy Waldron, *Property, Justification and Need*, 6 CAN. J.L. & JURISPRUDENCE 185 (1993).

158. Mautner, *supra* note 152, at 110-12.

159. *Id.* at 107-09.

160. *See* Hanoch Dagan, *Toward a New Era in the Israeli Discourse of Property*, 1996 Y.B. ON ISR. L. 673, 722-24 (Ariel Rosen-Zvi ed., 1997).

161. Mautner, *supra* note 152, at 100.

costs between the original owner and the third party are negligible.[162] Even if the law is wrong from the perspective of ex post efficiency, this mistake will be corrected quickly, because the loser in the priority litigation, by definition, will then be willing and able to purchase the right from the winner.

In many types of cases, notably regarding legal accidents in a purely commercial context, this account is sufficient. But other types of cases do not follow the reasons justifying lexical priority for ex ante efficiency (or retributive justice), or may present other reasons that support a more significant emphasis on ex post considerations. Thus, in certain categories of cases, the assumptions underlying this approach, that the law's messages reach their addressees (or are in some way intuitive to most people) and that people will be able to change their behavior accordingly, are likely to be fanciful, or at least questionable.[163] In such cases, even where the comparative avoidance ability test yields a definite answer—let alone where it is somewhat ambiguous—ex ante efficiency should not enjoy exclusive emphasis. Likewise, in many cases of legal accidents, conflicting parties face nonnegligible transaction costs following the legal accident. Frequently, legal accidents entail an all-or-nothing battle for a unique asset, such as land or art, that constitutes a large part of one or both parties' estates, and on whose ownership both parties had relied. In such cases, the litigating parties frequently are locked into a bilateral monopoly,[164] and thus are subject to strategic behavior that may hinder mutually beneficial transactions.[165] The result of such "legal wars of attrition" might be dictated more by the parties' relative wealth, which determines their resiliency

162. *See* R.H. COASE, *The Problem of Social Cost*, *in* THE FIRM, THE MARKET, AND THE LAW 95 (1988) (stating that from the perspective of efficiency, legal allocation of entitlements is irrelevant when transaction costs are negligible).

163. *See* Robert D. Cooter & Edward L. Rubin, *A Theory of Loss Allocation for Consumer Payments*, 66 TEX. L. REV. 63, 89-90 (1987) (claiming that the incentive effect of legal rules should take into account and discount properly the parties' responsiveness, which is in turn a function of their knowledge of the law and their ability to factor liability rules into their cost-benefit analysis, as well as a function of their capacity to learn about liability rules); *see also* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 144-45 (1991) (doubting the ability of law to direct behavior); IZHAK ENGLARD, THE PHILOSOPHY OF TORT LAW 43-44 (1993) (same). Some versions of the cheapest cost avoidance test incorporate factors of information and rationality into the calculus of comparative avoidance ability. If these considerations already have been taken into account, they should not, of course, be reintroduced again at this stage.

164. A bilateral monopoly is a situation in which, concerning a specific resouree or right, there is only one seller and one buyer, who are locked into dealing with each other. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 60-61 (6th ed. 2003).

165. *See* Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373, 384 (1999); Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 70-74 (1987). The text should not be interpreted as taking a position in the broader debate as to the effects of the choice between property rules and liability rules on bargaining more generally.

in a long and exhausting legal struggle, than by the balance of harm or utility.[166]

This concern over bilateral monopolies leads to another reason to avoid overly discounting the significance of the relative harm to the litigating parties in priority cases: the link between relative harm and concerns of distributive justice,[167] which should be important in any discussion of property law, and of law in general.[168] We must give the balance of harm due attention even when it has no impact on ex post efficiency (i.e., even if mutually beneficial transactions are not hindered by bilateral monopolies) because even in these cases the legal allocation of entitlements determines the identity of winners and losers.[169] These distributive implications are not always obvious: in some categories of legal accidents the groups of original owners or third parties can hardly be characterized as discrete subgroups of society, making the distributive question much less significant.[170] When such a characterization can be made, however, the distributive consequences are crucial. Insofar as resorting to ex post efficiency (relative harm) considerations stresses distributive effects by emphasizing the ascription of winners and losers to specific social categories, it gains further significance, and we should be wary of renouncing it.

2. *Legal Accidents in Marital Property Governance*

A legal accident in the marital property context involves conflicts between a nondebtor spouse and a creditor of the other spouse, or, more precisely, attempts by a creditor of one spouse to recover from the marital

166. In other words, in many cases the wealthier party will obtain the asset, and the one with more limited resources will lose out or will be forced into an uncomfortable compromise, even if he or she is more needy of the disputed asset or likely to gain more utility from obtaining it.

167. The relationship between balance of harm and concerns of distributive justice lies in our interest in both cases in the variance between people competing for disputed rights. In the former case, this variance serves as the basis for clarifying the different future damage the parties could incur if they were to lose; in the latter case, it serves as a basis for justifying preferable treatment of deprived groups. There is also an instrumental link between a general distributive analysis and the balance of harm issue: clarifying the social membership of the parties involved could help to locate the correct answer concerning the balance of harm issue.

168. *See* Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741 (1999). To be sure, in most contexts I have no quarrel with the claim that private law adjudication does not and should not deal with redistribution in the pursuit of distributive justice. My claim is rather that the entitlements that private law vindicates constitute a society-wide distribution of benefits and burdens that needs to be justified on a principled basis. *See* Hanoch Dagan, *The Distributive Foundation of Corrective Justice*, 98 MICH. L. REV. 138 (1999).

169. *See* Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227, 240 (1980); *see also* Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 385-87 (1991).

170. In these cases as well, the difficulties of characterizing the original owner and the third parties may follow from our entrapment in existing social categories. This constraint actually may increase the advantage of making the competing parties confront each other as a possible way of exposing "hidden social categories" and other relevant private information.

estate to the detriment of the nondebtor spouse and the marital unit. In the discussion that follows, I consider three common manifestations of such conflicts—claims made by contract creditors, tort victims, and the government. Using my previous examination of the governance of marital property and legal accidents, I consider conflicts with each of these types of third parties from the two pertinent perspectives: internal and external to the married couple.

In theory, such a two-prong analysis might require a difficult balancing of the interests of the married couple with the interests of third parties. Happily enough, none of the three conflict types discussed here requires such balancing. To be sure, these three categories of conflicts produce different mixes of consequences, judged from both internal and external perspectives. As discussed below, the first scenario, involving contract creditors, leads to a single clear prescription, to require joinder, whether evaluated from the internal perspective of the optimal governance regime of marital property or from the external perspective of legal accidents law. The second case, involving tort creditors, is somewhat more difficult: although the external perspective strongly supports allowing a tort victim of one spouse to recover from the marital estate, the internal perspective may not. Finally, the third type of conflict, between a nondebtor spouse and a tax authority, is the most complex case, because the external perspective is inconclusive, and the internal perspective lends some support for shielding the marital estate from the tax liabilities of one spouse. Even in this third scenario, however, the internal and external perspectives do not lead to conflicting prescriptions. Therefore, the lack of a formula for balancing the goals of facilitating an optimal governance regime of marital property (the internal perspective) and of resolving legal accidents in the most efficient and just way (the external perspective) does not undermine the determinacy of my proposed analysis.[171]

a. Contract Creditors

In the most frequent type of case, the third party is a contract creditor, either a general creditor of the debtor-spouse[172] or a party to which that spouse purported to convey a property that he or she owned as a tenant by the entirety (or that was a part of the marital estate in community property

171. The text implicitly invokes a distinction between easy and hard cases that follows from the realist conception of law. This distinction does not derive from the linguistic characteristics of legal rules—compare H.L.A. HART, THE CONCEPT OF LAW 123, 141-42, 144 (1961)—but is rather a matter of the varying difficulty of justifying different legal prescriptions. *Cf.* RONALD DWORKIN, LAW'S EMPIRE 352-54 (1986).

172. *See, e.g.*, Beal Bank SSB v. Almand & Assocs., 780 So. 2d 45 (Fla. 2001); In re Myers, 262 B.R. 445 (Bankr. N.D. Ind. 2001); SNB Bank & Trust v. Kensey, 378 N.W.2d 594 (Mich. Ct. App. 1985).

jurisdictions).[173] The majority rule of tenancy by the entirety jurisdictions, according to which the nondebtor spouse prevails over his or her spouse's contract creditors, is fully justified.

Consider first the external perspective. Insofar as significant assets (such as land) are concerned, contract creditors are likely cheaper avoiders of the pertinent legal accident than the nondebtor spouse, who may be unaware of his or her spouse's individual indebtedness.[174] Typical contract creditors such as banks and other institutional lenders,[175] who can easily insulate themselves from conflict with a nondebtor spouse, clearly seem to be the least cost avoiders. Such lenders can require a potential debtor to have his or her spouse joined before agreeing to purchase a marital asset or affording the potential debtor a major debt in reliance on his or her ownership in a marital asset.[176] The comparative avoidance calculus is less obvious for noninstitutional contract creditors. But even in these cases, the creditor will be the cheaper cost avoider in the typical scenario in which joinder is required (i.e., the sale of a piece of land that is part of the marital estate) because such a creditor usually has the benefit of legal advice. If the buyer's lawyer fails to require the seller in such a case to have his or her spouse joined, the lawyer (or the lawyer's insurer) will have to cover, as they should, the resulting loss.

Contrary to these examples, in some cases, both in commercial contexts and in the context of relatively trivial transactions, it is not only efficient but also just to protect purchasers for value who rely on an asset's title with neither knowledge nor reason to suspect that the asset is part of a marital estate. But fortunately they are exactly the type of cases for which a sole or an equal management rule, respectively, is internally the most appropriate governance regime as well. Thus, in community property states the law supplies default rules that by and large correspond to the optimal jurisdictional boundaries of joint, equal, and sole management. As in other contexts involving the governance of marital property, the law in common law states is less accommodating of the ideal of marriage as an egalitarian liberal community, because the distribution of resources among different

173. *See, e.g.*, Wienke v. Lynch, 407 N.E.2d 280 (Ind. Ct. App. 1980). Obviously, a third party will be protected—no legal accident would occur—if the nonconveying spouse ratified the unauthorized transactions. *See* Oldham, *supra* note 127, at 134-37.

174. This is particularly true in the context of the entireties estate, where by definition both spouses are title owners. *See supra* text accompanying note 37.

175. On the comparative advantage of financial institutions vis-à-vis individuals, see generally Cooter & Rubin, *supra* note 163.

176. *See* JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE 218 (1998); Johnson, *supra* note 9, at 559; *see also* Hurd v. Hughes, 109 A. 418, 420 (Del. Ch. 1920) ("But creditors are not entitled to special consideration. If the debt arose prior to the creation of the estate, the property was not the basis for credit, and if the debt arose subsequently the creditor presumably had notice of the characteristics of the estate which limited his rights to reach the property.").

governance regimes depends solely on the spouses' choice. And yet, as in other contexts, the common law regime approximates the optimal governance regime: tenancy by the entirety mostly applies (and in some jurisdictions is specifically limited) to land,[177] which is a typical example of a resource of significant economic value that therefore calls for a governance regime of joint management. Hence, in these cases there is again no conflict between the prescriptions for optimal governance from either an internal or an external perspective.

Furthermore, where the internal perspective and ex ante efficiency both call for joinder, allocating liability to the contract creditor is also likely to be desirable from the point of view of the ex post efficiency (and distributive) concerns of legal accidents law. This additional consequence transpires in the context of traditional marriages, discussed by Justice Scalia, in which the nondebtor spouse is a wife who would suffer a greater loss if her husband's contract creditor prevailed than the contract creditor would suffer if the wife prevailed.[178]

Commentators have worried that couples would abuse the majority rule of tenancy by the entirety jurisdictions, according to which the nondebtor spouse prevails, by rendering the debtor-spouse judgment proof while the marital estate is full of resources out of reach of his or her creditors.[179] One commentator even speculated that this rule will reduce credit and limit commercial activity.[180] These concerns, however, are almost certainly misguided. The critics may be correct in claiming that spouses may acquire property as tenants by the entirety in order to exempt it from future creditors of an individual spouse. But this consequence is rather fortunate, because the expected response of their creditors, requiring joinder, indirectly channels the married couple in these cases toward the more desirable governance regime of joint management.

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177. *See* Orth, *supra* note 80, at 47 n.60.

178. There still may be hard cases even in this category, in situations involving uninformed lenders. *Cf.* Harms v. Sprague, 473 N.E.2d 930 (Ill. 1984) (holding mortgage lien extinguished with death of debtor joint tenant). But as long as the law works with categories of typical cases—that is, applies rules rather than case-by-case discretion—such cases are inevitable. Recall also the alternative, according to which the creditor becomes a tenant in common with the nondebtor spouse for the joint lives of the spouses, surely a source for much agony and friction. *See* Sawada v. Endo, 561 P.2d 1291, 1297 (Haw. 1977). The shift from a coownership of two spouses to a coownership with a stranger is likely to be a source of "qualitative anticommons tragedy." *See* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 627-29 (1998); Mark D. West & Emily M. Morris, *The Tragedy of the Condominiums: Legal Responses to Collective Action Problems After the Kobe Earthquake*, 53 AM. J. COMP. L. (manuscript at 27 n.107, on file with author) (forthcoming 2003).

179. *See* Ritter, *supra* note 111, at 164; *see also* STOEBUCK & WHITMAN, *supra* note 72, at 198 ("[I]n some jurisdictions, tenancies by the entirety may be used to shield property from seizure and sale to satisfy the claims of creditors of either spouse."); Phipps, *supra* note 77, at 45 (same); Will Allen Wilkerson, *Creditors' Rights Against Tenants by the Entirety*, 11 TENN. L. REV. 139, 148 (1933) (same).

180. Huber, *supra* note 68, at 206.

Admittedly, requiring joinder might somewhat increase transaction costs and thus the cost of credit. Yet with respect to most transactions where joinder is internally desirable—notably, real estate transactions and sales of a business—the increase is marginal because these transactions already require complicated and lengthy procedures.[181] Such cost is also well spent given the convergence of the prescriptions of the internal and the (ex ante and ex post) external considerations. These prescriptions all lead to the same conclusion—that joinder is the most desirable rule for cases of conflict between contract creditors and nondebtor spouses.

b. Tort Victims

Victims of torts committed by one spouse comprise another important category of creditors of one spouse seeking collection from the entireties estate.[182] *Sawada v. Endo*, in which an automobile driver with no liability insurance injured the plaintiffs, provides a vivid example.[183] The Hawaii Supreme Court decided to endorse and apply the majority rule requiring joinder and absolving the entireties estate from any separate debt of one spouse only.[184] The court made use of both deductive formalistic arguments (criticized in Part II.A above) and "a public policy . . . favoring the interests of the family unit," stressing the value of a single-family residence "available in its entirety for the benefit and use of the entire family."[185]

This last reason captures the concerns of the internal perspective of marital property governance. Furthermore, insofar as the new Hawaii rule addresses conflicts with contract creditors, it is, as we have just seen, fully justified. Tort creditors, however, are sufficiently distinct to justify further analysis.[186] From the perspective of legal accidents theory, it is unlikely that tort victims can better avoid the risk of uncompensated harm relative to nondebtor spouses who, at least in some cases, can protect themselves by insurance.[187] And in many such cases, particularly those involving severe and irreparable injury, tort victims will also suffer a qualitatively

181. *See* Oldham, *supra* note 127, at 107-09.

182. There are, of course, hard cases, such as medical malpractice, which fall in the gray area between contract and tort. Classifying these cases poses difficult questions in a host of other contexts in which the contracts-torts divide is important (notably waivers). It seems that the same considerations that generally guide law in classifying cases between contracts and torts should work in our context as well.

183. 561 P.2d at 1293.

184. *Id.* at 1295.

185. *Id.* at 1297. Instructively, the dissent in *Sawada* criticized "the resultant restriction upon the freedom of the spouses to deal independently with their respective interests." *Id.* at 1298 (Kidwell, J., dissenting).

186. As suggested by the Teachers Manual for JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 180 (5th ed. 2002).

187. *Cf.* DWYER & MENELL, *supra* note 176, at 218 ("Unsecured creditors of a single spouse, however, cannot protect themselves in this way.").

greater loss if the nondebtor spouse prevails.[188] Even the internal analysis, focusing on the bilateral relationship between spouses, seems sufficiently different between the tort and the contract creditor contexts. Shielding the entireties estate from the claims of tort victims of an individual spouse is unlikely to facilitate indirectly the desirable governance regime of joint management. On the contrary, exposing entireties estates to claims of tort victims may encourage spouses to decide jointly to insure themselves.

The Hawaii Supreme Court, like other courts facing similar issues,[189] implicitly assumed that if it endorsed the majority rule, joinder should apply across the board, both for the bilateral relationship between spouses and for any conflict between a nondebtor spouse and the creditor of the other spouse. Therefore, the Court did not even consider the possibility of allowing tort creditors to reach the debtor's interest in the entireties estate while, at the same time, requiring joinder insofar as contract creditors are concerned. However, once we fully appreciate the Hohfeldian lesson of the relativity of title and substitute the formalist's imaginary, inevitable doctrinal derivations from frozen legal concepts with context-dependent normative judgments, it becomes clear that it is not necessary to lump these different questions together. As categories involving different types of legal relations, cases addressing tort victims raise concerns different from those of cases involving contract creditors. Therefore, these two types of cases can and should be subject to different property configurations. The *Craft* majority correctly implied that the same form of property (in that case, tenancy by the entirety) can lead to different consequences in different categories of social contexts.[190] This prescription means that there is no conceptual difficulty with following our normative conclusions that

188. *Cf.* Gregory C. Keating, *Pressing Precaution Beyond the Point of Cost-Justification*, 56 VAND. L. REV. 653 (2003) (insisting that the incommensurability of health and productivity generates a lexical priority between these two distinct types of goods, which requires the elimination of certain risks of severe and irreparable injury, without any consideration of possible competing interests).

189. *See* Finley v. Thomas, 691 A.2d 1163 (D.C. 1997) (involving tort victim in assault and battery); Hurlbert v. Shackleton, 560 So. 2d 1276 (Fla. Dist. Ct. App. 1990) (involving victim of physician malpractice).

190. Another type of conflict that seems analogous to the conflict between the victim of a tort of one spouse and the nondebtor spouse is the conflict that results when an ex-wife seeks to aequire a lien against entireties property held by her former husband and his second wife for child support due pursuant to a divorce decree. Courts following the majority rule requiring joinder conclude, as if it is a matter of course, that no such lien ean be available. *See* Myler v. Myler, 210 N.E.2d 446 (Ind. Ct. App. 1965); Farmer v. Miller, 746 S.W.2d 661 (Mo. Ct. App. 1988). This result is probably undesirable and certainly not inevitable. Interestingly enough, in yet another type of legal accident involving a first and a second wife, courts tend to favor the first wife. This accident involves cases in which the husband promised the first wife, in their separation agreement, to maintain his life insurance policy, which designated her and their children as beneficiaries, and later breached that agreement by allowing the policy to lapse and obtaining another policy naming the second wife as beneficiary. *See* Rogers v. Rogers, 473 N.E.2d 226 (N.Y. 1984). The best explanation for this outeome is probably that second spouses are generally better situated to prevent the legal accident. *Cf.* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 687 (3d ed. 2002).

contract creditors should not be able to collect from the marital estate absent joinder of the nondebtor spouse, whereas tort victims should be entitled to recover from the marital estate to the extent of the tortfeasor's interest in it. States can, and should, subscribe to the majority rule insofar as conflicts with contract creditors are concerned and, at the same time, properly protect tort victims.

c. The Government

Resolution of legal accidents of the type raised by *Craft*—that is, conflicts between nondebtor spouses and governmental tax authorities—is more difficult.[191] Like tort creditors, the government does not advance credit consensually. It is difficult to know, however, whether the tax authority or the nondebtor spouse is the better cost avoider. In some cases, the nondebtor spouse seems better positioned to avoid problems. For example, the requirement in common law jurisdictions that both spouses actively opt into the marital property framework may indicate that the nondebtor spouse is savvy enough to garner protection for rights that might be vulnerable to the other spouse's creditors. That spouse might thus also be savvy enough to encourage his or her spouse to file tax returns. But in other cases, such as in the traditional marriages portrayed by Justice Scalia, the tax authority may be better situated to prevent the conflict with the nondebtor spouse. Although attaching a lien to the taxpayer's interest in the entireties estate is frequently a relatively easy method of collection (especially when the lien is attached to real property), the tax authority can, and perhaps should, seek alternative sources of collection. Moreover, the tax authority has better control than the nondebtor spouse as to the amount of tax liability accumulated before enforcement and collection proceedings begin.

The second prong of legal accidents analysis, the concern for minimizing hardships, does not yield a much clearer conclusion. This indeterminacy derives from the heterogeneity of cases that fall under the *Craft* category of conflicts between nondebtor spouses and governmental tax authorities. The deep pocket of the federal government surely makes it less vulnerable to loss than virtually all nondebtor spouses. However, given the

191. The question of the ability of the government to subject a spouse's interest in a tenancy by the entirety to civil forfeiture seems even more difficult and is beyond the scope of this Article. For conflicting authorities, see United States v. 1500 Lincoln Ave., 949 F.2d 73, 78 (3d Cir. 1991) (allowing forfeiture subject to the other, innocent spouse's "right to full and exclusive use and possession of the property during her life, her protection against conveyance of or execution by third parties upon her husband's former interest, and her survivorship right"), and United States v. Lee, 232 F.3d 556, 561 (7th Cir. 2000) (distinguishing and criticizing the hybrid arrangement approved in *1500 Lincoln Avenue* and ruling against the government because law should not penalize an innocent wife for crimes of her husband). *See also* Eric G. Zajac, *Tenancies by the Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553, 579-85 (1993) (describing circuit splits on civil forfeiture under this law).

heterogeneity of both tax authorities and married couples holding assets in tenancies by the entirety, this conclusion would not always be correct in the broader context at issue. Conflicts between small governmental units and wealthy spouses may raise more ambiguous, or even opposite, conclusions.

Consequently, legal accidents analysis does not suggest a clear prescription in the case of government creditors seeking recovery from a nondebtor spouse. The internal analysis of the bilateral relationship between spouses should therefore be determinative. Shielding entireties estates from the tax liabilities of one spouse is desirable from this perspective because, as with conflicts with contract creditors, it may encourage—or at least avoid discouraging—couples in equitable division states to hold property as tenants by the entirety.[192]

On its face, this proposition appears confusing or simplistic, because the ideal of marital sharing also entails solidarity. Solidarity, in turn, seems to mean that marital property should be subject to one spouse's tax liability given that, at least under the ideal of marriage as an egalitarian liberal community, both spouses enjoyed the unreported revenue. This counterargument is not persuasive. To begin, the argument proves too much. If this claim is true, why set marital property as the outer boundary? By this line of reasoning, the separate property of both spouses could also be subjected to the tax liability. Even more important, the availability of both separate property and marital property gives spouses the option to shape respective spheres of separate and communal activities. This option, manifested in different forms in both common law and community property jurisdictions, fully justifies the unanimous rule of state supreme courts that "a judgment against the husband and wife jointly is a judgment by the entireties, and therefore a lien upon real estate held by them as tenants by the entireties."[193] Correspondingly, there is no doubt that a federal tax lien can attach to a tenancies estate with respect to a joint tax liability of husband and wife because such a liability at least roughly corresponds to the spouses' joint activities.[194] By contrast, insofar as separate filing stands for an individual, separate activity, this activity should not automatically affect the marital resources. Thus, notwithstanding this seemingly powerful objection, the internal perspective on the best rule in terms of governance of marital property supports the dissent's position that, as long as there is no clear evidence of significant tax abuse, entireties estates should be shielded from the tax liabilities of one spouse. Such a rule acts as a subsidy for

192. An alternative solution can be to limit the right of the tax authority in such cases to the right of survivorship of the debtor-spouse, so that it can take all if, but only if, the nondebtor spouse dies first.

193. Martin v. Lewis, 122 S.E. 180 (N.C. 1924).

194. The main case of joint spousal liability follows the filing of a joint income tax return (unless the spousal relief rules apply). *See* I.R.C. §§ 6013(d)(3), 6015 (West 2000).

joinder in alienability decisions, which indirectly facilitates the governance regime of joint management.[195]

Framed in this way, one may be tempted to explain the *Craft* majority's position as expressing the concern that this facilitation of a joinder-based type of ownership will appeal only to married couples eontemplating tax fraud, which surely would be an unfortunate result.[196] This concern is undisputed insofar as it refers to cases in whieh nonexempt funds of a delinquent taxpayer's separatc estate are used to pay for marital property in order to place the funds beyond the reach of the tax authority. Recall, however, that the practice before *Craft* allowed the IRS to collect from the marital property in these types of cases.[197] The claim about facilitating fraud therefore must refer to marital property purchased long before the accumulation of tax liability, as was the case in *Craft*. In these instances, concern that couples may use the entireties estate as a tax shelter is misplaced. Indeed, it is no more convincing than an analogous argument that corporate limited liability is undesirable because it faeilitates fraud of potential creditors of the incorporated business.[198] To say that limited liability is an important benefit of incorporation does not imply that a business

195. The idea that federal taxation laws should effectively subsidize property sharing within the marital community is not entirely foreign; for instance, tax law exempts donative transfers between spouses from gift tax. *See* Brief for Respondent at 12, 22, United States v. Craft, 535 U.S. 274 (2002) (No. 00-1831) (referring to I.R.C. § 2523(a) (2002)). *But cf.* Steve R. Johnson, *After* Drye*: The Likely Attachment of the Federal Tax Lien to Tenancy-by-the-Entireties Interests*, 75 IND. L.J. 1163, 1181 (2000) (raising horizontal equity concerns about subsidizing marriages but not necessarily subsidizing other types of domestic and familial arrangements).

One may wonder whether the presumption of proof for demarcating the boundary between a desirable subsidy and an objcctionable tax abuse should be reversed, so that taxpayers should be required to convince the IRS that the exemption they claim indeed serves—both theoretically and as a matter of empirical fact—a normatively appealing purpose without excessive reduction in tax revenues. This proposition raises a host of complicated questions of tax policy and tax enforcement that are beyond the scope of this Article. For my purposes it is enough to note two simple points. First, unlike the paradigmatic taxpayer in a subsidy-tax abuse conflict, an organized body representing an industry, the relevant taxpayers here are private individuals (couples) who are typically part of the nonorganized public and have no political clout. Therefore, whatever the merits of the claim for shifting the burden to taxpayers in the paradigmatic case, our case is significantly different because of both the taxpayers' disadvantage in lobbying the legislature and the insurmountable eollective action difficulties they are likely to encounter in any attempt to organize to produce the empirical support for their case. Second, although I agree that the line between subsidy and abuse is in many cases fine—which may justify the shifting-of-the-burden approach—the claim for a subsidy of joint management of marital property raises a relatively easy case of line drawing. As the text below indicates, courts have already addressed this difficulty by drawing the rather satisfying distinction between cases in which nonexempt funds of a delinquent taxpayer's separate estate were used to pay for marital property to place them beyond the reach of creditors and marital property that was purchased long before the time in which the taxpayer's liability started to accumulate.

196. *See* Johnson, *supra* note 22, at 471.

197. *See supra* note 19 and aceompanying text.

198. To clarify, I do not claim that marital property is analogous to corporate property. Rather, if we have good, albeit probably different, reasons to respect the legal personalities of corporations and marriages, then we should treat neither incorporation nor marriage as cheating.

chooses the corporate form because it contemplates abusing this benefit. Likewise, married couples who hold resources in the entireties form partly because they are aware that in this form the resources will be free from a potential federal tax lien should not be accused of contemplating tax fraud.[199]

* * * * *

This Part analyzed a specific doctrinal question: whether the tenancy by the entirety form should be immune from creditors' claims arising from the individual liability of one spouse. This issue lies at the intersection of marital property law and the law of legal accidents. Therefore, this Part delved into the normative underpinnings of both fields. This analysis clarified the considerations that should guide the resolution of conflicts between creditors and nondebtor spouses. From the perspeetive of marital property law, the relevant question is which rule promotes, indirectly, the joinder alienability regime, which is in turn a primitive form of the desirable governance regime of joint management. From the perspective of legal accidents law, the pertinent inquiries are, first, who is the better cost avoider of the legal accident (the nondebtor spouse or the type of creditor at issue), and, second, who is likely to suffer the smaller loss if the other party prevails.

This tripartite analysis yields different answers for different categories of creditors. It affirms the majority rule in tenancy by the entirety jurisdictions, according to which nondebtor spouses defeat contract creditors. But such an analysis suggests that tort victims can be treated differently and should probably be entitled to prevail. Finally, the *Craft* category of conflicts between a nondebtor spouse and a tax authority constitutes a difficult, borderline case. Yet, at least as long as there is no clear evidence of significant tax abuse, the better rule is probably the one that the majority in *Craft* rejected—namely, that the marital estate should be shielded from the tax liabilities of one spouse (in all but those cases involving fraudulent transfers).[200]

As important as these conclusions are, they do not exhaust the lessons of this Part. One important reason for conducting a painstaking analysis of these doctrinal questions is to use *Craft* as an opportunity for assessing the

199. If there is a sense in which this response might seem insufficient in the *Craft* case itself, I assume it is beeause the Crafts transferred the disputed property to Sandra Craft for a nominal consideration aftcr they were notified of the lien. But thcn the objcction is not about making the entireties estates a tax-friendly form of ownership but rather about the inadequacy of the prevailing tests for fraudulent transfers. This last issue is beyond the scope of this Article. Suffice it to say that if this last version of the claim is found correct, it can vindicate only the specific result in *Craft* and has no bearing on the broader issucs the Supreme Court addressed.

200. This conclusion makes the *Craft* decision somewhat of an irony: on the one hand, the majority opinion, which celebrates substance, ends up being mostly formal (counting incidents); on the other hand, the best way to defend the mostly formalistic dissent is by reference to substantive arguments.

practical significance of the conceptual debate over the nature of property, to which I will return shortly. On its face, very little hangs on the choice between the competing conceptions of property.[201] After all, it seems fanciful to suggest that thinking about property as forms, bundles, or for that matter institutions would affect parties' behavior or even legal advice.[202] Although a handful of academics may care about the proper conceptualization of property, it may not be obvious that anyone else should.

This challenge is fair but ultimately misguided. The proposition that the conceptualization of property matters encompasses three claims: (1) that the conception of property that lawyers apply affects what they deem to be a good argument about property, (2) that what lawyers deem to be a good argument about property affects some legal decisions about property, and (3) that legal decisions about property affect human life. Although nothing in this Article attempts to support the third claim, I hope that this Part demonstrated that the way lawyers approach property frames the way in which lawyers argue about practical questions about property and may therefore ultimately affect the actual content of property law. Thus, although nonlawyers may not particularly care about the precise legal conceptualization of property, they should care that property is conceptualized properly in law, because the legal conception of property that lawyers employ structures legal discourse, which in turn affects legal rules that affect people's lives.

My analysis of the question in *Craft* and of the other categories of conflicts between a nondebtor spouse and the creditors of the other spouse was guided by the realist conception of property. This conception prescribes the contextual and normative tenets of the analysis of this Part and thus its focus on the guiding principles for the governance of marital property and the resolution of legal accidents. As we have seen, the specific conclusions of this analysis are different from the conclusions reached under legal frameworks that conceptualize property as either forms or bundles. Thus, if one is willing to accept the modest assumption that arguments have some effect on courts' decisions, this exercise should help demonstrate that a court's understanding of property may make a difference.[203] This conclusion is not limited to cases, such as *Craft*, in which the concept of property is explicitly invoked. It applies also to other cases, such as *Sawada v. Endo*,[204] which do not explicitly resort to the concept of property, because even in these cases courts necessarily employ some implicit conception of property, which affects their decisions.

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201. I am grateful to my colleague Mark West for challenging me on this front.

202. *Cf.* WALDRON, *supra* note 86, at 50, 52-53.

203. For another demonstration of the practical implications of a court's conception of property, see Singer, *supra* note 83, at 632-63.

204. 561 P.2d 1291 (Haw. 1977).

IV
PROPERTY AS INSTITUTIONS

The critique of *Craft*'s conceptual approaches in Part II has already pointed out an alternative conception of property, which the analysis of the substantive issues raised by the case in Part III has put to work. Part IV fleshes out the skeleton of this conception of property, guided by the realist conception of law. I call it property as institutions. This approach understands the forms of property—such as the entireties form—as important default frameworks of interpersonal interaction. As such, property forms are justifiably limited in number and standardized. Yet, as institutions structuring and channeling people's relationships, the existing forms of property are never frozen. Rather, they are subject to ongoing normative (and properly contextual) reevaluation and possible reconfiguration.

A. The Realist Approach to Property

The realist approach to property neither dismisses nor essentializes the forms of property. Existing property institutions are and should be the starting point of any analysis of property questions. The current forms incorporate valuable—although implicit and sometimes imperfectly executed—normative choices,[205] such as the notion of marital unity underlying the modern conception of the entireties estate. In approaching the forms of property as institutions, one assumes that the existing configurations of rights, privileges, powers, and immunities of any given property institution constitute helpful frameworks for social interaction. This conservative assumption derives not only from the pragmatic reality that existing rules cannot be abandoned completely but also from a recognition that existing property forms represent an accumulated judicial experience that is worthy of respect.[206]

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205. *See* Grey, *supra* note 55, at 12 (discussing the pragmatic approach to "legal categories and concepts as instruments for making practical judgments"; in this view, a legal concept has the shape it does because it promotes "judgments that had survival value, were useful to some practical purpose").

206. *See* Thomas C. Grey, *Freestanding Legal Pragmatism*, 18 CARDOZO L. REV. 21, 26 (1996). For legal realists, much of the authority of adjudication derives from the judicial "office." Judges are embedded in an institutional environment that inspires an attitude "toward understanding sympathy [and] toward quest for wisdom in the result." KARL N. LLEWELLYN, THE COMMON LAW TRADITION 47 (1960) [hereinafter LLEWELLYN, COMMON LAW TRADITION]; *see also id.* at 45-47, 132. The two most important features of this environment are: (1) the adversary process, in which "officers of the court" marshal the authorities "on each side in support of one persuasive view of sense in life, as well as one view technically tenable in law," and (2) the role of judicial opinions, which are aimed at persuading the parties, the bar, and the interested public. Karl N. Llewellyn, *American Common Law Tradition, and American Democracy*, *in* JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 282, 309 (1962). These features help make judges "experts in that necessary but difficult task of forming judgment without single-phase expertness, but in terms of the Whole, *seen whole*." *Id.* at 310. *See also* Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 241-42 (1950) (claiming that the institutional structure of common law adjudication forces judges to have the "synoptic vision" that is "a distinguishing mark of liberal civilization"). For a modern articulation, see Owen M. Fiss, *Objectivity*

More specifically, our existing repertoire of property forms offers a tentative suggestion to parse the social world into distinct categories of human interaction. People interact in a myriad of ways depending on their relationships to one another. The spectrum of relationships ranges from arm's-length relationships between strangers (or market transactors); through relationships between landlords and tenants, members of the same local community, neighbors, and coowners; to intimate relationships between family members. Accordingly, as Joseph Singer has shown, property is configured in diverse ways.[207] Ideally, the existing property configurations both construct and reflect the optimal interactions among people in given categories of relationships and with respect to given categories of resources.[208] By facilitating such various categories of human interactions, the forms of property can promote important human values.[209]

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and Interpretation, 34 STAN. L. REV. 739 (1982). For a more suspicious account of adjudication that is skeptical of the legal realist approach, see BRUDNER, *supra* note 54, at 22-23.

207. *See* Singer, *supra* note 83, at 655. Although Singer's spectrum of social relationships is somewhat different from the one I use, it certainly serves as a source of inspiration. Because of this similarity, it may be helpful to describe how my account may differ from Singer's. First, Singer's claim that the reliance interest is an important premise of the entitlements of workers, spouses, adverse possessors, and so forth suggests that reliance can serve as at least part of an argument for property rights. But law never protects reliance *per se*; it protects reliance if and only if there is a good reason to encourage (or at least not discourage) the type and magnitude of the reliance at issue. Therefore, reliance, in and of itself, is a shaky ground for justifying entitlements. Reliance is desirable only when it facilitates some important human good. *See* Hanoch Dagan, *Mistakes*, 79 TEX. L. REV. 1795, 1803-04 (2001). Moreover, Singer maintains that the legal system may require a sharing or shifting of property interests from the owner to the nonowner to protect the more vulnerable party to the relationship. *See* Singer, *supra* note 83, at 621, 623, 664-65, 668, 728, 730. Although "sharing" is indeed desirable at times, as the case of marital property discussed above shows, I would reject "shifting" of property interests insofar as it legitimates an a posteriori approach to entitlement prescription. Shifting in this sense is undesirable because it generates considerable uncertainty, which might infringe too much on people's liberty and undermine efficiency. Furthermore, such uncertainty might even frustrate the social good, which both Singer and I cherish, of facilitating cooperation and trust: when the rules of the game are uncertain, the parties tend to be suspicious of one another.

208. Indeed, although I focus here on one resource only (land), the nature of the resource at hand may also make a difference: because society regards different resources (e.g., land, chattels, copyright, patents) as variously constitutive of their possessors' identity, the law treats them differently and subjects them to different property configurations. I have discussed this dimension in some detail elsewhere. *See* HANOCH DAGAN, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES 40-49, 63-108 (1997). For another explanation (based on efficiency considerations) of the range of property configurations of various types of resources, see Richard A. Epstein, *On the Optimal Mix of Private and Common Property*, *in* PROPERTY RIGHTS 17 (Ellen Frankel Paul et al. eds., 1994). For a more object-regarding understanding of property—which I do not endorse—see Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 331-64 (2002); *see also* Myrl L. Duncan, *Reconceiving the Bundle of Sticks: Land as a Community-Based Resource*, 32 ENVTL. L. 773 (2002).

209. The next paragraph does not imply that efficiency has no role to play. Rather, it suggests that matching the property configuration to the social context may well be the key to efficiency as well. *See* Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (demonstrating how matching the choice of a given conception of property to the type of relationship between the parties involved leads to efficient results); *cf.* MICHAEL TAYLOR, THE POSSIBILITY OF COOPERATION 26-28 (1987); Henry E. Smith,

Some property institutions are structured along the lines of the Blackstonian conception of property as "sole despotic dominion."[210] These institutions are atomistic and competitive,[211] and they vindicate people's negative liberty.[212] Other property institutions, such as marital property, are dominated by a much more communitarian view of property, in which ownership is a locus of sharing. Many other property institutions—governing relationships between people who are neither strangers nor intimates—lie somewhere along this spectrum between atomistic and communitarian norms.[213] For instance, with the property form of common interest communities, both autonomy and community are of the essence, and thus ownership implies both rights and responsibilities.[214]

To avoid the pitfalls of essentializing the existing repertoire of property forms, however, we must avoid according these forms overwhelming normative authority.[215] If property is understood as institutions, the appeal

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Exclusion Versus Governance: Two Strategies for Delineating Property Rights, 31 J. LEGAL STUD. 453 (2002).

210. 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

211. The classic example is *Keeble v. Hickeringill*, 11 East. 574, 103 Eng. Rep. 1127 (K.B. 1706 or 1707) ("[P]eople who are so instrumental by their skill and industry so to furnish the markets should reap the benefit."). *See also* Smith v. Chanel, Inc., 402 F.2d 562, 567-68 (9th Cir. 1968) (allowing unauthorized copy of a product because of "the public's desire for the unpatented product" and explaining that "imitation is the life blood of competition").

212. On the human condition dubbed "atomism" and the entailed commitment to negative liberty, see STEVEN LUKES, INDIVIDUALISM 66 (1973); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 57, 71-73 (1974); Charles Fried, *Is Liberty Possible?*, *in* LIBERTY, EQUALITY, AND LAW 89, 94-95 (Sterling M. McMurrin ed., 1987); F.A. Hayek, *Freedom and Coercion*, *in* LIBERTY 80, 81-82, 89, 95-98 (David Miller ed., 1991); Charles Taylor, *Atomism*, *in* PHILOSOPHY AND THE HUMAN SCIENCES 187, 187-88 (1985).

213. Compare the contextual accommodation of the seemingly conflicting values of property offered in this Article with Alan Brudner's claim that this conflict can be dissolved conceptually. *See* BRUDNER, *supra* note 54, at 65-85. Compare also to Henry Smith's claim that exclusion and governance are two strategies for delineating property rights with different characteristic cost structures. *See* Smith, *supra* note 209. Smith admits that most property rights involve both dimensions to some extent and thus further bolsters my claim that there is no reason to essentialize exclusion as the core of property. Indeed, unless one wants to trivialize property, one has to recognize that property is about both exclusion and governance, with varying degrees of emphasis of each. Furthermore, as the text demonstrates, the property regime of any given resource can be mostly about exclusion in some social contexts and mostly or significantly about governance in others.

214. *See, e.g.*, Nahrstedt v. Lakeside Vill. Condo. Ass'n, 878 P.2d 1275, 1278 (Cal. 1994) (finding that a restriction imposed in the original declaration or master deed will not be enforeed only if "the burdens it imposes on affected properties so substantially outweigh the benefits of the restriction" that it is deemed arbitrary or it violates public policy or a constitutional right); Western Land Co. v. Truskolaski, 495 P.2d 624, 626 (Nev. 1972) (finding that covenants restricting use of subdivision to single-family dwelling are enforceable as long as the "character of the neighborhood has not been adversely affected, and the purpose of the restrictions has not been thwarted").

215. Furthermore, there certainly is no reason to essentialize one form of property—which may well be normatively appealing for one type of social interaction—and treat it as if it embodies the only understanding of property. *Cf.* SINGER, *supra* note 59, at 14. For example, some scholars believe that if property is thought of as an institution that mediates the relations between separate individuals who are viewed as distinct self-authenticating sources of claims, a radically libertarian conception of property is in place. *See* Benson, *supra* note 11, at 764, 807-08, 812; Weinrib, *supra* note 157, at 1286-87, 1289-

of these forms need not, and should not, be the end of the legal analysis.[216] Rather, this approach calls for an ongoing (albeit properly cautious) process of identifying the human values underlying the existing property forms and designing governance regimes to promote them.[217] Here, we must rely on the vague notion of promoting optimality to capture the complex ways in which law can facilitate human values. The normative analysis recommended by the realist approach to property must resort to property law's material effect on people's behavior, to its expressive and constitutive impact, and to the intricate interdependence of the two effects.[218]

Property law, like law in general, is a coercive mechanism backed by state-mandated power, and therefore its prescriptions need to be justified in terms of their promotion of human values.[219] Consequently, we must reevaluate the institutions of property in terms of their effectiveness at promoting their accepted values, and the continued validity and desirability of these values.[220] This inquiry requires critical and constructive reexamination of law's existing categorization of relationships (and of resources), as well as the values property law promotes. In the legal realist tradition, this latter inquiry perceives the values of property in an antifoundationalist

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94, 1303. To be sure, other scholars who derive a whole set of limitations on the owner's sovereignty from very similar premises contest this claim. *See* BRUDNER, *supra* note 54, at 40-85. Consideration of this controversy is beyond the scope of this Article. Even if the former view proves correct insofar as this controversy is concerned, it is still lacking insofar as property law is concerned because of its insistence on the exclusivity of one construction of human interaction and thus on the exclusivity of one conception of property.

216. *Cf.* WALDRON, *supra* note 86, at 60-61 (presenting a conceptual account of private property as useful, even inevitable, notwithstanding the multiple conceptions of this contested concept, to argue about its justifiability, and perhaps using this philosophical account to address the question of what conception of property to adopt); DON HERZOG, POISONING THE MINDS OF THE LOWER ORDERS 18 (1998) (arguing that there is more than one way of respecting a precedent, that the shape of legal doctrines "is made and remade as its narrative continues to unfold," and that "even apparently surprising lurches can be integrated seamlessly").

217. *Cf.* SINGER, *supra* note 59, at 139.

218. *See* Hanoch Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 MICH. L. REV. 134 (2000). Even an analysis of law's material effect on people's behavior is, at least at times, more complicated than is frequently assumed. For our purposes it is enough to accept the modest claim that whatever the influence a legal ruling may have—which is frequently unknown—it should push in the normatively desirable direction. *See* Neil MacCormick, *On Legal Decisions and Their Consequences: From Dewey to Dworkin*, 58 N.Y.U. L. REV. 239, 251-54 (1983).

219. On the power dimension of adjudication, see Robert Cover, *Violence and the Word*, *in* NARRATIVE, VIOLENCE, AND THE LAW 203 (Martha Minow et al. eds., 1992). On the dialectical relation between law's coercion and its nature as a justificatory practice, see DWORKIN, *supra* note 171, at 261-62; K.N. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 YALE L.J. 1355, 1381-86 (1940). For other views of the relationship between law's coercion and its normativity—reductive, additive, and disjunctive—see generally Meir Dan Cohen, *In Defense of Defiance*, 23 PHIL. & PUB. AFF. 24 (1994). The present Article can be read as a response to any attempt to look for the end of property law "inwardly or essentially." *See* BRUDNER, *supra* note 54, at 29-33.

220. *See* Thomas W. Bechtler, *American Legal Realism Reevaluated*, *in* LAW IN A SOCIAL CONTEXT 1, 20-21 (Thomas W. Bechtler ed., 1978); *see also* Grey, *supra* note 206, at 26, 41-42.

spirit, as "pluralistic and multiple, dynamic and changing, hypothetical and not self-evident, problematic rather than determinative."[221] Yet, as Don Herzog maintains, values are importantly different from sheer preferences: values must be defended with reasons, which must in turn relate to human interests, "and not just anything can count as human interest."[222] Therefore, although property lawyers must not disregard radical alternatives, they can bracket out skeptical doubts and explicitly engage in a normative inquiry.[223]

This ongoing process of reshaping property as institutions is surely antithetical to the understanding of property as free-floating logical forms that can be addressed by means of deductive reasoning or counting incidents. But the conception of property as institutions does not collapse property to a catalog of substantive sticks that are "strikingly independent" (to use Hohfeld's term)[224] and have a limitless number of permutations. The institutions of property are unifying normative ideals for core categories of interpersonal relationships. Therefore, they must be limited in number and standardized.

Each property institution (such as tenancy by the entirety) targets, in its own way and with respect to some intended realm of application, a set of human values that can be promoted by its constitutive rules. As such, the institutions of property consolidate people's expectations, so that they know what they are getting into when entering, for example, a joint tenancy, a common interest community, or, for that matter, a marriage. Thus, a set of fairly precise rules must govern each property institution to enable people to predict the consequences of various future contingencies and to plan and structure their lives accordingly.[225] Furthermore, the institutions of property may also affect people's ideals and therefore their preferences with respect to these categories of relationships.[226] In this latter role, property institutions perform a significant expressive and cultural function.

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221. Hessel E. Yntema, *Jurisprudence on Parade*, 39 MICH. L. REV. 1154, 1169 (1941). *Contra* BRUDNER, *supra* note 54, at chs. 2, 6.

222. HERZOG, *supra* note 6, at 232, 237-38; *see also* Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, *in* PRAGMATISM IN LAW AND SOCIETY 359, 360 (Michael Brint & William Weaver eds., 1991).

223. *See, e.g.*, HOLMES, *supra* note 59, at 184 (recommending that lawyers make judgments relating to "social ends" and "considerations of social advantage").

224. Hohfeld, *supra* note 2, at 747.

225. As should be clear by now, a realist approach does not undermine law's predictability; in fact, it reinforces it. At least relative to the hopeless indeterminacy of pure doctrinal analysis—which is caused, as we have seen, first and foremost by the multiplicity of doctrinal sources—a contextual normative inquiry can secure a much more stable, and thus predictable, legal equilibrium. *See, e.g.*, K.N. LLEWELLYN, THE BRAMBLE BUSH 48 (1930, 6th prtg. 1977); LLEWELLYN, COMMON LAW TRADITION, *supra* note 206, at 19-61, 178-255; MICHAEL MARTIN, LEGAL REALISM: AMERICAN AND SCANDINAVIAN 39-40, 76 (1997).

226. *See* Dagan, *supra* note 218; Frantz & Dagan, *supra* note 114 (manuscript at pt. I.B, on file with author).

Both roles—consolidating expectations and expressing ideal forms of relationships—require some measure of stability: to form effective frameworks of social interaction and cooperation, property law can recognize a necessarily limited number of categories of relationships and resources. This prescription of standardization is particularly acute with regard to the expressive role that mandates limiting the number of property institutions because law can effectively express only so many ideal categories of interpersonal relationships.

Viewing property as institutions in this way is deeply rooted in the realist tradition. As did the *Craft* majority, this approach rejects deductive reasoning from frozen forms of property. Furthermore, the conception of property as institutions suggests that ownership for one purpose does not necessarily imply ownership for another and that the configuration of property rights is context dependent. However, unlike the *Craft* majority, the realist approach to property takes the existing forms of property seriously, using them as tentative suggestions for dividing the social universe into economically and socially differentiated segments. An understanding of property as institutions recognizes that each "transaction of life" has some features that are of sufficient normative importance to justify distinct legal treatment.[227] Finally, unlike both the majority and dissenting opinions in *Craft*, the realist approach takes the values underlying forms of property, and not only the existing doctrinal content of these forms, as part and parcel of the legal analysis, and thus makes these values an object of ongoing critical and constructive inquiry. In this way, the property as institutions approach is both backward looking and forward looking, constantly challenging the desirability of the normative underpinnings of property institutions, their responsiveness to the social context in which they are situated, and their effectiveness in promoting their contextually examined normative goals.

At times such an account helps 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 forms: rules that undermine the most illuminating and defensible account of such a property institution that should be reformed so that an institution lives up to its own ideals.[228] This reformist potential may yield—indeed, has yielded throughout the history of

227. *See* Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 73-76 (1928); KARL N. LLEWELLYN, *A Realistic Jurisprudence: The Next Step*, *in* JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 3, 27-28, 32, 34-36 (1962); LLEWELLYN, *Some Realism*, *supra* note 60, at 42, 56-57, 62, 73. Indeed, despite some critics' assertions to the contrary, legal realism does not require equity-like discretionary adjudication that tailors outcomes to the particular circumstances of cases. Rather, it advocates contextualism in the sense of careful articulation of preferably small categories. For similar contemporary claims of such contextuality, see MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983); ANDERSON, *supra* note 125, at 157; Grey, *supra* note 206, at 41.

228. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 118-23 (1977).

property—different types of legal reforms. In some cases, the reform is relatively radical: the abolition of a property form (as was the case, for all practical purposes, with the fee tail form[229]) or an overall reconstruction of its content (as with leaseholds[230]). 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, removing in the process indefensible rules (the best example here is probably the recent *Restatement of Servitudes*[231]), or adjusting one given form—think here of the fee simple absolute—to the various social contexts in which it may be situated.[232]

The realist approach to property is thus an exercise in legal optimism, an attempt to explain and develop the existing property forms in a way that accentuates their normative desirability while remaining attuned to their social context.[233] This approach reflects a conception of law, introduced by Karl Llewellyn and later popularized (with some important modifications not adopted here) by Ronald Dworkin, as a dynamic practice that evolves along the lines of fit and justification.[234] This conception follows the common law method, described by Llewellyn as "a functioning harmonization of vision with tradition, of continuity with growth, of machinery with

229. *See, e.g.*, DUKEMINIER & KRIER, *supra* note 1, at 215-19 (describing the rise and fall of the fee tail).

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

231. *See* RESTATEMENT (THIRD) OF SERVITUDES (2000).

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

233. On legal optimism, see BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 178-79 (1921); DWORKIN, *supra* note 171, at 400-13.

234. *See* DWORKIN, *supra* note 171, at 52-53, 164-258; LLEWELLYN, COMMON LAW TRADITION, *supra* note 206, at 36-38, 44, 49, 60, 194-95, 222-23. Dworkin is unlikely to share two important characteristics of Llewellyn's jurisprudence mentioned in the text. First, Llewellyn's understanding of justice is dynamic, experimental, and contextual—in short, pragmatic. Dworkin, by contrast, casts himself as a critic of pragmatism. RONALD DWORKIN, *What Justice Isn't*, *in* A MATTER OF PRINCIPLE 214 (1985). *Cf.* Don Herzog, *How to Think About Equality*, 100 MICH. L. REV. 1621 (2002) (book review) (discussing Dworkin's pragmatism and its difficulties). This difference may account for another difference, irrelevant for my current purposes, regarding the issue of judicial review. Second, unlike Dworkin, Llewellyn did not treat the dimension of fit ("fitness," as he called it) as a global imperative, and thus he advocated the use of smaller categories to analyze legal questions. In contemporary terms, Llewellyn was talking about "local coherence": pockets of coherence reflecting clusters of cases sufficiently similar in terms of the pertinent principles governing them and the appropriate weights of those principles so as to suggest they should be governed by a unified normative framework. *See* JOSEPH RAZ, *The Relevance of Coherence*, *in* ETHICS IN THE PUBLIC DOMAIN 261, 281-82, 294-304 (1994).

purpose, of measure with need," mediating between "the seeming commands of the authorities and the felt demands of justice."[235]

B. Numerus Clausus *for Property Governance*

In property as institutions the *numerus clausus* principle, which limits property to some set of identifiable and standardized forms, is understood as a means for facilitating stable, and thus necessarily a limited number of, categories of human interaction. The *numerus clausus* principle, in other words, sustains the institutions of property as intermediary social constructs through which law interacts with—reflects and shapes—our social values.[236] This realist account contrasts sharply with an influential theory of the standardization of property advanced recently by Thomas Merrill and Henry Smith.[237] Appreciating the differences between these competing accounts has important practical implications for determining the appropriate mode of judicial reasoning in the context of the forms of property and the appropriate approach to attempts to contract around property rules.

Merrill and Smith maintain that the regulation of property as a fixed menu of options reduces the communication costs of third parties who need to determine the attributes of these rights, both to avoid violating them and to acquire them from present owners. In this view, law should be reluctant to recognize new types of property rights because parties who create such rights are unlikely to take into account the full magnitude of costs incurred by such strangers in determining the attributes of these rights.[238] This account finds the distinctive features of property in its effects on "classes of individuals who fall outside the zone of privity."[239] This focus on third parties also entails a preference for legislative rather than judicial decision making in creating or modifying property rights, due to the advantages of legislation in terms of its "clarity, universality, comprehensiveness, stability, prospectivity, and implicit compensation."[240]

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235. LLEWELLYN, COMMON LAW TRADITION, *supra* note 206, at 37-38 (describing the "Grand Style").

236. This role of the *numerus clausus* principle may or may not be the historical cause (whatever this loaded term means) for its evolution. In the realist spirit, this account is aimed not at providing a historical explanation for this existing legal phenomenon but rather at interpreting it in its best normative light.

237. *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 26-34 (2000). I am grateful to my colleague Rick Pildes for challenging me on this front.

238. *Id. See also* Carol M. Rose, *What Government Can Do for Property (and Vice Versa)*, *in* THE FUNDAMENTAL INTERRELATIONSHIPS BETWEEN GOVERNMENT AND PROPERTY 209, 213-15 (Nicholas Mercuro & Warren J. Samuels eds., 1999); Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105 (2003) (discussing property forms in terms of a tradeoff between intensiveness and extensiveness of information).

239. Merrill & Smith, *supra* note 237, at 28.

240. *Id.* at 61; *see also id.* at 58-68.

The *numerus clausus* principle is not, however, fully explained by the concern of communication costs. In criticizing Merrill and Smith's theory, Henry Hansmann and Reinier Kraakman claim that limiting the forms of property does not economize on communication costs given parties' ability to tinker with the specific content of each property form.[241] For this reason, Hansmann and Kraakman maintain that property's standardization is unjustified and that the only concern of third parties that property law should facilitate is the verification of ownership of rights.[242] Accordingly, for them, the distinguishing feature of property law must be the regulation of notice: providing mechanisms for giving effective notice of the partitioning of property rights in a given asset among multiple people.[243] To be sure, Hansmann and Kraakman's dismissal of standardization as a means for economizing on communication costs is somewhat overstated, because, as Merrill and Smith indicate, the way information is structured affects how costly it is for people to process it.[244] Yet, the gist of their critique is correct: the relevant concern of third parties is verification, and it is doubtful whether verification can adequately account for the *numerus clausus* principle.

Both sides of this important controversy find the key to understanding property in the interactions between owners and third parties. Undoubtedly the interests of third parties affect the nature of property, as the present inquiry into *Craft* demonstrates. Yet both parties to this debate mischaracterize how these third-party concerns affect property law. Furthermore, they are both misguided in looking at the interests of third parties in their quest either to justify or to criticize the *numerus clausus* principle.

On the former issue, Hansmann and Kraakman are closer to the truth in focusing on verification and notice as major manifestations of property law's concern for third parties' interests. As we have seen, however, the law of legal accidents, dealing with exactly this type of conflict between first and third parties, takes other considerations into account as well. Thus, whereas in some contexts law privileges the ex ante perspective for resolving legal accidents and thus focuses on the conflicting parties' access to relevant information, in other contexts law is concerned with the ex post perspective and thus assigns responsibilities while considering also the balance of harm between the parties.[245]

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241. Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The* Numerus Clausus *Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373, 382, 416-17 (2002).

242. *See id.* at 374, 380-84, 419. *Cf.* Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objects of Property Law*, 78 N.Y.U. L. REV. (forthcoming 2003).

243. *See* Hansmann & Kraakman, *supra* note 241, at 374-75.

244. Merrill & Smith, *supra* note 237, at 33, 43-45.

245. One example of this phenomenon comes from the law of servitudes. Unless a recording act explicitly prescribes otherwise, an unrecorded servitude is valid against third parties if either the third party had notice or the harm to an owner of such a nonexpress servitude from invalidity is likely to outweigh the harm to the new owner of the servient estate from finding himself or herself unexpectedly

Merrill and Smith are nevertheless right in their reluctance to dismiss the desirability of the *numerus clausus* principle, which is a pervasive characteristic of property in postfeudal property systems. The gap between property theory and property law, where the standardization of property goes well beyond what can be justified by reference to third parties' interests, can be closed only if we follow the conception of property as institutions; that is, if we remember that property requires attention not only to the external dimension addressing third parties' interests but also to the internal dimension addressing property governance. More specifically, for property as institutions the best justification for the standardization of property lies in the internal dimension—within, rather than without, the zone of privity. Limiting the number of property forms and standardizing their content facilitates the roles of property in consolidating expectations and expressing ideal forms of relationship.[246]

This internal justification for the standardization of property contrasts sharply with Merrill and Smith's external perspective. These competing accounts not only are different theoretically; they also generate important practical implications. Thus, if economy of communication is the reason for limiting the forms of property, then to get these benefits, we may need to treat the forms of property as concepts with a recognizable structure and independent internal logic. The very reasons Merrill and Smith propose for limiting the forms of property may require judges to engage in deductive reasoning from the forms of property to decide how they apply to new contexts and to leave modifications to legislatures.[247] By contrast, if one understands standardization of property along the lines described in this Article, such deductive reasoning is misplaced (even if it were possible).[248]

Taking the existing forms of property seriously in this realist approach requires us to reason from the social purpose of the form (the property institution, as I prefer to call it).[249] We must address doctrinal questions

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subject to such a servitude. *See* RESTATEMENT (THIRD) OF SERVITUDES § 7.14 (2000). A focus on verification—or, for that matter, communication—costs would require a very different approach. At a minimum, such an approach would not take into account the hardship to the owner of the easement, who could have had it recorded or otherwise have transmitted the information about its existence to potential violators. But probably such an approach would go even further and eliminate all or most forms of nonexpress easement to encourage parties to use express easements that can be recorded properly.

246. Conversely, an open-ended approach to property or a failure to sustain the normative integrity of the institutions of property undermines law's roles of consolidating expectations and expressing normative ideals.

247. *See* Merrill & Smith, *supra* note 54, at 803.

248. Recall that, as we have seen, internal deductive reasoning is in fact an impossible task given the multiplicity of potentially relevant legal sources. *See supra* Part II.A.

249. *Cf.* Alan Schwartz, *The New Textualism and the Rule of Law Subtext in the Supreme Court's Bankruptcy Jurisprudence*, 45 N.Y.L. SCH. L. REV. 149, 185-90 (2000-2001) (explaining that because the application of a textual approach to vague legislative standards generally will be pointless, courts should opt in these contexts for a purposive interpretive method).

normatively rather than deductively because only normative reasoning can accentuate the benefits of our property institutions.[250] This mode of reasoning does not undermine the relative stability of the institutions of property because people's expectations relate more to the "character" of an institution than to its precise rules. And the character of the institutions of property is sufficiently stable as long as the purposes of these institutions and the social categories they serve are not revisited for every case.[251]

A second important implieation of the difference between Merrill and Smith's theory and that of this Article relates to the possibility of contracting around property rules. If the focus of the *numerus clausus* principle is on policing against externalizing verification costs to third parties, contractual freedom with respect to the various incidents of the forms of property may at times be misplaced. Freedom of contract is justifiably curtailed as long as the contracting parties' frustration costs are lower than the third parties' verification costs.[252] By contrast, understanding the institutions of property as unifying normative ideals for core categories of interpersonal relationships comfortably coexists with a much broader realm of freedom of contract.

Allowing people to opt out of many incidents of property law's existing forms—to tailor their property arrangements in accordance with the way in which they prefer to cast their interpersonal relationships—does not undermine law's functions of consolidating expectations and expressing ideals for core types of human interaction. Even insofar as the expressive role of property institutions is concerned, immutability is rarely appropriate. People legitimately may want to accommodate their property arrangements to their particular needs and circumstances. Furthermore, in a liberal society, citizens should be free to reject many of law's messages and repudiate at least some of the values recommended by the state. Thus, the conception of property as institutions welcomes the recent trend in property law—most significantly manifested in the traditionally immutable areas of marital property and of servitudes—away from mandatory rules and toward default rules.[253] Only in extreme cases, where the cultural role of a property institution is both overwhelming and likely to be particularly facilitated by immutability,[254] is proscribing contractual opting out of the

250. *Cf.* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 220, 231, 252, 336 (1973).

251. This conservative presumption regarding social categories may explain why adjudication rarely involves the creation of new forms of property (equitable servitudes being a notable exception).

252. *Cf.* Merrill & Smith, *supra* note 237, at 38.

253. *See* AMERICAN LAW INSTITUTE, *supra* note 140, at ch. 7; RESTATEMENT (THIRD) OF SERVITUDES §§ 2.1, 2.4, 2.6, 3.2 (2000).

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

rules of property law justifiable.[255] In all other cases, freedom of contract should apply and legal accidents law should be responsible for accommodating the legitimate interests of third parties.[256]

Some might argue that this realist account of standardization for governance fails to explain why property is limited in forms but contract law is not, even though contracts also involve various kinds of human interactions.[257] To begin, notice that my account explains the historical difference between property, with its set of forms, and classical contract, with its open-ended framework. Classical contract law stands for (i.e., facilitates) one-shot market interactions structured in an ad hoc fashion according to the contingent preferences of the contracting parties.[258] Property, in

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normative baselines. *See, e.g.*, Frantz & Dagan, *supra* note 114 (manuscript at pt. II.B, on file with author).

255. *Shelley v. Kraemer*, 334 U.S. 1 (1948), provides a vivid example of an extreme case in which immutability is appropriate as well as of some other implications of my debate with Merrill and Smith. By holding that judicial enforcement of racially restrictive covenants is an exercise of state action that violates the Fourteenth Amendment, *Shelley* posed "a state action enigma": both prior and later decisions show that the bare potential of judicial enforcement of private arrangements and preferences does not transform them into state action. *See* Carol Rose, Shelley v. Kraemer, *in* PROPERTY STORIES (Gerald Korngold & Andrew Morriss eds., forthcoming 2003) (manuscript at 48, on file with author). Rose suggests that this puzzle can be solved by reference to the character of racially restrictive covenants as property. More specifically, she refers to the concern of property law to minimize negative impacts on third parties who may not share the preferences of the existing transactors. *Id.* (manuseript at 42, on file with author). But, as Rose herself admits, taking the protection of third parties from the idiosyneratic preferences of current transactors as the core of property raises difficult qucstions for cases, such as *Shelley*, in which third parties are likely to share these current preferences. Notwithstanding these difficulties with Rose's specific explanation, which follows Merrill and Smith's account, I share her more general claim: that *Shelley* presents "some of the best instincts of property law" and that it can and should be understood as a case about property. *Id.* (manuscript at 48, on file with author). For me, the "propertiness" of *Shelley* lies in the fact that, like most other forms of property, covenants are means of strueturing one type of social relationships—here, a community. As such, covenants, like other forms of property, must be and indeed are interpreted, evaluated, and reconstructed in terms of the ideal human interaction within their intended realm of application. Exeising exclusion from the form of property that regulates (perhaps constitutes) private communities represents this feature of property similarly to how the notion of cgalitarian liberal community regulates the context of marital property, which is the focus of this Article. *Cf.* RESTATEMENT (THIRD) OF SERVITUDES § 3.1 (2000).

256. Some may still eomplain that a liberal (neutral) state should not use its property rules—even if they are defaults—to promote potentially controversial notions of social institutions, such as marriage or community. A full-blown response to this concern, whieh requires an analysis of liberal neutrality, is well beyond the scope of this Article. For my purposes, it is sufficient to note that some ideals of human interaction are inevitably fostered even in the most hands-off of legal regimes. Thus, even those advocating a greater role for private contracting need to account for the types of interpersonal relationships their preferred rules tend to foster.

257. *Cf.* Carol M. Rose, *Afterword: Whither Commodification?*, *in* COMMODIFICATION FUTURES: THE ROLE OF THE MARKET IN LOVE, SEX AND OTHER AREAS (Martha M. Ertman & Joan C. Williams eds., forthcoming 2004) (manuscript at 20-26, on file with author) (discussing the relationship between the in rem quality of property and markets).

258. *Cf.* ANDERSON, *supra* note 125, at 141-67 (characterizing the norms structuring market relations as impersonal, egoistic, exclusive, want regarding, and oriented to "exit" rather than to "voice"); Roy Kreitner, *The Gift Beyond the Grave: Revisiting the Question of Consideration*, 101

contrast, always has constituted a wider variety of social, including non-market, interactions; property law never has been shy about prescribing rules in the context of the relationship between family members (indeed, a significant force of the development of the estate system can be explained by this familial context), neighbors, community members, and the like.[259] However, today the distinction between contract and property should not be taken too far. From the external perspective, the distinction is quantitative rather than qualitative because third parties have interests in contracts and not only in property.[260] The internal perspective, addressing the relationship between the parties within the zone of privity, also questions the suggested dichotomy of property and contract. Modern property forms are increasingly subject to significant possible consensual adaptations. Modern contract law, in its turn, is increasingly composed of domain-specific rules, governing well-defined categories of human interactions (even if, as with property, they are mostly defaults).[261]

CONCLUSION

The forms of property matter—they should matter—because these configurations of property rights constitute property institutions that facilitate various categories of human interaction and thus promote important human values. The bundle of sticks metaphor should continue to guide property law because it empowers us to reexamine existing forms, add new forms, or reshape existing property configurations whenever these forms do not optimally promote human values. Thus, property is both forms and bundles. But property comprises more than mere forms that can yield necessary logical consequences. By the same token, property constitutes more than a catalog of substantive sticks with limitless permutations. As human institutions, the forms of property should be crafted through bundling in a way that fortifies their normative desirability, taking into account the features of the categories of relationships in which they are situated.

This realist conception of property as institutions helps define the types of questions courts need to address in resolving doctrinal property questions. As the discussion of *Craft* shows, the craft of property requires close attention to the interaction between the internal dimension of optimal property governance and the external dimension of third parties' interests. Understanding property as institutions also helps to account for the *numerus clausus* principle and to refine its implications. The standardization of

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COLUM. L. REV. 1876 (2001) (describing the marginalization of gifts and other statuslike relationships in modern contract theory).

259. *See generally* A.W.B. SIMPSON, A HISTORY OF THE LAND LAW (2d ed. 1986).

260. *See* Hansmann & Kraakman, *supra* note 241, at 409-11, 419.

261. *See, e.g.*, Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389, 415-19 (1994) (claiming that we should stop thinking about contract and start—actually, return to—analyzing "specific contracts," or what we may call forms of contract).

property forms prescribed by this principle consolidates people's expectations regarding various types of relationships and expresses law's normative ideals for these core categories of interpersonal interaction. Thus understood, the *numerus clausus* principle need not invite a formalistic legal discourse or an unaccommodating approach to parties' attempts to contract around property rules. Rather, this pervasive principle of property law perfectly coheres with normative and properly contextual legal reasoning, as well as with a rather broad scope of freedom of contract.