

## PROPERTY, EXCLUSIVITY, AND JURISDICTION

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*But one may be concerned with the efficacy of legal scholarship as well as with that of judgments. It is disconcerting to realize that one of the better products of our system of legal criticism can fall on deaf ears, or be turned aside by scattered and diverse reservations.*

Brainerd Currie<sup>1</sup>

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<sup>1</sup> Full Faith and Credit to Foreign Land Decrees, 21 U. Chi. L. Rev. 620, 621 (1954).

## INTRODUCTION

Few areas of American law can claim to have been shaped by academic commentary as heavily as the field of conflict of laws.<sup>2</sup> Whether that influence has been entirely wholesome may certainly be debated. But the influence itself is undeniable.<sup>3</sup>

At the beginning of the twentieth century, a general consensus prevailed when it came to interstate conflict of laws—the problem of determining whose law should govern when a legal controversy has elements connecting it with more than one state. That consensus, set out in the 1934 Restatement of Conflict of Laws, entailed a set of broad and relatively formal rules that typically assigned a given legal matter to a given state on the basis of a single event or relationship within the state’s territory.<sup>4</sup> The approach reflected in those rules was increasingly criticized by academics, however, who proposed a variety of alternative theories and methods in the years following the Restatement’s publication.<sup>5</sup> What started in the law reviews quickly spread to the case reports: Beginning in the mid-1960s, a cascade of states abandoned the traditional conflict-of-laws rules applicable to fields like contract and tort, opting for one or more of the schemes developed by scholars. A second Restatement, incorporating a hybrid of the principal academic theories, was assembled during this period, accelerating and amplifying the changes.<sup>6</sup> Almost overnight, the seemingly stable order governing jurisdictional allocation among states had been destroyed, thanks in large measure to a vocal and determined group of scholars.

The doctrinal transformation instigated by the legal academy has come to be called the “Conflicts Revolution,”<sup>7</sup> but in some sense this is a misnomer. If a revolution is the replacement of one regime with another

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<sup>2</sup> See Peter Hay et al., *Conflict of Laws* 78 (5th ed. 2010) (“It is generally believed that academic commentators have had a greater influence in the development of conflicts law than of any other branch of American law.”).

<sup>3</sup> Cf. *id.* at 92 (claiming “methodology rarely drives judicial decisions” in conflicts cases).

<sup>4</sup> See Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 *Iowa L. Rev.* 1125, 1130–31, 1138–39 (2010).

<sup>5</sup> See *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979) (stating that a canvas of First Restatement alternatives “reveals almost as many theories as there are theorists”).

<sup>6</sup> See Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 *Md. L. Rev.* 1248, 1277–78 (1997).

<sup>7</sup> The phrase apparently originated in Albert A. Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 *Harv. L. Rev.* 377, 387 (1966).

er,<sup>8</sup> it might be more proper to speak of the conflicts half-revolution. Although the First Restatement was toppled as the reigning system for resolving conflicts of law across the United States, no successor ever ascended to its imperial throne. Today no more than a plurality of states purport to have adopted the Second Restatement,<sup>9</sup> and the Restatement is sufficiently pliable that a simple headcount almost certainly overstates the similarity among its nominal adherents.<sup>10</sup> The remaining states practice a potpourri of conflicts methods drawn from different academic theories.<sup>11</sup> The unity that once characterized conflict of laws in the United States has vanished, seemingly for good.

Curiously, however, consensus—and not just consensus, but the old consensus—still prevails in one major area of conflict of laws: the rules applicable to property questions. Under traditional conflict-of-laws doctrine, issues of both real and personal property law are usually resolved under the law of the place where the property in question is located. This principle, the so-called *situs* rule, continues to command nearly universal adherence, notwithstanding the upheaval that conflicts doctrine underwent during the twentieth century and the diversity that characterizes it today.<sup>12</sup> By and large, the Conflicts Revolution simply never made it to property.<sup>13</sup>

This certainly is not because of any neglect by the revolutionary vanguard. The *situs* rule has been denounced as irrational, anachronistic, crude, dishonest, and downright nefarious.<sup>14</sup> Conflicts revolutionaries, some already inclined to condemn the First Restatement in Freudian

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<sup>8</sup> See Concise Oxford English Dictionary 1232 (Catherine Soanes & Angus Stevenson eds., 11th ed. rev. 2008) (defining “revolution” as “a forcible overthrow of a government or social order, in favour of a new system”).

<sup>9</sup> See Hay et al., *supra* note 2, at 72; cf. *id.* at 88 (noting that “classifying a state into a particular methodological camp is by no means an exact science”).

<sup>10</sup> See Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 *Notre Dame L. Rev.* 1821, 1869 (2005) (stating that “the Second Restatement’s application can vary so much from court to court as to virtually amount to distinct approaches”).

<sup>11</sup> For an overview, see Hay et al., *supra* note 2, at 78–121.

<sup>12</sup> See Symeon C. Symeonides, *Exploring the “Dismal Swamp”: The Revision of Louisiana’s Conflicts Law on Successions*, 47 *La. L. Rev.* 1029, 1091 (1987) (“Even after the so-called revolution which has swept away most other rules in American conflicts law, the *situs* rule continues to be taken for granted as if in the natural order of things.”).

<sup>13</sup> A few other traditional conflicts rules have also proved fairly resistant. See *infra* Section V.C.

<sup>14</sup> See *infra* note 52 and accompanying text.

terms,<sup>15</sup> intimated the situs rule was explicable only by psychoanalysis; they derided it as the “land taboo”<sup>16</sup>—an epithet that seems to have outlived Freudian psychotherapy itself.<sup>17</sup> At the height of the Conflicts Revolution, the *Stanford Law Review* published a four-part series of articles criticizing the rule.<sup>18</sup> Nearly half a century later, denunciations continue to appear, the passage of time and intransigence of courts having done little to discourage critics or erode their confidence in the rule’s defectiveness.<sup>19</sup> The latest edition of the leading American conflict-of-

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<sup>15</sup> See, e.g., Ehrenzweig, *supra* note 7, at 396–97; see also Jerome Frank, *Law and the Modern Mind* 48–57, 202–03 (1949) (describing legal perspective represented by Joseph Beale, the First Restatement’s reporter, as “legal fundamentalism” and opining that as “society relinquishes the cruder forms of the anthropomorphic God-concept,” eventually “the Law is looked to as a substitute for the infallible Father-Judge of childhood”).

<sup>16</sup> See, e.g., Brainerd Currie, *Ehrenzweig and the Statute of Frauds: An Inquiry into the “Rule of Validation,”* 18 *Okl. L. Rev.* 243, 317 (1965). The phrase was coined by Albert Ehrenzweig, see Albert A. Ehrenzweig, *Conflict of Laws* 190 (1959), and its psychoanalytic connotations were no accident. Ehrenzweig’s general view was that “as the natural sciences were compelled to begin anew after Copernicus and Darwin, other sciences must now begin anew after Freud—begin to face the demands of an age which dares to look below the surface of the mind,” and he concluded that “[e]ven in such seemingly academic fields as conflicts law, a psychological inquiry into the ‘land taboo’ . . . may produce surprising and valuable results.” Albert A. Ehrenzweig, *Psychoanalytical Jurisprudence: A Common Language for Babylon*, 65 *Colum. L. Rev.* 1331, 1343, 1351 (1965) (footnote omitted). On the concept of “taboo” in Freudian analysis, see generally Sigmund Freud, *Totem and Taboo: Resemblances Between the Psychic Lives of Savages and Neurotics* 30–34 (A.A. Brill trans., 1918).

<sup>17</sup> One leading casebook, for instance, includes a subchapter entitled simply, “The Land Taboo.” David P. Currie et al., *Conflict of Laws: Cases—Comments—Questions* 517 (8th ed. 2010). On the abandonment of Freudian psychoanalysis in medical psychiatry, see Edward Shorter, *A History of Psychiatry: From the Era of the Asylum to the Age of Prozac* 145–81, 239 (1997).

<sup>18</sup> See Moffatt Hancock, *Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws: The Disadvantages of Disingenuousness*, 20 *Stan. L. Rev.* 1, 38 (1967) [hereinafter Hancock, *Conceptual Devices*]; Moffatt Hancock, *Equitable Conversion and the Land Taboo in Conflict of Laws*, 17 *Stan. L. Rev.* 1095, 1124–25 (1965); Moffatt Hancock, *Full Faith and Credit to Foreign Laws and Judgments in Real Property Litigation: The Supreme Court and the Land Taboo*, 18 *Stan. L. Rev.* 1299, 1317–18 (1966); Moffatt Hancock, “In the Parish of *St. Mary le Bow*, in the Ward of *Cheap*,” 16 *Stan. L. Rev.* 561, 590, 611–12 (1964) [hereinafter Hancock, *Mary le Bow*].

<sup>19</sup> See, e.g., Hay et al., *supra* note 2, at 73 n.63, 77, 1289; Russell J. Weintraub, *Commentary on the Conflict of Laws* 573–627 (6th ed. 2010); Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 *Yale L.J.* 72, 106–07 (2005); William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 *Ind. L.J.* 417, 425–27 (2000). For a sampling of earlier criticisms, see William F. Baxter, *Choice of Law and the Federal System*, 16 *Stan. L. Rev.* 1, 15–17 (1963); Peter Hay, *The Situs Rule in European and American Conflicts Law—Comparative Notes*, in *Property Law and Legal Education: Essays in Honor of John E. Cribbet* 109, 109, 117 (Peter Hay & Michael H. Hoe-

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laws treatise, for instance, adds a new section listing reform of the situs rule as the number one reason to commission a third conflict-of-laws restatement.<sup>20</sup>

Trumpet blasts no stronger than these long ago brought the walls of the traditional conflicts edifice tumbling down. Yet the situs rule remains, a citadel of First Restatement orthodoxy amid the rubble of the old order. Given the receptiveness to academic guidance courts have otherwise exhibited when it comes to conflict of laws, the resilience of the situs rule is something of a mystery.<sup>21</sup> The insinuation behind invocations of the “land taboo” is that the rule survives as a kind of primitive superstition: Judges have hesitated to deviate from the situs rule because land, and, to a lesser extent, property more broadly, is a sacred and venerable thing, and the laws that govern it must therefore be treated as immutable.<sup>22</sup>

This is hardly a satisfying account. American property law has itself been influenced by legal realism and similar developments.<sup>23</sup> In an in-

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flich eds., 1988); Robert A. Sedler, *Moffatt Hancock and the Conflict of Laws: An American-Canadian Perspective*, 37 U. Toronto L.J. 62, 87–91 (1987); Symeonides, *supra* note 12, at 1052–53 (1987); Robby Alden, Note, *Modernizing the Situs Rule for Real Property Conflicts*, 65 Tex. L. Rev. 585, 585 (1987); see also *supra* note 18.

<sup>20</sup> Hay et al., *supra* note 2, at 77; see also Richman & Reynolds, *supra* note 19, at 424; Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 Ind. L.J. 437, 443 (2000) (“The time for debunking the ‘situs taboo’ is simply long overdue, and a new restatement can provide the opportunity for so doing.”).

<sup>21</sup> See Alden, *supra* note 19, at 586 (“Inexplicably, the situs rule has survived this revolution. Why this solitary territorial rule has survived is unclear . . .”).

<sup>22</sup> See Janeen M. Carruthers, *The Transfer of Property in the Conflict of Laws: Choice of Law Rules Concerning Inter Vivos Transfers of Property* 34–35, 229 (2005) (asserting the rule is “quasi-sacred” and “quasi-religious” and that any proposal for alteration would be “tantamount to conflicts heresy”); Weintraub, *supra* note 19, at 537, 573, 576, 592 (referring to the “situs myth that has infected common law countries,” discussing its “almost mystical acceptance” by courts, attacking the view that the rule is “written in heaven,” and labeling it a “false dogma”); Symeonides, *supra* note 12, at 1052–53 & n.94 (noting academic efforts to “demystify” situs rule and concluding that “tradition, or what has been aptly called a ‘taboo,’ is the only explanation for [the] anomaly” of its survival); Alden, *supra* note 19, at 587 (considering “some ancient affinity states have for land” a possible explanation for the rule’s persistence); see also Brainerd Currie, *Selected Essays on the Conflict of Laws* 427, 688 (1963) (lamenting that “the magic of ‘situs’ as regulating the incidence of law has not been dissipated” and calling for “a new age of reason” in conflict of laws, an “area of superstition and sorcery”).

<sup>23</sup> See Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 Seattle U. L. Rev. 617, 634–38 (2009) (reviewing Thomas W. Merrill & Henry E. Smith, *Property: Principles and Policies* (2007)); see also Gregory S. Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought 1776–1970*, at 311–51 (1997); Mor-

dustrial and increasingly knowledge-based economy, moreover, the sacred status of land just is not what it used to be—nor, for that matter, is the situs rule restricted to real property matters. And there is something else worth noticing: The idea that there should be a single institutional structure with exclusive authority to administer property-like entitlements seems to develop spontaneously in areas quite far removed from land. Internet domain names and telephone numbers, for instance, are each in the hands of specialized bodies with exclusive jurisdiction to assign them.<sup>24</sup> Certain procedural contexts involving competing claims to a particular asset also seem to entail what might be considered an analogous sort of exclusivity.<sup>25</sup> In fact, the situs rule has some doctrinal features that were peculiar even before the Conflicts Revolution—it turns out conflict of laws has always approached property in a rather unusual way.<sup>26</sup> Could it be that the situs rule reflects something special about property, and not just an uncritical traditionalism?

That possibility is more plausible today than it might once have appeared. In recent years, there has been renewed attention to the role property plays within the system of basic private law and to the way property works as an institution.<sup>27</sup> A central idea in much of this scholarship is the effect of the “in rem” character of property rights—the fact that property rights are said to be “good against the world.”<sup>28</sup> These accounts stress the ways that property’s formal structure sets it apart from other areas of law, the special difficulties arising from that structure, and the characteristic responses to those problems that property law adopts.<sup>29</sup>

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ton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* 145–67 (1992).

<sup>24</sup> See *infra* note 221.

<sup>25</sup> See *infra* notes 212–20 and accompanying text.

<sup>26</sup> See *infra* note 44 and accompanying text.

<sup>27</sup> See, e.g., Symposium, *The New Private Law*, 125 *Harv. L. Rev.* 1640 (2012); Symposium, *New Dimensions in Property Theory*, 160 *U. Pa. L. Rev.* 1853 (2012).

<sup>28</sup> See J.E. Penner, *The Idea of Property in Law* 25–31, 80 (1997); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 *Colum. L. Rev.* 773, 784, 787–88 (2001); Henry E. Smith, *Property as the Law of Things*, 125 *Harv. L. Rev.* 1691, 1702–14 (2012); see also Robert C. Ellickson, *Two Cheers for the Bundle-of-Sticks Metaphor, Three Cheers for Merrill and Smith*, 8 *Econ J. Watch* 215, 218–19 (Sept. 2011), <http://econjwatch.org/articles/two-cheers-for-the-bundle-of-sticks-metaphor-three-cheers-for-merrill-and-smith>. For more on the literature of rights in rem, see sources cited *infra* notes 61–64.

<sup>29</sup> See, e.g., Henry E. Smith, Introduction, *in* *Research Handbook on the Economics of Property Law* 1, 1 (Kenneth Ayotte & Henry E. Smith eds., 2011) (“More recent economic analysis of property law has begun to address what is special about property.”); see also

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One consequence of these developments has been an emergent challenge to the deconstructionist view of property championed by legal realism and in many ways still dominant in American law, in favor of older understandings—now enriched and reinforced by the lessons of both the critics and the critics' critics.

It is time conflict-of-laws scholarship became equivalently sophisticated in its contemplation of property, and as this Article will argue, a fuller appreciation of property's structure and function offers compelling reasons to adhere to the situs rule and the principles it instantiates. Drawing on insights from the property theory literature and offering further refinements of its own, this Article will show how certain peculiar problems associated with the formal attributes of property support the traditional situs rule. The key is exclusivity and its jurisdictional alter ego, uniformity: Because of property's in rem structure, the prospect that the substantive standard governing a controversy will depend upon the forum where it is litigated creates special conceptual and practical difficulties. Property uses the idea of an allocation as its central organizing idea, and as a result, a property entitlement is meant to be secure against the possibility of someone else holding a property entitlement that is logically incompatible with it. This model elevates the importance of conflict-of-laws uniformity in two ways. First, the structure of property law produces serious coordination difficulties, particularly when it comes to informing individual actors of their rights and obligations—think of a title search—and these would be compounded by the legal uncertainty non-uniform conflicts rules would produce. Second, and more fundamentally, a regime in which different legal regimes make contradictory assignments of rights in the same asset is at odds with the basic idea of a system of allocational rights. In other words, having multiple conflicts rules applicable to the same piece of property undermines the concept of property itself. The situs rule is in turn justified, at least as a general matter, because it is well-suited to facilitate uniformity in a number of ways.

In laying out this argument, I have several goals. My immediate purpose is to defend the special treatment given property questions in American conflict-of-laws doctrine. Academic hostility to the status quo has been overwhelming, and a response taking account of the particulars

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Henry E. Smith, Standardization in Property Law, *in supra*, Research Handbook on the Economics of Property Law, at 148, 157–65.

of property as a legal institution is overdue. Beyond this, however, I hope to provide some insight into property in ways useful to scholars of private law more generally. This Article is ultimately an exercise in what might be called applied property theory.<sup>30</sup> Conflict-of-laws questions provide a useful window into the nature of many basic legal problems, and property is no exception. In building and expanding upon emerging insights in the property literature, the analysis presented here is intended to help theorists better understand property, shedding new light on some unexamined aspects of this great, fundamental, and still-mysterious part of our legal system.

The argument proceeds as follows. Part I provides an overview of the situs rule and the substance of the criticisms that have been made against it. Part II looks at the structure of property and the ways it differs from other private law fields, developing an account of the allocational model used to organize property law. Part III explains why property's allocational structure creates a special need for conflict-of-laws uniformity, noting both the special information-cost and conceptual difficulties that arise when conflicting legal standards simultaneously apply to the same in rem entitlement. Part IV discusses the situs rule's advantages in facilitating uniformity and addresses concerns about the scope of the rule. Finally, Part V steps back to look at the way the in rem idea extends in contexts outside traditional property determinations.

## I. CONFLICT OF LAWS AND PROPERTY

### A. *The Situs Rule*

The basic principle governing prescriptive jurisdiction over property is that property questions are within the exclusive competence of the place where property is located. This Article will refer to that high-level principle as the "situs rule," but it should be understood that the term is shorthand for a set of general ideas and doctrines growing out of them, not a single legal directive equally applicable to all issues.

The situs rule has two components. Part of the rule is an ordinary choice-of-law principle. It calls for the resolution of property questions using the substantive law of the situs of the property in dispute. We may call this the "first-order" component of the rule, the part of the rule that

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<sup>30</sup> Cf. Andreas F. Lowenfeld, *Revolt Against Intellectual Tyranny*, 38 *Stan. L. Rev.* 1411, 1411 (1986) (reviewing Moffatt Hancock, *Studies in Modern Choice of Law: Torts, Insurance, Land Titles* (1984)) (referring to conflict of laws as "applied jurisprudence").



determines which body of substantive law supplies the ultimate rule of decision. Although its reach varies somewhat in different contexts, it typically applies to a wide range of property law questions: the formalities necessary to convey an interest in property, rules concerning the kinds of interests that can be created and transmitted, requirements for adverse possession, land use restrictions, landlord-tenant law, rules for intestate and testate succession, priorities among secured creditors, the creation and effect of servitudes, and so on.

Almost unique for a conflict-of-laws doctrine, the situs rule also has a “second-order” component, in that it prescribes which jurisdiction’s conflict-of-laws rules should be used in the first place. Ordinarily, the applicable conflict-of-laws rule in a given dispute is keyed to the identity of the forum hearing the dispute. A forum simply applies its own conflicts rules, and since a cause of action can generally be heard in any court where the requirements of personal jurisdiction can be satisfied, of which there are typically at least a handful, the identity of the forum is the name of the game. But the situs rule departs from this, offering not only a run-of-the-mill conflict-of-laws rule, but also a kind of conflict-of-conflict-of-laws rule. Rather than the forum’s conflict-of-laws rules, the second-order component of the situs rule effectively results in the application of the conflicts rules of the place where the property is located. It does this in two different ways. In its stronger form, it entails a limitation on adjudicative jurisdiction, prohibiting the courts of any state other than the situs from adjudicating a property dispute.<sup>31</sup> The situs then uses its own conflicts rules.<sup>32</sup> In other situations, however, non-situs courts are permitted to resolve property issues, but the second-order component requires that they apply the situs’s conflicts rules in doing so. This maneuver, in which one state uses another’s conflicts rules, is known as “renvoi.” In the context of the situs rule, it essentially tells non-situs courts to imitate a situs court and reach whatever result they think a situs court would reach—if the situs would apply the law of State X, then all other courts should do the same.

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<sup>31</sup> This is primarily because a state is said to have no “in rem” jurisdiction over property situated elsewhere. See *infra* notes 35 & 40; see also Restatement (Second) of Conflict of Laws § 87 (1971) (noting traditional policy of refusing to hear cases involving claims for damages resulting from trespass to nonsitus property).

<sup>32</sup> This corresponds with the notion of “hidden renvoi” (*versteckte Rückverweisung*) developed in some international, particularly German, conflicts decisions. See Gerhard Kegel, *Internationales Privatrecht* 252–53 (1987).

Putting the two pieces of the rule together, the situs rule creates a regime in which the situs gets to decide which state's substantive law supplies the ultimate rule of decision, and the situs then ordinarily selects its own substantive law. Thus, to give a concrete illustration, the Second Restatement provides that:

(1) Whether a conveyance transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs.

(2) These courts would usually apply their own local [that is, substantive] law in determining such questions.<sup>33</sup>

The first-order component of the situs rule is logically subordinate to the second-order component, but since situs conflicts rules typically choose situs property law, there is very little daylight between the two parts of the situs rule as a practical matter.<sup>34</sup>

The situs rule is most robust where real property is concerned. It has long been held, arguably as a matter of constitutional law, that only a situs court has jurisdiction to determine title to situs land.<sup>35</sup> When non-situs courts do have occasion to consider questions involving situs land, they are generally supposed to use situs conflicts rules,<sup>36</sup> which almost always then look to situs substantive law,<sup>37</sup> but in some cases simply apply situs law without stopping to ask whether the situs would do the same.<sup>38</sup>

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<sup>33</sup> Restatement (Second) of Conflict of Laws § 223 (1971).

<sup>34</sup> The first- and second-order components of the situs rule are independent of one another, however. On some questions, situs conflicts rules are used but situs substantive law is not. See e.g., *id.* § 236 cmt. a (offering examples such as the effect of an agreement waiving rights to inherit real property, which the situs might decide according to choice-of-law principles for contract questions). There are also a number of situations in which states simply apply situs substantive law without asking whether the situs would do the same. See *infra* note 38. That said, since all states, including the situs, tend to select situs substantive law in such cases, the second-order component's effects are usually achieved as a practical matter even when it does not formally apply.

<sup>35</sup> See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 235 (1998); *Durfee v. Duke*, 375 U.S. 106, 108 (1963); *Fall v. Eastin*, 215 U.S. 1, 11 (1909); *Clarke v. Clarke*, 178 U.S. 186, 195 (1900).

<sup>36</sup> See Restatement (Second) of Conflict of Laws §§ 223–26, 228, 230–42, 277–82 (1971).

<sup>37</sup> See *id.*

<sup>38</sup> These seem to be situations where there is no need to apply situs conflicts rules because there is essentially no possibility the situs would apply any law other than its own. See *id.* §§ 227 (adverse possession), 229 (foreclosure validity and effect), 243 (escheat).

For chattels, the situs rule is still the basic default, although its domain is more qualified. Situs substantive law is used for many questions concerning title to property, but there are some notable exceptions.<sup>39</sup> The situs rule's second-order component may also be less potent where chattels are concerned. The extent to which non-situs courts are deprived of adjudicative jurisdiction over chattels is somewhat unclear.<sup>40</sup> Renvoi is endorsed by the Second Restatement in a number of contexts involving personal property,<sup>41</sup> but somewhat fewer than with land.<sup>42</sup> Earlier versions of the Uniform Commercial Code incorporated renvoi, but more recent revisions have eliminated it (although largely on grounds of redundancy, given universal adoption of the relevant conflicts provisions of the Code).<sup>43</sup>

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<sup>39</sup> See Michael S. Finch, Choice-of-Law and Property, 26 *Stetson L. Rev.* 257, 271, 275 (1996) (stating that “the situs rule for personal property is often trumped by other choice-of-law rules,” most notably marital property and succession issues). For security interests in tangible collateral, the Uniform Commercial Code uses situs law to determine whether an interest has been perfected, the effect of the determination, and questions of priority, except that the question whether a nonpossessory security interest has been perfected is determined using the law of the location of the debtor. See U.C.C. § 9-301(1)–(3) (2011). See also Ingrid Michelsen Hillinger & Michael G. Hillinger, 2001: A Code Odyssey (New Dawn for the Article 9 Secured Creditor), 106 *Com. L.J.* 105, 125–26 (2001).

<sup>40</sup> Much litigation over chattels arises in proceedings that may not entail a determination of interests in the chattel binding on third parties, such as an action seeking damages for conversion, and that therefore would not be subject to jurisdictional limits. As a blackletter statement, however, there is reason to believe that in rem (including quasi in rem) jurisdiction over chattels requires “the presence of the subject property within the territorial jurisdiction of the forum State.” *Hanson v. Denckla*, 357 U.S. 235, 246 (1958); *id.* (remarking that “[t]angible property poses no problem for the application of this rule”). See also Restatement (Second) of Conflict of Laws § 60 (1986 Revisions); Restatement (Second) of the Law of Judgments § 43 (1982); *id.* § 6 cmts. c & e. In *Shaffer v. Heitner*, 433 U.S. 186, 187 (1977), the Supreme Court concluded the due process “minimum-contacts” requirement for the exercise of adjudicative jurisdiction is not satisfied by territorial presence of property when the property is not the subject matter of litigation and the underlying cause of action is not related to the property. *Id.* at 207–09, 213. Whatever the reach of that holding, it does not speak to the question of whether the presence of property is a necessary, as opposed to a sufficient, condition for the exercise of in rem jurisdiction over property, either as a matter of constitutional law or otherwise.

<sup>41</sup> See, e.g., Restatement (Second) of Conflict of Laws §§ 245, 248–49, 253, 255. The Second Restatement endorses renvoi in connection with succession to personal property, but calls for the application of the conflicts rules of the decedent's domicile, rather than the situs of property. *Id.* §§ 260–63, 264(2), 269, 274–75.

<sup>42</sup> See, e.g., *id.* § 251.

<sup>43</sup> See Hans Kuhn, Multi-State and International Secured Transactions Under Revised Article 9 of the Uniform Commercial Code, 40 *Va. J. Int'l L.* 1009, 1035–38 (2000).

*B. Peculiarities and Criticisms*

In three significant respects, the situs rule is quite unusual as a conflict-of-laws principle. First, the situs rule is that rarest of breeds, an essentially uniform American conflict-of-laws doctrine. Second, the situs rule's second-order component has always marked the rule as exceptional: Both aspects of the second-order component—restrictions on the adjudicative jurisdiction of non-situs courts and the use of renvoi—are very rare in American law and were so even in the pre-Conflicts Revolution era of the First Restatement.<sup>44</sup> But the third and arguably most striking feature of the situs rule is its sheer persistence, for it would be hard to imagine a clearer instance of the approach to conflict-of-laws issues that so many states repudiated in the Conflicts Revolution.

The core criticisms of the traditional approach to conflict of laws represented by the First Restatement are essentially two-fold.<sup>45</sup> First, the traditional approach can produce what may seem like arbitrary results inasmuch as the law selected to govern a given dispute usually turns on a single territorial occurrence, without any consideration of the overall picture of jurisdictional connections entailed by the dispute. It is black-and-white, either/or. When the only connection between a state and a dispute is a single “adventitious” or “fortuitous” event and all other connections are with some other state, the results produced by the First Restatement's broad and rather metaphysical theories of jurisdictional allocation may be hard to accept.<sup>46</sup>

Second, the traditional approach is considered defective because it is “jurisdiction-selecting”—it decides between the laws of different states

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<sup>44</sup> See *First Nat'l Bank of Chi. v. United Air Lines*, 342 U.S. 396, 396 (1952); *Hughes v. Fetter*, 341 U.S. 609, 609 (1951); *Tenn. Coal, Iron & R.R. v. George*, 233 U.S. 354, 354–55 (1914); *Atchison, Topeka & Santa Fe R.R. v. Sowers*, 213 U.S. 55, 55–56 (1909). See also Hay et al., *supra* note 2, at 162–64 (“Commentators and most of the cases, both here and in Europe, reject the more general use of renvoi.” (footnotes omitted)); William M. Richman & David Riley, *The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of Its Successor: Contemporary Practice in Traditional Courts*, 56 *Md. L. Rev.* 1196, 1197–200 (1997); Alden, *supra* note 19, at 589.

<sup>45</sup> There are other bases of criticism, but most of these—the First Restatement's supposed abstraction, for instance, or the use of doctrinal “escape devices” by courts in order to avoid unpalatable results—can be seen as either variations upon or derivative consequences of the two more general perceived faults noted here. Richman & Riley, *supra* note 44, at 1198.

<sup>46</sup> See *Babcock v. Jackson*, 191 N.E.2d 279, 284 (N.Y. 1963) (place of tort injury is “adventitious”); *Auten v. Auten*, 124 N.E.2d 99, 102 (N.Y. 1954) (place where contract was made is “fortuitous”). See also Brillmayer & Anglin, *supra* note 4, at 1138–45.

without regard to their substantive content.<sup>47</sup> The most potent challenge to the First Restatement, the method known as governmental interest analysis, grows out of this second critique. Interest analysis teaches that the way to determine whether a particular law applies in a particular case is to examine the law's purpose and determine whether that purpose is implicated by the facts of the case.<sup>48</sup> How does one determine whether that purpose is implicated? According to Brainerd Currie, the method's foremost advocate, most of the time states only have an interest in making the benefits of their laws available to their own citizens or residents.<sup>49</sup> Thus, for example, if one state's tort law provides a defense to liability but that state is not the home of the defendant, the defense should be deemed inapplicable. That the state is the place where the injury occurred—the First Restatement's preferred criterion—is of no relevance because that connection does not give the state an interest in shielding defendants from liability.<sup>50</sup>

The situs rule would thus seem to be the apotheosis of the conflicts methodology that prompted the Conflicts Revolution.<sup>51</sup> It entails a rule-like, single-factor determination and it does not incorporate analysis of the underlying policies reflected in competing state laws. These failings are especially difficult to ignore given the breadth of the situs rule, which uses a single conflicts inquiry for the entire category of issues connected with interests in a given *res*, rather than allowing for a separate conflict-of-laws analysis for any individual issue that happens to arise. The situs rule quite clearly rejects the kind of sensitive, contextual analysis demanded by conflicts reformers. And just to be clear, scholars have not let the point go unnoticed. Indeed, it is difficult to overstate academic hostility to the situs rule.<sup>52</sup> It is said to be among “the most dys-

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<sup>47</sup> See David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 Harv. L. Rev. 173, 173 (1933).

<sup>48</sup> See Currie, *supra* note 22, at 188–89.

<sup>49</sup> See *id.* at 85–86, 89, 292. See also, e.g., Herma Hill Kay, *Comments on Reich v. Purcell*, 15 UCLA L. Rev. 584, 592 (1968).

<sup>50</sup> See, e.g., *Babcock*, 191 N.E.2d. at 284.

<sup>51</sup> See Alden, *supra* note 19, at 586 (opining that the “situs rule leads to exactly the same sort of unjust and inequitable decisions that led to the demise of other territorial rules”).

<sup>52</sup> The situs rule is, for example, “outdated,” “simplistic,” “harsh,” “mechanical,” “irrational,” and “nefarious.” Alden, *supra* note 19, at 597–98, 617. It leads to “uncertainties and confusion,” “circuitry and waste,” “cumbersome procedural dance[s],” and “intellectual[] dishonest[y].” *Id.* at 603, 607. Propped up by “imaginary bogies,” Weintraub, *supra* note 19, at 584, it is at once the “most monolithic,” *id.* at 574, and the “least functional of all the territorial rules.” Russell J. Weintraub, “At Least, To Do No Harm”: Does the Second Restate-

functional of all the territorial rules,”<sup>53</sup> the product of “mystical acceptance,”<sup>54</sup> “fixation,”<sup>55</sup> and “taboo.”<sup>56</sup>

Detractors consider the fact that an item of property is located in a particular state irrelevant to whether that state has a rational interest in the application of its policy in many if not most cases. Thus, for example, Russell Weintraub argues that a situs law benefitting a mortgagor of real property over a mortgagee—a rule that a mortgage is invalid if the mortgage instrument fails to name a specific mortgagee, say, or that gives a mortgagor a post-foreclosure right of redemption—should not be applied if other connections, most especially the mortgagor’s residence, are with a state that does not have such a rule. In his view, the situs’s policy favoring borrowers over creditors “is designed primarily for the protection of situs citizens,” and it would be pointless to apply it when the borrower’s home state does not offer such protection.<sup>57</sup>

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ment of Conflicts Meet the Hippocratic Standard?, 56 Md. L. Rev. 1284, 1309 (1997). It is “[f]estooned with vague sophistries” and “garnish[ed] . . . with superficial, abstract arguments,” including “irrelevant historical considerations” and the “hoariest fallacy of legal thinking.” Hancock, Conceptual Devices, *supra* note 18, at 8, 10, 37. It “produces harsh and inconvenient results,” demands “needless sacrifices,” “obscure[s] the real ground” on which cases are decided, and is “quite unsuitable for a federal nation.” *Id.* at 10, 37, 38. The rule is “obsolete, oversimplified, and crude,” it rests upon “broad and promiscuous formulas” and “misleading maxims,” and it represents a “sterile methodology” and an “intellectual tyranny.” Hancock, *Mary le Bow*, *supra* note 18, at 567, 625, 627. Such condemnations notwithstanding, there have been occasional expressions of sympathy for the rule from some quarters. See Robert C. Ellickson, A Private Idaho in Greenwich Village?, 115 Yale L.J. Pocket Part 5, 8 (2005) (arguing against proposals for choice of law in property because they would entail “the sacrifice of a state’s autonomy to develop and maintain a unique legal environment”); Erin A. O’Hara & Larry E. Ribstein, From Politics to Efficiency in Choice of Law, 67 U. Chi. L. Rev. 1151, 1220–21 (2000) (claiming the situs rule “is not as arbitrary as the critics suggest” because the situs state has a comparative regulatory advantage on issues like land use and because the rule is clear).

<sup>53</sup> Weintraub, *supra* note 52, at 1307.

<sup>54</sup> Weintraub, *supra* note 19, at 573.

<sup>55</sup> *Id.* at 623.

<sup>56</sup> See sources cited *supra* notes 16 & 22. See also Ehrenzweig, *supra* note 7, at 397 & n.86 (discussing “compulsive adherence to a land taboo”); Elihu Schott & Charles Rembar, Note, Choice of Law for Land Transactions, 38 Colum. L. Rev. 1049, 1050–51 (1938) (asserting that because of “psychological forces,” the word “land” is “sacrosanct” and imbued with “magic” and that, as a result, “it is taboo to allow a law other than the law of the land to control questions involving that land”).

<sup>57</sup> Weintraub, *supra* note 19, at 623.

The situs rule has occasionally been criticized on other grounds,<sup>58</sup> but the basic complaint is a straightforward application of the precepts of interest analysis. It is broad and seemingly indifferent to policy concerns or context, instead preoccupied with the location of property assets within a framework of simple territorial borders. As one commentator puts it, “Property, unlike those who have interests in it, does not care about its ownership or the marketability of its title,” and the situs rule is therefore “defective on its face because the relationships relevant for choice criteria are those between sovereigns and people, not those between sovereigns and property.”<sup>59</sup>

## II. THE STRUCTURE OF PROPERTY

Perhaps judicial adherence to the sort of territorialism associated with the First Restatement is simply the relic of a more primitive legal era, sustained by some combination of inertia, linguistic entrancement, and fear of the unknown. But if courts really are so susceptible to such impulses, it is hard to see why they have been willing to refashion conflicts doctrine in virtually every other domain besides property. There is a growing recognition in the private law literature that property is different—not just a separate field marked off from other areas of law by its subject matter, but a body of legal principles with a distinctive set of organizing ideas and forms.<sup>60</sup> Before dismissing the situs rule as backward and benighted, therefore, we should consider whether the unusual way conflict-of-laws problems involving property are handled reflects something unusual about property.

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<sup>58</sup> Some have argued it is inconvenient or inefficient to use situs law to resolve a legal issue applicable to different properties in different states. See Symeon Symeonides, Louisiana’s Draft on Successions and Marital Property, 35 Am. J. Comp. L. 259, 264 (1987). This is a legitimate concern, and one that the doctrine responds to in some circumstances, such as rules for succession to personal property, which is typically governed by the law of the decedent’s domicile. Objections have also been raised where application of the situs rule invalidates attempted property transfers or otherwise appears to frustrate party expectations. See Weintraub, *supra* note 19, at 623. On efforts to respond to the problem of surprise within the confines of the general situs principle, see *infra* note 153.

<sup>59</sup> Baxter, *supra* note 19, at 16. See also Hancock, *Mary le Bow*, *supra* note 18, at 565–66 (“The soil of Texas could not feel aggrieved because its Ohio owners’ testamentary power had been limited.”).

<sup>60</sup> See, e.g., Thomas W. Merrill & Henry E. Smith, What Happened to Property in Law and Economics?, 111 Yale L.J. 357, 358–59 (2001) [hereinafter Merrill & Smith, Happened]. See also generally Penner, *supra* note 28.

*A. The Allocational Model*

The key lies in the structure of property law. Property rights differ from rights arising in other branches of private law in ways that elevate the need for uniform resolution of any given conflict-of-laws issue. To understand these structural differences, it is necessary to begin with a very basic account of what property is and does.

Recent property scholarship has stressed the importance of property's "in rem" structure in explaining how property works and what sets it apart from other legal fields.<sup>61</sup> Theorists J.E. Penner, Henry Smith, and Thomas Merrill, in particular, have sought to demonstrate that "the in rem character of property and its consequences are vital to an understanding of property as a legal and economic institution."<sup>62</sup> These insights are having a significant impact on property scholarship.<sup>63</sup> Yet somewhat surprisingly, the literature has thus far failed to identify with precision what it is that makes property in rem.<sup>64</sup> There is considerable

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<sup>61</sup> See, e.g., Penner, *supra* note 28, at 29–30; Shyamkrishna Balganes, Demystifying the *Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 *Harv. J.L. & Pub. Pol'y* 593, 619–27 (2008); Shyamkrishna Balganes, *Quasi-Property: Like, But Not Quite Property*, 160 *U. Pa. L. Rev.* 1889, 1892 (2012); R.B. Grantham & C.E.F. Rickett, *Property Rights as a Legally Significant Event*, 62 *Cambridge L.J.* 717, 719–47 (2003); James Harris, *Property—Rights in Rem or Wealth?*, in *Themes in Comparative Law* 51, 52 (Peter Birks & Arianna Pretto eds., 2002); David Lametti, *The Concept of Property: Relations Through Objects of Social Wealth*, 53 *U. Toronto L.J.* 325, 334–45 (2003); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *Yale L.J.* 1, 1 (2000) [hereinafter Merrill & Smith, *Optimal Standardization*]; Merrill & Smith, *supra* note 28; Merrill & Smith, *Happened*, *supra* note 60, at 357–59; Smith, *supra* note 28, at 1702–14. While there has been renewed emphasis on the issue of late, the distinctly in rem character of property has long been recognized. See 2 John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* 702–09, 730–40, 773–802 (Robert Campbell ed., London, J. Murray 1885); Jeremy Bentham, *The Limits of Jurisprudence Defined* 164 (Charles Warren Everett ed., 1945); John W. Salmond, *The First Principles of Jurisprudence* 173 (1893). See also Jeremy Waldron, *The Right to Private Property* 106–24 (1988); Kenneth Campbell, *On the General Nature of Property Rights*, 3 *King's C. L.J.* 79, 84–89 (1992); Bernard E. Jacob, *The Law of Definite Elements: Land in Exceptional Packages*, 55 *S. Cal. L. Rev.* 1369, 1377–79, 1393 (1982); Carole Lewis, *Real Rights in Land: A New Look at an Old Subject*, 104 *S. Afr. L.J.* 599, 608–13 (1987); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 *UCLA L. Rev.* 711, 724–31 (1996).

<sup>62</sup> Merrill & Smith, *Happened*, *supra* note 60, at 359; see also Penner, *supra* note 28, at 30.

<sup>63</sup> See Robert C. Ellickson, *The Inevitable Trend Toward Universally Recognizable Signals of Property Claims: An Essay for Carol Rose*, 19 *Wm. & Mary Bill Rts. J.* 1015, 1026 (2011); Lee Anne Fennell, *Property and Precaution*, 4 *J. Tort L.*, no. 2, 2011, at 54; Gideon Parchomovsky & Michael Mattioli, *Partial Patents*, 111 *Colum. L. Rev.* 207, 223 (2011).

<sup>64</sup> For some attempts to grapple with the meaning of in rem-ness and similar qualities of property, see 1 Joseph H. Beale, *A Treatise on the Conflict of Laws* 66–83 (1935); Peter



attention to the effects of in rem-ness, but far less to its content and origins.<sup>65</sup> And because it reveals some crucial aspects of property with implications for the conflict-of-laws analysis, the nature of rights in rem requires a fuller explication.

As a description of property, the term “in rem” is best understood to refer to two significant, and ultimately related, characteristics of property rights: A property right concerns the use of a particular, discrete thing or “*res*” and it is “good against the world.” The first aspect is frequently ignored altogether, with “in rem” essentially taken to mean simply that the legal relationship in question somehow affects all other people.<sup>66</sup> Thus it is common to come upon statements—made even by those who have written about the importance of a *res* to a right in rem—that the en-

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Birks, *An Introduction to the Law of Restitution* 49–50, 377–78 (1985); Penner, *supra* note 28, at 29–30; Walter Wheeler Cook, *The Powers of Courts of Equity*, 15 *Colum. L. Rev.* 37, 39–54 (1915); Arthur L. Corbin, *Jural Relations and Their Classification*, 30 *Yale L.J.* 226, 228–30 (1921); Arthur L. Corbin, *Rights and Duties*, 33 *Yale L.J.* 501, 509 (1924); Shalev Ginossar, *Rights In Rem—A New Approach*, 14 *Isr. L. Rev.* 286, 287–312 (1979); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *Yale L.J.* 710, 712–13 (1917); A.M. Honoré, *Rights of Exclusion and Immunities Against Divesting*, 34 *Tul. L. Rev.* 453, 453–61 (1960); Albert Kocourek, *Polarized and Unpolarized Legal Relations*, 9 *Ky. L.J.* 131, 131 (1921); Albert Kocourek, *Rights in Rem*, 68 *U. Pa. L. Rev.* 322, 322 (1920); C.C. Langdell, *Classification of Rights and Wrongs (Part I)*, 13 *Harv. L. Rev.* 537, 537–38 & n.1 (1900); A.V. Levontin, *Rights in REM etc.—A Response to Professor Ginossar*, 14 *Isr. L. Rev.* 401, 407–08 (1979); F.K.H. Maher, *The Kinds of Legal Rights*, 5 *Melb. U. L. Rev.* 47, 70–71 (1965); Merrill & Smith, *supra* note 28, at 780–89; Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 *Mich. L. Rev.* 239, 293–97 (1994); Jeanne L. Schroeder, *Hegel’s Slaves, Blackstone’s Objects, and Hohfeld’s Ghosts: A Comment on Thomas Russell’s Imagery of Slave Auctions*, 18 *Cardozo L. Rev.* 525, 529–30 (1996). On procedural and remedial usages, see Douglas Laycock, *Modern American Remedies* 843–45 (2d ed. 1994).

<sup>65</sup>In their most sustained discussion, Merrill and Smith describe rights in rem as those that bind a large number of duty-holders and that bind duty-holders whose individual identity is “indefinite.” See Merrill & Smith, *supra* note 28, at 783–85. By indefinite, they appear to mean that duty-holders are defined in terms of membership in some generic class, rather than by virtue of their individual personal identity. Merrill and Smith also note three other characteristics of rights in rem, though it is unclear whether these are meant to be understood as defining features. First, rights in rem affect duty-holders not by virtue of their relationships with the right-holder but by virtue of their relationship to a thing or other interest associated with the right-holder (bodily security, for instance). See *id.* at 783–87. Second, rights in rem are “two-way” in that all persons owe duties created by rights in rem to a large and indefinite class of persons, inasmuch as many different people hold various in rem rights. And third, rights in rem involve the ability to demand forbearance, rather than positive action, by some other person or persons. *Id.* at 788.

<sup>66</sup>Or even more weakly, that it casts duties on “large and indefinite classes of persons.” See Henry E. Smith, *Modularity and Morality in the Law of Torts*, 4 *J. Tort L.*, no. 2, 2011, at 6 (describing this as “one sense of ‘in rem’”).

titlement not to be assaulted is a “right in rem” simply because it imposes a duty on everyone or that the duty not to assault is a “duty in rem” because it is owed to everyone.<sup>67</sup> As we shall see, however, while the concept of a *res* is potentially more protean than everyday usage might suggest,<sup>68</sup> it nevertheless has important analytical consequences and is an essential feature of the way property entitlements are structured.<sup>69</sup>

The “good against the world” aspect of property has not been ignored, but it has been misunderstood. It is frequently taken to mean that a property right constrains the action of everyone who is not the right-holder.<sup>70</sup> While it is both true and important to the institution of property that property rights generally do entail duties to which most if not everyone else is subject, this is nevertheless an incomplete and inadequate account of property’s global scope of application. At the heart of what makes property “good against the world” is that a property right comes at the expense of all other people.<sup>71</sup> A property right may or may not concern the *behavior* of others, but it always concerns the *legal entitlements* of others. The right to use common property, for example, need not entail the imposition of any duties on anybody else. A person may be entitled to use property but, apart from ordinary tort protection against physical injury, have no right to demand that others refrain from interfering with that use. Even such a naked liberty, however, affects all legal actors, actual and hypothetical, because it rules out the possibility that anyone else has a property right obliging the commoner to keep off. Likewise, a landowner does not have the right to exclude the whole world from her land if her neighbors have easements giving them a right of way. Even so, the qualified entitlement she retains affects everyone, neighbors included: Her right to exclude all persons other than her neighbors means no one—neither her neighbors nor anybody else—has the right to license the general public to use the right of way. Essential to what it

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<sup>67</sup> See *id.* at 1.

<sup>68</sup> See *infra* notes 73, 83 and accompanying text. See also *infra* Sections V.B. and V.C.

<sup>69</sup> See *infra* notes 73–82 and accompanying text.

<sup>70</sup> E.g., Thomas W. Merrill & Henry E. Smith, *Property: Principles and Policies* 19 (2012) (“The distinction [between rights *in rem* and *in personam*] concerns who bears the duty to respect the right. An *in rem* right creates duties in a large and indefinite class of others . . .”).

<sup>71</sup> Cf. M. Tulli Ciceronis, 3 *De Finibus Bonorum Et Malorum*, III. xx. § 67, at 107 (James S. Reid trans., London, Cambridge University Press 1883) (remarking that “although the theatre belongs to all, it is right to say that the place which each man has taken belongs to him”).

means to say a property right is in rem, in other words, is that it leaves no room for any other property right with conflicting content. Claims that are mutually exclusive as a matter of fact are likewise mutually exclusive as a matter of law.<sup>72</sup>

Recognizing the nature of property's in rem-ness is important because it helps reveal larger aspects of how property is organized. The in rem shape that property rights take is no accident or idiosyncrasy, as the property literature too often makes it seem, but is instead a consequence of the organizing concepts used to structure property law. The attributes that make property in rem derive from the key fact that property rights are rights of *allocation* or *apportionment*. An apportionment affects the whole world because, whether the portion held by a given person is large or small, the apportionment necessarily comes at the expense of everyone else who might have held it instead. And an apportionment requires that there be something to apportion, hence the *res* whose control is at the heart of property law.<sup>73</sup>

This allocational structure reflects a pervasive concern, if not obsession, in property law with what might be called the problem of limitedness. As noted above, property exists to resolve disputes over the use of individual things. Those disputes arise because when the wishes of two or more people concerning the use of a given thing are mutually incompatible, it is by definition impossible for the thing to satisfy all of their wishes. Limitedness is one of the most elemental features of our universe,<sup>74</sup> and this problem of irreconcilable wishes concerning things is

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<sup>72</sup> The same can be said of the second-order issues pertaining to changes in legal relationships—powers to alter relationships and immunities from alterations by others. If *A* has the legal capacity unilaterally to acquire title to Blackacre, then *B* cannot have the legal capacity to deny *A* the ability to acquire title.

<sup>73</sup> What property really does is to apportion control over the uses of things. One may say that the true *res* in property law is not so much an object in the usual sense but a class of activities, defined by their relation to such an object. Cf. Ernest J. Weinrib, *The Idea of Private Law* 176 (1995) (describing property entitlements as “chunks” of “moral space”). Nevertheless, that property is really about the allocation of control over sets of activities does not mean that “things” in the conventional sense can be dispensed with when we talk about how property works or what it does. The things property law uses to structure its entitlements provide readily comprehended symbols of what would otherwise be rather complicated packages of activities. On the advantages of using things to define property entitlements, see *infra* note 83.

<sup>74</sup> Nothing can simultaneously be *X* and not *X*. See Aristotle, *Metaphysics*, Book IV, ch. 4, 1008b3-32 (Hippocrates G. Apostle trans., 4th prt. 1975) (developing the principle of non-contradiction and the law of the excluded middle). To be or not to be is indeed the question—“both” is not an option.

the manifestation of it that inspires the law of property.<sup>75</sup> Actual, practical control over a *res*, what might be called control-in-fact,<sup>76</sup> is a zero-sum game: One person's ability to influence what is done with a thing means that, to that extent, all others necessarily lack the ability to influence what is done with it. And the more control of a given thing becomes the object of multiple people's desires and the more it becomes difficult to obtain substitutes for that control, the more the trade-off inherent in the universe's finite nature will generate conflict.

The law responds to this basic problem and the conflicts it generates by creating a system of legal rules that mimics the limited nature of individual things, which is what we call the law of property. Property law translates the concept of control observable in the external world into a legal idea. Like control-in-fact, legal control is also a zero-sum game: One person's right to determine the lawfulness of a particular use of a thing comes at the expense of everyone else.<sup>77</sup> Property takes the idea of control, and the zero-sum principle associated with it, quite seriously. In contract law, *A* can promise *B* that no gas station will be built on Blackacre, promise *C* that a gas station will be built on Blackacre, and be considered legally obligated in both instances, with at least an obligation to pay damages to the party whose promise is broken. But *A* cannot give property rights to both *B* and *C* incorporating the respective promises made to them. One of property's core premises is that conflicting property rights cannot exist; any *prima facie* conflict must be resolved in order to ascertain where property rights truly lie. In this way, property is made to correspond to the limitations of a finite reality in a way fields like contract are not.

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<sup>75</sup> This is related to the problem of "rivalry," but broader, at least as the term seems conventionally to be understood. The problem of irreconcilable wishes and the mutually exclusive nature of control rights is present even for goods considered to be largely non-rival in character.

<sup>76</sup> Physical control over a physical thing, for example.

<sup>77</sup> This is not to say property is a zero-sum game from the standpoint of social welfare or even individual well-being, only that in analytic terms any property entitlement comes at the expense of everyone else. Cf. Laura S. Underkuffler, Property as Constitutional Myth: Utilities and Dangers, 92 Cornell L. Rev. 1239, 1247 (2007) ("If the law protects the enjoyment of a particular resource by one person, then it denies the enjoyment of that same resource by another. . . . In the context of finite resources, property is a zero-sum game.").

*B. Four Structural Consequences*

This design has a number of follow-on consequences for the character of property law. Four principal examples will be discussed here: its authoritativeness, its complexity, its impersonal and thing-centered way of framing entitlements, and its use of reification and other-complexity reducing devices. Part III shows how each of these contributes to the need for uniformity or otherwise supports use of the situs rule. Before examining their implications for conflict of laws, however, the nature of these features must be understood on their own terms.

*Authoritativeness.* Because property is meant to account for and to reconcile all conflicting claims upon a resource, its determinations have a particularly authoritative quality, which may hint at the reasons for setting up a system of in rem entitlements in the first place. Indeed, the whole orientation of property seems to incline toward a kind of sturdy dependability; in a number of ways, it appears designed to avoid producing absurd, impossible, or compromised results. Property is bottom-up: it arranges legal rights around particular sites of human conflict, framing entitlements in terms of actual things rather than abstract personal obligations (such as *A*'s duty to pay *B* \$100).<sup>78</sup> And property is bottom-line: it accounts for all potentially competing claims operating at that point and awards entitlements that are reliable on their own terms, neither overlapping with one another nor, in principle, failing to account for any situation that might arise.<sup>79</sup> In a similar spirit, property law exhibits a strong tendency to create only duties of abstention, rather than duties requiring affirmative conduct—affirmative duties being more likely to clash with other rights or otherwise turn out to be impossible to carry out.<sup>80</sup> The consistent theme that manifests itself again and again in property law is definitiveness and dependability. Property seeks to supply solutions to human conflict that can, as it were, be taken to the bank.<sup>81</sup>

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<sup>78</sup> One cannot have a property right in “some acre” of land, only Blackacre, Whiteacre, or the like. See James Y. Stern, *Property's Constitution*, 101 *Calif. L. Rev.* 277, 284 (2013).

<sup>79</sup> Property's aspirations for completeness can be seen in, for example, the idea of the “residuary right,” see A.M. Honoré, *Ownership*, in *Oxford Essays in Jurisprudence* (First Series) 107, 126–28 (A.G. Guest ed., 1961), and the tendency reflected in the *ad coelum* doctrine to imagine real property assets as having no vertical boundary. See also *infra* note 204 (discussing escheat).

<sup>80</sup> See Merrill & Smith, *supra* note 28, at 788–89.

<sup>81</sup> Cf. Larissa Katz, *The Concept of Ownership and the Relativity of Title*, 2 *Jurisprudence* 191, 192 (2011) (stating that “most people think finality is an important characteristic of ownership”).

*Complexity.* If authoritativeness is the upside of property's in rem structure, complexity is the downside. The in rem nature of property rights results in a high degree of interconnectedness, and this makes property law an inherently complicated proposition. This complexity has two basic dimensions, which we might think of as horizontal and vertical. The horizontal side of things has to do with the operation of property law among legal actors at any given moment in time and is a direct consequence of the zero-sum, allocational structure of property law. In a zero-sum system, each part is related to and has the potential to affect every other.<sup>82</sup> And because the domain of property is vast, there are many parts with many potential cross-cutting effects. Property deals with the activities of all persons; the activities with which it deals are essentially all those not otherwise forbidden by law that are considered "uses" of individual things; and the things whose uses it covers embrace, just for starters, virtually all physical space and physical objects. The point is that everyone's property relationships affect everyone else, in numerous ways.

As for the vertical side of things, property is also interconnected across time. In theory, a zero-sum principle does not demand this—rights could be reallocated afresh every instant without regard for how they were allocated the moment before—but for obvious reasons that is not what happens. As a consequence, property rights are generally path-dependent: The content of a property right and the identity of the person who holds it are shaped by prior allocations and affect future ones. Property, in other words, is not only a web of enormous breadth but also a chain of at least potentially infinite length. As we shall see, the combination of these two forms of interconnectedness produces potentially overwhelming levels of complexity for human beings attempting to navigate the system.

*Thing Centrism.* Property law is concerned with rights to things, in the sense of particular assets, resources, entities, or what you will—anything we might consider a *res*. The zero-sum organization of property is facilitated by property's inversion of the usual form of legal rights: Property law puts the subject matter of the right first, and then analyzes personal entitlements in relation to it. Rather than starting with *A* and *B*

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<sup>82</sup> Cf. Smith, *supra* note 28, at 1700–01 (noting that property's "modular" or "nearly decomposable" design helps ensure that property is "not a system in which anything can in principle relate to anything else").

and asking what they owe each other, as other areas of law like contract do, it starts with Blackacre and asks who has what rights in it. By framing the entitlement as a right to some particular subject matter as such, rather than a right against a particular person, the effect on the legal position of everyone else follows fairly naturally. The thing-centered nature of property law arises because the subject matter at the center of a property entitlement is a *res*—or more precisely, a set of activities bearing a particular relation to the *res*, for which the *res* serves as a convenient symbol and a clever device for delineating the scope of a person's entitlement.<sup>83</sup> That is why property is the “law of things.”<sup>84</sup>

This thing-centered structure tends to depersonalize property relations. As the focal point of different property relationships, the *res* places a sort of conceptual barrier between different actors and provides a common, objective benchmark that allows their relationships to be compared against one another. The duties of strangers to stay off property are owed to the office of the owner of property, and the person who benefits from that duty does so by virtue of holding the office of ownership. Duty-holder and right-holder have legal relationships to the property; the relationship between them as persons is analyzed in terms of the relationship between their relationships.

Incidentally, this helps make property “in rem” in other senses in which the term is used. Sometimes, for instance, the in rem character of property law is equated with the ability to transfer rights and the related

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<sup>83</sup> This synecdoche is ingenious for a number of reasons. The use of things divides the subject matters of different entitlements in a way that covers the gamut of different activities, helps avoid delineating entitlements in a way that would make them overlap (crucial for a zero-sum system), tends to keep entitlements on a human scale, and supplies sufficient flexibility to permit the entitlement to be extended to novel contexts, divided, combined, and folded back on themselves. See Smith, *supra* note 28, at 1712–13; see also Stern, *supra* note 78, at 37–39 (discussing ownership of entitlements). It draws upon an intuitive, commonly understood way to understand different sets of activities—while there are always hard cases, in most situations even a young child can generally distinguish, first, between one thing and another (with chattels, at least), and, second, between those activities that constitute “uses” of the thing and those that do not. See also *infra* note 132; cf. Robert C. Ellickson, *Property in Land*, 102 *Yale L.J.* 1315, 1328–29 (1993) (remarking that a “four-year-old can understand the convention that one does not cross a marked boundary”). Finally, at least as a first cut, the use of things also seems to do a decent job of allowing entitlement holders to capture the benefits of their activities while avoiding spillover effects for others.

<sup>84</sup> See Smith, *supra* note 28, at 1691; see also 2 William Blackstone, *Commentaries* \*1; Geoffrey Samuel, *Roman Law and Modern Capitalism*, 4 *Legal Stud.* 185, 192 (1984) (describing Roman law's three-part division into Obligations, Things, and Actions).

idea that benefits and burdens run to successors.<sup>85</sup> The use of a thing as the starting point in framing property entitlements makes it easier to conceptualize these privity-based aspects of property law. Something similar can be said about property's propensity to impose duties upon the world, which is so often conflated with its in rem form. Unless the subject matter of the entitlement is described as encompassing the activities of some people and not others, an entitlement will operate upon all others. Authority over Blackacre as such implies authority over uses of Blackacre irrespective of the identity of the user. In theory and in practice, these two features of property associated with the idea of in remness are more contingent than the zero-sum principle, in the sense that they are not necessary attributes of the property form, but they are nevertheless both common and important and they do relate to the idea of allocation by virtue of property's use of "things" as the starting point in the delineation of entitlements.

*Reification and Other Complexity-Reducing Devices.* Because the structure of property law is necessarily complicated, property law is shaped by a number of strategies that serve to simplify the way the system works and make it as manageable as possible.<sup>86</sup> A few of these will be discussed later, but one merits special attention at the outset because of its impact on the basic conceptual machinery of the property system. There is a strong tendency to reify legal relations in property law—which adds to property's already considerable sense of thing-ness. The individual allotment of control over a *res* that a property entitlement provides, as well as the entirety of all control rights in the *res*, are viewed as things themselves. In a sense one may say that the law looks at property issues stereoscopically—from the standpoints of many different people—and thereby comes to see property relations in three dimensions.<sup>87</sup> A property entitlement is imagined to have a kind of independent existence and reality, with a consistent meaning from person to person and a continuity across time. We speak as though there is such a thing as "title" to Blackacre, which existed yesterday and will exist to-

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<sup>85</sup> Birks, *supra* note 64, at 49–50 (discussing "exigibility" of property entitlements as the ability to trace proprietary rights to remote hands); see also Peter Birks, 1 *English Private Law* xxxviii (2000).

<sup>86</sup> See *supra* notes 113–16 and accompanying text.

<sup>87</sup> I do not mean three-dimensional in the sense used in Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 29 *Ariz. St. L.J.* 1075, 1076 (1997), where that description is used to refer to three separate analytic components of property.



morrow.<sup>88</sup> And we imagine that what we do to title today will affect title tomorrow, though not yesterday, endowing it with the properties of a material object. The “bundle of sticks” metaphor commonly used by lawyers to describe property not only suggests that property rights resemble physical things but that the operation of property law should be understood as a series of seemingly physical events—the movement of bundles between persons or of sticks between bundles.

Reification in law is often criticized,<sup>89</sup> in many cases perhaps with justification,<sup>90</sup> but it is indispensable to the system of property. Perhaps its most important benefit is that it gives property relationships the zero-sum character of the objects they concern such that a given property problem is accounted for by one, and only one, property right. Two different people cannot each be the sole owner of the same property, and while title can be divided and dispersed, the individual fragments can neither exceed the whole from which they derive nor fail, collectively, to add up to it.<sup>91</sup> Treating property rights like physical things also supports other useful organizing principles for property disputes. The power to transfer a property right from one person to another generally resides only with the person who currently holds the right,<sup>92</sup> much the way a person can acquire a physical thing only from the person currently in physi-

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<sup>88</sup> Karl N. Llewellyn, Wesley Hohfeld’s most devoted student, sought to minimize the role of “title” for just this reason in his work as drafter of the Uniform Commercial Code. Llewellyn recognized that “[t]itle is a static concept, a something which is conceived as continuing in somebody,” and while such a conception was meaningful in the context of land sales, it was generally “too blunt” to do service in the context of commercial transactions involving chattels. Karl N. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L.Q. Rev. 159, 165–75 (1938); see also Linda J. Rusch, *Property Concepts in the Revised U.C.C. Articles 2 and 9 Are Alive and Well*, 54 SMU L. Rev. 947, 947–48 (2001) (arguing that despite the aspirations of its drafters, the Code still relies heavily on property ideas, including the concept of title); William L. Tabac, *The Unbearable Lightness of Title Under the Uniform Commercial Code*, 50 Md. L. Rev. 408, 408–25 (1991) (same).

<sup>89</sup> See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, 811–12 (1935); Douglas Litowitz, *Reification in Law and Legal Theory*, 9 S. Cal. Interdisc. L.J. 401, 403 (2000); see also Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. Fin. Econ. 305, 311 (1976).

<sup>90</sup> As Cardozo cautioned, “Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.” *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926).

<sup>91</sup> See Honoré, *supra* note 79, at 126–28; Stern, *supra* note 78, at 10–11, 23. But see J.E. Penner, *Potentiality, Actuality, and “Stick”-Theory*, 8 Econ. J. Watch 274, 276–77 (2011).

<sup>92</sup> The principle is expressed in the Latin maxim *nemo dat quod non habet*—no one gives what he does not have.

cal control of it—a rule that is both intuitive and generally consistent with underlying normative goals like autonomy and efficiency. Likewise, by treating rights to things as things themselves, the law can link property rights to the objects they concern. Thus physical possession serves as a straightforward starting point for keeping track of property rights in the thing possessed—as reflected in the maxim that possession is nine points of the law.<sup>93</sup> Reification helps counteract the tremendous complexity of the problem property addresses, creating a relatively straightforward conceptual structure that helps make it easier to communicate and understand the way allocational entitlements are arranged.<sup>94</sup>

### *C. By Contrast: Tort and Contract*

As may already be clear, property's allocational structure sets it apart from other branches of private law. This is probably easiest to see by contrast with contract law. Contract is not ordered by a zero-sum principle the way property is. One person's contractual right does not foreclose the possibility of someone else holding a contractual right that is incompatible on its face (as in promises to sell the same property to two different people) or that works to its practical exclusion (as in insolvency and bankruptcy). And, in contrast to the situation with property, contractual obligations can and often do demand the impossible: In at least some situations, contract law is willing to hold promisors to their word even when they promise something they turn out to be incapable of do-

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<sup>93</sup> See Carol M. Rose, *Possession as the Origin of Property*, 52 *U. Chi. L. Rev.* 73, 84–85 (1985).

<sup>94</sup> Reification has a number of other benefits. It allows potentially distinct legal relationships to be treated as a single unit; much the way binding a set of sticks together makes it possible to lift what would otherwise be an unwieldy collection with a single hand, bundling property relations makes it possible to act upon the group in one fell swoop. See Jeremy Waldron, "Transcendental Nonsense" and System in the Law, 100 *Colum. L. Rev.* 16, 47–52 (2000). Indeed, reification may positively encourage such agglomeration, helping to resist or reverse the excessive diffusion of rights. See Michael A. Heller, *The Boundaries of Private Property*, 108 *Yale L.J.* 1163, 1191–94, 1197–202 (1999) (discussing the anticommons problem but expressing concern that the bundle-of-rights metaphor undermines property law's "thing-ness"); see also Charles Donahue, Jr., *The Future of the Concept of Property Predicted from Its Past*, in *Property: Nomos XXII* 28, 34 (J. Roland Pennock & John W. Chapman eds., 1980). It becomes much easier to speak of the excessive fragmentation of property when there is an idea of some larger object from which the fragments have been taken.

ing.<sup>95</sup> Where property starts with things and arranges legal relationships around them, contract starts with pairs of persons and articulates its obligations abstractly, which explains why it is possible a person might be bound to supply a promised good even after it turns out the good does not exist.<sup>96</sup> While this means contract lacks property's bottom-line authoritativeness and dependability, it also means the system of contract law lacks the formal complexity of property and therefore does not have the same need for the kind of conceptual devices property uses to keep track of the legal relations it administers. Contract law does not attempt to create some all-encompassing system in which contractual entitlements are made to depend on chains of prior transactions, to account for all other contracts, or to interlink all legal actors in the world. And it does not frame its entitlements around some abstract legal entity like "title," whose movements through the ether must be monitored in order to ascertain individual rights and duties.<sup>97</sup>

Tort is seemingly more similar to property in that tort obligations are often thought of as general duties binding upon the world,<sup>98</sup> but the resemblance is superficial from the standpoint of property's in rem features. First, even if we imagine tort law as a distributional system, its distributions are uniform and therefore easy to keep track of: Everyone's tort-law rights are the same.<sup>99</sup> More to the point, tort law seldom encounters any-

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<sup>95</sup> See, e.g., Restatement (Second) of Contracts § 266 illus. 9 (1979) (stating that a party may be held liable for breach of contract for failure to deliver an electronic device meeting contract specifications even though "it is not possible for any manufacturer, under the state of the art" to produce such a device).

<sup>96</sup> See *id.*; see also Jan Z. Krasnowiecki, *Sale of Non-Existent Goods: A Problem in the Theory of Contracts*, 34 *Notre Dame L. Rev.* 358, 358 (1959).

<sup>97</sup> An entitlement, including a contractual right, can itself become an item of property, as in a chose in action, but that does not mean the entitlement itself depends on such reification in the course of its own internal operations. Ownership of rights should not be confused with rights of ownership. See Stern, *supra* note 78, at 37–39.

<sup>98</sup> Indeed, it can be difficult to see just what the difference between tort and property is since much of property law is made manifest through the so-called property torts. For reasons of simplicity, reference to tort law in the discussion that follows should be taken as excluding property torts. A more comprehensive analysis would differentiate between tort law's norm-creation and remedial components. See Penner, *supra* note 28, at 142–43.

<sup>99</sup> Any legal policy is allocative in this sense, since one legal result forecloses another. See Guido Calabresi & Philip Bobbitt, *Tragic Choices* 38–39 (1978) (discussing trade-offs inherent in socially allocative decisions); see also Kenneth Arrow, *Modes of Choice*, 88 *Yale L.J.* 436, 437 (1978) (reviewing Calabresi & Bobbitt, *supra*). All of law must confront this problem eventually by virtue of the legal principle of non-contradiction. See Lon L. Fuller, *The Morality of Law* 65–70 (rev. ed. 1969). What distinguishes property is that the overall sys-

thing like the serious allocational issues routinely confronted in property. In the typical personal injury situation, it is unlikely that, instead of the person who is harmed, it is instead some remote third party who has a primary entitlement that the person not be injured.<sup>100</sup> In other words, there is no equivalent to the title search problem for tort rights. One person whose conduct causes injury to another may or may not commit a tort by doing so, but if causing that injury is a tort, it is clear whose rights have been thus violated: the person who is injured. Property and tort law both present issues concerning the *scope* of individual rights, but only property routinely generates the additional and complex problem of determining the *identity of the holder* of a right that, often as not, is acknowledged by all as belonging to someone.<sup>101</sup> And since third-party problems are so much less central, tort law can be much more casual in its treatment of them in the relatively unusual circumstances in which they do arise. Simply put, tort law does not determine substantive rights according to a strict zero-sum principle. That a tortfeasor owed a duty to a given victim does not necessarily rule out the possibility that the defendant also owed some contrary tort duty to someone else, at least in practice.<sup>102</sup> One person's

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tem of property law is structured in a way that takes this zero-sum problem into account from the start and with relative precision.

<sup>100</sup> Although primary rights are not arranged according to a strict allocational model, zero-sum considerations may come into play in certain remedial contexts, such as rules about recovery for derivative injuries, third-party standing, joint and several liability, and election of remedies. Relatedly, remedial claims may be transferable, at which point zero-sum concerns will come into play and problems of determining title to a claim may arise, but that is as a result not of the internal content of the entitlement but of the property quality that emerges when any legal entitlement is itself treated as a thing that legally belongs to someone. See *supra* note 97.

<sup>101</sup> This is so irrespective of whether one views tort law duties as "relational," in the sense so famously debated in *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928). The essential question there is whether suit can be brought against an actor whose conduct unreasonably endangered one person but only caused injury to someone else. However one answers that question about the nature and scope of the duty of care, there is no difficulty determining who has been torted, if a tort occurred.

<sup>102</sup> In negligence law, the fact that an actor's "only alternative is a course of conduct which involves an equal or greater risk of harm to a third person" is only treated as "a factor" to be considered in determining the reasonableness of the actor's conduct. See Restatement (Second) of Torts § 295 (1965). Furthermore, if the risk to each potential victim is substantially the same, "it may be that he can pursue either course without becoming negligent in so doing." *Id.* at cmt. a.; cf. *Martin v. Wilks*, 490 U.S. 755, 761–62 (1989) (allowing suit by employees of defendant alleging unlawful discrimination against them resulting from a consent decree between defendant and other employees).

tort-law right, in other words, does not foreclose the possibility that someone else holds a conflicting right.<sup>103</sup>

For similar reasons, tort law does not behave as though there were some continuously extant entitlement of the sort dealt with in property law—tort determinations are far more bilateral and one-off. Tort law largely operates *ex post*, and as a practical matter, its determinations are often so contextual that it seems a stretch to imagine that the result in a given case reveals the way entitlements were distributed between the parties all along or will continue to be distributed going forward.<sup>104</sup> That, after all, is why so many tort questions are submitted to juries—because they are not questions of law. Indeed, determining whether *A* owes *B* a duty of care in one case might not establish the rights and obligations of the same parties in future cases involving similar conduct but arising out of new accidents and injuries. In short, tort does not involve the same third-party allocational questions at issue in property, and it therefore does not insist on the sort of precision in determining individual issues of entitlement that gives property relations such consistency of effect across time and against different persons.

### III. PROPERTY AND UNIFORMITY

*Situs* rule critics have focused their attention on the issue of what might be called the intrinsic merits of using *situs* law. They have attacked old-fashioned suggestions that the place where property is located enjoys some sort of natural supremacy deducible from postulates about the nature of sovereignty.<sup>105</sup> And they have attempted to demon-

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<sup>103</sup> The preference for after-the-fact liability rule-protection, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1092 (1972), helps tort law escape any possible zero-sum constraints. Since tort law almost always operates *ex post*, there is little danger that the law will actually issue conflicting commands to a defendant by way of a preventative injunction. In addition, because the dispute is over what the defendant should have done, not what the defendant should do, third-party interests may tend to appear more speculative, thereby obscuring the possibility of conflict.

<sup>104</sup> See Kenneth S. Abraham, *The Trouble with Negligence*, 54 Vand. L. Rev. 1187, 1191 (2001) (“No matter how negligence is defined in instructions to the jury, or in the law applied by a judge in a bench trial, the negligence standard is abstract and general. Within wide bounds, the finder of fact does not identify a pre-existing norm, but simultaneously determines for itself what would constitute reasonable behavior under the circumstances and then applies this norm to the situation at hand.”).

<sup>105</sup> They had much grist for their mills. See, e.g., *Hughes v. Winkelman*, 147 S.W. 994, 996 (Mo. 1912) (declaring that a state’s property law “has no extraterritorial force, but dies

strate that the location of property is usually unrelated to the policies at issue in property disputes. Even if the situs of property lacks any intrinsic superiority, however, the use of situs law is not necessarily unjustified. Another possibility is that the rule makes sense in light of uniformity considerations—meaning that it is important that the same legal standard be used to resolve a given issue, regardless of the forum in which it is litigated, and that the situs rule is somehow important to producing such uniformity.

This is a very different way to look at the problem. If all we ask is whether as a matter of first principles the situs state is the only state competent to decide a property issue in some intrinsic sense, we overlook the possibility that uniformity is required but that in theory there is no barrier to the choice of any one of a number of candidates as the source of the law uniformly to be selected. The issue can be analogized to the problem of deciding whether the law should require drivers to drive on the left or the right. That neither side is inherently superior to the other cannot be the end of the inquiry—the fact that any particular choice is arbitrary does not mean the fact of making a choice, whatever its content may be, is equally unprincipled. Indeed, a universal right-side rule might be preferable even if driving on the right would often be *worse* than driving on the left.<sup>106</sup>

Approached in this way, the situs rule may be justified if the need for uniformity is greater than the value of selecting the legal standard most appropriate when the case is viewed in isolation and if the situs rule does a comparatively better job of ensuring the desired uniformity. Uniformity is linked to exclusivity—uniformity is the state of affairs produced by a system in which there is a single, exclusive legal standard governing a particular issue. Traditional conflict-of-laws theorists started from a premise of jurisdictional exclusivity and sought to derive the situs rule from it, while the rule's more recent detractors have rejected the situs rule because they have rejected the premise of territorial exclusivity, at

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at the state boundary, as the trees about Troy, under the mandate of the gods, grew no higher than the walls"); *Birtwhistle v. Vardill*, 6 Eng. Rep. 1270 (H.L. 1835) (stating that a rule affecting title to property "is sown in the land, springs out of it, and cannot, according to the law of England, be abrogated or destroyed by any foreign rule or law whatsoever").

<sup>106</sup> Suppose, for instance, drivers are less likely to litter when they drive on the side of the road corresponding to their dominant hand, making the right side superior for right-handed drivers but the left side superior for left-handed ones, or that it is too costly to determine which is the optimal side, or that a rule requiring people to drive on the side which is theoretically not the most optimal would nevertheless achieve greater rates of compliance.

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least as traditionally understood. But the benefits of uniformity suggest exclusivity may be more fruitfully understood as a conclusion than as a starting point—if uniformity is required, then so is exclusivity. They are flip-sides of the same coin.

To be sure, in seeking to understand how situs exclusivity might be warranted in a post-Conflicts Revolution world, something more will be needed than a citation to virtues typically associated with uniformity like predictability and the avoidance of forum-shopping. These are also beneficial for fields like contract and tort that were nonetheless “revolutionized” without much handwringing.<sup>107</sup> But the allocational structure of property law points the way, suggesting two basic reasons why uniformity of result, whatever its benefits as a general matter, is particularly valuable when it comes to property.

*A. Information and Coordination*

The first is of an immediately practical cast. The allocational structure of property law and its associated complexity entails potentially dramatic communication obstacles and information costs. Uniformity is therefore needed because without it, these special difficulties would be aggravated.

For a start, the interdependence hardwired into the structure of property law leaves property less able to absorb the additional uncertainty and confusion that a system of overlapping jurisdiction would entail. The horizontal connectedness that the system of property law entails—the way it creates a network of legal relationships between all people—is one major source of complexity. When every entitlement comes at the expense of any person who is not the entitlement holder, the steps needed to transmit the content of each entitlement—who has rights in what, requiring others to act how, obtainable by whom—are potentially overwhelming. A system in which multiple, conflicting legal regimes simultaneously applied to the same property question would increase these problems significantly.

Uniformity is also of elevated importance because of property’s vertical complexity—its temporal interconnectedness or path-dependence. The difficulties arising under a system of overlapping jurisdiction can be especially costly for property because property is set up in a way that tends to make more information relevant to the legal rights it creates

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<sup>107</sup> See Alden, *supra* note 19, at 597.

than is true for other areas of law.<sup>108</sup> The validity of a contract or the existence of a tort-law duty of care usually does not depend upon an evaluation of a series of prior contractual relationships or tort duties. But with property, each link in the chain of title often must be examined: At least in principle, every prior conveyance of the same property needs to have been valid and there must not have been any event at any point along the way that divested title so as to forge new links leading elsewhere.<sup>109</sup> This structure means there are more moving parts, which means more opportunities for something to go wrong, which means more uncertainty and higher information costs. In a system where different conflict-of-laws systems lead to different rules of decision in different courts, it becomes impossible to know what legal standard will govern a particular transaction until litigation commences. And if the true allocation of property rights at any given point can be determined only through litigation, it becomes necessary to litigate after every transaction to have assurance that the chain of title is complete,<sup>110</sup> an expensive proposition to say the least.<sup>111</sup>

But that is only the beginning, for the difficulties of coordination and information transmission multiply significantly with the combination of these two sources of complexity, vertical and horizontal. The position of buyer and seller depends on the status and actions of earlier buyers and sellers—not to mention creditors, co-tenants, lienholders, spouses, *cetuis que trust*, remaindermen, squatters, tenants, bailors, heirs, and others

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<sup>108</sup> Cf. Smith, *supra* note 28, at 1703–08. The problems faced in contract and tort prompt legal responses that are naturally more “decomposable” than the system property law establishes.

<sup>109</sup> There are important property principles that help mitigate these difficulties—adverse possession, negotiability, recordation procedures, good-faith purchaser rules, and similar devices for cutting off prior claims. But the chain-of-title arrangement is property’s default position, and even when these devices do come into play, they by no means eliminate the intertemporal dimension of property law.

<sup>110</sup> The Torrens system can be seen as an attempt to do just this, but more efficiently. See J.V. Brown II, *Yes Virginia—There Is a Torrens Act*, 9 U. Rich. L. Rev. 301, 303 (1975) (“In order to register a title under the Torrens Act, a judicial proceeding is held to determine the true holders of interest in the land, a proceeding very much in the nature of a suit to quiet title. Once this proceeding in rem is concluded, the Torrens law ‘clears [the] title and quiets it against all the world.’” (emphasis omitted) (citation omitted)). Negotiability reflects a similar impulse.

<sup>111</sup> See also James M. Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anticommons*, 43 J.L. & Econ. 1, 11–12 (2000); cf. Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* 18–28 (2000) (describing problems associated with proliferation of regulatory control over assets).



having at some point had some legal claim upon the property—persons with whom the current parties may have had no contact or relationship and who often have no stake in the current dispute. A person seeking to verify her title to Blackacre not only must concern herself with a series of prior legal events, potentially stretching well into the past, but she must do so notwithstanding her own lack of involvement in those events, the likelihood that those whose conduct is relevant have no interest in assisting her, and indeed the possibility that those persons are impossible to locate or just plain dead. Property holders, potential purchasers, creditors, courts, title examiners, insurers, and record keepers may all find themselves dragged into these complicated inquiries. Again, ascertaining a person's rights in contract or tort generally does not depend on formal complexities of this kind.<sup>112</sup> So while uniformity might be beneficial in those fields, it is more obviously essential when it comes to property.

Nor is the problem simply that non-uniformity magnifies the special problems property law faces; equally significant, non-uniformity also upsets the various institutional strategies property law incorporates to mitigate these problems. As Tom Merrill and Henry Smith have shown, property law embraces a number of strategies designed to reduce the impact of this essential complexity. These include heavy reliance on rules that are both broad in scope and bright-line in definition;<sup>113</sup> a related tendency to standardize legal forms and resist customization of individual legal entitlements;<sup>114</sup> the use of disclosure requirements and incentives, often accompanied by special mechanisms like recordation systems and other more indirect practices for supplying the requisite notification;<sup>115</sup> and a “modular” organization that compartmentalizes legal relationships and thereby limits the information relevant to different actors in different contexts.<sup>116</sup> The need for uniformity in conflict of laws follows from these strategies quite naturally. A bright-line rule is less bright-line when it cannot be determined when the rule will and will not apply. The benefits of having only a limited menu of standardized legal

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<sup>112</sup> Contract, tort, and other fields certainly can give rise to complicated inquiries, but the difficulties do not generally have the same structural aspect. Property's interconnected complexities are sewn into its basic fabric.

<sup>113</sup> Merrill & Smith, *supra* note 28, at 778–79.

<sup>114</sup> *Id.* at 776.

<sup>115</sup> *Id.* at 805–06.

<sup>116</sup> See Smith, *supra* note 28, at 1701–08. This last concept has been developed by Smith alone.

forms are undercut by the existence of multiple, competing menus. It is harder to give or receive effective notice in the face of uncertain legal standards and multiple notice mechanisms.<sup>117</sup> And a modular system, designed to combat complexity by clustering individual items together into separate units with simplified and standardized interfaces, calls for a common protocol to determine how those clusters are to be formed.<sup>118</sup>

And just as non-uniformity causes problems for institutional techniques used in property law to reduce complexity and combat information costs, those same institutional techniques can multiply the problems associated with non-uniformity. For example, at least for the kinds of issues covered by default rules, parties can avoid having to learn the content of a state's contract law; so long as they are explicit, parties can specify any combination of rights and duties they like or include a choice-of-law provision selecting their preferred legal regime for the resolution of ambiguities.<sup>119</sup> But much of property law takes the form of mandatory rules that cannot be altered by the parties to a particular transaction, whether directly<sup>120</sup> or through choice-of-law mechanisms,<sup>121</sup> making it necessary to find out what the rules actually are in order to satisfy them. In addition, conflicts questions can be more acute for property because property law often entails greater procedural and technical formality. The steps necessary to create a legally binding contract for the provision of \$1 million in services, for example, will generally prove less elaborate and particular than those necessary to transfer title to a \$50,000 plot of land.<sup>122</sup> This has significant effects on the conflict-of-

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<sup>117</sup> See U.C.C. § 1-301 cmt. 4 (2001) (“[P]arties taking a security interest or asked to extend credit which may be subject to a security interest must have sure ways to find out whether and where to file and where to look for possible existing filings.”).

<sup>118</sup> See Martin C. Libicki, Standards: The Rough Road to the Common Byte, in Standards Policy for Information Infrastructure 35, 37 (Brian Kahin & Janet Abbate eds., 1995); see also Richard S. Whitt, A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model, 56 Fed. Comm. L.J. 587, 602–03 (2004).

<sup>119</sup> Restatement (Second) of Conflicts of Laws § 187 (1971).

<sup>120</sup> For example, the *numerus clausus* principle; see Merrill & Smith, Optimal Standardization, supra note 61, at 9–24.

<sup>121</sup> See Bell & Parchomovsky, supra note 19, at 78 (lamenting that “[o]ne may not, for example, create a chattel in California, but specify that it will be governed by the property law of Wyoming”).

<sup>122</sup> For example, most contracts need not be in writing, but the statute of frauds excepts contracts for the sale of real property or goods worth more than \$500. See *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 805–09. (Tex. App. 1987) (handshake contract for sale of

laws problem. In tort and contracts situations, actors may be able cope with uncertainty by adopting a belt-and-suspenders approach and complying with every legal standard that might plausibly be applied. Such a strategy is more likely to prove unworkable with property, however, because of the costlier formalities it entails.

### *B. Allocations and Allocators*

These immediately practical concerns are serious enough by themselves but there is another, arguably more fundamental, difficulty. A system of overlapping property jurisdiction is at odds with the conceptual structure of property and the techniques we use to communicate, comprehend, and organize property relationships. As discussed, property aspires to a kind of authoritativeness and completeness in a way other areas of law do not. Its in rem structure represents an attempt to account for all possible claims upon a given resource and to determine their priority against each other. Property is designed to have the last word, describing a bottom-line state of legal rights—in this sense perhaps corresponding with what civil lawyers call “absolute,” as opposed to “relative,” entitlements.<sup>123</sup>

The possibility of more than one operative system of property law, applicable to the same issue concerning the same resource, undermines that basic idea. Under one property regime, *A* might be the owner of Blackacre while under another equally valid and applicable regime, the owner might be *B*. Property’s ambitions to offer a complete and reliable account of legal rights in a resource are thwarted by a conflict-of-laws regime that imagines two sovereigns with concurrent jurisdiction over the same property dispute, capable of propounding different rules and making different determinations of property rights holding. Conflict of laws, backed up by the law of preclusion and judgments, supplants property as the mechanism for sifting through conflicting claims. A system of universally exclusive entitlements—one in which each entitlement precludes the possibility that anyone else has an equivalent and

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multi-billion-dollar Getty Oil Company held enforceable); U.C.C. § 2-201; Restatement (Second) of Contracts § 110 (1971).

<sup>123</sup> See Honoré, *supra* note 64, at 453–54, 458–62; cf. Mauro Bussani, Vernon Valentine Palmer & Francesco Parisi, Liability for Pure Financial Loss in Europe: An Economic Restatement, 51 *Am. J. Comp. L.* 113, 125–26 (2003) (discussing the distinction between absolute and relative rights based on whether “the right is over a ‘thing’” as opposed to a right whose object “has as its focal point an expectation over somebody else’s behavior”).

conflicting entitlement—faces a profound challenge in the absence of an exclusive system of rules for its internal ordering.

Concurrent, conflicting, prescriptive jurisdiction also interferes with conceptual devices like reification used to organize property law. As discussed, property depends on the idea that there is somehow a “there there,” a legal status that is as much an attribute of the *res* in question as it is of any person affected by it. Yet to say explicitly that the law determining the owner of Blackacre formally depends on the forum in which the question is litigated seems to imply one of two things: Either there is no owner until litigation commences or there are two owners simultaneously, with the choice of forum effectively extinguishing the claims of one or the other when judgment is entered. Both ideas are in tension with the zero-sum-game quality of property law and the way property law promotes it by reifying property status. With respect to the former, property law abhors a vacuum—in principle, property law imagines title is always somewhere, even if the location is uncertain—so the idea that there simply is no owner until a forum is chosen is hard to square with the premises of the underlying substantive law.<sup>124</sup> As to the latter, property rights are exclusive by their definition, and undivided title to property cannot be in two places at the same time. When conflicting property systems apply simultaneously, the legal “object” that serves as the organizing focus of analysis loses its objectivity and seeming reality.

The point can also be seen from the other way around, by looking at the challenges property poses to a system of overlapping, non-exclusive jurisdiction. There is something troubling about the idea that different tribunals would use different legal standards to resolve the same dispute—not, or not only, because it may lead to undesirable forum-shopping, but because adjudication purports to supply an authoritative determination of the merits of a legal dispute, an idea that becomes less

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<sup>124</sup> See, e.g., James C. Robertson, Abandonment of Mineral Rights, 21 Stan. L. Rev. 1227, 1228 (1969) (noting the “seldom-articulated but ancient policy disfavoring voids or gaps in the chain of title to land”). None of this should be taken as an expression of the general impulse associated with pre-Realist jurisprudence to impute to the law a kind of crystalline perfection. See Thomas C. Grey, Langdell’s Orthodoxy, 45 U. Pitt. L. Rev. 1, 16–19 (1983); see also Harris, *supra* note 61, at 54 (remarking that “few of us today suppose that determinate solutions to all problems can be read off deductively from received concepts”). Rather, it is a reminder of certain operating rules specific to property that play a central role in its organization. There is some room for error and for play in the joints in property, but not much: Property law is generally quite insistent on a high level of precision because of its aspiration to provide a reliable bottom-line account of basic, static entitlements. See Tabac, *supra* note 88, at 408–10.

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credible when the law formally recognizes that a different result would have obtained if the determination had been made elsewhere. This may or may not be a problem from the standpoint of strict Rule-of-Law theory, but it is discomforting as a practical matter.<sup>125</sup> Nevertheless, it is tolerated in almost all areas of American law other than property law, and indeed, this was so even in the days of the First Restatement.<sup>126</sup>

One reason for property's special treatment may be that property more clearly exposes the issue. The unity and continuity of property—the notion that a property right is somehow a static thing unto itself—brings out the unease generated by a fractured legal order in a way the more bilateral, one-off relationships arising in tort and contract do not. If a contract or tort dispute is subjected to the vagaries of contradictory conflicts regimes, the damage is largely contained to the parties and is less likely to depend on prior transactions, to impinge upon unwitting successors, or to affect the legal position of creditors, distant strangers, or others outside the zone of privity. The relationship is personal to those affected by it, in the sense that it is not keyed to some exterior metric like shares in an actual asset and is not thought of as distributing some imaginary legal particle as between all legal actors. Because property is built on the idea of a continuously extant right with a kind of objective legal meaning, there is a sense in which property, to a greater extent than other legal problems, threatens to embarrass the law by calling attention to the manifest self-contradiction of overlapping, inconsistent authorities.

None of this should be taken too far—legal concepts should not be fetishized.<sup>127</sup> Nevertheless, respect for the conceptual architecture of

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<sup>125</sup> It is a core premise of a genuinely legal system that norms should not contradict one another. See Fuller, *supra* note 99, at 65–70. Conflict-of-laws rules represent an attempt to reconcile the problem of contradictory norms. See Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. Rev. 979, 1005–08 (1991). Yet there is a sense in which the ability of conflicts rules to effect such reconciliations is called into doubt when those conflict-resolving rules themselves contradict each another. Cf. Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 Yale L.J. 1191, 1249 (1987) (arguing non-contradiction principle forbids forum preference for forum law and responding to claim that the principle might "coherently apply only within legal regimes, and not across legal regimes" (emphasis omitted)).

<sup>126</sup> The problem was admittedly less acute when there was greater uniformity in conflicts rules, but it is still the case that the First Restatement was willing to use *renvoi* in the context of certain property issues but rejected it entirely in tort and contract cases. Compare Restatement (First) of Conflict of Laws § 8 (1934), with *id.* § 7.

<sup>127</sup> Cf. Smith, *supra* note 28, at 1700 (remarking that "[u]nreflective conceptualism or formalism is a nonstarter").

property matters. The reasons are partly instrumental. For one thing, the underlying purposes in structuring legal relationships the way property law does are likely to be frustrated when that structure is compromised. A system of bottom-line, good-against-the-world entitlements affords a special measure of security, for example,<sup>128</sup> and when multiple property systems potentially govern the same asset, that security is compromised. At a more general level, we may say that conceptual coherence is valuable from the standpoint of comprehensibility. A legal regime that is systematic and organized on a principled basis can generally be expected to be easier to understand than one that is not. In dealing with abstractions—and law is necessarily abstract—human comprehension depends on techniques like metaphor, analogy, translation, and reification,<sup>129</sup> and overlooking their role therefore has potentially serious costs. This is particularly true for property, where the concepts at issue seem so clearly oriented toward making it easier for legal players to understand the rules of the game.<sup>130</sup> “The revolutionary contribution of an integrated property system is that it solves a basic problem of cognition,” writes the economist Hernando de Soto. Indeed, he argues, the secret of the developed world’s success lies in the standardization of property norms and of techniques for “representing economic aspects of the things we own and assembling them into categories that our minds can quickly grasp.”<sup>131</sup> Property has given rise to its own linguistic and visual vocabularies, and especially if de Soto is correct that the hallmark of a good system of property law is that it is systematic and “mind-friendly,”<sup>132</sup> these merit consideration in the formulation of procedural rules and enforcement structures.

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<sup>128</sup> See, e.g., Honoré, *supra* note 64, at 468.

<sup>129</sup> See Jonathan Haidt, *The Happiness Hypothesis: Finding Modern Truth in Ancient Wisdom* 2 (2006) (stating that human beings “understand new or complex things in relation to things we already know”).

<sup>130</sup> See *supra* notes 92–94 and accompanying text (discussing reification, *nemo dat* principle, and role of physical possession in property law).

<sup>131</sup> de Soto, *supra* note 111, at 218–19; see also *id.* at 52–53.

<sup>132</sup> *Id.* at 218. In this sense, de Soto continues, “property systems are like Coase’s firm—controlled environments to reduce transaction costs.” *Id.* at 220; see also *Tyler v. Judges of the Court of Registration*, 55 N.E. 812, 814 (Mass. 1900) (“Personification and naming the res as defendant are mere symbols, not the essential matter. They are fictions, conveniently expressing the nature of the process and the result; nothing more.”); Rose, *supra* note 93, at 88 (arguing that possessory acts comprise a “commonly understood and shared set of symbols”). It might be added that to criticize the situs rule as “rigid” or “mechanical” is in a sense to repair to the same sorts of conceptual techniques.

It should also be said, however, that internal coherence need not be seen only as the means to an end, much less the single end of lubricating the wheels of the law's machinery. There are reasons to think a measure of theoretical consistency and comprehensibility serves jurisprudential values and is not simply a tool of policy.<sup>133</sup> One might say that if there is a lawyer's answer to a legal question—a distinctly legal way of resolving a legal issue, involving the tools of legal reasoning and the materials of legal authority, as opposed to goals exterior to the law—then it is the lawyer's answer that the law should adopt. And further, if internal coherence does indeed have this kind of intrinsic jurisprudential value, we might conclude that one goal in developing a system for resolving conflict of laws should be avoiding unnecessary damage to the analytical structure and self-conception of the fields of substantive law with which it deals.<sup>134</sup> This is not a goal that is often made explicit in conflict of laws, but it does seem to be how things do actually work. Thus, for example, transporting chattels from one state to another does not affect existing property rights,<sup>135</sup> since property imagines a general stability of ownership that can be changed only by a limited set of events that does not include transportation from one place to another. Making title to property a function of the forum in which the parties litigate their case is problematic in a similar way.

The two overarching problems discussed here that arise under a non-uniform approach to the resolution of property disputes—informational complexity and conceptual disjoint—can perhaps be illustrated by considering the possibility of having multiple, uncoordinated title registration systems simultaneously applicable to the same issue of title to the same asset. Such duplication would undermine the very benefits registration systems are meant to provide: Actors would have to consult every possible system to ascertain the information they need, and in the

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<sup>133</sup> For different arguments about and understandings of the idea of internal coherence, see Ken Kress, *Why No Judge Should Be a Dworkinian Coherentist*, 77 *Tex. L. Rev.* 1375, 1376 (1999); Joseph Raz, *The Relevance of Coherence*, 72 *B.U. L. Rev.* 273, 275 (1992); Cass Sunstein et al., *Predictably Incoherent Judgments*, 54 *Stan. L. Rev.* 1153, 1153–55 (2002); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 *Yale L.J.* 949, 968–71 (1988).

<sup>134</sup> A parallel might be drawn in contracts, where the conflict-of-laws issue is frequently resolved by contractual provision. See Hay et al., *supra* note 2, at 1085–88. The treatment of conflicts questions in tort cases, it might also be noted, seems to have placed some emphasis on foreseeable sources of law. See *id.* at 796–99.

<sup>135</sup> See Restatement (Second) of Conflict of Laws § 247 (1971).

event of conflict between systems, the information would be effectively undiscoverable absent a single set of rules for resolving such conflicts. Both the efficient operation and the coherence of the overall system are compromised because each of those goals depends upon the communication of information. When conflicting registries exist, none of them is able to answer the question property law is supposed to resolve: Who, when all is said and done, has what rights in a given thing, as against all other claimants? Title registries are visible manifestations of what the rules of property law seek to accomplish in a more abstract fashion—the provision of a definitive and accessible account of who has rights in what. Much as a multiplicity of registration systems prevents property law from doing its job, competing sets of rules for resolving the same allocational issue for the same item of property makes each set of property rules less property-like.

#### IV. UNIFORMITY AND THE SITUS RULE

##### *A. Situs as Focal Point*

If uniformity is the goal, the situs rule is a highly plausible way to achieve it. As a tool for coordination among states, it has a number of advantages; indeed, it is hard to imagine a conflict-of-laws doctrine better suited to the encouragement of uniform treatment of property. For a start, the situs rule is firmly established,<sup>136</sup> and when uniformity already exists, the most sensible thing is to leave well enough alone. The broad and bright-line quality of the rule also contributes to its usefulness as a coordination device. Coordination through unilateral action is easier with simpler rules, which provide a better focus around which a consensus might coalesce.<sup>137</sup> A broad and bright-line rule serves as a signal to others, and it makes it easier to track defections from the plan of coordinated action. The location of property also makes for a good focal point because it is often easy to determine, if not patently obvious,<sup>138</sup> and, moreover, the rule that in property disputes the relevant location for pur-

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<sup>136</sup> See Finch, *supra* note 39, at 259–60.

<sup>137</sup> On focal points, see Thomas C. Schelling, *The Strategy of Conflict* 54–58 (1980); Maarten C.W. Janssen, *Rationalizing Focal Points*, 50 *Theory & Decision* 119, 119 (2001); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 *Va. L. Rev.* 1649, 1651 (2000); Robert Sugden, *A Theory of Focal Points*, 105 *Econ. J.* 533, 533 (1995).

<sup>138</sup> See Michael J. Whincop, *Conflicts in the Cathedral: Towards a Theory of Property Rights in Private International Law*, 50 *U. Toronto L.J.* 41, 50 (2000).



poses of a system of territorial allocation is the location of the property will often gel with individual expectations.<sup>139</sup>

The second-order component of the situs rule also does a great deal to reduce the possibility that property questions will be resolved differently by different courts.<sup>140</sup> A limitation on adjudicative jurisdiction would appear to be the perfect uniformity device: If only one state even gets the chance to apply its conflict-of-laws rules, there is no possibility of inter-jurisdictional divergence on the conflicts question. Renvoi is even more obviously geared toward the promotion of uniformity, since the use of a single set of conflicts rules is precisely what renvoi entails.<sup>141</sup> In addition, both variants of the situs rule's second-order component serve as a kind of red flag; they signal that the matter is *very important*, highlighting the position of the focal-point state and drawing attention to any state that adopts a contrary approach. They also help moderate the problems of over- and under-inclusiveness associated with bright-line rules: The state whose conflicts laws apply can adopt a somewhat more granular conflict-of-laws regime than might otherwise be possible if uniformity were to be achieved simply through the design of first-order rules for selecting applicable substantive law.

Ironically, as this last comment implies, an ideal rule from the standpoint of encouraging uniformity should also pay heed to other conflicts policies besides uniformity. A rule that frequently produces patently unjust or unwise results as a substantive matter may be less effective as a focal point because defections will be more likely. Is the situs rule a wise choice from the standpoint of policy? This is the point on which scholars have been most vociferous in their criticism. Yet the use of situs law has some real attractions as a mode of resolving jurisdictional

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<sup>139</sup> See *infra* text accompanying note 153.

<sup>140</sup> If there is already substantial uniformity, however, renvoi may actually do more harm than good. See Kuhn, *supra* note 43, at 1035–38 (arguing renvoi is unnecessary in Article 9 of the U.C.C. because the U.C.C. itself assures that conflicts rules are generally uniform).

<sup>141</sup> See Robert L. Felix & Ralph U. Whitten, *American Conflicts Law* 468 (6th ed. 2011) (“If uniformity in title holdings is sought, the one way in which a nonsitus court can achieve uniformity is by handling the problem as nearly as possible the way a situs court would handle it. This means the nonsitus court would apply the whole law of the situs, starting with its conflicts law, to the problem.”). Compared to a rule limiting adjudicative jurisdiction, renvoi's effectiveness in securing uniformity is lessened by (a) the likelihood one state will misapply another's conflicts rules, (b) limits on the scope of the renvoi rule (it may not apply to procedural issues, for instance), and (c) the possibility courts will take a renvoi rule less seriously than a restriction on their jurisdiction because a jurisdictional limit is more visible and of more apparent gravity.

conflicts over property, sufficient at least to make the selection of situs law an acceptable choice as a uniform standard.

*State Interests.* Interest analysis proponents maintain that the location of property often has no relation to the purposes underlying the competing state laws invoked in conflicts cases.<sup>142</sup> That claim, however, rests on certain assumptions about the way the connection between property situs and policy interests is to be evaluated. If the assessment is made on a case-by-case and issue-by-issue basis, as the critics urge, the appropriateness of situs law is likely to vary from one instance to the next. But uniformity necessitates a broader rule, and given that necessity, the situs rule arguably is not only a good, but perhaps even the best, possible choice. By framing the problem at a higher level of generality, the question shifts from a state's hypothesized interest in preferring some very specific class of property claimants in a very particular kind of dispute to a state's interest in knowing and being able to control who it is that succeeds to the asset at issue.<sup>143</sup> And, notwithstanding some of the sweeping claims of interest analysis scholars, it would seem that the state where an asset is located will probably always have *some* interest in being able to decide the identity of the asset's owner, and by extension, in the processes by which ownership is acquired and transferred.<sup>144</sup>

*Substantive Virtues.* The situs rule also has virtues outside the framework of an analysis of governmental regulatory interests. The use of the location of property as the central choice-of-law criterion gels with the ideas that underlie property law. There is a strong conceptual similarity between sovereign jurisdiction and property,<sup>145</sup> particularly for real

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<sup>142</sup> See supra note 52.

<sup>143</sup> See supra note 52 and accompanying text.

<sup>144</sup> For one thing, the use of property is likely to have an effect on the surrounding community. For another, stability of title and rules for transfer of property, and policies that affect the fragmentation of property interests have an impact on local markets, a matter of obvious situs concern. Where the situs state maintains a registry for recording property transactions, it also has an interest in having property issues determined by rules that are familiar and subject to its control. In addition, the situs state may be said to have an interest in the distribution of wealth within its jurisdiction and in its tax base, both of which are affected by the allocation of property rights. And as already noted, only the situs state has the power directly to enforce judgments concerning title to things within its borders, and it may be easier and more convenient if its officers are responsible only for matters resolved under local law. Similar considerations of economy support using situs law in land cases where only situs courts have jurisdiction to determine title and other property interests.

<sup>145</sup> See Larissa Katz, Exclusion and Exclusivity in Property Law, 58 U. Toronto L.J. 275, 293–95 (2008); see also Lea Brilmayer, Consent, Contract, and Territory, 74 Minn. L. Rev.

property,<sup>146</sup> which, like most sovereign authority today, entails control over physical space.<sup>147</sup> Because the situs rule mirrors the conceptual architecture of property, the rule is harmonious with the substantive law of property at a very basic level. Property is thing-centered, and the location of the *res* whose use is the subject of potential dispute is the most obvious connection between it and a territorially defined state. So while some critics denounce the situs rule because “the relationships relevant for choice criteria are those between sovereigns and people, not those between sovereigns and property,”<sup>148</sup> their argument ignores the impersonal, thing-centric nature of property law. The “modularity” of property as a legal system—its division of the universe of a large class of legal problems into discrete, semi-autonomous units—has the benefit of reducing the information that legal actors need to ascertain, the personal characteristics of entitlement holders being foremost among them.<sup>149</sup> The situs rule centers the conflict-of-laws inquiry on the features used to form the individual units of property law. And it minimizes reliance on

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1, 35 (1989); Morris R. Cohen, Property and Sovereignty, 13 Cornell L.Q. 8, 12–14 (1928); A. John Simmons, On the Territorial Rights of States, 11 Phil. Issues 300, 316–17 (2001).

<sup>146</sup> See Henry Sidgwick, *The Elements of Politics* 222 (4th ed. 1919) (observing that “in modern political thought the connection between a political society and its territory is so close that the two notions almost blend”). The U.S. Constitution uses the word “jurisdiction” to refer to geographic territory in several places. E.g., U.S. Const. art. IV, § 3 (declaring that “no new State shall be formed or erected within the Jurisdiction of any other State”).

<sup>147</sup> See 1 John Westlake, *A Treatise on Private International Law, or the Conflict of Laws, with Principal Reference to Its Practice in the English and Other Cognate Systems of Jurisprudence* 128 (London, C. Roworth & Sons 1858); see also Penner, *supra* note 28, at 152 (“Land is not only property, it is territory, the extent of the jurisdiction of the State. Owning land depends on political sovereignty in a much more direct way than does the ownership of chattels, for the ability to maintain one’s rights to land depends on whether the State is able to hold its territory against invaders from without or rebels from within.”). Indeed, in a Lockean account, it is individual members’ property rights in land that legitimate a civil government’s territorial jurisdiction. See John Locke, *The Second Treatise of Government*, in *Two Treatises of Government* 345–49 (Peter Laslett rev. ed. 1963) (1698); Simmons, *supra* note 145, at 312–13.

<sup>148</sup> Baxter, *supra* note 19, at 16.

<sup>149</sup> See Smith, *supra* note 28, at 1703–04. For this reason, it might be thought especially peculiar to look to personal characteristics like domicile as a choice-of-law criterion in the context of property. There are some situations where practical considerations may make domicile the most appropriate connecting factor, but generally speaking the use of personal characteristics should be discouraged where it does not offer clear benefits. The premise of much governmental interest analysis theory that state laws are intended only to benefit domiciliaries would ordinarily seem to be an inappropriate foundation for a conflict-of-laws principle where property is concerned.

factors that property law's clustering of legal issues along thing-based lines is meant to make less important to discover.

Indeed, sovereign jurisdiction is itself a modular structural concept, in that it reflects a division of the world into distinct, largely independent units—a system of territorially defined jurisdiction especially so because the divisions are made in such a way that the interface governing interactions between units is relatively simplified, impersonal, and standardized.<sup>150</sup> In dealing with “the application of law in space,” said Benjamin Cardozo, “[t]he walls of the compartments must be firm, the lines of demarcation plain, or there will be overlappings and encroachments with incongruities and clashes. In such circumstances, the finality of the rule

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<sup>150</sup> See James Anderson, *Transnational Democracy: Political Spaces and Border Crossings* 27 (2002) (stating that territoriality is “a ‘spatial strategy’ which uses territory and borders to control, classify and communicate” and that its “advantages include simplifying issues of control, giving relationships of power a greater tangibility, and providing easily understood symbolic markers ‘on the ground’”); Hendrick Spruyt, *The Sovereign State and Its Competitors: An Analysis of Systems Change* 34–35 (1996) (stating that “the modern state defines the human collectivity in a completely novel way. It defines individuals by spatial markers, regardless of kin, tribal affiliation, or religious beliefs. Individuals are in a sense amorphous and undifferentiated entities who are given an identity simply by their location in a particular area”); Richard T. Ford, *Law’s Territory (A History of Jurisdiction)*, 97 *Mich. L. Rev.* 843, 867 (1999) (stating that the development of territorial jurisdiction displaced “existing social relations based on personal status,” and “[t]o use the terms of private law, it initiated a shift from statuses *in gross* or *in personam* to statuses bound to political territory”); Matt Whitt, *The Paradox of Sovereignty: Authority, Constitution, and Political Boundaries* 200 (Aug. 2010) (unpublished Ph.D. dissertation, Vanderbilt University) (stating that “territoriality facilitates the achievement of modern sovereignty by providing a mediating framework for the exercise of sovereign authority, objectifying its jurisdiction, and objectifying the collective subject of that authority”); see also Steven Pinker, *The Stuff of Thought: Language as a Window into Human Nature* 155 (2007) (stating that a fundamental aspect of the way human cognitive functions are constituted is that “[c]ontinuous three-dimensional space is an ever-present matrix in which the objects of our imagination must be located”).

Richard Ford has identified a series of what he considers prototypical characteristics of modern territorial jurisdiction. In a system of territorial jurisdiction, boundaries are ordinarily unambiguous, corresponding to “a ‘bright line’ rule, never a flexible standard,” and within those boundaries, authority is defined abstractly, “eliminat[ing] the need for the specific enumeration and classification by kind.” Ford, *supra*, at 853 (emphasis omitted). Here we have the simple interfaces and open-ended class of uses that correspond to property law’s modular structure. This arrangement, moreover, “tends to present social and political relationships as impersonal,” which can again be seen as a way of making the relevant legal relationships easier to comprehend and of generating fluid social institutions. *Id.* at 854 (emphasis omitted). And, similar to property law’s zero-sum architecture, the system tends “to produce ‘gapless’ maps of contiguous political territories.” *Id.* Jurisdiction, in other words, is an allocational scheme that assigns individual situations to chunky legal categories within which they can be dealt more particularly.

is in itself a jural end.”<sup>151</sup> Modern conflicts methodologies like governmental interest analysis can be seen as a shift away from this approach. These methods still accept territorial divisions of state authority as a starting point,<sup>152</sup> but in a way that effectively decreases the modularity of the overall system: They show relatively little concern for the possibility that the authority of the different territorial states might overlap when a legal problem is connected in some way with more than one state’s territory or that the rules for determining which territorial contacts to count in assigning a problem to a particular state may become complex and irregular. Whatever its merits as a general matter, this partial demodularization would look rather strange if extended to property issues. Conflict-of-laws rules serve to connect the modular system of territorially defined states to the modular system of property law, and to use de-modularizing rules to manage this interface would be a bit like attempting to translate a scientific manual from English to Chinese by first converting it to a Romantic ode.

*Design Virtues.* Many of the attributes of the rule that make it a good focal point for coordination among different legal systems are merits in their own right. For a start, because property is thing-centered, and because its thing-centrism is meant to make the system of property law generally comprehensible, the situs rule has the additional virtue of, if not intuitiveness, at least not being counterintuitive—as a general matter, a property owner could hardly be surprised by a rule that title to property is determined by the law of the place where the property is located, even if she thinks there might be a better or more natural rule in

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<sup>151</sup> Benjamin Cardozo, *The Paradoxes of Legal Science* 67 (1928).

<sup>152</sup> First Restatement-type approaches are often condemned as “territorialist” but the label is somewhat misleading. Although there are many different conflict-of-laws methods that have been proposed in the United States, none of them operate without some recourse to territorial conceptions of state power. For example, although in many cases interest analysis shifts the focus from the location of particular events in favor of party residence or domicile, these are still essentially territorial connections: one does not become a Texas domiciliary by moving to San Francisco. That a First Restatement-type doctrine—the place of injury to resolve a tort issue, for example—can be described as “territorial” as a way of communicating how it differs from, say, a rule based on the place where the parties are domiciled, is an indication of the comparative simplicity and salience of the kind of territorial connection that such a doctrine uses. The connection and the logic that suggests it are so apparent—even to those who reject that connection as a normative foundation for choice of law—that it appears as though the territory itself is doing all the work.

her case.<sup>153</sup> Furthermore, the situs of property is easily determined, and there may also be some value in using the same conflicts rule that applies in international conflicts, where the position of the situs rule is fairly secure.<sup>154</sup> The use of the location of property as choice-of-law criterion also ensures a measure of stability. Much as it is desirable to ensure that the legal rules governing property not change with the forum of litigation, there is value in having property governed by the same legal rules irrespective of the passage of time or shifting fact constellations. For real property, the situs rule makes temporal considerations entirely irrelevant since land—“immovable property” in conflicts jargon—is permanently situated in the same place, while for chattels, the use of situs law at least ensures that property rights do not fluctuate according to the identity of the parties involved.<sup>155</sup> Finally, quite apart from the use of *situs* as such, the simple and bright-line nature of the rule is likely to offer a greater measure of predictability, transparency, and ease of administration—the usual virtues of broader and more rule-like legal provisions.<sup>156</sup>

*Systemic Virtues.* Finally, the situs rule can help promote the systemic goods of individual choice and inter-jurisdictional competition. As to choice: in contrast to the situation with contract, obstacles to the communication of information make it necessary to place substantial limits

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<sup>153</sup> See Herbert F. Goodrich, *Two States and Real Estate*, 89 U. Pa. L. Rev. 417, 419 (1941). But see Alden, *supra* note 19, at 596 (asserting that any expectation that situs law will apply is “generated by what courts have done in the past”). Although the situs rule generally conforms to a certain lay intuition, frustration of party expectations may be a serious concern in some contexts. The situs rule can and has been moderated in situations in which there is a risk of surprise, as with the use of “borrowing statutes” and conflicts rules that explicitly prefer whichever legal provision connected with a dispute would validate an attempted transfer. E.g., Unif. Probate Code § 2-506 (1991). There is certainly room for such reforms, but the need for uniformity still suggests a single jurisdiction—that is, the situs—should perhaps be used to determine whether such reforms apply, although the issue may not make much practical difference since these statutes tend to be uniform anyway. See Hay et al., *supra* note 2, at 1295 & n.4.

<sup>154</sup> In international cases, the situs rule is supported by additional reasons—the necessity of situs cooperation at the enforcement stage, for example—that do not apply with the same force in domestic situations.

<sup>155</sup> In a case in which the situs of land (“immovable property”) changed because of shifting state boundaries, the states in question agreed that questions concerning the validity of pre-existing property interests in such land at the time of the boundary shift would be determined under the law of the state where the land had previously been located. See *Nebraska v. Iowa*, 406 U.S. 117, 120 (1972).

<sup>156</sup> See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557, 565–66 (1992) (drawing distinction between simplicity and rule-ness).

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on the ability of individuals to customize their property rights.<sup>157</sup> Standardization in property law helps combat the information cost problem, but it also imposes costs of its own because it prevents parties from arranging their relations in the most mutually beneficial fashion. The situs rule allows a degree of customization—a property owner can locate or invest in assets within the jurisdiction of her choice—while at the same time providing clear and reasonably cheap notice to the world of the legal regime that has been selected.<sup>158</sup> Voluntary choice of law is available, subject to the conditions that the whole cluster of issues pertaining to a given asset is governed by the same body of substantive law and that the asset is packaged along with all others for which the same selection has been made.<sup>159</sup>

The situs rule also helps create the conditions necessary for beneficial competition among states—that is, it harnesses individual choice in ways that may induce lawmaking bodies to produce better legal regimes, or at least to avoid worse ones.<sup>160</sup> A competition-fostering rule requires

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<sup>157</sup> See Merrill & Smith, *Optimal Standardization*, supra note 61, at 31–34.

<sup>158</sup> A domicile-based rule, by contrast, allows choice only insofar as one is willing to relocate oneself, and not simply one's assets. See Michael J. Whincop & Mary Keyes, *Policy Pragmatism in the Conflict of Laws* 111 (2001).

<sup>159</sup> See O'Hara & Ribstein, supra note 52, at 1220–21; see also Bell & Parchomovsky, supra note 19, at 78–79 (arguing that being able to choose governing property law results in “[a] richer menu of property rules [that] gives individuals a greater chance of finding the most suitable property regime for them”). At the level of the states themselves, the situs rule offers the attractions of mutual accommodation and non-interference. See Alfred P. Hill, *The Judicial Function in Choice of Law*, 85 *Colum. L. Rev.* 1585, 1629 (1985) (observing that the “non-situs forum of today may be the non-forum situs of tomorrow”). To that extent, the situs rule may be seen as responsive to individual preferences in terms of “voice,” as well as “exit,” see Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* 4, 15–17 (1970), inasmuch as it promotes conflicts uniformity and jurisdictional exclusivity. The ability to vote on property law is of diminished effectiveness when jurisdictional authority significantly overlaps and the regime selected by voters is subject to competing regimes selected by other voters. This is a virtue of exclusivity as a general democratic principle, and, to the extent the situs of a person's property corresponds with the place where the person is eligible to vote in elections that may affect property law, it also bears upon the choice of property law to which one's own property is subject. Cf. Ilya Somin, *Federalism and Property Rights*, 2011 *U. Chi. Legal F.* 53, 58 (2011) (arguing that “[e]xit rights are little help in protecting assets that you can't take with you when you leave”).

<sup>160</sup> See Bell & Parchomovsky, supra note 19, at 79, 98–101 (arguing that jurisdictional competition “creates a fertile ground for experimentation with new property forms and proliferation of these forms as states adopt laws that have proven useful in other states”); see also Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416, 418–23

some linkage between the incentives that would encourage a state to offer an attractive property regime and the criteria that trigger the application of its law. Those incentives include tax revenue, stronger local commercial markets, and the many other benefits associated with capital inflow. The location of property is very much tied to those benefits—local property is likely to be subject to local taxes, traded on local markets, and enjoyed by local people. Jurisdictional competition also requires clear and relatively simple lines of demarcation; the more fine-grained, blurry, or overlapping each state's domain becomes, the more difficult it becomes for effective competition to take place. If an asset is subject to one state's law for some purposes and another state's for other purposes, it becomes harder for owners to determine where to locate their assets and harder for states to trace the effect of their policies on the choices property owners make. On this score, too, the situs rule, with its broad framing, excels.

For all these reasons, if a state were attempting to formulate principles for choosing whose substantive property law governs questions of title to property, the rule that such questions are usually or always a matter of situs law would be a good choice. Perhaps it is the optimal choice, or perhaps not. But it is a plausible choice, and given the need for coordination, that is good enough.

#### *B. Uniformly Uniformity?*

This list of virtues other than uniformity promotion might prompt one to ask whether uniformity and jurisdictional exclusivity are really necessary to justify the rule. It is certainly possible, though the possibility is difficult to assess, since an absence of uniformity would erode many of the situs rule's seemingly freestanding benefits—predictability and jurisdictional competition, for example. To the extent these additional virtues are equally applicable to First Restatement-type approaches to conflict of laws as a general matter, justifications for the situs rule based upon them may also prove too much for purposes of this analysis, since they fail to show why the situs rule should outlive the rest of the *ancien regime* in conflicts. Yet they are not always equally applicable to the whole of traditional conflicts doctrine, and at least in terms of an explanation, if not a justification, for what courts have done, other factors

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(1956) (discussing incentives created under multi-jurisdictional system in which actors can vote with their feet).



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probably did play a role. Overall, the location of property presents fewer ambiguities than the place where a contract was made or a tort was committed, for example. Conflicts issues involving contracts can largely be dealt with through choice-of-law clauses, moreover, while a general expansion of liability and commitment to loss-spreading helps account for the rejection of older conflicts doctrines that left less room for judicial discretion or forum-preference in the tort arena. And to the extent the other virtues of the situs rule discussed in the preceding section—intuitiveness, simplicity, and lack of regard for the personal characteristics of individual entitlement holders, to give a few examples—help ameliorate the problems of complexity and high information costs property law creates, they too support adherence to traditional conflicts doctrine where property is concerned, even after it had been abandoned elsewhere.

At any rate, while it is possible the situs rule's position may be overdetermined, there is nevertheless reason to view uniformity as the primary reason to support it. Overlapping prescriptive jurisdiction presents unique conceptual difficulties for property, and while the other virtues of the situs rule discussed above depend on a measure of uniformity, the conceptual value of uniformity to property does not depend upon them in the same way. Uniformity and exclusivity are important to property law's coherence even if, say, the rule that uniformly and exclusively applies is hard to predict *ex ante* or if assets or capital cannot easily be moved from one jurisdiction to another.

Uniformity's preeminence is born out by doctrinal practices. The most unusual features of the situs rule are its continued interstate uniformity, its imperviousness in the face of the Conflicts Revolution, and its use of *renvoi*. There is good reason to think these features are linked. The singular benefit of *renvoi* is uniformity,<sup>161</sup> and given that it was understood that the Conflicts Revolution would be bad for uniformity,<sup>162</sup>

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<sup>161</sup> See, e.g., Richard Fentiman, Choice of Law in Europe: Uniformity and Integration, 82 *Tul. L. Rev.* 2021, 2029 (2008).

<sup>162</sup> Professor Brainerd Currie, for instance, was quite candid about his relative lack of concern for uniformity. See, e.g., Currie, *supra* note 22, at 100–01, 168–69 (stating that the “most forceful affirmative defense that can be made for the traditional method is that it leads to uniformity of result, regardless of the state in which the action is brought” but concluding any such uniformity not “worth the cost” by asserting that “the ideal of uniformity is given too high a priority” and that forum shopping in some cases “seems positively commendable”); see also *Reich v. Purcell*, 432 P.2d 727, 730 (Cal. 1967) (Traynor, C.J.) (“Ease of determining applicable law and uniformity of rules of decision, however, must be subordinated

the situs rule's persistence can be seen as a choice to prefer uniformity to the Conflicts Revolution's attractions—where property is concerned. The strength of the perceived need for uniformity is also born out both by the considerable costs that renvoi can entail and the variety of contexts in which it nevertheless appears. Having to use another jurisdiction's conflicts rules is a complicated business and can give rise to some famously difficult analytical conundrums.<sup>163</sup> Yet despite all this, renvoi was reluctantly deployed in connection with property even in the days of the First Restatement when uniformity was easier to come by,<sup>164</sup> and, tellingly, renvoi is used today in certain property contexts where the situs of property is not the criterion that is used as the choice-of-law focal point.<sup>165</sup> It should be noted that if the primary reason for the situs rule were “thing-ness,” simplicity, autonomy, or any other such goal, the use of renvoi would be difficult to explain—a pointless and obscure doctrinal twist, at best, and a step in the wrong direction, at worst.

In short, in addition to the explanations for uniformity's special importance where property is concerned developed above, the fact of the situs rule's uniform application across the country, the rule's costly, longstanding, relatively broad, and virtually unique use of renvoi, and the other features of the situs rule that tend to promote uniformity all offer reason to believe uniformity is and should be a paramount concern where property is concerned.

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to the objective of proper choice of law in conflict cases, i.e., to determine the law that most appropriately applies to the issue involved.” (citation omitted)). But see *Wilcox v. Wilcox*, 133 N.W.2d 408, 416 (Wis. 1965) (adopting the Second Restatement in the expectation it would lead to national uniformity in conflict of laws).

<sup>163</sup> See, e.g., *Kramer*, supra note 125, at 980; see also *Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960) (Friendly, J.) (“Our principal task . . . is to determine what the New York courts would think the California courts would think on an issue about which neither has thought.”).

<sup>164</sup> Restatement (First) of Conflict of Laws § 8 (1934).

<sup>165</sup> Succession to chattels is one example, where courts are supposed to apply the conflicts rules of the decedent's domicile. See Restatement (Second) of Conflict of Laws §§ 260–63 (1969); see also, e.g., *In re Estate of Wright*, 637 A.2d 106, 109 (Me. 1994). Professor Joseph Beale was hostile to such an approach, preferring to rationalize apparent instances of renvoi in cases concerning succession to chattels on other grounds. See 1 Beale, supra note 64, at 57–58 (arguing use of domicile law in succession cases is a principle of substantive law, rather than a conflict-of-laws rule, and that situs conflicts rules always govern).

*C. Breadth and Overbreadth*

A persistent theme in scholarly criticism of the situs rule is the charge that the rule is too broad—indeed, “much too broad” and “hopelessly indiscriminating.”<sup>166</sup> While a connection between the breadth of the rule and the goal of uniformity has already been noted, academic preoccupation with the scope of the rule calls for a closer examination of a few basic issues pertaining to its reach.

To begin with, the “monolithic”<sup>167</sup> nature of the situs rule has a number of important strengths as a general matter. As discussed, it helps secure uniformity by creating a clear and obvious focal point and by simplifying the doctrines that states are supposed to employ in concert with one another. The breadth of the rule also helps combat the “characterization” problem—the problem of identifying the appropriate category to which a particular legal issue belongs—which is often held up as a major defect of traditional conflict-of-laws rules because of its perceived subjectivity.<sup>168</sup> Thanks to the situs rule’s wide sweep, legal actors can repair to a simple rule of thumb: When in doubt, situs law probably applies.<sup>169</sup> A similar advantage of the rule’s breadth is that it creates a buffer zone to protect against false negatives—cases failing to apply situs law where situs law should be applied (although possibly at the expense of cases in which it should not be). The rule’s breadth is useful to other goals like predictability, facilitation of choice, and jurisdictional competition for reasons previously noted. And the rule’s breadth is consistent with the general tenor of property. By simplifying the conflicts inquiry, it reflects the preference for “lumpy” entitlements that charac-

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<sup>166</sup> Hancock, *Mary le Bow*, supra note 18, at 566; see also Richman & Reynolds, supra note 19, at 424–25 (“The problem with the situs rule . . . is an imbalance between its scope and rationale. The scope of the rule extends to nearly all questions involving title to real property, but its rationales work in only a fraction of those cases.”); Ralph U. Whitten, *Curing the Deficiencies of the Conflicts Revolution: A Proposal for National Legislation on Choice of Law, Jurisdiction, and Judgments*, 37 *Willamette L. Rev.* 259, 294–95 (2001) (stating that “the situs rule extends far beyond these legitimate interests of the situs state to prevent the enforcement of nonsitus judgments in the courts of the situs where no conceivable interest of the situs state would be served by refusing enforcement”).

<sup>167</sup> Weintraub, supra note 19, at 574.

<sup>168</sup> See, e.g., Brilmayer & Anglin, supra note 4, at 1133–34 (2010).

<sup>169</sup> See Finch, supra note 39, at 260 (“As much as any choice-of-law rule, the situs rule provides an unequivocal answer . . .”).

terizes the law of property as a whole.<sup>170</sup> It thereby reinforces that approach, makes the law more internally consistent, and draws upon lay intuitions. Perhaps most importantly, it responds to the same problems that inspire property to adopt a simplified, thing-centered system of entitlements in the first place—it reduces complexity by smoothing the rough edges of legal forms and making them more interchangeable. Simply put, it helps make the practice of standardization itself more standard.

Modern conflicts methodologies like interest analysis celebrate *dépeçage*, the practice of performing a separate conflict-of-laws analysis for different individual issues within the same, larger dispute.<sup>171</sup> Often this means breaking apart what William Allen and Professor Erin O’Hara call the “policy bundles” of individual states—sets of seemingly separate legal provisions that work in tandem to secure a larger goal or a balance between competing ones.<sup>172</sup> Property law too has its bundles: Since at least the days of legal realism, property has been frequently depicted as an ad hoc “bundle of sticks”—each stick representing a different legal issue between a single pair of actors, somewhat arbitrarily associated with others with which it is bundled.<sup>173</sup> More recently, however, a number of property scholars have argued that the bilateral, disaggregated, and contingent vision reflected in this description gets property law backwards. What is significant about property is that it does *not* approach each issue of resource use entirely anew, deciding it on the basis of first principles.<sup>174</sup> Property divides the world into separate packages of legal problems according to the particular resource involved, and, even when property is substantially regulated, it tends to rely on a single,

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<sup>170</sup> See Lee Anne Fennell, *Lumpy Property*, 160 U. Pa. L. Rev. 1955, 1956–57 (2012) (stating that “[p]roperty law is lumpy as a positive matter, filled with doctrines and approaches that deal with the world in discrete, hard-to-divide chunks”).

<sup>171</sup> William M. Richman, *Diagramming Conflicts: A Graphic Understanding on Interest Analysis*, 43 Ohio St. L.J. 317, 330–33 (1982); see also Willis L.M. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 Colum. L. Rev. 58, 58–69, 71–72 (1973).

<sup>172</sup> See William H. Allen & Erin A. O’Hara, *Second Generation Law and Economics of Conflict of Laws: Baxter’s Comparative Impairment and Beyond*, 51 Stan. L. Rev. 1011, 1034–35 (1999).

<sup>173</sup> Horwitz, *supra* note 23, at 156 (1992) (discussing the Hohfeldian conception of property).

<sup>174</sup> Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 Cornell L. Rev. 959, 963–64 (2009) (observing that “because the default package [of property rights] is lumpy, it sweeps in all sorts of as-yet-unspecified uses and potential interactions and declares the owner the winner”).

fairly simple mechanism like ownership to resolve most issues pertaining to that resource.<sup>175</sup> In other words, the approach that property generally reflects is the antithesis of the kind of issue-by-issue, context-heavy, policy-based analysis that situs rule critics advocate for conflict of laws.<sup>176</sup> If the situs rule is “overbroad,” so too is property, therefore, and the sweep of the rule is at least defensible on the ground that it harmonizes conflict-of-laws doctrine with underlying principles of substantive law. But more than that, it is defensible because there is reason to believe those underlying private law principles themselves stand on sound footing, and some care should therefore be taken to ensure that the formulation of jurisdictional rules does not needlessly subvert them.

Beyond these observations about the situs rule’s breadth as a general matter, a few more specific issues merit a brief examination:

*First-Order Component.* Given the situs rule’s second-order component, which has the effect of requiring any court to use the situs’s conflict-of-laws doctrines, it might seem superfluous from the standpoint of uniformity for the situs rule to demand the application of situs substantive law as well. Yet the use of situs substantive law is still important for a number of reasons. First, it makes the conflicts inquiry much easier. Situs courts have the benefit of applying their own domestic law, while non-situs courts forced to apply situs conflicts rules will find their task mercifully simplified and will be less likely to misconstrue the situs’s conflicts rules. Second, the first-order component is valuable because the second-order component of the situs rule is not always supposed to apply and is not always applied when it is supposed to be. Using the same basic criterion to select applicable law, whether or not situs courts or situs conflicts rules are to be used, helps keep the basic jurisdictional

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<sup>175</sup> See Sherwin, *supra* note 87, at 1076 (discussing ownership as a separate dimension of property, distinct from use).

<sup>176</sup> Professor Wesley Hohfeld, whose fragmented analysis of property is reflected in the bundle metaphor, may also have helped spur the Conflicts Revolution by virtue of his influence on Professor Walter Wheeler Cook, an early and outspoken critic of the First Restatement. See N.E.H. Hull, *Vital Schools of Jurisprudence: Roscoe Pound, Wesley Newcomb Hohfeld, and the Promotion of an Academic Jurisprudential Agenda, 1910–1919*, 45 *J. Legal Educ.* 235, 277 n.220 (1995) (reporting the story that after Hohfeld’s death, “Cook took Hohfeld’s notes for a major piece on conflict of laws, walked off with them, and later published them as his own without crediting Hohfeld”). Cook was likewise influenced by Hohfeld’s view of property. See W.W.C., *Comment, The Associated Press Case*, 28 *Yale L.J.* 387, 388 n.6 (1919) (opining that “[t]o say that a person who ‘owns’ something has ‘a property *right*’ is a totally inadequate way of describing the legal situation” and calling for use of Hohfeldian analysis of “‘multital’ jural relations”).

principle simple and clear. Indeed, this is a virtue of using substantive situs law quite apart from the need for uniformity and would offer some reason for doing so even if the second-order component of the rule applied in all cases without exception. Finally, the use of situs substantive law amplifies the general situs principle by signaling the importance of the situs's role and enhancing its focal attributes. It also bolsters the normative position of the situs: If it becomes common for the situs not to apply its own law, other states may begin to take the situs state's position less seriously and be less inclined to respect the second-order component—notwithstanding that, in principle, the need for uniformity justifies the second-order component of the situs rule even when the situs would select another state's substantive law.

*Antecedent and Penumbral Issues.* Critics have objected to the application of the situs rule to matters that merely have some relation to property and do not seem to be true property issues in the usual sense. Some of these situations involve legal questions that are preconditions to a property determination, such as the legitimacy of a putative heir in a succession dispute. There is a straightforward mandate for the situs rule in such cases, however, at least in part. Because title to property ultimately turns on the resolution of such issues, the need for uniformity is not diminished. That by no means requires that the use of situs substantive law must invariably be applied, but it does call for the resolution of such issues according to whatever state's rule of decision a situs court would use.<sup>177</sup> Critics have also objected to the application of the situs rule to certain collateral legal issues, like the interpretation of contracts pertaining to land.<sup>178</sup> Here too, however, many of the general reasons for a broad situs rule carry over. The use of situs law emphasizes the general situs principle and avoids characterization problems—which can be especially tricky when the characterization depends on whether title to

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<sup>177</sup> See Restatement (Second) of Conflict of Laws, § 233 cmt. b (1971) (commenting that the situs may wish to determine marital property issues under some other state's law, but that if it would do so, other states should do likewise); Hay et al., *supra* note 2, at 1287 (noting that the “law of the situs will ordinarily recognize the claim of a child validly adopted elsewhere to inherit the land”); Finch, *supra* note 39, at 260; see also A.E. Gotlieb, *The Incidental Question Revisited—Theory and Practice in the Conflict of Laws*, 26 *Int'l & Comp. L.Q.* 734, 736 (1977); cf. *In re Bruington's Estate*, 289 N.Y.S. 725, 729 (Sur. Ct. 1936) (applying situs law to deny recognition to foreign legitimation determination).

<sup>178</sup> E.g., Alfred Hill, *The Judicial Function in Choice of Law*, 85 *Colum. L. Rev.* 1585, 1629 (1985) (suggesting use of situs law to resolve “a claim . . . founded on a contract for the sale and purchase of situs land (as distinct from a claim to actual title)” may be “indefensible”).

property is ultimately affected by the way the collateral issue is resolved.<sup>179</sup> In addition, it may often be desirable to treat such collateral issues as part of the overall property package, even when it is theoretically independent as a matter of legal logic, in order to ensure consistent legal treatment of the same transaction.<sup>180</sup>

*Original Parties.* Finally, it has been argued that the situs rule should only come into play in cases involving the effect of a transaction upon a successor to one of the parties to the transaction, rather than its effect on the parties themselves.<sup>181</sup> Yet property's conceptual demand for uniformity is as applicable in resolving claims of the original parties as it is to successors. A two-tiered structure, moreover, undermines the impersonality of property law by applying one legal standard to one owner but another to someone else standing in his shoes. This creates potentially distorting incentives to hold on to property or try to launder it through transactions with unwitting third parties.<sup>182</sup> And more generally, it introduces destabilizing complications to the governing rule, risking complexity and confusion.<sup>183</sup>

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<sup>179</sup> See Ian F.G. Baxter, *Essays on Private Law: Foreign Law and Foreign Judgments* 92 (1966) (stating that in conflict-of-laws problems, an "inherent difficulty is the overlap between the law of contract and the law of property").

<sup>180</sup> For example, it may be better that a promissory note and a security interest be equally valid or invalid, rather than subject to separate determinations. But see *Thomson v. Kyle*, 23 So. 12, 17 (Fla. 1897); *Polson v. Stewart*, 45 N.E. 737, 738 (Mass. 1897) (reaching different results on the two issues).

<sup>181</sup> Weintraub, *supra* note 19, at 575 (stating an "argument based on the needs of the recording system has no relevance to the original parties to the transaction for which we are seeking the governing law").

<sup>182</sup> Cf. Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 *Stan. L. Rev.* 455, 465–67 (2010) (arguing property law is wisely structured so as to avoid the expansion or contraction of the overall package of rights in a given asset by transferring rights to others).

<sup>183</sup> See Whincop & Keyes, *supra* note 158, at 110 (noting that in transaction between original parties "there may be no way of telling that a third party will not become involved" (emphasis omitted)). The Missouri Supreme Court has expressed general fears of this variety rather vividly:

Miserable, indeed, would be our property conditions if we left the simple and safe rules of the common law to run after a will-o'-the-wisp of speculative refinements said by counsel to spring from comity. All our titles would be drawn within the hazard of such new doctrine; and, fortunately, even comity calls for no ruling having such mischief hid in its bowels.

*Hughes v. Winkleman*, 147 S.W. 994, 997 (Mo. 1912). Having to prove reasonable reliance on situs law, as some have proposed, only adds to these difficulties. Cf. Richman & Reynolds, *supra* note 19, at 425–26 (proposing a general test that would apply the law of the state having the "most significant relationship" with respect to a particular issue to be decided,

*D. Judicial Jurisdiction*

The rule forbidding adjudication of property interests by non-situs courts is sufficiently unusual and potentially burdensome to require a few additional comments. Its usefulness in preventing the application of divergent substantive standards has been noted, but like the first-order component of the situs rule, it too has other important benefits. For one thing, it ensures a related kind of uniformity by helping to foreclose the production of conflicting judgments purporting to resolve the same property issue. Conflicting judgments undermine property's bottom-line definitiveness much the way conflicting legal rules do. It is worth noting that even in situations where multiple courts are competent to handle the same property issue, there is still a strong push toward exclusivity. In the context of federal-state relations, for example, the usual rule is that in areas where federal and state courts have concurrent jurisdiction, a federal court should neither attempt to prevent a state court from entertaining a matter that duplicates its own pending proceeding nor should it stay or dismiss the federal litigation in deference to the state-court proceeding. Yet there is an exception for "in rem" questions—indeed, so strong is this exception that a state court that has already begun hearing an in rem action may actually *enjoin* simultaneous proceedings in federal court requiring jurisdiction over the same *res*.<sup>184</sup> Parallel proceedings and conflicting judgments are not tolerated. Property law seeks to provide rights that are definitive and bottom-line, and a property determination is meant to be correspondingly final.

The prohibition on non-situs adjudications also helps combat information-cost problems in a fairly direct way.<sup>185</sup> Judgments involving

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and applying situs law only in exceptional cases where to do otherwise would "disadvantage a party that relied reasonably" on situs law to conduct a title search). Not only does it introduce uncertainty and a factual inquiry that can be expensive and subjective, but it seems unlikely to do much good. Actors might well hesitate to rely on situs law knowing that it is available only as a safety valve for those who do not know better.

<sup>184</sup> See *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 467–68 (1939) (upholding state court's decree enjoining litigants from proceeding with suit in federal court). Actions involving claims to a *res* is also a foundation for abstention under the *Colorado River* doctrine. See *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976); cf. Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 *Notre Dame L. Rev.* 1347, 1359 (2000) (describing this special rule for in rem cases as "little more than a meta-physical relic of a very different epistemological age").

<sup>185</sup> In addition, the jurisdictional prohibition offers certain procedural efficiencies if the situs of property will eventually be called upon to enforce the property rights at issue in the



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property issues can be grouped into three basic categories according to their preclusive consequences: they can bind all people with interests in the property, they can bind only the parties and their successors in interest, or they can bind the parties and no one else.<sup>186</sup> Binding anyone to the results of litigation without notice of the proceedings is problematic, and while the problem may be most acute for strangers, it remains serious even when only successors are to be precluded. Yet it is black letter law that successors-in-interest stand in the shoes of those they succeed: They are entitled to rely on a determination favorable to their predecessors and, more importantly for our purposes, they are bound by any judgment against their predecessors—whether or not they knew or reasonably could have known about it.<sup>187</sup>

The basic privity principle reflected in these rules is essential. Again, making property allocations depend on the identity of the party involved creates distorting incentives, here on the part of judgment winners to hold on to property and judgment losers to convey.<sup>188</sup> But this privity rule also creates serious notice problems. Obtaining information about prior judgments that could emanate from any court in the country is an expensive undertaking, and it seems likely that successors might indeed be ignorant of a relevant determination with some frequency. Yet the problem is not easily avoided. Conditioning preclusion on actual knowledge encourages property holders to find unwitting successors and encourages successors to remain ignorant. If the default were to presume knowledge, moreover, successors would be put in the difficult position of having to prove a negative, while if the default were to presume lack

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proceeding. See Whincop & Keyes, *supra* note 158, at 114–15. Since situs courts and situs officers will inevitably be involved unless the property migrates to another jurisdiction—an extremely unlikely development where land is concerned—a rule requiring claims to situs property be brought in situs courts avoids what may generally be expected to be wasteful proceedings elsewhere.

<sup>186</sup> These may be referred to respectively as *in rem*, *quasi in rem*, and *in personam* judgments, although courts do not always use these labels in this manner. See *supra* notes 31 & 40. This understanding of *quasi in rem* jurisdiction—the authority to determine property interests in a way binding on successors but not strangers—should not be confused with the sort of problem presented in *Shaffer v. Heitner*, 433 U.S. 186, 198–99 (1977), in which it was argued that the ordinary requirements for personal jurisdiction could be partly avoided in the context of adjudicating a personal liability by virtue of the presence of the defendant’s property within the adjudicating state.

<sup>187</sup> Restatement (Second) of the Law of Judgments § 43 (1982).

<sup>188</sup> See Epstein, *supra* note 182, at 465–67; see also Smith, *supra* note 28, at 1704.

of knowledge, challengers would face a serious evidentiary problem in trying to establish what the successor knew and when he knew it.

An objective reasonableness standard might seem like the way to go, but what does a reasonable effort look like? Again, a search of all litigation in all states would be extremely costly. Requiring instead that any property determination binding on non-parties be made in the courts of the place where property is located can be seen as a decent proxy for a reasonableness rule. It lays down a clear legal line that can be apprehended *ex ante* and it reduces the cost of searching by limiting the universe of information relevant to the property question. The location of property generally has a fairly strong salience, and it does not seem too much to ask that claimants to property be willing to appear in the place where property is physically situated (particularly when it comes to real property, which will never be situated anyplace else).<sup>189</sup> It is notable that rules channeling litigation into the courts where property is located exist not only at the interstate but the intrastate level—proceedings are often restricted not just to the *situs* state but to the *situs* county.<sup>190</sup>

## V. BEYOND BLACKACRE

The arguments developed in Part III drew connections between rights *in rem*, the *situs* rule, and property. This Section takes a brief look at situations where one of those three elements is missing.

### A. Property in Personam

While one state court is generally said to lack jurisdiction over property located in another state, there is an important practical qualification to that statement. A non-*situs* court is allowed to determine property issues affecting anyone over whom it has personal jurisdiction, so long as its judgment is only “*in personam*.”<sup>191</sup> Critics of the *situs* rule see this

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<sup>189</sup> It is perhaps noteworthy that the prohibition on adjudicative jurisdiction also appears in the international context. See *British S. Afr. Co. v. Companhia de Moçambique*, [1893] A.C. 602 (H.L.) 624 (appeal taken from Eng.).

<sup>190</sup> So-called local action rules are state-law requirements that proceedings determining title to real property be brought in the judicial district where property is located. See June F. Entman, *Abolishing Local Action Rules: A First Step Toward Modernizing Jurisdiction and Venue in Tennessee*, 34 U. Mem. L. Rev. 251, 253 (2004).

<sup>191</sup> See *Fall v. Eastin*, 215 U.S. 1, 8 (1909) (“A court of equity having authority to act upon the person may indirectly act upon real estate in another State, through the instrumentality of this authority over the person.”).

apparent exception to the jurisdictional bar as yet another mark against the situs rule, an accident of history that betrays the lack of principle behind the situs rule's territorialist prohibitions.<sup>192</sup> Yet the distinction can be understood when some basic concerns of property law are taken into account.

Standardization and limitation bring not only the benefit of reduced information costs but also the burden of impeding otherwise desirable arrangements,<sup>193</sup> and this is as true for the prohibition on non-situs adjudications as it is for other restrictions property law imposes. The *in personam* exception recognizes that, to the extent it is possible to reduce notice problems and either avoid any serious risk of nonuniform substantive standards or to reduce the costs associated with nonuniformity, there is some room left for action outside the situs. It may be useful to bring a proceeding in a non-situs court if, for example, money damages are sought and the situs does not have personal jurisdiction over the defendant. Likewise, a non-situs court might need to resolve issues between claimants to property in the course of some larger determination, as in a divorce or probate proceeding.<sup>194</sup> The non-situs determination is purely *in personam*—it does not affect adverse strangers or successors, because it is not conceived of as acting upon the property itself—but it does provide relief between the parties where such relief is needed.<sup>195</sup>

Under these circumstances, the limitation on the exercise of non-situs jurisdiction can sensibly be relaxed. A purely *in personam* adjudication does not present the notice problems that arise when non-parties are to be bound. So long as situs conflicts rules are still used, moreover, uniformity should largely be preserved, and since the judgment does not run to successors, the practical foundation of property's special demand for uniformity is diminished in any event. Far from runaway conceptualism, this is formal but practical—an attempt to conform the structures that the

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<sup>192</sup> See Alden, *supra* note 19, at 595; see also Nicholas de Belleville Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 *Yale L.J.* 1087, 1139 (1956) (“The oft-repeated statement that a court could exercise no jurisdiction over foreign land without offense to sovereignty is nonsense; equity did so all the time for no better reason than that equity acts *in personam*.”).

<sup>193</sup> See Merrill & Smith, *Optimal Standardization*, *supra* note 61, at 35–38.

<sup>194</sup> See Alden, *supra* note 19, at 599, 604–05.

<sup>195</sup> See Restatement (Second) of the Law of Judgments § 43 cmt. a (1982) (“If the action is characterized as having involved only the ‘personal’ rights of the litigants, it does not affect the property itself. The consequence of such a characterization is that a person who subsequently acquires property owned by one who was a party to litigation is not bound by the judgment.”).

law provides to meet serious needs. It reflects a strategy to promote change and flexibility while simultaneously preserving structure, continuity, and stability.

*B. Intellectual Property and Intangibles: Property Without Situs*

There are a number of situations in which the use of situs law to resolve property or property-like questions is either impossible or plainly undesirable, yet the law tends to recognize the need for uniformity nevertheless. The clearest example is the treatment of intangible property, where inter-jurisdictional uniformity remains uncommonly common.<sup>196</sup> The Uniform Commercial Code provides not only conflict-of-laws rules,<sup>197</sup> but also detailed substantive rules for most issues concerning the transfer of interests in pure intangibles like choses in action, and like all provisions of the Code, these provisions are uniform from state to state.<sup>198</sup> Furthermore, the Code's conflicts provisions adopt many of the strategies for achieving uniformity reflected in the situs rule. The Code generally refers to situs law where possible, for example, as in the case of chattel paper and other intangibles reduced to a physical representation.<sup>199</sup> It otherwise selects the location (something akin to domicile) of the debtor, which is probably the next most obvious focal point—appropriate not because of the regulatory interests of the state where the debtor is located but because of the salience of the debtor's location as a touchstone for coordination. The transfer of shares in a corporation, meanwhile, is generally governed by the conflict-of-laws rules of the state of incorporation, the corporation's legal "location," and for certificated securities, the state of incorporation usually looks in turn to the substantive law of the situs of the certificates at the time of transfer.<sup>200</sup>

Intellectual property fields are likewise spared the kind of forum-centric regime produced by the Conflicts Revolution. There is little room for conflicting laws on subjects of intellectual property like copyright and patent since those areas are largely a matter of federal law—in a sense, one may say they are governed by a situs rule, and their situs is

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<sup>196</sup> Succession to personal property is another. See *supra* note 165.

<sup>197</sup> See U.C.C. § 9-301 (2012) (choice-of-law provision regarding the perfection and priority of security interests).

<sup>198</sup> All states have enacted the 2000 version of Article 9, although with some individual variation. See Unif. Commercial Code, 3 U.L.A. 1, 16 (2002).

<sup>199</sup> See Weintraub, *supra* note 19, at 647–51; Kuhn, *supra* note 43, at 1035–38.

<sup>200</sup> See Hay et al., *supra* note 2, at 1283–84.

federal territory.<sup>201</sup> There is also a strong judicial dimension to the division of authority over intellectual property in the United States. Federal courts in many cases have exclusive jurisdiction over questions concerning the validity and scope of patents and copyrights,<sup>202</sup> and, moreover, appellate jurisdiction in patent cases is vested exclusively in the Court of Appeals for the Federal Circuit—when it comes to patents, even circuit splits are largely ruled out.<sup>203</sup> Regardless of whether these unusual arrangements are ultimately justified, they suggest that the value of uniformity in dealing with intellectual property is understood to be particularly strong.

The paramount need for uniformity in dealing with rights in rem and the extension of the principle to intangible property is evident in the treatment of escheat questions.<sup>204</sup> The Supreme Court has in some circumstances been willing to allow multiple states to tax the same intangible property<sup>205</sup> but it has firmly ruled out the possibility of allowing mul-

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<sup>201</sup> See 17 U.S.C. § 301(a) (2006) (copyright provision preempting state law); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 143–44, 152 (1989) (finding a state statute preempted by federal patent laws); see also *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 n.7 (1964); H.R. Rep. No. 94-1476, at 129 (1976) (expressing congressional view that “[o]ne of the fundamental purposes” behind the Constitution’s Copyright Clause was to “promote national uniformity” and avoid having authors enforce their rights “under the differing laws and in the separate courts of the various [s]tates”). Trademark law has a federal, and thus a nationally uniform, component, but federal jurisdiction is less exclusive than with copyright and patent. See Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 414–16 (1964) (opining that “the desirability of full federal occupation of this nearly occupied field . . . can scarcely be doubted”).

<sup>202</sup> 28 U.S.C. § 1338(a) (Supp. 2012); *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 828 (2d Cir. 1964); see also Donald Shelby Chisum, *The Allocation of Jurisdiction Between State and Federal Courts in Patent Litigation*, 46 Wash. L. Rev. 633, 636–38 (1971) (questioning whether uniformity was part of the original motivation for this exclusivity); Chris J. Katopis, *The Federal Circuit’s Forgotten Lessons?: Annealing New Forms of Intellectual Property Through Consolidated Appellate Jurisdiction*, 32 J. Marshall L. Rev. 581, 583–97 (1999) (justifying federal court grant of exclusive jurisdiction on uniformity grounds).

<sup>203</sup> 28 U.S.C. § 1295(a) (2006). That the need for uniformity appears to be more strongly felt in patent than copyright is also suggested by the unwillingness of American courts to entertain patent claims arising under foreign patent law and to enjoin litigants from proceeding with adjudications of American patents in foreign courts. Neither of these policies has an analog in copyright. In international patent litigation, in other words, there appears to be a very strict equivalent of the *situs* rule’s second-order component.

<sup>204</sup> Escheat of property occurs when a property-holder dies intestate without any legal heirs or has not claimed property and cannot be located. Rather than allow title to be held in suspense, it transfers to government. See John V. Orth, *Escheat: Is the State the Last Heir?*, 13 *Green Bag* 2d 73, 75 (2009).

<sup>205</sup> See *State Tax Comm’n v. Aldrich*, 316 U.S. 174, 178 (1942); *Curry v. McCannless*, 307 U.S. 357, 373 (1939); see also Weintraub, *supra* note 19, at 711.

multiple escheats, concluding that one, and only one, state can acquire an item of intangible property by virtue of escheat.<sup>206</sup> Again, the difference has to do with the conceptual organization of property. Taxation, even where assessed on the basis of property holding, imposes a kind of personal liability,<sup>207</sup> and as such it can be multiplied: In theory, a person can be taxed on an item of property at a rate greater than 100%. But escheat is a transfer of property rights and thus concerns the allocation of rights in rem. Two states cannot each acquire 100% of a given *res*, even when the *res* is itself an intangible, *in personam* obligation like a chose in action—a figment of the legal imagination.<sup>208</sup>

*Texas v. New Jersey*, one of the Supreme Court's principal decisions dealing with the escheat issue, in many respects exemplifies the kind of reasoning that generally supports the situs rule. The Court's opinion noted that a jurisdictional rule based on physical situs would not work for intangible property but recognized that exclusivity was the cause, not the effect, of the situs principle and that therefore some alternative criterion of allocation would have to be devised.<sup>209</sup> It considered, and rejected, a "most significant contacts" test inspired by a number of landmark Conflicts Revolution cases, concluding it would "leave in permanent turmoil a question which should be settled once and for all by a clear rule."<sup>210</sup> Instead, it decided intangible property should escheat to the state of the last known address of the creditor, the owner of the debt-*res*. This had the advantage not only of entailing a simple and easily determined question of fact, but also of being consistent with how the "situs" of intangibles is determined in other legal contexts, of conforming with the basic idea of property law, and of allocating property among the states in proportion to the commercial activities of their residents. Of course the last known address might not always turn out to be the creditor's home as of the time the debt arose or escheated—which governmental interest anal-

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<sup>206</sup> See *Texas v. New Jersey*, 379 U.S. 674, 677 (1965); *W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961); *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 443 (1951); see also Weintraub, *supra* note 19, at 711 (discussing divergence).

<sup>207</sup> Conceptually, that would seem to be what distinguishes it from confiscation.

<sup>208</sup> See Weintraub, *supra* note 19, at 712 ("[O]nce one state has taken all by escheat, there is nothing left to apportion among other states without taking it out of the hide of the stakeholder.").

<sup>209</sup> See *Texas*, 379 U.S. at 677.

<sup>210</sup> See *id.* at 678. Indeed, said the Court, it was no test at all, "simply a phrase" calling for the evaluation of each case on its own peculiar facts, an evaluation that was "difficult," "often quite subjective," open to the most self-serving interpretations by states, and likely to generate a high volume of wasteful litigation. *Id.* at 679.

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ysis might view as necessary to make a state's connection to the creditor relevant from a policy standpoint. But the Court was untroubled, noting that such cases would be exceptional and that "any errors thus created, *if indeed they could be called errors*, probably will tend to a large extent to cancel each other out."<sup>211</sup>

The decision recognized property's implicit need for uniformity and adopted a systemic perspective. It emphasized the need for clarity and coordination. It made a rough attempt to draw lines in a way that would allocate material benefits to each state to the extent of the prosperity they generated. And it resisted the impulse to abandon the project because its rule would not reach what might arguably be the most correct result in every individual case if each was examined in isolation from any other. The decision shows how the outlook that supports the situs rule for physical property carries even when confronting the esoteric issue of succession to unclaimed, intangible debts.

### *C. In Remishness Without Property*

Strictly speaking, the definition of an in rem entitlement is coextensive with the definition of property—an entitlement that affords some measure of legal control over a particular thing and is secure against anyone else's contrary such entitlement neatly captures property's formal essence. Nevertheless, a number of legal problems have qualities that in some ways resemble the features that make property relations in rem. These are worth examining, not only because they too seem to be accompanied by rules tending toward uniformity and exclusivity, but because they offer further opportunity to reflect on just what it is that makes a legal problem in rem.

Lawyers commonly have their first encounter with the term "in rem" in the context of procedural rules, not the classification of substantive rights, and procedure is an appropriate place to start in looking at in remness. An in rem entitlement is meant to be secure against the possibility of anyone else having an entitlement inconsistent with it, and in rem jurisdiction allows a court to make a determination providing that security. It permits a court to declare that no such entitlements exist in a way that will be effective against anyone asserting such an entitlement. But in rem jurisdiction so-called is not the only situation in which courts make determinations of this kind. Something similar can be said about proce-

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<sup>211</sup> Id. at 681 (emphasis added).

dural devices like interpleader<sup>212</sup> and the “natural”<sup>213</sup> class actions provided for in Federal Rule of Civil Procedure 23(b)(1), which involve either the possibility of potentially conflicting duties or multiple parties asserting claims upon a limited fund of money. A fairly typical interpleader paradigm is an insurer’s obligation to pay several different claimants whose total claims exceed the insured risk,<sup>214</sup> and that obligation is a *res* only in a highly abstract sense.<sup>215</sup> A legal actor’s future course of conduct—the object being fought over in cases where a person faces a risk of being subjected to conflicting duties—even more so. But the zero-sum aspect of the issue makes it appropriate to seek a unitary disposition, not simply because doing so avoids redundancy but because it is necessary in light of the interrelatedness of the claims.<sup>216</sup> To allow conflicting judgments in separate proceedings is to replicate at the more targeted level of those little laws called judgments the same problem of overlapping, inconsistent norms present when conflicting regimes of general property law are made simultaneously applicable to the same property issue.

Notice that, by contrast, merely similar claims of the kind involved in class actions certified under Federal Rule of Civil Procedure 23(b)(3)—claims that simply share a common legal or factual question—are not as readily accorded class treatment such as issues lacking in *rem* interrelatedness.<sup>217</sup> Efficiency, repose, and the need to treat like cases alike offer some reason for consolidation, but these more prudential considerations are not as compelling as the need for unitary disposition presented when claims must be reconciled against one another. The distinction is an im-

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<sup>212</sup> Fed. R. Civ. P. 22.

<sup>213</sup> Norman C. Sabbey, Comment, Rule 23: Categories of Subsection (b), 10 B.C. Indus. & Com. L. Rev. 539, 542 (1969). These categories bear some resemblance to what were called “true” and “hybrid” class actions under the original version of Rule 23. See Fed. R. Civ. P. 23(a)–(b) (repealed 1966) (allowing class-wide resolution of issues involving “joint, or common, or secondary [that is, derivative]” rights or “several” rights related to “specific property”); see also James Wm. Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Geo. L.J. 551, 571–76 (1937).

<sup>214</sup> E.g., *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967).

<sup>215</sup> See *Rush v. Savchuk*, 444 U.S. 320, 328–29 (1980).

<sup>216</sup> Cf. Fed. R. Civ. P. 19 (requiring interpleader where the court cannot afford complete relief in the absence of interpleader or the person requesting interpleader demonstrates either an interest in protecting the property at issue or a risk of inconsistent obligations in the absence of interpleader).

<sup>217</sup> It is notable that in these situations, a uniform procedure is often legally required. In class actions certified under Fed. R. Civ. P. 23(b)(1), for instance, parties are denied the right not to participate enjoyed by members of Rule 23(b)(3) classes.



portant one and one that is too easily overlooked by those seeking to reduce in rem relations to a matter merely of numerosity or generality. Professor Wesley Hohfeld, for example, wrote that a right in rem is “one of a large class of fundamentally similar yet separate rights . . . availing respectively against persons constituting a very large and indefinite class of people.”<sup>218</sup> That description misses something crucial. For a start, by treating each separate application of what is generally treated as a single legal relation as a freestanding entitlement, it obscures the idea that there is a larger, simpler legal principle from which each right-duty pair can be readily deduced.<sup>219</sup> Still more fundamentally, however, Hohfeld’s notion that each imaginable interpersonal relationship within the collection we call property is merely “similar” to all the others fails to account for the way in which those relations relate to one another. In the true in rem paradigm, individual right-duty pairs are not just similar; they are pieces of an integrated system, such that a change to one necessarily risks affecting the others. The special procedural doctrines and devices discussed here that are designed to deal with such claims under a single adjudicative standard reflect this crucial operative difference.<sup>220</sup>

A propensity toward uniformity can also be seen in a number of areas of substantive law where something like the idea of in rem-ness is present.<sup>221</sup> One legal oddity of rather long standing is the practice of classi-

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<sup>218</sup> Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *Yale L.J.* 710, 718 (1917) (emphasis omitted).

<sup>219</sup> J.E. Penner similarly writes:

If Hohfeld’s description of rights *in rem* is correct, then whenever Blackacre is transferred from one person to another, everyone else in the world exchanges one duty for another. Since rights correlate with duties, when A sells Blackacre to B, all persons who previously had a duty to A now have a duty to B, since B now has the bundle of Blackacre rights. The alternative, and I think better, view is that no one’s but A’s and B’s rights and duties have changed.

Penner, *supra* note 28, at 23.

<sup>220</sup> Cf. Merrill & Smith, *supra* note 28, at 785 & n.41 (giving standard-form contracts and class actions, though perhaps only in the fairly unusual situation involving a defendant class, as possible examples of “compound paucital” relations: legal relationships involving numerous but identified parties).

<sup>221</sup> Some fields like estate administration and bankruptcy have fairly obvious similarities to property and can be viewed as essentially a specialized or modified body of property law. Not surprisingly, there is a tendency toward uniformity in those areas in terms of both conflicts rules and adjudicative procedure. The Constitution, for instance, gives Congress the power to enact “uniform Laws on the subject of Bankruptcies throughout the United States.” U.S. Const. art. I, § 8, cl. 4. This Congress has done, in the form of the Federal Bankruptcy Code. See 11 U.S.C. §§ 101–1532 (2006). The Code not only provides nationally uniform bankruptcy law but also looks to state law where relevant in order to ensure uniform treat-

fyng questions of personal status, like marriage and legitimacy, as “in rem” matters.<sup>222</sup> While marriage, for example, has property law implications, it seems quite peculiar to say that a marriage itself is an object to be chopped up and distributed among the universe of possible claimants. Yet on further reflection, the analytical similarity to property may be greater than first appears, although the connection does not necessarily have to do with rights in assets. Marriage has effects on the world inasmuch as a marriage between *A* and *B* precludes a marriage between *A* and *C*—at the risk of potentially serious penalties.<sup>223</sup> It is as though each person were born with a sort of imaginary object whose possession by

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ment of the same legal relationship as between bankruptcy and non-bankruptcy proceedings, see *Butner v. United States*, 440 U.S. 48, 55 (1979), and the authority for the view that the rules for deciding which state’s law to incorporate should not depend on the forum, see *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 162 (1946); *Woods-Tucker Leasing Corp. of Ga. v. Hutcheson-Ingram Dev. Co.*, 642 F.2d 744, 749 (5th Cir. 1981). But see *In re Gaston & Snow*, 243 F.3d 599, 606 (2d Cir. 2001). Bankruptcy adjudication is also restricted: Federal courts have exclusive jurisdiction over “cases under” the Code, 28 U.S.C. § 1334(a) (2006), and the particular court in which a case is filed or pending has exclusive jurisdiction over “all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.” *Id.* § 1334(e).

Other property-like areas involve the conversion of certain activities into intangible things that are administered by specialized bodies, sometimes public and sometimes private. Broadcast spectrum—what might be thought of as the right to emit electromagnetic radiation at a given frequency—is administered by the Federal Communications Commission. Telephone numbers in the United States are allocated among telephone service providers according to the North American Numbering Plan Administration, which is administered by Neustar, Inc., and providers in turn assign individual numbers to their customers. The Internet domain-name system is managed by the Internet Corporation for Assigned Names and Numbers, or ICANN. See ICANN, Uniform Domain Name Dispute-Resolution Policy (Oct. 24, 1999), <http://www.icann.org/en/help/dndr/udrp/policy>; see also Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d)(2) (2006) (establishing an “in rem civil action against a domain name” in federal court to establish priority of a trademark holder to a domain name employing the mark). In any of these situations, it would clearly be undesirable to have conflicting regimes in place for the distribution of the hypothesized *res*. Telephone networks, for instance, could hardly operate if one protocol meant that dialing a particular number would cause one person’s telephone to ring while other equally applicable protocols meant the same number would connect the dialer with someone else. See Karl M. Manheim & Lawrence B. Solum, *An Economic Analysis of Domain Name Policy*, 25 *Hastings Comm. & Ent. L.J.* 359, 401 (2003).

<sup>222</sup> See *Ray v. Ray*, 217 N.W.2d 492, 494 (Minn. 1974) (“A custody proceeding is in the nature of an action in rem, the child’s status being the *res*.”); see also *Unif. Child Custody Jurisdiction Act* § 12, 9 U.L.A. 274 (1988) (stating that there is no requirement for technical personal jurisdiction since custody determinations are proceedings in rem or proceedings affecting status).

<sup>223</sup> Actually, marriage is zero-sum even if polygamy is allowed inasmuch as *B* might have an interest in preventing *C* from also becoming *A*’s spouse.

another transforms the possessor into something called a spouse. We may not think of marriage in quite this way, but the rules that govern it can be mapped onto this allocational structure. *Pace* Hohfeld, the inter-relatedness of claims that this structure implies gets quite close to the core of rights in rem as a legal category.<sup>224</sup> And notably, conflict-of-laws rules concerning the validity of a marriage are generally single-factor, bright-line, and uniform—largely unaffected by the Conflicts Revolution.<sup>225</sup> Jurisdiction to terminate a marriage by divorce is curtailed, moreover,<sup>226</sup> and the validity of a divorce decree was the only issue outside the context of property for which renvoi was tolerated in the era of the First Restatement.<sup>227</sup> The property parallels are strong.

Corporate law also involves one of the few First Restatement doctrines to survive the Conflicts Revolution largely intact. The principle that the law of the state of incorporation governs many of the major issues in the law of corporations continues to dominate American law.<sup>228</sup> Here, too, there are aspects of in rem-ness. Shareholding in important respects corresponds with a conception of corporate ownership,<sup>229</sup> and

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<sup>224</sup> The same can be said of legitimacy. Sibling rivalry, for instance, attests to the potentially zero-sum nature of such family relations.

<sup>225</sup> See Hay et al., *supra* note 2, at 620 (stating that “the courts of the United States traditionally have applied a single choice-of-law reference to the place of celebration for the determination of issues relating to marriage”). The validity of marriage may be distinguished from the incidents of marriage, which does not implicate zero-sum considerations in the same way. The so-called public policy exception, which permits non-recognition of marriages thought to be repugnant to local mores, is also not necessarily inconsistent with the thesis advanced here to the extent non-recognition is limited to the forum.

<sup>226</sup> See Restatement (Second) of Conflict of Laws § 72 (1971); see also *Rice v. Rice*, 336 U.S. 674, 674 (1948); *Williams v. North Carolina*, 325 U.S. 226, 229 (1945).

<sup>227</sup> See 1 Beale, *supra* note 64, at 57–58.

<sup>228</sup> See Restatement (Second) of Conflict of Laws § 303 (identity of shareholders); *id.* §§ 303–310 (shareholder rights inter se, officer and director fiduciary duties, and other internal governance questions); *id.* § 307 (shareholder liability to corporate creditors); see also Note, *The Internal Affairs Doctrine: Theoretical Justifications and Tentative Explanations for Its Continued Primacy*, 115 *Harv. L. Rev.* 1480, 1481 (2002) (reflecting upon “how truly remarkable it is that most states voluntarily adhere to the internal affairs doctrine”). There have been some attempts by states to limit this general rule. See, e.g., *Cal. Corp. Code* § 2115(a) (Deering 2009). On possible conflict between such “pseudo-foreign corporations” laws and the Supreme Court’s decision in *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982), see Hay et al., *supra* note 2, at 1410–11. The place-of-incorporation principle has in some instances been accompanied by something similar to the situs rule’s second-order component. *Id.* at 1283–84, 1405–06 (noting use of conflicts rules of state of incorporation in connection with transfer of shares and discussing judicial jurisdiction over foreign corporations).

<sup>229</sup> It is associated with residual claims on the assets of a corporation, a right to the fruits of the corporation’s endeavors and improvements, and control over the ways the corporation is

since it is therefore zero-sum in the sense that no one can hold 130% of a company's stock, a single ultimate standard is needed to determine who owns what shares.<sup>230</sup> The "internal affairs" of a corporation—voting rules, fiduciary duties, and so on—are likewise zero-sum inasmuch as they have the potential to generate mutually exclusive legal demands if not administered on a unitary basis according to a single standard.<sup>231</sup> And whatever their content, rules concerning the personal liability of shareholders to corporate creditors (that is, limited liability) and the availability of corporate assets for the satisfaction of shareholder liabilities ought to apply the same way to all shareholders, given the interdependence of their relationship.<sup>232</sup> Rules limiting liability in these ways, moreover, can be seen as strategies for "modularizing" the corporation so as to minimize the information relevant to potential creditors and investors through the creation of partitioned groups of assets with standardized features.<sup>233</sup> In a sense, they are ways of delineating the bounda-

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put to use—on a good-against-the-world basis. But see Eugene F. Fama, Agency Problems and the Theory of the Firm, 88 J. Pol. Econ. 288, 290 (1980) (stating that from a "nexus of contracts" perspective, ownership of the firm is an irrelevant concept").

<sup>230</sup> Authority over the partitioning of the corporate *res* can itself be subdivided and delegated, insofar as the place of incorporation can use another state's law to resolve issues concerning particular issues pertaining to particular allocations—paralleling the second-order component of the situs rule. For example, the place of incorporation can decide who inherits a shareholder's shares by using the law applicable to the division of the shareholder's estate or by looking to the place where share certificates are located. But the place of incorporation is the starting point because ultimately there must be a final sort of registry to coordinate these disparate sorts of determinations. See *supra* note 200 and accompanying text. The partitioning process takes place along a slightly different dimension under the "indirect holding" system established under Article 8 of the Uniform Commercial Code. See U.C.C. § 8-503(d)–(e) (2012); Marcel Kahan & Edward Rock, The Hanging Chads of Corporate Voting, 96 Geo. L.J. 1227, 1242 (2008) (explaining that under Article 8, "the interest of the customers who hold a certain security is not an interest in any particular item of property, but rather is a pro rata interest in all like securities of the intermediary held in common by all other customers who own the same security").

<sup>231</sup> Cf. William S. Lerach, Securities Class Actions and Derivative Litigation Involving Public Companies: One Plaintiff's Perspective, in 399 Practising L. Inst., Litigation and Administrative Practice Course Handbook Series 65, 99–107 (1990) (asserting that the "only argument in favor of the internal affairs doctrine boils down to having the state of incorporation's own law applied to promote uniformity and predictability" and that such concerns are insufficient to justify the doctrine after the Conflicts Revolution).

<sup>232</sup> See Restatement (Second) of Conflict of Laws § 302 cmt. e ("Uniform treatment of directors, officers and shareholders is an important objective which can only be attained by having the rights and liabilities of those persons with respect to the corporation governed by a single law.").

<sup>233</sup> See Henry Hansmann & Reinier Kraakman, The Essential Role of Organizational Law, 110 Yale L.J. 387, 390 (2000). Once again, Wesley Hohfeld thought otherwise, since he per-

ries of the corporate *res*, the kind of allocational process at the heart of property law. By way of an illustrative contrast, the liability of the corporation itself for the acts of a putative agent is determined by ordinary conflicts rules, which do not evince any special concern for uniformity.<sup>234</sup> Unlike the distribution of shareholder and corporate assets, the corporation's dealings with individual creditors does not present the same essential need for a uniform rule, even if uniformity might offer some benefits by providing greater clarity or certainty.

The principles noted here may even have constitutional implications. Today, the Full Faith and Credit Clause is said to require one state to apply another's law in some circumstances. Scholars, however, debate whether that is a correct reading of the original meaning of the Clause, and in fact, the Supreme Court does not appear actually to have held as much until well into the twentieth century.<sup>235</sup> Rather suggestively, the Court's earliest uses of Full Faith and Credit to require the application of another state's law were in two sorts of cases: those concerning the liability of corporate shareholders,<sup>236</sup> the issue just discussed, and those concerning fraternal benefit societies<sup>237</sup>—insurance cooperatives, in essence, in which member-owners contributed to a common fund to compensate fellow members who had been injured or killed.<sup>238</sup> In the context

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ceived the thing-ness or personification of corporations as analytical error, and argued against universal application of the law of the incorporating state to such questions. See Wesley Newcomb Hohfeld, *The Individual Liability of Stockholders and the Conflict of Laws*, 10 *Colum. L. Rev.* 283, 296 (1910); see also Currie, *supra* note 22, at 346 & n.248 (citing Hohfeld approvingly).

<sup>234</sup> Restatement (Second) of Conflict of Laws § 301.

<sup>235</sup> See Ann Woolhandler & Michael G. Collins, *Jurisdictional Discrimination and Full Faith and Credit*, 63 *Emory L. Rev.* (forthcoming 2014), available at <http://ssrn.com/abstract=2054645>.

<sup>236</sup> See *Broderick v. Rosner*, 294 U.S. 629, 637–39 (1935); see also *Converse v. Hamilton*, 224 U.S. 243, 261 (1912).

<sup>237</sup> See *Order of United Comm. Travelers of Am. v. Wolfe*, 331 U.S. 586 (1947); *Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66, 72 (1938); *Modern Woodmen of Am. v. Mixer*, 267 U.S. 544 (1925); *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531, 532 (1915).

<sup>238</sup> These societies often operated under an assessment system, meaning that members contributed as individual claims arose, in order to relieve the society of the need to maintain a large reserve fund. See John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 *Harv. L. Rev.* 690, 803 (2001); see also *id.* (noting the importance placed upon assessing all members in equal amounts). As with rules for determining the extent to which shareholders are liable for corporate debts (and vice versa), this structure is centered on a question of asset-partitioning, which is to say a problem of in rem-ness. See *supra* note 233.

of these latter cases the Court remarked that membership in such a cooperative society is “something more than a contract;” it is a “complex and abiding relation, and as marriage looks to domicile, membership looks to and must be governed by the law of the [S]tate granting the incorporation.”<sup>239</sup> Regardless of whether the Court was correct in its reading of the Full Faith and Credit Clause, the strongest case for the application of one state’s laws by another seems to have been presented in cases concerning rights of an in rem quality.<sup>240</sup>

#### CONCLUSION

This Article has both drawn upon and sought to reinforce the growing recognition of the distinctness of property’s analytical form. Understood as a regime for the allocation of control over resources, in which rights in rem necessarily come at the expense of everyone else, property is a system at once complex, authoritative, and fundamental. Its zero-sum design makes an especially strong demand for uniform conflict-of-laws rules from state to state, both because of the toll non-uniformity takes on the allocation-based concepts used to structure property law and because of the difficulties actors face in communicating and acquiring the information made relevant to them by the in rem entitlements such a system produces.

The situs rule is justified not because the state where an item of property is located has a superior claim to have its property law applied *per se*, but because the situs rule creates a clear focal point that facilitates uniformity, helping ensure that only one legal regime will be used to determine any given question concerning the distribution of property rights in a given asset. In short, if the “land taboo” is anachronistic, the anachronism lies not in its content but in its name, suffused as it is with the once-fashionable notions of mid-twentieth-century psychoanalysis and the conceited presentism of a present now very much a part of the

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<sup>239</sup> *Modern Woodmen*, 267 U.S. at 551.

<sup>240</sup> These cases are examined in Weintraub, *supra* note 19, at 697–705; Larry E. Ribstein & Erin Ann O’Hara, Corporations and the Market for Law, 2008 U. Ill. L. Rev. 661, 716; Robert A. Sedler, Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism, 10 Hofstra L. Rev. 59, 99–100 (1981); James Y. Stern, Note, Choice of Law, the Constitution, and *Lochner*, 94 Va. L. Rev. 1509, 1528 (2008); Woolhandler & Collins, *supra* note 235; Clyde Spillenger, Risk Regulation, Extraterritoriality, and the Constitutionalization of Choice of Law, 1865–1940 (UCLA Sch. L. Res. Paper No. 12-01, 2012), available at <http://ssrn.com/abstract=2006719>.

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past.<sup>241</sup> Far from an obsolete relic from a bygone legal era, the situs rule represents a sensible response to issues that play a central role in some of today's most innovative private law scholarship and points the way forward in future thinking about questions of both property and jurisdiction.

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<sup>241</sup> See Lawrence K. Frank, *An Institutional Analysis of the Law*, 24 *Colum. L. Rev.* 480, 481 (1924) (describing institution of private property as a reflection of "taboo").

