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PART I

THE BASIC FRAMEWORK

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Supply and Demand

The essence of law does not lie in disembodied principles and abstract values. What law is, can be, or ought to be is determined by the character of those processes that make, interpret, and enforce law. The interaction of these processes molds the supply of and demand for law. When U.S. lawyers and legal scholars use the term "law," they commonly mean court-made law. Here law is the product of a process – the adjudicative process – filled with limits and trade-offs. This process has elaborate procedures that raise the cost of participation and reduce access to information. It has limited physical resources and is constrained by the bottleneck of an appellate system that restricts its growth. Defining a role for law – at least the U.S. sense of law – means defining a role for this adjudicative process, and that requires recognizing its limits. This is the supply side of law.

Allocating these judicial resources appropriately, however, means considering demand as well as supply, and that necessitates looking at more than courts. Courts are most needed where alternative decision makers such as political processes, markets, and informal communities work least well. If we focus solely on questions of supply and, therefore, solely on the characteristics of the courts, we will often waste the courts by using them where they are least needed. By contrast, if we focus solely on demand and, therefore, on the failings of these other decision-making institutions, we will set tasks for law and courts that far exceed their capacity. To understand what law is or ought to be, we must consider both supply and demand. We must understand both the ability of courts to deliver legal protections and the need for these protections and that means understanding and choosing among alternative decision makers such as courts, markets, communities, and political processes.

This book focuses primarily on court-based law and legal rights. A significant emphasis on courts and rights is by no means exclusively

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associated with the United States. It has developed in various forms in many Western democracies. In fact, the influence of this vision of law and rights extends beyond the confines of the United States and the other Western democracies. It is exported under labels like the Rule of Law and constitutionalism. Many believe that a strong judicial presence and strong legal rights will provide the protection of property and the individual that will allow markets and democracies to flourish.[1]

As this book shows, however, systemic forces operating through supply and demand are bound to frustrate these hopes for courts, rights, and law, both at home and abroad. The same forces that produce the call for law and rights cause a deterioration in their functioning. The same forces that increase the demand for law and rights diminish their supply. These forces require us to reexamine the role of law and rights and the associated role of courts. There may be an important role for law, rights, and courts, but it cannot be facilely defined.

Analyzing law, rights, and the role of courts by joining supply and demand means coping with the reality of institutional behavior. Courts, political processes, markets, and informal communities all function well when the number of people affected by the relevant decision is small and the complexity of the decision is low. Ideal types ranging from civic republics and informal communities to minimal states and the Rule of Law are conceived in this setting. But all these ideal types deteriorate as numbers and complexity increase. Moreover, numbers and complexity are high and increasing. Reality is a long way – an increasingly long way – from ideal types.

This book paints a picture of law and rights unlike that commonly portrayed. Increasing numbers and complexity strain courts as the demand for law and rights increases and the capacity to supply them decreases. Law and rights shift and cycle. There is increased cycling between basic judicial strategies, such as cycling between individual and class actions and between rules and standards. There will be long-term trends toward rules of abdication as courts abandon entire areas of social decision making. On a normative level, there will be unexpected combinations of goals and responses – private property best protected by the political process and communitarian values best achieved through exit and atomistic markets.

In this portrayal, legal rights are forged by the forces of supply and demand; they are quintessential institutional choices. Rights mark those instances in which courts have significant decision-making responsibility.

[1] Ackerman (1997); Franck (1992); Sunstein (1993).

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The strongest legal rights involve significant judicial activism but not necessarily significant judicial activity. Although, on one level, strong legal rights mean the substitution of courts for other institutions, on another level, courts deflect most of this decision-making responsibility. Thus, for example, the strongest First Amendment rights see courts substituting their decisions for legislative or political process determinations, while at the same time allocating much of the decision about the content of speech to the individual or the marketplace.

This distinction between judicial activism and judicial activity interacts with the traditional dichotomy between rules and standards. Moderate rights involve standards and judicial balancing and, therefore, require the most judicial activity. But both the strongest and weakest judicial activism are found in rules that involve limited judicial activity. These rules allocate significant responsibility away from courts to other institutions such as the market or the political process. Systemic forces – such as increasing numbers and complexity – make these shifts of responsibility to other institutions both increasingly necessary and increasingly difficult. Here lie the dynamics of shifts and cycles between rules and standards and between judicial philosophies. Systemic forces and institutional choices determine these shifts and cycles and mold rights in surprising ways. In turn, they confound icons like minimal states and informal communities.

In order to establish and elaborate this vision of law and rights, I begin by exploring law, rights, and the role of the courts in the context of U.S. property law and property rights. The Rule of Law being promoted around the world often relies on a vision of strong property rights apparently modeled on the U.S. system. But the reality of U.S. property law and property rights is inconsistent with the strong judicial presence supposed in the Rule of Law. U.S. courts mostly decide not to decide, leaving the protection of property to other institutions. These anointed institutions often are highly imperfect – biased, corrupt, insensitive, or worse – and these imperfections are likely to increase over time. Yet, the allocation to these other institutions is increasingly necessary, even as these alternatives deteriorate in ability. Exploring U.S. property law with its emphasis on local decision making also allows us to assess the communitarian position commonly counterposed to the Rule of Law. As we shall see, informal communities and norms are no more a cure-all than courts and the Rule of Law.

Cosmic ideological debates rage around the subject of property: communitarians versus liberals; civic republicans versus individualists; the market-oriented versus the government-oriented, and so forth. These

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debates focus on the virtues and vices of what is referred to as the "institution of property" – usually meaning the institution of private property. In this book, however, I am interested in the institutions of the institution of property – those processes in society that define, monitor, protect, and allocate property. There is a variety of these institutions, ranging from informal communities operating through norms to complex market transactions to governmental regulatory programs to courts operating in a variety of roles.

The workings of these institutions of property are central, whether the property in question is called private, public, common, communal, or republican. Choice among and comparison of these institutions provides us with an intriguing and even startling picture of property law and rights and of law and rights in general. Everything from the Coase Theorem to the role of communities and norms takes on new meaning, and the very definitions of private and common property are called into question.

I will allocate three chapters to U.S. land use regulation and the property rights associated with its judicial review. Much is at stake here. The battle over U.S. land use regulation concerns the environment, housing, racial and economic integration, public education, and community values. Here, the controversy over property rights is a controversy over basic human rights.

Examining the reality of U.S. land use law exposes the problems facing the globalization of the Rule of Law and allows us to identify those moments where courts will work well enough to make the Rule of Law more than a slogan. Institutional choices and comparison determined by systemic factors like numbers and complexity are essential in understanding all institutions and all legal systems. Although the structures of law clearly differ across nations, these basic systemic variables and difficult institutional trade-offs are universal.[2]

The first two parts of this book explore the central issue of U.S. property law – the resolution of conflicting land uses. Part I presents the basic framework in the context of traditional common law doctrines. Chapter

[2] Similarly, the insights about institutional choice and comparison revealed in the exploration of land use regulation and real property discussed in this book – what might be considered traditional property – should be equally applicable to newer forms of property involving telecommunications and cyberspace. See, generally, Lessig (1999); Laffont and Tirole (1999); Sidak and Spulber (1997). Indeed, this world of explosive increases in numbers and complexity will demand a strong grasp of the insights gleaned here. This is a setting in which the institutions meant to define, monitor, and enforce property rights will be severely tested. As a general matter, the same basic issues of institutional choice and comparative institutional analysis confront any form of law and right.

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2, " The Spectrum of Rights," shows that even these traditional, court-centered doctrines exhibit continuous shifts in the role of courts and significant allocations of decision-making responsibility away from courts to the market and the political process. In order to understand the dynamics of these shifts and the systemic factors that produce them, I present a comparative institutional approach that integrates supply and demand. I then contrast this approach with the demand-side approaches of standard law and economics and conventional legal analysis. I discuss the central role that institutional choice must play in both institutional and neoclassical economics. Chapter 3, "The Supply Side – The Little Engine of Law and Rights," examines the adjudicative process. It uses systemic factors to analyze the performance of the courts and basic issues of adjudication such as the choice between individual and class action.

Part II examines the sorts of constitutional rights and serious constitutional judicial review that are thought to be the essence of property rights and, more broadly, of constitutionalism and the Rule of Law. Chapter 4, "Zoning and its Discontents – Political Malfunction and the Demand for Rights," focuses primarily on the demand for these rights. It analyzes various forms of political malfunction and shows the necessity of employing a two-force model of the political process rather than the one-force model that characterizes the interest group theory of politics and the economic theory of regulation. This two-force model recognizes the possibility of both over- and underrepresentation of the majority – majoritarian and minoritarian bias – and sets out the conditions that make one or the other more likely. This approach proves crucial in understanding local community decision making like that involved in zoning. The chapter evaluates several strategies to deal with these political malfunctions. Chapter 5, "Just Compensation – The Problems of Judicial Pricing," explores the Takings Clause and the United States Supreme Court's recent regulatory takings cases, considered the foundation of a revolution in property rights. It shows the systemic limits of these ambitious attempts to construct strong property rights. In Chapter 6, "High Stakes Players and Hidden Markets," I propose a strategy for judicial review of land use regulation that promotes an unorthodox combination of no rights and market pricing.

Utilizing the lessons from U.S. property law, Part III explores the role of the same basic systemic forces in two broad legal settings. Chapter 7, "Theories of Property – From Coase to Communitarianism," analyzes the debates about private property. It examines the economic theory of private property as well as theories of communal or civic republican

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property and shows how systemic forces and institutional choice dissolve ideological positions on property and draw into question the definitions of private and common property. Chapter 8, "Numbers, Complexity, and the Rule of Law," analyzes the role of the courts and of law and rights as societies become massive and complex. It focuses attention on the forces that produce shifts and cycles in law and rights and, thereby, undermine the stability and certainty sought by the proponents of the Rule of Law. Here I evaluate the positions of both the advocates of the Rule of Law and its communitarian opponents. The last chapter, "Changes," sets out needed reforms in legal analysis, economic analysis, legal education, and judicial decision making.

There are basic lessons here for the establishment of the Rule of Law around the world. We are most likely to hear cries for a stable, clear, evenly applied Rule of Law in those situations in which it will be most difficult to achieve this Rule of Law. Where numbers and complexity are high, the Rule of Law will be most demanded, but it also will be in the shortest supply. This does not mean that the adjudicative process cannot play a meaningful role in dealing with these tough conditions, but it may mean that it can do so on a broad basis for only a short time, and that any long-term role for serious judicial intervention will require severely narrowing the band of societal issues allocated to the courts.

In turn, there are basic lessons about the attractive images of the judicial and political processes that seem to carry the debate about judicial review and the Rule of Law. This imagery – such as notions of deliberation, consensus, and community – fits neatly into the easy world of low numbers and complexity. But this is not where courts, judicial review, and the Rule of Law are most needed. They are needed where numbers and complexity are high and, therefore, where deliberation, consensus, and community are strained and distorted. The resulting tensions require that any meaningful analysis of the role of the courts eschew attractive imagery and easy answers. These problems promise to haunt analyses of courts both in Western democracies and developing nations.

From a distance – and in the throes of nostalgia – laws, rights, and decision-making institutions seem to work simply and well. But especially at high numbers and complexity, a closer look yields a different picture. Institutions will function far more imperfectly and the institutional choices will be both more difficult and less attractive. As a poignant example of the lessons of a closer look, one only needs to reflect on what we have learned about the U.S. political processes and courts during the 2000 presidential election.

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This is a book about the legal process and the laws and rights it produces. More exactly, it is a book about reforming the way we think about the legal process, law, and rights. Law and rights cannot be understood by methods of legal analysis that focus attention solely on goals and values or at most discuss the horrors of present systems. The first is totally indeterminate, and the second leaves us in continuous and costly cycling among highly imperfect alternatives. Different tools must be employed – different questions asked – to understand what law and rights are, what they can be, and what they ought to be.

If law and rights are the product of tough institutional choices impacted by systemic variables such as the costs of participation and numbers and complexity, then we need a conception of law and rights that reflects these tough institutional choices and models of the various decision-making institutions that embody these systemic variables. We need a vision of the adjudicative process that reflects the dynamics of litigation and the severe constraints on resources as well as the competence of judges and juries and a vision of the political process that reflects and integrates both the power of the few and the power of the many. This means serious reform in the way we analyze and teach law.

These propositions hold no matter how we define law. In this book, I focus primarily on court-made law. This is a narrow definition of law. Even in the U.S. context, law is the product of societal institutions such as legislatures, bureaucracies, and informal communities as well as courts. My use of this narrow definition does not mean that I believe that law and public policy should be court centered. Quite the opposite. The limits of the courts and, hence, the limits of court-made law are central tenets of this book. Nor does it mean that I discuss and focus exclusively or even primarily on the characteristics of the adjudicative process. My approach to law requires an understanding of both the adjudicative process and its substitutes or alternatives such as legislatures, bureaucracies, and informal communities. I spend much of the book discussing the roles of these alternative societal institutions and, therefore, exploring broader definitions of law.

The analytical framework employed here to study court-made law is equally applicable to other definitions of law or, more broadly, to law and public policy in general. Whether seen as the product of courts, legislatures, bureaucracies, or informal communities, the meaning and efficacy of law will be determined by the abilities of the institution or institutions meant to deliver legal protections. Under alternative definitions of law, courts might be considered as substitute decision makers with legislatures,

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bureaucracies, or informal communities now considered primary. But the same issues of supply and demand will surface everywhere.

The analysis presented here warns against attaching normative significance to any definition of law. As this book shows, deciding whether and to what extent law produced outside the courts is superior to court-made law is a tricky business. The same sort of challenging systemic or institutional quandaries raised in this book remain, no matter how one rearranges the institutional alignment. All forms of law depend on imperfect structures and involve difficult institutional choices. No matter how it is defined, law has limits.

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The Spectrum of Rights

In one form or another, judges are asked to decide who will decide basic substantive decisions. Rather than directly addressing these substantive decisions, courts funnel most of them elsewhere – to markets or to the political process. They allocate only a very limited and often shifting range of these substantive decisions to themselves. The role of courts and the character of law and legal rights are determined by these allocations of decision making.

This chapter and the next use several traditional common law property issues to explore these institutional choices and the systemic factors that underlie them and to examine the role of these choices in shaping law and rights. This chapter focuses primarily on the common law doctrines of nuisance and trespass and employs a case popular among legal scholars and casebook authors, *Boomer v. Atlantic Cement Company.*[1] I use *Boomer* and its simple and familiar setting to introduce most of the themes and analytical tools I will employ in this book. I show the shifts and changes in law and rights associated with variation in systemic factors such as numbers and complexity, introduce a simple analytical model for institutional choice and comparison – the participation-centered model – and show its use across the three alternative institutions at play in *Boomer* – the courts, the market, and the political process.

Boomer involves two levels of institutional choice – the choice between the market and the courts that so often characterizes private law such as torts and contracts – and the choice between the courts and the political process, which is more commonly seen in public law areas such as constitutional law. These institutional choices produce property rights that take on unexpected shapes. Property owners injured in much the

[1] 26 NY2d 219, 309 NYS2d 312, 257 NE2d 870 (1970).

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