INTERCATEGORICAL ANALYSIS OF LAW

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AUTHOR'S SYNOPSIS

This Article advocates the routine use of intercategorical analysis in lawmaking: When formulating (or revisiting) rules within one legal category, courts, legislators, and codifiers alike should explore analogous doctrines that prevail in related categories. Such exploration may provide lawmakers with both inspiration and data relevant to formulating the doctrine under consideration. The Article offers three disparate illustrations of how intercategorical analysis could improve our law regarding (1) nonpossessory liens, (2) formalities for transfers of property, and (3) in rem proceedings for winding up different kinds of estates. The Article also addresses the potential relevance of intercategorical analysis when drawing the boundaries of legal categories. Finally, the Article assesses the risks inherent in intercategorical analysis and relates this mode of analysis to other "law-ands."

Lawmaking today demands policy analysis. Gone is the age when formalism reigned, when courts found law by excavating precedent and nothing more. In a formalistic world, those who remember the past *too well* are condemned to repeat it.[1] Yet even when operating in that world, courts managed to suffer convenient lapses of memory. Lord Coke suffered many, and English law became all the better for it.[2]

In the wake of formalism's decline within judicial doctrine, coupled with widespread codification, lawmakers no longer contend with these constraints.[3] In a famous passage, Justice Oliver Wendell Holmes, Jr., proclaimed: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[4] Liberation from formalism nonetheless left lawmakers groping for resources. Even a judge so resourceful as Holmes had to confess that whether "one [rule] tends more distinctly than its opposite to the survival and welfare of . . . society" appeared quite uncertain.[5] Fretted Holmes, "The wisest are but blind guides."[6]

Since Holmes's era, no development has done more to enhance

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1. *Cf.* GEORGE SANTAYANA, LIFE OF REASON, REASON IN COMMON SENSE 284 (1905) ("[t]hose who cannot remember the past are condemned to repeat it."). On the contrary, in a formalistic world "[i]gnorance is the best of law reformers." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 78 (Sheldon M. Novick ed. 1991) (1881).

2. "Thus in a new age ancient precedents became valueless and were ignored, and others, even Magna Carta itself, took on meanings they never had before. This is as it should be. . . . It is fortunate that Coke was not a better historian than he was . . . ." SAMUEL THORNE, SIR EDWARD COKE, 1552-1952, at 12–13 (1957). Similarly in America, "Justice Story . . . was thought to be capable, on occasion, of putting his erudition to work in furtherance of essentially political ends . . . . Many of his contemporaries thought him . . . a highly pragmatic bookworm." DAVID W. ROBERTSON, ADMIRALTY AND FEDERALISM 30–31, 31 n.12 (1970).

3. On the trend toward codification, see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1–3 (1982). The rise and fall of formalism within judicial doctrine cannot be tied to a single era; historically, it has had its ups and downs. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 1–30 (1977) (identifying the post-revolutionary period in the United States as one that rejected formalism). Nor is formalism extinct as a jurisprudential methodology. In modern cases, one can find the United States Supreme Court dipping back to the fifteenth-century Yearbooks for authority. *See, e.g.,* Miller v. United States, 357 U.S. 301, 307 (1958).

4. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) [hereinafter Holmes, *Path*]. As for the Yearbooks, "I have studied tradition in order . . . to estimate its worth with regard to our present needs; and my references to the Year Books often have had a skeptical end." OLIVER WENDELL HOLMES, *Twenty Years in Retrospect*, *in* THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 154, 155-56 (Mark DeWolfe Howe ed. 1962) (1902) [hereinafter HOLMES, *Retrospect*].

5. HOLMES, *Retrospect*, *supra* note 4, at 156.

6. *Id.*

lawmakers' vision, to enrich policy analysis, than the advent of social science as an aid to the enterprise of legislating and judicial decision-making—especially law-and-economics.[7] Although some scholars condemned it as a *folie à neuf*,[8] few today would deny the hybrid discipline's usefulness, much less its impact on our law. Law-and-economics has reverberated in equal measure within codes and judicial doctrine.[9]

This Article highlights a different approach to policy analysis. Put simply, the Article proposes that lawmakers who produce codes, statutes, and judicial doctrine should routinely explore other categories of law for insight regarding the problem at hand.

Viewed conceptually, this approach represents the structural antithesis of law-and-economics. Whereas economics relies on a confined set of analytical tools, and hence glimpses law with a sort of "tunnel vision,"[10] intercategorical analysis ascends to aerial vision. This mode of analysis aspires to contemplate the big picture and recognizes that, even then, lawmakers can always envision a bigger picture. Justice Holmes alluded to the perspective when he observed that, in his capacity as a judge, he "tried to see the law as an organic whole."[11]

Accordingly, intercategorical analysis offers no normative approach to lawmaking. It makes no core assumptions comparable, say, to the rational-actor model of economics. Nor does it steer the law in any substantive direction. At bottom, it is an invitation to opportunism. The insight upon which this mode of analysis rests is that problems lawmakers face in one context are bound to reemerge in related—and possibly relevant—contexts. Hence, lawmakers would do well to scrutinize doctrines, along with their rationales and desiderata, arising in parallel contexts.[12]

In essence, intercategorical analysis comprises a variant of reasoning by analogy. Such reasoning ordinarily functions to establish the scope of a doctrine. Advocates and courts reason by analogy to extend a doctrine

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7. As Holmes himself predicted. *See* Holmes, *Path*, *supra* note 4, at 469 (observing that "the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics").

8. *See* Arthur A. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 *passim* (1974).

9. *See, e.g.*, UNIF. PRUDENT INVESTOR ACT prefatory note (1994), 7B U.L.A. 3 (2006) (applying modern portfolio theory to the rules of trust investing); Comet Delta, Inc. v. Pate Stevedore Co. of Pascagoula, Inc., 521 So. 2d 857, 862 (Miss. 1988) (Robertson, J., concurring) (applying "the increasingly familiar lingo" of law-and-economics to the instant case).

10. Leff, *supra* note 8, at 452, 477.

11. HOLMES, *Retrospect*, *supra* note 4, at 155.

12. In this respect, intercategorical analysis structurally resembles both comparative law and law-and-history as tools of policy analysis.

beyond its original factual confines.[13] Here, by contrast, lawmakers reason by analogy to establish the substance of a doctrine. Beginning with a rule whose details are uncertain or in need of reconsideration, lawmakers can look (literally) afield for inspiration.

Of course, lawmakers could treat doctrines as sui generis and develop them without the aid of any sort of perspective, be it economic or comparative. We cannot discount "law-only" as an alternative to "law-and."[14] Given, however, that nothing under the sun is truly unique or novel, lawmakers can usefully freeride on the efforts of their fellows who have labored in other vineyards, harnessing their efforts to other purposes. By so doing, lawmakers spare themselves the need to generate their own evidence and ideas. For lawmakers now have access to data that were lacking in Holmes's time, which they might as well apply as broadly as possible. And to this extent, weirdly, economic analysis and intercategorical analysis coincide—the first striving for doctrinal efficiency, the second for efficiency in formulating doctrine.

Having thus set the aspiration, we must confine it within practical bounds. In fact, taken to extremes, a push for intercategorical analysis would entail great *in*efficiency, overwhelming lawmakers with endless, fruitless searches for analogues. Like the rest of us, lawmakers are mortal beings with limited capabilities and tight schedules. To insist that they scour every category of law in pursuit of every conceivable analogue of a doctrinal problem would take forever, and nothing would get done. This path leads nowhere. Instead, lawmakers must pick their targets, searching selectively for the most promising analogues. These are most likely to be found in adjoining regions of the legal landscape. And they should prove easy to discover, if only we can coax lawmakers to make the effort. Lawmakers must take the initiative to peek over the hedges separating categories, to survey how they are evolving in juxtaposition with each other.

Lest this Article get mired in abstraction, let us proceed forthwith to concrete illustrations of how intercategorical analysis could improve our law. The three examples explored in the next few pages range widely, in the hope of demonstrating the universal value of intercategorical analysis. And those examples may inspire the reader to posit additional ones involving his

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13. *See* LLOYD L. WEINREB, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT 16–36 (2d ed. 2016) (offering examples from published cases).

14. As Professor Gunther observed of Alex Bickel's analysis in The Least Dangerous Branch: "[T]he source of this achievement . . . is not the discovery of an exotic new tool in the warehouse of cybernetics or statistics or social psychology, but the application of a weapon whose lack of novelty is too often equated with lack of potency—the weapon of a subtle, incisive mind." Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 2 (1964).

or her own doctrinal specialties. The comparisons could be multiplied without end—for the legal landscape contains no archipelago. Not a single area of law is an island, isolated from other areas, reliant exclusively on internal inquiry.

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Consider Article 9 of the Uniform Commercial Code. Article 9 covers consensual liens. It allows creditors by agreement to collateralize property of the debtor, thereby enhancing their rights upon default to satisfy their claims vis-à-vis the debtor and in competition with general creditors. Secured creditors can offer credit at a lower interest rate than a general creditor because they bear less risk. And because Article 9 allows security interests to be nonpossessory, they are benign from the standpoint of debtors, who can carry on using the collateral as if the lien did not exist.

Viewed structurally, collateralization presents a discrete set of issues. Nonetheless, lawmakers have seen fit to divide the subject into two categories. Although not devoid of logic, this division stems mostly from history. Prior to the Industrial Revolution, land constituted the principal form of wealth in society and hence became the principal target of collateralization. And ever since the Statute of Enrollments in 1536, title to freehold estates has required recordation, making nonpossessory security interests in land—which are created by conveyances—notorious.[15] These became the subject of mortgage law. Although security interests in personal property had existed from a remote period, those unrecorded transactions required transfer of possession, providing a sort of indirect notice to potential lenders that the property was unavailable to satisfy unsecured debts.[16]

With the Industrial Revolution came a demand for collateralization of personal property, which, although newly valuable, was not subject to existing recording acts. Therefore, lawmakers did not fold personal property into mortgage law. Rather, in the nineteenth century, lawmakers developed a congeries of security devices for personal property, each with its own body of substantive law and each with a distinct suite of filing requirements.[17]

In 1952, the drafters of the Uniform Commercial Code set themselves

15. *See* Statute of Enrollments, 27 Hen 8 c. 16 (1536) (Eng.). Recording acts in America date to the colonial era. *See* 14 POWELL ON REAL PROPERTY § 82.01[b] (Michael A. Wolf ed. 2022).

16. For a historical overview, see JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 330–33 (5th ed. 2019).

17. *See* 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY §§ 2.1–2.2 (1965).

the task of "radical simplification" of these rules.[18] But the conceptual damage had already been done. The drafters limited their efforts to unifying collateralization of *personal* property within Article 9.[19] Collateralization of real property remained the independent domain of mortgage law, even though the two categories overlapped to a certain extent.[20]

That Article 9 and mortgage law should differ in some details finds ready enough justification in the characteristics of the property that they respectively address. Personal property is sometimes the subject of consumer transactions within markets that depend on speed and efficiency, which preexisting liens would hamper. Debtors can also abscond with personal property, potentially thwarting secured creditors and creating a need for prejudgment remedies that mortgagees do not share. In addition, real property typically involves longer-term lending than personal property. Yet, significant differences between various types of personal property also exist. As the drafters of Article 9 recognized, "distinctions based on the type of property which constitutes the collateral" sometimes justify "special rules."[21] In other words, "the scheme of . . . Article [9] is to make distinctions, where distinctions are necessary, along functional rather than formal lines."[22] Following this operating principle, the drafters could have established Article 9 with an unlimited scope. Real and personal property present similar issues that, at the very least, merit comparison; lawmakers could create special rules as necessary to accommodate significant differences. To distinguish real and personal property across the board is, well, to draw formal rather than functional lines, which the drafters claimed to oppose.

It is striking that within the comments accompanying Article 9, the drafters pointed to mortgage law for policy guidance only three times. One of those comments involved the collateralization of fixtures, an area of overlap between the two categories where intercategorical analysis was especially important.[23] Another involved the equity of redemption, a particularly salient feature of mortgage law.[24] And the third involved an uncertainty in mortgage law.[25] In other instances, on the face of things, the

18. U.C.C. § 9-101 cmt. (pre-2010 art. 9) (AM. L. INST. & UNIF. L. COMM'N 1977).
19. *See id.* § 9-102 & cmt. (pre-2010 art. 9).
20. *See id.* § 9-313 (pre-2010 art. 9) (addressing security interests in fixtures).
21. *Id.* § 9-101 cmt. (pre-2010 art. 9).
22. *Id.*
23. *See id.* § 9-313 cmt. (pre-2010 art. 9).
24. *See id.* § 9-501(3) & cmt. (pre-2010 art. 9) (barring waivers of debtors' rights following default, observing that "no mortgage clause has ever been allowed to clog the equity of redemption").
25. *See id.* § 9-403(1) & cmt. (pre-2010 art. 9) (clarifying that a security interest takes effect from the time when it is presented to the filing officer, rather than when it is indexed). The revisers of Article 9 added a new provision that also found inspiration in mortgage law. *See id.* § 9-324(g) & cmt.

drafters ignored mortgage law. Perhaps the legal distinctions between the two categories are defensible. Yet, no rationale for them enabling assessment of their defensibility appeared either in Article 9, or in modern opinions, or in other sources of mortgage law.

Take the problem of competing liens. Under Article 9, a purchase-money secured creditor has a grace period in which to perfect (by filing) its lien. So long as the creditor files within that period, the lien relates back to the time when it attached, thereby defeating gap lien creditors.[26] *No analogous grace period exists within mortgage law.*[27] Why the difference? Neither the U.C.C. nor sources of mortgage law draw the comparison.[28] The editorial board of the Code in 1958 had justified the grace period as responsive to "the business practice of filing after delivery in cases of purchase money security interests."[29] Are the business practices of enabling-loan mortgagees any different? Arguendo, seller-mortgagees might be unsophisticated parties who, if anything, have a greater need for a grace period. In any event, lawmakers have failed to draw the comparison—and, accordingly, no one has thought to explore the issue.

And consider a second example: the remedies available to creditors following a default. Under Article 9, a secured creditor can dispose of the collateral in a private sale, so long as it does so in a manner that is "commercially reasonable."[30] A comment adds that "[w]hile not itself sufficient to establish a violation of this Part, a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable."[31] By contrast, under mortgage law, the mortgagee lacks the option of private sale; following default, the collateral must be disposed of in a "regularly conducted" foreclosure sale, which is voidable only if the sale price is "grossly inadequate."[32] Furthermore, in around half the states, statutory law allows mortgagors

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(revised 2010) (granting priority to purchase-money secured creditors who are sellers over purchase-money secured creditors who make enabling loans, citing mortgage law by analogy).

26. The original version of Article 9 in 1952 created a ten-day grace period. *See id.* §§ 9-301(2), -312(4) (pre-2010 art. 9). The grace period was eliminated in 1954 and then restored in 1958. *See* JAMES J. WHITE & ROBERT S. SUMMER, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 25-5, at 1050 (2d ed. 1980) (in the second ed. only). The revised version of Article 9 in 2010 extended the grace period to twenty days. *See* U.C.C. §§ 9-317(e), -324(c) (AM. L. INST. & UNIF. L. COMM'N, amended 2022).

27. *See* RESTATMENT (THIRD) OF PROP.: MORTGAGES § 7.2(b) & illus. 8 (AM. L. INST. 1997).

28. The drafters drew comparisons only to antecedent forms of security interests in *personal* property. *See* U.C.C. § 9-301 cmt. (pre-2010 art. 9) (AM. L. INST. & UNIF. L. COMM'N 1977).

29. WHITE & SUMMER, *supra* note 26, § 25-5, at 1050–51 (quoting the editorial board).

30. U.C.C. § 9-504(1) (pre-2010 art. 9) (AM. L. INST. & UNIF. L. COMM'N 1977); *id.* § 9-610(a)–(b) (amended 2022).

31. *Id.* § 9-627 cmt. (amended 2022).

32. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 8.3 (AM. L. INST. 1997).

(and, in some states, junior lienholders) to redeem the collateral after sale for a specified amount of time, at the sale price.[33] Again, neither the comments accompanying Article 9 nor sources of mortgage law explain the dichotomy.

Whether one approach or the other is better calculated to maximize the amount realized upon sale of the collateral—the common objective here—merits scrutiny. Is the standard of commercial reasonability sufficiently clear to avoid litigation? Which is more prone to abusive process—public or private sale? Does a more robust rule allowing courts or mortgagors to undo a sale when it yields an inadequate price paradoxically depress the amount buyers are willing to pay for collateral, given the greater risk that the sale will be unwound after the fact? Lawmakers can, of course, address these questions independently within Article 9 and within mortgage law. Yet, a view of the prevailing dichotomy puts the questions into sharp relief and suggests that the approach taken in one area or the other is suboptimal. Market economics, surely, does not change its workings when we shift from real to personal property. The experience and data regarding selling under the rules of Article 9 are pertinent to mortgage law—and vice versa.

The several comments found within Article 9 that do refer to mortgage law suggest that the analogy did not escape its drafters altogether. And, of course, these gifted, learned drafters may have drawn comparisons during their deliberations that failed to find their way into the official comments. Yet, if lawmakers are to judge the merits of intercategorical analysis of a prior day, they must have something in writing to go on. Sadly, the drafters of the original version of Article 9 are no longer available for consultation. In their official comments, the drafters pursued the analogy between mortgage law and Article 9 neither aggressively nor systematically. So far as we can tell, they failed "to see the law as an organic whole."[34] If anything, the drafters took steps to distance Article 9 from antecedent forms of lien law, including mortgage law. "[T]he selection of the set of terms applicable to any one of the existing forms (e.g., mortgagor and mortgagee) might carry to some extent the implication that the existing law was to be used for the construction and interpretation of this Article," the drafters observed.[35] They created their own unique terminology, "[s]ince it is desired to avoid any such implication."[36] That these conspecific legal categories should have

33. *See* GRANT S. NELSON ET AL., REAL ESTATE FINANCE LAW § 8.4 (6th ed. 2007); 12 THOMPSON ON REAL PROPERTY § 101.07 (David A. Thomas ed., 2d Thomas ed. 2008). Statutes in several states also give courts authority to grant continuances from foreclosure proceedings. *See also* THOMPSON, *supra*, at § 101.07(b).

34. *See supra* text at note 11.

35. U.C.C. § 9-105 cmt. (pre-2010 art. 9) (AM. L. INST. & UNIF. L. COMM'N 1977).

36. *Id*.

drifted apart, however desirably or undesirably, could come as no surprise under such circumstances.

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Consider next the core problem of transfers of property, which has splintered into an array of categories: (1) exchanges concerning tangible personal property, addressed by Article 2 of the Uniform Commercial Code; (2) exchanges concerning intangible personal property, addressed by Articles 1 and 8 of the U.C.C.; (3) exchanges concerning services or real property, addressed by the common law of contracts; (4) gratuitous transfers during life, addressed by the common law of gifts; and (5) gratuitous transfers at death, addressed by the universally codified law of wills.

Obviously, contracts concerning different sorts of property are closely related; the subcategories diverged formally only with the promulgation of the Uniform Acts.[37] And the subcategories blur together, for example, where a seller must perform services (such as painting a portrait) in order to provide tangible things.[38] Likewise, gifts and wills share a close kinship, although they split apart as categories many centuries ago.[39] They, too, blur together when a gift is made in anticipation of imminent death (known as a gift causa mortis).[40]

By comparison, exchanges and gratuitous transfers seem more like polar opposites. Yet, sociologically, the distinction even between these meta-categories is hazier than appears at first sight. Gifts can have contractual overtones, usually when social taboos preclude overt trading, whereas contracts can have gratuitous undertones, sometimes when an overt gift would cause a donee to lose status.[41] But even pure gifts and contracts (assuming perfect purity is possible) share enough attributes *as transfers* to make doctrinal choices within one category instructive in the other. And

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37. Antecedents of the Uniform Commercial Code of 1952 included the Uniform Sales Act of 1906 (concerning goods) and the Uniform Stock Transfer Act of 1909. Neither one gained universal enactment, however.

38. *See* 1 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 1.9a, at 47–51 (2d ed. 1998) (exploring the case law on this problem).

39. Ninth-century wills in England took effect as gifts delayed until death—dubbed "post obit gifts." 2 FREDERICK FREDERIC POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 317 (2d ed. 1898).

40. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 6.2 cmt. zz (AM. L. INST. 2003).

41. *See* Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CALIF. L. REV. 821, 840–46 (1997); *see also, e.g.*, SCOTT EYMAN, LION OF HOLLYWOOD: THE LIFE AND LEGEND OF LOUIS B. MAYER 406 (2005) (describing how the head of MGM rejected advice to terminate Judy Garland's contract to make a film so that he could reward her gratuitously for her prior contributions to the success of the studio).

once again, the categories blur together when gratuitous transfers figure within deals.[42]

Categorization has obscured doctrinal inconsistencies between subcategories of exchanges as well as subcategories of gratuitous transfers—two big pictures—and it has obscured doctrinal inconsistencies between the meta-categories of exchanges and gratuitous transfers—a bigger picture. Needless to say, parallel doctrines need not correspond, but lawmakers ought, at a minimum, to reflect on the wisdom of prevailing disparities. We have little indication in the written record that they have done so.

It would try the reader's patience to explore all of this in depth. For purposes of illustration, let us focus on one dimension of the problem—to wit, the formalization of a transfer. The dominant concern here, applicable to transfers of all sorts, is to ensure the authenticity and accuracy of evidence of a transfer, as reflected centuries ago in the statute of frauds.[43]

Under the Uniform Commercial Code, separate articles govern the formalization of contracts regarding different types of property. Under Article 2, contracts for the sale of "goods," that is, tangible personal property, must appear in a signed writing if the price of the goods exceeds $500.[44] Under Article 8, contracts for the sale of securities are enforceable irrespective of whether they are memorialized by a writing, whatever their value, and whenever the contract calls for performance.[45] Finally, under Article 1, formalizing rules regarding contracts for other forms of intangible property are left to state law, the Uniform Law Commission having determined "that there is no need for uniform commercial law to resolve that issue."[46]

Other exchanges are implicitly governed either by common law, whereby a parol agreement suffices to formalize a contract, or by the statute of frauds. The statute of frauds traditionally requires a signed writing to formalize any contract concerning real property, suretyship, or marriage, together with any contract, irrespective of subject matter, that cannot be

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42. *See, e.g.*, UNIF. PROB. CODE § 2-514 (amended 2019), 8 pt. 1 U.L.A. 233 (2013) (concerning contracts to make wills).

43. *See* Statute of Frauds, 29 Car. 2, c. 3 (1677) (Eng.).

44. *See* U.C.C. § 2-201 (AM. L. INST. & UNIF. L. COMM'N, amended 2022). The dollar amount is not indexed for inflation, and a revised version of the section that would have raised the threshold to $5,000 was withdrawn. *See id.* § 2-201 app.

45. *See id*. § 8-113 (amended 2022). The prior version of this section had generally required a writing. *See id*. § 8-319 (pre-1994 Art. 8).

46. U.C.C. § 1-206 legis. note (AM. L. INST. & UNIF. L. COMM'N 1977, amended 2022). The prior version of this section required a writing for contracts for the sale of intangible personal property beyond a value threshold of $5,000. *See id*. § 1-206 (pre-2001 Art. 1).

performed within one year.[47]

Manifestly, in respect of its persuasiveness, the evidence contained in a signed writing outperforms testimony. Forgery implicates greater effort than perjury, and paper (or, nowadays, a silicon chip) preserves information more accurately than carbon-based memories. Better evidence reduces error costs in contract disputes. On this basis, we might defend a rule requiring parties to formalize all exchanges in a signed writing without exception—thereby establishing a universal formalizing rule across all subcategories of exchanges.

Equally manifestly, lawmakers have perceived another side of the coin. Formalities are burdensome. They entail transaction costs, as well as opportunity costs for busy persons who would rather proceed from one transaction to the next at a rapid clip. In this connection, a value threshold for formalization reduces transaction costs for small deals, where error costs matter less. Meanwhile, a temporal threshold recognizes that memories deteriorate more rapidly than writings. Error costs associated with parol agreements increase over time, culminating in a sea-change when a party dies. Writings are comparatively more durable, so long as they are not lost or stolen—the evidentiary equivalent of death for a writing.

What is painfully apparent for present purposes is the lack of coordination between formalizing rules within the various subcategories of contract. Once upon a time, those rules were set out in a single source of law, namely, the statute of frauds. Early in the twentieth century, the Uniform Law Commission divided exchanges into separate acts covering sales of goods, stock transfers, and other subcategories.[48] In 1952, the Commissioners reconsolidated these subcategories into the Uniform Commercial Code. Nonetheless, they remained separate to the extent that each one was assigned to a different article of the Code, each with its own drafting committee.[49] The comments fail to analyze comparatively the formalizing rules found in those articles. Differences between the rules are nowhere rationalized. Indeed, the articles fail even to cross-reference their respective formalizing rules.[50]

At this juncture, intercategorical analysis would raise troubling questions. Why establish value thresholds for some sorts of exchanges but not others, as the Uniform Commercial Code mandates?[51] Why do they not make equal sense *vel non* for all kinds of contracts? Arguably, as

47. *See* RESTATEMENT (SECOND) OF CONTS. ch. 5 (AM. L. INST. 1981).
48. *See* U.C.C. general cmt. (AM. L. INST. & UNIF. L. COMM'N 1977).
49. *See id.*
50. *See id*. § 2-102 cmt. (amended 2022) (cross-referencing *other* sections of the Code).
51. *See supra* notes 44–46 and accompanying text.

commercial actors, parties have a need for speed with respect to contracts for goods, justifying less stringent formalizing rules where error costs matter less. Yet, if that is so, then why do looser formalizing rules apply to contracts for securities, which parties can create by parol agreement, irrespective of value? In other words, why do high-value contracts for goods require a signed writing, whereas high-value contracts for securities do not?

Plainly, the rule found in the statute of frauds requiring a signed writing for all exchanges that cannot be completed within one year aims in a heavy-handed way to address the problem of deterioration of memory. Yet, if it makes sense for one type of exchange, it makes sense for all types. And under the statute of frauds, it applied to all types.[52] But not under the Uniform Commercial Code. Articles 2 and 8 of the Code take contracts for the sale of goods and securities outside of the statute of frauds, and they establish no temporal threshold analogous to the one found in the statute of frauds.[53] Accordingly, under the Code, contracts for the sale of goods that fail to meet the value threshold, together with all contracts for the sale of securities regardless of value, can be created by parol agreement. That is so even if the exchange occurs within a futures market and cannot be completed within one year—an inconsistency with the law of contracts for services that would not have existed under the statute of frauds.

How did the drafters of the Uniform Commercial Code rationalize this inconsistency? We cannot tell from the accompanying comments, which say not a word about it. But at least one of the drafters recognized the overarching problem. As Grant Gilmore conceded, "[o]ne of the sad truths about the Code is that its several articles were never coordinated as they should have been."[54] Conflicts between the articles are "glaringly evident."[55]

Simultaneously, the world of gratuitous transfers features its own smattering of formalizing rules. Wills require a signed and witnessed writing, irrespective of subject matter or value,[56] but with exceptions in some states. Just over half the states permit handwritten wills that are unwitnessed, known as holographic wills.[57] Meanwhile, under modern common-law doctrine, gifts of personal property require either manual, constructive, or symbolic delivery to the donee, coupled with intent to make

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52. *See* RESTATEMENT (SECOND) OF CONTS. § 130 (AM. L. INST. 1981).
53. *See supra* notes 44–45 and accompanying text.
54. Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605, 628 (1981).
55. *Id.*
56. *See, e.g.*, UNIF. PROB. CODE § 2-502 (amended 2019), 8 pt. 1 U.L.A. 209 (2013).
57. *See, e.g., id.* § 2-502(b).

a gift;[58] whereas gifts of real property require delivery of a signed deed of gift, also coupled with intent.[59]

The law of gratuitous transfers has not fragmented to the same extent as the law of exchanges. And, although rarely discussed, the reason why wills require more extensive formalities than gifts appears more or less self-evident. The point is that donors of gifts can testify as to what they did, said, or intended. Courts or juries, in turn, can assess the credibility of their testimony.[60] By contrast, at the time when wills mature, testators are unavailable to corroborate their actions, statements, or thoughts. The risk of fraud grows exponentially in connection with wills, and a signed, witnessed writing safeguards the evidence that testators themselves have lost the ability to certify.

So far, so plausible. But that still leaves situations where gifts perform the same function as wills and hence become difficult to distinguish from them. Take gifts made in anticipation of imminent death, known as gifts causa mortis. Unlike ordinary gifts, a gift causa mortis can be, and is presumed to be, revocable if the donor somehow cheats death. Donors make these gifts as a last-minute form of estate planning (or estate revising). They differ from wills only in that the donor surrenders the corpus of the gift just before, rather than upon, death. Either way, the ostensible benefactor is unavailable to testify as to the intent—and voluntariness—of the transfer. The formalizing rule for gifts causa mortis nonetheless coincides with the one applicable to ordinary gifts.[61] Should it?

Or take gifts of a remainder interest in property. Here, the donor retains a life estate in the gift corpus, such as a painting. These are allowed but again entail formalization according to the law of gifts, not wills.[62] Hence, gifts of remainders require symbolic delivery of a writing (not necessarily signed) to the donee describing the gift, as opposed to the execution of a signed writing in the presence of witnesses (not necessarily delivered). Gifts of remainders differ from wills in that they are irrevocable. Nonetheless, the two correspond insofar as the circumstances preclude testimony by the ostensible transferor in both instances. Again, given this correspondence, should the usual formalizing rule for gifts apply?

These questions arise and become pointed only upon intercategorical

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58. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 6.2 (AM. L. INST. 2003).

59. *See id*. at § 6.3.

60. *See, e.g.*, Buis v. Buis, No. CA95-1040, 1996 WL 717442, at *1 (Ark. Ct. App. Dec. 11, 1996) (rejecting as not credible a donor's claim that "he was joking" when he declared a gift).

61. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 6.2 & cmt. zz (AM. L. INST. 2003).

62. *See id*. § 6.2 cmts. g, w; Gruen v. Gruen, 496 N.E.2d 869, 874 (N.Y. 1986).

comparison. Historically, no such comparisons have been made, either within common-law opinions or within the Restatement of Property, where these rules are recited without further comment.[63]

When we step back and compare the formalizing rules for exchanges and gratuitous transfers, the contrast appears equally dramatic. Whereas wills require signed writings in the presence of witnesses, no contracts depend on witnesses, even when the contract is long-term, carrying a substantial risk that either or both of the parties will die before the contract terminates naturally. Under the original statute of frauds, a value threshold that applied to sales of goods had an analogue in its provision covering wills, allowing testators to create wills disposing of small estates by unwitnessed oral declaration.[64] Since then, lawmakers have come to regulate the formalization of wills under separate statutes, and provisions allowing oral wills (known technically as nuncupative wills) for small estates to have gradually disappeared.[65]

To be sure, lawmakers may have had reason to differentiate the formalizing rules applicable to gifts, wills, and contracts. But if they did distinguish those rules thoughtfully, lawmakers must explain their thinking and demonstrate its soundness. Neither the U.C.C. nor the Restatement of Contracts cross-references either the Uniform Probate Code or the Restatement of Property, where formalizing rules for wills and gifts are delineated. In short, Grant Gilmore's complaint gazing in upon the U.C.C. would have been equally apropos had he directed his gaze outward. None of the relevant bodies of law are properly coordinated, and conflicts are again glaringly evident.[66] Here we find inconsistency as near and as far as the eye can see.

* * *

Let us turn to one more pair of categories: probate and bankruptcy. These

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63. By statute, two states have reformed the law of gifts causa mortis to require formalization in the presence of witnesses. *See* GA. CODE ANN. § 44-5-100(a)(4)–(5) (West, Westlaw through the 2023 Regular Session of the Georgia General Assembly); N.H. REV. STAT. ANN. § 551:17 (West, Westlaw through Chapter 243 of the 2023 Reg. Sess.).

64. *See* Statute of Frauds, 29 Car. 2, c. 3, §§ 16, 18 (1677) (Eng.) (invalidating parol agreements for the sale of goods valued above £10 and invalidating unwitnessed nuncupative wills for estates valued above £30).

65. A few do remain. *See* MISS. CODE ANN. §§ 91-5-15, 91-5-17 (2013) (West, Westlaw current with laws from the 2023 Regular Session effective through July 1, 2023) (allowing unwitnessed nuncupative wills if the total value of bequests is no greater than $100); N.H. REV. STAT. ANN. §551:16 (2007) (West, Westlaw through Chapter 243 of the 2023 Reg. Sess.) (allowing unwitnessed nuncupative wills if the total value of bequests is no greater than $100 of personal property).

66. *See supra* text at notes 54–55.

categories are distinct in substance, obviously, but also in jurisdiction and source of law. Whereas probate falls exclusively within the domain of state courts and state law,[67] bankruptcy remains a preserve of federal courts and federal law.[68] Nonetheless, the two categories display structural similarities. In common, they address the winding up of an individual's affairs. Whereas probate follows physical death, the relief afforded under Chapter 7 of the Bankruptcy Code, covering liquidation, deals with financial death. The connection has been noted metaphorically. Observers sometimes liken bankruptcy to a "financial funeral."[69] And the similarity sharpens into a near-identity when an individual dies insolvent. In such a case, probate and bankruptcy alike function primarily to order and satisfy creditors' claims. Intercategorical analysis might again benefit these fields.

Both bankruptcy and probate comprise in rem proceedings. The bankruptcy trustee under Chapter 7 administers the bankruptcy estate, and the personal representative administers the probate estate. Their duties are functionally similar—to marshal and then to distribute the available corpus of property. Yet, we can observe one salient difference between the two. Creditors elect the bankruptcy trustee;[70] by comparison, a testator is free to appoint a personal representative under the terms of his or her will.[71] Is there a reason to differentiate these rules, even when the probate estate is insolvent, so that the estate effectively belongs to creditors? That is far from clear. And the authors of neither the Bankruptcy Code nor the model Uniform Probate Code took pains to identify, let alone to explore, the dichotomy.

A host of other inconsistencies appear on inspection. One concerns the power to marshal assets of the debtor on behalf of creditors. In probate, a personal representative can sue to avoid fraudulent conveyances made by the decedent that creditors could have recovered at state law.[72] Bankruptcy trustees enjoy the same power.[73] Yet, they also have an independent federal power to avoid fraudulent conveyances, enhancing creditors' rights, that is

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67. Federal law establishes an exception from federal jurisdiction for probate proceedings. *See* Marshall v. Marshall, 547 U.S. 293, 296 (2006).

68. *See* U.S. CONST. art. 1, § 8, cl. 4. Nonetheless, state law can fill in the interstices of bankruptcy law. *See* Butner v. United States, 440 U.S. 48, 55 (1979).

69. *E.g.*, C.W. Taylor, *Alabama Landlords' Lien Law and Its Effect on Bankruptcy Proceedings*, 10 AM. BANKR. REV. 202, 207 (1934).

70. *See* 11 U.S.C.A. § 702 (West 2016) (inapplicable to bankruptcy relief under other chapters of the Code).

71. *See, e.g.*, UNIF. PROB. CODE § 3-203(a)(1) (amended 2019), 8 pt. 2 U.L.A. 48 (2013).

72. *See, e.g.*, *id.* § 3-710 (amended 2019), 8 pt. 2 U.L.A. 194 (2013).

73. *See* 11 U.S.C.A. § 544(b) (West 2016). *But cf.* Moore v. Bay, 284 U.S. 4, 4–5 (1931) (reading § 544(b) to create a more expansive avoiding power than the one created by state law); *see also* DOUGLAS G. BAIRD, ELEMENTS OF BANKRUPTCY 118–19 (4th ed. 2006) (discussing the doctrinal implications of *Moore v. Bay*).

unique to bankruptcy proceedings.[74] Through this power, inter alia, trustees can invalidate transfers into asset protection trusts that a personal representative would have been powerless to reach in a probate proceeding.[75] Why this difference should hinge on the happenstance of death is scarcely apparent.

The problem of unliquidated claims presents still another contrast. In probate, barring settlement, creditors have one, and only one, way to value their claims: They can pursue them in court, even after the death of the debtor.[76] In bankruptcy, the automatic stay prevents creditors from bringing or even continuing actions against a debtor.[77] The court can lift the automatic stay if doing so is expedient,[78] but in the alternative the court can value claims through a streamlined procedure that does not exist at state law.[79] If a creditor will receive pennies on the dollar in bankruptcy, then a full-blown trial to value a claim could well appear wasteful. *And the same is true in probate* if the estate is insolvent.

In the event of insolvency, which is normal for bankruptcy and a possibility for probate, priority among creditors' claims also becomes critical. And here again, differences loom. The trustee in bankruptcy can avoid as a preference any lien perfected or judgment obtained within ninety days of a bankruptcy petition.[80] The petition itself then triggers the automatic stay, which bars creditors from taking any subsequent action to improve their position vis-à-vis other creditors.[81] As a consequence of these rules, secured creditors with unperfected liens or preexisting liens perfected within ninety days of bankruptcy lose their right to satisfy their claims out of their collateral; bankruptcy trustees can invalidate unperfected liens as another one of their avoiding powers, leaving the lienholder no better off than general creditors.[82] Likewise, creditors who obtained judgments

74. *See* 11 U.S.C.A. § 548 (West 2016).

75. *See id*. § 548(e); *cf., e.g.*, DEL. CODE ANN. tit. 12, §§ 3570–3573 (West, Westlaw through ch. 237 of the 152nd General Assembly (2023-2024)) (validating asset protection trusts under state law and making them invulnerable to most creditors' claims). Section 548 of the Bankruptcy Code could also enhance the trustee's power to avoid disclaimers of inheritance by an insolvent debtor, although the U.S. Supreme Court has yet to resolve the issue definitively. *See* Adam J. Hirsch, *Disclaimers and Federalism*, 67 VAND. L. REV. 1871, 1909–28 (2014).

76. *See, e.g.*, UNIF. PROB. CODE §§ 3-804(2)-810 (amended 2019), 8 pt. 2 U.L.A. 300, 340 (2013). A personal representative may, however, compromise a claim with a creditor when the value of its claim is uncertain. *See, e.g., id*. § 3-813 (amended 2019), 8 pt. 2 U.L.A. 343 (2013).

77. *See* 11 U.S.C.A. § 362 (West 2016).

78. *See id*. § 362(d).

79. *See id*. § 502(b).

80. *See id*. § 547.

81. *See id*. § 362(a).

82. *See id*. § 544(a).

shortly before bankruptcy must share the proceeds with other creditors.[83]

Nothing comparable to the power to avoid preferences or the automatic stay exists in probate. Creditors remain free to perfect their liens or liquidate their claims prior to and after the debtor's death.[84] These powers hardly matter when debtors die solvent, in which case all creditors can satisfy their claims in full. But if debtors die insolvent and their estates enter probate, the absence of a power to avoid preferences and the absence of an automatic stay present stark contrasts to bankruptcy. Whether this dichotomy holds merit deserves inquiry.

A related problem is posed by statutory priorities of creditors' claims. In probate, these priorities vary from state to state, but typically they take effect as a shortlist of classes of creditors that must be satisfied 100 cents on the dollar before the next class can take. Under the Uniform Probate Code, fairly typically, administrative expenses of the estate enjoy top priority, followed by funeral expenses, followed by debts and taxes with preference under federal law, followed by medical expenses incurred in the last illness, followed by debts and taxes with preference under state law, followed by general creditors.[85] Meanwhile, the Bankruptcy Code creates an elaborate scheme of priorities in which funeral expenses and medical expenses fail to appear at all, whereas administrative expenses—lawyers again—receive a second-tier priority.[86]

Whether the treatment of claims in bankruptcy would benefit from coordination with claims in probate hinges on the theory lawmakers accept as bankruptcy's policy foundation. Under the economic model of bankruptcy, collective proceedings should ensue only when they yield efficiencies. To achieve this outcome, the relative value of creditors' rights within and without bankruptcy needs to remain roughly comparable. That way, creditors will lack an incentive to bring (or to forego bringing) debtors into bankruptcy only for the purpose of gaining advantages over other creditors inter se.[87] The competing pragmatic model of bankruptcy aims simply to establish fair rules for winding up the financial affairs of a debtor, on the assumption that state law fails to focus adequately on this problem.[88]

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83. *See id.* § 547.

84. Creditors cannot exercise judicial liens to collect their claims individually after a debtor's death, however. To this extent, general creditors must share and share alike in probate. *See, e.g.*, UNIF. PROB. CODE § 3-812 (amended 2019), 8 pt. 2 U.L.A. 342 (2013).

85. *See id*. § 3-805 (amended 2019), 8 pt. 2 U.L.A. 309 (2013). The accompanying comment refers to federal law, but not to bankruptcy law. *See id*. cmt.

86. *See* 11 U.S.C.A. § 507 (West 2016).

87. *See* Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815 *passim* (1987).

88. *See* Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 *passim* (1987).

Both models become attenuated in connection with deceased debtors. Once a debtor dies, his or her estate becomes ineligible for bankruptcy relief, so the problem of forum shopping disappears.[89] The problem persists only insofar as creditors are aware that a debtor is in ill health and could die presently. Likewise, the assertion that state law fails to attend to the problem of insolvency appears less persuasive in connection with a decedent's estate. Lawmakers know that the financial affairs of a deceased individual will come to an end in probate in each and every instance. Which, then, is the greater problem—that federal lawmakers will overlook the rights of death-related creditors because death arises only infrequently in a bankruptcy proceeding? Or that state lawmakers will overlook the importance of insolvency-related priorities because insolvency arises only infrequently in a probate proceeding? Or are they coequal problems?

At any rate, by coordinating creditors' rights and priorities in probate and bankruptcy, lawmakers would reconcile the two models. If, for example, state lawmakers find reason to give priority to the satisfaction of funeral expenses and last-illness expenses, might federal lawmakers not incorporate the same priorities into bankruptcy? And if, for example, federal lawmakers create a priority for the satisfaction of alimony and child support obligations in bankruptcy, might state lawmakers, who give alimony and child-support creditors special status in other contexts,[90] not incorporate the same priority into probate? Lawmakers' failure even to draw comparisons between the alternative regimes of probate and bankruptcy—to take stock of the disparities—is striking.

Intercategorical analysis could play a constructive role in all of these situations. Whether it is indispensable is another matter. It is equally striking that in some instances, probate and bankruptcy procedures already coincide, despite the apparent absence of any effort by lawmakers to compare them.

Consider suits to enhance the value of the bankruptcy estate and probate estate, respectively. Like personal representatives in probate, bankruptcy trustees step into the shoes of the parties they represent and can sue to enforce claims that a debtor had outside of bankruptcy. In bankruptcy, however, the statute of limitations applicable to those claims is either the one that exists at state law or two years after the order for relief in

89. *See* 11 U.S.C.A. §§ 101(15), (41), 109(a) (West 2016). Contrarily, if a debtor who has already entered bankruptcy dies, his estate stays there and is administered "in the same manner, and so far as possible, as though the death had not occurred." FED. R. BANKR. P. 1016. For a further discussion, see Laura B. Bartell, *Bankruptcy and the Deceased Debtor: Rule 1016 in Practice*, 94 AM. BANKR. L.J. 523 *passim* (2020).

90. *See. e.g.*, UNIF. TR. CODE § 503(b)–(c) (amended 2010), 7D U.L.A. 191 (2018) (allowing alimony and child support creditors, along with other "exception" creditors, unlike general creditors, to obtain a continuing garnishment order against a spendthrift trust).

bankruptcy—whichever is greater.[91] This extension recognizes the disruptive effect that bankruptcy has on the debtor's affairs and the time necessary for bankruptcy trustees to familiarize themselves with a debtor's financial situation.[92]

The same sort of disruption occurs when an individual dies. And, addressing the matter separately, lawmakers have crafted an analogous rule in probate. Under the Uniform Probate Code, personal representatives have a minimum of four months from the date of death to commence actions on behalf of the probate estate.[93] As usual, neither body of law cross-references the other,[94] and the extension period in bankruptcy and probate fail to coincide exactly. But lawmakers in both spheres did perceive the problem, and they arrived at structurally similar solutions, it would appear, independently and unwittingly. Intercategorical analysis proved unnecessary to achieve rough-and-ready symmetry in this instance. Nonetheless, by applying such analysis comprehensively, lawmakers could have streamlined the analytical process of devising these rules.

Here again, we behold a dichotomy long neglected by lawmakers and largely, but not entirely, by academic commentators.[95]

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These three examples of intercategorical analysis serve to illustrate the idea and its usefulness. Others would have served equally well. Labor law and employment law present another desirable pairing.[96] And for some

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91. *See* 11 U.S.C.A. § 108(a) (West 2016).

92. *See* CHARLES J. TABB, LAW OF BANKRUPTCY § 2.5, at 145 (4th ed. 2016).

93. *See* UNIF. PROB. CODE §§ 3-109 (amended 2019), 8 pt. 2 U.L.A. 42 (2013). The minimum limitations period varies from state to state. In California, for example, the limitations period stretches to a minimum of six months from the date of death. *See* CAL. CIV. PROC. CODE § 366.1 (West, Westlaw through Ch. 1 of the 2023-24 1st Extraordinary Sess., and urgency legislation through Ch. 888 of the 2023 Reg. Sess.).

94. *See* sources cited *supra* notes 91, 93.

95. The only academic discussions predate both the promulgation of the Uniform Probate Code (1969) and the enactment of the modern Bankruptcy Code (1978). *See* Kurt H. Nadelmann, *Insolvent Decedents' Estates*, 49 MICH. L. REV. 1129, 1138–44 (1951) (observing that "[a] detailed comparison of the laws on insolvent decedents' estates in the states . . . with the national bankruptcy law should yield valuable information on efficacy, duration, costs, and other elements of importance to judge the merits of the respective procedures.") (quotation at 1144); Note, *Suicide or Bankruptcy?*, 5 STAN. L. REV. 74 *passim* (1952); *see also infra* note 119. For technical discussions of the interplay of bankruptcy and probate, see Donald L. Swanson, *Bankruptcy—Probate . . . and the Twain Shall Meet*, 20 CREIGHTON L. REV. 435 *passim* (1986); David B. Young, *The Intersection of Bankruptcy and Probate*, 49 S. TEX. L. REV. 351 *passim* (2007).

96. *See* Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539, 1540 (2006) (remarking that labor law, applicable to collective bargaining, and employment law, applicable to individual service contracts, "have developed relatively independently from one another," while adding that "the realities of contemporary work defy this fragmented structure and its conceptual satellites.").

pairings, the virtues of intercategorical analysis would scarcely come as a revelation. In the areas of patent and copyright, for example, courts have analyzed legal issues intercategorically for quite some time.[97] The same is true as concerns admiralty doctrines in juxtaposition with common-law rules governing parallel matters on land[98]—although here, oddly, intercategorical analysis has flowed in only one direction. The common law has influenced admiralty doctrine but not vice versa, a limitation that makes historical sense but defies logic.[99] This Article makes no pretense of pioneering a mode of legal analysis hitherto unknown. Rather, its aim is to reify and regularize, as a method of universal application, one that lawmakers have been using here and there, now and then, and in so many words.

This mode of analysis is most commonly seen *within* categories—intra-categorical analysis, we could call it—although even here, lawmakers have failed to harmonize kindred doctrines as fully as they might.[100] Within categories, the desirability of doctrinal coordination appears strongest insofar as its absence is less likely to find justification in public policy. The very fact that a category exists suggests that lawmakers have made this judgment. But lawmakers should not stop there. Intercategorical analysis may be less apt to bear fruit than intra-categorical analysis, yet—as the examples presented earlier seek to demonstrate—it is not without promise.

The authors of the second Restatement of Contracts appreciated the idea. They peppered their volume with twenty-one "relation to other rules"

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97. *See, e.g.*, eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 392–93 (2006) ("This approach [to injunctions under the Patent Act] is consistent with our treatment of injunctions under the Copyright Act."); *see also* Herb Reed Enters., LLC, v. Florida Ent. Mgmt., Inc., 736 F.3d 1239, 1249 (9th Cir. 2013) (extending the analogy to trademark infringement); John Wolff, *Copyright Law and Patent Law: A Comparison*, 27 IOWA L. REV. 250 *passim* (1942) (observing that there exists "a vast body of copyright and patent cases in which courts have used what may be called the comparative approach. . . . [S]uch comparisons have invariably served to elucidate the problem at hand and have helped the courts to arrive at a sound decision.") (quotation at 250–52, footnotes omitted).

98. *See* Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257, 259–60 (2d Cir. 1963) (observing that "admiralty judges often look to the law prevailing on the land. . . . If the common law recognized a wife's claim for loss of consortium . . . a[n] . . . admiralty court would approach the problem here by asking itself why it should not likewise do so.").

99. Admiralty law developed in England, and in turn in colonial America, as a product of specialized prerogative courts but later fell into the hands of common-law judges in the United States. *See* U.S. Const. art. III, § 2; ROBERTSON, *supra* note 2, at 35–94, 104 (1970). Hence, judges steeped in the common-law tradition today control admiralty. Had this jurisdictional history occurred in reverse, intercategorical analysis might flow instead in the opposite direction.

100. *See, e.g.*, UNIF. PROB. CODE § 2-609 cmt. (amended 2019), 8 pt. 1 U.L.A. 267 (2013) (relating as "parallels" to which "the same policy" applies the doctrines of ademption by satisfaction for wills and advancement for intestacy). For a discussion of persistent failures to coordinate doctrines within inheritance law, see Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057 *passim* (1996).

comments.[101] Two other Restatements have also included them, but only for a few scattered sections.[102] At the instance of supervisory bodies, comments of this sort could become routine components of new Restatement projects, Uniform Acts, or other sources of law. If presented with such a requirement (or perhaps a recommendation, to keep the burden within bounds), lawmakers would have the impetus they often seem to need to take cognizance of the broader context of rules within their remit.

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The problem of borderline doctrines—ones that do "not fit comfortably into either" of two categories[103] but occupy "a sort of no-man's-land lying between" them[104]—presents a special concern within intercategorical analysis. Borderline doctrines could provide points of comparison within either of the categories they straddle—or they could prove analogous to other borderline doctrines. Hence, at the intersection of contract and tort, quasi-contract and promissory estoppel present structural concomitants. "The two concepts were, indeed, twins," Grant Gilmore observed.[105] At the intersection of tort and property, likewise, nuisance and trespass present structural concomitants.[106] Even when they fail to discover such analogues for comparative purposes, lawmakers should, at the very least, consult the policies applicable to each of the neighboring categories when presented with borderline issues.

Yet, even here, where intercategorical analysis is so manifestly needed, it does not invariably occur. Lawmakers might deem the borderline problem of quasi-contract "a little closer to contract than it is to tort" and hence focus their policy analysis on contract theory.[107] Or different lawmakers might

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101. *See* RESTATEMENT (SECOND) OF CONTS. §§ 90 cmt. a, 139 cmt. a, 150 cmt. a, 155 cmt. b, 166 cmt. b, 173 cmt. c, 195 cmt. b, 196 cmt. b, 204 cmt. a, 215 cmt. a, 216 cmt. a, 217 cmt. a, 220 cmt. a, 222 cmt. a, 229 cmt. a, 233 cmt. a, 251 cmt. b, 266 cmt. a, 268 cmt. a, 270 cmt. a, 271 cmt. a (AM. L. INST. 1981). Although many of these comments were confined to the second Restatement itself, and hence concerned intra-categorical analysis, the one attached to the famous Section 90 is broader. The comment observes: "Obligations and remedies based on reliance are not peculiar to the law of contracts. . . . In some cases those rules [in agency, tort, and restitution] and this Section overlap; in others they provide analogies useful in determining the extent to which enforcement is necessary to avoid injustice." *Id*. § 90 cmt. a.

102. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.10 cmt. b (AM. L. INST. 2000); RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 9 cmt. a, 46 cmt. b (AM. L. INST. 1995).

103. 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 2-20, at 185 (3d ed. 2004) (regarding quasi-contract).

104. GRANT GILMORE, THE DEATH OF CONTRACT 88 (1974) (same).

105. *Id.*

106. "At some point the law of trespass shades into the law of nuisance." WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 7.1, at 411–12 (3d ed. 2000).

107. GILMORE, *supra* note 104, at 89.

choose alternatively to apply one theory or the other, making no attempt at synthesis. This sort of vacillation can be seen in connection with another borderline doctrine, insolvent disclaimer, which straddles inheritance and debtor-creditor law.[108]

Borderline doctrines could undergo intercategorical analysis clandestinely. Lawmakers might choose to locate a borderline doctrine within one of the alternative categories after reaching the implicit judgment that its theory is better suited to the problem at hand.[109] How often these judgments occur is, of course, unknown, but as a matter of jurisprudence they are suboptimal. Implicit judgments furnish succeeding lawmakers with no analytical legacy. Intercategorical analysis is more useful when it occurs explicitly. It then yields a body of analytical material that lawmakers can build on when related problems arise.

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At the end of the day, intercategorical analysis can point the way not just toward the reformation of rules, but toward the reformulation of categories themselves. To be sure, legal categories provide helpful means of organizing rules that intercategorical analysis can serve to improve while leaving the law's taxonomy intact.[110] Yet, to the extent lawmakers have made divisions between rules along formal lines, relying on distinctions without a difference—or, at least, without a policy difference—they have risked the evolution of pointless inconsistencies. If and when intercategorical analysis identifies systematic symmetries, lawmakers should consider not just harmonization but consolidation. Article 9 embodied such a consolidation, and others have taken place elsewhere on the legal landscape.[111] Yet, seismic though it was, Article 9 could have gone

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108. I discussed this doctrine in a prior article. *See* Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587 *passim* (1989).

109. For an example of a case in which this sort of judgment might have occurred, see *id*., at 601–03, 653.

110. For recent discussions of the jurisprudence of legal categorization, see Lee Anne Fennell, *Sizing Up Categories*, 22 THEORETICAL INQUIRIES L. 1 *passim* (2021); Emily Sherwin, *Legal Taxonomy*, 15 LEGAL THEORY 25 *passim* (2009).

111. *See supra* notes 17–19 and accompanying text. The revised version of Article 6 of the Uniform Probate Code consolidates pay-on-death designations for bank accounts with Totten trusts, whose only difference is the formal inclusion of the term "in trust" on the account, because "the two types of designations in an account serve the same function." UNIF. PROB. CODE § 6-201 cmt. (amended 2019), 8 pt. 3 U.L.A. 362 (2013). The original version of Article 6 had distinguished the two designations both formally and in some ways substantively. *See id*. §§ 6-101(10), (14), 6-103 to -104, 6-110 to -111 (pre-1989 Art. 6), 8 pt. 3 U.L.A. 412, 415, 420, 432 (2013). More ambitiously, the third Restatement of Property proposes to consolidate easements, profits, real covenants, and equitable servitudes into a single category, in the process "eliminate[ing] needless distinctions" with the aim of "[s]ubstantial

further. Why not expand Article 9 to encompass real property mortgages? Even if distinct characteristics of real property suggest the need for residual exceptions, Article 9 already incorporates a host of special exceptions.[112] Consolidation would rope all security interests together in a way that would help to ensure their continued congruity.

At the same time, intercategorical analysis could carry a different implication: it could demonstrate the usefulness of splitting categories apart. Probate differs from bankruptcy in a myriad of ways exactly because it deals mainly with solvent decedents' estates. By setting probate side-by-side with bankruptcy, which ordinarily concerns insolvent debtors, we illuminate the contrast.[113] And that contrast suggests the possibility, and perhaps the wisdom, of creating a breakaway, borderland category devoted to insolvent decedents' estates. Once established, such a category could encompass proceedings both for insolvent decedents whose estates are in probate *and* for insolvent debtors who die after a bankruptcy case has commenced.[114] Given the adverse effect that debt can have on health, eligibility for this category would not arise merely by chance.[115] And the idea is not wholly without precedent. A few states have taken steps in this direction.[116]

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simplification," although whether this effort succeeds remains to be seen. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES intro. (Am. L. INST. 2000).

112. *See, e.g.*, U.C.C. § 9-334 (AM. L. INST. & UNIF. L. COMM'N 1977, amended 2022) (requiring security interests in fixtures to be filed in the real estate records office, among other special rules).

113. Whereas insolvency is not a prerequisite for a petition for relief under Chapter 7 of the Bankruptcy Code, a court could dismiss the case if a debtor proves to be solvent, although it is not obliged to do so. *See* 11 U.S.C.A. §§ 109(b), 707(a)–(b) (West 2016).

114. The category could take shape either as an aspect of state law with regard to probate, or as an independent chapter of bankruptcy relief. If the category were to become a standard feature of state law, then debtors who die during a bankruptcy proceeding should be redirected out of bankruptcy into that state proceeding; whereas, if the category were to form a new chapter of bankruptcy relief, then state probate estates should become eligible for that relief. Under current law, however, neither is true. *See supra* note 89 and accompanying text.

115. See Daniel A Hojman et al., *Debt Trajectories and Mental Health*, 167 SOC. SCI. & MED. 54 *passim* (2016); Elizabeth Sweet et al., *The High Price of Debt: Household Financial Debt and Its Impact on Mental and Physical Health*, 91 SOC. SCI. & MED. 94 *passim* (2013).

116. Four states (Alabama, Massachusetts, New Jersey, and Tennessee) distinguish insolvent estates as a separate chapter of probate. *See* ALA. CODE tit. 43, ch. 2, art. 19 (West, Westlaw through the end of the 2023 First Special, Regular, and Second Special Sessions); MASS. GEN. LAWS, ANN. ch. 198 (West, Westlaw through Chapter 25 of the 2023 1st Annual Session); N.J. STAT. ANN. tit. 3B, ch. 22, art. 7 (West, Westlaw through L.2023, c. 107 and J.R. No. 11); TENN. CODE ANN. tit. 30, ch. 5 (West, Westlaw through the 2023 Reg. Sess. and 1st Extraordinary Sess. of the 113th Tennessee General Assembly). In Massachusetts, the personal representative can avoid preferences made while the debtor was insolvent within four months of the debtor's death (tracking the reach back period for avoidance of preferences under the former Bankruptcy Act, rather than the modern Bankruptcy Code). *See* MASS. GEN. LAWS ANN. ch. 198, § 10A–C (West, Westlaw through Chapter 25 of the 2023 1st Annual Session). *Cf.* 11 U.S.C.A. § 547(b)(4) (West 2016); Bankruptcy Act ch. 6, § 60 (11 U.S.C. § 96) (1898) (repealed 1978). In Alabama, creditors can elect the personal representative of an insolvent estate, as under the Bankruptcy Code, superseding the nominee of the decedent. *See* ALA. CODE §§ 43-2-720 to -724 (West, Westlaw through the end of the 2023 First Special, Regular, and Second Special Sessions). *Cf.* 11

Nonetheless, important bodies of drafters left their blinders on. The Commissioners who promulgated the Uniform Probate Code carved out no special procedures for insolvency at all.[117] Likewise, the drafters of the Bankruptcy Code made no special arrangements for debtors who die while the proceeding is ongoing, even though federal law does include, within separate chapters, distinct types of bankruptcy relief for different types of debtors.[118]

Intercategorical analysis can even suggest a third possibility: leaving the essential structure of categories intact but removing part of one and grafting it into another.[119] Gifts causa mortis represent a form of will-substitute,[120] yet, as a matter of doctrine, lawmakers have always treated them as part of the law of gifts.[121] By shifting them into the category of testamentary transfers, lawmakers would create a presumption that subsidiary doctrines applicable to wills should apply to gifts causa mortis as well, in the absence of some reason to distinguish them.[122]

Still, a note of caution is in order. Lawmakers should not reorganize legal categories lightly. They must bear in mind that certain categories—bankruptcy is an example—do not comprise mere bodies of doctrine. Bankruptcy also features a distinct forum[123] and a distinct procedural regime.[124] Other categories are regulated by administrative agencies. If

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U.S.C.A. § 702 (West 2016). In New Jersey, the probate court in an insolvency proceeding has power to value claims against the estate, as in bankruptcy. *See* N.J. STAT. ANN. § 3B:22-34 (West, Westlaw through L.2023, c. 107 and J.R. No. 11). *Cf.* 11 U.S.C.A. § 502(b) (West 2016).

117. *See* UNIF. PROB. CODE art. 3 (amended 2019), 8 pt. 2 U.L.A. 15 (2013).

118. *See* 11 U.S.C.A. ch. 9 (West 2016) (municipalities); *id*. ch. 12 (farmers and fishermen).

119. For proposals published prior to the enactment of the modern Bankruptcy Code to make insolvent probate estates eligible for bankruptcy relief, see Charles E. Nadler, *Bankruptcy Courts' Refusal to Assume Jurisdiction over Insolvent Decedents' Estates: A Rebuttal*, 26 FORDHAM L. REV. 1 *passim* (1957); Richard V. Wellman, *Bankruptcy Proceedings for Insolvent Decedents' Estates*, 6 U. MICH. J.L. REFORM 552 *passim* (1973).

120. *See supra* text at p. 57. Treatise writers have long perceived this connection. *See, e.g.*, THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 45 (1953).

121. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 6.2 cmt. zz (AM. L. INST. 2003) (treating gifts causa mortis as a species of gift); UNIF. PROB. CODE § 6-101 (amended 2019), 8 pt. 3 U.L.A. (2013) (implicitly excluding gifts causa mortis from the coverage of the Code).

122. British courts have applied the testamentary doctrine of lapse to gifts causa mortis, but the issue has never arisen directly in American cases. *See* ANDREW BORKOWSKI, DEATHBED GIFTS 31, 60 (1999); Expressmen's Aid Soc'y v. Lewis, 9 Mo. App. 412, 415 (1880) (dicta repeating the English rule). In one state, gifts causa mortis are addressed within the probate code, which goes on to codify the British rule. *See* CAL. PROB. CODE § 5704(a)(2) (West, Westlaw through Ch. 1 of 2023-24 1st Ex.Sess, and urgency legislation through Ch. 888 of 2023 Reg.Sess.).

123. Bankruptcy cases are heard in federal courts. Core bankruptcy matters come before Article I judges, whereas noncore matters can be reviewed de novo by Article III judges. *See* BAIRD, *supra* note 73, at 25.

124. Bankruptcy courts operate as courts of equity. As such, they ordinarily sit without a jury and follow unique rules of civil procedure. *See* FED. R. BANKR. P. 1001, 9015; BAIRD, *supra* note 73, at 25–26.

lawmakers were to shift the dimensions of categories, their reconfiguration could have implications beyond the scope of legal doctrine. Lawmakers would need to consider the institutional, along with the doctrinal, implications of these decisions.

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Having established, it is hoped, the utility of intercategorical analysis, we should take a moment to dwell upon its dangers. As a pessimist might say, every silver lining has its cloud.

The principal danger of intercategorical analysis is that lawmakers will perform it badly—that they will draw false comparisons, suggesting symmetries where asymmetries find justification in policy differences that distinguish categories. Of course, lawmakers should dig into this question whenever they perform intercategorical analysis; the mere identification of a symmetry or asymmetry raises no presumption about its appropriateness. Nevertheless, the risk exists that lawmakers who perform intercategorical analysis will exhibit a bias in favor of symmetry, leading them to impair rules.

Curiously, it is this danger, rather than the complementary benefits of intercategorical analysis, that has drawn scholarly attention. Commentators have identified "the fallacy of the transplanted category,"[125] warning that when concepts or terminology leap from one category to another, lawmakers may assume inconsiderately that its explication in one domain should extend to all. Hence, for example, what lawmakers refer to as "fiduciary duties" in trust law can spread without reflection—a sort of legal idée fixe—to corporate law.[126] Parallel terminologies and even general conceptions need not express themselves in the same way within different categories, of course. To the extent they are moved by different policy considerations, lawmakers operating within one category who replicate the terminology of another category remain free to use it to mean different things. Yet, tribunals may lose sight of this fact. It was this concern that actuated the drafters of Article 9 to develop an original body of terminology for their newly constructed category of law.[127]

The point is well taken, but it is not confined to intercategorical analysis.

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125. *See* Moffatt Hancock, *Fallacy of the Transplanted Category*, 37 CANADIAN B. REV. 535 *passim* (1959).

126. *See* Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 804-08 (1983); Edward Rock & Michael Wachter, *Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants*, 96 NW. U. L. REV. 651 *passim* (2002).

127. *See supra* text at notes 35–36.

Lawmakers risk misapplying other modes of policy analysis, such as law-and-economics. The problem may be more acute in law-and-economics for the simple reason that lawmakers (with exceptions, of course) are not themselves economists, whereas lawmakers are (for the most part) lawyers. Surely, a judge or a codifier should have an easier time comparing different fields of law than applying with any degree of sophistication the principles of law-and-economics.

The concern may be most applicable to specialists such as bankruptcy judges, who do nothing but decide cases within their field, or probate judges, who never stray beyond theirs. When they confine themselves to a single wheelhouse, lawmakers might be better advised to reinvent the wheel—that is, to think independently about problems rather than seek to draw inspiration from other categories of law in which they are poorly versed. The risk of false comparisons might loom too large in such cases. Yet, even within courts of general jurisdiction, judges sometimes specialize. They may divide opinion writing informally on this basis.[128]

A second, related danger lurks here. Lawmakers may have no substantive reason to distinguish an analogous rule, but that rule may poorly serve public policy, either because it has grown out-of-date or because it was ill-conceived in the first place. A push for intercategorical homogenization could thus have the perverse effect of replicating bad rules across the legal landscape.

This problem raises fundamental questions in jurisprudence. The late Ronald Dworkin identified what he called the "integrity" of law as a value.[129] By this, he meant that lawmakers should strive to develop the legal landscape consistently and eschew the sort of statutory inconsistencies that can result from political compromise. "Most of us, I think, would be dismayed by 'checkerboard' laws that treat similar accidents or occasions of racial discrimination or abortion differently on arbitrary grounds," Dworkin contended, adding that "[e]ven if I thought strict liability for accidents wrong in principle, I would prefer that manufacturers of both washing machines and automobiles be held to that standard than that only one of them be.[130]

This issue pits a sort of pragmatic utility against citizens' larger perception of the legitimacy of a doctrinal system that sometimes plays out

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128. *See, e.g.*, Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 139–42 (2002) (remarking an instance of such specialization on the U.S. Supreme Court); William J. Brennan, Jr., A *Tribute to Justice Harry A. Blackmun*, 1990 ANN. SURV. AM. L. xi, xiii (remarking another such instance).

129. *See* RONALD DWORKIN, LAW'S EMPIRE 176–275 (1986).

130. *Id.* at 179, 182.

in messy ways.[131] In this regard, we can observe that citizens' sense of the integrity of law, or want thereof, is bound to hinge mainly on the congruence of rules within categories. Surely, citizens' peripheral vision is no better than lawmakers'. Citizens will fail to perceive many intercategorical inconsistencies, which will therefore fail to offend their sense of the integrity of the system as a whole. On this theory, intra-categorical analysis becomes crucial to maintaining the law's integrity, whereas intercategorical analysis may not be.

At any rate, we need not travel down this rabbit hole. This Article advocates a mode of policy analysis, not a political ideal or imperative when crafting rules. The political implications of lawmakers' decisions represent a separate question.

From the standpoint of legal policy, lawmakers would err if they extended rules unthinkingly from one category to another. Before lawmakers import a rule of mortgage law into Article 9, for example, they should assess the rule's quality. And if lawmakers conclude that the rule within mortgage law is deficient in some way, then they should reverse their analysis and export what they perceive as a reformed rule within Article 9 into mortgage law. As a working principle—which, if politically feasible, would advance the aim of integrity—*intercategorical analysis should operate reciprocally*. Nonetheless, to the extent lawmakers already perform intercategorical analysis, this feature has sometimes been lacking.[132]

Once again, though, lawmakers can only make these determinations intelligently if they are well enough informed about both of the categories under comparison. This prerequisite again suggests the danger of placing intercategorical analysis in the hands of specialists.

A final concern is that lawmakers might use intercategorical analysis disingenuously. Lawmakers might employ it to draw knowingly false analogies that support some preconceived substantive preference. Whether the proliferation of this mode of analysis would enhance to any significant degree lawmakers' existing abilities to follow their own preferences nonetheless appears doubtful. Lawmakers can already manipulate their analyses when it suits them—whence the maxim that hard cases make bad

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131. Compare:

> The area of contract law is unlikely to cohere with the field of tort law, or property law; contract law is itself likely to contain multiple and sometimes inconsistent strands. Multiple and sometimes inconsistent strands are a natural outgrowth of incompletely theorized agreements, which are themselves a way of minimizing the extent and depth of conflict.

Cass Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1750 (1995).

132. *See supra* notes 98–99 and accompanying text.

law. Even formalism is subject to manipulation by a motivated court.[133]

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Putting aside unscrupulousness, we can posit an alternative solution to the problem of ensuring competent performance of intercategorical analysis. Lawmakers can look not to other categories, but rather to scholarship drawing intercategorical comparisons.[134] In other words, lawmakers can leave the heavy lifting to those who command the skills necessary to handle the task. The same process goes on within law-and-economics, where lawmakers frequently rely on scholarly sources rather than undertake economic analysis in their own right.

And so, if the ball is in our court, then it behooves us within the scholarly community to get the ball rolling. Intercategorical analysis can serve as a useful tool in the toolkit of legal policymaking. But legal scholars may have to get into the game first and present concrete proposals based on intercategorical analysis that lawmakers can contemplate as they go about the task of revisiting rules, whether within case law or codes.

Or does this solution degenerate into the same problem? Are legal scholars any better at drawing comparisons than lawmakers? Or do they display the same tropisms for specialization, undermining their ability to operate outside any given sphere of expertise? How can a commentator tell, and tell about, the difference or similarity between categories unless he or she knows quite a bit about the policies that drive each of them? We begin to discern the horns of a dilemma. Specialization within law provides benefits, but it simultaneously attenuates the power of specialists—be they judges, codifiers, or academics—to integrate one esoteric field with another. In the hands of specialists, legal categories might be better left to develop in splendid isolation.

If intercategorical analysis is truly to thrive, we need renaissance lawyers to stand alongside the specialists. Free from docket pressures and legislative session deadlines, the legal academy might provide the best environment in which to nurture generalists. But, in fact, we do not require true generalists so much as *regionalists* who are familiar with related legal categories, such as the pairings described earlier. Regionalists can become elite players in the game of intercategorical analysis.

In theory, lawmakers could foster regionalism at the judicial level by

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133. *See supra* note 2.

134. A confined body of such scholarship already exists, mostly devoted to borderline issues. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 *passim* (2001).

establishing (for want of a better term) semi-specialized courts; likewise, at the legislative level, lawmakers could establish semi-specialized committee staffs. If, for instance, lawmakers expanded the subject-matter jurisdiction of the Federal Circuit Court of Appeals to cover patent *and copyright* cases, its judges would become proficient in each area and could thereby perform intercategorical analysis with greater ingenuity.[135] Yet, something would be lost. Semi-specialized courts would dilute expertise and the efficiencies that flow from it.[136] Hence, a Federal Circuit with broader jurisdiction would have to concentrate less on scientific know-how, which is crucial for patent cases but irrelevant for copyright cases. This dilution would increase if courts or committee staffs widened their focus from a big picture to a bigger picture, which, in the current context, would merge the meta-category of intellectual property with the meta-category of physical property.[137] A court with jurisdiction over all manner of property disputes (and nothing else) might perform intercategorical analysis more effectively, but only by forfeiting virtually all efficiencies of specialization.

Here again, though, we can pin our hopes on the legal academy to breed the necessary talents. The practicalities of legal education are such that, sooner or later, most academics have to teach multiple doctrinal subjects and may, in time, master each one. Any didactical inefficiencies stemming from this division of effort are beside the point. And, fortuitously, academics thereby gain the wherewithal to cross-pollinate fields.

These are the thinkers to whom we should turn to pursue the agenda set by this Article.[138] They can do so indirectly within the law review literature, which serves to influence lawmakers.[139] Or they can do so directly via their

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135. *See supra* note 97 and accompanying text. Although the Federal Circuit has appellate jurisdiction in several residual areas unrelated to patents, *see* 28 U.S.C.A. § 1295 (West 2018), patent cases dominate its docket. *See* U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT: A HISTORY, 1990-2002, at 253–54 (Kristi L. Yohannan ed. n.d.). At present, the Federal Circuit can hear copyright issues only if they arise in connection with patent issues. *See, e.g.*, Jacobsen v. Katzer, 535 F.3d 1373, 1377 (Fed. Cir. 2008).

136. *See* Rochelle C. Dreyfuss, *Specialialized Adjudication*, 1990 BYU L. REV. 377, 378–79 (discussing the efficiencies of specialized courts).

137. For a discussion of the relationship between these meta-categories, see Jake Linford, *Trademark Owner as Adverse Possessor: Productive Use and Property Acquisition*, 63 CASE W. RES. L. REV. 703, 746 (2013).

138. Specialized academics can also collaborate via co-authorship, unlike judges sitting on different specialized tribunals. Of course, some might question the core abilities of academics in comparison to lawmakers. Grant Gilmore suggested (perhaps facetiously) in connection with intercategorical analysis of contract and tort that "the academic mind is usually a generation or so behind the judicial mind in catching on to such things." GILMORE, *supra* note 104, at 90. Query also whether academics have more axes to grind than courts or legislators, aggravating the risk of motivated scholarship as opposed to motivated lawmaking. *See supra* text at note 133.

139. We can identify instances where analysis of other "law-ands" elaborated within the law review literature has found its way into legal doctrine. *See, e.g.*, Carpenter v. Double R Cattle Co., Inc.,

service on private lawmaking bodies—the Uniform Law Commission and the American Law Institute. Produced by committees typically led by academics, Uniform Acts and Restatements can serve as ideal gateways for the injection of intercategorical analysis into our law.[140]

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In the course of advocating the routine application of a tool of policy analysis, this Article has not sought to displace any other tool. Conceptualized as another "law-and," the movement for *law-and-law* merits attention not in lieu of, but alongside its counterparts. Each in its own way can add value to the lawmaker's toolkit. And we can express the point more strongly: As an aid to the craft of lawmaking, intercategorical analysis depends on other tools to assess the portability of rules and the direction in which they should flow. Lawmakers must employ those tools in concert if they are to strengthen our corpus juris.

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669 P.2d 643, 647, 658 (Idaho Ct. App. 1983) (applying Professor Calabresi's economic model of nuisance, elaborated in a classic law review article, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972)).

140. Academics have often incorporated their own ideas, originally promoted within law review articles, into the Uniform Acts or Restatements that they have gone on to draft as reporters. The effort by the American Law Institute in 2000 to consolidate the categories of easements, profits, real covenants, and equitable servitudes in the third Restatement of Servitudes, *see supra* note 111, was preceded by a number of academic proposals along those lines—including one by the reporter for the third Restatement, published eighteen years earlier. *See* Susan F. French*, Toward a Modern Law of Servitudes: Reweaving the Ancient Strands,* 55 S. CAL. L. REV. 1261 *passim* (1982); *see also Symposium Issue: A Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1177–447 (1982); Lawrence Berger, *Integration of the Law of Easements, Real Covenants and Equitable Servitudes*, 43 WASH. & LEE L. REV. 337 *passim* (1986).