The Community Aspect of Private Ownership

Nadav Shoked
0@0.com

Follow this and additional works at: http://ir.law.fsu.edu/lr
Part of the Law Commons

Recommended Citation
http://ir.law.fsu.edu/lr/vol38/iss4/2

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized administrator of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.
THE COMMUNITY ASPECT OF PRIVATE OWNERSHIP

Nadav Shoked

THE COMMUNITY ASPECT OF PRIVATE OWNERSHIP

NADAV SHOKED

ABSTRACT

This Article advances a new understanding of property rights by introducing the concept of the community aspect of private ownership. Unlike traditional accounts, which assign property rights to the individual owner alone, this Article argues that property rights should be conceived as held by the individual owner in partnership with her immediate community. The neighborhood within which a residential property is located holds a limited interest in that property. The Article reaches this conclusion following a discerning reading of the prevalent theories of property law. As they have so far mostly failed to acknowledge this community aspect of ownership, writers in these diverse traditions have not been able to provide a conceptualization of ownership that will correspond to their theories’ own premises. Through the prism of the community aspect of ownership, this Article thus provides not only a more accurate notion of ownership, but also a better view of the contending philosophies of property. In addition, this Article suggests a legal reform that will promote the community aspect of ownership by stabilizing neighborhoods experiencing rapid change in the form of either abandonment or gentrification. Finally, this Article examines the ways in which its proposed community-invested idea of ownership can be applied to problems in other fields of property, torts, and intellectual property law.

I. INTRODUCTION
II. THE COMMUNITY ASPECT OF PRIVATE OWNERSHIP AND PROPERTY THEORY
   A. Communitarian Theories
      1. The Communitarian Worldview
      2. Complicating to the Communitarian Worldview
      3. The Communitarian Worldview in Property Law
      4. Conclusion
   B. Utilitarian Theories
      1. Preferences for a Stable Community
      2. Providing for a Stable Community: Markets and Dilemmas
         a. Stable Communities as a Public Good
         b. The Failure of Market Mechanisms in Policing the Provision of Community Stability
         c. The Strategic Dilemma Neighbors Face
      3. Conclusion
   C. Right-Based Arguments
      1. Personhood Theory
      2. Labor-Desert Theory
         a. The Theory
         b. The Production of Value
         c. The Production of Residential Properties’ Value
         d. Conclusion
      3. Property as a Natural Right
      4. Property as a Social Phenomenon
      5. Conclusion
   D. Conclusion

* Visiting Assistant Professor, University of Texas School of Law. S.J.D., LL.M. Harvard Law School; LL.B. Hebrew University. This Article originated in a paper written under the supervision of Joseph Singer at Harvard Law School, who was always extraordinarily generous with his time and advice. I further benefitted from extremely helpful comments on varied drafts of this Article from Ronen Avraham, Oren Bracha, William Forbath, Gerald Frug, Morton Horwitz, and Duncan Kennedy. Finally, thanks are due to participants in the Project on Welfare, Justice, and Economics Workshop Series at Harvard University.
I. INTRODUCTION

“For the quality of owning freezes you forever into ‘I,’ and cuts you off forever from the ‘we.’” John Steinbeck, The Grapes of Wrath.¹

On September 22, 1988, the City of Chicago issued a rezoning ordinance revising the land uses allowed on a parcel of land where an abandoned factory stood. The ordinance permitted commercial-residential planned development.² Maria Rodriguez, who lived nearby in a building she owned, should have been thrilled. Everyone predicted an increase in property values following the development—a true windfall for Ms. Rodriguez.³ Nevertheless, Ms. Rodriguez did not view the ordinance as a blessing. Quite the opposite; she chose to go to court, arguing that the ordinance was a deprivation of her property in violation of the Illinois Constitution’s substantive due process guarantees.⁴

How so? If anything, her private property rights appeared to have been enhanced, as real estate values were to increase. Yet Ms. Rodriguez was looking beyond this traditional perception of enhancement and deprivation of private property rights. She understood her property right as implying a broader entitlement; as being more than a mere economic private endowment. For Ms. Rodriguez, her private property right contained a community component without which it would lose much of its value. The rezoning ordinance was putting at risk that important element of her right. She feared the governmental act would entail a change in her community, offsetting any monetary gain brought about by the increase in the property’s market value. She believed that the rise in property values following the rezoning would generate higher rents and property taxes leading to

---

³ Id.
⁴ Id. (citing ILL. CONST. art. I, § 2).
residents’ displacement, thereby changing the local social fabric. Similarly, she worried that higher taxes might force her to move. Though she would sell her house at a profit, she would not be able to recreate elsewhere the atmosphere of her old neighborhood. By thus potentially transforming the community, the ordinance could decrease her subjective valuation of her land, even though it did not touch her parcel or injure the parcel’s objective valuation.

Such an argument strikes legal observers as novel, perhaps too novel. The Illinois trial court dismissed Ms. Rodriguez’s complaint, noting that it was “unaware of precedent which would recognize an increase in the property value as an injury” to an owner. But the state appellate court was undeterred by the unconventionality of the legal challenge, and it reversed the decision. It explained that “even if [Ms. Rodriguez’s] property might experience net dollar value increases, theoretically realizable in the future,” she would suffer harms, “including destruction of . . . neighborhood social and commercial fabric.” Accordingly the court concluded that she had stated a constitutional claim.

In so doing, the Illinois Appellate Court implicitly recognized the community aspect of an owner’s property right. The Illinois Constitution mandates due process of law when a person is “deprived of . . . property.” Ms. Rodriguez was not deprived of her property under any traditional understanding of the terms “deprivation” or “property.” The building was not confiscated, nor did it lose value. Regardless, as the court understood, her holdings were being altered in an irreversible way. This alteration was as troubling as any other damage

5. Id. at 60.
6. Id. at 66.
7. Id. at 63.
8. Id. at 64.
10. Neither was her property “taken,” as this latter term is normally used and understood in constitutional takings clauses. The Illinois Constitution employs the term in its eminent domain clause. Ill. Const. art. I, § 15 (“Private property shall not be taken . . . for public use without just compensation.”). The term and its common legal meaning are not irrelevant for due process analysis since American courts have not always clearly distinguished the takings test from the due process test when reviewing zoning ordinances. To find that a zoning ordinance violated substantive due process rights the Illinois courts require a showing that the enactment was “arbitrary, capricious and unrelated to the public morals, safety and general welfare.” Mercer Lumber Cos. v. Vill. of Glencoe, 60 N.E.2d 913, 916 (Ill. 1945). This test closely traces the federal standard, set by the Supreme Court in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). That landmark decision blurred the lines between due process and takings. See Steven J. Eagle, Property Tests, Due Process Tests and Regulatory Takings Jurisprudence, 2007 BYU L. Rev. 899, 906-07 (2007). The ambiguity persisted for decades, even though takings jurisprudence appeared to have emerged as an independent body of law a few years earlier. The starting point for modern takings jurisprudence is Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
the government could inflict on her land. While maybe not directly invading Ms. Rodriguez’s own private property, the government action was impinging on her community. The Illinois ruling stands for the idea that the value of the individual piece of private property is intertwined with the value of the surrounding community. This Article will argue that property law theory should embrace this view.

Owning property means more than owning land and walls. It denotes owning specific land and walls, which other lands and walls, owned by others, surround.12 Owning land is owning a part of a specific community. Removal of the community, just like removal of the land and walls, alters the nature of the property right. It does so in a different way that might be perceived as less intrusive, but it does so nonetheless.

Ownership contains a community aspect, and this aspect of ownership is not merely an attribute of an owner’s right that should be shielded from arbitrary government interference in the manner envisioned by the Illinois court. The community aspect of ownership is much more meaningful than that. Ms. Rodriguez’s story illustrates this point nicely, for it did not end in the courts, where Ms. Rodriguez won the battle. Unfortunately, on her neighborhood’s streets, she probably lost the campaign. Her neighborhood, West Town,13 was to become the focal point for gentrification processes: households’ median income soared by more than 50%, and the median home value rose 176%.14 The neighborhood’s racial composition exhibited a clear trend of change: the non-Latino white population increased from 27.4% to 39.39%, as the percentage of persons of Latino origin decreased from 59% to 46.85%.15 Latino homeowners were squeezed out as the assessed value of their properties for tax purposes increased dramatically.16 Thanks to all these developments West Town ended up extolled as the equivalent of New York City’s SoHo;17 unfortunately, this eventuality was in all likelihood the exact outcome Ms.

---

12. Lee Anne Fennell coined the very useful and accurate term “the unbounded home.” The home has come unbound since threats to its value originate from events and conditions that lie outside the parcel’s boundaries and never cross those boundaries in a physical sense. Fennell mostly focuses on threats to the house’s objective monetary value. See Lee Anne Fennell, The Unbounded Home: Property Values Beyond Property Lines 13, 25 (2009).

13. The decision does not specify the location of the property, but it does include the address of the rezoned factory, which is nearby. It is within the West Town neighborhood.


16. A case study of one home owned by a Latino family shows consistent increases, including a jump in assessed value of 117% between 1995 and 1996 alone. Id. at 17.

Rodriguez was dreading. It must have been an interference with the community aspect of her ownership: a stark decrease in her property right’s subjective value. Yet the state court, which had identified such harm as a deprivation of property, could not have come to her rescue this time around. Its decision introduced a remedy applicable where the cause of harm was a specific governmental decision; but here, the harm was generated mainly by the cumulative effect of private decisions made by Ms. Rodriguez’s neighbors—a decision to sell their houses to gentrifiers and leave. The court was willing to act when there was state action: it addressed the problem within the contours of public law; but the underlying problem is broader than that—it extends to private law as well.

The fact that Ms. Rodriguez could find no legal redress for the diminution in her property right is a problem for property law. It also presents a challenge for the way we think about what property rights mean. This specific—though rather widespread—predicament endured by Ms. Rodriguez and her neighbors should propel us to engage a broader review of our theories of property. This Article will answer that call by highlighting the community aspect of ownership, thereby enriching our understanding of ownership as a concept and a legal institution. The time is ripe for such an intervention since the scholarly debate over the nature of property rights and their social role has recently gained much needed momentum.

Yet, until it acknowledges the community aspect of ownership, this normative discussion will remain lacking. The action taken by the Illinois court was a bold move in recognizing the community aspect of ownership; still it was merely a first, and insufficient, step. In order for the community aspect of property to exist and benefit owners, it must also burden owners and limit their freedom. For Ms. Rodriguez to be able to safeguard the stable community that allowed her to enjoy her property, curtailing governmental powers was obviously not enough. Recognizing her neighbors’—and her own—obligations created by the community interest in property is, as this Article will explain, necessary.

18. For details on racial conflicts and outrage of the Latino community, see U. ILL. AT CHI., supra note 15.
19. For examples of earlier such proposals, see Frank I. Michelman, Property as a Constitutional Right, 38 WASH. & LEE L. REV. 1097 (1981) and Richard Lewis, Destruction of Community, 35 BUFF. L. REV. 365 (1986).
The right to a stable community carries a correlative duty on community members, i.e., the opposite of an unlimited freedom to move out.\textsuperscript{21} Lee Ann Fennell explains that while property within a neighborhood can be divided into individually owned units, important aspects of neighborhood life (e.g. “atmosphere” and greenbelts) are not amenable to being parcelled out.\textsuperscript{22} Thus, as she argues, the neighborhood has both privately owned elements and elements held in common by all neighbors and it should be viewed as a semicommons.\textsuperscript{23} This very valid point can—and should—be carried further. Even the supposed privately owned elements of the community (i.e. individual parcels and structures) contain elements held in common. The concept of the community aspect of ownership, as promoted by this Article, holds that private property rights, normally perceived as belonging to the individual owner alone, are in fact held by the owner in partnership with the surrounding immediate community. In this partnership, the owner is by far the senior partner—her stake in the land is much greater than the neighborhood’s. Still, other members of the community hold an interest in the individual homes of their counterparts, as the latter affect their enjoyment of their own homes. A private owner has a right to expect the law to protect her property interests, and the community has a right to expect the same. The community interest in ownership, and the community itself, cannot be obliterated without hindrance. The neighborhood’s interest in the properties of residents entails the maintenance, at least to some degree, of community stability, even at the cost of making it more burdensome for owners to exercise their freedom to sell their properties and leave.

This community interest in ownership should be introduced since it is a natural outgrowth of our thinking about property. As long as we do not recognize it, the property rules we adopt fail to serve their function. They treat a right that is inherently social as if it were a mere individual entitlement, independent, in its enjoyment, promise, and setbacks, from the surroundings. Commonly, it is assumed that this is only true if communitarian or relational conceptions of property law’s role are adopted. These approaches highlight property rights’ contextual and social nature.\textsuperscript{24} When read in this fashion, it is easy to detect in property rights a community aspect. Yet property is not always interpreted in this way. For some theories of property, property is all about the individual and her independence from soci-

\textsuperscript{21} On rights and their correlatives, see Wesley N. Hohfeld, \textit{Some Fundamental Legal Conceptions as Applied in Judicial Reasoning}, 23 YALE L.J. 16, 30-44 (1913).
\textsuperscript{22} FENNELL, supra note 12, at 55, 64.
\textsuperscript{23} On semicommon property rights, see Henry E. Smith, \textit{Semicommon Property Rights and Scattering in the Open Fields}, 29 J. LEGAL STUD. 131 (2000).
\textsuperscript{24} See infra Sections II.A and II.C.4.
According to such worldviews, property stands for privacy, for the ability to detach oneself from others’ desires and pursue idiosyncratic preferences. Still it is the thesis of this Article that even in reliance on such individualistic theories of property the community’s stake in private ownership cannot be ignored. Even without assuming that society predates private property, or that the community’s existence is an objective good, the community should be viewed as owning a stake in an individual’s private property. Recognizing this element of ownership entails a certain role for property rules: property law should do more to stabilize communities so that the community aspect of a given property is preserved.

In order to make this argument, Part II will analyze the competing theories that account for the existence of property rights and will demonstrate why law should recognize the community interest inherent to property rights. The first theory to be examined will be communitarianism, under which the case for the community aspect of property is the easiest to make. Afterwards, I will move to theories that at first blush appear less hospitable to my argument, examining utilitarian and right-based arguments. The objective of the exercise made in Part II is to illustrate how these diverse theories can all justify, and even necessitate, the recognition of the community interest in property. It follows that it is not the goal of Part II, or of this Article as a whole, to pass judgment on the merits of these rival theories of property.

By the same token, the reader need not adopt all of the perspectives presented in Part II in order to accept my conclusion. On the contrary, Part II aims at proving that be one’s preferred theoretical approach to property as it may, she should seriously consider the existence of the community aspect of private property. In this regard this Article assumes an approach that differs from that embraced by most property theorists whose work is reviewed in Part II. Adherents of competing schools of thought normally write with the aim of refuting their counterparts’ theories. They thus focus on the polarities between theories. In this Article, I will rather try to bridge the gap between the different theories. I will demonstrate that, despite their many important contrasts, and mostly without even realizing it, these theories share common grounds with regards to the interplay of community and ownership. Without renouncing their own tenets or claims at exclusivity and superiority, the disparate theories should embrace an understanding of property that includes a community aspect. In order to make this argument in a coherent and persuasive manner Part II will introduce the contending theories with some detail. Those well versed in the relevant literature might naturally prefer to

25. See infra Sections II.B and II.C.1-3.
read the more general segments of the discussion less closely and focus on the more particularized treatment of the community aspect.

To better understand the meaning of this proposed community aspect, I will supplement the theoretical discussion with a practical one. Part III will explain how the new understanding of the essence of property emerging from Part II should affect property law. As one possible application I will put forward a novel approach for tackling rapid neighborhood change—in the form of gentrification or abandonment—relying on varied legal tools including local taxation, rent control, and the provision of municipal services. Part III will thereby address the problem faced by Ms. Rodriguez and the many others whose plight as owners is currently ignored. Part IV will further bolster the theoretical argument by reviewing its implications for other legal rules in the fields of property, nuisance, and intellectual property.

Finally, an important caveat should be kept in mind throughout this Article. The community right suggested here is not absolute. I am arguing that the community should be accorded partnership status in private properties. But in our liberal society, the community is solely the owner’s junior partner—and it must remain so. While property has a community aspect that should provide security and assure some degree of neighborhood stability, property is also a tool to promote liberty. The community interest in ownership does not imply an attempt to negate an owner’s ability to move out of her home and community. As its name indicates, the community aspect of ownership merely calls for the introduction of another aspect to private ownership, not for the institution’s abolition.

II. THE COMMUNITY ASPECT OF PRIVATE OWNERSHIP AND PROPERTY THEORY

A. Communitarian Theories

In an influential study, sociologist Herbert Gans found that Levittown, New Jersey—the quintessential postwar American suburb—was neither an economic unit whose members depended on each other, nor a cohesive social body.\textsuperscript{26} In this respect it differed greatly from earlier communities, such as the medieval town.\textsuperscript{27} Nevertheless, Gans discovered that in Levittown, very much like in the medieval town, there was the possibility of “an intense identification with the community” if exposed to an external threat.\textsuperscript{28} Communitarian theo-

\textsuperscript{26} Herbert J. Gans, The Levittowners: Ways of Life and Politics in a New Suburban Community 145 (1967). The town has since reverted to its original name: Willingboro Township.

\textsuperscript{27} On the medieval town, see Gerald E. Frug, City Making: Building Communities Without Building Walls 27-30 (1999).

\textsuperscript{28} Gans, supra note 26, at 145.
ries seize upon this persistent sociological, non-materialistic role of communities in defining individuals.

Though pursued elsewhere for decades, these theories’ application to property discourse is a recent phenomenon. Nonetheless, as they make the most natural argument for recognizing community attributes of private ownership, they should serve as the starting point for this Article’s theoretical discussion. This Section will show how communitarianism recognizes the community element inherent to ownership and advocates for an ensuing need to maintain stable neighborhoods.

1. The Communitarian Worldview

Communitarian thought evolved in reaction to the liberal tradition, and many of its proponents trace its roots to the Aristotelian idea of the “good life.” Communitarians reject the liberal notion that the “right” is prior to the “good.” They believe that “principles of justice depend for their justification on the moral worth . . . of the ends they serve,” i.e., on a particular conception of the good life. This position stands in stark contrast to the liberal aspiration at neutrality, epitomized in the positioning of individual liberty as the substitute for any predetermined set of values describing the good life. This liberal celebration of individual liberty is grounded in a conception of the individual that is rejected by communitarians.

The liberal individual is depicted by communitarians as an empty, atomized, disembodied, solitary, characterless self. The liberal self exists before her attributes, associations, and ends, which she only


31. Aristotle believed that humans are not born with the capacity to live full human lives. Such lives require the cultivation of intellectual and moral virtues that can only take place when an individual forms a part of a political community. Humans can perform their highest actions, such as philosophy or virtuous acts, only within a community. Hence Aristotle described the relationship between the individual and the community as a part-whole relationship. Many, though not all, philosophers further argue that for Aristotle the community was a natural, or organic, entity. Compare David Keyt, Three Fundamental Theorems in Aristotle’s Politics, 32 PHRONESIS 54 (1987), with Robert Mayhew, Part and Whole in Aristotle’s Political Philosophy, 1 J. ETHICS 325 (1997).


33. Id. at 185-86.
later chooses in an independent manner.\textsuperscript{34} The resulting liberal society is constituted by many different selves, each with different ends. Values become nothing but the distinct expressions of preferences of the separate selves. In such a society there can be no aspiration towards reaching an agreement regarding values or the nature of the good life, and hence each individual must be left free to set her own perceptions of the good life.\textsuperscript{35}

Against this detached liberal self, communitarians posit their alternative: a social self, deeply attached to her community. She is a situated self—born and placed into certain associations. The attachments to these associations define her and mold her identity.\textsuperscript{36} Without them, the self is not only devoid of character,\textsuperscript{37} but also of the ability to feel, since feelings are learned through the experience of others and cannot be described even to oneself without sharing a tradition of discourse.\textsuperscript{38} As Charles Taylor explains, “[m]y identity is defined by the commitments and identifications which provide the frame or horizon within which I can try to determine from case to case what is good, or valuable, or what ought to be done, or what I endorse or oppose.”\textsuperscript{39} This is not to say that the self enjoys no independence; the self can decide at a certain point in her life to break loose from her community and develop her unique identity and values. However, the uniqueness of her new values—indeed her independence itself—will be defined in relation to the social values she previously absorbed.\textsuperscript{40}

This portrayal of the self’s communal constitution is perceived as the heart of communitarian thinking. Michael Walzer, however, argues that fellow communitarians carry the point too far. He believes that the central issue is not the self’s constitution, but rather the pattern of social relations.\textsuperscript{41} Liberalism is a theory of relationship that has voluntary associations at its center, with voluntarism meaning a persistent right of rupture.\textsuperscript{42} Communitarians view these ties not as
associations but as attachments, which the individual does not choose and which she is limited in her ability to sever.

The contrast between liberalism and communitarianism concerning the nature of relationships is not merely theoretical. It has an empirical component. In this regard communitarianism is of a dualistic quality. On the one hand it is a normative attack on a modern society that has allegedly become liberal, lacking consensus and guided by private caprices. On the other hand, it is a sociological-empirical condemnation of modern liberal thinking for misrepresenting real life, in which social ties still matter. The normative and empirical arguments cannot coexist; each implies an opposite diagnosis of modern society. Walzer settles the inconsistency by concluding that each of the two claims is only partly right.\textsuperscript{43} Modern society is indeed characterized by a continuous motion of individuals, who leave behind, more easily than before, old associations and attachments. But individuals have remained to some degree creatures of community, whose ties of place, class, family, and politics survive new mobility.\textsuperscript{44}

As the culmination of this—partly normative, partly sociological—criticism of liberalism, communitarians prescribe a clear policy. Alasdair MacIntyre, who laments the loss of morality reaching its climax with modern liberalism, concludes with these powerful words:

What matters at this stage is the construction of local forms of community within which civility and the intellectual and moral life can be sustained through the new dark ages which are already upon us. And if the tradition of the virtues was able to survive the horrors of the last dark ages, we are not entirely without grounds for hope. This time however the barbarians are not waiting beyond the frontiers; they have already been governing us for quite some time.\textsuperscript{45}

MacIntyre and others view the reinstitution and reinforcement of communities as a moral concern. But it is not only a moral imperative. It is also a political concern for the democratic state. Unlike Enlightenment European republicans who viewed intermediate communities as a threat to general society,\textsuperscript{46} communitarians regard these “partial societies” as vital for the survival of the state. The shattering of local communities will lead to the disintegration of the larger national community since a “society of self-fulfillers,” where

\begin{flushleft}
\textsuperscript{43} Id. at 20-22.
\textsuperscript{44} Id. at 7-14.
\textsuperscript{45} MacIntyre, supra note 34, at 263.
\end{flushleft}
affiliations are perceived as revocable, cannot sustain the strong identification with the political community democracy requires. For this reason, in the words of John Dewey:

When a state is a good state . . . . [i]t renders the desirable associations solider and more coherent . . . . it gives the individual members of valued associations greater liberty and security: it relieves them of hampering conditions which if they had to cope with personally would absorb their energies in mere negative struggle against evils. It enables individual members to count with reasonable certainty upon what others will do, and thus facilitates mutually helpful coöperations [sic].

In so acting to preserve a community, the state unavoidably inflicts harms on some members of that community—it curtails their freedom in order to serve their community’s interests. As seen in the Introduction, the community interest is not only a right, but also a duty placed on community members. Under communitarian premises this harm is justified, even from the standpoint of the injured party. When required to enlist her resources in the service of a communal endeavor, the communitarian individual is not being used for others’ ends; she is contributing to the purposes of a community she regards, or regarded in the recent past, as her own. The justification for her sacrifice “is not the abstract assurance that unknown others will gain more than [she] will lose, but the rather more compelling notion that by [her loss she] contribute[s] to the realization of a way of life in which she take[s] pride and with which [her] identity is bound.”

So far we have seen why community matters, why the state must act in order to help it survive, and why, when doing so, the state may demand contributions from community members. This is not enough for the purposes of this Article’s argument. For communitarianism to serve as grounds for recognizing a community aspect inherent to private property and necessitating legal action to stabilize surroundings, it must be shown that the neighborhood—private land’s environment—is a community. For communitarians a community is not a spatial notion. A community is created by “a common vocabulary of discourse and a background of implicit practices and understandings within which the opacity of the participants is reduced if never finally dissolved.”

47. TAYLOR, supra note 34, at 508.
49. SANDEL, supra note 32, at 143. Not surprisingly, critics of communitarianism find such “ethics of sacrifice” worrisome. See, e.g., Hanoch Dagan, Reimagining Takings Law, in PROPERTY AND COMMUNITY 39, 44 (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010).
50. Id. at 172.
Localities are frequently invoked in communitarian writings as examples of such communities, and it is widely believed that social groups are often constituted by their connection to land. As Jennifer Wolch and Michael Dear wrote, “social life structures territory . . . and territory shapes social life.” These claims are bolstered by the works of urban scientists who have found that neighborhoods provide residents with an important source of identity. Over the past half-century the traditional notion of the neighborhood as an organic self-contained unit has receded. Nonetheless, planners and social scientists still consider the neighborhood to be a meaningful unit. While they accept that the neighborhood is a contested concept lacking a settled definition, most contend that this indeterminacy does not disprove the neighborhood’s existence. Even the currently prevalent open-ended definitions—such as that “a neighborhood is a limited territory within a larger urban area where people inhabit dwellings and interact socially”—posit that neighborhoods offer not only spatial demarcations but also social demarcations. Therefore it is not surprising that studies have found that residents will act passionately relying on the meaning the neighborhood provides them.

Communitarians will agree that the individual and her private abode are meaningless when separated from their surrounding community. Part of what makes an individual an individual, and a home a home, is their close environment. Identity is intimately tied to memory and a person’s memory is interconnected with the histories of her neighbors. Therefore,

a more humane conception of land has to go beyond the notion of a physical, material space demarcated by a finite number of square feet. It also must be understood as an integral part of the social

51. See, e.g., id. at 143.
52. Alexander, supra note 29, at 11-12.
57. Id. at 13. For a similar definition, see Anthony Downs, Neighborhoods and Urban Development 15 (1981).
and spiritual life of our communities—socially produced places that have meaning for all of us.\textsuperscript{60}

Communitarians will argue that measures should be adopted so that the neighborhood, given its importance as a community, can persist. In a similar vein, a communitarian will object to the perception of the neighborhood as a mere commodity, whose fate is to be determined by market dynamics generated by the actions of supposedly despotic owners. The mere use of price rhetoric in this context can be accused of engendering social alienation, of undermining personal identity, and of doing “violence to our deepest understanding of what it is to be human.”\textsuperscript{61}

2. \textit{Complicating to the Communitarian Worldview}

While the communitarian endorsement of neighborhoods as communities that property law should embrace is straightforward, it often seems too simplistic. It should be fine-tuned. I will now examine several critiques of communitarianism and use their counterarguments to question and revise several of the broad statements made above.

A forceful denial of many communitarian assumptions is found in post-modernist theory. Post modernists, occupied with the deconstruction of identity, view the self as fragmented and shifting.\textsuperscript{62} This post-modern self is embedded within a matrix of social and psychological factors.\textsuperscript{63} The effort at prescribing one identity to the self is not merely fruitless—it is dangerous; all the interlacing identities within the self are delusional and serve as tools for exercising power over her, by defining the “self” and contrasting her with the “other.” The self’s identity and relationships, complex and highly mobile, are performances. They are not an “internal” feature of hers, but an effort she makes to live up to an invented figure others created for her. The choice of words here is important: the self is invented, but is by no means false, as there is no “true inner self” to be repressed.\textsuperscript{64}

These few lines cannot begin to convey the richness and complexity of post-modernist literature, but they introduce the essence of the post-modernist reply to this Section’s themes. They suggest that the neighborhood should not be treated as the self’s main source of iden-

---

\textsuperscript{63}. Id. at 307.
tity; that we should be sensitive to the discourse of power associated with spatial identities and with any community component inserted into private rights. The basic demand post-modernism makes is to realize that the community and the connections that allegedly tie individual residents to it are performances. But what are the implications of these observations?

Mostly they advise us to exercise caution in arguing for the social component of the self generally and for neighborhood stability particularly. Caution here does not necessarily entail a substantial revision of the communitarian project. Caution implies acknowledging that each individual has many identities, and that the neighborhood—or any other community—may be the mainstream's weapon for subjugating minorities. Despite this cautionary note, the post-modernist perspective does not deny the need for personal and community identity. Post-modernism does not require law to ignore the enabling and constitutive power that identities and communities exert over people’s lives and feelings. They might be performances, mythical rather than real connections, but they still influence people and hence deserve recognition.

The neighborhood is an “imagined community,” 65 often defined less by actual interactions and “true” identity than by subjective perceptions and beliefs regarding the existence and importance of said interactions and identity. 66 This does not mean that the neighborhood is a mere personal fantasy that can persist indefinitely regardless of changes to surrounding places and people. 67 Rather it is an inter-subjective creation. Being a “neighbor” might be a performance, but one that needs to be performed with, and in front of, others who are engaged in the same performance and understand it. The fleeting and seemingly meaningless sight of a neighbor, the knowledge that she is there, constructs the neighborhood and confers psychic benefits. The neighborhood might be imagined, but it is still important for individuals and thus should carry legal weight.

65. The term “imagined community” was coined by Benedict Anderson to describe the notion of the nation. Anderson explained that the nation is imagined since its members view themselves as related to one another, despite the fact that they have never met all their “fellow” nationals. BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 5-6 (rev. ed. 1991).

66. Residents sometimes even have difficulty describing the boundaries of their neighborhoods. See generally ALBERT HUNTER, SYMBOLIC COMMUNITIES (1974). They will talk about “their neighborhood” or “their community,” even though the boundaries and meanings of these self-defined places are unlikely to be exact. WILLIAM PETERMAN, NEIGHBORHOOD PLANNING AND COMMUNITY-BASED DEVELOPMENT: THE POTENTIAL AND LIMITS OF GRASSROOTS ACTION 21 (2000).

67. See ANGOTTI, supra note 60, at 22 (“[S]tories of people threatened with displacement show how land may evoke deep feelings and emotions associated with the everyday lives and activities of people. This approach cannot be understood as purely ‘subjective’ because ideologies and symbols have a material base and are a material force in the world.”).
This revised understanding of the nature of community can be used as a reply to a critique of the communitarian case coming from another quarter. Some argue that it is a mistake to group all neighborhoods under the same heading. They concede that some neighborhoods are communities and should be protected, but they contend that other neighborhoods are not communities. These views are associated with an understanding of community as implying real life interactions. When faced with a neighborhood where one resident has never talked to another, adherents to this understanding deny the neighborhood’s pretensions of community status. This “behavioralist” approach would therefore require, before a specific locale is granted protection, an empirical examination to determine to what degree its residents interact.

But the portrayal of the neighborhood as an imagined community renders unsustainable such cries for empirical distinctions. The experience of community is richer than that represented by any metric of interactions suggested by a behavioralist approach. As we saw, the neighborhood defies easy objective definitions. The community is based on imagination and beliefs, and thus there is no need for it to always have actual, objective, or easily identifiable features. “A neighborhood is a subjective entity as well as an objective reality. Its face and form and the social relations within are what individual residents perceive.” The neighborhood as residents imagine it, an abstract invented idea, may be more important than the neighborhood residents actually experience. Even when its beneficial attributes are a shared fantasy, the neighborhood still delivers those beneficial attributes. Without them, the individual loses something that is important to her constitution, and her private property ceases to perform a function that is extremely important.

3. The Communitarian Worldview in Property Law

Communitarian theories are invoked much less often than theories presented in the following Sections when property law rules are debated. Still, their neglect does not render them irrelevant; they are not alien to existing property rules.

The Supreme Court acknowledged the importance of maintaining communities, noting that “the State has a legitimate interest in local

68. MARGARET JANE RADIN, REINTERPRETING PROPERTY 87-89 (1993).
69. An example for this research approach is social networks analysis. See, e.g., Gary Bridge, Gentrification, Class and Community: A Social Network Approach, in THE URBAN CONTEXT: ETHNICITY, SOCIAL NETWORKS AND SITUATIONAL ANALYSIS 259 (Alisdair Rogers & Steven Vertovec eds., 1995).
70. See supra notes 55-58 and accompanying text.
71. HALLMAN, supra note 56, at 13. See also NAT’L COMM’N ON NEIGHBORHOODS, supra note 55, at 7 (admitting an inability to provide an agreed definition of “neighborhood,” and concluding that “[i]n the last analysis, each neighborhood is what the inhabitants think it is”).
neighborhood preservation, continuity, and stability."  
72 It thus upheld a property tax scheme that discriminated against similarly located properties in the service of neighborhood preservation.  
73 Elsewhere, citing the same public interest in preserving neighborhood character, the Court authorized the curtailment of owners' free speech in an effort to disperse adult motion picture theatres throughout the city.  
74 Other courts have addressed governmentally inflicted harms to neighborhoods' stability in similar communitarian terms. When New York City approved the construction of a luxury building in Chinatown, the state Court of Appeals ruled that under the State Environmental Quality Review Act,  
75 the city should have considered detrimental effects on the Chinatown community. The court construed the phrase "environmental impact" as including impact upon "neighborhood character."  
76

Furthermore, communitarian thinking exerts tremendous influence throughout whole bodies of property law. Zoning laws, often presented as tools for spatial engineering, function to a great extent as measures of social engineering. They are employed to control the community, not just the environment.  
77 Restricting construction to single-family units, mandating minimum lot sizes, limiting the ability to subdivide, capping the number of unrelated occupants—these laws serve to keep unwanted persons out of the community.  
78 Exclusionary zoning is many times attributed to municipalities' desire in ensuring a tax base,  
79 but some argue that it is mainly driven by non-fiscal reasons, such as preferences for racial and income homogeneity and preservation of suburban lifestyles.  
80 These non-fiscal reasons can be understood, at least to some extent, as communitarian.

Zoning laws are no longer the only instrument designing the environments and communities within which owners exercise their rights.

73. Id.
75. N.Y. ENVT. CONSERV. LAW § 8 (Consol. 2011).
78. LOGAN & MOLOTCH, supra note 58, at 186.
As many as sixty million Americans are now living in housing subject to covenants limiting the uses of their properties and governed by a condominium or homeowners association. ¹¹ Traditionally, property law placed many restrictions on the ability to create and enforce covenants, as they curtail the owner’s freedom to use her land. The legal drive to liberalize these old laws of restrictive covenants culminated in the adoption of the Restatement (Third) of Prop. (Servitudes) in the year 2000. It has facilitated the placement of intrusive restrictions on the rights of owners. ¹² These can, for example, forbid repainting, ¹³ constructing or dismantling a fence, ¹⁴ hanging curtains, ¹⁵ planting trees, ¹⁶ or keeping pets. ¹⁷ They might also limit an owner’s freedom to lease or sell her property. ¹⁸ Such restrictions do not merely safeguard certain desired neighborhood aesthetics; they also ensure that the residents themselves correspond to a certain “community character.” ¹⁹ Affirmative covenants, such as a duty to pay fees for membership in a recreational club, ²⁰ serve a similar function.

Covenants are regarded by many as forms of private governance, assuming roles once ascribed to public government. ²¹ Yet individualistic-utilitarian explanations cannot alone account for homeowners associations’ popularity. Covenants have generally not been carefully designed to assure maximization of property values. For example,
they do not allow for deviation from association rules whenever an expert panel predicts that an owner's proposed action will increase property values. The reason is that covenants are not only meant to keep property values from declining; they are meant to preserve community character, even when threatened by actions that increase property values.

In light of this role of homeowners associations, the legal regime that allowed them to prosper can be viewed as corresponding to communitarian views. The willingness of property law in this and the other contexts presented in this Subsection to further communitarian causes illustrates how communitarian ideas can be employed to legitimize the recognition of the community interest in property. It shows that doing so will not be out of line with existing property principles.

If anything, it will complement them. Law has on many occasions restricted its recognition of the community interest to affluent communities. While exclusionary zoning and homeowners association laws serve communitarian goals in private properties situated in relatively affluent neighborhoods, political authorities and courts have been much less eager to adopt similar community-promoting property rules when inner city properties are concerned. This discrimination against the community needs of lower income residents is troubling, since the local community and the social ties it engenders play a larger role in the lives of the poor than in the lives of the affluent.

The latter, given their resources and salience, may much more easily find and, if necessary, create other communities within which they feel at home and freely express their identities.

4. Conclusion

Communitarian theories insist that the individual cannot exist without the community, and thus she cannot be served by private rights, such as ownership, that lack a community component. They advocate for the protection of neighborhood stability, and property law indeed recognizes this need in many fields. Yet as persuasive as the communitarian case may be, the protection of neighborhood stability must not be absolute. An extreme communitarian conception will lead to effacement of the individual and erosion of freedom.

92. Homeowners associations' staunch supporters have recognized the need for allowing covenants' modification without a unanimous vote, as is customary. See Richard A. Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906, 922 (1988).
93. See Alexander, *supra* note 29, at 11-12, 40-42.
94. See FRUG, *supra* note 27, at 81-82.
96. For a similar argument, see RADIN, *supra* note 68, at 70, 97.
Furthermore, community members are not the only ones to pay the price of the community’s empowerment. Outsiders, the “others” used to define the community members’ “we,” pay a higher toll. As put by Gregory Alexander, “[c]ommunities by their very nature exclude.”

Rigid adherence to the ideal of stable neighborhoods is extremely dangerous. It will block residents from moving out, impeding their pursuit of lives they desire. It will prevent others, immigrants who could have improved their own living standards and enriched the neighborhood, from moving in. We must not blind ourselves to the costs of zealously promoting community stability. This is a key theme of this Article—stability and change must be allowed to interplay. We need and want stability to exist side by side with change, not at its expense. Most communitarians will agree with this contention; it is not clear, however, whether communitarianism can offer a sensible balance. Communitarians should not ignore the role of the individual and mobility, just as liberals should not ignore the role of the community and stability.

B. Utilitarian Theories

In the preceding Section the justification for recognizing the community’s stake in a private owner’s right and the ensuing legal need to promote neighborhood stability was derived from the community’s alleged intrinsic value. That is, the community was perceived as a good in itself. Utilitarian theories vehemently reject any such notion. The only goods they recognize are those originating in the individual and her preferences. The community as such is of no value. But what if individuals, independently, want a community? This Section will put forward possible utilitarian responses to this challenge, developing a utilitarian case for the community aspect of ownership.

1. Preferences for a Stable Community

Welfare economics, probably the currently most prevalent utilitarian theory, assesses policies exclusively in terms of their effects on individuals’ wellbeing. The notion of wellbeing—“utility”—incorporates everything that an individual might value.

101. See, e.g., Walzer, supra note 30, at 21-22.
104. Id. at 18.
sis revolves around the actual preferences of individuals, not on what the analyst thinks these preferences ought to be.\(^{105}\)

Hence, for welfare economics to support legal promotion of community stability, it must be shown that stability corresponds to individuals’ actual preferences. Some evidence for the existence of such a preference was provided earlier when the popularity of homeowners associations was noted. Americans are eager to be able to exercise control not only upon the physical contours of their homes, but also upon the surroundings’ human composition. Their motivation might be assuring quality of living, and it might also be that such control preserves property values: in either case the premiums owners put on exerting this power indicate a potent preference for avoiding change.

A strong consumer preference for living in homogenous neighborhoods exists.\(^{106}\) Housing in such neighborhoods commands a substantial “exclusivity premium.”\(^{107}\) Anxiety and social fright are widely associated with anticipated neighborhood change.\(^{108}\) The American suburban dream has been based on the constant fear of being caught up by people of lower standing, of neighborhoods being “invaded.” More recently, as the Introduction demonstrated, inner city homeowners have turned apprehensive as higher-class residents invade their neighborhoods. All these observations indicate an intense preference for neighborhood stability.

This preference is readily explicable. The neighborhood is the focal point of residents’ daily routine. Since routines only develop after a lengthy process of trial and error, neighborhood change undermining a routine’s element is costly. Neighborhoods also supply residents with informal support networks, which deliver various goods, ranging from a cup of sugar and babysitting to political connections. These bonds enable people to rely on one another.\(^{109}\) The bonds of trust also allow residents to learn what to expect from each other. Residents can then cooperate in order to achieve common goals, such as better local services.\(^{110}\) Neighborhood bonds facilitate the creation of social norms and other coping mechanisms that invisibly control behavior and prevent unacceptable actions, like parking across another’s driveway or playing loud music at night. These civil forces control uncivil actions, and only in exceptional cases is police intervention

\(^{105}\) See id. at 409-463.


\(^{109}\) See LOGAN & MOLotch, supra note 58, at 103-05.

needed. These norms and their informal enforcement render residents’ lives more agreeable. When neighborhood stability is lost, social norms break down. In addition, a stable neighborhood provides a sense of physical and psychic security that comes with a familiar and dependable environment. Being a part of a stable community provides the benefit of membership in an orderly and protective social space. Finally, a neighborhood enables residents to benefit from economies of scale; residents enjoy benefits that would have been unavailable had they not been living within the community. The concentration of a large number of similar people stimulates the development of agglomerations appropriate to their needs. For example, in an immigrants’ community residents will enjoy restaurants, shops, and entertainment venues tailored to their customs. If the community disintegrates and its members disperse, such businesses will not be operated and the individuals will be deprived of goods they desire.

The conclusion is that individuals entertain a preference for stable communities, as these enhance their welfare. Obviously, this preference is different from a preference for, say, running water or heating. Unlike running water or heating, a stable community is an intangible good. The quantification of such a good is always difficult. It is rendered even more difficult in this case since a stable community entertains characteristics of an irreplaceable good. Owners prize their community because it is unique, and hence its valuation increases dramatically when the individual owns a right in it. Therefore, the discrepancy between relevant asking and offering prices is likely to be substantial, and the allocation of a property right in the community’s preservation will greatly influence its valuation.

These characteristics make it challenging for economic analysis to calculate the preference, since the analysis tends to focus on preferences’ monetary values. Indeed, efficiency analysis has been criticized for not accounting for the loss of a community’s way of life as a cost. Yet the difficulty associated with appraising such intangible preferences, accompanied by lack of rigor on the part of some analysts, is no valid justification for welfare economics to ignore a viable preference. Welfare economics, as explained above, is interested in all actual preferences regardless of their nature.

112. See LOGAN & MOLotch, supra note 58, at 105-09.
114. See SINGER, supra note 20, at 124-125; Radin, supra note 61, at 1878.
115. See SINGER, supra note 20, at 124-125; Radin, supra note 61, at 1878; KAPLOW & SHAVELL, supra note 103, at 454-55.
2. Providing for a Stable Community: Markets and Dilemmas

After a preference for a good has been identified, welfare economic analysis inquires whether legal intervention in the allocation of rights is necessary to assure the supply of desired quantities of the good. I intend to prove that such a need exists since problems of collective action inhibit the market from providing desired levels of community stability.

a. Stable Communities as a Public Good

A stable community is in many ways a public good, yet it is not a classic or pure public good. Public goods are defined by two attributes: non-rivalry of consumption and non-excludability of benefits. Application of these criteria to neighborhood stability produces ambiguous results. As to non-rivalry of consumption, a resident’s partaking in the consumption of neighborhood stability’s benefits does not reduce the benefits derived by others. On the other hand, each outsider added to the pool of consumers of neighborhood stability—each new resident—is likely to subtract from the enjoyment of stability by other neighbors: newcomers, by their very nature, contradict stability. In this regard neighborhood stability corresponds to the definition of a “club good,” which involves only a certain degree of “publicness” in consumption. It is a good optimally consumed by more than one person but less than an infinitely large number of persons. Beyond a certain group size, the benefit that the individual places on the good will decline as congestion sets in.

The non-excludability criterion also indicates that we are faced with a case of a partially public good: insiders cannot be excluded from enjoying the benefits derived from a stable community, while outsiders can be excluded. The latter can be blocked via zoning or covenants from moving into the neighborhood and enjoying the community’s stability. Still, not all benefits generated by a stable community can be withheld from outsiders. A community’s stability may confer benefits on the entire society. Displacement, gentrification, and neighborhood abandonment have negative social and economic effects—externalities—burdening the entire society. These include extreme poverty, social unrest, homelessness, crime, and arson.


the extent that neighborhood stability prevents such phenomena, its benefits are non-excludable.

b. The Failure of Market Mechanisms in Policing the Provision of Community Stability

That neighborhood stability is not endowed with all the characteristics of a public good does not necessarily render it a regular consumer good. No good fits fully the polar definition of a public good. 119 Moreover, the major market mechanism regulating the provision of private goods is highly problematic when used for the efficient provision of neighborhood stability. The “exit” mechanism represents the ability to stop consuming a certain producer’s products. It is vital to the functioning of an efficient market, as it communicates consumers’ desires to producers and forces them to adjust. Goods provided by local government have triggered debate regarding their dual nature as public and consumer goods, mainly due to the controversial role of this “exit” mechanism in local life.

In a highly influential article, Charles Tiebout sought to show that local services are very much like ordinary private goods. 120 In his model, the nation is perceived as a market, where each municipality supplies public goods—such as education, sanitation, and security—at a price—represented by taxation—and consumers choose freely the municipality that satisfies best their set of preferences. Citizens pick a locality in the same manner as they choose any other product: Tiebout compares the citizen’s search for a community to a “shopping trip.” 121 The model’s basic premise is that if the city does not provide the services desired by an individual she can move to another provider—she can exercise the “exit” mechanism. This ability to leave a municipality spurs competition over consumers, assuring municipalities’ efficiency. 122

The model’s assumptions—e.g., that people are fully mobile and have perfect knowledge regarding the quality of municipal services—have been denounced as unrealistic. 123 More important for this Article’s purposes, the mere exercise of the action of leaving a community—i.e., the operation of the “exit” mechanism—dramatically decreases social welfare. Normally, when a consumer chooses to avoid

121. Id. at 422.
consuming a product, her choice does not directly and immediately affect her peers’ ability to remain loyal to that product and reap the benefits they detect in it. This, however, is not the case with the choice of a municipality. “Everybody who selects a new environment affects the environments of those he leaves and those he moves among.”124 A consumer’s decision to leave a municipality hampers the ability of those left behind to enjoy local services, especially as the first to exit a deteriorating community are the most quality-conscious members, those who could make the greatest contribution to fighting deterioration.125

In the context of neighborhood stability the problem intensifies: a member’s choice to resort to the “exit” mechanism not only hastens the deterioration of the good’s supply to others, but it actually embodies the deterioration. Since stability—people not departing en masse—is the product, its supply cannot systematically be improved by residents’ departure.126 True, the “exit” mechanism is not wholly counterproductive. Stability implies that the residents maintain a certain character, not necessarily that they remain the same individuals. Some individual turnover may even be vital to the maintenance of the characteristic that makes some neighborhoods desirable. For example, a neighborhood cherished by owners as a good environment for families can only persist if at least some of its residents leave once they become empty nesters.127 At that time those owners should choose a neighborhood which better fits their new preferences. Similarly, an immigrants’ neighborhood cannot be maintained unless the established and integrated younger generations depart and are replaced by more recent immigrants. But even in such neighborhoods, when those exercising the “exit” mechanism are the residents who contribute to the neighborhood’s character (i.e. in the first case families with children and in the second case recently arrived immigrants), stability—the relevant good—is threatened.

Moreover, the “exit” mechanism not only impedes the ability of those who remain to enjoy the good, it also fails to provide the consumer opting for exit greater benefits from the good. Exiting a community and entering a different one stands in opposition to the exiting individual’s own desire to enjoy a stable community, for mobility contrasts stability. The definition of the relevant good—neighborhood

---

125. See HIRSCHMAN, supra note 122, at 45-47, 49-51.
126. See Fennell, supra note 110, at 28-30 (arguing that “exit” cannot serve as a viable feedback mechanism for spurring improvement in local education and security services because the consumers are the product: consumers of municipalities don’t choose a product, but rather who to live with. Thus, when they choose to leave one pool of users, the remaining consumers cannot improve who they are).
127. This assumes, of course, that not all neighbors become empty nesters at the same moment and accordingly adopt a new preference regarding the character of the neighborhood.
stability—is limited membership turnover; that is to say, limited exits and entries. Hence offering “exit” as a mechanism to supply the good is very often contradictory to the good’s nature.

The “exit” mechanism cannot be fully relied on to discipline the community to better appease members’ tastes, which is its healthy market effect elsewhere. “Exit,” however, is not the only market mechanism regulating the provision of goods. The other mechanism associated with consumer goods and often appealed to when local government services are discussed is the mechanism of “voice.” As first explained by Albert Hirschman, the customer’s option of “exit” is sometimes complemented or even substituted by expressing dissatisfaction to the managing authority. Thanks to the ability of consumers to voice their concerns, producers become advised of market preferences and the market can operate more efficiently. Unfortunately, the ability to assure desired levels of neighborhood stability as a consumer good via the mechanism of “voice” is limited. The notion of “voice” assumes a distinction between consumers and management. It presupposes a tiered system with one level of consumers and another of decisionmakers charged with controlling the quality of the good provided to costumers. With neighborhood stability as a good, the role of such central decisionmakers is secondary. Each member needs to influence not only government to act, but other members to act—i.e., to stay (recall the Introduction). Obviously, governmental policies may indirectly influence other members’ decisions, yet eventually each member makes her own decision. Hence utilizing one’s “voice” to influence “management” can only help in providing the good up to a certain point.

c. The Strategic Dilemma Neighbors Face

Market tools are inadequate for the supply of community stability. The main reason is that many times the situation involves a strategic dilemma. All neighbors may want a stable community, but in order to attain and maintain it they must act in concert. At the same time, each neighbor may have an incentive to bail out whenever market conditions make selling her house appealing. The situation is likely to be aggravated by a fear of change strengthening the tendency to

129. Hirschman, supra note 122, at 4; see also id. at 15-20, 30-43.
130. Fennell, supra note 110, at 23-24.
131. See Thomas C. Schelling, A Process of Residential Segregation: Neighborhood Tip- ping, in RACIAL DISCRIMINATION IN ECONOMIC LIFE 157, 174 (Anthony H. Pascal ed., 1972) (discussing the case of the deteriorating community, in which the owner seeks to limit her monetary exposure). Since an owner risks a capital loss, she attempts to get rid of her house a little sooner than everyone else. This is a strong incentive leading to spirals of neighborhood decline. See id.
sell, thereby prompting change in a “feedback loop.”132 Housing markets are easily susceptible to such self-fulfilling prophecies, as owners are sensitive to perceived “changes in the wind” that may alter neighborhood characteristics.133 Prominent commentators argue that this dynamic—in which homeowners can sustain or improve the neighborhood if they all stay and invest in their properties, but an owner who stays and invests when others leave will lose most of her home’s value—resembles the Prisoner’s Dilemma.134 As the ensuing discussion will illustrate, this proposition is inaccurate and leads to misguided policy suggestions. A more accurate characterization of the situation will suggest recognizing the community interest in private ownership as the strategic dilemma’s solution.

The Prisoner’s Dilemma is a strategic game in which the preferences of the actors are ranked as follows: (1) I defect, other actor cooperates, (2) I cooperate, other actor cooperates, (3) I defect, other actor defects, (4) I cooperate, other actor defects. Regardless of the other actor’s decision, a rational actor will choose to defect. This option leaves her better off no matter what the other actor chooses to do: at the most it allows her to free ride the efforts of the other actor (option (1)), and at the least it assures her that the other actor will not free ride her efforts (option (3)). The result is that all actors defect and the preference fulfilled is option (3), even though all actors would have been better off with another outcome (i.e. the resultant option (3) does not represent maximum social welfare).135 Thus in a Prisoner’s Dilemma the best result is unattainable in the absence of intervention.

Yet the structure of the Prisoner’s Dilemma does not correspond to neighborhood dynamics. Before laying out the perimeters of the more representative dynamics, the assumptions guiding them should be specified. Based on the discussion in Section II.B.1., I will assume that a resident has an absolute preference to stay in her stable neighborhood. I will relax this unrealistic assumption later. Deprived of the possibility to enjoy a stable community, she will prefer to leave and sell her house for the highest price. Monetary benefit, according to these assumptions, is a motivation, but it is only secondary to stabili-

ity. I will further assume, at this preliminary stage, that stability can be preserved only if all actors cooperate and stay in the neighborhood.

Based on these assumptions, the proper ranking of the actors’ preferences is: (1) I cooperate, other actor cooperates, (2) I defect, other actor cooperates, (3) I defect, other actor defects, (4) I cooperate, other actor defects. I assumed that residents’ highest preference is having their environment remain stable, which means that both they and their neighbors remain. Unlike the situation in the Prisoner’s Dilemma, free riding is not available as an option here: in order to enjoy neighborhood stability, one must cooperate. Defection, by definition, carries a price of losing the enjoyment the actor derives from the stable community. Hence, unlike in the Prisoner’s Dilemma, it is not the most preferred option, and that is why I swapped the rankings of preferences (1) and (2) of the Prisoner’s Dilemma. Once no possibility of enjoying the stable community survives, the actor would like, at least, to cut her financial losses (or make a gain) and leave the community. Yet when she decides to leave, other actors’ decisions cease to influence her enjoyment of a stable community. They do probably influence the financial reward she reaps when defecting: if others sell as well, the price a buyer will pay her diminishes. Therefore, option (2) in most cases will be preferable to option (3). The worst option, as in the Prisoner’s Dilemma, is staying in the neighborhood, investing in the property while the community disintegrates. In this scenario, the actor loses both the benefits of stability and the financial benefits associated with a sale. Her investments in

---

136. A similar ranking of preferences has been suggested for the decision whether to rehabilitate a house in a rundown neighborhood. See McKim N. Barnes, A Strategy for Residential Rehabilitation, REAL ESTATE REV., Fall 1976, at 40, 41.

137. The provision of stable communities differs from other local public goods, such as lighting and security, where free riding is possible. See Gillette, supra note 123, at 957.

138. This ordering is even clearer in a deteriorating neighborhood: an owner will prefer to have stability reintroduced over selling her home at a loss. In this case (unlike the gentrifying neighborhood) preferences for neighborhood stability and for financial benefits correspond.

139. I chose to restrict this statement to most cases and not all since there might be a difference between a declining and improving neighborhood. The logic of positions preference (2) before preference (3) is obvious in a declining neighborhood: the demand for housing is limited to begin with and hence as supply grows, prices decrease. In gentrifying neighborhoods the situation is more complex. On the one hand, the above analysis of supply and demand may apply: the demand for housing may not be strong enough to offset the rise in supply. On the other hand, the demand for housing in such neighborhood may rise dramatically only after a certain point is attained. Most wealthy incomers arrive only after the neighborhood has been partially transformed by earlier movers. Therefore, owners of assets in a gentrifying neighborhood can receive higher consideration for their homes if they sell only after the turnover rate intensified (and major gentrification set in motion). Theoretically, being the last to sell might be the most lucrative option (preferences (4) and (2) change places). However, in many cases this is not a viable option, since rising living expenses in the improved neighborhood may exact a high price from a resident choosing to stay too long. Therefore in a gentrifying neighborhood there is no rule ordering options (2) and (3) (and to a lesser degree option(4)), since they depend on the elasticity of the supply and demand curves.
the neighborhood, which may solely amount to the loss of opportunity to sell earlier at a better price, are gone to waste. The actor cannot retrieve them, while standing alone they do nothing to provide desired neighborhood stability.

Changing the ordering of preferences in this manner changes the dynamics of neighbors’ interaction. The problem arising out of this ranking of preferences is similar to the Assurance Problem, rather than to the Prisoner’s Dilemma.\footnote{The Assurance Problem was identified in Amartya K. Sen, Isolation, Assurance and the Social Rate of Discount, 81 Q.J. ECON. 112 (1967). The lack of clarity regarding the ordering of options (2) and (3) is not detrimental to the characterization as an Assurance Problem. Some variants of the Problem reverse the ordering of options (2) and (3). See, e.g., Daphna Lewinsohn-Zamir, Consumer Preferences, Citizen Preferences, and the Provision of Public Goods, 108 YALE L.J. 377, 392 n.40 (1998).} The major characteristic of the Assurance Problem is that if the actor expects the other to cooperate, she will cooperate as well, thereby assuring an efficient result.\footnote{Sen, supra note 140, at 114.} Contrast this outcome to the one envisioned in the Prisoner’s Dilemma: there, even when the actor expects her counterpart to cooperate, she will defect (since she can free ride), and an efficient result is unachievable. Our case, on the other hand, is covered by reciprocity theory: the collective action problem can be solved, but because of the assurance problem, we cannot predict that it will be solved.\footnote{Sugden, supra note 142, at 772, 781 (1984).} An actor confronted with an Assurance Problem, unlike one confronted with a Prisoner’s Dilemma, has no dominant strategy: her preferred action is influenced by her expectations of the other’s actions.\footnote{The Assurance Problem is similar to the “Stag Hunt Game.” Hungry hunters have two options: work together and hunt a stag, which will provide them with a good meal, or individually chase rabbits, which will provide a poorer meal. If one hunter deserts the company and chases rabbits, the stag escapes. The best option, hence, is cooperating, while the worst is chasing the stag when all others deserted to chase rabbits (in which case the remaining cooperator starves). The choice is based on expectations regarding the fellow hunters’ behavior. See Edna Ullmann-Margalit, The Emergence of Norms 121-24 (1977).}

This difference is of dramatic importance for policy-making. While the Prisoner’s Dilemma presents a problem of compulsory enforcement, the Assurance Problem does not. In an Assurance Problem, assurances as to other actors’ behavior are sufficient to achieve an efficient result, and outside enforcement is unnecessary.\footnote{Sen, supra note 140, at 114-15.} Assurance is needed because in its absence an actor may not trust the others to cooperate. The actor will choose not to cooperate since her contribution will only have a miniscule effect on the desired outcome of a stable community, while it may result in the worst outcome for her: investing in the neighborhood without reward.\footnote{This motivation to defect in an Assurance Problem has been labeled “hopelessness.” Lewinsohn-Zamir, supra note 140, at 392-94.} However, once assur-
ance is provided, enforcement is not needed in the Assurance Problem, for the result in which both actors cooperate is an “equilibrium point”—a point from which no actor would depart even after the other actor’s choices are revealed—since it is the actor’s top individual preference.\textsuperscript{146} In the Prisoner’s Dilemma, the result where all actors cooperate is not an equilibrium point: each actor will still have an incentive to defect and move to the result which is better from her standpoint. Therefore assurances as to the other’s behavior are insufficient in the Prisoner’s Dilemma.\textsuperscript{147}

The assurance needed in an Assurance Problem, such as the one here, might be supplied by contracts: parties can promise each other that they will cooperate. This is the practice of residents in homeowners associations. Often enough, as seen in Section II.A.3., properties within such communities are subject to restraints on alienation. Rights accorded to the association to block a unit’s transfer guarantee that no resident will be able to defect in a manner hurtful to the community.\textsuperscript{148} However, outside such associations, in large and already constructed neighborhoods, the transaction costs of subjecting all developed properties to restraints on alienation impede contractual assurances.

In the absence of explicit contracts, an implicit contract might still serve as assurance. Implicit contracts can take the form of norms based on ideas of honor\textsuperscript{149} or loyalty to the community.\textsuperscript{150} The reputational injury associated with violating social norms may assure that the actor internalizes harms her defection causes to the community. Though such intangible factors probably are at play, they are not robust checks on defections from neighborhoods, as the empirical record shows.\textsuperscript{151} The costs of being denounced as a deserter are not likely to affect a community member contemplating a move, because she will not be around to suffer the harsh reaction.

Seeing that the market cannot produce an efficient contractual assurance that will allow an efficient outcome, the solution is regulatory intervention. Recall that in the Assurance Problem defecting is not a dominant strategy. There is no natural and unavoidable tendency to defect. The actor’s choice between defection and cooperation is motivated by three factors: the costs associated with not defecting

\textsuperscript{146} Once more, in a declining neighborhood the same result is achieved without such assumption. See infra note 159.

\textsuperscript{147} See Sen, supra note 140, at 122.

\textsuperscript{148} Restraints on alienation held by homeowners associations, unlike those held by parties in other contexts, are generally upheld by courts if they either require the association to act reasonably or are in the form of preemptive rights. JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 526 (3d ed. 2002).

\textsuperscript{149} ULLMAN-MARGALIT, supra note 143, at 36-37, 40-41.

\textsuperscript{150} For a discussion of the role of loyalty in economic and political markets, see HIRSCHMAN, supra note 122, at 76-105.

\textsuperscript{151} Fennell, supra note 110, at 51.
when others defect, the rewards offered by defecting, and the expectations regarding others’ behavior. One regulatory tool for adjusting the payoffs—the first two factors affecting an actor’s decision—is a partial locking device. This locking device ought to make the resident contemplating leaving internalize the costs her departure will inflict on the community. It should make the option of leaving less financially attractive, and of staying less financially risky.

This alteration in the attractiveness of defecting vis-à-vis cooperating also serves as an assurance. The resident, whose motivations have been changed, knows that her neighbors’ incentives to defect have also been decreased. Since she knows that moving has become costlier for her neighbors, she has more grounds to expect them to remain.\(^{152}\) Given this assurance that neighbors are likelier to stay, her inclination to defect decreases. The locking device sparks a reinforcing loop of incentives to stay, which renders the attainment of a stable community more probable.\(^ {153}\)

There is no need, though, for an absolute locking device making a departure impossible. Such a radical solution is only called for by a Prisoner’s Dilemma, where the cooperative result is not an equilibrium point. Since this is an Assurance Problem, stability and change are allowed to coexist. Furthermore, because the game does not require such drastic measures, the recommendations it generates survive the relaxation of the assumptions laid at its foundation.

Two of the assumptions made earlier are unrealistic. The first was that there is an absolute preference for a stable community. This is a false assumption, as residents might prefer to leave a stable community in certain circumstances and given certain financial rewards. Therefore, let me now assume a pool of residents, some still holding the ordering of preferences presented above in the Assurance Problem, while others, added to the pool, do not hold an overriding preference for a stable community. For the latter, option (2)—I defect, other actor cooperates—and probably even option (3)—I defect, other actor defects—are preferable to option (1)—I cooperate, other actor cooperates.\(^ {154}\)

---


153. Another possible positive effect barriers to exit can have is that of stimulating “voice”: neighbors who remain in a deteriorating community will work to improve the neighborhood. See HIRSCHMAN, supra note 122, at 79-80. However, the concern has been raised that people locked in a particular pool against their will may show a tendency not to cooperate, particularly where they view escape as imminent. Fennell, supra note 110, at 72-73. Such reservations might not be pertinent to the neighborhood stability context (unlike education), since non-cooperation will injure the resident’s possible financial reward for leaving.

154. The different way in which the two groups of residents rank their preferences relates to the two distinct values that an owner derives from her house. Logan and Molotch use the terms “use value” and “exchange value” to describe these two different benefits.
pool does not render a stable community unattainable for those other residents who cling to the original ordering. The reason is that a second unrealistic assumption should be relaxed. I assumed that all neighbors must cooperate in the creation of a stable community. In reality, a neighborhood may endure a certain degree of turnover and remain stable; indeed, as mentioned earlier, turnover may in some instances be needed to maintain stability.

The partial locking device suggested by the analysis based on the unrealistic assumptions can now be examined in a more realistic world based on this new set of assumptions where a “mixed game” exists. With a partial locking device, those newly introduced residents who prefer option (2) to option (1) are still able to move, but the exercise of this option will become more expensive for them. The result will, however, remain efficient, as long as the locking device reflects their actions’ externalities—the harm their departure causes to those who seek to preserve the community. If this harm, now internalized by the mover, is greater than the increase in welfare the mover gains by moving, she will not move (her ordering of preferences will change and she will join the group preferring option (1) to option (2)), which is the efficient result. The externalities of a move will decrease as the number of residents interested in stability decreases. Therefore as their number dwindles, the impediment placed on others’ ability to act on their preference to move lessens. This result is efficient, as it reflects individuals’ actual preferences: they now prefer moving to remaining. Even at this point a Prisoner’s Dilemma does not emerge: if all prefer moving, they may all move without injuring others.

I can now summarize the conclusions of the neighborhood stability dilemma. In order to allow residents interested in preserving their

“Exchange value” relates to financial return, and “use value” relates to the essential needs of life, for example securing a “home.” Their analysis centers upon the interaction between residents, who prefer use value, and entrepreneurs, who prefer exchange value. Logan & Molotch, supra note 58, at 1-2. My analysis centers upon the interaction between different residents, assuming that different individuals, and indeed each individual, might hold the two conflicting preferences. Residents hold their houses both as a consumer good and an investment. The relative importance of these two values is not constant: residents differ in their attitudes, and over time a resident’s own attitude is susceptible to change.

155. See supra text accompanying note 127.

156. Restraints on alienation within a homeowners association, discussed above, follow this model. If the action of leaving is more valuable to the seller than her staying is valuable to the community, she will be able to buy from the association its refusal right. If she cannot offer enough money to persuade it to approve the sale, her staying is more valuable to the community than her departure is for her, and a decision to sell is indeed inefficient. Courts should apply this analysis in deciding whether in an association’s exercise of a refusal right is reasonable.

157. When an owner wants to leave the influence the decision of others to leave will have upon her wellbeing is not as dramatic as in the Prisoner’s Dilemma. It might influence to some degree the economic reward she gets, but it will not make her prefer the cooperative result over the result in which all defect. Her first priority is to leave, and thus possibilities of cooperation are ranked as lower preferences.
community to do so, the payoffs of leaving the community must be altered. This alteration is achieved by introducing a partial locking device, which makes residents contemplating leaving internalize the costs of their move to the residents left behind who prefer the preservation of neighborhood stability. The partial locking device will entail subjecting ownership rights to some kind of a community interest in the property that makes its transfer less attractive. This community interest is a peculiar right. It is amorphous and fluctuating. Its size and effect change as the influence of the property owner’s actions on her neighbors’ preferences for a stable community changes. Nevertheless, it achieves its important goal: it allows owners, otherwise hopelessly locked in a group dilemma, to enjoy the balance between neighborhood stability and mobility that best suits their personal preferences.

3. Conclusion

Even without ascribing any intrinsic value to the community, law ought to provide it with protection. Individuals prefer a stable community as a good that allows them to better enjoy their lives. Market failures prevent them from satisfying this preference, creating a loss of efficiency. Actions of actors in the real estate market generate externalities that are not internalized. As property rights have historically been created, according to utilitarians, in response to needs for internalization of externalities, a community property right ought to be established. This right will diminish social losses created by absolute private property rights and allow the internalization of the harmful effects of an owner’s decision to sell her property.

C. Right-Based Arguments

In the previous Sections justifications for the community interest in property were sought in theories that view and evaluate reality through a social prism: the community for the communitarian, aggregate social welfare for the utilitarian. In this Section I will demonstrate that even theories that focus solely on the individual and her rights, rights that should not be overridden for community goals or collective welfare, support recognizing the community aspect of property.

As Jeremy Waldron defines it, a “right-based argument for private property is . . . an argument which takes an individual interest to be sufficiently important in itself to justify holding others (especially the government) to be under duties to create, secure, maintain, or respect an institution of private property.” This Section will review two such individual interests that lie at the heart of influential right-
based arguments for private property: personhood and labor-desert. The Section will demonstrate that neither is sufficiently important to justify holding others under a duty to maintain absolute individualistic property rights. Both will be shown to justify a duty to respect a community interest in private property rights.

1. Personhood Theory

No right-based argument for property focuses more on the individual and her powers as an independent owner than personhood theory. This theory ties the institution of private property to the owner’s basic attributes of personality; it relates property to a person’s humanity. Still, as the ensuing discussion will show, despite its avowed individualism, personhood theory’s conception of private property is incoherent, on its own terms, without recognizing the community aspect of ownership. In order to serve the important role that personhood theory assigns to it, ownership must include a community component that will assure the stability of the neighborhood where the property is situated.

Personhood theory is a tradition originating in the ideas of Aristotle and Hegel. Its most prominent modern advocate is Margaret Radin. Radin claims that certain properties, “personal properties,” are bound up with personhood, and that these properties must be guaranteed to every person. Such “personal properties” deserve more extensive protection than other kinds of property—“fungible” properties—held for purely instrumental reasons. The determination as to which properties constitute “personal properties” is based on shared understandings. Radin and others present the home as the most striking example of a “personal property.” A shared understanding has evolved in American society that housing is not a mere commodity, but a crucial element in allowing people to flourish personally.

Therefore, personhood theory, as Radin explains, holds that a person should be allowed to have the choice between leaving and remaining in the home and environment—“context”—to which she has become attached. For this reason, property law must extend special

---

161. RADIN, supra note 68, at 37.
162. Id. at 36-38, 43.
163. Id. at 53, 55-56.
164. Id. at 11, 18.
167. RADIN, supra note 68, at 23-24, 30.
protection to an owner's right to keep her home. This protection is apparent in different bodies of law, such as adverse possession, eminent domain, privacy, takings jurisprudence, and tenant rights.

This legal approach of personhood theory, however, ignores an important variable: it might assure a person's option of remaining in the "context," yet it does not assure her that the "context"—the community—will remain. Personhood theory envisions the home as a rich and meaningful social institution, embodying the person's relationship to herself and her surroundings. But when translating this philosophical notion into property law rules, the theory conceives the home as merely a parcel of land and four walls to be protected. If it were to follow its own ideas regarding the home's role, the theory would adopt a broader legal attitude to preserving the home. Describing the ideas animating personhood theory, Radin explains:

Contextuality means that physical and social contexts are integral to personal individuation, to self-development. . . . The relationship between personhood and context requires a positive commitment to act so as to create and maintain particular contexts of environment and community. Recognition of the need for such a commitment turns toward a positive view of freedom . . . in which proper self-development, as a requirement of personhood, could in principle sometimes take precedence over one's momentary desires or preferences.168

This exploration into the notion of "contextuality" implies a need for subjecting at times the individual's impulses to restraints assuring the context's survival. Yet the common celebration of the homeowner's "personal right" by personhood theory ignores this duty which is essential to being part of a context.

If property law is to respect constitutive attachments, as personhood theory demands, it should strengthen the resident's right to her home—the traditional banner of personhood theory—but also provide disincentives against dissolving the community. This does not mean that one resident's option to leave should be blocked so as to allow another resident to preserve her "context" forever undisturbed. The first resident too enjoys personhood rights allowing her the same choice between remaining in her "context" and leaving. Even when property is conceived as freedom to create the social arrangements a person desires, the person's choice does not have conclusive effect, since other persons—other decisionmakers—are involved.169 However, rendering the choice to leave the "context" harder is legitimate in personhood theory's terms.

A resident choosing to leave her house and neighborhood perceives the house and neighborhood as "fungible goods," goods that she can

168. Radin, supra note 61, at 1905.
169. See WALDRON, supra note 159, at 296-97.
replace. By moving she is actively seeking to replace them, and thus now these goods only represent in her eyes an instrumental monetary value. In contrast, for the neighbor remaining behind, the context still represents a “personal good.” In the conflict between the two, the interest of the person for whom the good is a “personal good” should prevail, according to personhood theory. 170 Therefore the community’s interest in property, a tool that will make leaving a neighborhood more difficult as means for preserving the “context,” can and should become a part of personhood theory.

Without it, and as long as personhood focuses solely on the individual right to a specific asset, personhood theory cannot serve its own goals of creating property rules that preserve the owner’s personality and deepest attachments. As William Simon notes when critiquing the theory, “[i]t may be harder to assimilate into a new community than to recreate a comfortable home environment, and loss of membership in a community seems a more serious threat to identity than loss of a particular dwelling.” 171

Simon believes that the community can only be afforded the necessary legal protection under communitarian theories, reviewed in Section II.A. This conclusion may be too hasty. The emphasis on a person’s attachment to her community can come not only from a firm belief in the community, but also from an unwavering dedication to the person and her needs as a human being. The obligation to preserve the community can be explained within personhood theory’s framework. This result is conditioned upon the framework being widened, so as to make it, in practice and not only theory, inclusive and responsive to a person’s attachment to her home and environment. Only in this manner can personhood theory and its emphasis on personal ties to “context” remain coherent.

2. Labor-Desert Theory

a. The Theory

Personhood theory presents a forceful right-based argument for private property. Still the most influential right-based argument for property is found elsewhere—in labor theory. The idea that labor creates a property right is deeply rooted in legal thought: “It would seem to be a first principle of Anglo-American jurisprudence, an axiom of the most fundamental nature, that every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations.” 172 This idea traces back to the philoso-

170. See supra note 163 and accompanying text.
171. Simon, supra note 98, at 1361.
phy of John Locke. Locke’s theory of property holds that by mixing her labor with an unowned—or rather, owned by the commons—part of the earth or its fruits, a person makes that part her own. The entitlement to the products of one’s labor is frequently explained by a notion of desert. Though it is unclear whether this was Locke’s own intention, the labor theory is often read as a desert theory: a person deserves the product of her work.

If labor is the basis of entitlement to property, it must be defined. Locke himself did not devote much attention to this matter. Commentators have suggested several alternative notions of labor. One is the production of something (even if valueless to society) that otherwise would not have existed. A second possibility is that only labor producing something of value to others deserves reward—a “value added” labor theory. Finally, labor might be an activity that involves pain to the laborer.

b. The Production of Value

This Article is concerned with rights in a residential unit. More specifically, it contends that the surrounding community should be assigned an interest in a house, that it should be entitled to some of its value. For labor-desert theory, the central task, when assigning property rights, is to identify the asset’s creator. Thus this Article’s question, “Who should have a right to the house and its value?” translates to the question, “Who labored and produced it?” This, in turn, given the possible definitions of labor, implies an inquiry as to the identity of those creating the house, adding value to it, or exerting pains in doing so. Is the house’s value “natural?” Is it produced solely by the dweller? Is it the result of the labor of others who deserve corresponding rights? To answer these questions it is necessary to address the general issue of the origin and nature of goods’ values.

Until at least the second half of the seventeenth century, scientists believed that when placed in the open air, putrefying meat generates, out of itself, maggots of flies. Following such experiments as those conducted by Francesco Redi and later Louis Pasteur, this theory of “spontaneous generation” was eventually abandoned. Similarly, few will contend today that if a house is placed in a neighbor-

173. See 2 JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 27-28 (Peter Laslett ed., 1988). Locke placed limits on the ability to appropriate, none of which are relevant here.
174. WALDRON, supra note 169, at 206.
177. Id. at 302-03; Lawrence C. Becker, The Labor Theory of Property Acquisition, 73 J. PHIL. 653, 655-56, 659 (1976).
178. For more on the demise of the theory, see John Farley, The Spontaneous Generation Controversy (1700-1860): The Origins of Parasitic Worms, 5 J. HIST. BIOLOGY 95 (1972).
hood, it will generate, out of itself, its value. More generally, it is accepted that “our concern for goods . . . . does not arise in spontaneous consumer need,” as renowned economist John Galbraith put it.\footnote{John Kenneth Galbraith, The Affluent Society 132 (4th ed. 1984).} Nevertheless, while “spontaneous generation” has long ceased to influence thinking about the natural sciences, the belief that assets’ values are created organically by some natural need still affects our thinking about the moral justification for an owner’s right to the value of her asset and any increases in it. The remainder of this Subsection will criticize this outdated idea. In its stead, it will promote the argument that if the justification for property is that she who labors upon a thing deserves to own it, then when part of the thing’s value is created by society, society deserves an interest in it.

Philosophers and economists have been noting that the values of goods, and accordingly their prices, are not natural, but social. Locke himself distinguished money and other “treasures” from goods that are naturally needed. “[A]s to Money, and such Riches and Treasure,” he wrote,

\begin{quote}
these are none of Natures Goods, they have but a Phantastical imaginary value: Nature has put no such upon them: They are of no more account by her standard, than the Wampomake of the Americans to an European Prince, or the Silver Money of Europe would have been formerly to an American.\footnote{Locke, supra note 173, § 184.}
\end{quote}

Jean-Jacques Rousseau, who lamented the replacement of the romantic state of nature by civilized society, described the latter as an “assemblage of artificial men and factitious passions, which . . . have no foundation in nature.”\footnote{Jean-Jacques Rousseau, The Social Contract and The First and Second Discourses 137 (Susan Dunn ed., 2002).} He viewed civilized man as constantly living “outside himself,” a man whose needs and desires—anything but natural—are created by society, and who has hence ceased to be free.\footnote{Id. at 122-23, 137-38. On Rousseau’s thesis that man has come to live outside of himself see Alan Ryan, Property and Political Theory 53-54 (1984).}

Like Rousseau, John Stuart Mill was concerned about the modern separation of actual values and desires from natural needs and “true” values. Relying on a labor theory and conceiving labor as related to efforts, Mill criticized the economy of his times, where labor’s rewards were not proportional to the pains exerted.\footnote{John Stuart Mill, Principles of Political Economy 235-36 (Jonathan Riley ed., Oxford Univ. Press 1994) (1848).} Karl Marx’s approach to workers’ entitlements in the nineteenth century was similar. Furthermore, he sought to make people realize that decisions regarding production and distribution are not natural, but are rather made by men. He believed that the characterization of such decisions
as natural consequences of properties of the produced commodities, accompanied by the claim that value is intrinsic to the commodity, were means of concealing the true nature of these decisions and values. In reality, they are events that individuals themselves bring about through concrete social activities. By hiding this reality, an illusion is created that the actual patterns of production and distribution are the necessary ones.

These insights have been largely incorporated into twentieth-century theories of markets and prices. As already seen, Galbraith attacked the myth of consumer sovereignty. He emphasized that preferences and demand were to some degree created by production—the same activity depicted as reacting to consumer needs. Similarly, Walzer argues that goods themselves are inter-subjective, and not objective, creations:

All the goods with which distributive justice is concerned are social goods. . . . Goods in the world have shared meanings because conception and creation are social processes. For the same reason, goods have different meanings in different societies. The same ‘thing’ is valued for different reasons, or it is valued here and dis-valued there.

Ross Zucker elaborates on the impact of this realization upon concepts of justice and equality. Social influences—generated by all community members—greatly affect the formation and character of individuals’ consumer wants, which determine economic value. Zucker explains that needs are formed in an interdependent, inter-subjective manner because the individual constitutes herself so as to accommodate others’ needs; she must be able to provide others with means to satisfy their needs so she can receive in exchange means to satisfy her needs. She must also develop her needs in a manner that will enable them to be satisfied by things other persons provide. The capitalist system is thus sustained by common action of all the members of the economic community. Zucker concludes that every member of the economic community should be entitled to an equal share of some of the national income, as each contributed to its creation.

185. See id. at 968-88.
186. GALBRAITH, supra note 179, at 131-33.
189. Id. at 113.
190. Id. at 206, 238.
191. Id. at 86-88, 119, 254-55.
c. The Production of Residential Properties’ Value

All these arguments highlight the social nature of the economic value of assets, which is evident in the case of residential properties. In his book *The Production of Space*, discussing urban space in general, the influential French sociologist and philosopher, Henri Lefebvre, wrote that “Space is permeated with social relations; it is not only supported by social relations but it is also producing and produced by social relations.”\(^{192}\) The value of a house is the product of many factors, only one of which is the structure’s quality and the owner’s patterns of investment in it. Other impactful factors are generated by the surrounding community. First, much of the change in a house’s value is the outcome of public investment in the city, of changes in the regional and national economy, and of changes in the way the real estate market is regulated and taxed.\(^{193}\) Second, an upgrade to one property may improve the market value of nearby properties (neglect will have similar, though detrimental, effects).\(^{194}\) Hence, some of the value of my property is created by the investment of my neighbor in her property. Third, the house’s value is influenced by neighborhood context. In the dynamics associated with neighborhood change, areal factors play a major role.\(^{195}\) The value of my property is a function of the common perception of my neighborhood: if others view it as up-and-coming and desirable, the value will increase. If they perceive it as declining, the value will decrease.\(^ {196}\) The stigma or status conferred on a particular neighborhood distorts the allocation of resources.\(^ {197}\) Rolf Goetze goes as far as stating that actual events such as changes in credit availability and facts regarding turnover rates often go unnoticed when deciding whether to live in a neighborhood and invest in a house, until reported by the media.\(^ {198}\) Neighborhood confidence, which determines property values, is produced by attitudes’ change, rather than by housing obsolescence.\(^ {199}\)

A house’s value is deeply influenced by social perceptions. Hence, labor-desert ideas can hardly justify the owner’s entitlement to the full increase in its value. The owner did not create it alone. The same goes for decreases in value. This conclusion holds, no matter which

\(^{192}\) Henri Lefebvre, *The Production of Space* 286 (Donald Nicholson-Smith tr., 1991) (emphasis added).


\(^{194}\) See generally Barnes, *supra* note 136, at 41-45 (examining the rehabilitation experience in Boston’s South End and its impact on property values).

\(^{195}\) *Housing in America: Problems and Perspectives* 192 (Roger Montgomery & Daniel R. Mandelker eds., 2d ed. 1979).

\(^{196}\) See Leven et al., *supra* note 133, at 199.

\(^{197}\) Goetze, *supra* note 111, at 31.

\(^{198}\) Id. at 61.

\(^{199}\) Id. at 62.
meaning of labor is adopted. The owner did not create something new, the added value was not wholly due to her efforts, and the pains she suffered are limited to those associated with improvements she made, which form only part of the story. The community, on the other hand, labored on the asset and accordingly deserves reward. It created something new: a trendy neighborhood where previously there was a forgotten one. This something new is of value to society. Finally, efforts were made by the community: the improvement in the perception of one neighborhood normally entails the deterioration of that of others—the harms caused to those other neighborhoods are “pains” the community endured.  

d. Conclusion

Part of the change in a residential unit’s value is due to changing attributes of the community where it is situated. These attributes are created not by the unit’s owner, but by public perceptions or economic circumstances, improvements to neighbors’ houses, and government investment in infrastructure. As John Morgan and Harvey Molotch conclude, in the market for places and homes “price is sociological.” 201 There is nothing “natural” about it. 202 Therefore, in accordance with notions of desert, the community that labored on creating part of the asset’s value should maintain a property right in that part: the community aspect of property.

Still, a caveat must be added regarding this application of Lockean theory. The relationship of the preceding analysis to labor theory is complicated. The discussion is consonant with the theory’s spirit and logic, yet the theory as written by Locke might not accommodate it. Locke’s theory was a theory of first appropriation: the first man who labors on an unowned asset is entitled to own it. After this appropriation, a later laborer on the same—but now owned—asset will acquire nothing. Locke’s is a theory of natural rights, of historical entitlements. 203 As such, it encounters difficulties in acknowledging any property interest in the house credited to the community (or anyone else) after an original owner acquired the asset. Theories of natural rights are static theories; they thus might be irrelevant to real-world problems of a developed interdependent society. I will address this difficulty in the following two Subsections.

201. LOGAN & MOLOTCH, supra note 58, at 9.
202. WALDRON, supra note 159, at 138.
203. Id.
3. Property as a Natural Right

The preceding discussion explored two right-based arguments justifying property rights and concluded that they call for recognizing a community interest in such rights. This might not have been the case had those right-based arguments been read as natural right theories of property. The strongest opposition to the community interest in private property stems from natural rights theories. I will now point at the concerns raised by these theories and highlight the problematic nature of their understanding of the role and law of property.

A natural rights and historical entitlement system is not a specific right-based argument justifying property. The natural right to property can emerge from whatever source—labor and personhood being two contenders. The key element in a natural rights/historical entitlement philosophy is that afterwards—after the right’s original creation—it is forever protected. The particular rule that determines the just origin of the property right is only of secondary importance.

Therefore, Robert Nozick, the most prominent philosopher of the historical entitlement theory, refrains from formulating the “principles of justice in acquisition,” though they are an important component in his system of justice. Nozick holds that in a just world, a person who acquires a holding in accordance with the principles of justice in acquisition is entitled to that holding. The only way another person can become entitled to that holding is by acquiring it from her in accordance with the “principle of justice in transfer” (also not detailed by Nozick). This is a historical theory of justice in distribution, rather than an end-result theory of justice. The determination whether a distribution is just depends upon how it came about, and not upon how things are distributed at the present. For the existing system of property to be just, it must be the result of transfers of assets from those who acquired them in accordance with the original principle of acquisition. If those transfers were made following the governing rules of transfer then the result is just—regardless of its specific character.

Such a theory would arguably deny the introduction of the community’s interest in property. Nozick differentiates his principles of justice from “patterned” principles of distribution. The latter specify “that a distribution is to vary along with some natural dimension, weighted sum of natural dimensions, or lexicographic ordering of natural dimensions.” According to his theory, if a distribution is

204. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 150, 153 (1974).
205. Id. at 151.
206. Id.
207. Id. at 153-55.
208. Id. at 155-56.
209. Id. at 156.
arrived at by the principles of historical entitlement, it is just, no matter how “unpatterned” and random.\(^{210}\) Hence arguments for distribution according to “patterns” of moral merit, needs, or marginal product, are alien to the system.\(^{211}\) The claims made in the former two Subsections that the community is entitled to an interest in property because of notions of desert or due to individual needs for maintaining constitutive attachments are irrelevant to a Nozickean system.

This denial is reinforced when the role of first acquisition is further strengthened, as it is by other writers in the natural rights tradition. The desire to acquire is sometimes presented as inherent to human nature: a biological instinct or an uncontrollable psychological impulse, serving both as means for survival and tool for self-fulfillment. For this reason property is understood as a natural right, predating organized society.\(^{212}\) On a less abstract and deterministic note, first possession has been justified as the source of property due to its alleged enduring role in most societies.\(^{213}\)

If first acquisition or possession is the controlling factor, it is hard to argue for an interest emerging for the community’s benefit in a house already acquired and possessed. It is not, however, an impossible argument to make. Individuals can maintain natural rights in assets they acquired, and still those rights may be subject to limitations, even in a natural rights/libertarian world—if the individuals choose the limitations. The property right voluntarily restricted ex-ante is a complicated issue for libertarian approaches.\(^{214}\) On the one hand, such theories object to limits placed on property rights. On the other hand, they celebrate individual choice. Nozick’s assignment of a key role to voluntary communities is thus highly intriguing.\(^{215}\) The proliferation of these communities represents utopia for Nozick. His utopia is a framework—a minimal state—within which many societies exist, each living its members’ idea of the utopian society. Every group of persons sharing the same idea of utopia may come together and realize its ideal. Internally, the different communities may impose restrictions on their members to assure the realization of their utopia. Had they been imposed by the state, these restrictions would have been unjustifiable on libertarian grounds. Yet the different communities may enforce these limitations on freedom. For example, a communist community may redistribute wealth between its members,

\(^{210}\) Id. at 156-58.
\(^{211}\) See id. at 155-60.
\(^{212}\) See RICHARD PIPES, PROPERTY AND FREEDOM 65-86, 286 (1999).
\(^{215}\) Nozick is a strong proponent of free contract: he believes that an individual should be allowed to sell himself into slavery. NOZICK, supra note 204, at 331.
while the central government may not redistribute wealth between communities.\textsuperscript{216}

It may follow that the different communities should be preserved so that they can continue to live diverse utopias, thereby allowing each person to choose her utopia. However, Nozick emphasizes that the system should be based on a person’s ability to leave one community and move to another.\textsuperscript{217} Community stability is to be achieved by the payoffs the community awards each member, persuading her to stay.\textsuperscript{218} Nozick’s utopia consists of “a world which all rational inhabitants may leave for any other world they can imagine . . . an association,” and not of a “world in which some rational inhabitants are not permitted to emigrate to some of the associations they can imagine, an east-berlin [sic].”\textsuperscript{219}

But at the same time, Nozick acknowledges that absolute rights to leave a community lead to an impasse:

\begin{quote}
[P]roblems arise if an individual can plausibly be viewed as owing something to the other members of the community he wishes to leave: for example, he has been educated at their expense on the explicit agreement that he would use his acquired skills and knowledge in the home community. Or, he has acquired certain family obligations that he will abandon by shifting communities. Or, without such ties, he wishes to leave. What may he take out with him? . . . Clearly the principles will be complicated ones.\textsuperscript{220}
\end{quote}

If the idea of “owing something” to the community is broadly conceived, loyalty and a duty to allow peers to continue living their utopia may serve as justifications for making leaving a community more difficult. Recall the issues explored in Section II.B.2.ii.: the Nozickian utopia is analogous to Tiebout’s model of the market for local public goods. While Tiebout’s individuals shop for municipalities, Nozick’s shop for utopias. Accordingly, Nozick’s utopia encounters problems similar to those that Tiebout’s model faced, namely the damage inflicted to the community by every departure. This problem renders the visions impossible to realize. Like Tiebout’s model, Nozick’s utopia can be saved only following the introduction of reasonable controls allowing communities’ survival without turning them into “east-berlins.” This idea might, to the superficial observer, contrast the notion of the minimal state, which is Nozick’s framework for utopia.\textsuperscript{221} But the minimal state always plays an active role in

\begin{itemize}
\item \textsuperscript{216} See generally id. at 297-334.
\item \textsuperscript{217} Id. at 302, 317.
\item \textsuperscript{218} Id. at 306.
\item \textsuperscript{219} Id. at 299.
\item \textsuperscript{220} Id. at 330.
\item \textsuperscript{221} Id. at 333-34.
\end{itemize}
protecting property rights, or—in Nozick’s terms—in rectifying deviations from the principles of justice in acquisition and transfer. So why must it refrain from acting to protect a certain form of property right and community desired by owners?

These ambiguities make it difficult to assess the response of libertarian thinking to the reinforcement of voluntary associations’ powers. They are symptoms of libertarianism’s general deficiencies. The theory is attractive as it offers clear-cut notions of justice, freedom, and property; but, for the same reason, it is also unrealistic. It fails to recognize the complex nature of property rights. In a world with more than one owner, property rights conflict and regulation must be introduced to determine which right shall prevail. This Article demonstrates the problem: while one owner—for example Ms. Rodriguez of the Introduction—seeks to preserve her property right as it were, another demands to secure her ability to use or transfer her property right as she pleases. Yet if the latter is allowed to act, the former cannot maintain her property right in its current condition. Answers to such conflicts—between one owner’s security and another’s freedom—cannot be found by resorting to an endorsement of “natural property rights” and to a denial of “regulation,” because property rights are found on both sides of the dispute. Society, not nature, picks the winners in such contests.

4. Property as a Social Phenomenon

The natural rights conception of property is juxtaposed with a very different idea regarding the origin of property, explained by Rousseau in this famous excerpt:

The first man, who after enclosing a piece of ground, took it into his head to say, this is mine, and found people simple enough to believe him, was the real founder of civil society. How many crimes . . . how many misfortunes and horrors, would that man have saved the human species, who pulling up the stakes or filling up the ditches should have cried to his fellows: Beware of listening to this impostor; you are lost, if you forget that the fruits of the earth belong equally to us all, and the earth itself to nobody?

This conception of property rights as a social phenomenon that could not have antedated society shatters any pretences of sanctity on the part of property rights. First acquisition can no longer be portrayed as natural. In a style reminiscent of Rousseau, Carol Rose explains the common law’s acceptance of first acquisition as ownership’s origin by its being a manner for communicating a message, a “text” intelli-
gible to others. It therefore is not enough for the person to say “it’s mine”; “some relevant world must understand the claim it makes and take that claim seriously.”225 First possession is “the articulation of a specific vocabulary within a structure of symbols approved and understood by a commercial people.”226

Property rights can only exist within a society. They are not a natural right that cannot be modified after the individual enters society. As society defines the right, it may set the right’s limits.227 This conception of property makes it easier to recognize the need to reward the community’s labor on the creation of the house’s value, and to constrain property rights in residential units in a manner that will better protect owners’ personhood.

More importantly, this social conception of property allows an understanding of property that integrates the different theoretical approaches explored in this Part of the Article. Joseph Singer has proposed replacing the ownership model with an entitlement model, which will direct attention to the way in which property law structures relations.228 He explains that property rules not only protect individual rights, but also form the overall social context in which individuals live.229 Accordingly, the property rules chosen are those that shape the contours of social relations in a manner which accords with our considered judgments about the appropriate forms of social life. The central normative goal of property law is to protect justified expectations. The decision as to what constitutes justified expectations relies both on utilitarian and right-based arguments.230 As seen in this Section, right-based arguments, both those appealing to labor-desert and those appealing to personhood, lead to the conclusion that the expectation that a neighbor will not easily leave her fellows behind, is justified. Utilitarian arguments, explored in the preceding Section, and communitarian ideas, reviewed still earlier, converge on the same result.

These insights counsel that emphasis be placed upon the relations that develop between neighbors. This is indeed the approach advocated by Singer:

The relational approach shifts our attention from asking “Who is the owner?” to the question “What relationships have been established?” The shift is partly a shift from focusing on the relation between the owner and the resources owned to the relation between

225. Carol M. Rose, Possession as the Origin of Property, 52 U. Chi. L. Rev. 73, 81, 84-85 (1985).
226. Id. at 88.
228. Singer, supra note 20, at 91.
229. Id.
230. Id. at 90, 130-39, 146, 210-12.
the owner and non-owners who have benefited from the resources. But more important, the shift is from a perspective that focuses on the owner as an isolated individual whose presumptive control of the resource is absolute within her sphere of power to a perspective that understands individuals to be in a continuing relation to each other as part of a common enterprise.  

This property theory has been applied to gentrification and neighborhood change. One researcher found that neighborhood activists in Vancouver based their struggle against development that would have led to gentrification and displacement on an alleged community property right in a privately owned department store and a public park. Residents viewed themselves as owners of the properties, in defiance of the classical ownership model. They invoked the entitlement model arguing that these properties became part of the community.

In this manner the relational theory was enlisted to regulate the relations between the community and external forces. It can guide the internal relations between neighborhood residents just as well. The relationship between residents should be viewed as constituting a common enterprise—a community—on which all residents are dependent. The residents rely on the relationship’s continuity: they invest in their houses and make them the center of their lives, based on an assumption that their relationship with their surroundings, which benefits all involved, will persist. The reliance on such relationships should be protected. Owners should have property rights—community property rights—in the private holdings of their neighbors.

Property rights are the creation of society, not nature or god. As such, society may model property rights according to its conceptions of individuals’ needs, of justice and desert, and of desired social relationships. Hence property rights should be recognized when people reasonably rely on existing relationships with others. Reliance on the character of one’s environment, on lasting interactions with surrounding people, is something that socially created property rights seek to promote.

5. Conclusion

Right-based arguments, in their vast majority, necessitate the protection of the community’s interest in private property. The community is entitled to such an interest as a reward for its labor on the

---

231. Singer, supra note 165, at 657.
233. Id. at 55-65.
234. Id. at 73-74.
235. See Singer, supra note 165, at 661.
creation of a portion of a house’s value. This interest is also vital in order to enable the existence of the individual’s personhood and to safeguard her “personal properties,” which cannot be detached from the “context” where she lives. Even if these or other right-based arguments are regarded as creating natural property rights, they may still be understood as requiring the protection of certain communities—certain forms of property—that people voluntarily choose. Regardless, social conceptions of property rights may be deemed preferable to natural rights worldviews. From the perspective of these relational readings of rights, the absence of protection for the community’s interest in ownership is particularly troubling.

D. Conclusion

This Part of the Article has explored diverse property theories and illustrated how they all could support—indeed, necessitate—the recognition of the community aspect of private ownership. It must be stressed, however, that the fact that communitarianism, welfare economics, and rights-based arguments all converge on this conclusion does not imply that their rationalizations are identical or that the specific contributions they make are useful for the same purposes. Thus, for example, communitarianism provides us with a rich understanding of the meaning and import of the neighborhood, but it falls short in putting forward detailed principles for regulating the relationship between the neighborhood and the individual: for balancing neighborhood stability against individual freedom. Welfare economics presents the groundwork for such a balancing scheme, but the intangible value of the neighborhood is, too often, not a natural element in its calculus. Rights-based arguments ground the community aspect of ownership in the very powerful tradition and rhetoric of property rights, but, as each right-based explanation isolates one salient attribute of reality, such accounts’ notion of community is rather thin. Those not exclusively attached to one specific theory will draw in a pragmatic manner on all of them when considering the community aspect of ownership. Those adhering to one or another of the theories are bound to view the community aspect in divergent lights. That being said—they are still likely to view it favorably.

III. THE COMMUNITY ASPECT OF PRIVATE OWNERSHIP AND PROPERTY LAW PRACTICE: A PROPOSAL

A clear conclusion emerged from Part II of the Article. The community’s interest in property should be recognized. But how can this goal be achieved? How—if at all—can the community aspect of property don a practical garb? The impetus for challenging property law theory to recognize the community interest was provided by a real
world problem presented in the Introduction. It originated in a difficulty faced by actual owners whose neighborhoods are destabilized. It is thus important that the community aspect of ownership not be constricted to the realm of theory. This Part of the Article will suggest one possible way of giving it concrete substance. I will propose a scheme that will grant the community the partnership interest in assets’ value to which it is entitled, in a way that can alleviate the plight of owners whose community is threatened.

The proposal distinguishes two disparate situations: one where properties’ market values are increasing dramatically—the conditions characteristic of an improving/gentrifying neighborhood—and another where property values are decreasing dramatically—the common occurrence in a declining neighborhood.

A. An Improving Neighborhood

In the improving neighborhood the traditional individualized notion of property and the community-invested idea of property, introduced by this Article, contrast most strikingly. Therefore Ms. Rodriguez’s story served as a good illustration of the problem property law faces. In a gentrifying neighborhood properties’ monetary values increase, while the community aspect of those same properties is threatened. Local residents are displaced. The owners among them—like Ms. Rodriguez—might be able to reap a profit when selling. Yet they lose their community, which was a constitutive element of their property right and the enjoyment they derived from it.

In light of the fact that, as already seen, this result is inefficient and unjust, what should be the policy response? I suggest imposing a tax calculated as a percentage of the profit made in selling property and collected at the time of sale, accompanied by rent control. The tax rates are to be set according to the intensity of gentrification, with higher taxes levied the more intense the process. The establishment of such a tax corresponds to the requirements of the theoretical approaches reviewed in Part II. The tax will deter sales since it will render them less lucrative, thereby carrying a stabilizing effect. In this manner it will convey upon residents better chances at preserving their attachment to their neighborhood, as suggested by communitarian and personhood theories. It will make emigrants internalize their departure’s costs, thereby solving the collective action problem identified by utilitarian theories. It will compensate those remaining behind for the upsetting of their reliance and expectations, as required by relational theories. The tax will also be a reward to

236. For a similar proposal of a sales tax aimed at deterring further destabilization and resegregation in neighborhoods undergoing racial integration, see Bell & Pachomovsky, supra note 152, at 2009-11.
society for its work on the creation of the increase in the house’s value, a reward merited in accordance with labor-desert theory.

The tax will be levied at sale. At that time, the difference between the price for which the owner bought the house, and the price for which she is selling it, will be taxed. Subtractions should be introduced for improvements she made to the property, as well as for general increases in housing prices in the entire region and nation.

The best way to understand these characteristics of the proposed tax is by identifying the tax’s relationship to other taxes to which property owners are subject. The proposed tax, like existing property taxes, will be paid to a local authority. Another similarity between these two taxes lies in their normative structure. The tax contemplated is based to some degree on the “benefit tax” principle of taxation, as property taxes are held to be. The benefit principle of taxation dictates that a person be taxed in keeping with the amount of benefit she derives from services provided by the relevant governmental body. Property taxes represent a payment a homeowner makes for her enjoyment of local public services. More importantly, these services enhance property values. Hence, when paying property taxes, calculated based on her home’s value, the taxpayer is paying the local government consideration for its services. Similarly, the proposed tax will be paid in accordance with the contribution the community, via public and private investment, made to the value of the taxpayer’s asset.

But unlike property taxes, the proposed tax will only be paid when the investment is realized—upon the occurrence of a sale. In this feature, the tax is comparable to the capital gains tax, which forms a part of the income tax. The reason for emulating the capital gains tax in this regard is obvious; levying the suggested tax while the owner is still occupying the house will achieve a result opposite to the desired outcome. Subjecting homeowners in a gentrifying neighborhood to higher taxes puts further pressure on them, making displacement practically unavoidable. Conditioning the tax on a sale relates it to the principle of taxation according to ability to pay (which contrasts the benefit principle of taxation)—the guiding principle in income taxation. A homeowner is being taxed according to her ability to pay since she only pays the tax when she is in actual


238. For more on taxation upon realization, see Charles T. Terry, Normative Capital Cost Recovery for a Realization-based Income Tax, 5 Fla. Tax Rev. 467 (2002).

239. Property taxes might be viewed as undermining property rights, since they might compel owners to sell their properties. See Richard A. Posner, Economic Analysis of Law 496 (6th ed. 2003).

possession of the funds representing the increase in her home's value, i.e., after she sold it for a profit. Nevertheless, the tax does not truly embody the taxpayer's ability to pay. Unlike income taxation, the proposed tax is paid without considering the taxpayer's overall wealth. It only deals with income gained from one source—the sale of a house. Such an approach naturally deviates from the ability to pay principle, which sets taxes according to the taxpayer's entire income.241 It also contradicts a major aspiration of income taxation, which is to tax similarly different investments, so as not to distort capital market decisions (i.e., not to have investors choose an investment solely because it is taxed favorably).242 The proposed tax targets a specific investment—residential units—while leaving other investments untouched. Still, this is not a problem: the tax explicitly aims at “distorting” decisions in this one market.

Because of these major differences the tax is neither an addition to the capital gains tax, nor a part of its normative structure. Rather, it in some ways evokes Henry George's late nineteenth century proposed comprehensive taxation of land value as a single tax.243 Although rejected in most jurisdictions,244 that proposal still exerts much influence on the way scholars think about land taxation.245 The famed economist and politician envisioned one single tax whose amount is determined solely by the value of land, discounting structures built on it. He believed that such a tax would be both efficient and progressive in incidence. In addition, he saw it as just, since land's value increases due to social and economic developments, as well as governmental investment, while owners do practically nothing to bring about such value increases. Hence, George did not believe that landowners earn these increments in value and conceived owners as occupying a different position than individuals who contribute labor and capital to production and earn their compensation.246 This Article's community interest in property, as explained in Section II.C.2., shares this rationale, though it does not separate the value of buildings from the value of land. In addition, the tax sug-

243. See generally HENRY GEORGE, PROGRESS AND POVERTY (1942).
246. See generally Coughlan, supra note 244, at 263-68 (examining arguments in favor of land value taxation).
gested has no aspirations at replacing other forms of taxation, in stark contrast to George’s plan.

Now that the proposed tax has been situated among other taxation schemes, and its roles and characteristics clarified, it is necessary, in order to evaluate its effects, to try and predict who will actually pay it. Foreseeing the economic incidence of a tax\textsuperscript{247} is practically impossible, as it depends, among other factors, on the elasticities of supply and demand.\textsuperscript{248} As far as the relationship between seller and buyer is concerned, this is not a major worry: whether the owner/seller pays the tax, or whether she passes the tax on to the buyer, the tax’s purposes are attained. In both scenarios, the sale is deterred, and either the owner moving out or the in-mover internalizes the move’s costs to the neighborhood.

The incidence of the tax does raise a concern with regards to the possibility that owners will pass it on to potential buyers, but to tenants. When sales’ profits are taxed, owners have an incentive to lease their properties for higher rents rather than sell them.\textsuperscript{249} Theoretically, rent proceeds should be taxed as sale proceeds since the two are economically equivalent. However, the danger is that landlords will pass on, via higher rents, rent income tax to current tenants, leading to displacement and the community’s demise. A better approach, thus, is to avoid taxing rent income. Instead, the sales tax should be supplemented by a more traditional rent control policy. Rent control prevents landlords from increasing rents beyond a set amount representing fair return on their investment. It thereby prevents higher-income in-movers from outbidding lower-income tenants.\textsuperscript{250} The rent control suggested here correlates to the taxation of sales and is thus justified on the same grounds justifying the tax: it is an embodiment of the community’s interest in the asset. Rent control will check owners’ ability to realize value increases by leasing for higher rents, thereby evading the tax levied at sale. It will allow this Article’s proposal, which otherwise centers on homeowners, to convey benefits directly to tenants. Rent control is probably the only tool that can effectively help tenants stay in a gentrifying community.\textsuperscript{251}

\begin{itemize}
\item \textsuperscript{247} The economic incidence of the tax relates to the identity of the party who is unable to pass along the burden of the tax. It need not correlate to the legal incidence.
\item \textsuperscript{248} Fulton Corp. v. Faulkner, 516 U.S. 325, 341-42 (1996); Walter Hellerstein, Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination, 39 TAX LAW. 405, 438-42 (1986).
\item \textsuperscript{249} For a similar scenario with a land improvement tax, see Posner, supra note 239, at 496.
\item \textsuperscript{250} Rent control has been controversial for years. For an overview of the debate, see Singer, supra note 148, at 777-81. For the debate in the context of gentrification, compare Molly McUsic, Note, Reassessing Rent Control: Its Economic Impact in a Gentrifying Housing Market, 101 HARV. L. REV. 1835 (1988) with Minton, supra note 95.
\item \textsuperscript{251} See, e.g., J. Peter Byrne, Two Cheers for Gentrification, 46 HOW. L.J. 405, 426 (2003).
\end{itemize}
Aiding tenants is necessary for the realization of the community interest in ownership, as their displacement threatens the community.

B. A Declining Neighborhood

This Article focused on the operation of the community interest in a gentrifying neighborhood. However, as has been made clear, the community aspect of property is operable in all situations, and community stability is at threat in declining neighborhoods as well. In fact, the declining neighborhood presents an easier case for justifying the community interest in property. Maintaining it in such neighborhoods implies combating the drop in property values, and thus it correlates to traditional individualized understandings of property protection. However, when it comes to practical implementation, the challenge of protecting the community’s interest in such neighborhoods might be more complex than in improving neighborhoods. The reason is that the theoretical justifications for the community interest explored in Part II of this Article may diverge in their recommendations here.

When understood as created by society, the decrease in property values calls for a transfer of funds from society to the owner/seller, perhaps in the form of a negative tax.\textsuperscript{252} As seen in Section II.B.2, society is the entity responsible for locations losing appeal. If the community is a silent partner in land ownership, partaking in its benefits (as suggested by the tax discussed above), it should also share in the losses.

However, the stabilizing effect of such a scheme is questionable at best. A promising precedent is the experience of Oak Park, Illinois. When, during the 1970s, the Chicago community bordering Oak Park became segregated following white flight and neighborhood decline, the Oak Park community fought back by enacting an equity assurance plan.\textsuperscript{253} The plan—financed by a one percent general tax on all local properties—is open to any single-family homeowner that enrolls by paying a fee covering the cost of appraisal.\textsuperscript{254} An appraisal is then made of the home’s value. Five years after the owner enters the program, the protection sets in, and if an owner is unable to sell her residence at the appraised value, she is reimbursed for eighty percent of the loss.\textsuperscript{255} The plan has been perceived as a success: no owner has

\textsuperscript{252}. The term negative tax describes government payments made to citizen through the tax system instead of the welfare system. See James Tobin, Joseph Peckham & Peter M. Mieszkowski, \textit{Is a Negative Income Tax Practical?} 77 YALE L.J. 1, 2 (1967).
\textsuperscript{254}. \textit{Id}. at 1468.
\textsuperscript{255}. \textit{Id}..
ever sought reimbursement and the community remains remarkably stable. As a result, other municipalities adopted similar programs.256

Still, in Oak Park the municipality promised to reimburse owners for eighty percent of their losses. It is doubtful whether less affluent locales could assume such a financial burden. Yet if they solely pledge partial compensation for owners' losses, the chances of replicating Oak Park's success dramatically decrease. A partial monetary compensation might not hand the owner a strong enough incentive to refrain from selling; she might fear the cost of waiting will be greater.257

Therefore, another policy tool should be developed. One possible approach might be lowering property taxes using public funding (generated by the proposed tax collected in improving neighborhoods) to finance the ensuing tax deficit. It is imperative that local authorities advise residents that the same level of public services will be maintained (or even enhanced) despite the decrease in property taxes. At times of abandonment city government often reduces services, or at least does not keep up with the greater needs of the poor neighborhood.258 It thereby, if only inadvertently, intensifies the spiral of neighborhood decline. In contrast, assurances that public investments in the neighborhood will remain steady, accompanied by the decrease in living costs, serve as incentives to stay.259 They help preserve the community. The plan plays a role in reinstating neighborhood confidence, which, as seen in Section II.B.2.iii., is vital to neighborhood recovery. Indeed, property tax abatements have been known to encourage private investment in neighborhood rehabilitation.260

Furthermore, this plan, despite its eschewal of straightforward reimbursements for property value losses, is not inconsistent with the community interest's goal of reflecting the partnership between owner and neighborhood. Though not a direct transfer of funds, this scheme provides compensation for losses created by society: studies show that fiscal factors, namely tax rates and per capita municipal

256. See, e.g., 65 ILL. COMP. STAT. ANN. 95/1-20 (West 2010). On the plan elsewhere, see Bell & Parchomovsky, supra note 152, at 2005 n.136, 2006 n.140.
257. See supra note 131 and accompanying text.
258. HALLMAN, supra note 56, at 218.
259. Theoretically, any price stabilization scheme could also lead to the opposite result: it may induce moves. When the market trends downward, owners may refuse to accept prices that are lower than those the properties could have commanded earlier, and therefore they tend to stay put. The reason is liquidity constraints and also loss aversion. Once the market is stabilized, owners are thus less hesitant to sell, Lee Anne Fennell, Homeownership 2.0, 102 NW. U. L. REV. 1047, 1109-10 (2008). While this may be true to some extent in the general market, deteriorating neighborhoods normally, as seen, experience an exodus of residents. In such places, the pre-intervention baseline is excessive mobility, rather than the lack thereof.
expenditures, are capitalized into house values. Therefore, under the plan suggested here, the community will monetarily compensate the homeowner whose house decreased in value: the more favorable fiscal environment will offset part of the decrease in the asset’s value.

IV. THE COMMUNITY ASPECT OF PRIVATE OWNERSHIP AND OTHER LEGAL PROBLEMS

Part III of this Article translated Part II’s theoretical insights into practice by suggesting a plan implementing the community’s interest in residential properties. This Article’s theoretical insights have implications for the design and defense of still other rules of law. This concluding part of the Article will briefly review several such implications. I will highlight rules in other fields of property law that are, or can be, justified by reference to concepts similar to the community interest. I will also use the Article’s thesis to suggest reforms in several of these rules. The discussion of each example will be merely introductory. My goal is to point at directions for further research, and I entertain no pretensions of engaging a full exploration of each and every example.

The discussion will be divided into three groupings of legal issues: properties other than residential housing, nuisance law, and intellectual property law.

A. Properties Other than Residential Units

This Article focused on the need to subject residential ownership to a community interest. The thesis relates to earlier calls for the acknowledgment of a similar interest in factories, and commercial and public assets important to a community. Several other assets with similar attributes, in which a community may claim an interest, exist.

---

261. For a survey of these studies, see Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 521-22 (1991).
262. The plan proposed in this Part of the Article, in both its facets, can be viewed as a form of home-equity insurance. It insulates, to some extent, the homeowner from decreases in the value of her home that are beyond her control. The premium she pays for this insurance is the loss of the ability to realize some of the increases in the value of said home. For an example of a scheme reimagining property rights in a way that will allow for the easier provision of home equity insurance, see Pennell, supra note 259. The program as proposed in this Article is a form of public—rather than private—insurance. Such an approach to the provision of the relevant insurance product might be justified as moral hazards are likely precluding its provision by private insurers. See, e.g., ROBERT J. SHILLER, MACRO-MARKETS: CREATING INSTITUTIONS FOR MANAGING SOCIETY’S LARGEST ECONOMIC RISKS 79, 82-83 (1993).
263. See Singer, supra note 165.
264. See Blomley, supra note 232.
1. Places of Worship

Church closings have become a major issue over the past few years. Faced with declining attendance and mounting costs, archdioceses close churches that no longer appear viable. But worshippers feel that their churches should not be treated as standard assets with which the owner—the Catholic Church—can do as it pleases. They perceive themselves as entitled to a holding in what is not just a real estate commodity, but also an institution central to their communities and lives. Though not cloaked in legal terms, this is a debate about ownership rights in churches.

Throughout the years, courts have dealt with ownership in church properties mainly when confronted with controversies between religious fractions, arising out of a schism. Difficulties in deciding these cases stem from the First Amendment’s Free Exercise and Establishment Clauses. Because of the latter, the Supreme Court has held that courts adjudicating such disputes must refrain from analyzing religious doctrines in an effort to determine which fraction is “loyal” to the church’s tenets. Rather, the Court has suggested two alternative approaches. Under the first, courts must defer to the church’s governmental structure. This structure may be hierarchal (as in the Roman Catholic Church) or congregational (as with Judaism and Baptist Christianity). If the church’s governance is hierarchical, ownership of church properties resides with the church’s highest authority, whose decisions are binding even when arbitrary or fraudulent. If the church is organized on a congregational basis, each congregation owns its own property and governs it. Under the second approach legitimized by the Court for settling controversies over church properties, a court is to apply “neutral” secular legal principles. It is to employ standard property and contract doctrines to the relevant documents setting the assets’ status.

When a church closing is at issue there is hardly doubt that both these approaches allow an archdiocese to proceed with its plans. The Catholic Church is the prototypical hierarchical organization, and it is also the properties’ owner according to secular principles. Thus traditional legal analysis of church property controversies pays scant attention to the interests of community members. Commenta-


267. For an analysis of the approaches, see Louis J. Sirico, Jr., Church Property Disputes: Churches as Secular and Alien Institutions, 55 FORDHAM L. REV. 335, 348-57 (1986).

tors share this bias. In prescribing standards for church property disputes, the only individuals whose intent and reliance is mentioned as meriting consideration are those who donated money to the purchase and upkeep of the specific church.  

This legal attitude is too restrictive. Part II of this Article suggests that the community aspect of church properties ought to be acknowledged. This goal can be attained if courts, in applying “neutral” standards to church property disputes, identify and enforce implied agreements between members and the church. Over the lifespan of the parish an implied agreement comes into being, encompassing an understanding that the church will, at least to some extent, protect parishioners’ reasonable expectations. The agreement implies that closing a church will only be the solution of last resort, and that the community will be supplied with an alternative place of worship. Progress can also be made if courts categorize churches’ governmental structure as congregational more liberally. Since courts must avoid religious doctrine, there is little barring them from setting their own secular criteria for defining a local church as an empowered congregation, even when the church’s doctrine requires otherwise.

2. Sports Teams

For many, sports teams are an indispensable component of their community and an important part of their identity. As noted elsewhere, “[f]or better or ill, a cultural hallmark of our era is the truism that almost any community’s most visible and cherished asset is a local major league professional sports franchise.” Yet most sports teams are private properties that can easily relocate. This reality bluntly ignores teams’ roles in constituting communities, fans’ attachment to them, and fans’ contributions to a team’s reputation. Several legal solutions have been proposed for these problems. First, there is the community-owned team model. The National

269. See Greenawalt, supra note 266, at 1865; see also Catharine Pierce Wells, Who Owns the Local Church? A Pressing Issue for Dioceses in Bankruptcy, 29 SETON HALL LEGIS. J. 375, 389-95 (2005) (examining the impact of donations on a church’s ability to declare bankruptcy).


Football League’s Green Bay Packers is incorporated as a non-profit organization, whose shares are owned by fans.\footnote{Lynn Reynolds Hartel, Comment, Community-Based Ownership of a National Football League Franchise: The Answer to Relocation and Taxpayer Financing of NFL Teams, 18 Loy. L.A. ENT. L.J. 589, 593-95 (1998).} Another possible solution is limiting teams’ ability to relocate and obliging relevant approving bodies to consider the implications for the community.\footnote{Gordon, supra note 272, at 1259-64.} A third proposal is to award a team’s home city trademark rights in the team’s name, logo, and colors.\footnote{Alvin B. Lindsay, Comment, Our Team, Our Name, Our Colors: The Trademark Rights of Cities in Team Name Ownership, 21 Whittier L. Rev. 915, 936-61 (2000).} Finally, there have been failed attempts at acquiring by eminent domain the property of a sports franchise contemplating a move.\footnote{In one recent case, parties arrived at this solution by agreement. Ending litigation initiated by the city of Seattle seeking to stop the relocation of the local professional basketball team—the SuperSonics—the team owners agreed in a settlement that though they will retain the rights to the SuperSonics’ name, colors, and logos, they will not use them after moving to Oklahoma City. If a new National Basketball Association team arrives in Seattle, the owners will turn over those rights to the new team’s owner at no cost. In addition, the team left behind all banners, trophies, and retired jerseys. Jeff Latzke, Seattle to Retain SuperSonics Banners and Trophies, Seattle Times, Aug. 20, 2008, http://seattletimes.nwsource.com/html/nba/2008127774_websoni20.html. A similar agreement was reached in 1996 when the original Cleveland Browns left for Baltimore, where they became the Ravens. In an accord with the city, the National Football League allowed the city to keep that team’s name, colors and records, for use by a new promised team, which entered the league in 1999. Jon Morgan, Deal Clears NFL Path to Baltimore, The Balt. Sun, Feb. 9, 1996.}

All these proposals raise serious issues of law and policy. However, they all evidence a belief shared by many that private sports teams have a community aspect.

3. Other Examples

The community interest in the preservation of its culture and architectural history may serve as justification for historic preservation legislation.\footnote{Carol M. Rose, Preservation and Community: New Directions in the Law of Historic Preservation, 33 Stan. L. Rev. 473 (1981).} Cultural heritage is created by the community and helps define it. Consequently it deserves protection.

Even in non-historic districts, buildings’ façades are important to neighborhood life and confidence. The maintenance of the neighborhood’s appearance presents a collective action problem. Thus statutory obligations placed on homeowners to renovate their buildings’
exteriors might be justified (lower income owners should be provided financial support to enable them to abide by such obligations).278

Finally, for more than three decades now, banks have been subject to a statutory duty to meet their communities’ credit needs.279 Said legislation was introduced to combat redlining (the practice of denying credit to certain, mostly poor and minority, communities) and to force banks to reinvest in communities from which they obtain deposits. It is based on a belief that banks are obliged to serve their communities: that they are not merely market actors, but entities that carry societal duties.280 Though the law’s efficacy is debatable,281 it reflects a conception of financial institutions imbued with a community aspect.

C. Stigma-Based Nuisances

A nuisance is “a substantial and unreasonable interference with the use or enjoyment of land.”282 Courts have stated that a diminution in property value, standing alone, does not constitute an actionable interference.283 Thus, if, for example, an owner discharges hazardous waste contaminating a neighbor’s land, she may be sued for nuisance. But if the hazardous waste does not reach the neighbor’s land, yet public perceptions stigmatize the area educing a diminution in the land’s value, the situation becomes more complex. As the Restatement (Second) of Torts explains, the tort protects the owner’s interest in “[f]reedom from discomfort and annoyance while using land[,] . . . freedom from physical interruption with his use[,] . . . [and] freedom from detrimental change in the physical condition of the land itself.”284 Stigmas do not cause discomfort and annoyance, nor are

278. Many cities require owners to maintain the exterior façades of their buildings in a safe condition. See generally BUILDING FACADE MAINTENANCE, REPAIR, AND INSPECTION 3-44 (Jeffrey L. Erdly & Thomas A. Schwartz eds., 2004). In Israel the city of Tel-Aviv went beyond mere safety concerns and adopted an ordinance forcing owners to renovate a building’s exterior every fifteen years. Ranit Nahum-Halevy, Tel Aviv Landlords Now Required to Renovate Buildings Every 15 Years, HAARETZ.COM (July 13, 2010), http://www.haaretz.com/news/national/tev-aviv-landlords-now-required-to-renovate-buildings-every-15-years-1.301585.


284. RESTATMENT (SECOND) OF TORTS § 821D cmt. b (1979).
they physical interruptions. At the most, they may cause emotional distress, but the Restatement holds that the tort is not addressed at protecting the owner’s “interest in freedom from emotional distress.”  

Courts are thus mostly hostile to nuisance claims arising from stigmas not accompanied by physical damage. For their part, commentators are split on the topic. Some believe that damages should be awarded as owners suffer economic affliction because of stigmas. In contrast, others claim that stigmas are prone to transformation as public perceptions shift, and therefore plaintiffs may not suffer any financial harm; seeing that by the time they sell their houses the stigma might subside, owners’ claims for such damages are speculative.  

The problems accompanying stigma-based nuisance claims relate to many of the topics discussed in Part II of this Article. The social origins of market values, the role of perceptions in setting housing market trends, and stigmas’ negative influences on communities are connected to the review of the community aspect of property. It is thus likely that the policy proposal put forward in Part III of the Article will partially solve the problem of stigma-induced property devaluation. When the fair market values of properties in a certain community drop, residents will receive property tax abatements. The decrease’s cause may be neighborhood change, but it may also be stigmas. Providing residents of neighborhoods affected by stigmas such compensation may replace nuisance awards.  

This scheme acknowledges the damage suffered by residents and is sensitive to stigmas’ devastating effects on communities. In this last regard it follows the cue of courts that have become aware of the dire prospects facing affected communities. Some courts tend to be more receptive to nuisance claims based on contamination stigmas when plaintiffs succeed in tying property devaluation “to a general loss in community quality of life caused by a particular source of contamination.” Another advantage of the plan promoted in this Article is that it only awards residents compensation for as long as the stigma actually impacts the neighborhood: when its effect subsides, values will re-stabilize and taxes will cease to be subsidized. Thus the

---

285. *Id.* In the past, courts accepted claims for nuisance based on emotional anguish, especially those concerning the operation of funeral homes and prostitution houses. Courts have mostly retreated from such holdings. See Michael D. Riseberg, Comment, *Exhuming the Funeral Home Cases: Proposing A Private Nuisance Action Based on the Mental Anguish Caused by Pollution*, 21 B.C. ENVTL. AFF. L. REV. 557, 574-78 (1994).

286. See SINGER, supra note 148, at 319.


program mollifies the main concern of compensation’s opponents—the fear of damages awarded to residents suffering no harm.

It should be noted, however, that this solution will not deter the original producers who created the pollution generating the stigma. They will not be burdened with the compensation costs associated with stigma damages—a task that will be undertaken by government. Since the polluters will be liable for the physical damages they caused, regardless of any stigma damages, it is not clear that such extra-deterrence is needed. The public, on the other hand, which did not produce the pollution but generated the stigma, will be “deterred.” Thus, the duty to subsidize taxes in declining neighborhoods creates incentives for authorities to better educate the public in an effort to combat misguided stigmas.

D. Intellectual Properties

1. Copyright

“Why buy a Vermeer when a Metsu is available?” The eminent art historian Francis Haskell argued that this “question, which may sound odd today[,] . . . would have been natural enough in 1800.” In the twenty-first century Johannes Vermeer is a superstar, while his countryman and contemporary Gabriel Metsu is only known to dedicated art lovers. Yet for the first centuries following their deaths, the situation was reversed: starting in the early eighteenth century Metsu became one of the most celebrated artists among collectors and critics, while Vermeer slowly lapsed into near oblivion. Vermeer’s modern rise, and the ensuing reversal in the artists’ critical fortunes, is largely due to a few exhibitions and a heap of publications, including a best-selling novel. The current comparative stature of the artists “says more about our taste than the artists’ paintings.” Since their creation in the seventeenth century, the paintings have not changed. The transformation in their relative stature reflects the arbitrary nature of art-world popularity.

290. On liability’s role in achieving optimal levels of deterrence, see STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 178-204 (2004).

291. FRANCIS HASKELL, REDISCOVERIES IN ART: SOME ASPECTS OF TASTE, FASHION AND COLLECTING IN ENGLAND AND FRANCE 21-23 (1976).

292. The only time when the two artists’ reputations seem to have been more or less on par was during their own lifetime. Illustrating the changes in later centuries Adriaan Waiboer writes: “Whereas Le Brun needed the epithet ‘in the manner of Metsu’ to raise Vermeer’s profile in 1792, present-day taste requires phrases such as ‘in the age of Vermeer’ in order to promote paintings by Metsu.” Adriaan E. Waiboer, ‘Why Buy a Vermeer when a Metsu is Available?’ The Relationship between Two Dutch Genre Painters, in GABRIEL METSU 29, 50 (Adriaan E. Waiboer ed., 2010). For more see id.

293. Id. at 50. “It reflects our modern penchant for streamlined and stylized aesthetic, as evidenced by contemporary design and architecture.” Id. This preference contrasts that which dominated during the artists’ lifetime, when people preferred works with a “decorating richness” of objects. Id.
What changed was not the works, but rather the public perception of them.

Intellectual creations, such as Vermeer’s works, have an inherently social character, and thus the discussion of the community aspect of property applies to them. The value of protected intellectual works is created to a large extent by the community, and not merely by the creator’s talent. At the same time, these works are a constitutive element of the community and its culture. These observations help explain the limitations law places on copyright protection.

First, a major exception to copyright is the fair use doctrine, which exempts some otherwise infringing uses under a complex calculus involving multiple factors. Some courts were willing to give substantial weight to the public interest/benefit under the first fair use factor, “the purpose and character of the use.” Some courts appealed directly to “public interest” while others folded “public benefits” into other concepts such as “transformative use” or “parody.” Commentators have further suggested that the greater the work’s relationship to the community’s shared values, the greater the need for public availability. In such cases, and despite rulings to the contrary, the fair use defense, so it has been argued, should be stronger.

Another restriction placed on copyright is the temporal limitation. A justification for this limitation can be found in the community aspect of the work. As Vermeer’s case demonstrates, the farther we move from the original creative act, the more likely it is that the work’s continuing success is due to factors unrelated to the original creative labor. As time goes by, it may well be that a work’s success “owes . . . more to the contributions of society . . . in imbuing [it] . . . with certain meanings.” Furthermore, as time passes, works begin the passage from pure products of creative expression to objects that are part of the community’s collective cultural history.

303. Id. at 441-42.
Another field of copyright law where the community interest is relevant is the artist’s moral rights. Moral rights confer on the artist entitlements relating to the meaning, representation, and attribution of the work even after she has relinquished title to either the physical object or the copyright in the work. Though mainly justified in reliance on personhood theory and the bond between the artist and her creation, some moral rights, especially the right of integrity, play a social role in preserving art for the community’s benefit. Clearly, for instance, there is a public interest in preventing the owner of a Rembrandt painting from destroying it. By carving an exception to the property owner’s ability to modify or destroy the artwork she owns, the right of integrity assures the safeguard of cultural properties. The social nature of the protection guaranteed by the right is demonstrated in several state moral rights statutes. California’s law, for example, was named the Art Preservation Act, and declares a dual purpose—communal and personal. This recognition of the moral right’s community aspect has an operative meaning: the Act allows public interest organizations—and not only artists themselves—to commence actions for injunctive relief to preserve works’ integrity.

The right of integrity is also, to some extent, protected by the federal Copyright Act. However, the protection of the community in-

304. See Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, 828 U.N.T.S. 221, 235 (1972). The moral rights include the right of integrity, the right of attribution, the right of disclosure (i.e., the right to decide if and when the work should be presented to the public), and the right of withdrawal (i.e., the right to remove the work from public eye). Sometimes the rights are defined and distinguished differently. See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.01[A] (rev. ed. 2010).


307. Eric M. Brooks, Book Note, “Tilted” Justice: Site-Specific Art and Moral Rights After U.S. Adherence to the Berne Convention, 77 CALIF. L. REV. 1431, 1434 (1989). A counterargument can be made: the public interest may call for the freedom to alter the work. This argument, however, is much more forceful when the right of integrity is applied to the intellectual work, as opposed to its physical embodiment. My focus, as can be seen in the text, is on the latter: on prohibiting mutilation of the physical object. While it is conceivable that the public may benefit from a freedom to make changes to an object (e.g., in the case of public art or alterations to an architectural work), the benefits of integrity in this context are likely to, more often than not, outweigh these.

308. CAL. CIV. CODE § 897(a) (Deering 2011).

309. Id. § 889.

310. 17 U.S.C. § 106A, allows the author of “a work of visual art” to prevent modification of her work only if it is intentional and would be “prejudicial to . . . her honor or reputation.” 17 U.S.C. § 106A (2006). It also allows her to prevent the destruction of the work, if it is “of recognized stature.” Id. For a discussion of the role of the notion of a public stake in protection of important works of art in the legislative history, see JOSEPH L. SAX,
interest afforded by the moral right of integrity is not absolute: as the moral right is personal, it is limited in time, and, furthermore, the community’s interests and those of the artist may diverge. A famous example is the order the author Franz Kafka gave his friend, Max Brod, to destroy his unpublished works after his death.

A related element of copyright law that can be tied into the current discussion is the droit de suite. This right “provides that an artist shall share in the profits accruing to subsequent purchasers from the appreciation in value of the artist’s work.” The right is recognized only in California. It can be constructed to further promote the community interest in the work. In fact, it can be made the equivalent of the taxation of profits from selling residential units, proposed in Part III of this Article. The discussion of the community aspect of property implies that much of the increase in the work’s value is due to society’s labor—not the effort of the artist who is currently accorded the benefit of droit de suite. Thus, perhaps droit de suite should be redesigned to make royalties payable to a public entity promoting public access to art. When considering such a proposal, its effects on art dealers’ and collectors’ incentives should be considered. Furthermore, it should also allow for compensation to collectors who sell works at a loss, as did the program put forward in Part III of the Article with regard to sellers of houses.

The role of collectors calls attention to one more manifestation of the community interest in copyrighted works. If the work is to some degree a creation of the community, and if it is a constituent part of the community, rights of public access to works—even when privately owned—should be assured. This suggestion has already been made elsewhere.

311. According to § 106A(d) of the federal Copyright Act, it lasts for the duration of the author’s lifetime.
315. The author of a work of fine art is entitled to 5% of the profits of any re-sale of her work, provided she “resides in California or the sale takes place in California.” CAL. CIV. CODE § 986(a) (Deering 2005).
316. In California, if the owner of the work cannot find the author when she sells the work, the royalty due is paid to the state Arts Council for use in acquiring fine art. Id. § 986(a)(2)-(5).
2. The Right of Publicity

The right of publicity, recognized in more than half the states, is the right a person, mostly a celebrity, holds to control the commercial use of her persona—her name, appearance, and voice. Courts and scholars have debated the justifications for the right’s existence. Michael Madow made an interesting argument against it:

Fame is a “relational” phenomenon, something that is conferred by others. A person can, within the limits of his natural talents, make himself strong or swift or learned. But he cannot, in this same sense, make himself famous, any more than he can make himself loved. Furthermore, fame is often conferred or withheld, just as love is, for reasons and on grounds other than “merit.” . . . [T]he reason one person wins universal acclaim, and another does not, may have less to do with their intrinsic merits or accomplishments than with the needs, interests, and purposes of their audience. . . . [T]he canon of great names—literary, scientific, cultural, even athletic—is in fact a “socially constructed reality,” not a “law of nature.”

This argument is similar to this Article’s claims regarding the community aspect of property. The discussion concerning the creation of value in Section II.C.2.ii. illustrated that all properties’ values are social constructions. Madow’s depiction of the origins of fame is persuasive. Yet, as seen, publicity is not wholly different from other assets in this respect. The case against the labor-desert rationale for the right of publicity, when framed in such terms, can be reiterated, even if only to a lesser degree, against other property rights.

3. Patents

Copyright law, as seen above, considers the public interest in the protected work in some instances, but it is still mostly attached to the primacy of the contribution made by the original owner. Patent law moved closer to a more cumulative, collaborative conception of crea-


tion in granting some protection to improvement patents.\textsuperscript{322} An inventor adding an improvement to an existing patent can patent her improvement (assuming it meets the threshold for patentability) even if it infringes upon the underlying patent.\textsuperscript{323} But the new patent does not privilege the infringement on the original patent. Since the material covered by that original patent is put to use by the new patent, the original owner may block the improver from using the new patent. At the same time the original owner is also blocked from using the improvement—which is now patented by the improver. The result is known as “blocking patents.” The only way for either of the parties to benefit from the improvement is by striking a bargain. This arrangement contrasts with that which by and large prevails in copyright law: there, the original owner is bestowed with exclusive rights over future alterations to the work.\textsuperscript{324} The approach adopted by patent law relates to several of the arguments made in this Article. The value of the asset—the improvement patent—is perceived as the product of the work of several individuals and not only the original patent owner. Rights in patents are accordingly assigned in a manner that seeks to promote efficient bargaining between the different contributors and to incentivize behaviors that avoid the detrimental effects of individualistic decisionmaking on joint production. The community aspect of ownership, as seen in Part II.B, aims at a similar goal.

Another relevant analogy from the field of intellectual property law is presented by proposals for replacing law’s exclusive rights regime with a reward system.\textsuperscript{325} A reward system decouples the question of the creator’s compensation from the question of the scope of protection awarded to a work. It assures the creator remuneration deemed fair by society, without granting her the full ability to control the use of her work by other members of society. Even more than existing rules, it allows society to strike a balance between the interests of the individual owner and those of other members of society. It does so by dislodging, at least to some extent, the traditional property

\textsuperscript{322} See Mark A. Lemley, The Economics of Improvement in Intellectual Property Law, 75 Tex. L. Rev. 989 (1997). I am grateful to Oren Bracha for drawing my attention to this issue.

\textsuperscript{323} 35 U.S.C. § 101 (2006) (“Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor.”).

\textsuperscript{324} Section 106(2) of the Copyright Act grants the owner of a copyrighted work the right to control “derivative works.” 17 U.S.C. § 106(2) (2006). Section 103(a) provides that only the owner of the underlying copyrighted work can copy any original contribution made in the creation of the derivative work. 17 U.S.C. § 103(a) (2006).

rights-based market pricing mechanism. A reward system is, in this respect, very much like the argument made in this Article about the social aspect of rights heretofore read as primarily individual.

V. CONCLUSION

“This is the beginning—from 'I' to 'we.'” John Steinbeck, The Grapes of Wrath.\(^{326}\)

We live in an era of constant change. Technological progress, globalization, and an array of economic and social developments have contributed to the creation of a society where everything and everyone must keep upgrading themselves or be left behind. Against this background, it is easy to believe that law, in order to remain loyal to its commitment to freedom, should concentrate its efforts on facilitating the ability to progress, change, and evolve.

This Article strived to show that, at least with regards to housing, this perception is mistaken. It proved that different theoretical frameworks converge on one conclusion: community stability must be preserved. Property rights should be subjected to a community interest. In order to breathe life into this theoretical insight, the Article suggested instituting the community aspect of property, a device making the option of leaving a neighborhood less attractive, thereby helping keep communities intact.

However, “[n]one of this is any guarantee against the erosion of the underlying communities or the death of local loyalties. It is a matter of principle that communities must always be at risk.”\(^{327}\) The aim of the community interest is to allow us to reach the middle ground, not to bring about a move from one pole—absolute mobility—to the other—absolute rigidity. The community interest is to be molded in keeping with one of property law’s main social functions: to establish “a compromise between the desire for change and the desire for stability.”\(^{328}\) The community interest in property will render the departure from a neighborhood less attractive—but not impossible. It will not turn property law upside down. It will only make it more responsive to the needs and desires of actual owners.

Property law should lend a hand to Ms. Rodriguez and the many others who aspire to preserve communities they have come to cherish and regard as part of not only their ownership interests, but also their lives. This is by no means a desire felt only in gentrifying or declining neighborhoods, though it becomes more pressing in times of community crisis. We all want stability. Yet absolute stability is un-

\(^{327}\) Walzer, supra note 30.
attainable; furthermore, it is paralyzing. A balance must be struck: between stability and mobility, between safeguarding the status quo and making room for transformation. This Article proposed injecting a greater degree of stability to property law and community life, since currently, while very much attentive to needs for change, law does not always devote enough attention to complementary needs for security.